No. 19-351

IN THE

Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL.,

Petitioners,

v.

ALAN PHILIPP, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETER TOREN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

LAWRENCE S. ROBBINS
Counsel of Record
GARY A. ORSECK
ARIEL N. LAVINBUK
D. HUNTER SMITH
ANNA L. DEFFEBACH
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

Counsel for Amicus Curiae

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BRIEF OF PETER TOREN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

Amicus Peter Toren is the successor-in-interest to his father David Toren, who escaped Germany on a so-called "Kindertransport" in 1939, before eventually emigrating to New York, where he died earlier this year. The Nazi regime murdered David Toren's parents and most of the rest of his family and expropriated their property. In 2014, David Toren filed suit against Germany under the Foreign Sovereign Immunities Act's (FSIA's) expropriation exception to seek restitution of the Max Liebermann oil-on-canvas masterpiece, "Two Riders on the Beach," which the Nazis had stolen from his great uncle. *See* Ulrike Knöfel, *New Yorker Fights to Regain Family Heirloom*, Der Spiegel International (Nov. 3, 2014), https://bit.ly/2FTYNcb. Germany ultimately returned the painting to David Toren in 2015.

In September 2015, David Toren located in a Polish archive a ten-page inventory, compiled by the Gestapo, of hundreds of additional items the Nazis had looted from his great uncle's art collection. In addition to "Two Riders on the Beach," the inventory listed paintings by Courbet, Pissarro, Raffaëlli and other leading artists. Other documents that Mr. Toren located described how the Nazi regime declared Mr. Toren's great uncle an enemy of the state, evicted him from his home and confined him to a nearby basement where he soon died, and confiscated his

property to sell to generate cash to fund the German war effort.

In 2016, David Toren filed a second action against the Federal Republic of Germany seeking return of or compensation for the remaining stolen property. He asserted jurisdiction under the expropriation exception to the FSIA. That case has been stayed for most of the last three years pending the outcome of this case. *See Toren v. Fed. Republic of Germany*, No. 1:16-cv-01885-RJL (D.D.C.). After David Toren's death, his son Peter (Amicus here) substituted for him as plaintiff.

Aside from returning "Two Riders on the Beach," Germany has not provided any compensation to Amicus or his family for the theft of the family's art collection and other property. Amicus submits this brief to provide legal analysis on the applicability of the FSIA's expropriation exception to genocidal expropriations by the Nazi regime.[1]

SUMMARY OF ARGUMENT

For two independent reasons, the expropriation exception to the Foreign Sovereign Immunities Act applies to a state's genocidal taking of property.

First, property that is taken in violation of the international law of genocide is "taken in violation of international law." 28 U.S.C. § 1605(a)(3). A taking

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[1] No counsel for any party authored this brief in whole or in part, and no person other than amicus or his counsel made a monetary contribution to the preparation or submission of this brief. All parties have filed a blanket consent with the Court.

of property is an act of genocide under international law if it is done "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group" by "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction." Convention on the Prevention and Punishment of the Crime of Genocide, art. 2(c), Dec. 9, 1948, 78 U.N.T.S. 277 (Genocide Convention). Even if not itself an act of genocide, a taking may also violate the international law of genocide if it is *complicit* in genocide or part of a *conspiracy to commit* genocide. Complicity and conspiracy are each forms of inchoate liability recognized in international law and specifically criminalized by the Genocide Convention. *See* Genocide Convention, art. 3(b), (e).

Second, putting aside the international law of genocide, takings of property without compensation from the victims of a genocide violate the international law of uncompensated takings. Petitioners do not dispute that takings without compensation or a public purpose violate international law and satisfy the expropriation exception. They contend, however, that under the so-called "domestic takings" rule, a state's takings *from its own nationals* do not violate this body of international law.

It is, however, the very essence of genocide to strip its victims of their status as nationals of the genocidal state. Nationality, after all, is a relationship between a state and an individual premised on "reciprocal rights and duties," *Nottebohm (Liech. v. Guat.)*, Judgment, 1955 I.C.J. Rep. 4, 23 (Apr. 6); a genocidal state, through its acts, severs that relationship with its victims. To be sure, Germany *officially* stripped only *some* (but not all) Jews of their

German nationality during the Holocaust, before murdering them and expropriating their property. But the legal formalities of the Third Reich (and other murderous regimes) do not control federal court jurisdiction under the FSIA. For purposes of the expropriation exception, during the genocide of the Jews, *all* German Jews ceased to be German nationals, and Germany's uncompensated takings from them therefore fall within the expropriation exception.

ARGUMENT

I. Property Taken In Violation Of The International Law Of Genocide Is "Taken In Violation Of International Law"

"[C]laims of foreign states to immunity should … be decided by courts … in conformity with the principles set forth in" in the FSIA. *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014) (quoting 28 U.S.C. § 1602) (third alteration in original and emphasis omitted). "When interpreting Congress's work in this arena, no less than any other," a court's charge is "to ascertain and follow the original meaning of the law before [it]." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). Thus, as with any statute, "the question is not what Congress would have wanted but what Congress enacted in the FSIA." *NML Capital*, 573 U.S. at 145-46 (quotation and alteration marks omitted).

The text of the expropriation exception, as confirmed by subsequent statutes, makes plain that property taken in violation of the international law of genocide is taken "in violation of international law." 28 U.S.C. § 1605(a)(3). None of petitioners' or the

Solicitor General's policy arguments can overcome the statute's text.

A. The Plain Text Of The Expropriation Exception Provides Jurisdiction Where Property Is Taken In Violation Of The International Law Of Genocide

1. The expropriation exception provides that foreign states "shall not be immune" in cases "in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). Genocide, of course, violates international law. *See, e.g.*, Genocide Convention, art 1.

The taking of property is itself an act of genocide if it is "committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group" by "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction." Genocide Convention, art. 2(c).[2]

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[2] Amicus takes no position as to whether the 1935 commercial transaction alleged in the present case violates the international law of genocide. *See* Pet. Br. 36 (asserting that "Respondents do not allege genocidal acts here"); *cf. Judgment of September 30, 1946*, Int'l Mil. Trib. (Nuremberg), 22 Trial of the Major War Criminals Before the International Military Tribunal 411, 492 (1948) (only in "the autumn of 1938 [did] the Nazi policy towards the Jews … reach[] the stage where it was directed towards the complete exclusion of Jews from German life"). If this Court has doubts as to whether the takings alleged here satisfy the international law of genocide, it may wish to vacate so that the Court of Appeals may reconsider that question. By contrast, the Nazis' uncompensated takings from Amicus's family, which occurred as they were evicted from their

Moreover, a taking may violate the international law of genocide if it is part of a "[c]onspiracy to commit genocide" or is "[c]omplicit[] in genocide." Genocide Convention, art. 3(b), (e). International law recognizes these forms of inchoate liability, and the Genocide Convention specifically provides that they are "punishable." *Id.* art 3. Just as the domestic "law of homicide is quite wide enough to comprise those who have procured, counselled, commanded or abetted" a murder, *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) (Hand, J.) (quotation and alteration marks omitted), the international law of genocide comprises many acts that are not themselves a murder. A taking that satisfies the relevant international law standards for inchoate liability for genocide is also a taking "in violation of international law." 28 U.S.C. § 1605(a)(3).[3]

2. Though the expropriation exception's text is plain enough, statutes must also be read "in the context of the *corpus juris* of which they are a part,

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homes and many of them deported to extermination camps, present a crystal clear violation of the law of genocide (*see* this Part I) and the law of uncompensated takings from non-nationals (*see* Part II, *infra*).

[3] The taking of property may also satisfy the expropriation exception if it violates other provisions of international law. For instance, "[e]stablished pre-World War II principles of international law … prohibited pillage and the seizure of works of art." Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 17 (1998); *see* Hague Convention (IV) on the Laws and Customs of War on Land art. 56, 36 Stat. 2277, 2309 (1907) ("All seizure of … works of art … is forbidden, and should be made the subject of legal proceedings.").

including later-enacted statutes." *Branch v. Smith*, 538 U.S. 254, 281 (2003) (plurality opinion of Scalia, J.); *United States v. Fausto*, 484 U.S. 439, 453 (1988); *see also Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006) ("[S]tatutes addressing the same subject matter generally should be read as if they were one law." (quotation marks omitted)).

That is especially true here, as the expropriation exception's open-ended reference to "international law," 28 U.S.C. § 1605(a)(3), ensures that the exception "develops in tandem" with that "external body of *potentially evolving* law." *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 769 (2019) (emphasis added); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 (2004) (Alien Tort Statute claims "must be gauged against the *current* state of international law" (emphasis added)). Congress did not grave in stone the scope of the exception in 1976. And Congress's work since it enacted the FSIA removes any doubt that the expropriation exception's reference to "international law" includes the international law of genocide.

First, Congress has ratified and implemented the Genocide Convention, *see* 132 Cong. Rec. 2349 (1986) (ratification); Pub. L. No. 100-606, 102 Stat. 3045 (1988) (implementation), thereby removing any doubt that (with exceptions not pertinent here) it considers the Convention's definitions of genocide and its incorporation of inchoate liability to be international law. *See* Genocide Convention, arts. 2(c), (3)(b), (e).[4]

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[4] *Cf., e.g.*, *Hearings on the Genocide Convention Before a Subcomm. of the S. Comm. on Foreign Relations*, 91st Cong. 143, 202 (1970) (statements of Senators opposing

Second, Congress has recognized that "the Nazis' policy of looting art was a *critical element* and incentive in their campaign of genocide," Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201, 112 Stat. 15, 17 (1998) (emphasis added), and that "the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe *as part of their genocidal campaign* against the Jewish people," Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1524 (HEAR Act) (emphasis added). The statutory scheme thus recognizes that expropriation was a critical part of the genocide of the Jews.

Third, over the last decade, courts across the country have—without exception—held that genocidal takings satisfy the expropriation exception.[5] And Congress "has not only expressed no

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ratification of Convention based on article 2(c)'s property-based definition of genocide).

[5] *See*, in addition to the opinion below, *Simon v. Republic of Hungary*, 812 F.3d 127, 142-44 (D.C. Cir. 2016); *Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847, 854 (7th Cir. 2015); *Mezerhane v. República Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015) (distinguishing, but not doubting the reasoning of *Abelesz*, and *de Csepel* regarding genocidal takings); *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 675 (7th Cir. 2012); *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1102 (C.D. Cal. 2013), *aff'd on other grounds sub nom. Bakalian v. Cent. Bank of Republic of Turkey*, 932 F.3d 1229 (9th Cir. 2019); *de Csepel v. Republic of Hungary*, 808 F. Supp. 2d 113, 129-30 (D.D.C. 2011), *approved in relevant part* 714 F.3d 591 (D.C. Cir. 2013).

disagreement with [courts'] view of the proper exercise of the judicial power, but has responded … by enacting legislation supplementing the judicial determination." *Sosa*, 542 U.S. at 731.

In response to a Ninth Circuit decision, Congress enacted the HEAR Act to facilitate plaintiffs' ability to bring "claims [as] to Nazi-confiscated art." HEAR Act, §§ 2(7), 3, 130 Stat. at 1525-26 (citing *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009)). And in response to other "[r]ecent court decisions," H.R. Rep. No. 114-141, at 2 (2015), Congress enacted the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act, Pub. L. No. 114-319, 130 Stat. 1618 (2016) (codified at 28 U.S.C. § 1605(h)) (Clarification Act), which narrowed the expropriation exception's definition of "commercial activity," but expressly preserved the jurisdiction that the exception had previously provided over:

> (1) "Nazi-era claims" for takings by the "Government of Germany" and its allies; and
>
> (2) other takings "in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group."

130 Stat. at 1618-19, 28 U.S.C. § 1605(h)(2)(A), (B).

Congress enacted the HEAR Act and the Clarification Act after the lower courts had decided *Simon v. Republic of Hungary*, *Abelesz v. Magyar Nemzeti Bank*, and all the other cases cited in footnote 5. But Congress did not respond to that expropriation exception jurisprudence by limiting FSIA actions over

Nazi-expropriated art. Instead, it *facilitated* such actions. Twice.

In sum, the expropriation exception is now part of a statutory scheme that recognizes that expropriations were "part of" and a "critical element" of the genocide of Jews, *see* Holocaust Victims Redress Act § 201, 112 Stat. at 17; HEAR Act § 2, 130 Stat. at 1524, and the exception itself accords special status to "Nazi-era claims" and the claims of other "targeted and vulnerable group[s]," 28 U.S.C. § 1605(h)(2)(A), (B). Petitioners' insistence that the exception's reference to "international law" does *not* include the central international law that the Nazis violated—the law of genocide—runs against all the textual evidence.

3. To square their limited theory of the expropriation exception with the exception's broad text, petitioners argue that "taken in violation of international law" must be read as a "term of art." Pet. Br. 22. But that phrase is nothing like "'fraud' or 'forgery'" or other common-law "term[s] of art with substantive content." *Jam*, 139 S. Ct. at 770; *see id.* (holding, for that reason, that the phrase "immunity enjoyed by foreign governments" is not a "term of art"). Petitioners, moreover, "point[] to no treatise or case decided before [the FSIA] that assigned any … meaning to the terms actually" used in the statute. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2365 (2019). They do point to the discussions of "*takings*" in the Restatement (Second) of the Foreign Relations Law of the United States (1965). *See* Pet. Br. 23-24 (quoting Restatement § 185). But the FSIA does not use that word, and this Court will not "imbue statutory terms with a specialized … meaning when

Congress hasn't itself invoked the [very] terms of art associated with that meaning." *Food Mktg.*, 139 S. Ct. at 2365; *see Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 233-35 (2011) (rejecting, for this reason, the argument that Congress's use of "unavoidable" adopted the meaning of "unavoidably" in the Restatement).

The United States, for its part, tries to circumvent the statutory text by arguing that, at the time of the FSIA's enactment, the word "taking" meant only "conduct … that … deprive[s] *an alien* of substantially all the benefit of his interest in property." U.S. Br. 15 (alteration marks omitted) (quoting Restatement (Second) of Foreign Relations Law § 192 (emphasis added by U.S.)). But, putting aside that the expropriation exception does not use the word "taking," *see Bruesewitz*, 562 U.S. at 233-35, the "ordinary public meaning" of that word makes (and made) no distinction based on nationality, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020); *see, e.g.*, Webster's Third New International Dictionary 2329 (1981) (gerund of "to take": "to seize or capture physically"). Nor does (or did) its ordinary legal meaning. *See, e.g.*, Black's Law Dictionary 1626 (rev. 4th ed. 1968) ("a transfer of possession, dominion, or control").

Instead, the definition on which the United States relies concerns "taking[s] … *within the meaning of § 185*" of the Restatement. Restatement (Second) of Foreign Relations Law § 192 (emphasis added); *see* U.S. Br. 15. But the expropriation exception does not supply jurisdiction for cases involving takings "within the meaning of [Restatement] § 185." Nor is its plain language confined to "violations of the international law of

takings from aliens."[6] Instead, it applies whenever property is taken "in violation of international law," 28 U.S.C. § 1605(a)(3), full stop.

Petitioners' and the Solicitor General's textual contortions are driven by their view that Congress *must* have intended to "incorporate[]" and "codify" the law of immunity reflected in the Restatement (Second) of Foreign Relations Law § 185. Pet. Br. 24; U.S. Br. 22. Both resort to legislative history to demonstrate the kinds of takings Congress had in mind. *See* Pet. Br. 24, U.S. Br. 23. "But the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock*, 140 S. Ct. at 1737. Nor does it matter whether there is any "evidence" (U.S. Br. 18) that anyone "in [1976] or for some time after … anticipated today's result." *Bostock*, 140 S. Ct. at 1750. "That is exactly the sort of reasoning this Court has long rejected." *Id.* "[T]he question," instead, is "what Congress enacted in the FSIA." *NML Capital*, 573 U.S. at 145-46. And, again, what Congress enacted provides jurisdiction where property was "taken in violation of international law." 28 U.S.C. § 1605(a)(3).[7]

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[6] In any event, as we show in Part II, Germany's taking of Jewish property *did* violate the "international law of takings from aliens."

[7] It is in any event not surprising that the 1976 Congress failed to discuss whether the still-unratified Genocide Convention should inform the expropriation exception. The FSIA's proponents would not have helped their cause by raising that longstanding bone of legislative contention. *See generally* Lawrence J. LeBlanc, *The United States and the Genocide Convention* (1991) (describing the contentious

To be sure, as petitioners (at 34) and the Solicitor General (at 23) observe, this Court has said that nothing in the FSIA's history "suggests [that] Congress intended a radical departure" from the restrictive theory of sovereign immunity. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017). But the "radical departure" this Court had in mind was the possibility that a court might "find jurisdiction where a taking does *not* violate international law." *Id.* at 1321. This Court, by contrast, *acknowledged* that "there are fair"—not radical— "arguments to be made that a sovereign's taking of its own nationals' property" satisfies the expropriation exception. *Id.* And those arguments do not need to look to the FSIA's "history" to find support. *Id.* at 1320. Congress's textually expressed intent is support enough.

B. Petitioners' And The Solicitor General's Policy Arguments Do Not Overcome The Expropriation Exception's Text

Petitioners and the United States "fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals." *Bostock*, 140 S. Ct. at 1753. They warn that enforcing the expropriation exception's plain text will require courts to answer "diplomatically fraught questions," Pet. Br. 38, that may "produc[e] friction in our relations" with other nations, U.S. Br. 26. But even if such policy concerns were weightier than they are,

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decades-long ratification process); *see also* note 4, *supra* (noting Senate opposition to Convention's definition of genocidal takings).

they could not trump the text of the statute. In any event, the concerns are overwrought.

First, applying the expropriation exception's text would not mean that foreign states, even foreign states that committed genocide, are "automatically subject to suit." *Jam*, 139 S. Ct. at 772. For one thing, "[t]he FSIA includes other requirements that must also be met." *Id.* The expropriation exception allows claims only as to "property." 28 U.S.C. § 1605(a)(3). *See, e.g.*, *Rukoro v. Fed. Republic of Germany*, 363 F. Supp. 3d 436, 447 n.4 (S.D.N.Y. 2019) (dismissing claims for conversion of "sovereignty rights" or "labor and tort rights").

Those property claims also must "have a sufficient nexus to the United States." *Jam*, 139 S. Ct. at 772; *see, e.g.*, 28 U.S.C. § 1605(a)(3) (requiring that a state's "property or any property exchanged for such property is present in the United States in connection with a commercial activity"); *id.* (requiring a foreign agency or instrumentality to be "engaged in a commercial activity in the United States"). That nexus is in fact more stringent than the nexus that Congress has required for criminal prosecutions of genocide. *See* 18 U.S.C. § 1091(e)(2)(D) (providing jurisdiction for genocide prosecutions any time the defendant is "present in the United States"). And, indeed, the court below directed that petitioner Federal Republic of Germany be dismissed because plaintiffs had not pled the required nexus with the United States. *See* Pet. App. 16.

Even where the FSIA's jurisdictional requirements are met, other doctrines will often bar suit. These include forum non conveniens, *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480,

490 n.15 (1983), statutes of limitations, *see Bakalian v. Cent. Bank of Republic of Turkey*, 932 F.3d 1229, 1234 (9th Cir. 2019), treaties, *see Moore v. United Kingdom*, 384 F.3d 1079, 1084 (9th Cir. 2004); *In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000), *aff'd sub nom. Deutsch v. Turner Corp.*, 317 F.3d 1005 (9th Cir. 2003), *as amended* 324 F.3d 692, the political question doctrine, *Davoyan v. Republic of Turkey*, 116 F. Supp. 3d 1084, 1103-04 (C.D. Cal. 2013), and the act-of-state doctrine, *see* 22 U.S.C. § 2370(e)(2) (doctrine may still apply to pre-1959 takings). Applying the expropriation exception as written will not, as petitioners assert, open any floodgates.

Petitioners either did not raise these constraining doctrines below, or the lower courts held that they did not apply. Petitioners, for example, did not press the act-of-state doctrine, presumably because, since 1949, the State Department has consistently "relieve[d] American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." State Department Press Release (Apr. 27, 1949), in 20 Dep't State Bull. 592; *see Republic of Austria v. Altmann*, 541 U.S. 677, 713-14 (2004) (Breyer, J., concurring) (citing *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart–Maatschappij*, 210 F.2d 375, 375-76 (2d Cir. 1954) (per curiam)). If the State Department concludes, however, that it is no longer the "Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution," 20 Dep't State Bull. 592, it could reverse that determination and make the act-of-state doctrine available again in Holocaust litigation. "But that is a policy matter for

the State Department to decide." *Altmann*, 541 U.S. at 714 (Breyer, J., concurring).

Second, in addition to being overstated, petitioners' and the Solicitor General's policy arguments ignore Congress's repeated insistence that the Nation's interests are furthered, not hindered, by adjudication of foreign states' unlawful expropriations.

Before the FSIA's enactment, this Court observed that it was "difficult to imagine" courts "embarking on adjudication in an area which touches more sensitively the practical and ideological goals" of other nations than "a state's power to expropriate the property of aliens." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428, 430 (1964). Therefore, out of concern for "giv[ing] offense" to other nations, and causing "embarrassment to the Executive Branch," this Court held that the act-of-state doctrine proscribed challenges to foreign states' expropriations. *Id.* at 432-33.

Congress disagreed. First, it undid *Sabbatino*'s specific holding as to the act-of-state doctrine and required courts to give "effect to the principles of international law in … case[s] in which a claim of title or other right to property is asserted." Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1012-13 (as codified at 22 U.S.C. § 2370(e)(2) (Second Hickenlooper Amendment)). Then, a decade later, it enacted the expropriation exception, and provided jurisdiction for courts to determine whether rights in property were "taken in violation of international law," 28 U.S.C. § 1605(a)(3), not just in any action, but in actions against foreign states themselves. So, Congress was well aware that

the expropriation exception it enacted might, on occasion, require courts to answer "highly political questions solely for jurisdictional purposes." Pet. Br. 38 (emphasis omitted). Whether that was a wise choice is a question that petitioners should direct to Congress.

In a similar vein, petitioners (but not the Solicitor General) argue that enforcement of the expropriation exception's plain text would result in a "major breach" of the international law of state immunities, which, according to them, "obliges nations to grant foreign states immunity in their domestic courts for sovereign acts." Pet. Br. 32 (citing *Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, 123-24 (Feb. 3)).

But Congress's understanding of that international law differs from petitioners'. "[E]xpropriations … are sovereign … acts," Restatement (Fourth) of the Foreign Relations Law of the United States § 455 reporters' note 4 (2018), but Congress has not afforded states immunity for them—as the very existence of the expropriation exception demonstrates. And, notably, the Solicitor General does not argue that affirmance of the decision below would result in a breach of international law. Instead he warns only of "negative consequences for foreign relations" and for the "reciprocal self-interest" of the United States. *See* U.S. Br. 29-30 (citing *Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99, 139).

That alone is enough to foreclose petitioners' argument (at 32-33) that this Court should construe the expropriation exception in accordance with their view of the international law of state immunity. First,

Congress's "express words" control the statute's scope, regardless of any asserted international law to the contrary. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). And, second, even if those words were ambiguous, this Court would construe them to be consistent with "the law of nations *as understood in this country*," *id.* (emphasis added); and the FSIA's text and the Solicitor General's position are each strong evidence that none of the interpretations on offer here would violate international law as this country understands it, *cf., e.g.*, *Al-Bihani v. Obama*, 619 F.3d 1, 33 (D.C. Cir. 2010) (en banc) (The *Charming Betsy* canon should not be used to "incorporate customary international law into federal statutes when the political branches of our government may have rejected the international law at issue." (Kavanaugh, J., concurring)).

This Court, too, has always understood "foreign sovereign immunity [to be] a matter of grace and comity on the part of the United States," not a dictate of international law. *Verlinden B.V.*, 461 U.S. at 486 (discussing *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)). Indeed, petitioner itself has admitted that this Court's opinions "unequivocally reflect[] the view that sovereign immunity can be handled free from any constraints deriving from international law." Memorial of Federal Republic of Germany, *Jurisdictional Immunities of the State (Ger. v. It.)*, ¶ 98 (I.C.J. June 12, 2009), https://bit.ly/2HA0goW (discussing *Altmann*, 541 U.S. at 696); *see id.* ¶¶ 97-100. Today, that it is because Congress has considered the international law of immunities and codified its understanding in the FSIA's plain text. *See* 28 U.S.C. § 1602 (stating as much).

In any event, petitioners' understanding of the international law of state immunity is simply wrong. "[A]t the present day," there is no "established rule of international law" concerning state immunity for acts of genocide or violations of other humanitarian norms. *The Paquete Habana*, 175 U.S. 677, 708 (1900). Italy, for example, has refused to enforce the very International Court of Justice ruling on which petitioners now rely, thus "pav[ing] the way for the resumption in Italian courts of compensation proceedings brought against Germany" for German crimes during the Second World War. Riccardo Pavoni, Case Note, *Simoncioni v. Germany*, 109 Am. J. Int'l L. 400, 400 (2015); *see* Corte Cost., 22 ottobre 2014, n. 238, Foro it. 2015, I, 1152 (It.), translated in Judgment No. 238—Year 2014, Corte Constituzionale, https://perma.cc/GMB7-RGF7. Moreover, many of the states to have joined the United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 2, 2004, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (not in force), have *invited* the imposition of liability on states for human rights violations. *See, e.g.*, Declarations of Norway; Italy, Finland, Sweden, Liechtenstein, and Switzerland.[8]

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[8] What is more, a leading United Nations body has determined that *granting* states immunity may be "in direct conflict" with states' obligation to "provid[e] redress to victims," Committee Against Torture, *General comment No. 3: Implementation of article 14 by State parties*, U.N. Doc. CAT/C/GC/3 ¶ 42 (Dec. 13, 2012), which of course undermines petitioners' assertion that customary international law requires state immunity in the first place.

The relevant international law of immunity is at best "in a state of flux," *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26 ¶ 26 (appeal taken from Eng.), and the subject of an ongoing "dialogue within the international community," *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, ¶ 148 (Can.).[9] Congress's contribution to that dialogue is reflected in the expropriation exception's unambiguous text, which petitioners offer no reason to distort.[10]

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[9] The Restatement notes, for instance, that it is "not clear" that the FSIA's terrorism exception "contravenes any presumptive jurisdictional constraint under international law," because terrorism has been "condemned as illegal by the international community" and there has been a "frequently repeated exhortation that states should provide relief and means of compensating victims." Restatement (Fourth) of Foreign Relations Law § 460 reporters' note 11 (discussing *Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening)*, Judgment, 2012 I.C.J. Rep. 99 (Feb. 3)). If international law does not require state immunity from terrorism litigation, then it certainly cannot require state immunity for litigation over genocide—an even more widely condemned (and better defined) offense.

[10] And as even critics of the U.S. approach acknowledge, the United States has long "been a frontrunner in the development of the international law of state immunity." Daniel Franchini, *State Immunity As a Tool of Foreign Policy: The Unanswered Question of* Certain Iranian Assets, 60 Va. J. Int'l L. 433, 438 (2020); *see, e.g.*, Justice for Victims of Terrorism Act, S.C. 2012, c. 1, s. 2 (Can.) (following U.S. approach in allowing victims of terrorism to sue foreign states).

II. Takings From Victims Of A Genocide Are Never "Domestic Takings" Because The Victims Of A Genocide Cease To Be Nationals Of The Genocidal State

Even if the expropriation exception's reference to "international law" does not cover the international law of genocide, Germany's takings from Jews satisfy the exception anyway. That is because they violated the international law prohibiting uncompensated takings. Indeed, petitioners agree that "takings without compensation, lacking a public purpose, or that are discriminatory" violate international law and satisfy the expropriation exception. Pet. Br. 24-25. Nor do they contend that their takings during the Holocaust provided victims compensation or had a public purpose.

Petitioners instead invoke the so-called domestic takings rule, which holds that a state's takings from its own nationals do not implicate the international law of uncompensated takings. The problem for Germany is that it formally stripped many of its victims of their German nationality before murdering them and expropriating their property.[11] And even where it did not formally do so, it (like other genocidal states) did so in substance. For that reason, takings from the victims of a genocide are not immunized by the domestic takings rule.

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[11] That practice is not unusual in the context of genocides. *See, e.g.*, Shehmin Awan, *The Statelessness Problem of the Rohingya Muslims*, 19 Wash. U. Global Stud. L. Rev. 85, 96-97 (2020).

Respondents appear not to advance any argument under the law of uncompensated takings. *See* Resp. Br. 27-28 (arguing only that their predecessors-in-interests' nationality is irrelevant to the law of genocide). Nonetheless, their formulation of the first question presented would encompass such an argument, see Resp. Br. i, so the Court should either consider the argument we develop below or make clear that its opinion in this case does not foreclose lower courts from addressing it.

1. Nationality is "the principal relationship that links an individual to the state." Restatement (Third) of the Foreign Relations Law of the United States § 211 cmt. a (1987). It is "a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests, and sentiments, together with the existence of reciprocal rights and duties." *Nottebohm*, 1955 I.C.J. Rep. at 23.

Though citizenship is not "a concept of international law, … [a] citizen under national law is generally a national for purposes of international law." Restatement (Third) of Foreign Relations Law § 211 cmt. h; *cf.* Peter J. Spiro, *A New International Law of Citizenship*, 105 Am. J. Int'l L. 694, 695 n.6 (2011) ("Today, the distinction [between citizenship and nationality] is vanishingly small."). A person is considered "stateless if the state of which he had been a national deprives him of nationality." Restatement (Third) of Foreign Relations Law § 211 cmt. g. Takings from stateless individuals are, by definition, not "domestic takings, i.e., takings by a foreign

sovereign of its own national's property." Pet. Br. 9 (quotation marks omitted).[12]

Generally, "[a] state is free to establish nationality law and confer nationality as it sees fit." Restatement (Third) of Foreign Relations Law § 211 cmt. c. But a state's laws and decisions establishing nationality need not always be "recognize[d]" by other states. *Id.* cmt. d. Though "[t]he precise contours" of when states may look past other states' assertions of nationality "are not clear," states may do so where "the individual has renounced" the contested nationality or where the claimed nationality is not "based on an accepted 'genuine link.'" *Id.* cmts. c, d.

The leading international case on the subject, for example, recognized that Guatemala could look to the substantive reality of a former Nazi officer's nationality and treat him as a German, even though he had "abjured his nationality as a citizen of the Reich [and had] acquir[ed] the nationality of Liechtenstein … in strict conformity with the internal nationality laws of both [those] states." Robert D. Sloane, *Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality*, 50 Harv. Int'l L.J. 1, 11 (2009) (discussing *Nottebohm*, 1955 I.C.J. Rep. at 25-26).

This Court has likewise recognized that, for certain purposes, "a national character may be impressed upon a person, different from that which"

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[12] *See also* United Nations Convention Relating to the Status of Stateless Persons art. 13, Sept. 28, 1954, 360 U.N.T.S. 117 (codifying the customary international law that stateless persons have the same property rights as aliens under international law).

he has under the formalities of domestic law. *The Venus*, 12 U.S. (8 Cranch) 253, 277-78 (1814). For that reason, it has treated naturalized American citizens who had returned to Britain as British subjects for purposes of the law of prize. *See id.* It has likewise treated a British subject as a Confederate national when he had long resided in New Orleans, "identified with the people of Louisiana," and had aided the Confederate cause. *The Venice*, 69 U.S. (2 Wall.) 258, 274-75 (1864); *see also Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 197 (1815) (holding that "identification of [a person's] national character" may depend on the "particular transaction" at issue).

2. During the 1930s and 1940s, Germany's internal law stripped many German Jews of their nationality before the Nazis murdered them and expropriated their property. But it did not do so in all cases. Shortly after coming under Nazi rule in 1933, Germany enacted legislation stripping recently naturalized East European Jews of German nationality.[13] In 1935, the Reich Citizenship Law (one

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[13] App. 1a-2a (*Gesetz über den Widerruf von Einbürgerungen und die Aberkennung der deutschen Staatsangehörigkeit vom 14. Juli 1933*, I Reichsgesetzblatt 480 (1933) and *Verordnung zur Durchführung vom 26. Juli 1933*, I Reichsgesetzblatt 538 (1933)). Excerpts from relevant laws are included in an appendix. This brief's discussion of German nationality law draws on Joachim Neander, *Das Staatsangehörigkeitsrecht des „Dritten Reiches" und seine Auswirkungen auf das Verfolgungsschicksal deutscher Staatsangehöriger*, 3 Theologie Geschichte (2008), https://perma.cc/W4KB-BE2V and Martin Dean, *The Development and Implementation of Nazi Denaturalization and Confiscation Policy up to the Eleventh Decree to the*

of the Nuremberg laws) stripped all Jews of German citizenship (*Reichsbürgerschaft*), but left them, by default, as German nationals (*Staatsangehörige*).[14] Jews could nonetheless lose their German nationality if they had, among other things, engaged in "a typically Jewish behavior that was damaging to the people [*Volk*]," but such denaturalization required individualized, case-by-case proceedings.[15]

In November 1941, as Germany began to deport Jews to extermination camps, the so-called Eleventh Decree under the Reich Citizenship Law dispensed with many of those individualized proceedings. It provided that "a Jew loses his status as a German national at the time he … takes up ordinary residence abroad."[16] That meant that Jews deported to camps outside Germany (such as Treblinka, Sobibor and Majdanek) automatically lost their nationality "from the moment they left the Reich's territory."[17] But Jews deported to camps within Germany's (purported) borders, such as Lodz, Theresienstadt, and even Auschwitz, remained German nationals until either

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Reich Citizenship Law, 16 Holocaust and Genocide Stud. 217 (2002).

[14] App. 2a-3a (*Reichsbürgergesetz vom 15. September 1935*, I Reichsgesetzblatt 1146 (1935)).

[15] Dean, *supra*, at 221-22 (quoting memorandum of Reichsführer-SS Heinrich Himmler).

[16] App. 3a-4a (*Elfte Verordnung zum Reichsbürgergesetz vom 25. November 1941*, I Reichsgesetzblatt 722 (1941)).

[17] Dean, *supra,* at 231.

their deaths or the outcome of individualized denaturalization proceedings.[18]

Denaturalization and expropriation policy were "linked … from the start."[19] The Gestapo often "secured all property before denaturalization," but waited until the denaturalization was complete before officials "collected and disposed of this property on behalf of the Reich Finance Minister."[20] And, when Germany sought to seize the property of Jews in countries it had occupied, it was concerned to give the appearance of compliance with international law, and so arranged for the seizures to be "undertaken by the various occupied countries and territories themselves,"—in other words, for the takings to appear to be domestic takings.[21]

3. These obscene technicalities of Third Reich law do not control the jurisdiction of federal courts, even if—as the Solicitor General and petitioners urge—the expropriation exception is always subject to a domestic takings rule. *Cf. JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88,

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[18] Dean, *supra*, at 241 n.91; Neander, *supra*, at nn.86-106 & accompanying text. "German Jews—so long as they were not deported—[were exempted] from loss of their nationality." Diemut Majer, *"Non-Germans" under the Third Reich* 162 (Peter Thomas Hill et al. trans., 2013). Needless to say, the Gestapo often took actions in "crass" contempt of the terms of written law. *Id.*

[19] Dean, *supra*, at 220.

[20] *Id.*

[21] Götz Aly, *Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* 187 (2005).

98 (2002) ("[J]urisdictional analysis under the law of the United States is not ultimately governed by the [nationality] law of the United Kingdom, whatever that may be."). Here, takings from the victims of a genocide are *never* domestic takings, for two independent reasons.

First, as a matter of international law, a state that murders its own nationals in violation of international law breaks the "genuine connection" of "*reciprocal* rights and duties" on which nationality is premised. *Nottebohm*, 1955 I.C.J. Rep. at 23 (emphasis added). In such circumstances, it is appropriate for American courts to look beyond a genocidal state's formal assertion of nationality and adjudicate the case according to its substance. *See, e.g.*, *id.* at 25-26 (looking past formalities of Germany's denaturalization and Lichtenstein's grant of nationality); *The Venice*, 69 U.S. (2 Wall.) at 275 (treating British subject as Confederate national); *The Venus*, 12 U.S. (8 Cranch) at 277-78 (same with naturalized Americans who had returned to Britain). During the Holocaust, German Jews became, in substance, stateless, and it is appropriate for federal courts to treat them as such. Indeed, several lower courts have already held the domestic takings exception inapplicable to Holocaust takings on this ground.[22]

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[22] *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 & n.2 (9th Cir. 2010) (en banc) (holding the expropriation exception satisfied because "[b]y [1939] … German Jews had been deprived of their civil rights, including their German citizenship"); *de Csepel*, 808 F. Supp. 2d at 130, *approved in relevant part* 714 F.3d at 597 (same). *See also* Amicus

Second, as a matter of domestic procedure and choice of law, courts give effect to the laws of illegitimate and belligerent states only "to such extent as justice and public policy require that effect be given." *Fred S. James & Co. v. Second Russian Ins. Co.*, 239 N.Y. 248, 255 (1925) (Cardozo, J.) Thus, for example, "in litigations following our Civil War" this Court held that Confederate laws were "nullities" insofar as "they worked injustice to citizens of the Union, or were in conflict with its public policy." *Sokoloff v. Nat'l City Bank of New York*, 239 N.Y. 158, 165 (1924) (Cardozo, J.) (citing *Williams v. Bruffy*, 96 U.S. 176, 187 (1877), and other cases). Here, giving effect to the Third Reich's nationality law would be "the plainest of errors." *Simon v. Republic of Hungary*, 911 F.3d 1172, 1189 (D.C. Cir. 2018).

Instead, where a state's laws are "denied recognition as an utterance of sovereignty, the problem before us is governed, not by any technical rules, but by the largest considerations of public policy and justice." *James & Co.*, 239 N.Y. at 256. So considered, none of the victims of the Holocaust were German nationals subject to a domestic takings exception, whatever the technical rules of Germany's nationality law may have provided.[23]

Brief of Holocaust and Nuremburg Historians, at 13 (explaining that German Jews "faced growing statelessness" "[e]ven before they were rendered officially stateless" (emphasis omitted)).

[23] Determinations of nationality may "be responsive to the function that nationality serves in [different] context[s]." Sloane, *supra*, at 51; *see id.* at 37-60; *see*, *e.g.*, *Thirty Hogsheads of Sugar*, 13 U.S. (9 Cranch) at 197 (holding that

Petitioners' and the Solicitor General's approach to the expropriation exception would, by contrast, lead to irrational and intolerable results. First, in any given case, a court would need to determine whether a Nazi expropriation became effective while a Jew remained a German national or after he or she had become formally stateless.[24] Second, courts would end up reaching the absurd result that genocidal takings at Treblinka could satisfy the expropriation exception, while genocidal takings at Auschwitz could not. Worse still, courts applying the expropriation exception would honor the very schemes that Nazi lawyers concocted to disguise their violations of international law.

A federal statute that provides jurisdiction for takings at Treblinka, but not at Auschwitz, is far "odd[er]" than one providing jurisdiction for "property harms but not for personal injury or death." Pet. App. 103 (Katas, J., dissenting from denial of rehearing en banc) (emphasis omitted); Pet. Br. 30.[25] And a statute

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plaintiff was Danish for some purposes and British for others, and the "identification of [his] national character" depended on the "particular transaction"). Thus, German Jews may not have been German nationals for purposes of the expropriation exception, but may have been for other purposes.

[24] "Expropriation procedures," however, often "were shrouded in extraordinary secrecy, which makes them difficult to reconstruct." Aly, *supra*, at 186; *see id.* at 187 (describing officials' efforts not to leave "a paper trail").

[25] In any event, *contra* Judge Katsas's suggestion (Pet. App. 103), it is not hard to imagine why Congress might have wanted to provide jurisdiction to recover wrongfully taken property when that property is "present in the United

that would give effect to Nazi schemes to evade international law is not just odd, but odious. But the expropriation exception does not require such results, even if, as petitioners and the Solicitor General urge, it is always subject to the so-called domestic takings rule.

CONCLUSION

The expropriation exception's reference to "international law" includes the international law of genocide. Even if it does not, Germany's uncompensated takings would still satisfy the exception.

Respectfully submitted.

LAWRENCE S. ROBBINS
Counsel of Record
GARY A. ORSECK
ARIEL N. LAVINBUK
D. HUNTER SMITH
ANNA L. DEFFEBACH
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K Street, NW, 4th Floor
Washington, DC 20006
(202) 775-4500
lrobbins@robbinsrussell.com

Counsel for Amicus Curiae

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States" or being used in commerce by an agency "engaged in a commercial activity in the United States," 28 U.S.C. § 1605(a)(3), yet not have provided jurisdiction over wholly extraterritorial murders.

APPENDIX OF RELEVANT GERMAN CITIZENSHIP AND NATIONALITY LAWS*

Law on the Repeal of Naturalizations and the Revocation of German Nationality of 14 July 1933

I Reichsgesetzblatt 480 (1933)

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SECTION 1

Naturalizations that occurred between 9 November 1918 and 30 January 1933 can be revoked if the naturalization is considered undesirable.

Through denaturalization, the denaturalized person loses German nationality [*Staats-angehörigkeit*] as well as all others who would have otherwise not have held it but for the naturalization….

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* Where available, translations are from II *Foreign Relations of the United States Diplomatic Papers*, The British Commonwealth; Europe (1935), and Office of the United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression* (GPO 1946), except those translations are edited to ensure consistent translations of the words *Staatsangehörigkeit* (nationality) and *Reichsbürgerschaft* (citizenship).

Implementing Decree for the Law on the Repeal of Naturalizations and the Revocation of German Nationality of 26 July 1933

I Reichsgesetzblatt 538 (1933)

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Whether a naturalization is to be considered undesirable shall be adjudicated in accordance with racial-national principles. In the foreground are the racial, civic and cultural viewpoints regarding an increase of the German population compatible with the interests of Reich and folk by naturalization….

Accordingly the repeal of naturalization is especially to be contemplated in the case of:

(a) Eastern Jews, unless they have fought on the German side at the front in the World War, or have rendered extremely meritorious services to the German interests ….

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Reich Citizenship Law of 15 September 1935

I Reichsgesetzblatt 1146 (1935)

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SECTION 1

(1) A national [*Staatsangehöriger*] is anyone who is a member of the protective community of the German Reich and in return therefor is under special obligations to it.

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SECTION 2

(1) Only a national of German or related blood who proves by his conduct that he is willing and fit to serve the German people and Reich faithfully is a Reich citizen [*Reichsbürger*].

…

(3) A Reich citizen is the sole holder of full political rights under the laws.

First Decree under the Reich Citizenship Law, 14 November, 1935

I Reichsgesetzblatt 1333 (1935)

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SECTION 4

1. A Jew cannot be a citizen of the Reich [*Reichsbürger*]. He has no right to vote in political affairs, he cannot occupy a public office.

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Eleventh Decree under the Reich Citizenship Law, 25 November 1941

I Reichsgesetzblatt 722 (1941)

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SECTION 1

A Jew who has his ordinary residence abroad cannot be a German national [*Staatsangehöriger*].

Ordinary residence abroad is presumed when a Jew lives abroad under circumstances which indicate that his stay is not merely a temporary one.

SECTION 2

A Jew loses his status as a German national—

a. On the day this decree goes into effect, if on that day he has his ordinary residence abroad.

b. At the time he takes up residence in a foreign country, if he takes up ordinary residence abroad later.

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