No. 19-351

In the Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL.,
PETITIONERS

v.

ALAN PHILIPP, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides that a foreign state and its agencies and instrumentalities are immune from the jurisdiction of federal and state courts in civil actions, subject to limited exceptions. The "expropriation exception" applies in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. 1605(a)(3). The questions presented are:

1. Whether the expropriation exception applies to claims that a foreign state has seized the property of its own nationals as part of a human-rights violation.

2. Whether a court may invoke the doctrine of international comity to abstain from exercising jurisdiction under the FSIA.

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INTEREST OF THE UNITED STATES

This case concerns the scope of subject-matter jurisdiction under the expropriation exception in the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, as well as whether a court may abstain from exercising jurisdiction under the Act on international comity grounds. The application of the FSIA has implications with respect to the United States' relations with other sovereigns and the treatment of the United States in foreign courts. Accordingly, the United States has a substantial interest in this case. At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

While the United States agrees with petitioners that the court of appeals erred in holding that the expropriation exception applies in this case, and further in foreclosing the availability of international-comity-based abstention, the United States deplores the atrocities committed against victims of the Nazi regime and supports efforts to provide victims with remedies for the wrongs they suffered. Since the end of World War II, the United States has worked in numerous ways to achieve some measure of justice for the victims, and with the United States' encouragement and facilitation, the German government has provided significant relief to compensate Holocaust survivors and other victims of the Nazi regime. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 404-406 (2003); U.S. Dep't of State, *The JUST Act Report* 73 (Mar. 2020), https://www.state.gov/reports/just-act-report-to-congress/germany.[1]

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides the sole basis for jurisdiction in a civil suit in United States courts against a "'foreign state,'" which the Act defines to include "an agency or instrumentality of a

[1] See also, *e.g.*, Agreement concerning final benefits to certain United States nationals who were victims of National Socialist measures of persecution, with exchange of notes and supplementary agreement to the agreement of September 19, 1995, concerning final benefits to certain United States nationals who were victims of National Socialist measures of persecution. Agreement Between the United States of America and Germany, Sept. 19, 1995, T.I.A.S., No. 13,019. Agreement concerning the Foundation "Remembrance, Responsibility and the Future", with annexes. Agreement Between the United States of America and Germany 3, July 17, 2000, T.I.A.S., No. 13,104, 2130 U.N.T.S.

foreign state." 28 U.S.C. 1603(a); see *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). Under the FSIA, a foreign state is immune from the jurisdiction of a U.S. court in a civil action unless a claim against it comes within one of the limited exceptions to immunity described in 28 U.S.C. 1605-1607. If one of those exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

This case involves the FSIA's expropriation exception to immunity from suit. That exception provides that a "foreign state shall not be immune from the jurisdiction of" U.S. courts in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. 1605(a)(3).

2. a. Respondents are the heirs of several Jewish art dealers who owned firms in Frankfurt, Germany, in the 1920s and 1930s. Pet. App. 2. In 1929, the firms formed a consortium and purchased a valuable collection of medieval relics known as the "Welfenschatz." *Id.* at 2-3. In 1935, the consortium sold a portion of the collection to the Nazi-controlled state of Prussia. *Id.* at 3, 40. After World War II, that portion of the Welfenschatz was turned over to the Stiftung Preussischer Kulturbesizt (SPK), an instrumentality of the German government that was created after World War II to preserve Prussia's cultural artifacts. *Id.* at 4. The collection is currently on display in an SPK-administered museum in Berlin. *Ibid.*

In 2014, respondents sought to recover the Welfenschatz, alleging that the consortium was forced to sell the collection to the Prussian state at a fraction of its

value as part of the Nazi campaign to deprive Jews of valuable art and destroy Jewish livelihoods. Pet. App. 3-4, 39-41. Respondents first submitted their claim to an Advisory Commission established by Germany pursuant to the Washington Conference Principles on Nazi-Confiscated Art, an international declaration that "encouraged" countries to develop "alternative dispute resolution mechanisms" for Nazi-era art claims. *Id.* at 4 (quoting U.S. Dep't of State, W*ashington Conference Principles on Nazi-Confiscated Art* ¶ 11 (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/). After hearing testimony from five experts, the Commission issued a non-binding recommendation that "the sale of the Welfenschatz was not a compulsory sale due to persecution," and that as a result the Commission did "not recommend the return of the Welfenschatz." *Id.* at 4-5, 44-45 (citation omitted).

b. Respondents then filed suit against petitioners Germany and the SPK in the United States District Court for the District of Columbia, alleging that the Welfenschatz had been taken in violation of international law, and asserting several common-law causes of action, including replevin, conversion, unjust enrichment, and bailment. Pet. App. 5, 45. Petitioners moved to dismiss, arguing—as relevant here—that jurisdiction was improper and that international comity required the court to abstain from adjudicating the suit. *Ibid.* The court denied the motion. *Ibid.*

3. The court of appeals affirmed in part and reversed in part. Pet. App. 24.

The court determined that respondents had adequately alleged that their property was "taken in violation of international law" for purposes of the FSIA's expropriation exception because respondents asserted

that the sale of the Welfenschatz was a forced sale as part of the Nazi genocide. Pet. App. 6-15. The court explained that, although a state's confiscation of its own citizens' property is not a violation of the international law of takings, a seizure that "amount[s] to the commission of [a] genocide" violates international law, even with respect to a state's own nationals, and so comes within the expropriation exception. *Id.* at 7 (citation omitted) (discussing *Simon* v. *Republic of Hungary*, 812 F.3d 127, 142-143 (D.C. Cir. 2016) (*Hungary I*), remanded, 277 F. Supp. 3d 42 (D.D.C. 2017), rev'd and remanded, 911 F.3d 1172 (D.C. Cir. 2018), cert. granted, No. 18-1447 (July 2, 2020)).

The court then determined that the forced sale of the Welfenschatz alleged by respondents falls within the definition of genocide articulated in the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), art. 2, *adopted* Dec. 9, 1948, 78 U.N.T.S. 277, 280. Pet. App. 7-9. The court observed that the Convention defines genocide to include "conditions of life calculated to bring about [a group's] physical destruction," *id.* at 10 (citation omitted; brackets in original), and it reasoned that the forced sale of the Welfenschatz was "motivated, at least in part, by a desire 'to deprive [German] Jews of the resources needed to survive as a people,'" *id.* at 14 (quoting *Hungary I*, 812 F.3d at 143) (brackets in original).[2]

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[2] The court of appeals also held that the district court lacked jurisdiction over Germany because the expropriation exception allows a U.S. court to exercise jurisdiction over a foreign state only when the expropriated property, or property exchanged for such property, is present in the United States, 28 U.S.C. 1605(a)(3), and "the Welfenschatz is in Berlin." Pet. App. 15-16. This Court denied respondents' cross-petition seeking review of that holding.

After finding jurisdiction, the court of appeals rejected petitioners' contention that the district court should have abstained under principles of international comity because respondents have not yet exhausted their claims in the German courts. Pet. App. 16-21. Invoking *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), the court held that "'any sort of immunity defense * * * must stand on the Act's text,'" and "nothing in the text of the FSIA's expropriation exception requires exhaustion." Pet. App. 17 (citation omitted).

4. The court of appeals denied rehearing en banc, over the urging of the United States as amicus curiae. Pet. App. 96-97, 119-136.

Judge Katsas would have granted rehearing en banc to reconsider the court of appeals' holdings on the applicability of the FSIA's expropriation exception and the availability of comity abstention. Pet. App. 97-118. In his view, the expropriation exception applies only where a foreign state seizes property in violation of the international law of takings, which does not apply to a state's taking of the property of its own nationals. *Id.* at 101-110. Judge Katsas also would have concluded that international comity is a permissible "non-jurisdictional" defense that may be invoked in an FSIA case. *Id.* at 113-117.

SUMMARY OF ARGUMENT

I. The expropriation exception of the FSIA, 28 U.S.C. 1605(a)(3), does not abrogate sovereign immunity when a foreign state has allegedly taken the property of its own nationals. The exception applies in cases involving "property taken in violation of international law," *ibid.*, and under the well-settled domestic takings rule, a sovereign's treatment of the property of its own

nationals does not implicate the international law principles governing expropriation.

The court of appeals acknowledged the domestic takings rule, but mistakenly concluded that a domestic taking may nonetheless fall within the expropriation exception if it occurs as "part of" a genocide. Pet. App. 9. That conclusion is contrary to the expropriation exception's text, context, and history.

At the time of the FSIA's enactment, the phrase "rights in property taken in violation of international law" referred to property expropriated from an alien in violation of international expropriations law. 28 U.S. 1605(a)(3); see Restatement (Second) of Foreign Relations Law of the United States §§ 185, 192 (1965). That interpretation is reinforced by the settled meaning of the Second Hickenlooper Amendment, a 1964 statute that facilitated judicial review in certain cases involving a "confiscation or other taking * * * by an act of state *in violation of the principles of international law*." 22 U.S.C. 2370(e)(2) (emphasis added). The Amendment's text has been consistently interpreted to exclude confiscations by a state of the property of its own nationals. Because statutory phrases that "pertain to the same subject" should be interpreted in the same way, the expropriation exception should similarly be understood to exclude claims involving domestic takings. *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972).

The statutory context confirms that the expropriation exception does not cover domestic takings, even when they occur as part of a genocide or other human-rights violation. It is undisputed that the FSIA does not create an exception to sovereign immunity for claims of death or bodily injury resulting from genocide. Indeed, the FSIA explicitly addresses human-rights claims only

in the terrorism exception, 28 U.S.C. 1605A, a narrowly tailored provision that covers a limited class of claims and permits recovery of damages for bodily injury and death, along with property loss. Given this context, it is unlikely that Congress intended for the expropriation exception to broadly abrogate foreign sovereigns' immunity for human-rights violations, but only to the extent that they involve the taking of property.

The history of the FSIA further confirms that the court of appeals erred. The FSIA was enacted primarily to codify the restrictive theory of sovereign immunity, under which a sovereign is generally immune for its public acts. The expropriation exception creates a narrow deviation from the restrictive theory by abrogating immunity for public acts of expropriation, but there is no indication that Congress intended a "radical departure." *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017) (*Helmerich*), aff'd and remanded, 743 Fed. Appx. 442 (D.C. Cir. 2018). The court of appeals' interpretation would effect such a dramatic departure because "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act" for which immunity would be afforded under the "restrictive theory." *Id.* at 1321.

Any remaining ambiguity should be resolved against jurisdiction. The court of appeals' interpretation would force courts to make sensitive foreign-policy determinations regarding the existence and scope of a genocide or other human-rights violation merely to assess jurisdiction. Such determinations would not only give courts a role in foreign affairs far beyond what Congress (or the Constitution) intended, it would also place the United

States at odds with consistent international practice, under which a sovereign's immunity is not disturbed even in the face of alleged human-rights violations abroad.

II. If the Court determines that the expropriation exception establishes jurisdiction over respondents' claims, it should remand the case so that the lower courts may determine in the first instance whether comity counsels in favor of abstention. Those courts previously declined to perform the comity analysis based on the erroneous conclusion that the FSIA prohibits application of the doctrine of international comity. As explained more fully in the United States' brief in *Republic of Hungary* v. *Simon*, No. 18-1447 (Sept. 11, 2020) (U.S. *Hungary* Br.), the FSIA imposes no obstacle to invocation of that longstanding common-law doctrine.

ARGUMENT

I. THE EXPROPRIATION EXCEPTION IN THE FOREIGN SOVEREIGN IMMUNITIES ACT DOES NOT PROVIDE JURISDICTION IN ANY CASE INVOLVING A DOMESTIC TAKING

A. Under The Domestic Takings Rule, The Expropriation Exception Does Not Apply When A Sovereign Has Taken The Property Of Its Own Nationals

The FSIA's expropriation exception abrogates sovereign immunity in cases in which "rights in property taken in violation of international law are in issue." 28 U.S.C. 1605(a)(3). Under the long-settled domestic takings rule, "[t]he property which is the subject-matter of expropriation must be *foreign* property." S. Friedman, *Expropriation in International Law* 163

(1953) (emphasis added). Accordingly, the expropriation exception does not apply to cases in which a sovereign has taken the property of its own nationals.

1. a. The domestic takings rule has been an established principle of international expropriations law since well before World War II. During the first half of the twentieth century, Western countries "claimed that the rules of international law governed * * * [a]ny taking of *foreign* property." Alice Ruzza, *Expropriation and Nationalization*, *reprinted in Oxford Public International Law* ¶ 2 (updated July 2017). Other nations disputed the application of international law even to property taken from aliens, asserting that a sovereign's treatment of any property within its territory was a matter for domestic law alone. *Ibid.* But all agreed that international expropriation law had no application to a sovereign's treatment of the property of its own nationals.

For example, in a 1938 letter asserting that Mexico had violated international law through its uncompensated taking of American-owned property, Secretary of State Cordell Hull observed that he "could not question the right of a foreign government to treat its own nationals in this fashion" because that was "a matter of domestic concern." *Mexico-United States: Correspondence concerning expropriation by Mexico of agrarian properties owned by Aliens, Extradition, and Naturalization*, 32 Am. J. Int'l L. 181, 184 (Supp. 1938); cf. *United States* v. *Belmont*, 301 U.S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here."). And pre-World War II international-law principles more generally dictated that a sovereign was not accountable for the treatment of its own people within

its own territory. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 831 (1997).

b. The domestic takings rule continued to hold force after World War II, even as the international community began to recognize a series of human-rights norms that apply to a sovereign's treatment of its own nationals, see Bradley & Goldsmith 831-832. Thus, in 1960, the European Commission on Human Rights explained that the "general principles of international law" governing the "peaceful enjoyment of [one's] possessions" are the principles "concerning the confiscation of the property of foreigners," such that "measures taken by a State with respect to the property of its own nationals are not subject to these general principles." Louis B. Sohn & Thomas Buergenthal, *International Protection of Human Rights: Gudmundsson* v. *Iceland* (Appl. No. 511/59) 1236-1237 (1973).

This continued focus of international law on the treatment of the property of aliens paralleled the ongoing—and indeed, intensifying—debates regarding whether international law should govern takings *at all*. The rise of the Cold War focused attention on the basic differences in the way communist and capitalist governments treated property, leading this Court to observe in the 1964 *Sabbatino* case—which involved Cuba's allegedly unlawful taking of the property of American-owned companies—that "[t]here are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 428 (1964). Given the international community's inability to reach consensus even

with respect to the expropriation of foreign property, the prospect of a consensus with respect to domestic takings was remote.

There has been no departure from the domestic takings rule. For example, the Restatement (Third) of Foreign Relations Law of the United States (1987) recognizes that "[a] state is responsible under international law" for "a taking by the state of the property *of a national of another state.*" *Id.* at § 712(1), at 196 (emphasis added); see also Restatement (Fourth) of Foreign Relations Law of the United States § 455 (2017).[3] And a recently-updated treatise explains that "the term 'taking'" in international law "is used with reference to both acts of expropriation and nationalization," which exclusively involve the appropriation of "*foreign* property." Ruzza ¶¶ 2, 9 (emphasis added).

2. In the more than forty years since the FSIA was enacted, courts have repeatedly invoked the domestic takings rule to reject the assertion that the expropriation exception creates jurisdiction over claims that a sovereign has expropriated the property of its own nationals. *Republic of Austria* v. *Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring) (observing that the

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[3] While the partial Restatement (Fourth) updates several chapters of the Restatement (Third), it does not yet contain a section addressing wrongful takings. But in the context of a discussion of sovereign immunity, the Restatement (Fourth) makes clear that the domestic takings rule should be applied in interpreting the FSIA's expropriation exception. Restatement (Fourth) § 455 (2017), cmt. c, at 365; *id.* § 455 Reporters' Notes 6, at 369 (By "eliminating the 'domestic takings' rule and permitting claims to proceed on the basis of allegations that the takings occurred in the context of egregious violations of international law," courts go "well beyond the original intent of Congress, potentially opening courts in the United States to a wide range of property-related claims.").

"consensus view" is that the expropriation exception does not apply when the property "belong[s] to a country's own nationals"); see, *e.g.*, *Mezerhane* v. *República Bolivariana de Venezuela*, 785 F.3d 545, 549 (11th Cir. 2015), cert. denied, 136 S. Ct. 800 (2016); *Altmann* v. *Republic of Austria*, 317 F.3d 954, 968 (9th Cir. 2002), aff'd on other grounds, 541 U.S. 677 (2004); *de Sanchez* v. *Banco Cent. de Nicaragua*, 770 F.2d 1385, 1395-1398 (5th Cir. 1985). The same result should have obtained here. As it comes before the Court, this case presents allegations that the German government expropriated the property of German nationals through the forced sale of the Welfenschatz in 1935. The domestic takings rule dictates that such claims fall outside the bounds of the expropriation exception.

B. The Expropriation Exception Does Not Provide Jurisdiction Over Domestic Takings That Occur In The Context Of A Human-Rights Violation

In the decision below, the court of appeals did not dispute the existence or continued vitality of the domestic takings rule. To the contrary, it acknowledged that "an 'intrastate taking'—a foreign sovereign's taking of its own citizens' property—does not violate the international law of takings." Pet. App. 7 (citation omitted). And in its prior related decision in *Simon* v. *Republic of Hungary*, 812 F.3d 127, 142-143 (D.C. Cir. 2016), remanded, 277 F. Supp. 3d 42 (D.D.C. 2017), rev'd and remanded, 911 F.3d 1172 (D.C. Cir. 2018), cert. granted, No. 18-1447 (July 2, 2020), the court explicitly recognized that "[t]he domestic takings rule means that, as a general matter, a plaintiff bringing an expropriation claim involving an intrastate taking cannot establish ju-

risdiction under the FSIA's expropriation exception because the taking does not violate international law." *Id.* at 144-145.

The court of appeals held, however, that the "domestic takings rule has no application" where the takings in question "amount to genocide." *Hungary I*, 812 F.3d at 143-144. The court reasoned that "genocide itself is a violation of international law" that a sovereign may commit against its own people by—among other things—confiscating property "'to bring about [a protected group's] physical destruction.'" *Id.* at 142-143 (quoting Genocide Convention art. 2(c), 78 U.N.T.S. 280) (emphasis omitted). Thus, in the court's view, respondents' domestic takings claims fit within the expropriation exception so long as they involve a seizure that allegedly occurred as "part of" the Nazi genocide. Pet. App. 9.

The court of appeals erred, however, in assuming that the expropriation exception should be read broadly to encompass claims involving property seized as part of a genocide. The text, context, and history all demonstrate that the expropriation exception deprives a sovereign of immunity only in cases where the sovereign is alleged to have violated the international law governing expropriations. The FSIA's reference to "property taken in violation of international law" therefore excludes property taken by a sovereign from its own nationals, even when the taking occurs in the context of a genocide or other human-rights violation.

1. The text excludes property taken from a sovereign's own nationals

a. The expropriation exception applies in cases involving "rights in property taken in violation of international law." 28 U.S.C. 1605(a)(3). Congress did not further define those terms, but this Court has previously

looked to the "most recent restatement of foreign relations law at the time of the FSIA's enactment" to discern the contemporary meaning of one of the statute's provisions. *Permanent Mission of India to the United Nations* v. *City of New York*, 551 U.S. 193, 199-200 (2007); see *Baker Botts L. L. P.* v. *Asarco LLC*, 576 U.S. 121, 128 n.2 (2015) (terms must be understood in accordance with their "ordinary meaning * * * at th[e] time" they were enacted). When the FSIA was enacted in 1976, the then-current Restatement (Second) of Foreign Relations Law of the United States (1965) defined a "taking" as "[c]onduct attributable to a state that is intended to, and does, effectively deprive *an alien* of substantially all the benefit of his interest in property." *Id.* § 192, at 572 (emphasis added). It follows that property "tak[en]" in violation of international law must be the property of "an alien." *Ibid.*

Moreover, the Restatement (Second) contains a section entitled "When Taking is Wrongful under International Law." Restatement (Second) § 185, at 553. The section explains that property is taken in violation of international law when there is a "taking by a state of [the] *property of an alien*" for a non-"public purpose," or without "just compensation," or where the property is merely "in transit through the territory of the state, or has otherwise been temporarily subjected to its jurisdiction, and is not required by the state because of serious emergency." *Ibid.* (emphasis added); see also *id.* §§ 165-166, at 501-502, § 185 cmt. a, at 553 (explaining that a taking may also violate international law where it is "discriminatory" against an alien); *id.* §§ 186-187, at 562-563. The statutory phrase "rights in property taken in violation of international law" is therefore best read to encompass rights in property taken from

an alien in the specified circumstances and to exclude property taken from a state's own nationals, no matter the context. 28 U.S.C. 1605(a)(3).

b. That conclusion is reinforced by "settled principles of statutory of construction" under which particular words or phrases should be given "a consistent meaning" across statutes that "pertain to the same subject." *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). Twelve years before Congress enacted the FSIA, it enacted the Second Hickenlooper Amendment, which created an exception to the act of state doctrine—the doctrine that generally bars U.S. courts from sitting in judgment of the acts of a foreign state undertaken within its own jurisdiction, *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897). The Second Hickenlooper Amendment was a response to this Court's decision in *Sabbatino*, 376 U.S. at 428, which held that the act of state doctrine bars U.S. courts from adjudicating claims involving the taking of property by a foreign sovereign within its own territory. In the wake of *Sabbatino*, Congress sought to ensure that the act of state doctrine would not prevent courts from adjudicating certain expropriation claims, such as those arising from the Castro government's expropriation of American-owned businesses. See *Banco Nacional de Cuba* v. *Farr*, 243 F. Supp. 957, 962-963 (S.D.N.Y. 1965), aff'd, 383 F.2d 166 (2d Cir. 1967), cert. denied, 390 U.S. 956 (1968) (explaining history of the Amendment).

The text of the Second Hickenlooper Amendment specifies that the exception to the act of state doctrine applies in cases involving a "confiscation or other taking * * * by an act of state *in violation of the principles of international law*." 22 U.S.C. 2370(e)(2) (emphasis added). Nine years before the FSIA was enacted, a

court interpreted the quoted language to prevent the application of the exception in cases involving "confiscations by a state of the property of its own nationals, no matter how flagrant and regardless of whether compensation has been provided." *F. Palicio y Compania, S. A.* v. *Brush*, 256 F. Supp. 481, 487 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2d Cir. 1967) (per curiam), cert. denied, 389 U.S. 830 (1967). The language has been interpreted in the same way ever since. *Perez* v. *Chase Manhattan Bank, N.A.*, 463 N.E.2d 5, 10 (N.Y.), cert. denied, 469 U.S. 966, (1984); see *Comparelli* v. *Republica Bolivariana De Venezuela*, 891 F.3d 1311, 1320 (11th Cir. 2018); *Bank Tejarat* v. *Varsho-Saz*, 723 F. Supp. 516, 520–521 (C.D. Cal. 1989); *Jafari* v. *Islamic Republic of Iran*, 539 F. Supp. 209, 215 (E.D. Ill. 1982).

The expropriation exception's reference to "rights in property taken in violation of international law" closely tracks the Second Hickenlooper Amendment's reference to "takings * * * in violation of principles of international law." Because the two statutes also "pertain to the same subject"—the facilitation of judicial review of claims involving takings by a foreign state—they should be interpreted in the same way. *Erlenbaugh*, 409 U.S. at 243; see also *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) (citation omitted) (when statutory language is "obviously transplanted" from another source, it brings the "old soil with it"). Accordingly, like the Second Hickenlooper Amendment, the expropriation exception excludes any cases involving domestic takings, "no matter how flagrant." *Palicio*, 256 F. Supp. at 487.

c. Neither the court of appeals nor respondents have offered support for the contrary proposition that the ordinary, contemporary meaning of the text of the expropriation exception covers property excluded by

the domestic takings rule if the property was confiscated as part of a genocide. Instead, both the court of appeals and respondents have relied primarily on the proposition that the United Nations' 1948 definition of genocide is capacious enough to establish that some confiscations amount to genocide. Pet. App. 7. But if the Genocide Convention informed the meaning of the phrase "rights in property taken in violation of international law," 28 U.S.C. 1605(a)(3), when the phrase was enacted, one would expect to find evidence suggesting as much. Instead, the then-current Restatement (Second) defined wrongful "takings" to include only those involving the expropriation of foreign owned property, even though the Genocide Convention had been adopted 16 years before the Restatement was published. See p. 15, *supra*. And no court of appeals espoused the view that the expropriation exception may be understood to cover takings that occur as part of a genocide until 2012—almost 40 years after the FSIA's enactment and more than 60 years after the 1948 Genocide Convention. See *Abelesz* v. *Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012).

This dearth of contemporary support for the court of appeals' position cannot be excused by analogy to the Alien Tort Statute (ATS), 28 U.S.C. 1350. The court of appeals briefly observed that under the ATS, courts may apply norms of human-rights law that "did not even exist" when the statute was enacted. *Hungary I*, 812 F.3d 145. But there is no reason to assume that Congress intended for the expropriation exception to be interpreted in accordance with the ATS, a statute that employs different statutory language, was drafted in a different context, was enacted almost two centuries earlier, and was not considered in the context of human-

rights law until after the FSIA was enacted. See *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 724-725 (2004). As noted, the text of the Second Hickenlooper Amendment provides the far more obvious statutory precursor for the expropriation exception. See pp. 16-17, *supra*. In any event, even if Congress were somehow attempting to mirror the ATS in the expropriation exception, that would not help respondents. At the time of the FSIA's enactment, the ATS had been interpreted to bar a German national's claims predicated on the forced sale of his property under the Nazi regime. *Dreyfus* v. *Von Finck*, 534 F.2d 26, 31 (2d. Cir. 1976).

2. Statutory context confirms that the expropriation exception does not encompass property taken as part of a genocide or other human-rights violation

a. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007) (citation omitted). With respect to the FSIA in particular, the Court has emphasized that even where a proposed interpretation is "literally possible," it may be rejected based on an "analysis of the entire statutory text." *Samantar* v. *Yousuf*, 560 U.S. 305, 315 (2010); see *Republic of Sudan* v. *Harrison*, 139 S. Ct. 1048, 1057-1070 (2019) (adopting the "most natural reading" of FSIA provision based on context).

Here, the FSIA as a whole demonstrates that the expropriation exception does not abrogate sovereign immunity in cases involving genocide. As Judge Katsas explained in his dissent from denial of en banc review, genocide is primarily understood as the intentional "extermination of a national, ethnic, racial, or religious

group." Pet. App. 102. Yet it is undisputed that the FSIA provides no jurisdiction over genocide claims involving mass murder and other inflictions of physical suffering outside the United States. *Ibid.* It would be odd for Congress to provide jurisdiction over claims involving genocide only when, and to the extent, that property is confiscated, while extending no jurisdiction to other acts, including killing members of the group or otherwise inflicting conditions of life calculated to bring about that group's destruction. See *Hungary I*, 812 F.3d at 146 (acknowledging the "seeming anomaly" in the statute).

Nor is that the only anomaly that is likely to arise from the court of appeals' interpretation of the expropriation exception. The FSIA leaves a sovereign's immunity intact in the vast majority of cases in which a plaintiff claims that death or injury resulted from other human-rights violations such as torture, slavery, and extrajudicial killings. See *Saudi Arabia* v. *Nelson*, 507 U.S. 349, 361 (1993) (holding that U.S. courts lacked jurisdiction over a personal injury suit alleging "wrongful arrest, imprisonment, and torture" because—while those forms of state action may be "monstrous"—they are nonetheless shielded by sovereign immunity). But under the court of appeals' reading of the statute, a foreign sovereign's immunity might be abrogated if it has seized property as part of one of these human-rights violations. The unlikely consequence would be a system of foreign sovereign immunity that offers more protection for an individual's property than for her person.

b. The FSIA's terrorism exception, 28 U.S.C. 1605A, supplies additional contextual support. The terrorism exception is the sole provision of the FSIA that expressly permits a sovereign to be sued for a human-

rights violation that occurs outside the United States. Notably, the terrorism exception allows plaintiffs to seek damages not only with respect to their property losses, but also with respect to the personal injuries that are more typically associated with human-rights violations. 28 U.S.C. 1605A(a)(1) and (d).

Further, the terrorism exception is narrowly tailored to abrogate sovereign immunity only with respect to specific acts—namely, "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act." 28 U.S.C. 1605A(a)(1). It also restricts the plaintiffs who may bring a cause of action, see 28 U.S.C. 1605A(a)(2)(A)(ii) and (c), and it mandates that any claims must be brought against a designated state sponsor of terrorism, 28 U.S.C. 1605A(a)(2)(A)(i), rather than allowing plaintiffs to bring suit against any sovereign they choose.

The absence of similar tailoring in the expropriation exception counsels against reading the exception to cover losses of property that occur in the context of a human-rights violation. It is unlikely that Congress would narrowly abrogate a sovereign's immunity in U.S. courts for acts in the context of terrorism committed against U.S nationals and U.S government employees, while broadly depriving sovereigns of immunity any time they have allegedly seized property as part of a genocide or other human-rights violation. Indeed, such a reading might lead to evasion of the congressionally established limits in the terrorism exception itself because plaintiffs who do not come within those limits may nonetheless attempt to bring suit under the expropriation exception by alleging that a taking occurred as part of the terrorist act.

3. The FSIA's statutory history reinforces that the expropriation exception applies only in cases involving a foreign state's taking of the property of a foreign-national

The history of the FSIA counsels strongly against the broad reading of the expropriation exception that was endorsed by the court of appeals below. As this Court has previously observed, the FSIA was primarily intended to codify the "restrictive theory" of foreign sovereign immunity that the Executive Branch had adopted and applied for decades before the FSIA's enactment. *Bolivarian Republic of Venezuela* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1319-1321 (2017), aff'd and remanded, 743 Fed. Appx. 442 (D.C. Cir. 2018); *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 487 (1983). Under the restrictive theory, a foreign state is generally immune for its "public acts," *ibid.*, but not for those that are private or commercial. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 14 (1976) (House Report); see *Victory Transp. Inc.* v. *Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965). The bulk of the FSIA's immunity exceptions are therefore "narrow ones[,] covering waiver, commercial activity in the United States, * * * torts causing injury in the United States, and arbitration." Pet. App. 104 (Katsas, J., dissenting from the denial of rehearing en banc) (citing 28 U.S.C. 1605(a)(1)-(6)).

The expropriation exception deviates from the restrictive theory by allowing courts to exercise jurisdiction over sovereigns for public acts that qualify as unlawful expropriations. But there is no evidence that Congress intended for that deviation to work a "radical departure from the[] basic principles" of the "restrictive

theory." *Helmerich.*, 137 S. Ct. at 1320. To the contrary, the House Report stated that the exception was intended to encompass "[e]xpropriation claims" involving "the nationalization or expropriation of property without payment" of "compensation required by international law," as well as "takings which are arbitrary or discriminatory in nature," as when a state targets the property of foreign nationals. House Report 19-20 (emphasis omitted); see also Restatement (Second) § 185 cmt. a, at 553 (explaining that a taking is wrongful under international law when it discriminates against an alien), § 166 (defining unlawful discrimination against an alien); pp. 15-16, *supra*.

Accepting the court of appeals' interpretation would effect a "radical departure" from the restrictive theory. *Helmerich*, 137 S. Ct. at 1320. As the *Helmerich* Court observed, "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a '*jure imperi*') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit." *Id.* at 1321. And while *Helmerich* also acknowledged that there were "fair arguments" that Congress intended for the expropriation exception to abrogate immunity with respect to certain takings of the property of a sovereign's "own nationals[]," that statement is most naturally read to refer to the "fair arguments" to that effect advanced in *Helmerich* itself. *Ibid.* Those arguments were dramatically different from the ones advanced in this case. *Ibid.*

The plaintiffs in *Helmerich* had asserted that U.S. courts could exercise jurisdiction over their claims under the expropriation exception because Venezuela violated international expropriation law by targeting the

property of a Venezuelan corporation based on the foreign nationality of the corporation's shareholders. *Helmerich & Payne Int'l Drilling Co.* v. *Bolivarian Republic of Venezuela*, 784 F.3d 804, 812 (D.C. Cir. 2015). The parties agreed that the domestic takings rule would generally bar plaintiffs' claims because the expropriation involved the property of Venezuela's own national (a Venezuelan corporation), but the plaintiffs asserted that there is an exception to the domestic takings rule where a country targets a domestic corporation because it is owned by foreign nationals. *Ibid.* This Court observed that there were "fair arguments" for that proposition, but declined to decide the question, instead remanding on the basis that the court of appeals had applied too lenient a standard in assessing jurisdiction. *Helmerich*, 137 S. Ct. at 1321. But the Court's tentative appraisal of the arguments for a targeted exception to the domestic takings rule in *Helmerich* do not help respondents, who seek an entirely distinct—and far greater—departure from the rule to allow U.S. courts to exercise jurisdiction in cases in which the property was not even *indirectly* owned by a foreign national at the time of the taking.[4]

4. More recent statutes are unavailing

In an attempt to bolster their arguments, respondents and the court of appeals have relied on a pair of statutes from 1998 and 2016 in which Congress has denounced seizures of property that occurred during the

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[4] In any event, on remand, the court of appeals rejected the plaintiffs' arguments, explaining that plaintiffs had not offered sufficient evidence to establish that their desired exception to the domestic takings rule "has in fact crystallized into an international norm that bears the heft of customary law." *Helmerich*, 743 Fed. Appx. 442, 449 (D.C. Cir. 2018).

Holocaust. Pet. App. 9-10, 13-14 (citing the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), Pub. L. No. 114-308, § 2, 130 Stat. 1524-1525, and the Holocaust Victims Redress Act, Pub. L. No. 105-158, Tit. II, § 201, 112 Stat. 17). Those statutes demonstrate Congress's concern with Nazi art seizures, but they do not expand the expropriation exception or otherwise provide courts with jurisdiction to resolve related takings claims against sovereigns. To the contrary, the HEAR Act expresses the "sense of Congress" that "the use of alternative dispute resolution" mechanisms "established for this purpose" is likely to "yield just and fair resolutions in a more efficient and predictable manner" than litigation. § 2(8), 130 Stat. 1525.

A 2016 amendment to the FSIA that references "Nazi-era claims" also fails to establish that the expropriation exception provides jurisdiction in this suit. 28 U.S.C. 1605(h)(2)(A). The recent FSIA amendment confers immunity with respect to "certain art exhibition activities" in the United States, making it possible for sovereigns to loan artworks for display without fear that the artworks' presence in the United States will subject the sovereign to litigation. *Ibid.* The provision exempts certain "Nazi-era claims" from its general grant of immunity, but it does nothing to broaden the existing statutory basis for jurisdiction over those claims. *Ibid.* Rather, the exemption from the conferral of "exhibition activities" immunity applies only to Nazi-era claims "in which rights in property taken in violation of international law are in issue within the meaning of" the expropriation exception. *Ibid.* The 2016 amendment thereby expressly preserves the existing scope of the expropriation exception, under which a state is immune with respect to Nazi-era claims involving domestic takings, but

may face liability where a plaintiff alleges that the taking involved property belonging to a foreign national.

C. Any Ambiguity Should Be Resolved Against Jurisdiction

To the extent there is any remaining ambiguity in the expropriation exception, it should be resolved against jurisdiction. "When foreign relations are implicated," it is particularly important for courts to "'to look for legislative guidance before exercising innovative authority over substantive law.'" *Hernandez* v. *Mesa*, 140 S. Ct. 735, 747 (2020) (quoting *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (opinion of Kennedy, J.)). That principle is grounded in large part on the Constitution, under which the "conduct of the foreign relations of our Government is committed * * * to the Executive and Legislative—'the political' Departments." *Medellin* v. *Texas*, 552 U.S. 491, 511 (2008) (citation omitted). But the principle also stems from practical concerns regarding the serious "risks of adverse foreign policy consequences" that arise when U.S. courts attempt to set "limit[s] on the power of foreign governments over their own citizens," *Sosa* 542 U.S. at 727-728.

Those constitutional and practical considerations counsel strongly against adopting the court of appeals' interpretation of the expropriation exception, which requires courts to make declarations with respect to highly sensitive foreign-policy questions merely to determine jurisdiction. Moreover, adopting a broad understanding of a provision that abrogates the immunity of foreign sovereigns threatens to "'affront' other nations, producing friction in our relations" and the reciprocal revocation of immunity in foreign courts.

Helmerich, 137 U.S. at 1322 (brackets and citation omitted).

1. This Court has expressed doubt about the extent to which the judiciary can properly be granted the discretion to make foreign policy determinations. *Hernandez*, 140 S. Ct. at 749 ("Foreign policy * * * decisions are delicate, complex, and involve large elements of prophecy' for which the Judiciary has neither aptitude, facilities[,] nor responsibility.") (citation and internal quotation marks omitted; brackets in original). The court of appeals' position would not just permit, but actually *require*, courts to assess whether and to what extent a foreign sovereign has committed a genocide whenever a plaintiff asserts that her case falls within the expropriation exception because the property at issue was seized as part of a genocide. In the context of this case, that determination may be largely straightforward because the international community has long recognized that the Holocaust constituted a genocide. But plaintiffs may raise allegations of genocide in other contexts. See, *e.g.*, *Bakalian* v. *Central Bank of the Republic of Turkey*, 932 F.3d 1229 (9th Cir. 2019) (considering allegations that property was taken as part of a genocidal campaign by Turkey against ethnic Armenians); *Rukoro* v. *Federal Republic of Germany*, 363 F. Supp. 3d 436 (S.D.N.Y. 2019) (considering claim that Germany committed genocide in colonial Africa), appeal pending, No. 19-609 (2d Cir. filed Mar. 11, 2019). And it could have dramatic effects on foreign policy if a federal court were to declare that another country has committed genocide as part of the court's jurisdictional analysis. Moreover, even with respect to settled instances of genocide like the Nazi Holocaust, questions may remain regarding the onset, scope, and nature of the genocide.

For example, in this case, the German government has asserted that the particular forced sale did not occur within the scope of the Holocaust. See Pet. App. 10-12.

The court of appeals' decision is also likely to give rise to other difficult questions in the sensitive human-rights arena, all of which a court would be required to address merely to determine whether it has jurisdiction. See Pet. App. 104 (Katsas, J., dissenting from the denial of rehearing en banc). A plaintiff might, for example, allege that her claim falls within the expropriation exception because her government seized property as part of a program of slavery, torture, or extrajudicial killing. The court would then have to decide, at a bare minimum, whether the alleged human-rights violation occurred, the scope of the human-rights violation, and whether the property was in fact taken within the context of the alleged human-rights violation. *Id.* at 105 (recognizing the threat that the court of appeals' decision will enmesh the judiciary in sensitive foreign policy determinations).

These foreign policy concerns are exacerbated because international law disputes regarding expropriations may be highly sensitive even when they do not involve alleged human-rights violations. Disputes regarding rights in property tend to implicate the "basic divergence between the national interests of capital importing and capital exporting nations and between the social ideologies of those countries that favor state control * * * and those that adhere to a free enterprise system." *Sabbatino*, 376 U.S. at 430. Congress has determined that courts may nonetheless exercise jurisdiction over such disputes when they fall within the bounds of the expropriation exception, but courts should not broaden the bounds of the exception so that they are

forced to address questions that implicate sensitive issues with respect to both a sovereign's treatment of the property rights of its own citizens *and* human-rights norms.

2. Finally, rejecting the court of appeals' broad interpretation of the expropriation exception serves the "reciprocal self-interest" of the United States. *National City Bank* v. *Republic of China*, 348 U.S. 356, 362, (1955). As this Court has recognized, the United States is not infrequently sued in foreign courts. See *Helmerich*, 137 U.S. at 1322. Because "some foreign states base their sovereign immunity decisions on reciprocity," *Persinger* v. *Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984), it is generally in the United States' interest to avoid adopting broad exceptions to foreign sovereign immunity that are inconsistent with the immunity protections that would be afforded under principles of international law generally accepted by other nations. *Helmerich*, 137 U.S. at 1322 (noting the Court's prior recognition that "our grant of immunity to foreign sovereigns dovetails with our own interest in receiving similar treatment).

The text of the expropriation exception already departs from typical international practice because it appears that no other country has adopted a comparable exception to sovereign immunity for expropriations. Restatement (Fourth) § 455, Reporter's Note 12. But the court of appeals interpretation goes further, suggesting that the already anomalous exception to immunity has broader application in the context of a human-rights violation. In 2012, the International Court of Justice rejected a similar proposition, holding that "a State is not deprived of immunity by reason of the fact that it

is accused of serious violations of international human rights law." *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. ¶ 91, at 44 (Feb. 3). Several European nations have submitted diplomatic notes to the United States endorsing that view and emphasizing that depriving Germany of immunity in this case might have negative consequences for foreign relations. See Pet. Br. 9 n.3; Letter from Jonathan M. Freiman to the Clerk of the Court (Sept. 4, 2020) (No. 19-351). Because it is an inappropriately expansive judicial interpretation that has exacerbated the tension between international and domestic immunity law, the court of appeals' position should be rejected.

II. A COURT MAY ABSTAIN ON THE BASIS OF INTERNATIONAL COMITY FROM EXERCISING JURISDICTION UNDER THE FSIA

Even if the FSIA's expropriation exception allowed the district court to exercise jurisdiction over respondents' claims, a remand would still be required because the court of appeals erred in holding that the FSIA prohibits the application of the doctrine of international comity. As explained more fully in the government's brief in *Hungary*, No. 18-1447, the FSIA does not foreclose application of the common-law doctrine of adjudicatory comity. Accordingly, the court of appeals should have decided whether comity favors abstention in favor of a German forum in this case.

A. This Court has long recognized a common-law doctrine of adjudicatory comity, under which courts may "decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or nonresidents, or where for kindred reasons the litigation

can more appropriately be conducted in a foreign tribunal." U.S. *Hungary* Br. at 12 (quoting *Canada Malting Co.* v. *Paterson S.S., Ltd.* 285 U.S. 413, 421-423 (1932)). To determine whether international-comity-based abstention is warranted in a particular case, courts apply flexible criteria that focus on protecting the United States' interests, preserving international harmony, and ensuring fairness for litigants. U.S. *Hungary* Br. at 13-14. Courts have routinely applied this comity framework in a range of different cases involving both private parties and foreign states. *Ibid.*

B. The court of appeals erred in determining that the FSIA bars foreign sovereigns from invoking comity. U.S. *Hungary* Br. at 17-25. Nothing in the FSIA's text prohibits the application of comity. To the contrary, the FSIA provides that, for any claim falling within an immunity exception, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. Because a private individual may invoke comity as a defense, so too may a sovereign. U.S. *Hungary* Br. at 17-18. Moreover, interpreting the statute to foreclose the application of the common-law comity doctrine would be inconsistent with the principle that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (brackets in original); see, *e.g.*, *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 623 (1813); see also U.S. *Hungary* Br. at 18.

The court of appeals reached a contrary conclusion primarily through its mistaken reliance on *Republic of Argentina* v. *NML Capital, Ltd.*, 573 U.S. 134 (2014), which it read to foreclose any reliance on comity in cases

under the FSIA. But *NML Capital* addresses "[t]he single, narrow question" of whether the FSIA itself confers immunity from post-judgment execution. *Id.* at 140. It does not broadly prohibit the application of comity; indeed, *NML Capital* expressly recognizes that, even where there is jurisdiction under the FSIA, a court "may appropriately consider comity interests" relevant to other non-immunity determinations in the litigation. *Id.* at 146 n.6 (citation omitted); see also U.S. *Hungary* Br. at 20-21. And the court of appeals' other rationales are equally unavailing because nothing in the text of the FSIA suggests that Congress intended to prevent foreign states from invoking comity in appropriate circumstances. U.S. *Hungary* Br. at 21-25.

C. Preserving the availability of comity-based abstention is important to the interests of the United States. Domestic suits against foreign sovereigns often raise serious foreign-policy concerns, and comity provides a means for courts to weigh whether adjudication in an alternate forum might mitigate those concerns. See U.S. *Hungary* Br. at 25-26. Moreover, comity-based abstention aids in the United States' efforts to persuade foreign partners to establish appropriate redress and compensation mechanisms for human-rights violations, including for the horrendous human-rights violations perpetrated during the Holocaust. See, *e.g.*, Bureau of European and Eurasian Affairs, U.S. Dep't of State, *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), https://2009-2017.state.gov/p/eur/rls/or/126162.htm (emphasizing importance of property restitution and compensation, and supporting national programs to address Nazi-era property confiscations). If U.S. courts were powerless

to consider the availability and adequacy of the alternative fora that foreign states establish, those foreign states would have less incentive to establish compensation mechanisms in the first place or to maintain their adequacy.

For example, a comity analysis in this case might consider that respondents already unsuccessfully pressed their claims before a German Advisory Commission established in accordance with the Washington Conference Principles on Nazi-Confiscated Art. See p. 4, *supra*; Pet. App. 4-5, 44-45.[5] The United States hosted the Washington Conference and participated in drafting the principles that called for the establishment of mechanisms to resolve disputes regarding cultural assets seized by the Nazi regime. *Ibid.* It therefore has an interest in the success of properly constituted alternate dispute resolution mechanisms that result from the Conference.

D. Because the district court and the court of appeals found that Germany was prohibited from invoking the doctrine of comity, neither court analyzed the factors implicated by the comity analysis—such as Germany's

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[5] In 2018, Germany and the United States stated their awareness that "there still are improvements which must be made, and they commit to undertake any necessary and appropriate actions with a sense of urgency to advance further the faithful implementation of the Washington Principles by Germany and the United States." See Joint Decl. Concerning the Implementation of the Washington Principles from 1998, at 4 (Nov. 26, 2018), https://www.state.gov/wp-content/uploads/2020/09/Jt-Decl-US-Germany-re-Nazi-looted-art.pdf. They specifically noted that the Advisory Commission had been reformed in 2016 and that mediation before the Commission was now required at a claimant's request; previously, both parties had to agree to mediation. *Ibid.*

interest in resolving disputes such as this in its own forums, and any obstacles to such a resolution. See U.S. *Hungary* Br. at 13-14. This Court generally does "not decide in the first instance issues not decided below." *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999). The case should therefore be remanded to the lower courts so that they may undertake the comity analysis in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to be dismissed for lack of jurisdiction, or in the alternative, reversed and remanded for the court of appeals to consider whether to abstain on the basis of international comity.

Respectfully submitted.

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