[ORAL ARGUMENT NOT YET SCHEDULED]
Nos. 22-7010, 22-7112

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

ROSALIE SIMON, ET AL.,
Plaintiffs-Appellees/Cross-Appellants,
v.
REPUBLIC OF HUNGARY, ET AL.,
Defendants-Appellants/Cross-Appellees
– and –
STEVEN HELLER, ET AL.,
Plaintiffs-Appellants,
v.
REPUBLIC OF HUNGARY,
Defendant-Appellee

Consolidated Appeals from the United States District Court for the District of Columbia, Nos. 1:10-cv-01770-BAH and 1:21-cv-01739-BAH

BRIEF OF *AMICUS CURIAE* PROFESSOR VIVIAN GROSSWALD CURRAN IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS ROSALIE SIMON, ET AL., AND PLAINTIFFS-APPELLANTS STEVEN HELLER, ET AL., IN SUPPORT OF AFFIRMANCE/REVERSAL

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December 23, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

The Parties appearing before the district court and in this Court are listed in the Briefs for the Appellant and Appellees, except for *Amicus Curiae* Professor Curran.

B. Rulings Under Review

Reference to the rulings under review appears in the Briefs for the Appellants, Cross-Appellants, Appellee, and Cross-Appellees.

C. Related Cases

The related cases concerning this matter are set forth in the Briefs for the Appellants, Cross-Appellants, Appellee, and Cross-Appellees.

Dated: December 23, 2022

/s/ Andrew D. Freeman
Andrew D. Freeman

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INTEREST OF *AMICUS CURIAE*

Vivian Grosswald Curran is a Distinguished Professor of Law at the University of Pittsburgh School of Law, Vice-President of the International Academy of Comparative Law, and was on the Members Consultative Group of the *Restatement (Fourth) of Foreign Relations Law of the United States*. From 2004 to 2006, Prof. Curran served as the United States State Department appointee to the Austrian General Settlement Committee for the return of property expropriated by Nazis from 1938 to 1945.

Prof. Curran's scholarship has addressed the issue of nationality and citizenship analysis under the Foreign Sovereign Immunities Act of 1976's ("FSIA") domestic takings exception, as well as the issue of Nazi-looted property in cases brought under the FSIA. *See generally, e.g.,* Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. Int'l. L. & For. Aff. 46 (2019); Vivian Grosswald Curran, *Appraising the Supreme Court's* Philipp *Decision*, 83 U. Pitt. L. Rev. 303 (2021); Vivian Grosswald Curran, *Nazi Stolen Art: Uses and Misuses of the Foreign Sovereign Immunities Act*, -- J. Trans. L. & Contemp. Problems (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4236409 [hereinafter *Nazi Stolen Art*].

Pursuant to D.C. Circuit Rule 29(a)(4)(D), Prof. Curran has an interest in assisting this Court in understanding why the appropriate analysis of a domestic taking under FSIA, 28 U.S.C. § 1605(a)(3), is a test of substantive—not nominal—citizenship established and adopted by U.S. courts, including this one, in FSIA cases. Prof. Curran's scholarship in this particular area of the intersection between international and domestic law, and specifically the courts in Nazi Germany and other occupied countries, *see, e.g.*, Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 Cornell Int'l. L. J. 102 (2002), qualifies her to provide broader context into how the lower court's analysis runs afoul of the appropriate substantive tests for determining jurisdiction of expropriation claims. The key question under this test is whether the foreign sovereign treated the plaintiff as a full-fledged citizen of its nation and considered plaintiff to be such at the time of the property expropriation. This test is in keeping with standards of international customary law and should be applied to the case at bar.[1]

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[1] All parties have consented to the filing of this brief pursuant to D.C. Circuit Rule 29(a)(2). Moreover, *Amicus Curiae* certifies pursuant to D.C. Circuit Rule 29(a)(4)(E) that: no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *Amicus Curiae* and her counsel—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs below are Holocaust survivors who have brought claims for property expropriation in violation of international law under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(3). This Court has previously held that Plaintiffs established their claims because the takings were part of genocide. *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). On appeal, the United States Supreme Court reversed and remanded, finding that FSIA § 1605(a)(3) does not support jurisdiction for claims of genocide. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 711 (2021). On remand, the Supreme Court instructed the lower court to address two unresolved questions: (1) whether Plaintiffs had been nationals of the foreign sovereign at the time of the takings; and (2) whether Plaintiffs had preserved that issue for appeal. *Id.* at 715–16. This brief addresses only the first issue.

This Court should follow precedent, reverse the decision of the lower court, and apply a substantive test to find that Plaintiffs were not nationals of the Republic of Hungary at the time of the takings. In *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 n.2 (9th Cir. 2010), the Ninth Circuit reasoned that a plaintiff's citizenship for purposes of determining the jurisdictional question under FSIA requires a substantive analysis of the facts at the time of the taking to determine one's citizenship status. In *de Csepel v. Hungary*, 808 F. Supp. 2d 113,

130 (D.D.C. 2011), *aff'd in part (and on this ground), rev'd in part*, 714 F.3d 591 (D.C. Cir. 2013), this Court adopted the *Cassirer* reasoning and concluded that Hungary had "stripped [plaintiff of] her . . . and all Hungarian Jews of their citizenship rights" due, among other things, to the anti-Semitic laws passed by Hungary during World War II. Accordingly, this Court held that "the alleged Hungarian 'citizenship' of plaintiffs' predecessors did not preclude the application of the expropriation exception" under FSIA. *Id.*

As discussed more fully below, the Supreme Court has recently indicated its acceptance of such a substantive test for purposes of analyzing the domestic takings exception carved out in FSIA. Ignoring the Supreme Court's guidance in *Philipp*, however, the district court here either instead favored a nominal, formal test that inappropriately conflates a nationality analysis with issue preservation, or otherwise inappropriately conflated the Supreme Court's rejection of the genocide exception to Section 1605(a)(3) with the nationality issue. In the area of property expropriation and sovereign immunity, under international law standards, substantive citizenship norms prevail over those of mere form, and this Court should reverse the judgment of the district court and find that Plaintiffs were not nationals of defendant sovereign under the appropriate substantive test.

ARGUMENT

I. THIS COURT SHOULD APPLY THE SUBSTANTIVE CITIZENSHIP TEST DEVELOPED BY FSIA COURTS.

A. This Court should follow its own precedent and apply the substantive citizenship test it has previously approved.

In FSIA cases involving Nazi property expropriations, plaintiffs are often nationals of the foreign sovereign at the time of the taking. But where they have been members of a shunned minority, subject to legal discrimination under the laws and/or practices of the defendant state, FSIA courts have developed a test for deciding whether FSIA's domestic takings exception applies.

FSIA's domestic takings exception provides an exception to the rule that a sovereign will be subject to the jurisdiction of U.S. courts for "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), if the victims were a part of the sovereign's own nation. *See, e.g., Philipp*, 141 S. Ct. at 710. In determining the exception's applicability, courts have looked at whether the foreign sovereign considered and treated the plaintiff as a full-fledged citizen of its body politic at the time of the taking. *See de Csepel*, 808 F. Supp. 2d at 130; *Cassirer*, 616 F.3d at 1023 n.2. If the foreign sovereign did not treat the plaintiff as a full-fledged member of its body politic, then the defendant sovereign cannot benefit from the domestic takings exception. *See id*. As the *de Csepel* Court explained: "[A] citizen is one who has the right to exercise all the political and civil privileges extended by his government [and] citizenship conveys the idea of membership in a nation . . . ."

808 F. Supp. 2d at 130 (quoting *Nagano v. McGrath*, 187 F.2d 759, 768 (7th Cir. 1951)). As the *de Csepel* Court found:

> As of 1944, Hungarian Jews could not acquire citizenship by means of naturalization, marriage, or legalization; vote or be elected to public office; be employed as civil servants, state employees, or schoolteachers; enter into enforceable contracts; participate in various industries and professions; participate in paramilitary youth training or serve in the armed forces; own property; or acquire title to land or other immovable property. Moreover, all Jews over the age of six were required to wear signs identifying themselves as Jewish, and were ultimately subject to complete forfeiture of all assets, forced labor inside and outside Hungary and genocide.

808 F. Supp. 2d at 129 (cleaned up).

This Court affirmed the district court's finding with respect to Hungary's treatment of its Jewish minority:

> Of course, we have no quarrel with the historical underpinnings of the district court's analysis. During World War II, the Hungarian government did indeed enact a series of anti-Semitic laws "designed to exclude Jews from meaningful roles in Hungarian society." This exclusion was both symbolic, through the requirement that Jews "wear distinctive signs identifying themselves as Jewish," and physical, through expulsion "to territories under German control where they were mistreated and massacred[.]"

de Csepel v. Republic of Hungary, 714 F.3d 591, 598 (D.C. Cir. 2013) (cleaned up).

Like many Jews in Germany and France during the Nazi period, Hungarian Jews often felt themselves to be first and foremost Hungarian, as the lower court in

de Csepel suggested might have applied to the plaintiffs in that case.[2] The *de Csepel* court clarified that, for purposes of the FSIA's domestic takings exception, the determinative legal factor is not the subjective loyalties of the plaintiff, but the objective treatment by the defendant. In other words, what is at the heart of the analysis, irrespective of whether the plaintiff "still considered herself to be a Hungarian citizen in 1944," is whether "the government of Hungary thought otherwise and had *de facto* stripped her . . . and all Hungarian Jews of their citizenship rights." *de Csepel*, 808 F. Supp. 2d at 130.

In affirming that reasoning, this Court endorsed the substantive citizenship test and further specified that it is a *de facto* test, *see de Csepel*, 714 F.3d at 598, and thus need not even be a *de jure* test (although the present case meets *de jure* criteria) as the *de Csepel* court specified in the passage quoted above.

The Supreme Court's determinations in *Cassirer* are instructive and support the application of a substantive citizenship test in expropriation matters. The Supreme Court initially denied Defendants' Petition for Writ of Certiorari, thereby leaving *Cassirer's* substantive citizenship test to stand. In 2022, the Supreme Court granted certiorari in that case on another unrelated issue, once again declining to

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[2] *See, e.g.,* Viktor Klemperer, *I Will Bear Witness* (1933–1941) (vol. I), (1941–1945) (vol. II) (Martin Chalmers, 1999) (explaining similar sentiments with respect to Jews targeted in Germany); Hélène Berr, *The Journal of Hélène Berr* (David Bellos, 2008) (expressing similar sentiments for those targeted in France); Raymond-Raoul Lambert, *Diary of a Witness* (1940–1943) (Isabel Best, 2007) (same).

touch the jurisdictional test applied by the intermediate appellate court. *See Cassirer v. Thyssen Bornemisza Collection Found.*, 142 S. Ct. 1502, 1507 (2022). The Supreme Court also denied certiorari in *de Csepel*, *see* 139 S. Ct. 784 (2019), further indicating its reluctance to modify the substantive citizenship test.

What is more, the Supreme Court has not shied away from raising jurisdictional issues *sua sponte* in similar matters. *See, e.g., Kiobel v. Royal Dutch Petroleum Co*., 569 U.S. 108 (2013) (ruling beyond the issues presented for certiorari and independently assessing the separate jurisdictional issue of extraterritoriality, which neither party had raised). The Supreme Court's consistent refusal to address and revise this jurisdictional test is one indication of its approval of the substantive citizenship test and in favor of finding that the district court erred by failing to apply the correct test and dismissing Plaintiffs' cases below.

B. In light of the Supreme Court's ruling in *Philipp*, this Court should reject any attempt to challenge the Court's adoption of the substantive citizenship test.

In *Federal Republic of Germany v. Philipp*, the Supreme Court held that the expropriation exception does not permit the courts of the United States to exercise jurisdiction over claims that the Republic of Germany deprived plaintiff German nationals of property, on the ground that such deprivations occurred during a period of mass genocide. 141 S. Ct. at 715.

But the Court left open the issue of whether plaintiffs were actually considered German nationals at the time their property was taken and remanded the case for the district court to address two distinct and separate issues. *Id.* at 716. First, did plaintiffs preserve the nationality issue for purposes of appealing the applicability of FSIA § 1605(a)(3)'s domestic takings exception? Second, were plaintiffs nationals of the foreign sovereign at the time of the alleged takings? In rejecting the creation of a genocide exception for Section 1605(a)(3) but leaving open the possibility that the U.S. courts could still have jurisdiction based on plaintiffs' citizenship, the Court continued its tacit acceptance of the substantive citizenship test for purposes of the domestic takings exception. This was demonstrated during the Supreme Court's oral argument in *Philipp*.

In response to Germany's argument that the *Philipp* plaintiffs were German nationals as of the taking in 1935 because the Nuremberg laws of 1935 were enacted some months later, Justice Gorsuch questioned whether Germany's position that a nominal nationality test—in lieu of a substantive citizenship test considering relevant facts—applied:

> You indicated that the Jewish victims of the Holocaust were stripped of their citizenship but not nationality and are, therefore, still barred by the domestic takings rule. But, if they can't access the domestic takings laws because they are no longer citizens, in — in what respect could that — could that rule bar them? . . . Your third answer to Justice Alito supposed that they [plaintiffs] were, in fact, stripped of their citizenship before the taking, but that — you said that doesn't

> matter because they're still nationals. . . . And I'm asking you, well, in what relevant sense does that make a difference?

Transcript of Oral Argument at 19–20, *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), (No. 19-351), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-351_d0fi.pdf.

Justice Thomas similarly raised the issue with plaintiffs' attorney: "I'm interested in what you think of . . . the stateless people or people who have been denaturalized, as Justice Alito brought up." *Id*. at 30.

In the immediately subsequent *Simon* oral argument at the Supreme Court, Justice Alito asked: "If we were to rule . . . in favor of Germany on the jurisdictional issue [in *Philipp*], wouldn't the plaintiffs in this [*Simon*] case still have an argument based on their claim of denaturalization?" Transcript of Oral Argument at 13, *Republic of Hungary v. Simon*, 141 S. Ct. 697 (2021), (No. 18-1447), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/18-1447_apl1.pdf.

Justice Barrett also indicated at oral argument in *Simon* that the substantive citizenship test was pertinent so long as it had been preserved, or, alternatively, if the Court could take judicial notice of well-known historical facts:

> And let me ask you a question about the citizenship point. You know, you point out that some of the plaintiffs in the suit below were not Hungarian nationals and others have a claim to their citizenship

> having been severed . . . . Is that a claim that you raised below? As Justice Gorsuch pointed out, it's not one that's developed here, it wasn't part of the QPA. Did you raise that below or develop it all below and, if not, did you have to in order to preserve it?

Id. at 81.

Despite this Court's and the Ninth Circuit's adoption of a substantive, rather than nominal, citizenship test for analyzing the FSIA domestic takings exception, *see de Csepel*, 714 F.3d at 598, *Cassirer*, 616 F.3d at 1023 n.2, after the Supreme Court decided *Philipp*, the United States District Court for the District of Columbia has not used it consistently. As discussed below, it indicated the likely insufficiency of nominal citizenship tests in a thoughtful discussion in *Ambar v. Federal Republic of Germany*, --- F. Supp. 3d. ---, 2022 WL 782388, at *1 (D.D.C. 2022), but failed to apply that reasoning on remand in *Philipp v. Stiftung Preussischer Kulturbesitz*, --- F. Supp. 3d ---, 2022 WL 3681348 (D.D.C. 2022); *Simon v. Republic of Hungary*, 579 F. Supp. 3d 91 (D.D.C. 2021); *Heller v. Republic of Hungary*, No. 21-CV-1739 (BAH), 2022 WL 2802351, at *9 (D.D.C. July 18, 2022) ("The FSIA forecloses, only, the use of *United States federal courts* as fora in which recourse can be found for historical expropriations of property by a foreign state from persons who were at the time, at least nominally, nationals of such state."), *appeal dismissed sub nom. Simon v. Republic of Hungary*, No. 22-7010, 2022 WL 7205036 (D.C. Cir. Oct. 12, 2022); or *Toren v. Federal Republic of Germany*, No. CV-16-1885 (RJL), 2022 WL 3646307 (D.D.C. Aug. 24, 2022).

In *Ambar*, the court looked to customary international law for the proposition that "he who seeks equity must do equity[.]" 2022 WL 782388, at *6. Germany had argued that its current law, which repudiates Nazism's exclusion of Jews from its body politic, should be applied now to declare that the plaintiff victims were German even if their property had been expropriated at a time when that state's laws made them outcasts and aliens. *Id.* at *6–8. The court squarely rejected that argument, applied the Supreme Court's reasoning in *Philipp*, and examined whether the domestic takings exception was inapplicable because the foreign sovereign expropriated the property of a person it considered an "alien." *Id.* at *4 (quoting *Philipp*, 141 S. Ct. at 712). In doing so, the court relied on the Nuremberg laws of 1935 and the decree of 1941, pursuant to which Germany severed all legal ties to "non-Aryans" located outside of Germany who once had legal ties to Germany. Relying on that decree, which completely stripped plaintiff of any relation with Germany, the *Ambar* Court found that plaintiff had been rendered stateless when the taking occurred in 1941. *Id.* at *5–8.[3]

The district court's reasoning in *Ambar* appropriately analyzed laws and decrees in effect at the time of the taking to apply the international law principle

[3] Pursuant to the law of 1941, any formerly German Jew living abroad automatically became stateless. *See Ambar*, 2022 WL 782388, at *5 (citing the "11th Decree" of November 25, 1941). The 11th Decree was one of the many decrees added to the Nuremberg Laws of 1935 that further underscored the dehumanizing treatment of former German Jewish nationals.

that the sovereign's own views are determinative. *Id.* at *4 (citing Convention on Certain Questions Relating to the Conflict of Nationality Laws, art. 1, 2, Apr. 12, 1930, 179 U.N.T.S. 89; European Convention on Nationality, art. 3, Nov. 6, 1997, E.T.S. No. 166). As explained below, decrees effectively rendered Jews aliens in the country of their birth long before the enactment of the Nuremberg Laws of 1935, let alone the decree of 1941 pertaining to those outside the country. As this Court found, the same was true in Hungary by the time of the takings in *Simon* and *de Csepel*. 808 F. Supp. 2d at 130, *aff'd on this ground*, 714 F.3d 591. The standard of looking to the sovereign's own perception of the plaintiff at the time of the taking is in keeping with the substantive citizenship test. There can be no doubt that Hungary would have denied that plaintiffs were part of the Hungarian nation had they been asked this question at the time of the takings.

Buttressing *Ambar*'s reasoning in looking to international law is an international law case of continuing relevance. In *Nottebohm (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4 (Apr. 6) [hereinafter *Nottebohm*], the International Court of Justice ("ICJ") looked beyond a state's own recognition of citizenship and applied a substantive citizenship test. *Id.* There, Liechtenstein had naturalized a German citizen, but the ICJ determined that the naturalization was not valid for purposes of allowing Liechtenstein to represent him at the ICJ because it concluded that the ICJ's substantive citizenship standards had not been met. *See id*.

The principles of international law espoused in *Nottebohm* underscore the importance of substance over form in these matters. In the discussion of property expropriation and sovereign immunity, "[t]he terminology of the subject is by no means settled and, in any event, *form should not prevail over substance*." James Crawford, *Expropriation of Foreign Property*, in *Brownlie's Principles of International Law* 603 (Oxford University Press, 9th ed., 2019) (emphasis added).

The other post-*Philipp* Supreme Court cases remanded to the United States District Court for the District of Columbia have erred in various ways. On remand in *Philipp v. Stiftung Preussischer Kulturbesitz*, the district court conflated the Supreme Court's directive to analyze whether the plaintiffs' ancestors had been German nationals at the time of the taking with the Court's directive to determine if plaintiffs had preserved that issue for appeal. When the district court referred to plaintiffs' argument that, well before the takings had occurred, the Nazis' platform had made explicit that Jews could not be members of the German nation, the court indicated its belief that the plaintiffs had not preserved that issue for appeal: "While Plaintiffs rely on language from the Nazi party platform that 'no Jew may be a member of the [German] nation,' that language was not included in their Complaint." *Id.* at 19, n.96 (citing *Philipp*, 2022 WL 3681348, at *12).

The district court relied heavily on the defendant's memorandum and its expert, quoting them at length, for the proposition that, mere months before the

Nuremberg Laws of that same year officially stripped Jews of the last rights of full-fledged citizens, Jews still had to be deemed German for the purposes of the domestic takings exception. In reality, by that time, hundreds of official decrees and regulations had already segregated Jews from the rest of the population, depriving them of civil and political rights by order of law. Hundreds of decrees in 1933, 1934, and 1935 that preceded the more-comprehensive September 1935 Nuremberg Laws thoroughly discriminated against Jews in Germany, stripping them of their citizenship:

> The first wave of legislation, from 1933 to 1934, focused largely on limiting the participation of Jews in German public life. The first major law to curtail the rights of Jewish citizens was the "Law for the Restoration of the Professional Civil Service" of April 7, 1933, according to which Jewish . . . civil servants and employees were to be excluded from state service. The new Civil Service Law was the German authorities' first formulation of the so-called Aryan Paragraph, a kind of regulation used to exclude Jews . . . from organizations, professions, and other aspects of public life.
>
> In April 1933, German law restricted the number of Jewish students at German schools and universities. In the same month, further legislation sharply curtailed "Jewish activity" [*i.e.*, presence] in the medical and legal professions. Subsequent laws and decrees restricted reimbursement of Jewish doctors from public (state) health insurance funds. The city of Berlin forbade Jewish lawyers and notaries to work on legal matters, the mayor of Munich disallowed Jewish doctors from treating non-Jewish patients, and the Bavarian Interior Ministry denied admission of Jewish students to medical school.
>
> At the national level, the Nazi government revoked the licenses of Jewish tax consultants; imposed a 1.5 percent quota on admission of "non-Aryans" to public schools and universities; fired Jewish civilian

> workers from the army; and, in early 1934, forbade Jewish actors to perform on the stage or screen.
>
> Local governments also issued regulations that affected other spheres of Jewish life: in Saxony, Jews could no longer slaughter animals according to ritual purity requirements, effectively preventing them from obeying Jewish dietary laws.

U.S. Holocaust Mem. Museum, *Anti-Jewish Legislation in Prewar Germany, The Holocaust Encyclopedia* (last visited Dec. 14, 2022), https://encyclopedia.ushmm.org/content/en/article/anti-jewish-legislation-in-prewar-germany.

The *de facto* "aryanization" of property had begun from the time that Jews became effectively unable to resist Nazi demands, well before the passage of the 1935 Nuremberg Laws, because the courts had stopped protecting Jewish parties. Viktor Klemperer's diary, *see supra* note 2, recounts the helplessness of Jews as their contracts became unenforceable against "Aryans" when courts were called upon to adjudicate, as well as his fears of losing his house. *See generally id*.; *see also* Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Deborah Lucas Schneider, 1992) (providing an account of the judicial system under Hitler, including a description of the German judiciary's enthusiastic reception of Hitler's accession to the Chancellorship in 1933 and ultimately changing Hitler's original ideas about suppressing Germany's regular judiciary). These matters are extremely well known, especially in Germany, as is the work of the eminent German law

professor and historian of that era, Michael Stolleis. *See generally, e.g.,* Michael Stolleis, *The Law Under the Swastika: Studies on Legal History in Nazi Germany* (Thomas Dunlap, 1998).

Germany argued that even the Nuremberg laws of 1935 would not change Germany's immunity under the domestic takings exception because plaintiffs remained German "nationals." But the German word *Staatsangehöriger*" used in the Nuremberg Statute of 1935, which concretized Jews' *de facto* status that had existed well before its enactment, counsels otherwise. This term breaks down as follows: The German word "*Staat*" means "state"; "*Angehöriger*" means a "relative," not a "member"; and "*Zugehörige*" denotes property, as in goods or chattel. Thus, while the defendant in *Philipp* suggested the translation of "*national*" for "*Staatsangehöriger*"—a translation uncritically adopted by the D.C. district court—a more accurate translation is "*subject*," which better indicates that Jews were utterly subject to the will of the State but no longer had rights or powers themselves, as they were not part of the German *Volk*. Thus, had the German sovereign been asked at the time of the taking in *Philipp* in 1935, a few months before the official passage of the Nuremberg laws, if the Welfenschatz owners were in any way German, the German government indisputably would have replied in the negative.

Indeed,

> [t]he district court decision to dismiss *Philipp* on remand . . . adopted the . . . dichotomy defendant had suggested of analyzing the plaintiffs as either being German "nationals" or as being "stateless", even though Germany under Hitler had other categories, and the court tried to equate a *de facto* substantive citizenship test with the genocide exception that the Supreme Court had rejected, but which the earlier courts establishing the *de facto* test had never espoused. . . . At the time of the expropriation of plaintiffs' art, June of 1935, just three months before Germany stripped all Jews *de jure* of their German citizenship, making them not German "nationals" (as claimed by defendants, and repeated by the district court), but merely German "subjects" ["Staatsangehörige"], their *de facto* subjugation was in full place: they were not entitled to practice professions, their books were burned, and they were excluded from the *Volk*.

Nazi Stolen Art, *supra*, at 18–19 (footnotes omitted).

Nowhere did the Supreme Court in *Philipp* suggest that German Jews in 1935 should be deemed German nationals for purposes of the FSIA's domestic takings exception, or Hungarian Jews be deemed Hungarians in *Simon*. On the contrary, the Court expressly reserved that issue for remand. *See Philipp*, 141 S. Ct. at 716. Yet on remand in *Simon*, the district court conflated the domestic takings substantive citizenship test with the Supreme Court's rejecting the genocide exception, 579 F. Supp. 3d at 117–18, as though the issue of nationality already had been resolved. While the Supreme Court rejected the argument that FSIA provides jurisdiction where plaintiffs claim that they were victims of genocide, it also gave every indication that jurisdiction would still exist under FSIA where plaintiffs allege a property expropriation in violation of international law, so long as the sovereign was not expropriating from members of its own

nation at the time, clearly delineating these as two distinct issues. *See Philipp*, 141 S. Ct. at 715–16. Like Germany, had the Hungarian government been asked in 1944, at the time of the takings, if plaintiffs were in any way Hungarian, the government would have said, "No." *See generally* Susan Faludi, *In the Darkroom* (2017) (recounting Hungary's long perception of Jews as not being part of its nation and defining the nation in terms of Magyar heritage).[4]

The district court's reasoning in *Simon* is incongruent with the Supreme Court's directive on remand in *Philipp* requiring the lower courts to analyze the nationality issue. The Supreme Court ruled that a taking as part of genocide was not a shortcut to a FSIA § 1605(a)(3) claim but reserved on whether plaintiffs could establish under the domestic takings exception that they were not nationals at the time of the takings. If so, then the foreign sovereign could not claim that the taking was a domestic one, establishing jurisdiction in the U.S. courts under FSIA.

The district court committed the same logical error in *Toren v. Federal Republic of Germany*, 2022 WL 3646307, at *3–5, confusing the Supreme Court's holding with respect to genocide with its ruling that jurisdiction may still exist if plaintiffs were not considered nationals at the time of the takings. The *Toren* Court

[4] *See also de Csepel v. Republic of Hungary*, No. 1:10-cv-01261(ESH), ECF No. 22-24, Decl. of Prof. Tamás Lattman (D.D.C. May 2, 2011) (detailing historical background establishing that Hungarian Jews were not considered citizens of Hungary in 1944).

reasoned that because the plaintiff had been rendered stateless through a genocidal undertaking and the Supreme Court in *Philipp* had rejected genocide as a basis for automatic jurisdiction, deprivation of citizenship resulting from genocide barred plaintiff from attacking defendant's immunity to jurisdiction. *Id*. at *3–4. This is logically inconsistent with the Court's remand instructions and would make a nullity of them, inasmuch as, since *Philipp* involved genocide, it would have been pointless for the Supreme Court to remand on domestic takings if the genocidal undertaking already answered the question, as the *Toren* court inappropriately concluded. The district court's ruling in *Heller* was based on the same fundamental logical flaw, *see* 2022 WL 2802351, at *8, and should be reversed.

CONCLUSION

For the foregoing reasons, and for those reasons set forth by Plaintiffs-Appellees in *Simon* and Plaintiffs-Appellants in *Heller*, this Court should reverse the decision of the district court dismissing Plaintiffs' claims below and find that Plaintiffs were not citizens of Hungary at the time of the takings.

Date: December 23, 2022

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CERTIFICATE OF COMPLIANCE

Counsel for *Amicus Curiae* Professor Curran certify:

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and D.C. Circuit Rule 32(e). This brief contains 4,954 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1).

2. This brief complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Date: December 23, 2022

Respectfully Submitted,

By: /s/ Andrew D. Freeman
Andrew D. Freeman

CERTIFICATE OF FILING AND SERVICE

I hereby certify the foregoing was electronically filed with the Clerk for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system on December 23, 2022. All participants in the case are registered CM/ECF users and so will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and D.C. Circuit Rule 25(f).

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