ORAL ARGUMENT NOT YET SCHEDULED

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

No. 22-7126

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

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

REPLY BRIEF FOR APPELLANTS

January 18, 2023

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INTRODUCTION

There is an ironic symmetry between the brief filed by Defendant-Appellee Stiftung Preußischer Kulturbesitz (the "Prussian Cultural Heritage Foundation"; hereinafter, the "Prussian Foundation" or "SPK") in this appeal, and the one it filed in this Court in 2017 in its prior appeal from the District Court's 2017 denial of its motion to dismiss. Specifically, having failed to persuade the Supreme Court in 2021 to dismiss the case—just as the Prussian Foundation failed to convince the District Court in 2017 to dismiss the case—the Prussian Foundation nonetheless declares that it *did* win and that Plaintiffs-Appellants Alan Philipp ("Philipp"), Gerald G. Stiebel ("Stiebel"), and Jed R. Leiber ("Leiber," together with Philipp and Stiebel, the "Plaintiffs") may not even be heard.

The simple truth, however, is that the Prussian Foundation won a battle in the Supreme Court but did not notice that it lost the war. Rather than end the Plaintiffs' case, or hold that forced sales of art are never takings in violation of international law, or that Germany is free from responsibility for its organized property theft (all of which the Prussian Foundation requested), the Supreme Court remanded the case for consideration of a specific substantive question: whether the art dealer consortium members (neither their companies, nor a fictional collective corporation on whose existence the Prussian Foundation's continues to insist) were *not* German nationals, and whether that issue was adequately preserved. The

Supreme Court did not remand to determine if the victims were *foreign* nationals, but rather whether they were *not* German nationals. The answer to that question must be significant, or the remand would serve no purpose. The Supreme Court does not remand cases for no reason. In other words, if the victims were not German nationals, there is jurisdiction over this case pursuant to the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(3).

If the Prussian Foundation had won this case in the Supreme Court, then the Prussian Foundation would have won this case in the Supreme Court and this further proceeding would not exist. Yet here the parties are. The Prussian Foundation cannot repeat the word "unanimous" enough (twelve times in total), yet it fails to understand that the Supreme Court's repudiation of the Prussian Foundation's arguments that the case should have ended instantly and that there was no taking at all *was equally unanimous* and this remand proceeded in precisely the fashion that Plaintiffs argued it should if *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016) fell. In any event, the Prussian Foundation's punditry about the opinion's unanimity is irrelevant: an opinion of the Supreme Court is the opinion of the Supreme Court, whether five or nine Justices join in it. The Prussian Foundation has lost sight of *what* the Supreme Court decided, rather than the margin by which it decided.

In its preservation argument, the Prussian Foundation also continues to fail to understand the difference between a jurisdictional theory and the application of the facts alleged to the jurisdiction asserted. Plaintiffs' jurisdictional theory has been the same since the case was filed in 2015: the forced sale of the Welfenschatz concerns rights in property taken in violation of international law within the meaning of Section 1605(a)(3). A new jurisdictional theory would be to assert the implied waiver exception to sovereign immunity of 28 U.S.C. § 1605(a)(1), or the non-commercial torts exception of 28 U.S.C. § 1605(a)(5). Plaintiffs have done nothing of the sort. An example of an argument that has been waived in this case is the Prussian Foundation's tactical choice not to challenge personal jurisdiction, or to appeal its failed *forum non conveniens* argument, or Plaintiffs' decision not to defend the initial assertion the commercial activity exception to sovereign immunity of 28 U.S.C. § 1605(a)(3). By contrast, Plaintiffs' explicit briefing that "the domestic takings rule does not apply because. . . ." is obviously not a failure to respond to the Prussian Foundation's domestic takings argument. The Prussian Foundation's insistence that waiver occurred makes no sense.

Finally, the opinion of the District Court must be vacated and remanded because the proceedings below were hopelessly compromised by the manner in which the court denied Plaintiffs' request for leave to amend the First Amended Complaint. *See Philipp v. Federal Republic of Germany*, Civil Action No. 15-266

(CKK), ECF No. 52, 2021 WL 3144958 (D.D.C. Jul. 26, 2021) (the "Amendment Order"). Although the Prussian Foundation mocked that Plaintiffs "chose not to" respond to the domestic takings argument (a falsehood) (JA845), it was the Prussian Foundation that "chose" not to submit any expert opinion on the law of nationality until seven years into this case—after it had successfully persuaded the District Court that no new opinions could be filed, and after Plaintiffs had no further opportunity to respond. The Prussian Foundation concedes the point in its opposition by failing to counter the collateral estoppel argument at all, and its meager defense that one of the opinions responded to Plaintiffs' argument ignores that the assertion of the domestic takings rule (which requires, by definition, a conclusion about the parties' nationality) was *Defendant's* argument, one that it first raised in 2015. At the very least the case must be remanded for a fair process in which *both* sides have the opportunity to present expert testimony responsive to the Supreme Court's instructions.

ARGUMENT

I. The Victims of the Forced Sale of the Welfenschatz Were not German Nationals.

A. The answer to the nationality question posed by the remand must have significance to the jurisdictional analysis.

The Supreme Court remand requires the lower courts to determine whether "the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction."

F.R.G. v. Philipp, 141 S.Ct. 703, 715-16 (2021) ("*Philipp*"). What, then, if the answer is that Consortium members were not German nationals? According to the Prussian Foundation, the Supreme Court posed this question for no reason at all, because it would not matter unless the victims had acquired a new affirmative nationality without which they would be stateless, and (according to the Prussian Foundation) international law is indifferent as to stateless victims. Yet of course the Supreme Court issued a question about the absence of German nationality, not the acquisition of *another* nationality. The Supreme Court chooses its words carefully, so the answer to its question must matter to the outcome of this case.

It is not until page 50 of its 66-page brief that the Prussian Foundation addresses the *first* relevant query: how should the Court determinate nationality to answer the question that the Supreme Court posed? The Prussian Foundation attempts to waive away the *Nottebohm Case*, claiming it has been "frequently criticized" and "not accepted." Appellee Brief at 50 (citing *Nottebohm (Liech. v. Guat), Judgment,* 49 AM. J. INT'L L. 396 (1955) ("*Nottebohm Case*")). In fact, *it is the very law of nationality of the FSIA* as enacted by Congress. In this very case, the Supreme Court noted its "consistent practice of interpreting the FSIA in keeping with 'international law at the time of the FSIA's enactment' and looking to the contemporary Restatement for guidance." *Philipp*, 141 S.Ct. at 712, quoting *Permanent Mission of India to United Nations v. City of New York*, 551 U. S. 193,

199-200 (2007). That "contemporary Restatement" as of 1976 was the Restatement (Second) of the Foreign Relations Law of the United States (the "Second Restatement"). *Id.*, citing the Second Restatement at § 192. Section 26 of the Second Restatement is fatal to the Prussian Foundation's efforts to ignore the *Nottebohm Case*. In fact, the Second Restatement confirms that the "genuine link" standard explained in the *Nottebohm Case* (and to which the Prussian Foundation has no response) *is* the law of the United States when it comes to the expropriation exception:

> d. Genuine link. **The requirement of a genuine link has its basis in the logical result of the decision of the International Court of Justice in the Nottebohm Case**, discussed in the Reporters' Note to this Section. What constitutes a genuine link depends both on the factual circumstances under which a state confers its nationality and the purposes for which the link of nationality is asserted. The nature of **the genuine link requirement** has not been determined by decisions since the Nottebohm Case, although it is clear from that case that **a variety of factors such as** consent, birth, marriage, other family ties, voting, **allegiance, and economic interests would be relevant**. The determination may be different if asserted for the purpose of jurisdiction rather than if asserted for the purpose of protection.

Second Restatement at § 26 (emphasis added).[1]

[1] Upon review, Plaintiffs can understand the Prussian Foundation's confusion about the syntax of their citation to Section 26 of the Second Restatement. The antecedent quote in Plaintiffs' brief was meant to connect the Restatement to other principles of law as enunciated by the courts. The real point is that the full text of Section 26 set forth here provides the definitive answer.

The Prussian Foundation attempts to use the Third Restatement to justify its giddy disdain for stateless victims, and it claims the right to do so because the Supreme Court cited the Third Restatement in *Philipp*. *Philipp*, 141 S.Ct. at 710 (citing Restatement (Third) of Foreign Relations Law of the United States pt. VII, Introductory Note, at 144-145). Once again, this misunderstands the Supreme Court's words. There is simply no question that the Second Restatement was the "contemporaneous" Restatement at the time of the FSIA. *Philipp*, 141 S.Ct. at 712. In *Philipp*, the Supreme Court cited to the Third Restatement (from ten years after the FSIA was enacted) in reference to the contours of genocide in the context of human rights law. *Id.* at 710 ("the United Nations Universal Declaration of Human Rights and Convention on the Prevention of Genocide became part of a growing body of human rights law that made "how a state treats individual human beings . . . a matter of international concern."). The Supreme Court did not use the Third Restatement to interpret the FSIA's law of expropriation. To the contrary: the Supreme Court held that whatever the reach of international human rights law, it may not be used to determine whether a property taking violates the international of expropriations. In other words, the Third Restatement describes what the law of the FSIA is not.

Thus, the Supreme Court's citation to the Third Restatement in discussing the historic development of international human rights law does not contradict the

Supreme Court's repeated holding that the Second Restatement is the relevant touchstone to understanding the FSIA. If it were otherwise, later explicit pronouncements by Congress about the international scope of the Nazis art theft would have defined the FSIA, but the Supreme Court held that those laws do not bear on the FSIA's meaning. *Id.* at 715, citing as inapplicable the Holocaust Victims Redress Act of 1998, 112 Stat. 15; the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act), 130 Stat. 1524; and the Justice for Uncompensated Survivors Today (JUST) Act of 2017, Pub. L. 115-171, 132 Stat. 1288.

Rather than confront this, the Prussian Foundation returns to where it began in its first motion to dismiss in 2015: trying to litigate degrees of Nazi persecution. It tries, yet again, to minimize the effect that Hitler's ascension to power had from its inception—which everyone except Germany and the Prussian Foundation recognizes to be beyond dispute. Like the District Court's blithe winnowing of the Holocaust to a single sentence (JA1150), the Prussian Foundation effectively suggests that the Nazis were an incidental part of law and government in 1935. Appellee's Brief at 61 ("nationality is controlled by a state's actual law, not by the ideology of its ruling party *or the statements of its leaders*") (emphasis added). Reducing the explicit, detailed, and consistently enforced ideology of Adolf Hitler to the "statements of [Germany's] leaders," as though this were litigation over a

parliamentary debate in a 21st century democracy, is at odds with history and logic.

Oddly trying to argue that Plaintiffs never even stated a claim for a taking (*See* Appellee's Brief at 40-41, a question decided six years ago and not before this Court), the Prussian Foundation overlooks that the Supreme Court disagreed—unanimously, as the Prussian Foundation is so fond of saying:

> **According to the heirs**, this clarification of the expropriation exception [the 2016 Foreign Cultural Exchange Jurisdictional Immunity Clarification Act] shows that **Congress anticipated Nazi-era claims could be adjudicated** by way of that exception. **We agree with the heirs**, but only to a limited extent. **Claims concerning Nazi-era art takings could be brought under the expropriation exception** where the claims involve the taking of a foreign national's property. *See, e.g.*, *Altmann*, 541 U.S. at 680-682 (claim concerning Austrian taking of Czechoslovakian national's art brought under the expropriation exception).

Philipp, 141 S.Ct. at 715 (emphasis added).

Finally, the transcript of the Supreme Court oral argument—which the Supreme Court cited in the eventual opinion itself—bears out the conclusion that even overturning *Simon* would not foreclose this case proceeding. Oral Argument, *Federal Republic of Germany v. Philipp* (No 19-351) (Dec. 7, 2020). Justice Sotomayor asked Plaintiffs' counsel what should happen if the Supreme Court overruled *Simon*'s holding that genocide is a sufficient violation of international law to satisfy the FSIA's expropriation exception. *Id.* at 67. Plaintiffs' counsel responded that what would be necessary would be:

> **a remand to determine if**, under a relatively unaddressed part of the case in terms of the scope of nationality, a remand to answer that question, whether in this case, as amici have ably demonstrated, that **German governmental treatment of German Jews in the 1930s would transgress that nationality line**.

Id. at 68. This framework relies upon the understanding that takings from stateless persons are subject to the expropriation exception; otherwise, the only question for remand would be whether another country accepted German Jews as its own.

In the end, of course, the Supreme Court determined—as Justice Sotomayor said—that the Prussian Foundation's petition was "right that customary international law does not apply to the takings of nationals. That's the rule we set." *Id.* at 67. And what did the Supreme Court do then? It remanded to address whether the Consortium members retained German nationality—precisely as Plaintiffs contended at oral argument must be the next step. It did not remand to determine if the victims had acquired some other nationality; it remanded to determine if they *lacked* Germany nationality (which would make them stateless). Why would the Supreme Court have remanded if a stateless victim lost protection under the law of takings? The remand would be a purely advisory exercise.

As if that were not evidence enough, the Supreme Court's proceedings *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 1502 (2022) prove the point. That remand cannot be squared with the Prussian Foundation's unwavering position that a Jew born in Germany could never lose German

nationality no matter the excesses of Nazi persecution, because Lily Cassirer was either a German national or a stateless person[2] without a new nationality. Here again the Prussian Foundation tries to bury the issue in a footnote (Appellee's Brief at 57, n.21), stating only that the *Cassirer* opinion was about choice of law, not jurisdiction. Of course it was; Plaintiffs have already pointed that out. But that simply exposes that the Prussian Foundation's position depends on the belief that in the two highest-profile cases about Nazi-looted art in a generation, the Supreme Court twice remanded a case for further proceedings even though there was no

[2] Lily Cassirer sold the painting under duress and after losing her citizenship, and she fled Germany in 1939. *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022-23 (9th Cir. 2010). The United States has agreed, throughout that case, that the taking there violated international law. *See, e.g.*, Brief for the United States as *Amicus Curiae*, *Kingdom of Spain v. Est. of Claude Cassirer*, 564 U.S. 1037 (2011). The United States also agreed—in that case last year—that the Consortium members' German nationality was an open question. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 20-1566, 2021 WL 5513717 at *5, n.2 (Nov. 2021) ("The Court left open the argument that the plaintiffs in that case were not German nationals at the time of the taking and therefore that the expropriation of their property did violate international law."). This is notable because in recommending that the Supreme Court grant certiorari in this case in 2020, the United States initially adopted the Prussian Foundation's contention that Plaintiffs had failed to assert that the Consortium members were not German. *See* Brief for the United States as *Amicus Curiae*, *Federal Republic of Germany v. Philipp*, No. 19-351, 2020 WL 2840336 at 14 (May 26, 2020) ("But respondents have not previously disputed that the facts alleged would constitute a domestic taking," citing only the Prussian Foundation's brief for that proposition). Yet that inaccurate assertion was, to the credit of the United States, dropped in its later merits brief after Plaintiffs refuted it in their supplemental brief at the petition stage. *See generally* Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Federal Republic of Germany v. Philipp*, No. 19-351, 2020 WL 5535982 (Sep. 11, 2020).

hope of jurisdiction because, under the Prussian Foundation's view, the victim was a stateless person with no redress. The Supreme Court's opinions speak for themselves, and they cannot be read to compel the lower courts to engage in a futile exercise. If the Consortium members were not German nationals (which they were not) and if Plaintiffs preserved the issue (they did), then there is jurisdiction here. The case must now proceed.

The Prussian Foundation's attack on Saemy Rosenberg's and Isaac Rosenbaum's Dutch nationality (since acquisition of Dutch nationality would end the inquiry, even under the Prussian Foundation's view of the law) is almost as half-hearted as the District Court's analysis in the last words of the Memorandum Opinion dated July 26, 2021. *Philipp v. Federal Republic of Germany*, Civil Action No. 15-266 (CKK), ECF No. 72, WL 3681348 (D.D.C. Aug. 25, 2022) (the "Dismissal Order"). Since the Prussian Foundation has no answer for the "genuine link" standard that would compel the conclusion that all connection to Germany had been severed by emigrating as a result of Nazi policy about nationality, the Prussian Foundation tries to split hairs about the definition of "emigrate." Appellee's Brief at 52 (noting that "emigrate" can include the intention to retain nationality). That is true as far as it goes, but the "genuine link" analysis is how to determine the answer. The Prussian Foundation does not even try, pointing to the analysis of Dr. Evelien Campfens, who has no demonstrated knowledge at all of

Dutch law as of 1935. This semantic diversion proves that no set of factual allegations will ever be enough for the Prussian Foundation.

1. The new evidence that the Prussian Foundation submitted after insisting the record was closed renders the decision irredeemable.

The Prussian Foundation also fails to respond to the Plaintiffs' collateral estoppel argument (other than misstating it as "because SPK argued that Plaintiffs forfeited their jurisdictional arguments," Appellee's Brief at 43). That is not remotely what Plaintiffs argued: the Prussian Foundation is estopped from submitting new opinions because it successfully insisted that no new opinions could be submitted. *See* Appellant's Brief at 36-37. Should Plaintiffs have defied the District Court's[3] then-most recent ruling and submitted new expert opinions anyway, expert opinions the Prussian Foundation had insisted it would be unfair to entertain? The Prussian Foundation drops a footnote to suggest it is free to provide evidence of foreign law outside the pleadings, but that is not what it said in crying foul about the proposed amended pleadings: that the remand must be decided "based on the *operative complaint* and the arguments found in the parties' briefs in earlier stages of the case"). JA861 (emphasis in original).[4] Then, the Prussian

[3] This is the District Court that, incredibly, had chilled Plaintiffs advocacy by actually entertaining the idea that Plaintiffs' proposed housekeeping amendment was not in good faith; it would not have countenanced unpermitted expert opinions.

[4] The Prussian Foundation's view that the law of preservation is "waiver for thee, but not for me" is nothing new in this case, as discussed further below. In its 2017

Foundation did not submit that remand should be decided based on new expert opinions, which the Prussian Foundation described thusly: "[R]esponding to [additional allegations] will require new expert opinions and substantial legal and factual investigations," which the District Court paraphrased approvingly as the terrible prospect of prejudice from "requir[ing] new expert opinions[.]" Dismissal Order at 17, JA894.

The Prussian Foundation has no factual excuse for the new opinions of Dr. Thiessen and Dr. Armbrüster, either, and it suggests instead that Dr. Campfens' opinion was to rebut Plaintiffs' "new" argument about Dutch nationality. That too is not what Plaintiffs pointed out in their opening brief, or an accurate description of the sequence. Plaintiffs made clear in their motion for leave to amend in April of 2021 that Dutch nationality was one of the reasons the case should survive. "Both [Rosenberg and Rosenbaum] were domiciled in Amsterdam well before the transaction and, as such, were Dutch nationals under the relevant international standard at the time their property was taken." JA663-64. Yet only ten months later, after Plaintiffs had their one opportunity in opposing the motion to dismiss, did the Prussian Foundation reveal Dr. Campfens' opinion. JA1120. The Prussian

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appeal to this Court, the Prussian Foundation submitted a "Supplement of Sources to Brief for Appellants" consisting entirely of pre-existing documents that the Prussian Foundation chose not to submit to the District Court in moving to dismiss in 2016. *See Philipp v. Federal Republic of Germany, et al.*, Case No. 17-7064, Document #1707183 (Dec. 1, 2017).

Foundation knew the argument was coming in April of the prior year, it claimed prejudice from the very thing it already had decided to do, and it sprang the document on Plaintiffs when there were no opportunities left to respond (the District Court has never held an oral argument in this case).

The use of the Armbrüster[5] and Thiessen opinions is even worse. As addressed below, the Prussian Foundation has pretended since 2017 that everything that could be said about the domestic takings rule should have been said in 2016. In none of their motion papers before (this appeal or the earlier one) did the Prussian Foundation attempt to articulate the standard for nationality. Why not? The domestic takings rule, which depends on nationality, was the Prussian Foundation's argument in the first instance. Only on remand did it begin to offer expert opinion on this point, expert opinion that it previously decried would be particularly unfair to have to obtain. So what possible excuse does the Prussian

[5] Dr. Armbrüster continues to advance the failed *factual* assertion that the Consortium was a separate German entity. This conclusion has no basis in fact, it is pure conjecture. The Prussian Foundation also suggests that Plaintiffs have never alleged the seizure of their individual art dealer firms. That is demonstrably, puzzlingly, false. In fact, the forced liquidation of those firms subsequent to the forced sale of the Welfenschatz (and subsequent to the Reich Citizenship Laws and the pretextual stripping of the citizenship of some of the heirs) was alleged explicitly, and is a property seizure that would also justify jurisdiction. JA943-44 (¶ 170). Even the Prussian Foundation would have to concede that at the very least those firms would have had a cause of action for the Welfenschatz seizure that was taken without compensation when the firms were dissolved and seized in 1937 or 1938. *Id.*

Foundation have for new opinions from the same "experts" it has had on the payroll since at least 2015? The Prussian Foundation is the party that asserted the domestic takings rule, yet its motions in 2015 and 2016 are silent on what the legal standard for nationality should be. Yet now, while at once suggesting that Plaintiffs "forfeited" the question, the Dr. Thiessen has suddenly discovered expertise in a nationality law from 1913, or the Reich Citizenship Laws of 1935.

The Prussian Foundation's refusal to respond to the collateral estoppel argument underscores the principal reason Plaintiffs appealed the denial of their motion for leave to amend. The proposed Second Amended Complaint that the District Court refused to accept was never proposed as a change in theory or direction, but the denial of the motion for leave to amend cast a pall over all the proceedings after it. The analysis in the Dismissal Opinion cannot be divorced from the impatience in the Amendment Opinion.

II. The Plaintiffs' Pleadings, Briefing, and Argument Fully Preserved the Question of Nationality.

A. The Plaintiffs' original brief set forth their position on nationality.

The Prussian Foundation acknowledges that the First Amended Complaint set forth the Plaintiffs' position that the Consortium members were deprived of German nationality by 1935. The Prussian Foundation disingenuously claims, however, that the Plaintiffs failed to include this position in their initial *briefing*. This attack relies upon misreading not only the initial brief at issue, but also the

recent appellate brief to which the Prussian Foundation was responding. It is, moreover, a distinction without a difference.

In their 2016 opposition, the Plaintiffs unambiguously asserted that, in Nazi Germany, Jews "were officially no longer considered German." Plaintiffs' Opp. to Defendants' Motion to Dismiss at 9, JA0390. That is, Plaintiff's earliest brief contained precisely the kind of clear statement that the Prussian Foundation now claims it lacked.

The 2016 opposition went further. As the Prussian Foundation concedes, the First Amended Complaint set forth, in great detail, historic facts establishing that the Consortium members were not considered German under the genocidal Nazi regime. Many of these historic facts were repeated—verbatim—in the Plaintiffs' 2016 opposition to the Prussian Foundation's motion to dismiss. *See, e.g.*, *id.* at 7-10, JA388-91. This briefing history was set forth in Plaintiff's opening brief; the Prussian Foundation's argument simply and inexplicably ignores it.

B. The Prussian Foundation urges an unmanageable briefing rule.

The Prussian Foundation contests the idea that waiver doctrine is intended to provide fair notice to the court or the opposing party—which, here, the court and the opposing party had—but it proposes no other basis for that doctrine that justifies an overly strict interpretation. The Federal Rules have a "clear preference . . . to resolve disputes on their merits." *Cohen v. Bd. of Trustees of the Univ. of the*

Dist. of Columbia, 819 F.3d 476, 482 (D.C. Cir. 2016). Here, an overly rigid version of the waiver doctrine would defy that preference, and to serve no countervailing good.

The Prussian Foundation feints that a strict version of the waiver doctrine would serve efficiency, but the opposite is true. When the Prussian Foundation moved to dismiss the case in 2016, the parties did not merely address the domestic takings argument currently at issue. They briefed a wide range of legal issues, including the applicability of the commercial activity exception to the FSIA; whether foreign policy preempted the claims; whether international comity rendered the claims nonjusticiable; whether the case should be dismissed under the doctrine of *forum non conveniens*; and whether the claims were barred by the statute of limitations.

As it was, briefing was extensive; the Prussian Foundation's opening brief was over 70 pages. Under the Prussian Foundation's proposed waiver doctrine, briefing would have been completely unmanageable. For example, previously, the Prussian Foundation succeeded on its argument that the commercial activity exception to the FSIA did not apply. Under the Prussian Foundation's proposed waiver doctrine, the Prussian Foundation should have included every possible alternate basis for that same result, just in case the precedent it relied upon was overturned. Similarly, Plaintiffs successfully opposed the motion's *forum non*

conveniens, international comity, and foreign relations arguments based on law that controlled—like *Simon* did at the time. The Prussian Foundation's position would have required the Plaintiffs—just in case—to ignore controlling precedent on those issues and make alternative arguments that would have been, by definition, outside that controlling law. A brief that addressed every possible change in the governing law, regarding every claimed basis for dismissal, would have been infinite. The District Court would then have to have addressed each permutation, yielding reems of dicta, or constrained its decision to what was essential, rendering the excess briefing simply a waste. Either option is procedural madness and defeats the "efficiency" that the Prussian Foundation claims to serve.

Nor is there any question that, here, the law did change. The Prussian Foundation implies that Plaintiffs' reliance on *Simon* was some sort of risky choice on an outlier case that cannot really be defended because *Simon* was decided after this case was filed. This contention fails for two reasons. First, as Plaintiffs noted in their opening brief, this case is pleaded as a classic expropriation consistent with the Second Restatement. Plaintiffs were not "saved" by the decision in *Simon*; *Simon* confirmed that Plaintiffs' allegations were more than sufficient under existing law.

Second, there is simply no question the *Philipp's* overruling of *Simon* changed the law, before which arguing about nationality was unnecessary. A

related case from 2020 proves the point. In *Berg v. Kingdom of the Neth.*, a district court in the Fourth Circuit succinctly distilled the state of understanding just before this case changed it. Civil Action No.: 2:18-cv-3123-BHH, 2020 U.S. Dist. LEXIS 84489 (D.S.C. Mar. 6, 2020). The *Berg* plaintiffs were the heirs of Firma D. Katz in the Netherlands, which owned and operated three art galleries. After the German invasion of the Netherlands in May 1940, the Katz firm's owners were forced to sell the company's inventory to Nazi agents—just as the Consortium members were the victim of a forced sale of the Welfenschatz to Prussia's agents. The *Berg* plaintiffs sued the Netherlands and various agencies and museums in U.S. District Court for the District of South Carolina in 2018, invoking the expropriation exception. In 2020, the District Court denied that part of the motion the questioning the applicability of the expropriation exception. *Berg* relied on this Court's opinion from 2018 and held that the Katz heirs had made out a case for a taking in violation of international law. *Id.* at *31-33. The Court summed up thusly: "These allegations, considered in the grim context of the Nazis' persecution of Jews during World War II, suffice to show at this juncture that the coerced sale of the Artworks was consistent with the Nazis' pursuit of the Final Solution." *Id.* at *32. The Berg court makes no mention of the nationality or citizenship of the Katz victims at all. Notably, that taking was almost certainly a classic expropriation *not* subject to the domestic takings rule (Dutch victims, German perpetrators). Yet the

District Court did not decide the expropriation exception analysis on that basis; instead, it affirmed that (as of 2020) claims qualified because of the extent of Nazi persecution, not because of the parties' nationality. Ironically, the court dismissed on personal jurisdiction, an argument the Prussian Foundation elected not to make and waived. Fed. R. Civ. P. 12(h)(2). The Prussian Foundation's suggestion that *Philipp* did not change anything is simply wrong.

Finally, if waiver doctrine were as strict as the Prussian Foundation now claims, it could not have made its comity arguments to the Supreme Court. In 2016, the Prussian Foundation argued that the claims were flatly "non-justiciable due to international comity." Motion to Dismiss at 40, JA0298. It argued that "international comity require[d] deference to the [German] advisory commission" that had previously considered the matter (41) and that "international comity require[d] exhausting remedies in Germany" (48). These arguments were rejected—both by the District Court and this Court.

At the Supreme Court, the Prussian Foundation changed its argument. It no longer argued that comity rendered the claims non-justiciable or posed an absolute bar to the case proceeding. Instead, the Prussian Foundation argued that the Supreme Court should determine "whether courts may abstain when . . . suits conflict with international comity." Petition for Writ of Certiorari, *Federal Republic of Germany v. Philipp* (No. 19-351) at 6 (Sep. 16, 2019).

As the Prussian Foundation might have said, it "never argued in the alternative" that comity was a discretionary doctrine. Brief for Appellee at 31. "The words central to [this] argument[]"—discretion and abstention— "are found nowhere in [its] prior briefs" to the District Court. *Id.* at 32. Yet the Prussian Foundation still made this argument on appeal, and the Supreme Court still granted certiorari. When it suits the Prussian Foundation, it acknowledges that appellate arguments are not restricted to verbatim recitations of statements made below.

The effect of this was not incidental. In a case where the Prussian Foundation continues to pounce when it claims Plaintiffs have failed to use the precise words of the Prussian Foundation's choosing, Plaintiffs were forced to contend with a merits argument in the Supreme Court (and half their brief) that had never—not once—been articulated before. For the Prussian Foundation to suggest that an issue that has been joined since the case began is not a close call. It is an outrage.

C. The Prussian Foundation supports its draconian rule with inapposite and nonbinding cases.

The SPK cites only one case from this circuit in which an issue was found not preserved following remand. *American Trucking Ass'ns, Inc. v. E.P.A.* addressed challenges to certain national ambient air quality standards (NAAQS). 283 F.3d 355 (D.C. Cir. 2002). Following remand, the petitioners were not allowed to raise an entirely new challenge to one of the EPA standards at issue that

"appear[ed] nowhere" in previous briefs. *Id.* at 371. Here, as discussed above, the fact that the Consortium members had lost their German nationality pervaded previous filings. Moreover, the petitioners in *American Trucking* had not reached the Supreme Court after prevailing—at every previous stage—based on binding circuit precedent. To the contrary: the petitioners had argued, in part, "that the court should depart from" circuit precedent; both the Court of Appeals and the Supreme Court rejected the attack on precedent. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 463-65 (2001).

The SPK turns to a number of distinguishable cases from other circuits. None of these cases involve a party that made a correct and sufficient argument under binding precedent, only for that Supreme Court to reverse that very precedent. None of these cases, therefore, can provide even persuasive guidance about the situation here: litigants, trial court, and court of appeals all bound by precedent until the moment of the Supreme Court's reversal.

Two of these cases involve unsuccessful litigants that sought to raise, or revive, completely different theories of liability after adverse decisions. In *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, a law school that had been sued by a religious organization prevailed on summary judgment; the result was upheld on appeal. 561 U.S. 661, 673-74 (2010). At the Supreme Court, the twice-unsuccessful plaintiff raised a new discrimination

argument for the first time (*id.* at 697); on remand, this new argument was found waived. *Christian Legal Soc. Chapter of Univ. of California v. Wu*, 626 F.3d 483, 488 (9th Cir. 2010). Similarly, in *Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, a party that chose to pursue its conspiracy allegations throughout the appellate process was not, when unsuccessful, permitted to "turn back the clock and resuscitate the monopolization and attempt to monopolize theories that it earlier chose not to pursue." 974 F.2d 502, 505 (4th Cir. 1992). The attempt to introduce an entirely new merits theory cannot fairly be compared to Plaintiffs' increased focus on an alternate response to a specific legal defense after their prior—sufficient—response was no longer available.

The SPK's other cases are similarly inapposite. In *Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, certain plaintiffs appealed a bankruptcy court decision on subject matter jurisdiction grounds. 600 F.3d 135, 144-145 (2d Cir. 2000). Following, remand, the plaintiffs were not permitted to make a new and separate argument "that they were not adequately represented at [certain] proceedings"—a completely separate issue, and not based on any change in the relevant law. *Id.* at 147. In *Gibson v. Brown*, the plaintiffs set forth a novel argument (regarding a Title VII exhaustion requirement)—the precise inverse of the situation here. *See Gibson v. Brown*, 137 F.3d 992, 995 (7th Cir. 1998). That argument failed at the district court, succeeded at the court of appeals, and failed

again at the Supreme Court. *Id.* at 998; *Gibson v. West*, 201 F.3d 990, 992 (7th Cir. 2000). Following remand, an alternate argument was found waived. *Id.* at 992.

CONCLUSION

For the foregoing reasons and those previously stated, Plaintiffs respectfully request that the Court REVERSE or VACATE the ruling of the District Court.

January 18, 2023

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2023, a copy of the foregoing Reply Brief for Appellants was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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