ORAL ARGUMENT NOT YET SCHEDULED

No. 22-7126

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

ALAN PHILIPP; GERALD STIEBEL; JED LEIBER,

Plaintiffs-Appellants,

v.

STIFTUNG PREUSSISCHER KULTURBESITZ,

Defendant-Appellee.

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

BRIEF FOR APPELLEE STIFTUNG PREUSSISCHER KULTURBESITZ

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Defendant-Appellee Stiftung Preußischer Kulturbesitz ("SPK") certifies as follows:

(A) Parties and Amici

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

- Plaintiff-Appellant Alan Philipp;
- Plaintiff-Appellant Gerald G. Stiebel;
- Plaintiff-Appellant Jed R. Leiber;
- Defendant-Appellee Stiftung Preußischer Kulturbesitz.

The Federal Republic of Germany ("FRG") was a defendant before the District Court but is not a party in this Court. No intervenor or amicus appeared before the District Court or has appeared in this Court. SPK is a governmental entity and need not file a disclosure statement under Federal Rule of Appellate Procedure 26.1(a) and Circuit Rule 26.1.

(B) Rulings under Review

The rulings at issue in this appeal are *Philipp v. Stiftung Preussischer Kulturbesitz*, Civil Action No. 15-266 (CKK), ECF No. 71,

--- F. Supp. 3d ----, 2022 WL 3681348 (D.D.C. Aug. 25, 2022); and *Philipp v. Stiftung Preussischer Kulturbesitz*, Civil Action No. 15-266 (CKK), ECF No. 60, 2021 WL 3144958 (D.D.C. Jul. 26, 2021).

(C) Related Cases

This case was previously before this Court and the U.S. Supreme Court:

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

The following appeals currently pending before this Court involve similar issues:

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

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GLOSSARY

The art dealers:	The five individuals—Julius Falk Goldschmidt, Arthur Goldschmidt, Zacharias Max Hackenbroch, Isaak Rosenbaum, and Saemy Rosenberg—who owned the three art dealerships
The art dealerships:	The three companies—Z.M. Hackenbroch, I. Rosenbaum, and J.&S. Goldschmidt—that made up the Consortium
The Consortium:	The partnership composed of the three art dealerships, created to purchase, own, and resell the Welfenschatz
FAC:	The First Amended Complaint, filed January 14, 2016 (JA170–246)
FRG:	Dismissed defendant the Federal Republic of Germany
FSIA:	The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–11
***Philipp I*:**	The District Court's decision partially denying SPK and FRG's motion to dismiss, reported at 248 F. Supp. 3d 59, 70–72 (D.D.C. 2017), and reprinted at JA607–48
***Philipp II*:**	The D.C. Circuit's decision on SPK and FRG's appeal of *Philipp I*, reported at 894 F.3d 406 (D.C. Cir. 2018)
***Philipp III*:**	The Supreme Court's decision in this case, reported at 141 S. Ct. 703 (2021)
***Philipp IV*:**	The D.C. Circuit's remand order to the District Court, following *Philipp III*'s remand of this case to the D.C. Circuit,

	reported at 839 F. App'x 574 (Mem.) (D.C. Cir. Mar. 26, 2021)
***Philipp V*:**	The District Court's decision denying Plaintiffs' motion to amend their complaint a second time, available at 2021 WL 3144958 (D.D.C. July 26, 2021), and reprinted at JA878–895
***Philipp VI*:**	The District Court's decision granting SPK's renewed motion to dismiss, available at 2022 WL 3681348 (D.D.C. Aug. 25, 2022), and reprinted at JA1148–79
RM:	Reichsmarks (the German currency from 1924–1948)
SAC:	The operative Second Amended Complaint, filed September 10, 2021 (JA896–1036)
SPK:	Defendant-Appellee Stiftung Preußischer Kulturbesitz

PRELIMINARY STATEMENT

In June 1935, a group of German art dealerships owned by German Jews sold a collection of medieval German ecclesiastical art known as the Welfenschatz to Germany for millions of dollars. Eighty years later, some of the art dealers' descendants sued the German public museum—defendant-appellee Stiftung Preußischer Kulturbesitz ("SPK")—where the Welfenschatz has been on display for decades, seeking restitution of the Welfenschatz and a quarter billion dollars in damages. They claimed that SPK—a part of the German sovereign—was not immune from suit in U.S. court under the Foreign Sovereign Immunities Act's expropriation exception, which abrogates foreign states' immunity in suits involving property "taken in violation of international law."

For six years, SPK argued it was immune because Plaintiffs had not alleged that Germany violated the international law of takings when it purchased the Welfenschatz in 1935. Assuming Plaintiffs' allegations were true, they alleged only that Germany "took" property from a German partnership, composed of German companies, all of which were owned by German nationals. This alleged "domestic taking"

did not implicate the international law of takings, so it does not fall within the expropriation exception.

For six years, Plaintiffs had only one response. They argued the international law of *takings* was irrelevant because their complaint alleged a violation of the international law of *genocide*. While the District Court and this Court initially agreed with them, the Supreme Court unanimously rejected this expansion of the FSIA, explaining that the expropriation exception provides jurisdiction only for alleged violations of the customary international law of takings. *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 715 (2021) ("*Philipp III*"). Because that body of international law applies only to states' takings of foreign nationals' property, states are immune from claims they took property from their own nationals. *Id.*

Having lost in the Supreme Court, Plaintiffs now try to revive their suit with new jurisdictional theories. They assert that the six years the parties spent litigating whether the expropriation exception incorporates the domestic-takings rule was all irrelevant, because the 1935 purchase of the Welfenschatz was never subject to that rule in the first place. That is so, they contend, because two of the art dealers who

owned one of the member companies of the Consortium were Dutch nationals, and the remaining art dealers should be considered "stateless," not German nationals at all.

The District Court rightly rejected Plaintiffs' attempted revisionism. This Court should too for three reasons. First, Plaintiffs forfeited these alternative arguments years ago. Regardless of whether their complaint's allegations could support these arguments, litigants must do more than gesture at possible legal theories with vague allegations. They must "spell out [their] arguments squarely and distinctly, or else forever hold [their] peace." *Schneider v. Kissinger*, 412 F.3d 190, 200 n.1 (D.C. Cir. 2005). Plaintiffs' prior briefs in the District Court and this Court never disputed that the Consortium, the art dealerships, and the art dealers who owned those companies were German nationals. The Supreme Court's mandate and basic rules of waiver bar Plaintiffs from trying to dispute those points for the first time now.

Second, even if this Court could consider Plaintiffs' new arguments, their allegation that Germany "took" property from a German Consortium of three German art dealerships falls squarely

within the domestic-takings rule. Plaintiffs have never disputed that the art dealerships owned the Welfenschatz when they sold it in 1935 and that they were German companies. The domestic-takings rule bars claims a state took property from its own corporate nationals. None of Plaintiffs' arguments about the nationality of the art dealers who owned the art dealerships matter because no rule of international law looks past the nationality of the art dealerships that owned the Welfenschatz to the nationality of those companies' owners.

Finally, even if this Court could look to the nationality of the art dealers, Plaintiffs' efforts to avoid the domestic-takings rule would still fail. Plaintiffs contend that two of the art dealers were Dutch in June 1935 and the rest were stateless. As to the former, Plaintiffs' allegation that two art dealers emigrated to the Netherlands between 1933 and 1935 does not meet their burden of establishing those art dealers became Dutch nationals. As to the latter, *Philipp III* recognized that the international law of takings is implicated only by a state's taking of foreign nationals' property. For that reason, Plaintiffs cannot point to authoritative sources establishing that a state violates the customary international law of takings if it takes property from supposedly

stateless persons. Even if they could, Plaintiffs concede that the art dealers were German nationals under the German law of 1935, so they were not "stateless" under the international law of nationality. Because Plaintiffs have not alleged facts sufficient to evade the domestic-takings rule, this Court should affirm the dismissal of their complaint.

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion by finding that Plaintiffs forfeited alternative jurisdictional theories they never raised until this case reached the Supreme Court? (No)
2. Does the expropriation exception allow Plaintiffs' claim that Germany took property belonging to German companies owned by German nationals? (No)
3. Did the District Court abuse its discretion by denying Plaintiffs leave to amend their complaint to add futile allegations in support of forfeited arguments? (No)

STATEMENT OF THE CASE

I. Factual Allegations

Plaintiffs allege that Alan Philipp is the legal successor of the late art dealer Zacharias Max Hackenbroch, who was the sole owner of Z.M. Hackenbroch, an art dealership once based in Frankfurt, Germany.

JA896–97, 901 (¶¶1, 17).[1] They allege that Gerald Stiebel and Jed Leiber are the sole legal successors of the late art dealers Isaak Rosenbaum and Saemy Rosenberg, who together owned the Frankfurt-based art dealership I. Rosenbaum. JA896–97, 901 (¶¶1, 18–19). Plaintiffs claim to be the assignees or agents of the heirs of the late art dealers Julius Falk Goldschmidt and Arthur Goldschmidt, who together owned the Frankfurt-based art dealership J.&S. Goldschmidt. JA896–97, 901–902 (¶¶1, 20). This brief refers to Plaintiffs' predecessors—Hackenbroch, Rosenbaum, Rosenberg, and the two Goldschmidts—as the "art dealers." Their three companies—Z.M. Hackenbroch, I. Rosenbaum, and J.&S. Goldschmidt—are the "art dealerships."

In 1929, the art dealerships formed a "Consortium" to purchase the Welfenschatz, a collection of medieval German artifacts of great artistic and historical significance. JA908–11 (¶¶28–33). Acting in their corporate capacities, the art dealerships signed the purchase contract on October 5, 1929, paying a duke who then owned the collection 7.5M

[1] For present purposes, SPK assumes the Second Amended Complaint's well-pleaded factual allegations are true, even though it would contest many of them as baseless if this litigation proceeded.

Reichsmarks ("RM"). JA911 (¶32) ("Only these three art dealer *firms*—Z.M. Hackenbroch, I. Rosenbaum and J.&S. Goldschmidt—were the signatories to the contracts of 1929 and of 1935"); JA976–77, 982.[2] From then until June 14, 1935, "the Consortium was solely entitled to ownership rights of the collection." JA911 (¶32). But the Consortium did not buy the Welfenschatz for the art dealers' personal collections: The purchase contract "obligated [the Consortium] to attempt to resell the items" (with the duke entitled to a share of any profits) and prohibited the Consortium from "fully or partially retain[ing]" the collection. JA977–78.

The Consortium promptly undertook to resell the Welfenschatz, commissioning a worldwide tour. JA913 (¶39). By 1930, they had succeeded in selling about half the collection to museums and individuals. *Id.* But the Great Depression, which began weeks after the Consortium's October 1929 purchase, inhibited its ability to sell the remaining 42 pieces, including many of the most valuable items. JA913 (¶¶39–40). Following this tour, the Consortium brought the remainder

[2] Unless otherwise indicated, all emphasis is added, and internal quotation marks, citations, or alterations are omitted.

of the collection to Amsterdam, where it stayed in storage until 1935. JA922 (¶76). Despite the economic downturn, the art dealerships remained in business throughout the Great Depression. JA913 (¶40).

In early 1933, the Nazi party took control in Germany. JA916–17 (¶¶48–51). According to the complaint, the Nazis soon grew interested in acquiring the Welfenschatz on behalf of the German state due to the collection's unique historical and artistic significance. JA898, 919–20 (¶¶6, 67). Negotiations between the Consortium and the Prussian state (a political subdivision of Germany) began soon thereafter through an intermediary: the Dresdner Bank. JA922–25 (¶¶77–78, 81–84, 90–91). In April 1935, the Consortium offered to sell the remainder of the collection for 5M RM. JA937 (¶138). The Dresdner Bank countered with an offer of 3.7M. JA937 (¶139). In the following months, the offers converged, and the parties agreed on a price of 4.25M RM. JA938–39 (¶¶145–48); JA1020. The Consortium and the Dresdner Bank executed a contract on June 14, 1935, which, like the original purchase contract, the art dealerships entered into in their corporate capacities. JA911, 940 (¶¶32, 152–53); JA1020; JA1030. In mid-July, the Consortium packed up the Welfenschatz in Amsterdam for delivery to a German

state museum, with the Dresdner Bank making the required payments the next day. JA940–41 (¶¶156–57).

Sometime between 1933 and 1935, Rosenbaum and Rosenberg "emigrated to Holland." JA922, 933, 943–44 (¶¶76, 126, 170) (alleging that all the art dealers lived in Germany in 1933 but that Rosenberg and Rosenbaum had emigrated by June 1935). They nevertheless continued to travel to Germany and maintained their business there for several years. JA939–40, 943–44 (¶¶149–151, 170). The two Goldschmidts left Germany after the sale. JA943 (¶169). Hackenbroch died in 1937, and his family emigrated soon after. JA942–43 (¶¶162, 167). Germany put the Welfenschatz on display in a public museum in Berlin. JA945 (¶176). In 1957, Germany established SPK, a public foundation, and transferred ownership of the Welfenschatz to it. JA902 (¶22). In the years since, the collection has been on display in public museums in Berlin. JA906 (¶26.iv).

II. Initial Proceedings in the District Court and the D.C. Circuit

In the early 2010s, some of the Plaintiffs raised claims for restitution of the Welfenschatz with SPK. Those Plaintiffs and SPK agreed to submit the dispute to Germany's "Advisory Commission on

the return of cultural property seized as a result of Nazi persecution, especially Jewish property," a special body created by the German government to hear claims for restitution of property allegedly seized by the Nazis. JA952, 955 (¶¶204, 219). After hearing evidence and expert testimony, the Advisory Commission concluded that the sale of the Welfenschatz was an arms' length transaction; it recommended against restitution. JA956 (¶220).

In February 2015, Philipp and Stiebel sued SPK and the Federal Republic of Germany ("FRG"). *See* JA13–83. They alleged that these foreign sovereign entities were not immune under the FSIA's expropriation exception, 28 U.S.C. § 1605(a)(3), which abrogates foreign states' immunity in suits involving "rights in property taken in violation of international law." JA19–25 (¶¶23–25). SPK and FRG moved to dismiss, arguing the expropriation exception did not apply because "[i]nternational law is implicated only when a state expropriates property from *foreign* nationals," so a state's alleged taking of its own nationals' property is not a "taking in violation of international law." JA114–17 (emphasis original). This "domestic-takings rule" barred Plaintiffs' suit, because the Consortium, its three members (the art

dealerships), and the individual art dealers who owned the art dealerships were all German nationals in June 1935. JA118–20. SPK and FRG raised other arguments, including that Philipp and Stiebel lacked standing because the some of the art dealers' heirs were absent from the suit. JA126–33.

With SPK and FRG's consent, JA169, Plaintiffs filed a First Amended Complaint ("FAC"), *see* JA170–246. Its only meaningful amendments addressed standing, adding Leiber as plaintiff and asserting that the Goldschmidts' heirs had assigned Plaintiffs their rights. *Compare* JA175–76 *with* JA18–19.[3] The FAC did not alter or add allegations about the nationality of the Consortium, the art dealerships, or the individual owners of the three companies, such as by alleging that Rosenberg and Rosenbaum had become Dutch nationals by June 1935 or that the art dealerships or the art dealers had been stripped of German nationality by then.

[3] Plaintiffs also expanded their allegations regarding the Dresdner Bank and the Advisory Commission. *See* ECF No. 57-1 (redline showing FAC's changes).

After Plaintiffs filed the FAC, this Court decided *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016). *Simon* addressed Nazi-era Hungary's seizures of property from Jewish Hungarians in 1944, when Hungary confiscated all their possessions and sent them to Nazi death camps. *Id.* at 133–34. *Simon* rejected Hungary's reliance on the domestic-takings rule, holding that it had "no application in the unique circumstances of this case, in which, unlike in most cases involving expropriations in violation of international law, *genocide* constitutes the pertinent international-law violation." *Id.* at 144–46 (emphasis original) (explaining that unlike the law of takings, the law of genocide applies to a state's treatment of its own nationals).

After *Simon*, plaintiffs in expropriation-exception cases could pursue two theories. First, they could argue (as all plaintiffs had before *Simon*) that an alleged taking violated the international law of *takings*. Because that body of law was limited by the domestic-takings rule, a plaintiff following this approach had to plead and prove that a state had taken property from a foreign national. Second, a plaintiff could argue that a taking of property was a violation of the law of genocide, making

nationality irrelevant. These two theories were not mutually exclusive: If factually supported, a plaintiff could pursue both in the same suit.

SPK and FRG moved to dismiss the FAC, arguing again that they were immune due to the domestic-takings rule. JA271–80 ("Because [Plaintiffs'] claims attack Germany's alleged expropriation of the property of a German consortium of German firms owned by German nationals, [P]laintiffs have not alleged a taking in violation of international law."). In response, Plaintiffs relied only on the theory *Simon* created, arguing that the domestic-takings rule (and the nationality of Plaintiffs' predecessors) did not matter, because the sale of the Welfenschatz for less than its market value was part of Nazi Germany's genocide against German Jews. JA411–16. But Plaintiffs never argued in the alternative that the 1935 sale was not a domestic taking: They did not dispute that the Consortium and the three art dealerships were German corporate nationals in 1935. They never argued the court could look past the nationality of these companies that owned the Welfenschatz to the nationality of the individual art dealers who owned them. And they never asserted that the art dealers were

Dutch nationals or were "stateless" in 1935. *See* JA411–16.[4] SPK and FRG highlighted this point in their reply: "Plaintiffs d[id] not deny that this case involves the German government's alleged taking of property of German nationals." JA549. Plaintiffs did nothing to challenge that characterization of their argument (such as by seeking leave to file a sur-reply). Ultimately, the District Court agreed with Plaintiffs' *Simon* argument, finding the domestic-takings rule inapplicable because Plaintiffs had alleged that "the taking of the Welfenschatz was part of the genocide of the Jewish people during the Holocaust and, accordingly, violated international law." *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 70–72 (D.D.C. 2017) ("*Philipp I*"), JA618–22. The District Court's decision never suggested the Court understood Plaintiffs to be disputing that the Consortium, the art dealerships, or the art dealers were German nationals in 1935. *See id.*

SPK and FRG appealed, renewing their arguments that the domestic-takings rule barred Plaintiffs' claims. *See* Appellants' Brief, *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018) (No.

[4] Plaintiffs' brief used the word "Dutch" only in other contexts. JA424, 441. It did not contain the word "stateless" at all.

17-7064) ("*Philipp II*"), 2017 WL 6040672, at *28–45. As in the District Court, Plaintiffs again relied exclusively on *Simon* to argue that the 1935 sale was an act of genocide, so nationality did not matter. *See* Appellees' Brief, *Philipp II*, 894 F.3d 406 (No. 17-7064), 2018 WL 5098952, at *21–32. They never argued that the Consortium, the art dealerships, or the art dealers were not German nationals. *See id.*[5] SPK and FRG noted this in their reply. *See* Appellants' Reply, *Philipp II*, 894 F.3d 406 (No. 17-7064), 2018 WL 1565449, at *11 n.8 ("Plaintiffs don't dispute that when the Welfenschatz was sold the Consortium remained a German entity, owned by German firms, owned by German nationals."). Plaintiffs once again did not challenge this characterization of their arguments.

This Court recognized that this case raised a novel question, calling for the extension of *Simon* to new facts and requiring the Court to decide "for the first time whether seizures of art may constitute 'takings of property that are themselves genocide.'" *Philipp II*, 894 F.3d at 411 (quoting *Simon*, 812 F.3d at 144). *Philipp II* concluded that they

[5] Plaintiffs' appellate brief again used the word "Dutch" only in other contexts and did not contain the word "stateless."

could be, agreeing with Plaintiffs that nationality was irrelevant because genocide was the relevant international-law violation. *Id.* at 411–14.[6] SPK and FRG petitioned the D.C. Circuit for rehearing en banc, which it denied over the dissent of Judge Katsas. *See Philipp v. Fed. Republic of Germany*, 925 F.3d 1349 (Mem.) (D.C. Cir. 2019).

III. The Supreme Court's Unanimous Decision in Favor of SPK

SPK and FRG sought certiorari, challenging this Court's holding that the expropriation exception's reference to "takings in violation of international law" includes violations of human-rights norms like genocide. *See* Petition, *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) (No. 19-351) ("*Philipp III*"), 2019 WL 4528128, at *13–30. Plaintiffs' brief in opposition argued the case was not an appropriate vehicle for resolving this statutory-interpretation question because "[b]y 1935, the Consortium were long since no longer regarded or treated as Germans," providing jurisdiction even if the exception were limited to alleged violations of the law of takings. Brief in Opposition, *Philipp III*, 141 S. Ct. 703 (No. 19-351), 2019 WL 5391187, at *22–24. This brief

[6] This Court directed FRG's dismissal for a separate jurisdictional reason. *Id.* at 414; *see* JA649 (District Court's dismissal of FRG).

Plaintiffs filed in the Supreme Court was the first time they argued the Consortium or its members were not German nationals in 1935.

The Supreme Court granted certiorari and unanimously "repudiated [*Simon*'s] approach, holding . . . that the domestic takings rule admits of no exception." *Ivanenko v. Yanukovich*, 995 F.3d 232, 237 (D.C. Cir. 2021). Its decision began by situating the law of takings in fundamental principles of international law: "[I]nternational law customarily concerns relations among sovereign states, not relations between states and individuals." *Philipp III*, 141 S. Ct. at 709–10. A state's taking of property owned by a *foreign national*, however, "implicate[s] the international legal system because it constitute[s] an injury to the state of the alien's nationality." *Id.* at 710. The law of takings arose to remedy this state-to-state injury. *Id.* "A domestic taking by contrast d[oes] not interfere with the relations *among states*"—no foreign state is harmed by such takings—so the law of takings does not address them. *Id.* Based on these long-established principles of international law—ones the United States had consistently advocated on the international stage—courts before *Simon* had reached the "consensus" that the domestic-takings rule barred claims that a

state had taken its own national's property. *Id.* at 711. Reviewing the history, text, and purpose of the FSIA, the Court agreed, rejecting *Simon*'s and *Philipp II*'s conclusions that "rights in property taken in violation of international law" extends to violations of human-rights norms, such as the law of genocide. *Id.* at 711–15. *Philipp III* thus restored the pre-*Simon* consensus: A plaintiff suing under the expropriation exception must allege facts establishing a violation of the international law of *takings*, which precludes domestic-taking claims.

While the Supreme Court unanimously agreed with SPK and FRG, the Court declined to "consider an alternative argument *noted* by the heirs: that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction." *Id.* at 715. Recognizing that SPK and FRG contended this alternative argument was "forfeited, *id.* at 715–16, the Supreme Court directed this Court to remand to the District Court "to consider this argument, including whether it was adequately preserved below," *id.* at 716. This Court did so, directing the District Court "to consider whether the sale of the Welfenschatz is not subject to the domestic takings rule because the

[C]onsortium members were not German nationals at the time of the transaction, including whether this argument was adequately preserved in the District Court." *Philipp v. Fed. Republic of Germany*, 839 F. App'x 574 (Mem.) (D.C. Cir. Mar. 26, 2021) ("*Philipp IV*").

IV. Proceedings in the District Court after *Philipp III*

Once back in the District Court, SPK expected to file a third motion to dismiss, explaining why Plaintiffs had forfeited the alternative argument they "noted" in the Supreme Court and why that argument failed on the merits. But Plaintiffs first sought leave to amend their complaint to address what they called a "recent change in the governing law": the Supreme Court's decision in *Philipp III*. JA662, 666–68. They proposed three main categories of amendments:

- Expanding their allegations about Nazi ideology, focusing on statements by Nazi officials about whether Jews could be true Germans, *see* JA750–51, 756, 769, 772–74, 776–79;
- Recharacterizing the 1929 and 1935 contracts through which the Welfenschatz was bought and sold by alleging that the art dealers *themselves* (rather than their companies) were the signatories of those agreements, *see* JA765;
- Pleading new facts regarding Rosenberg's and Rosenbaum's departures from Germany and asserting that by 1935 the

> two were "either Dutch Nationals, or functionally stateless," JA795–96, 806.[7]

SPK opposed Plaintiffs' request. *See* JA838–76.

The District Court denied Plaintiffs' request for leave for two reasons. *Philipp v. Stiftung Preussischer Kulturbesitz*, No. 15-cv-266 (CKK), 2021 WL 3144958 (D.D.C. July 26, 2021) ("*Philipp V*"), JA878–895. First, allowing Plaintiffs to amend their complaint would contravene the Supreme Court's and this Court's mandate. JA884–89. *Philipp III* "recognized that Plaintiffs *may not have preserved* their alternative argument" and directed the District Court "to consider this issue" on remand. JA889. That task "require[d] that [the District Court] look at the record in this case (which existed at the time the mandate was issued)" to decide "whether Plaintiffs' argument was adequately preserved." *Id.* Letting Plaintiffs amend "to include additional facts and theories" would be "inconsistent with the [Supreme Court's] instruction." *Id.* Second, the District Court concluded that amendment was inappropriate under Rule 15, because Plaintiffs had no excuse for

[7] Plaintiffs also proposed non-substantive amendments, to which SPK did not object. *See* JA855–56; JA895 n.8.

not making these allegations earlier, and permitting amendment now would prejudice SPK. JA889–94. In addressing these points, the District Court "reject[ed] Plaintiffs' argument that there was a change in law that excuses delay, as the applicability of the domestic takings rule pre-dates the Supreme Court's decision, and the Supreme Court's unanimous rejection of Plaintiffs' arguments in this case does not constitute new law" that might excuse Plaintiffs' failure to preserve their arguments. JA890–91. The District Court nonetheless allowed Plaintiffs to file a Second Amended Complaint ("SAC") with non-substantive amendments SPK consented to. *See* JA896–1036.

Following a renewed motion to dismiss, the District Court dismissed the SAC. *Philipp v. Stiftung Preussischer Kulturbesitz*, --- F. Supp. 3d ----, 2022 WL 3681348 (Aug. 25, 2022) ("*Philipp VI*"), JA1148–79. The District Court began by considering whether Plaintiffs had preserved their theory that the sale of the Welfenschatz was not subject to the domestic-takings rule because the Consortium or its members were not German nationals. JA1160–64. It concluded they had not, because Plaintiffs' prior briefs in opposition to SPK and FRG's motion to dismiss had relied exclusively on *Simon*'s genocide theory, never

disputing that the Consortium, the art dealerships, and the art dealers were German nationals in June 1935. JA1161–64.

The District Court also rejected Plaintiffs' arguments on the merits, concluding that Plaintiffs had failed to demonstrate any exception to the domestic-takings rule that would apply here. JA1164–78. Under long-established international law, whether the art dealers were German nationals in 1935 must be determined by Germany's 1935 nationality law. JA1170–72.[8] Uncontroverted opinions from experts on German law established that under Plaintiffs' allegations, the art dealers were German nationals in 1935. JA1174–76. Plaintiffs conceded this. JA1176 (noting Plaintiffs' acknowledgement that the Nazi regime had not stripped any of the art dealers of their German nationality by June 1935). The District Court also rejected Plaintiffs' argument that the Court could ignore actual German law and treat the art dealers as "stateless" based on Nazi persecution of Jewish Germans in 1935, finding no support for this purported exception to the domestic-takings

[8] The District Court declined to address the nationality of the Consortium itself or the art dealerships that comprised it, finding that unnecessary. JA1165–67.

rule in customary international law. JA1172–76.[9] The District Court also rejected Plaintiffs' argument that Rosenbaum and Rosenberg had become Dutch nationals by June 1935, because Plaintiffs' bare allegation the two had emigrated from Germany neither established that they had become Dutch nationals or that they had lost German nationality. JA1177–78.

SUMMARY OF THE ARGUMENT

Plaintiffs contend their suit is not barred by the domestic-takings rule because the art dealers who owned the companies that made up the Consortium were either Dutch nationals or stateless persons in June 1935. The District Court did not abuse its discretion by finding Plaintiffs forfeited these arguments, because their prior briefs never even hinted at them, much less developed them or provided supporting authority. Contrary to Plaintiffs' suggestions, these alternative arguments were always available; Plaintiffs simply failed to make

[9] Because Plaintiffs had failed to show that the art dealers were in fact stateless, the District Court found it unnecessary to decide whether a state's alleged taking of a stateless person's property violates international law. JA1167–70.

them. Six years into this suit is too late to do so for the first time. *See infra* at 25–39.

Even if Plaintiffs had preserved these arguments, Plaintiffs fail to satisfy their burden of pleading facts establishing that Germany's purchase of the Welfenschatz in 1935 was a taking in violation of international law. *See infra* at 39–63. Plaintiffs allege only that Germany "took" property from a German Consortium of German companies, an allegation that falls squarely within the domestic-takings rule. Plaintiffs cite no established principle of international law that would allow the Court to look past the nationality of these German companies to the nationality of their owners. *See infra* at 39–48. Even if there were one, Plaintiffs' allegation that two art dealers emigrated to the Netherlands between 1933–35 does not establish that they had become Dutch nationals. *See infra* at 48–54. For the remaining art dealers, Plaintiffs provide no support for their theory that a state violates the international law of takings by taking property from an allegedly stateless person. *See infra* at 54–58. Even if the law of takings did recognize such a rule, Plaintiffs concede that all the art dealers were

German nationals in June 1935. *See infra* at 58–63. For these reasons, the domestic-takings rule bars their claims.

Finally, the District Court did not abuse its discretion by denying Plaintiffs leave to amend their complaint a second time in response to *Philipp III*. Plaintiffs' motion to amend became moot when the District Court later found they had not preserved their current jurisdictional arguments. And even if Plaintiffs had preserved them, their proposed amendments were futile, because they do not change the outcome of SPK's motion to dismiss. *See infra* at 63–66.

ARGUMENT

I. Plaintiffs forfeited the argument that the Consortium, the art dealerships, or the art dealers were not German nationals in June 1935.

Plaintiffs contend the domestic-takings rule does not apply because some of the art dealers were Dutch nationals and the rest were stateless when the Consortium sold the Welfenschatz in June 1935. As *Philipp III* and *Philipp IV* required, the District Court first addressed whether Plaintiffs preserved these arguments by having raised them in the prior record. Because Plaintiffs' briefs never hinted at, much less fully presented, these alternative theories, the District Court did not

abuse its discretion by finding Plaintiffs had forfeited them. That conclusion disposes of this appeal.

A. Philipp III *and* Philipp IV*'s mandate prevents Plaintiffs from raising jurisdictional theories not preserved in their prior briefing.*

In *Philipp III*, the Supreme Court considered "whether a country's alleged taking of property from its own nationals falls within" the FSIA's expropriation exception. 141 S. Ct. at 708. The Court unanimously concluded it did not, because the phrase "taken in violation of international law" refers to "the international law of expropriation and thereby incorporates the domestic takings rule." *Id.* at 715. After reaching that result, the Supreme Court declined to consider an "alternative argument noted" by Plaintiffs in their Supreme Court brief: "that the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction." *Id.* (citing Respondents' Brief, *Philipp III*, 2020 WL 6323715, at *27–28) (arguing this without elaboration). Recognizing that SPK contended Plaintiffs had forfeited this argument, *id.* at 715–16, the Supreme Court and this Court directed the District Court "to consider this argument, including

whether it was adequately preserved below," *id.* at 716; *Philipp IV*, 839 F. App'x at 574 (directing District Court to decide "whether this argument was adequately preserved in the District Court").

The Supreme Court frequently issues similar mandates, directing lower courts to consider whether an alternative ground to affirm raised in the Supreme Court was preserved below and to address that ground if it was. Facing such mandates, lower courts scrutinize the record as it existed before the case reached the Supreme Court to decide whether a party had (1) alleged facts to support the alternative argument and (2) actually made that argument in their prior briefs. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337 (D.C. Cir. 2004), is a good example. There, the Supreme Court held that U.S. courts lack jurisdiction over anticompetitive conduct abroad causing only foreign injuries, reversing a D.C. Circuit decision. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 163–73 (2004). But in the Supreme Court, the plaintiffs urged the Supreme Court to affirm on the alternative ground that their injury arose from conduct in the United States. *Id.* at 175. Because this Court had not addressed that alternative theory, the Supreme Court directed it to "consider the

claim," including whether the plaintiffs "properly preserved the argument." *Id.* On remand, this Court found plaintiffs had preserved this alternative theory, because they had both pleaded facts in support of it, *Empagran*, 338 F.3d at 340–43, and "advance[ed] it in briefs or oral arguments at every stage in this litigation," *id.* at 343–44.

In many cases, however, courts find that a party never previously raised an alternative argument they made in the Supreme Court, so the lower courts refuse to consider that argument on remand. For example, in *West v. Gibson*, 527 U.S. 212, 217–23 (1999), the Supreme Court reversed a Seventh Circuit decision, which had held a plaintiff did not have to administratively exhaust his claim for compensatory damages under Title VII. The Supreme Court declined to address the plaintiff's alternative ground to affirm that he *had* exhausted, instead directing the Seventh Circuit to "determine whether these [alternative arguments] had been properly raised and, if so, decide them." *Id.* at 223. On remand, the Seventh Circuit declined to consider the plaintiff's argument, because "far from arguing that he had satisfied the requirement of exhaustion," he had consistently "argued that he *did not have to do so*." *Gibson v. West*, 201 F.3d 990, 992 (7th Cir. 2000)

(emphasis original). This Court and other circuits have similarly refused on remand to consider arguments parties raised as alternative grounds to affirm in the Supreme Court when those arguments had not been raised previously. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. E.P.A.*, 282 F.3d 355, 371 (D.C. Cir. 2002) (declining on remand to consider an alternative argument that "appear[ed] nowhere in" a party's pre-Supreme Court briefs); *Christian Legal Soc'y Chapter of Univ. of Cal. v. Wu*, 626 F.3d 483, 486–88 (9th Cir. 2010) (same when argument had not been "specifically and distinctly" raised).

These decisions make good sense. "If parties who lost [in the Supreme Court] were allowed to return to appellate courts to advance different previously available theories. . . already crowded dockets would swell" and adversaries would unfairly be forced "to defend the same lawsuit on appeal over and over." *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992); *accord United States v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("[P]arties cannot use the accident of remand as an opportunity to reopen waived issues."). And while courts generally have discretion to excuse a party's failure to raise an alternative theory earlier, when the

Supreme Court directs lower courts to consider preservation, the Court's mandate cabins that discretion, limiting parties only to those arguments they properly preserved. *In re Johns-Manville Corp.*, 600 F.3d 135, 147 (2d Cir. 2010) (explaining that by issuing a remand order like the one here, the Supreme Court "itself decided, in its discretion, that forfeited arguments should not be considered").

B. The District Court did not abuse its discretion by finding that Plaintiffs forfeited their new jurisdictional arguments.

The District Court's task was clear. The *Philipp III* and *IV* remand orders required it to examine the existing record to see whether Plaintiffs had preserved their argument that the art dealers were Dutch or stateless in June 1935. Scrutinizing Plaintiffs' prior briefs, it found that Plaintiffs could "point to no place in the record" where they had distinctly made those arguments. JA1164. Because that conclusion is amply supported by the record, it was not an abuse of discretion. *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812–13 (D.C. Cir. 2012) (reviewing a district court's finding that a party forfeited an argument for abuse of discretion even though the district court gave "an alternative, merits-based reason for rejecting" the argument).

In both its first and second motions to dismiss, SPK argued that the domestic-takings rule barred Plaintiffs' claims. As SPK explained, the Consortium and the art dealerships comprising it—the legal owners of the collection—were German companies. JA118–19. And even if one ignored their corporate nationalities, the art dealers who owned them were German nationals too. JA119–20; *see also* JA271–80 (renewing arguments in second motion to dismiss).

Plaintiffs' only response was that *Simon* made the nationality of the Consortium and its members irrelevant. *See* JA411–16. As they put it, "*Simon* disposes of the Defendants' 'domestic takings' argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims." JA412. This theory—that the expropriation exception is satisfied if a taking violates the law of genocide, regardless of nationality—is exactly what the Supreme Court would later unanimously reject. *Philipp III*, 141 S. Ct. at 711–15.

While Plaintiffs extensively discussed and relied on *Simon*, they never argued in the alternative that the Consortium or its members were not German nationals in 1935. Plaintiffs challenged SPK's argument that the Consortium was a German legal entity only in a

footnote addressing standing, JA439 n.8; they never disputed the point as to the FSIA. They never contested SPK's argument (or its expert's opinion) that the art dealerships were German companies. They pointed to no principle of international law that would let courts disregard these companies' nationality and instead look to the nationality of the art dealers who owned them. They never asserted that any of the art dealers were Dutch nationals in June 1935. And they never claimed that the art dealers were "stateless" under German or international law or cited any principle of international law that extends the law of takings to takings from stateless persons. The words central to these arguments as they now frame them—"stateless," "nationality," "genuine link," "emigrated," and "Dutch"—are found nowhere in their prior briefs. The sources they cite for those arguments are absent too. *Compare* Brief 19–36 *with* JA411–16. When SPK pointed all this out, JA549, Plaintiffs never disputed it.[10]

"[W]hen a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may

[10] The same sequence unfolded on appeal in this Court. *See supra* at 14–15 (citing record).

treat those arguments that the plaintiff failed to address as conceded." *Johnson v. District of Columbia*, 49 F. Supp. 3d 115, 121–22 (D.D.C. 2014); *accord Twelve John Does v. District of Columbia*, 117 F.3d 571, 577 (D.C. Cir. 1997) ("Where the district court relies on the absence of a response as a basis for treating the motion as conceded, we honor its enforcement of the rule."). And to raise a possible argument, "[i]t is not enough merely to mention [it] in the most skeletal way, leaving the court to do counsel's work" of fleshing it out with legal and factual support; instead, litigants must "spell out [their] arguments squarely and distinctly, or else forever hold [their] peace." *Schneider*, 412 F.3d at 200 n.1. Because Plaintiffs can point to nowhere in the District Court record where they "squarely and distinctly" argued that the Consortium members were not German nationals in 1935, the District Court rightly found that argument forfeited. JA1160–64.

Plaintiffs' opening brief never disputes the District Court's conclusion that their prior briefs did not make the jurisdictional arguments they make now. Instead, they argue that they preserved these arguments because their *complaint's allegations* were "more than adequate to inform the Court and [SPK] of the Plaintiffs' position that

the Consortium members were not German nationals at the time of the forced sale." Brief 37–38, 48–50. But the question is not whether their complaint gave the District Court or SPK adequate notice of arguments Plaintiffs *might have* made.[11] The question is whether they *actually* made those arguments "squarely and distinctly" in their briefs opposing SPK's motion to dismiss. *Schneider*, 412 F.3d at 200 n.1. Cases like *Empagran* and *Gibson* recognized as much, scrutinizing a party's prior briefs to see if they actually "advance[ed]" an alternative argument "in [prior] briefs or oral arguments" with enough specificity to preserve it. *Empagran*, 388 F.3d at 343–44. Plaintiffs never argued in their briefs that the Consortium and its members were not German nationals in June 1935. Instead, like the plaintiff in *Gibson*, Plaintiffs argued that *Simon* meant they "*did not have to do so*." 201 F.3d at 992 (emphasis original); *see* JA412 ("*Simon* disposes of the Defendants' 'domestic takings' argument . . . ."). The District Court rightly found those arguments forfeited.

[11] The case Plaintiffs cite for their "adequate notice" standard addresses what a party must do to preserve an APA challenge to agency action. *See Nat'l Treasury Emps. Union v. Fed. Lab. Rels. Auth.*, 754 F.3d 1031, 1040 (D.C. Cir. 2014). That is not the issue here.

C. Philipp III*'s rejection of* Simon *does not excuse Plaintiffs' failure to raise alternative arguments that were always available.*

Plaintiffs also contend that they did not have to preserve these arguments. They admit that their prior briefs relied exclusively on *Simon*'s genocide theory, under which the nationality of the Consortium and its members was irrelevant. Brief 43. But when *Philipp III* overruled *Simon*, Plaintiffs say that "nationality [only then] bec[a]me a live question." Brief 39. This "change in the governing law," they contend, allows them now to argue that the Consortium's members were Dutch or stateless, regardless of whether they made those arguments before.

Plaintiffs' change-in-law argument misunderstands the cases they cite, is irreconcilable with the basic rules of issue preservation, and flouts the Supreme Court's mandate. Courts sometimes excuse a party's failure to raise an argument earlier "where a supervening decision has changed the law *in the appellant's favor* and the law was so well-settled [before then] that any attempt to challenge it would have appeared pointless." *United States v. Washington*, 12 F.3d 1128, 1139 (D.C. Cir. 1994). Thus, if the law at the time of SPK's prior motions to dismiss had

foreclosed Plaintiffs' argument that the art dealers were not German nationals, a change in the law that opened up this previously barred path might allow them to make this argument for the first time now.

That is not what happened here. If *Philipp III* "changed" the law, it changed it to Plaintiffs' *detriment* when it rejected the only jurisdictional theory they had raised. But as to the alternative arguments Plaintiffs now try to make, no law has changed. *E.g.*, *Philipp III*, 141 S. Ct. at 709–11 (recognizing the decades-long "consensus" that the expropriation exception is cabined by the domestic-takings rule). Plaintiffs were always free to argue that the Consortium members were not German nationals in 1935. They just chose not to.

Plaintiffs cite no case holding that a court's rejection of a party's only legal theory excuses that party's failure to raise previously an alternative theory that was always available. If accepted, that proposition would eliminate the waiver doctrine: Every losing party would say "the law changed" when the court rejected their arguments, freeing them to pivot to alternative arguments they could have, but failed to, raise earlier. If that were the law, then *Empagran*, *Gibson*, and *American Trucking Associations* would make no sense: In each

case, a party prevailed in the court of appeals on their preferred theory, only to then have that theory rejected by the Supreme Court. If the Supreme Court's decisions "changed the law" so as to excuse the failure to make alternative arguments, those courts would not have needed to scrutinize the parties' prior briefs, and they would not have precluded parties from raising arguments they had failed to clearly make in the pre-Supreme Court record.

Plaintiffs' change-in-law excuse is also at odds with the Supreme Court's mandate. If *Philipp III* "changed the law," excusing Plaintiffs' failure to argue previously that the Consortium members were not German nationals, then the Supreme Court would not have directed the District Court to decide whether they had adequately preserved that argument. It would have said preservation did not matter, because the Court had just changed the law. The Court's direction to consider preservation implicitly decided that preservation was required. *See, e.g.*, *In re Johns-Manville Corp.*, 600 F.3d at 147.

Finally, Plaintiffs suggest that *Simon* was so well established and controlling that they could not have foreseen their *Simon* argument might fail. Brief 39–43. But *Simon* was decided *after* Plaintiffs filed this

suit, so it is hardly ancient precedent. *Simon* was also narrow: *Philipp II* recognized it was extending *Simon*, deciding "*for the first time* whether seizures of art may constitute takings of property that are themselves genocide." 894 F.3d at 411. Finally, that the Supreme Court could grant certiorari and unanimously overrule *Simon* demonstrates that Plaintiffs' legal theory was, at the very least, subject to reasonable debate. *Philipp III* was not an unforeseeable transformation of the law that might excuse Plaintiffs' failure to make arguments that were always available.[12]

Preservation means that a party cannot litigate a case to the Supreme Court on one theory, lose, and then revive their suit with an alternative argument they never previously raised. *Morris*, 259 F.3d at 898 ("[P]arties cannot use the accident of remand as an opportunity to reopen waived issues."); *accord Omni Outdoor Advertising*, 974 F.2d at 505. If Plaintiffs wanted to preserve the argument that the Consortium,

[12] Plaintiffs also assert that *Simon* made their new arguments "superfluous." Brief 38. The opposite is true: Had Plaintiffs persuasively argued that the Consortium members were not German nationals in June 1935, it would have been superfluous for this Court to decide whether to extend *Simon* as it did in *Philipp II*.

the art dealerships, or the art dealers were not German nationals, they needed to "spell out [those] arguments squarely and distinctly, or else forever hold [their] peace." *Schneider*, 412 F.3d at 200 n.1. Because they did not, those arguments were forfeited.

II. *Philipp III* and international law foreclose Plaintiffs' arguments.

Plaintiffs' arguments are also wrong. Their suit is barred by the domestic-takings rule because they allege only that Germany took property from German companies. Plaintiffs' arguments about the art dealers' nationality do not matter, because international law prohibits courts from looking past these companies' nationality to their owners' nationality. Even if that were not so, Plaintiffs do not plead facts establishing that two art dealers were Dutch nationals in June 1935. They cannot show that customary international law regards a state's taking of property from a "stateless person" as a violation of the law of takings. And they have not pled facts establishing that any of the art dealers were stateless.

A. Plaintiffs must plead facts establishing that the sale of the Welfenschatz was an actual, not merely possible, violation of the international law of takings.

The FSIA makes foreign states and their instrumentalities immune from suit unless a statutory exception to immunity applies. 28 U.S.C. § 1604. The expropriation exception Plaintiffs rely on requires them to show that that the 1935 sale of the Welfenschatz was a taking in violation of "the international law of expropriation," which "incorporates the domestic takings rule." *Philipp III*, 141 S. Ct. at 715; *see* 28 U.S.C. § 1605(a)(3). To survive SPK's motion to dismiss, Plaintiffs must do more than make a "nonfrivolous" argument that the sale violated the law of expropriation: they must plead facts establishing an *actual* violation of it. *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1316 (2017) ("*Helmerich I*").

In *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 743 F. App'x 442, 444–46 (D.C. Cir. Aug. 7, 2018) ("*Helmerich II*"), this Court explained what these rules mean in cases where parties dispute the applicability of the domestic-takings rule or argue that an exception to it applies. There, a U.S. company and its Venezuelan subsidiary sued Venezuela over its expropriation of the

subsidiary's oil rigs. They argued this was not a domestic taking because customary international law recognized an exception to the domestic-takings rule when a foreign state takes the property "of a domestically incorporated company with the discriminatory aim of harming the company's foreign owners." *Id.* at 448. Because *Helmerich I* requires plaintiffs to plead an actual (not merely possible) violation of the law of takings, the plaintiffs bore the burden of showing that this supposed exception was an established rule of customary international law by pointing to court judgments, scholarly writings, and governmental pronouncements recognizing it. *Id.* at 448–53; Restatement (Third) of the Foreign Relations Law of the United States §§ 102, 103 (1987) ("Third Restatement") (explaining how courts determine the rules of customary international law). Ambiguity or uncertainty as to either the facts alleged or the rules of customary international law means a plaintiff has pled only a *possible* taking in violation of international law, not the *actual* violation *Helmerich I* demands. *Helmerich II*, 743 F. App'x at 448–53. These pleading burdens are dispositive here, because Plaintiffs cannot show that the facts they

plead amount to a violation of the clearly established international law of takings.

B. The domestic-takings rule applies because Plaintiffs allege that Germany took property from German companies.

Plaintiffs alleges that when the Welfenschatz was sold in June 1935—the transaction they claim was a taking—it belonged to a Consortium of the three art dealerships. JA986–97, 911 (¶¶1, 32). "Under international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Helmerich II*, 743 F. App'x at 447. As a result, the domestic-takings rule bars claims that a state took property from its corporate nationals. *See, e.g.*, *id.* at 447–48 (domestic-takings rule applied to Venezuela's taking of Venezuelan corporation's property); *Ivanenko*, 995 F.3d at 237 (same for Ukraine's taking of Ukrainian company's property). Plaintiffs allege a similar domestic taking here.

First, both the Consortium and its member art dealerships were German companies. As one of SPK's German-law experts (Dr. Armbrüster) opined below,[13] "Consortium" is a well-established term for

[13] Federal Rule of Civil Procedure 44.1 lets courts consider expert testimony to help determine foreign law. *See, e.g.*, *McKesson Corp. v.*

a legal entity commonly referred to as an "occasion partnership," or GbR. JA1037–44 (¶¶9–13). The complaint and the terms of the 1929 and 1935 contracts through which the Consortium bought and sold the Welfenschatz, *see* JA976–82; JA1019–26, establish that German law would characterize the Consortium as a GbR. JA1039–44, 1047 (¶¶5–13, 21). Plaintiffs allege that the Consortium had three members: the art dealerships Z.M. Hackenbroch, I. Rosenbaum and J.&S. Goldschmidt. JA911 (¶32). Their allegations and the exhibits attached to their complaint establish that these art dealerships were German companies. JA1044–47 (¶¶15–21); *see also* JA896–97 (¶1) (alleging they were German companies); JA976 (1929 purchase contract showing they were German companies); JA1020 (same for 1935 sale contract).

Second, Plaintiffs' allegations establish that these German companies owned the Welfenschatz in June 1935. Under 1935 German

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Islamic Republic of Iran, 753 F.3d 239, 242–43 (D.C. Cir. 2014). Plaintiffs claim that SPK is "estopped" from presenting expert opinions as to foreign law, because SPK argued that Plaintiffs forfeited their jurisdictional arguments. Brief 35–36. But these opinions are only relevant if the Court finds that Plaintiffs *did* preserve these theories. If Plaintiffs did, SPK has every right to explain why Plaintiffs' arguments fail on the merits, including by providing expert opinions under Rule 44.1 on germane points of foreign law.

law, a GbR did not directly own property; instead, the members of a GbR jointly owned any property the GbR used for its common purpose. JA1050–52 (¶¶29–32). Plaintiffs allege that these art dealerships partnered to buy and resell the Welfenschatz. JA896–97, 911 (¶¶1, 32). And they allege this Consortium—and hence these three companies—were "solely entitled to ownership rights of the collection" from 1929 until the Consortium sold it in June 1935. JA911 (¶32). Any "taking" of the Welfenschatz thus amounted to Germany taking property from German companies, a claim squarely within the domestic-takings rule. *See*, *e.g.*, *Helmerich II*, 743 F. App'x at 447–48; *Ivanenko*, 995 F.3d at 237.[14]

Plaintiffs contest Dr. Armbrüster's opinion that the Consortium was a GbR, relying on their German-law expert's (Dr. Meder) opinion that it was an unincorporated association. Brief 27–28. Dr. Armbrüster explained below why Dr. Meder was wrong. JA1039–47 (¶¶5–21). But

[14] Under contemporary German law, the Consortium would directly own the Welfenschatz. JA1044, 1047–51 (¶¶14, 22–28, 32). But the Court need not decide whether to apply 1935 or present-day German corporate law: under either, Plaintiffs allege only that Germany took property from a German partnership (contemporary German law) or three German companies (1935 German law).

this makes no difference, because even if German law treated the Consortium as Plaintiffs propose, German and international law would then just look to the Consortium's members: the three art dealerships. Third Restatement § 213 cmt. a (explaining that when an association is not a distinct legal entity under domestic law, international law looks to the nationality of its members).[15] Neither Plaintiffs nor their expert have ever disputed that those art dealerships were German companies. Their complaint alleges that they were. JA896–97 (¶1). The 1929 and 1935 contracts they attached to their complaint establish the point. JA976; JA1020.

While Plaintiffs' brief focuses on the art dealers' nationality, those arguments are irrelevant unless Plaintiffs can show that clearly established international law would look past the nationality of the German companies that owned the Welfenschatz to the nationality of the people who owned those companies. Plaintiffs argued passingly

[15] Plaintiffs suggest that only the Second Restatement matters, because the Third Restatement postdates the FSIA's enactment. Brief 23 n.9. But *Philipp III* repeatedly relied on the Third Restatement to understand the law of takings. 141 S. Ct. at 709, 710. This Court has done so too. *Helmerich II*, 743 F. App'x at 447, 449, 452–53.

below, JA1100–01, and again on appeal, Brief 19–20, 26, that the German nationality of the art dealerships can be ignored because Plaintiffs allege Germany took these companies' property based on discriminatory animus toward their Jewish owners. But *Helmerich II* rejected that argument, finding no support for the proposition "that international law recognizes a discrimination exception to the domestic takings rule." 743 F. App'x at 448–53 (concluding that Venezuela's alleged taking of a Venezuelan company's property was barred by the domestic-takings rule even if Venezuela took the property based on the identity of the Venezuelan company's owners). This Court's precedent forecloses Plaintiffs' attempt to evade the art dealerships' German nationality. But even if it did not, Plaintiffs cite no international-law sources definitively establishing that the law of takings would look to the nationality of the art dealers, as *Helmerich* demands.[16]

[16] *Helmerich II* allowed a claim asserted by the Venezuelan company's American parent to proceed on the theory that Venezuela had taken the American parent's *own* property by seizing its ownership interest in its Venezuelan subsidiary. *Id.* at 453–56; *see Exxon Mobil Corp. v. Corporación CIMEX, S.A.*, 534 F. Supp. 3d 1, 27–28 (D.D.C. 2021) (citing the United States' explanation in an amicus brief that this principle applies if a state "expropriat[es] . . . [an] entire [domestic] enterprise"). Plaintiffs never argue that Germany seized the art dealerships themselves. Their own complaint refutes any such

While the District Court did not resolve the case on this basis, this Court can. *Philipp III*'s mandate directed the District Court to "consider" Plaintiffs' "alternative argument" that the domestic-takings rule did not apply "because the consortium members were not German nationals at the time of the transaction." 141 S. Ct. at 716. The District Court believed that "Consortium members" could mean either the art dealerships or the individual art dealers who owned them, but it looked to the individuals because it thought the parties had "focuse[d]" more on them. JA1167; *but see* JA1165–67 (summarizing SPK's arguments that the nationality of the Consortium and its corporate members was dispositive). But Plaintiffs allege that the companies were the Consortium's members, JA986–97, 911 (¶¶1, 32), and under international law, the nationality of a company—not its owners—is dispositive, *e.g.*, *Ivanenko*, 995 F.3d at 237. Because Plaintiffs' allegation that Germany took property from German companies falls

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argument. JA934, 942–43 (¶¶128, 162–70) (alleging that the firms continued their operations in Germany after the sale of the Welfenschatz).

within the domestic-takings rule, their arguments about the art dealers' nationalities are irrelevant.

C. *Plaintiffs did not plead facts establishing that the art dealers were foreign nationals in 1935.*

Even if Plaintiffs could show that international law would look to the nationality of the art dealers, Plaintiffs would still need to plead that they were "national[s] of another state" when Germany purchased the Welfenschatz in June 1935. Third Restatement § 712 (explaining that only such takings can violate international law).[17] They do not meet that burden.

1. States' domestic laws determine nationality.

"International law recognizes that it is generally up to each state (i.e., country) to determine who are its nationals." *Comparelli v. Republica Bolivariana de Venezuela*, 891 F.3d 1311, 1321 (11th Cir. 2018) (citing sources). This rule was well established by 1935: In 1930, Germany and other states entered a multilateral convention addressing questions of nationality. Convention on Certain Questions Relating to

[17] As the District Court recognized, JA1171, nationality—not citizenship—is what matters under the domestic-takings rule. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 676 n.6 (7th Cir. 2012) (citing authority). Plaintiffs never dispute this.

the Conflict of Nationality Law, Apr. 12, 1930, 179 L.N.T.S. 89. It provides that "[i]t is for each State to determine under its own law who are its nationals" and that "[a]ny question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State." *Id.* arts. I & II. International law thus "neither contains nor prescribes certain criteria for acquisition and loss of nationality," instead leaving such questions to states' domestic laws. Oliver Dörr, *Nationality*, Max Planck Encyclopedias of International Law ¶ 4 (2019); *accord* 1 L. Oppenheim, *International Law: A Treatise* § 378 (Robert Y. Jennings & Arthur Watts, eds., 9th ed. 1992) ("[I]t is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national."). Whether the art dealers were German nationals in June 1935 is thus determined by 1935 German nationality law. *Comparelli*, 891 F.3d at 1321 (holding that whether plaintiffs were Venezuelan nationals at time of alleged taking "is determined by the laws of Venezuela").

Plaintiffs dispute these well-established principles, arguing that an individual's nationality turns on some vague analysis of whether a

person has a "genuine connection" to a state under the "totality of the circumstances." Brief 22–24. Their only support for this claim is the International Court of Justice's decision in *The Nottebohm Case (Liech. v. Guat.)*, Judgment, 1955 I.C.J. 4 (Apr. 6). That case has nothing to do with the issues here. It involved a German citizen and long-time resident of Guatemala who became a national of Liechtenstein during a brief visit, even though he had never resided there, owned no property there, and lacked any other connection with the country. *Id.* at 13–16. When Liechtenstein later sought to espouse a claim on his behalf, the ICJ found it lacked standing, because Nottebohm had no "genuine connection" with Liechtenstein (such as birth, owning property, or living there) supporting his acquisition of nationality. *Id.* at 20–24. *Nottebohm* has been frequently criticized: It is "not generally accepted and therefore not part of customary international law." Dörr ¶ 54; *accord* Malcolm N. Shaw, *International Law* 814 (6th ed. 2008) (The case "has been subject to criticism," and many have argued it "should be limited to its facts."). But that makes little difference, because *Nottebohm* stands *at most* for the principle that states need not respect someone's *acquisition* of nationality from a country with whom they

have no real tie. "Nothing in [*Nottebohm*] suggests that a state may refuse to give effect to a nationality acquired at birth, regardless of how few other links the individual had at birth or maintained later." Third Restatement § 211 reporter's note 1.[18]

Plaintiffs do not dispute that all the art dealers were German nationals under German law when the Nazis took power in 1933. The only dispute is whether they had "ceased to be German nationals" by June 1935, when the Welfenschatz was sold. Brief 19. Plaintiffs argue that two of them—Rosenberg and Rosenbaum—were Dutch nationals because they had emigrated to the Netherlands by then. Brief 24–28. For the rest, Plaintiffs contend that the Nazis' discrimination toward and persecution of Jews between 1933–35 stripped them of German nationality, making them stateless. Brief 28–36. These arguments all fail.

[18] Plaintiffs cite three Supreme Court cases from the 1800s dealing with individuals' domiciles. Brief 24. None addresses the international law of nationality or sovereign immunity. They long predate contemporary international law, which grants each state the right to determine who its own nationals are.

2. Plaintiffs have not pled facts establishing that Rosenberg and Rosenbaum were Dutch nationals in June 1935.

Plaintiffs argue that Rosenberg and Rosenbaum *became* Dutch nationals by June 1935. Brief 24–28. But their only factual allegation is that the two "emigrated to Holland" between 1933 and 1935. JA922, 933, 943–44 (¶¶76, 126, 170) (alleging that all the art dealers lived in Germany in 1933 but Rosenberg and Rosenbaum emigrated sometime afterward). "Emigrate" means a person has left their home country to live elsewhere. *See Emigrate*, Webster's Third New International Dictionary (2002). It does not mean they acquired the nationality of the state they immigrated to. 1 Oppenheim § 381 ("Emigration involves the voluntary removal of an individual from his home state with the intention of residing abroad, but not necessarily with the intention of renouncing his nationality, which he may well therefore retain.").[19] Plaintiffs never allege Rosenberg and Rosenbaum became Dutch

[19] Plaintiffs quote (Brief 25) the Second Restatement in support of their strained interpretation of the word "emigrate," but the section they cite does not contain their quotation or support their argument.

nationals under Dutch law and plead no facts establishing that the two acquired Dutch nationality by June 1935.

Even if Plaintiffs had alleged the two art dealers were Dutch nationals in 1935, that allegation would be a legal conclusion not entitled to the presumption of truth. Given the facts they do allege, Rosenberg and Rosenbaum could not have been Dutch nationals by June 1935. Whether they became Dutch turns on Dutch nationality law. *Comparelli*, 891 F.3d at 1321. As SPK's expert in Dutch law (Dr. Campfens) explained below, Dutch nationality law of the 1930s did not automatically bestow Dutch nationality on all who moved there; it required immigrants to meet eligibility requirements and apply for naturalization. JA1121–25 (¶¶3–13). Immigrants were not legally eligible to apply for naturalization until they had resided in the Netherlands for at least five years. *Id.* Plaintiffs alleged that Rosenberg and Rosenbaum moved to the Netherlands after 1933, so they were not even eligible to become Dutch nationals until years after the June 1935 sale. *Id.*[20] Because Plaintiffs did not plead or establish that Rosenberg

[20] Plaintiffs complain that SPK "deceitfully" provided Dr. Campfens's opinion with its reply brief below. Brief 37. But SPK raised these arguments then because Plaintiffs had never previously argued

and Rosenbaum were foreign nationals in June 1935, they have not met their burden of pleading an *actual*—as opposed to possible—violation of the law of takings.

3. A state does not violate the law of takings by taking property of a "stateless" person.

Plaintiffs also argue that Germany violated the law of takings because the remaining art dealers became "stateless" due to Germany's discriminatory treatment of Jews in 1933–35. This argument fails at the outset because Plaintiffs have not shown that a state violates customary international law when it allegedly takes property from a stateless person.

As *Philipp III* recognized, "international law customarily concerns relations among sovereign states, not relations between states and individuals." 141 S. Ct. at 709–10. Consistent with this focus, a state's taking "of a foreigner's property, like any injury of a foreign national, implicate[s] the international legal system because it

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Rosenberg and Rosenbaum were Dutch nationals. Responding to arguments made in an opposition brief is the purpose of a reply. Plaintiffs never sought leave to file a sur-reply or responsive expert report and do not argue that Rule 44.1 precludes a court from relying on this Dutch law expert (or the sources she cites) to determine Dutch law.

constitute[s] *an injury to the state* of the alien's nationality." *Id.* at 710; *accord* Third Restatement part VII intro. note. Domestic takings, by contrast, do not interfere with relations among states, because they harm no other state. *Philipp III*, 141 S. Ct. at 710. While international human-rights law has evolved to create state obligations toward individuals, including their own nationals, the law of takings retains this focus on state-to-state relations, so it is implicated only when a state takes a foreign national's property. *Id.* at 710–11; *accord* Third Restatement § 712; *id.* cmt. a (explaining that the customary international law of takings is violated only if a state causes "economic injury to *foreign* nationals").

Because no foreign state is harmed by a state's taking of property from a stateless person, courts and scholars have recognized that the law of takings is not implicated by such claims. The Third Restatement is explicit: "Since responsibility under §§ 711 and 712 is to the state of nationality, *the principles stated in these sections provide no protection for persons who have no nationality*." Section 713, cmt. d; *accord* 1 Oppenheim § 377 ("[A]part from obligations undertaken by treaty, a state was [historically] entitled to treat both its own nationals and

stateless persons at discretion," and "the manner in which it treated them was not a matter with which international law, as a rule, concerned itself."). In *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 551 (11th Cir. 2015), the Eleventh Circuit agreed, rejecting a Venezuelan plaintiff's argument that Venezuela's systematic deprivation of his civil and human rights made him "stateless," putting the case outside the domestic-takings rule. Consistent with *Philipp III*'s description of the international law of takings, such allegations were not a violation of the law of takings because they did "not implicate multiple states—they relate[d] entirely to Venezuela." *Id.* at 551; *see also Abelesz*, 692 F.3d at 676 n.6 (rejecting similar argument as to Hungary's mistreatment of its own citizens). As in *Mezerhane*, Plaintiffs' argument that the art dealers' own state—Germany—stripped them of their nationality and then took their property implicates no foreign state; those claims relate entirely to Germany.

Plaintiffs argue that *Philipp III* supports them because it said that the expropriation exception does not "cover expropriations of property belonging to a country's *own nationals*," *Philipp III*, 141 S. Ct at 711, which Plaintiffs think means the exception does cover

expropriations from any non-national. Brief 33–34. But the question presented in *Philipp III* was "whether a country's alleged taking of property *from its own nationals* falls within" the expropriation exception. *Id.* at 708. Plaintiffs argued that it did, but the Supreme Court unanimously disagreed. *See id.* 711–15. The Supreme Court's statement of its holding was thus a direct response Plaintiffs' argument; the Court was not implicitly deciding an issue the parties had not briefed or argued, namely whether a country's taking of property from stateless persons violates the law of takings. While *Philipp III* left that question to the lower courts, its explanation of genesis and rationale of the international law of takings supports the conclusion that this body of law does not extend to takings from stateless persons.[21]

Finally, Plaintiffs' brief is remarkable for what it lacks. Under *Helmerich*, Plaintiffs bear the burden of showing that the facts they allege amount to an actual, not merely possible, violation of the law of

[21] Plaintiffs also rely on *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 S. Ct. 1502 (2022). But it only addressed what choice-of-law rule applies in FSIA cases. *Id.* at 1507. It decided nothing about the meaning or scope of the expropriation exception or the law of takings.

takings. *Helmerich II*, 743 F. App'x at 448–53. To do that, they must point to "judgments and opinions of national and international judicial bodies, scholarly writings, and unchallenged governmental pronouncements that undertake to state a rule of international law." *Id.* at 449; *see* Third Restatement §§ 102, 103 (discussing how U.S. courts determine the content of customary international law). They cite no international-law sources stating that the law of takings extends to stateless persons. Even if they could, the authoritative sources discussed above rejecting that proposition alone establish that it cannot be clearly established international law. Plaintiffs have not shown that Germany's alleged taking of property from supposedly stateless persons violated the clearly established law of takings.

4. Plaintiffs have not pled facts establishing that any of the art dealers were stateless in June 1935.

Even if it did violate the law of takings for a state to take property from a stateless person, Plaintiffs would still need to show that under international law the art dealers were stateless in June 1935. Plaintiffs argue they were because Nazi ideology and Nazi persecution of Jews from 1933–1935 severed German Jews' "genuine link" with Germany. Brief 28–33. But under international law, Germany's domestic law of

1935 determines who were German nationals. Under that law, Plaintiffs concede the art dealers were German.

Plaintiffs' argument that the art dealers were stateless rests on their mischaracterization of the international law of nationality. The art dealers' nationality is not determined by looking to the "totality of the circumstances" to determine whether they have a "genuine link" with Germany. Brief 22–24. It is determined by the actual German law of 1935. *Comparelli*, 891 F.3d at 1321.[22]

On that score, there is no dispute: As one of SPK's German-law experts (Dr. Thiessen) explained below, the German law of nationality was the same in June 1935 as it was before the Nazi takeover, so no Nazi law could have stripped the art dealers of the German nationality Plaintiffs recognize they had before 1933. JA1057–62.[23] In September

[22] The 1954 Convention Relating to the Status of Stateless Persons likewise defines statelessness in terms of domestic legal status. Convention Relating to the Status of Stateless Persons art. 1, ¶ 1, Sept. 28, 1954, 360 U.N.T.S. 117 ("[T]he term 'stateless person' means a person who is not considered as a national by any State under the operation of its law."). The United States, like more than half the world's nations, has not ratified this convention.

[23] The sole exception was a 1933 law revoking nationality for certain former Eastern European Jews who had recently become German

1935—*after* the sale of the Welfenschatz—the Nazis enacted the so-called Nuremberg laws, which discriminated against Jewish Germans by depriving them of many civil rights. JA1062–64. But even those laws did not strip Jews of German nationality. *Id.*; *accord* United Nations, *A Study of Statelessness* 123–24 (1949) (explaining that it was not until December 1941—six years after the sale of the Welfenschatz and after the art dealers had left Germany—that Nazi Germany enacted laws systematically depriving Jews of German nationality). Plaintiffs never contested Dr. Thiessen's summary of German nationality law or his opinion that the art dealers were German nationals in June 1935 under German law. JA1094. They do not do so on appeal. Brief 30–31 (recognizing that Nazi Germany had not stripped the art dealers of German nationality by June 1935). There is thus no dispute that under German law in 1935, the art dealers were German nationals.

Rather than addressing German law, Plaintiffs contend this Court can ignore it and treat the art dealers as "stateless" due to Nazi discrimination against and persecution of Jewish Germans in 1933–35.

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nationals. JA1060–61; JA1144–45. Plaintiffs do not contend that any of the art dealers lost German citizenship or nationality under that law.

They cite statements of various Nazi officials that German Jews could not be true German citizens or nationals. Brief 28–30. But nationality is controlled by a state's actual law, not by the ideology of its ruling party or the statements of its leaders. While Germany's grave mistreatment of its Jewish nationals in the early years of the Nazi era is reprehensible, Plaintiffs cite absolutely no international-law authority establishing that a state's discrimination against or mistreatment of its nationals creates an exception to the domestic-takings rule. *See Helmerich II*, 743 F. App'x at 449 (requiring plaintiffs to show the existence of an exception to the domestic-takings rule through persuasive evidence of customary international law); Third Restatement §§ 102, 103.

Ultimately, Plaintiffs' argument that Nazi discrimination against German Jews from 1933–35 makes the domestic-takings rule inapplicable is a backdoor effort to revive the unanimously-repudiated *Simon* decision through new words. As *Philipp III* recognized, the expropriation exception was enacted to combat foreign nations' (particularly communist states') expropriation of American-owned property; it was not an "all-purpose jurisdictional hook for adjudicating

human rights violations" around the world. *Philipp III*, 141 S. Ct. at 713. Were U.S. courts to treat it that way, the United States would itself be violating customary international law. *Id.* (recognizing that *Simon* violated the International Court of Justice's decision in *Jurisdictional Immunities of the State (Ger. v. It.)*, Judgment, 2012 I.C.J. 99, 139 (Feb. 3)). Finally, such an approach departs from basic rules regarding the extraterritorial reach of U.S. law, injecting U.S. courts into disputes with little connection to this country. *Id.* at 714. Plaintiffs' argument that Germany's mistreatment of its own nationals allows U.S. courts to disregard their German nationality would resurrect the same problems that led the Court to unanimously reject *Simon*. And it would do so without a shred of legal support for this approach under the international law of takings.

Germany is unfortunately not the only country with a history of denying its own nationals basic civil rights through discriminatory laws. "As a Nation, we would be surprised—and might even initiate reciprocal action—if a court in Germany adjudicated claims by Americans that they were entitled to hundreds of millions of dollars because of human rights violations committed by the United States

Government years ago." *Id.* at 714. Endorsing the broad statelessness exception to the domestic-takings rule that Plaintiffs advocate here would do exactly that. This Court should not disregard the Supreme Court's clear holding in *Philipp III* by creating out of whole cloth a new exception to the domestic-takings rule without any precedent in the international law of takings.

III. The District Court properly denied Plaintiffs leave to amend their complaint to raise futile and forfeited theories.

Plaintiffs also challenge the District Court's earlier decision denying them leave to amend their complaint. *See* JA878–95. That issue is doubly mooted by the District Court's decision on SPK's motion to dismiss: No amendment could revive Plaintiffs' forfeited arguments. *See, e.g.*, *Mowrer v. U.S. Dep't of Transportation*, 14 F.4th 723, 733 (D.C. Cir. 2021) (concluding that district court properly denied leave to amend to raise a waived theory); *Kelley v. O'Malley*, 787 F. App'x 102, 107 n.7 (3d Cir. 2019) (noting that abandoned arguments "cannot be recovered through amendments to the complaint after remand"). And none of Plaintiffs' proposed amendments would have made a difference to the outcome of SPK's motion to dismiss: Many proposed amendments

(*e.g.*, JA765, 795–96, 806) were legal conclusions, not entitled to the presumption of truth. The rest simply expanded Plaintiffs' allegations about Nazi ideology (*e.g.*, JA750–51, 756, 769, 772–74, 776–79), allegations that do not matter, because the art dealers' nationality is controlled by German law. *See infra* at 58–63. Simply put, Plaintiffs' motion suffered from a fatal Catch-22: If their proposed amendments aided them on the merits in opposition to SPK's motion to dismiss, then those proposed allegations necessarily went beyond what Plaintiffs had already alleged and were not preserved. But if those amendments made no difference, then the denial of leave to amend was harmless, because SPK's motion would have been granted regardless.

Plaintiffs' remaining arguments provide no grounds to find the District Court abused its discretion by denying leave to amend. *See, e.g.*, *Bode & Grenier, LLP v. Knight*, 808 F.3d 852, 860 (D.C. Cir. 2015) ("We review the denial [of leave to amend] under an abuse of discretion standard."). Plaintiffs argue that the mandate did not prevent them from amending their complaint because the Supreme Court did not expressly address the possibility of amendment. Brief 51–52. But this Court directed the District Court to decide whether Plaintiffs had

"adequately preserved" their arguments "in the District Court." *Philipp IV*, 839 F. App'x at 574. That instruction would make no sense if, as Plaintiffs contend, they could amend their complaint to introduce new allegations or theories, preserved or not. *See supra* at 26–39.

The District Court's denial of leave to amend was also fully supported by Rule 15. Plaintiffs waited far too long to seek leave to amend. All the facts they sought to add with their proposed complaint are decades old; they knew them long before they sued. And they knew, or should have known, that those facts could be relevant in October 2015, when SPK raised the domestic-takings rule in its first motion to dismiss. In response to that motion, Plaintiffs *did* amend their complaint, but they did not add the alleged facts they sought to introduce many years later with their proposed complaint. Waiting until the Supreme Court rejected their preferred legal theory more than five years later was too late. *See*, *e.g.*, *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247–48 (D.C. Cir. 1987) (affirming denial of leave to amend when plaintiff could have raised allegations years earlier); *Frappier v. Countrywide Home Loans, Inc.*, 750 F.3d 91, 95–96 (1st Cir. 2014) (same). Second, Plaintiffs' delay is

prejudicial. It forced SPK to spend years litigating this case all the way to the Supreme Court on Plaintiffs' *Simon*-based theory, only for Plaintiffs to then try to revive the case with allegations they could have made years earlier. *See Perrian v. O'Grady*, 958 F.2d 192, 195 (7th Cir. 1992) (recognizing that the burden on courts of letting parties amend complaints after substantial litigation justifies denial of leave). Finally, Plaintiffs' allegations are futile, because none of them makes a difference to SPK's motion to dismiss. *See, e.g.*, *Foman v. Davis*, 371 U.S. 178, 182 (1962) (recognizing that leave to amend can be denied when the amendment is futile). The District Court did not abuse its discretion when it denied Plaintiffs leave to amend their complaint again.

CONCLUSION

The Court should affirm the dismissal of the Second Amended Complaint.

Dated: December 28, 2022

Respectfully submitted,

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Dated: December 28, 2022

By: /s/ *Jonathan M. Freiman*
Jonathan M. Freiman

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2022, I have caused a copy of the foregoing to be served on the following counsel of record through the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By: /s/ *Jonathan M. Freiman*
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