ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-7126

ALAN PHILIPP, GERALD G. STIEBEL, AND JED R. LEIBER,
Plaintiffs-Appellants,
v.
STIFTUNG PREUβISCHER KULTURBESITZ,
Defendant-Appellee.

Appeal from the United States District Court for
the District of Columbia (Washington, DC)
Case No. 1:15-cv-00266 (Hon. Colleen Kollar-Kotelly)

BRIEF FOR APPELLANTS

November 28, 2022

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GLOSSARY

FSIA	Foreign Sovereign Immunities Act
Philipp	*F.R.G. v. Philipp*, 141 S.Ct. 703 (2021)
Prussian Foundation	Defendant Stiftung Preußischer Kulturbesitz
SAC	Second Amended Complaint, ECF No. 62, filed September 10, 2021

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

The following individuals and entities were parties before the District Court and are parties in this Court:

1. Alan Philipp, Plaintiff-Appellant;
2. Gerald G. Stiebel, Plaintiff-Appellant;
3. Jed R. Leiber, Plaintiff-Appellant; and
4. Stiftung Preußischer Kulturbesitz, Defendant-Appellee.

The following entity was a party before the District Court but is not a party in this court:

1. Federal Republic of Germany, Defendant.

On September 14, 2018 the United States filed a brief as *amicus curiae* in support of appellee's Petition for Rehearing in *Philipp v. Federal Republic of Germany*, D.C. Circuit No. 17-7064; consolidated with *Philipp v. Federal Republic of Germany*, D.C. Circuit No. 17-7117.

(B) Rulings under Review

The rulings at issue in this appeal are *Philipp v. Federal Republic of Germany*, Civil Action No. 15-266 (CKK), ECF No. 72, WL 3681348 (D.D.C. Aug. 25, 2022) (the "Dismissal Order") and *Philipp v. Federal Republic of*

Germany, Civil Action No. 15-266 (CKK), ECF No. 52, 2021 WL 3144958 (D.D.C. Jul. 26, 2021) (the "Amendment Order").

(C) Related Cases

This case was previously before this Court and the Supreme Court of the United States:

- *Philipp v. Federal Republic of Germany*, D.C. Circuit No. 17-7064;
- *In re: Federal Republic of Germany*, D.C. Circuit No. 17-8002;
- *Philipp v. Federal Republic of Germany*, D.C. Circuit No. 17-7117;
- *Federal Republic of Germany v. Philipp*, Supreme Court No. 19-351; and
- *Philipp v. Federal Republic of Germany*, Supreme Court No. 19-520.

In addition, the following additional appeals currently pending before this Court involve similar issues:

- *Simon v. Republic of Hungary*, No. 22-7010;
- *Heller v. Republic of Hungary*, No. 22-7112; and
- *Toren v. Federal Republic of Germany*, No. 22-7127.

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants Alan Philipp ("Philipp"), Gerald G. Stiebel ("Stiebel"), and Jed R. Leiber ("Leiber," together with Philipp and Stiebel, the "Plaintiffs") invoke jurisdiction over their claims pursuant to the so-called expropriation exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3)(2018)

("FSIA") because their claims concern rights in property taken in violation of international law, and Defendant-Appellee Stiftung Preußischer Kulturbesitz (the "Prussian Cultural Heritage Foundation," or "SPK"), an instrumentality of the Federal Republic of Germany, a foreign state ("Germany"), is engaged in commercial activity in the United States within the meaning of the FSIA.

This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1291 because the Dismissal Order on August 25, 2022 was a final judgment of the District Court, which Plaintiffs timely appealed on September 19, 2022 pursuant to Fed. R. App. P. 4.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) The Dismissal Order must be reversed because the Plaintiffs' claims arising out of the forced sale of the so-called Guelph Treasure (Welfenschatz) by a group of Jewish art dealers to Nazi agents in 1935 concern rights in property taken in violation of international law within the meaning of 28 U.S.C. § 1605(a)(3), a taking that was not a domestic taking under *F.R.G. v. Philipp*, 141 S.Ct. 703 (2021) ("*Philipp*").

(2) The Dismissal Order also erred in holding that Appellants did not preserve the question of the victims' nationality before the Supreme Court's ruling because the operative facts that determine nationality have been alleged—identically—in

every pleading since the case was filed in 2015 and because preservation of this alternate argument was unnecessary under the then-state of the law.

(3) The District Court abused its discretion earlier in denying Plaintiffs leave to amend the operative Complaint.[1]

PRELIMINARY STATEMENT

This appeal addresses the District Court's erroneous ruling on the question posed on remand by the Supreme Court: whether "the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction" and, as a corollary, whether Plaintiffs had adequately preserved that argument. *Philipp*, 141 S. at 715. The victims were not, in fact, German nationals, and the question was more than adequately preserved.

Sometime before 1935, two art dealers, Saemy Rosenberg ("Rosenberg") and Isaac Rosenbaum ("Rosenbaum"), emigrated to Holland as a result of Nazi persecution, never to return. When they left, they and their business were among the group that owned the famed Guelph Treasure, or Welfenschatz. The Welfenschatz was then the subject of a forced sale in 1935 to agents of the state of

[1] Plaintiffs will refer at various points to a Proposed Second Amended Complaint that was never filed (JA0670), distinct from the Second Amended Complaint ("SAC") now before the Court (JA0896). The District Court denied Plaintiffs leave to amend the First Amended Complaint in the manner they proposed but did permit minimal clerical amendments to reflect Germany's departure as a Defendant and the dismissal of certain claims. It is that pleading that is under review.

Prussia at the direction of Hermann Goering, the most notorious art thief in modern history. The other owners remained in Germany—which had stripped them of their rights and persecuted them as enemies of the state—through the transfer of the collection to Nazi agents. Some escaped. One did not.

The Plaintiffs' case has always been this: the Nazi state took the Welfenschatz by forced sale because the Consortium of dealers were Jews. That expropriation violates international law because in 1935, there was no legal or colloquial definition of "German" that could conceivably include these victims. At a bare minimum, therefore, the case concerns property owned collectively by Dutch and German owners, the taking of which for discriminatory reasons plainly violates international law.

The District Court framed the question, and the burden of proof, backwards. The domestic takings rule is an *exception* that makes an expropriation outside the concern of international law. The question is not what the Plaintiffs did six years ago. It was for the Prussian Foundation to raise the defense, and it did in 2016. The only question now is whether in the face of that defense, the Plaintiffs' allegations (about Nazi policy and ideas of nationality) or jurisdictional theory (expropriation)—which have never changed since 2015 on the material facts of the taking—adequately preserved the conclusion responsive to the question posed by

the Supreme Court but that the District Court did not reach in 2017: whether the victims were not German nationals. They were not.

Finally, the District Court's denial of Plaintiffs' minimal request to amend the First Amended Complaint was an abuse of discretion, and the denial rested upon erroneous rulings of law that infected the ultimate dismissal of the case.

STATEMENT OF THE CASE

Factual Allegations

In or around 1929, a collection of art dealers—Plaintiffs' ancestors and predecessors—(the "Consortium") bought a collection of several dozen medieval reliquary and devotional objects known as the Welfenschatz. JA0911 (¶ 32). The Consortium consisted of three art dealer firms in Frankfurt: J.&S. Goldschmidt, I. Rosenbaum (owned together by both Rosenbaum and Rosenberg), and Z.M. Hackenbroch. *Id.* Zacharias Max Hackenbroch ("Hackenbroch"), Rosenbaum, Rosenberg, and Julius Falk and Arthur Goldschmidt ("Goldschmidt")—all Jewish—were the individual owners of those firms. JA0896 (¶ 1). The "Consortium" was not an incorporated entity and no such entity appears on any document concerning the purchase or sale of the Welfenschatz; no evidence of any separate corporate existence has ever been suggested let alone established. JA0911 (¶¶ 32-33); JA0968; JA1010.

The ascension of Hitler as Chancellor of Germany on January 30, 1933 immediately made state policy out of the entire Nazi theory, including the Nazi Party Program of 1920 and *Mein Kampf*. JA0898 (¶ 5), JA0914 (¶ 43), JA0915 (¶ 48). On the topic of who was a German, and who was not, the Nazi Party Program of 1920 was unequivocal:

> 4. Only members of the nation may be citizens of the State. Only those of German blood, whatever their creed, may be members of the nation. ***Accordingly, no Jew may be a member of the nation***. (emphasis added).
>
> 5. Non-citizens may live in Germany only as guests and must be subject to laws for aliens.

See JA0915 (¶ 48), JA0916 (¶ 50), *citing* United States Holocaust Memorial Museum, *Nazi Party Platform*. HOLOCAUST ENCYCLOPEDIA. https://encyclopedia.ushmm.org/content/en/article/nazi-party-platform. (Last Edited: Oct 15, 2020) (the "Nazi Party Platform").[2]

After the Reichstag Fire of February 27, 1933, the Nazis' policies were enacted swiftly. JA0915-16 (¶¶ 48-52). The "Decree of the Reich President for the Protection of People and State" of February 28, 1933, better known as the Reichstag Decree, gave Hitler far-reaching, violent means of power. JA0916 (¶¶

[2] This is the kind of expansion on an explicit earlier reference (the document is referenced in every pleading) that the Prussian Foundation accused Plaintiffs of withholding tactically—as though Germany was unaware of its own racist crimes. The District Court regrettably agreed and treated this and similar as "new" allegations that the Plaintiffs had somehow brought to the surface too late.

51-53). Similarly, the Enabling Act of 1933, or Law for the Remedy of the Emergency of the People and the Reich, gave Hitler the power to enact laws without the legislature. JA0916 (¶ 53). Other laws followed in this vein: the Restoration of the Civil Service Law of July 4, 1933, the destruction of public unions and democratic trade associations in April and May, 1933, the institutionalization of the one-party state and expulsion of non-National Socialists (July 14, 1933), and the repeal of the fundamental constitutional rights of the Weimar Republic. JA0916-17 (¶ 54).

These laws and regulations were but a portion of the repression that was unleashed on Germany's Jews as a matter of state policy. JA0917 (¶ 55). In other words, Jews as a population "*were officially no longer considered German*" (an allegation that has appeared verbatim in every pleading to date). *Id.* (emphasis added). State-sponsored boycotts of Jewish businesses spread in March and April 1933. JA0917 (¶ 58). Judges, lawyers, doctors, retailers, art dealers—the bedrock of the German middle class—were targeted and driven out of their ability to make a living. JA0918 (¶ 59). More laws restricted the ability of Jews to transfer assets. JA0918 (¶ 62).

In 1933, Minister for Propaganda and Education Joseph Goebbels founded the Reich Chamber of Culture (*Reichskulturkammer*). JA0931-32 (¶ 118). The *Reichskulturkammer* assumed total control over cultural trade, and membership

was required to conduct business. *Id.* Jews were excluded, naturally, effectively ending the means of work for any Jewish art dealer like the Consortium members in one stroke. *Id.*

In this climate, Jewish ownership of the Welfenschatz was unacceptable to the Nazi state. The mayor of Frankfurt soon wrote *to Hitler himself* about the Welfenschatz: "According to expert judgment, the purchase is possible *at around 1/3 of its earlier value*." JA0984 (emphasis added). As would later become apparent, Goering (who needs no introduction) soon assumed the role as the real driver of the quest for the Welfenschatz. JA0920-21 (¶¶ 71-73). The Prussian representatives, acting through the Dresdner Bank, manipulated the negotiation and scared away other arms' length buyers. JA0937-38 (¶ 141). The Consortium's inability to sell the Welfenschatz was a result of discriminatory state interference.

Rosenberg and Rosenbaum had emigrated by 1935 from Germany as a result of all this. JA0943-44 (¶ 170). Rosenberg had received a warning from a trusted friend and World War I comrade that he should "go on a long vacation abroad." JA0933 (¶ 126). He never returned. In Amsterdam, the two founded the company Rosenbaum NV, which was "Aryanized" by a German "manager" after the occupation of the Netherlands by Hitler's army in 1940. JA0943-44 (¶ 170).

By July of 1935, the Consortium realized it had no choice but to yield to Goering's minions to recover anything, and to save the lives of at least some of the

members. The coerced sale was documented and signed on Friday, June 14, 1935 for a token price. JA1010.

Procedural History

Plaintiffs initiated this case in 2015, invoking jurisdiction pursuant to 28 U.S.C. § 1605(a)(3) over the Prussian Foundation and Germany because the 1935 forced sale was property taken in violation of international law. *See* JA0013. On October 29, 2015, the Prussian Foundation and Germany moved to dismiss on multiple grounds. The initial motion to dismiss argued, *inter alia*, that (i) a forced sale of art is not a taking of any kind; (ii) the domestic takings rule exempted the forced sale of the Welfenschatz from the meaning of the FSIA; (iii) the commercial nexus requirement of the FSIA forbade jurisdiction over Germany as a defendant; (iv) the doctrine of *forum non conveniens* compelled dismissal; (v) the Plaintiffs' claims were at odds with United States policy; (vi) the doctrine of international comity required the Plaintiffs first to exhaust their remedies abroad; (vii) the Plaintiffs' claims were barred by the District of Columbia's applicable statute of limitations; and (viii) the Plaintiffs lacked standing to bring their claims. *See* JA0084.

On January 14, 2016, Plaintiffs amended their Complaint. *See* JA0170. On March 11, 2016, the Defendants again moved to dismiss, asserting the same arguments as they did in their first motion, other than standing. JA0276.

On March 31, 2017, the District Court denied the motion to dismiss.[3] *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59 (D.D.C. 2017), *aff'd and remanded*, 894 F.3d 406 (D.C. Cir. 2018), *vacated and remanded*, 141 S.Ct. 703 (2021). It held that claims of a genocidal taking constituted allegations of "property taken in violation of international law" and that this case was therefore properly brought under the expropriation exception to the FSIA. *Id.* at 68. The District Court held (correctly under this Court's precedent) that jurisdiction based upon genocide made the domestic takings rule irrelevant.

> [I]n *Simon*, *the D.C. Circuit expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings*. Rather, the D.C. Circuit, tracing the development of international human rights law, noted that in those circumstances *the relevant international law violation for jurisdictional purposes under the expropriation exception is genocide*, including genocide perpetuated by a foreign state against its own nationals.

Id. at 72 (citing *Simon v. Republic of Hungary*, 812 F.3d 127, 145-46 (D.C. Cir. 2016)) (internal citations omitted) (emphasis added).

On July 10, 2018, this Court affirmed in part and reversed in part.[4] *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018). Consistent with its

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[3] Certain common law claims brought in the alternative were dismissed. The heart of this case was, and is, the takings allegations brought pursuant to the FSIA. Plaintiffs also elected not to defend the assertion of the commercial activity exception, 28 U.S.C. § 1605(a)(2). The only assertion of jurisdiction at issue since then is 28 U.S.C. § 1605(a)(3).

[4] This Court dismissed Germany as a party pursuant to the commercial nexus requirement of the FSIA. *Philipp*, 894 F.3d at 418.

holding in *Simon*, this Court held that genocidal takings may "subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking 'amounted to the commission of genocide[]' . . . . This, we explained, is because '[g]enocide perpetrated by a state,' even 'against its own nationals[,] . . . is a violation of international law.'" *Id.* at 410-11. Germany and the Prussian Foundation sought *en banc* review. Their petition was denied. *Philipp v. Fed. Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019).

On February 3, 2021, the Supreme Court vacated the opinion of this Court. *Philipp*, 141 S.Ct. at 715. The Supreme Court held that Section 1605(a)(3) of the FSIA addresses only violations of the international law of expropriation, and therefore that the domestic takings rule applies. *Id.* ("We hold that the phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule."). The Supreme Court "noted that '[c]laims concerning Nazi-era art takings could be brought under the expropriation exception' so long as the property was taken in violation of the international law of expropriation." *Exxon Mobil Corp. v. Corporación Cimex S.A.*, 567 F. Supp. 3d 21, 27 (D.D.C. 2021), quoting *Philipp*, 141 S.Ct. at 715.

The Supreme Court made no finding about the nationality of the victims of the 1935 forced sale. Instead, it instructed the lower courts to determine if "the sale

of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction." *Philipp*, 141 S.Ct. at 715. The Supreme Court likewise instructed the lower courts to determine if the issue had been preserved. *Id.* at 716.

After remand, Plaintiffs sought leave from the District Court to amend the First Amended Complaint. Notably, this was the first substantive proceeding in the District Court since 2017, when the case was stayed pending appeal.[5] The proposed amendments would have built on facts already in the record of this case since it began; for example the First Amended Complaint referenced the Nazi Party Platform, and the Proposed Second Amended Complaint would have quoted explicitly from that document whose contents are not in dispute. The Proposed Second Amended Complaint also would have added more precise details about Saemy Rosenberg's and Isaac Rosenbaum's departure to Amsterdam by 1935, which was already referenced in the First Amended Complaint. *See* JA0748.

The District Court denied the motion for leave to amend, accusing the Plaintiffs of undue delay in a case where Plaintiffs could not have amended their Complaint even if they had wished—nor would such a request have made any sense while the case was on appeal on a question on which Plaintiffs had prevailed to that point without exception. In denying leave, the District Court repeatedly

[5] That stay was extended in 2019 when the Prussian Foundation and Germany petitioned the Supreme Court for *certiorari*.

cited the *age* of the case as though that had independent significance. The District Court's rulings of law would also cast a shadow over the Memorandum Opinion dated July 26, 2021 ("Dismissal Opinion"), JA0878. Despite the Supreme Court's dramatic change in the law not merely of this Circuit but also of the Supreme Court's own FSIA jurisprudence as recently as *Bolivarian Republic of Venezuela v. Helmerich & Payne International Drilling Co.*,[6] the District Court insisted that these changes had not happened at all.

The District Court entered the Dismissal Opinion on August 25, 2022. JA1148. The Dismissal Opinion first concluded that Plaintiffs did not preserve the assertion that the Consortium members were not German nationals. This conclusion was founded on surprisingly obviously errors in the District Court's review of the case record. For example, in response to Plaintiffs' reminder that they had already explained in the 2016 briefing—to the very same District Court judge—why she could not have applied the domestic takings rule, the Dismissal Opinion sarcastically quotes the Plaintiffs' words back at them: "'Plaintiffs noted the existence of the domestic takings rule and explained . . . why it was irrelevant.'

[6] *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312, 1321 (2017) ("To be sure, there are fair arguments to be made that a sovereign's taking of its own nationals' property sometimes amounts to an expropriation that violates international law, and the expropriation exception provides that the general principle of immunity for these otherwise public acts should give way."). Less than four years later, the Supreme Court concluded that the available "fair arguments" that might support jurisdiction were, in fact, none at all.

Pls.' Opp'n, ECF No. 66, at 43. Plaintiffs provide no record reference corresponding to this alleged 'explanation.'" Dismissal Opinion at 15, n.11, JA1162. That quote appears on page 36 of Plaintiffs' Opposition, however, not page 43. JA1110. Moreover, Plaintiffs' original Opposition to the First Amended Complaint—decided by the same District Court judge and referenced throughout Plaintiffs' recent Opposition (JA1068)—did precisely that. *See, e.g.*, JA0374 ("*Simon* disposes of the Defendants' 'domestic takings' argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims."). This reference cannot have been overlooked by the District Court, which had *paraphrased the Plaintiffs' 2016 Opposition in the 2017 opinion*:

> [I]n *Simon*, the D.C. Circuit expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings.

Order dated March 31, 2017 at 72, JA0605 (internal citations omitted) (emphasis added).

In other words, on the critical question of what the Plaintiffs did or did not argue, the District Court misquoted the record, ignored the explicit statements by Plaintiffs in their original briefing, and overlooked its own words—which incorporated the Plaintiffs' arguments—in correctly following circuit law in 2017.

The District Court's nationality analysis is regrettably no more accurate. The same sarcasm implicit in the above quotations around "alleged 'explanation'" drips from the Dismissal Opinion: "it is 'not the Court's job to scrutinize a plaintiff's

factual allegationsand *sua sponte* raise legal theories found nowhere in the briefs.'" Dismissal Opinion at 13-14. No one suggested the District Court should do that, yet having denied Plaintiffs leave to amend to quote from documents previously referenced explicitly, the District Court derided the references to the Nazi Party Platform as insufficient because "that language was not included in their Complaint." Dismissal Opinion at 26, JA1173.

The District Court also claimed that the Prussian Foundation's expert testimony was "uncontroverted." Dismissal Opinion at 28, JA1175. This is not at all true. The Plaintiffs submitted expert testimony in 2016, the point in time at which the District Court insisted the Plaintiffs were bound to an unaltered record, specifically with respect to expert opinions. That expert testimony addressed Nazi discriminatory policy at length, yet the District Court simply pretended it had never happened. *See* JA0458. The Prussian Foundation, on the other hand, having insisted that the record must be closed as of the 2016 briefing, nonetheless submitted two *new* opinions with its renewed motion. Plaintiffs pointed out this hypocrisy in their Opposition. JA1100-01. Incredibly, the Prussian Foundation responded by filing two *more* new opinions in reply, one by former Dutch Restitutions Committee member Evelien Campfens—who had never been identified and who has no experience or expertise on the law of nationality. Rather

than rebuke this tactic by the Prussian Foundation, the District Court punished the Plaintiffs.

Ultimately, the District Court held that (a) the immigrants to Holland Rosenberg and Rosenbaum were somehow still German nationals, (b) a fictitious German corporation whose existence was alleged not by Plaintiffs but as a counterfactual by the Prussian Foundation was the owner of the Welfenschatz and therefore a domestic taking was at issue, (c) the incontestable historical facts about the Nazis' views on nationality and Jews were somehow imperceptible to Germany (the actual perpetrator) and the District Court, despite the SAC's detailed narrative, and (d) that international law is indifferent to takings from stateless persons. All are wrong and compel reversal.

SUMMARY OF THE ARGUMENT

The District Court erred in dismissing the SAC because its allegations set forth a taking in violation of international law, facts which have been asserted (and therefore preserved) since the day this case was filed in 2015. The District Court was to answer two questions under the Supreme Court's remand: whether the sale of the Welfenschatz is *not* subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction, and as a corollary, whether Plaintiffs adequately preserved the argument.

The Supreme Court held that a taking does not violate international law when the victim is a national of the government that does the taking. Thus, if the victims here were German nationals, the taking does not implicate the expropriation exception of the FSIA. But if they were not German nationals, the District Court has jurisdiction. The latter conclusion—finding jurisdiction—is the correct one.

The Plaintiffs have always set out a narrative of allegations about the Nazis' fixation on the art dealer victims *as non-Germans* whose possession of the Welfenschatz could not be abided because the dealers were Jews. There is no mystery here, certainly no change in the theory of the case evident in the papers consistently and since the beginning. Instead, the District Court searched for the magic words that the Prussian Foundation claims must be incanted for the argument to exist. Had the District Court not ignored both the text and the gravamen of the pleadings, the Prussian Foundation's preservation argument should have been easily rejected. The forced sale violates international law. Plaintiffs do not invoke a new section of the FSIA, or claim that the Consortium members had a nationality that was not evident from the very first Complaint.

The first alarm signaling the District Court's error was its denial of the motion for leave to amend. The proposed amendments simply added additional details to the story of Rosenbaum and Rosenberg's emigration, but that emigration

was already alleged. The amendments quoted from the Nazi Party Platform, but that hateful screed was already referenced explicitly in all prior pleadings. Worse, the District Court scolded the Plaintiffs for suggesting that the record could be anything other than what was on file in 2016—and then accepted and relied upon four new affidavits from purported experts proffered by the Prussian Foundation in the Dismissal Order. This inconsistency cannot stand, and this Court should vacate both orders on appeal with instructions to permit the amendment.

ARGUMENT

I. Standard of Review.

The District Court's rulings regarding jurisdiction under the FSIA are reviewed *de novo. See Owens v. Republic of Sudan,* 864 F.3d 751, 785 (D.C. Cir. 2017). The District Court's denial of leave to amend is reviewed for abuse of discretion. *See Brink v. Continental Ins. Co.*, 787 F.3d 1120, 1128 (D.C. Cir. 1999).

II. The forced sale of the Welfenschatz was not subject to the domestic takings rule.

The Nazis took the Welfenschatz because it was owned by Jews. It is no more complicated than that. Some of those Jews were Dutch nationals; all had ceased to be German nationals. Taking that property, deprived by a government for discriminatory reasons without fair compensation at the expense of non-domestic victims, violates international law. *See Helmerich & Payne Int'l Drilling Co. v.*

Bolivarian Republic of Venez., 743 F. App'x 442, 455 (D.C. Cir. 2018) (on remand from the Supreme Court, "Venezuela and PDVSA have entirely commandeered all of H&P-V's [the American parent corporation] on-the-ground operations, leaving H&P-V with nothing but a nominal right to compensation that has proven worthless in Venezuela's courts[.]").

A. The forced sale in 1935 violated international law unless the victims retained the benefits of German nationality.

Foreign sovereigns are not immune against suits "in which the rights of property taken in violation of international law are in issue[.]" 28 U.S.C. § 1605(a)(3). Under *Philipp*, this provision "refers [only] to violations of the international law of expropriation[.]" 141 S.Ct. at 715. A taking violates international law when it is discriminatory, not for a public purpose, and lacking in just compensation. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) at 20 ("if property has been nationalized or expropriated without payment of compensation as required by international law it will not be immune with respect to actions in which rights in such property are in issue. . . [.]"); *see also Beierwaltes v. L'Office Federale De La Culture De La Confederation Suisse*, 999 F.3d 808, 821 (2d Cir. 2021). The Restatement (Second), of the Foreign Relations Law of the United States (confirmed by the Supreme Court in this case as the state of the law as of 1976) defines just compensation as adequate in amount, paid with reasonable promptness, and paid in a form that is effectively realizable. Restatement (Second),

of the Foreign Relations Law of the United States, § 187. Finally, deprivation of "substantially all the benefit of [the victim's] interest in property, constitutes a taking of the property, within the meaning of § 185, even though the state does not deprive him of his entire legal interest in the property." Restatement (Second), of the Foreign Relations Law of the United States, § 192.

The allegations constituting the forced sale of the Welfenschatz match those elements of a taking in violation of the international law of expropriation, so long as the taking is not a domestic taking[7] under *Philipp*. The forced sale for the Nazis' lust for art served no public purpose. The sale was discriminatory because it targeted the owners for being Jewish, which as explained further below, was something that the Nazis considered to be a nationality as much as anything else. And the consideration for the sale was neither adequate nor freely available; the

[7] Notably, the United States (who sided with the Prussian Foundation on the abstract question of whether Section 1605(a)(3) incorporates the domestic takings rule before the Supreme Court in this case) recently agreed that the question of the Consortium members' nationality has not been determined. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners *Cassirer v. Thyssen-Bornemisza Collection Found.,* No. 20-1566, 2021 WL 5513717 at 5, n.2 (Nov. 2021) ("The Court left open the argument that the plaintiffs in that case were not German nationals at the time of the taking and therefore that the expropriation of their property did violate international law."). Indeed, in its brief on the merits to the Supreme Court in this case in 2020 the United States pointedly omitted the Prussian Foundation's argument that *these* victims were German nationals (having previously and incorrectly assumed at the petition stage that the Prussian Foundation's assertion was true; when Plaintiffs noted this in their supplemental brief on the petition, the United States dropped the assertion). Instead, the United States advocated the general proposition ultimately adopted by the Supreme Court that nationality is an essential criterion of the analysis.

price was a third of the real value *according to the Nazis themselves*, and even that was not actually available. Some was paid into blocked accounts, some was paid as a "commission" to the very conspirators who had helped rob the Consortium, and some was "paid" in paintings that were selected by the Nazis and even then not even given to the sellers. JA0941.

B. Nationality requires a "genuine link" between the individual and the state.

To conduct the analysis ordered by the Supreme Court, the District Court was required first to determine the victims' nationality. Nationality is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties." *Nottebohm (Liech. v. Guat), Judgment,* 49 AM. J. INT'L L. 396 (1955) ("*Nottebohm Case*")*.* Nationality is the "genuine link"[8] between the individual person and the benefits of international law, the classic definition (and thus the one as Congress would have understood it in 1976) of which is: "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of *reciprocal* rights and duties." *Nottebohm Case* (emphasis added); Restatement (Second), of the Foreign Relations Law of the United States, § 26, cmt. d (1965) (citing the *Nottebohm Case*). The Restatement

[8] MALCOM N. SHAW, INTERNATIONAL LAW at 659 and 808 (6th ed. 2008).

(Second)[9] explains that "[t]he nature of the genuine link requirement has not been determined by decisions since the Nottebohm Case, although it is clear from that case that a variety of factors such as consent, birth, marriage, other family ties, voting, allegiance, and economic interests would be relevant." *Id.* In other words:

> Nationality . . . is determined by one's social ties to the country of one's nationality, and when established, gives rise to rights and duties on the part of the state, as well as on the part of the citizen/national. In turn "citizenship" is a way to maintain common norms and values of the state as a social and political community.

ALICE EDWARDS & LAURA VAN WAAS, NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW at 12 (Cambridge University Press, Kindle Edition, 2014). The law of the United States concurs: "[a]n individual has the nationality of a state that confers it upon him *provided there exists a genuine link between the state and the individual*." Restatement (Second), of the Foreign Relations Law of the United States, § 26 (1965) (emphasis added).

In 1935, the German Reich was a signatory to the Convention on Certain Questions Relating to the Conflict of Nationality Laws (the "Nationality Convention"), a League of Nations convention enacted at The Hague in 1930. League of Nations, Treaty Series, vol. 179, p. 89, No. 4137 (Pub. Apr. 13, 1930).

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[9] As the Supreme Court underscored, the Second Restatement is the definitive encapsulation of the state of international law at the time of the FSIA's enactment in 1976. *Philipp*, 141 S.Ct. at 712. The Dismissal Opinion notes the *Nottebohm* case as having been cited by Plaintiffs, but the Dismissal Opinion does not address the substance of either *Nottebohm* or the Restatement.

The Nationality Convention states in its very first article, "[i]t is for each State to determine under its own law who are its nationals." Nationality Convention, Article 1.

Needless to say, all of this can be resolved only by considering the totality of the circumstances. What is or is not the "genuine link" that is the determinative criterion of international law depends both on the factual circumstances under which a state confers its nationality, *and* the purposes for which the link of nationality is asserted. The Supreme Court has treated naturalized American *citizens* who had returned to Britain as British *nationals*. *See The Venus*, 12 U.S. (8 Cranch) 253, 277-78 (1814). The Supreme Court has also held a British citizen to be a national of the Confederate States of America where he was a longtime New Orleans resident, "identified with the people of Louisiana," and otherwise worked in service of the Confederate cause. *The Venice*, 69 U.S. (2 Wall.) 258, 274-75 (1864); *see also Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 197 (1815) (holding that "identification of [a person's] national character" may depend on the "particular transaction" at issue).

1. Rosenberg's and Rosenbaum's emigration makes the domestic takings rule irrelevant.

Under this analysis, Consortium members Rosenberg and Rosenbaum were Dutch nationals at the time of the sale:

> Saemy Rosenberg and Isaak Rosenbaum **had emigrated by 1935 from Germany**. In Amsterdam, the two founded the company Rosenbaum NV . . .

JA0943 (¶ 170) (emphasis added). To "emigrate" is a term of art, defined as: "to leave your own country to go and live permanently in another country." *Oxford University Press, Oxford Advanced American English Dictionary* (8th ed. 2013). Emigration is, by its essence, a circumstance where "the individual has renounced" the former nationality. Restatement (Second) of Foreign Relations Law § 26.

So it was here, because neither Rosenberg nor Rosenbaum ever returned to live in Germany or have any connection to it. Rosenbaum died in Amsterdam in 1936, sparing him the indignity of being pursued a second time by Goering's infamous minions who plundered Dutch Jews' collections. JA0944 (¶ 173). Rosenberg escaped to England. JA0944 (¶ 175). There is only one plausible inference from the facts alleged about two men chased out of the country of their birth *on the basis of the government's warped view of nationality*: that neither were German nationals any longer, or ever again.

The legal significance of this under *Philipp* is that the Welfenschatz was owned, in part, by two Dutch nationals (or at the very least by an art dealer firm that was owned entirely by Dutch nationals) at the time it was taken by the Prussian/German state. More to the point, the Welfenschatz was owned in part by two men who were *not* German nationals, the chief concern of the Court's opinion.

Philipp, 141 S.Ct. at 706. Returning to the standard set forth above: what were the "social ties" that bound two men who left the country where they had raised their families because of a government that denied their very humanity because they were Jews? What "duties" did the Nazi regime acknowledge toward two men who made the decision to leave their country of origin forever because that regime because the state declared them incapable of being German? The idea that either Rosenberg or Rosenbaum, living in Amsterdam, running their new business (which of course the Nazis would also seize when they invaded the Netherlands) had a "social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of *reciprocal* rights and duties" cannot be supported. *Nottebohm Case* at 23 (emphasis added). Nazi policy about nationality—easily discernable from the Plaintiffs' allegations since the case began—could scarcely have been clearer: Jews were not Germans.

At the time of the sale, the Welfenschatz had at least two *foreign* owners. The taking violated international law because it would have deprived (at least) two *Dutch* nationals of their property interest held in common with "domestic" victims. *See Helmerich*, 743 F. App'x at 455. Rosenberg and Rosenbaum are just like the American investors whose claims survived in *Helmerich*, not the Venezuelan domestic corporations whose claims did not. *See id.*

The District Court barely acknowledged this key aspect of Plaintiffs' case, devoting no more than *a single phrase to end the entire opinion* (after quoting the Prussian Foundation's briefing at length) that "Defendant concludes and this Court agrees that Plaintiffs fail to meet 'their burden of pleadings facts establishing that either [Rosenberg or Rosenberg] was no longer a German national in 1935.'"). Dismissal Opinion at 31, JA1178.

In its renewed motion, the Prussian Foundation clung to the reed that the Consortium was an entity with separate legal existence under German law, a factual contention directly contradicted by the pleadings that the District Court was obliged to consider as true in deciding the motion.[10] Dr. Armbrüster's opinion submitted with Defendants' Motion to Dismiss the First Amended Complaint offered the same fiction he had pressed since 2015. Plaintiffs already demonstrated that Dr. Armbrüster is mistaken, however, in 2016:

> A German court today - by applying today's law and in conjunction with the mandatory inclusion of the historical legal framework of the years 1929-35 - would not under any legal consideration whatsoever (as discussed above in detail) award the "Welfenschatz" Consortium a qualification with its own legal person status[.] The Consortium was not an "external corporation" and, as purely a tendering consortium, was also not the owner of the "Welfenschatz" collection.

[10] In addition, nothing about the Supreme Court mandate suggests that the District Court had the authority to revisit this factual theory that the District Court had declined to accept in 2017. Here again, the Prussian Foundation's view of the mandate is a straightjacket for the Plaintiffs, but free rein for the Prussian Foundation.

JA0479. The District Court responded to this by pretending that Plaintiffs *had not contested the point at all* (Dismissal Opinion at 28, JA1175), a misstatement of the record.

2. Jews in Nazi Germany were not German nationals.

That lack of German nationality as of the 1935 forced sale was not limited to Rosenberg and Rosenbaum, but extended to all the victims. Immediately upon Hitler's ascension to power, Germany deliberately and explicitly severed the "vital link" between nation and individual by excluding Jews from *all* rights that a national may claim for its subjects. From the moment the Nazis took control of the German state, to be a German national always required *not* being a Jew:

> These laws and regulations, while draconian, barely approach the repression that was unleashed on Germany's Jews. Through the collective humiliation, deprivation of rights, robbery, and murder of *the Jews* as a population, they *were officially no longer considered German.*

JA0917 (¶ 55) (emphasis added), *see also* JA0914 (¶ 43). No Plaintiff could give a "short and plain statement" of every undisputed historical example of Nazi Germany's definition of its very character as one for which Jews were constitutionally ineligible. The facts alleged since 2015 show that from the very start of the Nazi movement, that group's—and, after 1933, Germany's—motivating principle was the exclusion of Jews from the very ability to be German.

Indisputable historical documents referenced by name confirm as much, the contents of which the District Court could and should have taken notice, whether or not they were quoted at length. In February 1920, Adolph Hitler and the Nazi party released a 25-point platform (identified specifically in Paragraph 48 of the SAC, as well as all prior pleadings) that defined and animated their governance thirteen years later (emphasis added): "Only members of the nation may be citizens of the State. Only those of German blood, whatever their creed, may be members of the nation. Accordingly, no Jew may be a member of the nation." Nazi Party Platform at ¶ 4 (emphasis added). Yet the District Court mocked the Plaintiffs by suggesting "it is 'not the Court's job to scrutinize a plaintiff's factual allegations and *sua sponte* raise legal theories found nowhere in the briefs.'" Dismissal Opinion at 13-14, JA1160-61. In its haste to deride the Plaintiffs, the District Court overlooked the reference to the Nazi Party Platform (among other things) in the pleadings, and the central and unchanged legal theory of a discriminatory taking in violation of international law.

The Prussian Foundation's reliance on the Nationality Law of 1913 (*Reichs- und Staatsangehörigkeitsgesetz*) underscores that whatever the arguably surviving meaning of a 1913 law from the Germany Reich as it was then, it was rendered irrelevant with respect to Jews' status in Germany after 1933 as a result of Nazi policy *and* legislation. The 1933 Law for the Repeal of Naturalization and

Revocation of German Nationality of July 14, 1933 (the *Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der Deutschen Staatsangehörigkeit*) is no more relevant. That law identified Jews—uniquely—as ineligible for Germany nationality. Anyone naturalized between November 9, 1918 (the start of the Weimar Republic) and January 30, 1933 could be denaturalized merely if they were "undesirable." That standard was, of course, completely arbitrary and was in fact applied principally to Jews. The Court will note, too, the Nazis' own significance assigned to January 30, 1933 relative to Jews' capability of German nationality. The Nazis understood, and were quite proud of the fact, that on the day Hitler took power, Jews were outside of German nationality. It is perverse to argue, as the Prussian Foundation did, that formalistic acts of deprivation designed to humiliate Jews publicly in their community (*i.e.*, by announcing citizenship-stripping in the newspaper, the primary information medium of its day) are the benchmark of nationality, and that, *during the Holocaust*, any Jews not humiliated in this particular way still possessed the rights and privileges of German nationality.

It is uncontroverted, as Plaintiffs alleged specifically, that the Nazi regime undertook the public shaming of identifying the individual Consortium members for ceremonial *citizenship*-stripping until after 1935. Those ceremonial acts of ridicule made no difference from one day to the next with respect to the

individual's relationship to the state and therefore their *nationality*. Indeed, the example of Plaintiff Philipp's own mother (one of Hackenbroch's daughters) is illustrative. After her father's death, she was "stripped of her citizenship in humiliating fashion: published under the swastika of the German Reichs Gazette and Prussian Gazette. Almost as an afterthought, it is noted that all those on the list who have been expelled have also had their property seized." JA0943 (¶ 168). To suggest that her relationship to the state changed only on the day of that periodical is to deny reality.

Nor was September 1935 some sort of turning point before which Jews in Germany cannot claim to be non-German nationals.[11] The Reich Citizen Law of September 15, 1935 did not deprive Jews of citizenship (or nationality). Rather, it created a *new* exalted category of *Reichsbürger*—Reich Citizen. *See* Reich Citizens Law of September 15, 1935, Foreign Relations of the United States Diplomatic Papers, 1935, The British Commonwealth; Europe, Vol. II,

[11] It is grimly ironic that the Prussian Foundation would rely on the Reich Citizenship Law, also often called the Nuremberg Race Laws in defense of retaining stolen property, laws which were authored in significant part by Wilhelm Stuckart, one of the chief conspirators to rob the Consortium. SAC at ¶¶ 98, 107, JA0927, JA0929. Stuckart was one of the small number of participants at the so-called the Wannsee Conference in suburban Berlin in 1941, at which Reinhard Heydrich, Adolf Eichmann, and other high ranking war criminals decided upon the implementation of the "final solution of the Jewish question"—the plan to exterminate the entire Jewish population of Europe. JA0929 (¶ 107). To use Stuckart's pseudo-legalisms against Plaintiffs for the conclusion that the Consortium members were German nationals is grotesque.

https://history.state.gov/historicaldocuments/frus1935v02/d305 (Sept. 19, 1935). The *enhanced* persecution of Jews as a result of the Nuremberg Laws sheds no light in and of itself on whether Jews were German nationals immediately *prior* to those laws' passage. The Nuremberg Laws did not create Jews' exclusion from German nationality that had already existed from the moment the Nazis assumed power in Germany on January 30, 1933.

The District Court had no excuse for ignoring these allegations; the contortions that it performed to avoid these facts are remarkable. The District Court was not required to "scrutinize" anything—nor did it. Instead, it refused to acknowledge the obvious: that all pleadings to date have detailed the Nazis' national-identity based discrimination. The District Court shrunk the crux of the entire narrative in the pleadings about the Nazis' rise to power and discriminatory policy to one phrase ("In early 1933, the Nazi party assumed control over Germany") and the pages and pages of allegations about the Nazis' fixation on *these* owners as Jews whom Nazi policy distinguished from Germans to a neutral matter of "interest" as though Goering were a pensioner shopping for trinkets. Dismissal Opinion at 3, JA1150 ("The Nazis became *interested* in acquiring the [remaining items in the] Welfenschatz on behalf of the German state") (emphasis added).

Having shrugged off what was apparent from the pleadings, the District Court feigned confusion about what the Nazi Party Platform of 1920 said, as though the founding principles of the Nazi Party were hard to divine (or unknown to Germany). Dismissal Opinion at 26, JA1173 ("that language was not included in their Complaint"—though it was in the proposed amendment). To sum it up, the District Court suggested that the Plaintiffs' dozens of pages of allegations about the details of Nazi policy and its relation to the Nazis' perception of German identity was merely "general in nature" and "tangential at best." *Id.* That is wrong.

3. Taking property from stateless victims also violates international law.

The District Court also held that the FSIA's expropriation exception does not confer jurisdiction where victims not yet nationals of another state, *i.e.*, stateless. This too was error. The question on remand is whether they were *not* German nationals, not whether they were affirmatively nationals of some *other* country. *Philipp*, 141 S.Ct. at 715 (remanding whether "the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction.") (emphasis added). If the Supreme Court had intended for the District Court to determine only whether the Consortium members were nationals of another state, the Supreme Court would have said so. It did not. The Supreme Court did not hold that a taking violates international law *only* when the property who possess the affirmative

nationality of another state is targeted. The actual holding of the Supreme Court is as succinct as it is narrow: "We hold that the phrase 'rights in property taken in violation of international law,' as used in the FSIA's expropriation exception, refers to violations of the international law of expropriation and thereby incorporates the domestic takings rule." *Philipp*, 141 S.Ct. at 715. That rule, in turn, means that "the expropriation exception's reference to 'violation of international law' does not cover expropriations of property belonging to a country's *own nationals*." *Id.* at 711 (emphasis added). The criterion is a lack of common nationality, not possession of *another* nationality.

The Supreme Court's most recent decision concerning another Nazi-looted art case confirms this. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S.Ct. at 747 (2022). The *Cassirer* case concerns a Jewish woman, Lily Cassirer, born and raised in Germany. She was forced to sell a Pissarro painting to a Nazi agent in Germany—just like this case—in 1939 (*i.e.*, even after the Prussian Foundation's arbitrary and ahistorical reliance on the 1935 Reich Citizenship law). Under the District Court's analysis, that would be a domestic taking, or, if the Reich Citizenship Law were determinative, a taking from a stateless person. Yet the Supreme Court just revived her heirs' claims, brought under the expropriation exception, earlier this year. *See id*. It beggars belief to suggest that the Supreme Court, only one year after the decision in this case about domestic takings in the

context of a forced sale of art to Nazis and Jews in Germany, would have overlooked that dynamic and resuscitated a case inconsistent with its jurisdictional holdings. The fact that Spain (which did not perpetrate the Holocaust) had the decency not to contest that Germany violated international law when art was taken from a Jewish woman in German territory does not matter, of course, because parties cannot conspire to create jurisdiction. *See, e.g.*, *California v. LaRue*, 409 U.S. 109, 112 (1972).

As with its wholesale quoting of the Prussian Foundation's briefing throughout the Dismissal Opinion, the District Court outsourced this analysis[12] too, relying on the error of one of the District Court cases on appeal to this Court. *See Simon v. Republic of Hung.*, 1:10-cv-01770-BAH, 2021 U.S. Dist. LEXIS 248161, at *41 (D.D.C. Dec. 30, 2021). That court concluded that *no* taking that would have been considered genocidal under *Simon* can violate international law. *Id.* at *62. But that would mean that genocide *excuses* international law violations; even a classical expropriation of an alien's property would be beyond the reach of the FSIA as long as the state was simultaneously committing genocide (a holding that

[12] The only other post-*Philipp* authority that the District Court cited for the conclusion that stateless victims are at the mercy of every government under international law was decided by the same District Court judge involving the same defendant (Hungary). *See* Dismissal Opinion at 21-22, citing *Heller v. Republic of Hungary*, No. 21-cv-1739-BAH, 2022 WL 2802351, at *1 (D.D.C. Jul. 18, 2022). *Heller* is on even shakier ground than *Simon* (the 2021 remand decision), because *Heller* failed to understand the significance of the 2022 Supreme Court decision in *Cassirer* noted above.

cannot be squared with the revival of *Cassirer*). Under this logic, a state that committed genocide against all persons of a particular race would be excused from takings from victims who were foreign nationals by virtue of the genocide. That makes no sense.

C. The Prussian Foundation is judicially estopped from offering new expert opinions.

The Prussian Foundation submitted four new affidavits in support of its motion. The Prussian Foundation was judicially estopped from relying on any of these new opinions, however. Judicial estoppel is a principle of fairness, which involves four considerations: (1) the opposing party assumed a certain position; (2) that party succeeded in the proceeding on the position it asserted; (3) the party later assumed a contrary position; and (4) the party would derive an unfair advantage if the court permitted the reversal. *See, e.g.*, *Aera Energy LLC v. Salazar*, 642 F.3d 212, 219 (D.C. Cir. 2011), *cert. denied*, 565 U.S. 883 (2011) (citing and quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)); *see also* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981) ("absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory").

The Prussian Foundation was categorical that the record should be closed—then did the opposite once it had what it wanted. JA0861 (arguments to be

considered "based on the *operative complaint* and the arguments found in the parties' briefs in earlier stages of the case") (emphasis in original). The Prussian Foundation specifically claimed that amendment would create prejudice because they would need new expert opinions. *Id.* at 31 ("[R]esponding to [additional allegations] will require new expert opinions and substantial legal and factual investigations."). The District Court *agreed*. JA0894 (citing approvingly the Prussian Foundation's claims of prejudice from "requir[ing] new expert opinions"). Yet the first chance the Prussian Foundation had, it obtained a completely new opinion from Dr. Thiessen, on a topic he had never addressed. It repackaged Dr. Armbrüster's opinion that had been addressed to a different legal point. And most deceitfully of all, it sprang the opinion of Dr. Campfens at the very last moment, seven years into a case the Prussian Foundation has repeatedly decried as so old as to render any new assertions, and any analysis, unfair. The Dismissal Opinion does not mention Dr. Campfens by name, but that hardly insulates its cursory analysis of Dutch nationality, on which she purported to opine. Indeed, given the lack of citation to anything, it enhances the conclusion that the District Court was swayed by this tardy affidavit.

III. Plaintiffs more than adequately preserved the right to assert jurisdiction because the victims were not German nationals.

From 2016, the Plaintiffs rightly relied upon the law of this circuit, which held that the domestic takings rule was unavailable as a defense to genocide. The

Plaintiffs did not "waive" an alternate argument that their relatives had not been German nationals at the time of the taking. This argument would have been superfluous and resulted, at best, in *dicta*. Moreover, even if the argument theoretically could have been waived, the pleadings did put this assertion squarely before the District Court. The District Court erred when it found that the Plaintiffs had failed to preserve a position that they did assert, and that the District Court could not have reached until after the Supreme Court reversed circuit precedent.

In their First Amended Complaint, Plaintiffs described, in detail, the Nazis' persecution of German Jews in general and the Consortium members in particular, setting out the elements both of genocide and of a classic expropriation. *See* JA0177 (¶ 25), *infra*. After Plaintiffs filed that First Amended Complaint but before they had to respond to the Prussian Foundation's motion to dismiss, this Court issued its decision in *Simon*. *Simon* affirmed that this Court's law at the time did not allow the Prussian Foundation to rely on sovereign immunity to shield thefts of the Holocaust because a genocidal taking constitutes a taking in violation of international law and therefore exposes the sovereign to suit in U.S. courts under the expropriation exception of the FSIA. *Simon*, 812 F.3d at 144 (rejecting of the applicability of "the so-called 'domestic takings rule,' under which, 'generally, a foreign sovereign's expropriation of its own national's property does not violate international law.'") (quoting *Helmerich*, 784 F.3d at 812). This Court went on:

"*The domestic takings rule has no application* in the unique circumstances of this case, in which, unlike in most cases involving expropriation in violation of international law, genocide constitutes the pertinent international-law violation." *Id.* (emphasis added).

In 2017, the District Court in the present case was required to reject the Prussian Foundation's argument that the forced sale at issue was immune as a "domestic taking," and it did. Dismissal Opinion at 7, JA1154 ("This Court agreed with Plaintiffs' argument pursuant to *Simon I* and found the domestic takings rule inapplicable"). This Court upheld that decision, and in petitioning this Court for *en banc* review the Prussian Foundation conceded that the District Court had followed *Simon* correctly. *See Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018); *Philipp v. Fed. Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019). The Supreme Court, however, reversed *Simon* and held that a genocidal taking did not provide a basis for jurisdiction under the expropriation exception. Only then did nationality become a live question.

A. Plaintiffs preserved the issue of the victims' nationality.

When the Plaintiffs submitted their opposition to the Prussian Foundation's Motion to Dismiss the First Amended Complaint, *Simon* was binding precedent in this Court—and *Simon* confirmed the domestic takings rule was inapplicable in the context of genocidal thefts. As a matter of law, the Plaintiffs did not waive an

alternate theory that, under then-binding circuit law, the court could not have reached.

The Dismissal Opinion misstates the 2016 arguments: "Even as Defendants raised the domestic takings argument . . . Plaintiffs failed to respond to that argument, electing to rely . . . on *Simon I* and a claim of genocide." Dismissal Opinion at 7, JA1154. To the contrary: Plaintiffs' reliance on *Simon* was *explicitly* a response to the domestic takings argument, and under circuit law, it was a complete and sufficient rebuttal. *See* JA0412 ("*Simon* disposes of the Defendants' 'domestic takings' argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims.").

B. At all relevant times, this Court's precedent rendered the domestic takings rule inapplicable to genocidal thefts.

In its 2017 decision, the District Court rightly understood that *Simon* forbade its consideration of the domestic takings rule. The court noted: "[I]n *Simon*, the D.C. Circuit expressly rejected the application of the domestic takings rule in the context of intrastate genocidal takings." *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d at 72. The District Court, as required, followed this precedent: "In light of the D.C. Circuit's holding in Simon, the Court rejects Defendants' argument that the domestic takings rule precludes the application of the FSIA's expropriation exception in these circumstances." *Id.*

This Court affirmed this conclusion. The decision, which quoted heavily from *Simon*, confirmed that under circuit precedent, the domestic takings rule was simply not available as a shield to claims of genocide. It repeated *Simon*'s holding "that although an 'intrastate taking'—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings, an intrastate taking can nonetheless subject a foreign sovereign and its instrumentalities to jurisdiction in the United States where the taking 'amounted to the commission of genocide[.]'" *Philipp*, 894 F.3d at 410(D.C. Cir. 2018) (internal citations to Simon omitted).

In the Prussian Foundation's petition for *en banc* review, it acknowledged that, under circuit law, "the panel was bound by Simon[.]" Pet. for Reh'g *En Banc*, *Alan Philipp, et al v. Federal Republic of Germany, et al*, No. 17-7064, Doc. 1749546 (D.C. Cir. filed Sept. 7, 2018). The Prussian Foundation sought *en banc* review because it recognized that *Simon* would need to be reversed before the Prussian Foundation could have any possible defense based upon the domestic takings rule. It acknowledged that the *Philipp* panel had "Rel[ied] on another recent panel decision, *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016), which held that the domestic takings rule does not apply when an alleged taking itself violates a human rights norm[.]"

In *Philipp*, the Supreme Court recognized that D.C. Circuit precedent had nullified the domestic takings rule in the context of genocide; it observed that, if the expropriation exception included genocidal thefts, this overrode the domestic takings rule. *Philipp,* 141 S.Ct. at 709-12. The Supreme Court framed its decision as a restoration of the domestic takings rule, and reversed this Court's interpretation of the phrase "rights in property taken in violation of international one" in favor of a different interpretation that "incorporates the domestic takings rule." *Id.* at 715. In its remand, the Supreme Court did not consider—let alone decide—whether the panel decision in *Philipp* had been required under circuit law. It therefore did not consider whether the Plaintiffs were justified in relying on *Simon* in their arguments below.

In 2017, however—a year *before* this Court issued its decision the present case—the Supreme Court had observed that "[t]he [D.C.] Circuit has recognized that there are . . . cases" that may be brought under the expropriation exception even though they involve "a simple common-law claim of conversation, restitution, or breach of contract, the merits of which do not involve the merits of international law." *Helmerich*, 137 S.Ct. at 1323 (citing *Simon*).[13] As the Supreme

[13] As noted above, the Supreme Court in *Helmerich* specifically cited the District Court's 2017 ruling in this case, while elsewhere in that opinion noting the idea that takings from a government's own nationals might violate international law. *Helmerich*, 137 S.Ct. at 1321.

Court saw, it was *Simon* that established circuit law; this Circuit's decision in the present case did not make law, but merely followed it.

C. Waiver doctrine does not prohibit adjustments when the law changes.

When the Plaintiffs rightly relied upon controlling law, they were not required to preserve—and did not waive—an alternate argument in support of the same result, which no court could have reached until the Supreme Court reversed *Simon*. As a matter of law, litigants are not required to address hypothetical, future changes in the governing law. It would have been nonsensical for the Plaintiffs to submit an alternate argument about why, even if *Simon* were reversed, the domestic takings rule would still not shield the taking at issue in this case.

Under *Simon*, neither the District Court nor the appellate panel could have found that the domestic takings rule barred the Plaintiffs' claims, regardless of the nationality of the Consortium members. This Court explained: "[D]istrict judges, like panels of this court, are obligated to follow controlling circuit precedent until either we, sitting *en banc*, or the Supreme Court, overrule it." *U.S. v. Torres*, 115 F.3d 1033, 1036 (D.C. Cir. 1997). Therefore, under circuit law, both the District Court and this court were required to conclude that genocidal purpose of the forced sale precluded any possible application of the domestic takings rule.

The Plaintiffs were not required to make an alternate argument that was not only unnecessary to affirmance, but that no court could have actually reached. "It

is difficult to see why a litigant should be required to present an argument to a division of the court that the division of the court would be required to reject." *Fleming v. United States*, 224 A.3d 213, 219 (D.C. Cir. 2020). Likewise, "forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 740 (D.C. Cir. 1995).

As a matter of law—not to mention common sense—litigants cannot "waive" arguments that would require them to anticipate changes in the governing law. "[A]n effective waiver must . . . be one of a 'known right or privilege.'" *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 143 (1967). When the Supreme Court changes the law, a litigant is not penalized for having relied upon the previous state of the law; failure to make an argument "prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground." *Id.*; *see also Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) ("In any event a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made[.]").

Recently, this Circuit rejected an argument that a criminal defendant had waived an argument by failing to object to a certain jury instruction that was

consistent with then-governing law. *United States v. Abu Khatallah*, 316 F. Supp. 3d 207, 211 (D.C. Cir. 2018). The defendant's failure to object had been consistent with a recent D.C. Circuit decision (*id.*)—much as the Plaintiffs' prior arguments were consistent with then-governing law, as set forth in *Simon*. In the criminal case, although the Supreme Court subsequently "called [the relevant] ruling into question," the Circuit was clear: "surely his failure to raise an argument anticipating the Supreme Court's decision to change the law does not waive an argument relying on that change." *Id.* at 211-12. Once that law changed, he was "able to argue for the first time" against the jury instruction. *Id.* at 212.

Few litigants prevail three successive times, only for the Supreme Court to grant *certiorari* and unravel those successes (one of which the Supreme Court previously cited without criticism) by reversing preexisting circuit precedent. It would be bizarre if the Plaintiffs were precluded from reaching the merits of their suit based on allegations that have never changed, merely because they relied on the plain law of this Circuit—law that the Prussian Foundation conceded was correctly applied at the time. Even if the Plaintiffs' arguments below could be construed as waiver, when there has been "an intervening change in the law," "injustice might result if [the] court does not exercise its discretion to excuse the waiver." *Parker v. United States*, 254 A.3d 1138, 1144 (D.C. Cir. 2021). Moreover, when alleged waiver is by the previously prevailing party, "the potential

judicial diseconomies of forcing appellees to multiply the number of arguments presented, justifies a degree of leniency in applying the waiver rule to issues that could have been raised by appellees on previous appeals." *Crocker*, 49 F.3d at 741.

D. The District Court departed from this Court's precedent when it found waiver.

In finding the Plaintiffs' nationality-based argument barred by waiver, District Court did not follow the precedent discussed above. Instead, it relied upon an irrelevant district court decision from 2011: *GSS Grp. Ltd. v. National Port Authority*, No. CV 09-1322 (PLF), WL 13121428 (D.D.C. Aug. 10, 2011). In that case, a petitioner sought vacatur of an order dismissing the petition for lack of jurisdiction, but "none of" the petitioner's arguments in support of vacatur had been raised "*before the Court ruled on the motion to dismiss*." *Id.* at *4 (emphasis in original). In that case, there had been no change in the governing law; the petitioner simply, and abruptly, chose to assert an entirely new argument.

Even if *GSS* had any binding weight—and it does not—it is inapposite to the present situation because it did not concern a change in the governing law. The District Court nonetheless relied upon it, strangely insisting that, here too, "there was no change of law." Dismissal Opinion at *7 n.11.[14] That justification cannot be

[14] Likewise, in denying amendment, the District Court wrote: "the Supreme Court's unanimous rejection of Plaintiffs' arguments in this case does not constitute new law." Amendment Opinion at 13, JA890. That is flatly wrong; the Supreme Court's "unanimous rejection" reversed D.C. Circuit law—law that the

squared with the actual history of this case. As discussed above, in 2021, the Supreme Court reversed D.C. Circuit law. If there had been no change in the law, this case would still be preceding based on the District Court's original finding the complaint alleged a genocidal taking, and that genocidal takings establish jurisdiction under the expropriation exception. *Philipp*, 248 F. Supp. 3d at 70. Obviously it is not—because of the change in the law after appeal.

The District Court also mentioned the Prussian Foundation's citation to a footnote in a 2005 decision in this Court, *Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005). In *Schneider*, the plaintiffs' complaint addressed certain acts by the National Security Advisor and of the United States. *Id.* at 191. The court lacked jurisdiction because of the Political Question Doctrine. *Id.* at 193-98. On appeal—and, as in *GSS*, with no intervening change in the law—the plaintiffs "halfheartedly ma[d]e an ill-formed argument" that certain actions were *ultra vires*. *Id.* at 198-99. Although the plaintiffs' complaint included "language purporting not to waive *ultra vires* 'arguments,'" the complaint "never allege[d] a single claim for relief in *ultra vires* terms." *Id.* at 199. In that context, the Court included the footnote that the District Court cited—a quotation from a First Circuit case that, *inter alia*, "Judges are not expected to be mindreaders." *Id.* at 200, n.1. The Plaintiffs are not asking this or any other Court to mindread, merely to permit

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District Court itself had rightly relied upon in this case and applied correctly at the time (and as *Helmerich* seemed to confirm just four years earlier).

analysis of facts always present in the pleadings in light of a recent change in the law. As discussed below, the Plaintiffs have already put those facts squarely before the District Court.

IV. This case has always squarely presented the facts of the victims' nationality.

In their First Amended Complaint (which as noted above is functionally identical to the current operative pleading), Plaintiffs alleged that the members of the Consortium "were Jewish and regarding by the National Socialists as traitors and enemies of the Germanic state, in line with the corrupt ideology of Hitler's racist and inhuman manifesto *Mein Kampf*." JA0171 (¶ 3). They explained that certain German laws and regulations of 1933, "while draconian, barely approach the repression that was unleashed on Germany's Jews. Through the collective humiliation, deprivation of rights, robbery, and murder of the Jews as a population, they were officially no longer considered German." JA0192 (¶ 57). They referenced the state-sponsored boycotts, arbitrary detention, loss of the ability to engage in professional and commercial activity, and much, much more—including this specific property being targeted by the mayor the city where they lived *in collusion with Hitler himself*. *Id.* at ¶¶ 59-65, 69, 120, 138, JA0193-94, JA194-95, JA0207, JA0212; *see also id.* at Exhibit 2, JA0984. In addition, the Plaintiffs set forth that, by the time of the forced sale, two members of the Consortium had already emigrated. *Id.* at ¶ 128, JA0209; Exhibit 4, JA1000.

In their 2016 opposition to the Prussian Foundation's motion to dismiss, the Plaintiffs relied on *Simon* and noted their allegation in the pleadings that in Nazi Germany, Jews "*were officially no longer considered German*." Plaintiffs' Opp. to Defendants' Motion to Dismiss at 9, JA0390 (emphasis added). There is obviously no combination of words that could meet the Prussian Foundation's waiver argument standard. The Plaintiffs included many other relevant portions of the First Amended Complaint in the brief (a distinction the Prussian Foundation also pretends matters and which the District Court accepted despite what Plaintiffs' briefs said), verbatim, in their Opposition to the Motion to Dismiss (*see, e.g.*, JA388-91). They wrote that "the Nazis' stated goal" was "the complete physical removal of Jews from German society," and that "[t]he members of the Consortium were soon completely cut out of economic life in Germany." JA390. The Plaintiffs also raised, in their brief, the fact that Rosenbaum and Rosenberg had fully relinquished any connection to Germany before the forced sale. JA396.

These statements were more than adequate to inform the Court and the Prussian Foundation of the Plaintiffs' position that the Consortium members were not German nationals at the time of the forced sale. "A party is not required to invoke 'magic words' in order to adequately raise an argument . . . . Instead, an argument is preserved if the party has 'fairly brought' the argument 'to the

Authority's attention.'" *Nat'l Treasury Empls. Union v. Fed. Lab. Rels. Authority*, 754 F.3d 1031, 1040 (D.C. Cir. 2014).

V. The District Court erred by not allowing Plaintiffs leave to amend.

Much of this myopic (though erroneous) analysis could easily have been avoided because the District Court erred in rejecting the Plaintiffs' proposed amended complaint. A "court should freely give leave [to amend] when justice so requires," justice that was required here but denied. Fed. R. Civ. P. 15(a)(2). "It is an abuse of discretion to deny leave to amend without 'sufficient reason, such as futility of amendment.'" *Hall & Assocs. v. Env't Prot. Agency*, 956 F.3d 621, 629–30 (D.C. Cir. 2020) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). "[T]he crux of 'the liberal concepts of notice pleading embodied in the Federal Rules' is to make the defendant aware of the facts." *Harrison v. Rubin*, 174 F.3d 249, 253 (D.C. Cir. 1999) (quoting *Hanson v. Hoffmann*, 628 F.2d 42, 53 (D.C. Cir. 1980)) (holding that the district court erred by denying motion to amend). The Prussian Foundation has been aware of the infamous crimes of its predecessor—the State of Prussia—ever since it was created to hold the largely misappropriated cultural assets of that dissolved warmongering state that bore significant responsibility for both World Wars. Germany was certainly aware of its own crimes when it was a party.

A. The mandate did not prevent amendment.

The District Court incorrectly held that the mandate rule prevented amendment. When an open question remains on remand, amendment is often appropriate. *See, e.g.*, *Owner-Operator Indep. Drivers Ass'n v. United States Dep't of Transportation*, 316 F. Supp. 3d 201, 206 (D.D.C. 2018) (the Court of Appeals reversed the dismissal of two of five plaintiffs and remanded for consideration of their damages; the trial court rejected defendants' argument that the mandate rule prevented those plaintiffs from amending their complaint to add another statutory claim as a further basis for damages); *Silverman v. Teamsters Local 210 Affiliated Health and Ins. Fund*, 725 Fed. App'x 79, 81 (2d Cir. 2018) (district court did not exceed mandate by permitting amendment of complaint); *cf. Jacksonville Prop. Rts. Ass'n Inc. v. City of Jacksonville, Fla.* 496 Fed. App'x 956, 956 (11th Cir. 2012) (district court properly disallowed amendment when the case was remanded "with instructions to dismiss this action.").

The Supreme Court instructed the District Court to consider whether a certain argument had been preserved; that instruction did not address the possibility of amendment, which was not a question before the Supreme Court. The District Court erred by turning silence into a prohibition. *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 182 (D.D.C. 2005), *aff'd and remanded*, 470 F.3d 356 (D.C. Cir. 2006) (although the mandate merely

instructed that a plaintiff would be allowed to amend her own complaint on remand, she was also permitted to add claims on behalf of her deceased husband, since that question had not been before the Court of Appeals).

B. There was no delay by Plaintiffs.

The District Court was wrong to find that the Plaintiffs had delayed in seeking amendment. Until *Philipp*, the Plaintiffs had no reason—and just as importantly, with the case stayed on appeal, no opportunity—to amend. Once *Philipp* was decided, the Plaintiffs moved to amend immediately, pursuant to the mutually-agreed briefing schedule. Where an amended answer over a decade after a case began concerned a recent and relevant judgment, this Court has deemed amendment appropriate. *Franklin-Mason v. Spencer*, 756 F. App'x 20, 22 (D.C. Cir. 2019) ("[W]e do not see how the district court could have expected the Navy to amend its answer years before the Court of Federal Claims actually issued its decision."). Nor did the District Court venture to explain how or why Plaintiffs could have amended their Complaint years before the Supreme Court reversed D.C. Circuit law.

Inexplicably, the District Court emphasizes the very argument it rejected in 2017, that the present case is somehow distinguishable from *Simon*. Amendment Opinion at 14, JA891. That argument did not create any reason for the Plaintiffs to amend; to the contrary, that argument was rejected by the District Court and again

by this Court. *See Philipp*, 248 F. Supp. 3d at 71-72 (addressing, and rejecting, "Defendants' arguments that the facts at issue in this case are distinguishable from those in Simon."); *see also Philipp*, 894 F.3d at 412-13. Not a single court—not a single judge—ever found that this case was outside *Simon*'s precedential force.[15] *Philipp* said nothing to the contrary.

C. There was no prejudice to the Prussian Foundation.

The District Court also erred by finding that amendment would prejudice the Prussian Foundation. There has been no discovery requested or received; not a single deposition has taken place. The First Amended Complaint, which is seventy-seven (77) pages long, put the Prussian Foundation on notice of the facts relevant to this case; the SAC provided additional jurisdictional information but would not change the actual substance of the claims before the court. The Plaintiffs merely want the opportunity to litigate the same claims founded on the same allegations that they brought in 2015. It is the Prussian Foundation that has insisted, successfully, that the entire case remain in the starting blocks. It cannot be prejudiced for now having everything it asked for.

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[15] Moreover, while the motion to dismiss was pending, Congress amended the FSIA in a manner that confirmed that the expropriation exception applied, at least in some instances, to Nazis' takings of art and other cultural property for the entire Nazi period (which the Prussian Foundation had denied). Public Law No: 114-319 (12/16/2016), codified as 28 U.S.C. § 1605(h)(2)(a). This amendment to the expropriation exception itself eliminates any suggestion that the eventual overruling of *Simon* was so inevitable that Plaintiffs were on notice to argue in the alternative against their own earlier victories.

Even if there had been any delay or prejudice, it was not sufficient to justify denial of the motion to amend. *See Krupski v. Costa Crociere S.p.A.,* 560 U.S. 538, 550 (2010) (noting "the preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits."); 3 Moore's Federal Practice, § 15.02 ("The Rule allows for liberal amendment in the interests of resolving cases on the merits."). Although "the grant of leave to amend a complaint might often occasion some degree of delay and additional expense . . . leave still should be 'freely given' unless prejudice or delay is 'undue[.]'" *Barkley v. United States Marshals Servs.*, 766 F.3d 25, 39 (D.C. Cir. 2014) (quoting *Foman v. Davis*, 371 U.S. 178 at 182 (1962)) (reversing denial of motion for leave to amend); *cf. Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 860 (D.C. Cir. 2015) ("The motion to amend arrived four years after litigation began, one year after summary judgment motions were decided, eight months after filing an amended answer and only days before trial. That is the very picture of undue delay."). This case is in its earliest stages, and there is no arguable "undue" delay or prejudice.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court REVERSE the ruling of the District Court or, in the alternative, VACATE the

ruling of the District Court with instructions to permit Appellants to amend their SAC and to reconsider its ruling on the motion to dismiss.

November 28, 2022

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. 32(a)(2)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,859 words.

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2022, a copy of the foregoing Brief for Appellants was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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STATUTORY ADDENDUM

28 U.S.C. §1605 (2018). General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: Provided, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed,

a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub. L. 110–181, div. A, title X, § 1083(b)(1)(B), Jan. 28, 2008, 122 Stat. 341.]

(g)Limitation on Discovery.—

(1) In general.—

(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) Sunset.—

(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) Evaluation of evidence.—

The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) Bar on motions to dismiss.—

A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) Construction.—

Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) Jurisdictional Immunity for Certain Art Exhibition Activities.—

(1) In general.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)), that such work is of cultural significance and

the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)), any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) Exceptions.—

(A)Nazi-era claims.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) Other culturally significant works.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) Definitions.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.