No. 03-13

IN THE
Supreme Court of the United States

THE REPUBLIC OF AUSTRIA, a foreign state,
and the AUSTRIAN GALLERY,

Petitioners,

v.

MARIA V. ALTMANN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the expropriation clause of the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3) support the exercise of federal jurisdiction over the Republic of Austria as to artworks looted in violation of international law during World War II?

2. Is there an issue of whether a foreign state is a person under the Due Process Clause of the Fifth Amendment of the Constitution, where a court exercises personal jurisdiction over that state after finding that both the statutory requirements of the FSIA and the due process "minimum contacts" test are satisfied?

3. Is exhaustion of remedies in the foreign state a prerequisite for subject matter jurisdiction under the expropriation clause of the FSIA?

4. Is the promotion of a national museum a commercial activity under the expropriation clause of the FSIA?

5. When both a foreign state and its agency or instrumentality are sued in the same action, may venue lie in the jurisdiction where the agency is doing business pursuant to 28 U.S.C. § 1391(f)(3), or must the action be brought in the District of Columbia pursuant to 28 U.S.C. § 1391(f)(4)?

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STATEMENT OF THE CASE

This action was brought by Respondent Maria V. Altmann, an 87-year-old American citizen, to recover six paintings by Gustav Klimt confiscated from her uncle by the Nazis during World War II. The paintings are in the possession of Petitioner Republic of Austria ("Austria"), a foreign state, and housed in the museum operated by Petitioner Austrian Gallery ("the Gallery"), an agency or instrumentality of Austria (Austria and the Gallery are collectively referred to as "Petitioners"). Following her uncle's death in 1945, Petitioners withheld the paintings from Mrs. Altmann under false pretenses that have only very recently been revealed to her as a result of an investigation conducted by an Austrian journalist.

Petitioners' recitation of the facts of the case is replete with errors, misstatements and misleading half-truths concerning the merits of Mrs. Altmann's complaint. Because most of these are not very material to the legal issues in this Petition, Mrs. Altmann respectfully refers the Court to the factual summaries set forth in the comprehensive opinions of the District Court, *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001) ("*Altmann I*"), and the Ninth Circuit Panel, *Altmann v. Republic of Austria*, 317 F.3d 954, *rhrg. denied and opinion amended*, 327 F.3d 1246 (9th Cir. 2003) ("*Altmann II*"), copies of which are attached to Petitioners' brief as Appendices B and A, respectively, which more accurately reflect the allegations in Mrs. Altmann's complaint.

Contrary to Petitioners' assertions, the centerpiece of Mrs. Altmann's Complaint is *not* the 1923 will of her aunt Adele, but rather the property rights of her uncle Ferdinand Bloch-Bauer, who specifically named Mrs. Altmann as one of his three heirs. It was Ferdinand who owned the Klimt paintings at issue, and it was Ferdinand who was forced to flee into exile as the Nazis, including employees of the Gallery, divided up his estate and looted his valuable artworks. Upon his death in 1945, Ferdinand willed his entire estate to his nieces and nephew. His claims to recovery of the Klimt paintings were an important part of that estate. As the

documents clearly demonstrate, the Petitioners have misrepresented Adele's. The will is and indeed should be a non-issue, a conclusion that the District Court is bound to come to when it hears evidence in this case.[1]

Additionally, Petitioners cannot rely on the purported agreement obtained from Mrs. Altmann's brother's attorney, Dr. Gustav Rinesch, in 1948. The Austrian government has itself recently declared that such post-war agreements are invalid and indefensible. That conclusion is not surprising, because cases such as this one demonstrate that the Petitioners knowingly deceived claimants and improperly extorted artworks from them in the post-war era.

Stripped to its essentials, this case thus concerns Petitioners' complicity in the looting of the artworks, and Petitioners' abject and continuing failure to comply with their

1. Straining credulity, Petitioners purport to rely on the clearly precatory language of Adele's 1923 will: "I kindly ask my husband to bequeath my two portraits and the four landscapes by Gustav Klimt after his death to the Austrian National Gallery in Vienna. . . ." However, under Austrian, as well as American law, such a request is considered entirely precatory and unenforceable. *See In re Estate of Barnhardt*, 226 Cal. App. 2d 289, 301 (1964) (request that daughter donate property to state as museum upon daughter's death held unenforceable). The request is also in contrast with Adele's mandatory language in her other bequests. Indeed, in the probate proceedings after Adele's death in 1925, Ferdinand's lawyer (Mrs. Altmann's father who died in 1938) stated in reference to Adele's request, "they do not have the mandatory quality of a testamentary disposition. It has to be pointed out that the Klimt paintings mentioned are not the property of the testatrix but of her widower." The evidence uncovered to date demonstrates that Petitioners knew that Adele's purported bequest was unenforceable (especially after the events that befell the Bloch-Bauer family during the Nazi period) and nevertheless purposely misled Mrs. Altmann's attorney and extorted a "donation" of the paintings in 1948 in exchange for export permits for other paintings. Mrs. Altmann learned the truth only in 1999, thanks to the work of an Austrian journalist, Hubertus Czernin, who uncovered internal documents demonstrating the fraud that had been perpetrated against her and other Austrian Jewish victims of the Nazis who had attempted in the post-war era to recover their artworks. *See* Hubertus Czernin, *Die Fälschung. Der Fall Bloch-Bauer*, Vol. I-II (Czernin Verlag Vienna 1999); Thomas Trenkler, *Der Fall Rothschild. Chronik einer Enteignung* (Czernin Verlag Vienna 1999).

post-war duties and obligations to return the paintings to their rightful owners. When Petitioners obtained the looted paintings – whether during World War II, shortly after the conclusion of the War, or not until 1988 (as in the case of the *Amalie Zuckerkandl* portrait) – is not material to the jurisdictional issues. Petitioners cannot avoid the simple and inescapable fact that all of the paintings were taken from Mrs. Altmann's uncle in violation of international law, and they are now in the possession of the Petitioners who are wrongfully withholding them from her.

Petitioners' recitation of the "facts" with regard to the application of the recent Austrian restitution law and Mrs. Altmann's efforts to pursue a remedy in Austria is also highly misleading. First, there were certainly no formal "proceedings" before the art restitution commission created to advise the Austrian government under the 1998 art restitution law, nor did Appellants permit any formal "claims" to be made by Mrs. Altmann. In fact, all of the efforts by Mrs. Altmann to participate before the commission were thwarted. As alleged quite clearly in the Complaint, the entire commission proceeding was a sham and the outcome was politically pre-ordained.

Similarly, Mrs. Altmann was denied an opportunity to litigate the matter in Austria. Petitioners concede that the required statutory court fees of almost $2 million far exceed Mrs. Altmann's assets. Upon Mrs. Altmann's application, an Austrian court reduced the fees but ruled that she had to pay her entire life savings of $200,000, holding that "savings accounts may not be spared to the disadvantage of the general public." Not satisfied with this harsh result, Petitioners filed an appeal to reverse the decision in its entirety. Petitioners sought to raise the fees back to the higher statutory amount (almost $2 million) and to include in the fees the value of artworks that had not yet even been returned to Mrs. Altmann when she made her initial application. To this day, Petitioners maintain that Mrs. Altmann must deposit almost $2 million in court fees, far in excess of her assets, in order to litigate this matter in Austria. Austria also refused to waive or extend the

statute of limitations, even though the new 1998 art restitution law directs the government to return artworks notwithstanding that purported defense. Having no other recourse, Mrs. Altmann filed suit in the Central District of California, where she has resided since 1942, having herself narrowly escaped the clutches of the Nazis whose successors in interest now torment her with endless procedural appeals and delays.

REASONS FOR DENYING THE PETITION

This is a unique case arising out of a complex of particular historical circumstances and raising only very fact-specific legal issues. There is nothing here which requires this Court's attention.

First, what Petitioners characterize as a serious split of authority among the circuits is no such thing. Indeed, and perhaps most tellingly, neither of the two circuits recently addressing the core issue concerning the purported retroactivity of the FSIA has disagreed with the Ninth Circuit Panel's holding or approach to the retroactivity question at issue in this case.

As will be demonstrated more fully below, there is no actual conflict among the circuits concerning the law with regard to the retroactivity of the FSIA, nor is there any disagreement over the application of that law. Furthermore, none of the other issues raised by Petitioners warrant serious consideration by this Court. The most potentially interesting of them – whether a foreign state is a person entitled to due process – is not properly presented because the Ninth Circuit Panel expressly declined to rule on that issue and instead conducted a standard "minimum contacts" analysis. None of the other contentions of error on this interlocutory appeal are valid and, even if they were sound, they are not of broad enough importance to justify the granting of a writ of certiorari in this case. Rather, Mrs. Altmann respectfully requests that the case be allowed to proceed so that her claim to her uncle's paintings can be determined on the merits within her lifetime.

I. THERE IS NO CIRCUIT SPLIT ON THE RETROACTIVITY OF THE FSIA AND NO COMPELLING FOREIGN POLICY INTEREST AT STAKE IN THIS LITIGATION

A. Jurisdiction Under The FSIA In This Case Is Not Impermissibly Retroactive.

Federal jurisdiction over claims by United States citizens against foreign states is authorized in Article II, Section 2 of the Constitution of the United States. As a matter of grace and comity, but certainly not of right, United States courts generally declined to hear cases against foreign states until the middle of the last century. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). However, in the 1920's and 1930's, as the Ninth Circuit Panel has pointed out, the concept of "absolute sovereign immunity" began eroding and was already no longer recognized in several foreign states (including Austria).[2] The State Department announced in the so-called Tate Letter of 1952 that it had adopted the "restrictive theory" of sovereign immunity which permits suits against foreign sovereigns for certain actions. Letter from Jack B. Tate, Acting Legal Advisor, Department of State, to Acting Attorney

2. The phrase "absolute sovereign immunity" has been used to characterize the standpoint of United States jurisprudence prior to 1952. However, a closer reading of the arguments made by Chief Justice Marshall in *The Schooner Exchange* and Justice Story in *The Santissima Trinidad* reveals that the original concept was not "absolute" at all, but was in reality much closer to the so-called "restrictive theory" of sovereign immunity later espoused in the 1952 Tate Letter and embodied in the FSIA. *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. 116, 143 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual"); *The Santissima Trinidad*, 20 U.S. 283, 353 (1822) (permitting jurisdiction over cargo in foreign warship) ("If [a foreign sovereign] comes personally within our limits, although he generally enjoy a personally immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation."). *See also Republic of Mexico v. Hoffman*, 234 U.S. 30 (1945) (exercising jurisdiction over Mexican ship in absence of State Department request for immunity).

General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. of State Bull. 984-85 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of White, J.).

The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*., enacted in 1976, formalized this approach, and now "provides the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). The stated purpose of the FSIA was to

> insure that this restrictive principle of immunity is applied in litigation before U.S. courts. . . . A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.

H.R. Rep. No. 94-1487 at 7; 1976 U.S.C.C.A.N. at 6605 (1976).

The principal question raised by the Petitioners is whether the application of the FSIA to events predating its effective date (or predating the Tate Letter) is impermissibly retroactive.[3]

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3. It should be noted that the Court has previously considered several cases where the FSIA or the Tate Letter were applied retrospectively. *First Nat¹l City Bank v. Banco para el Comercio Exterior de Cuba*, 462 U.S. 611, 619-21 (1983) (concerning Cuban expropriations in 1960-61); *Verlinden*, 461 U.S. 480 (concerning transactions in 1975); *Nat. City Bank of New York v. Republic of China*, 348 U.S. 356 (1955) (concerning transactions in 1920 and 1947-48); *see also Bernstein v. N. V. Nederlandsche-Amerikaansche Stoomvaart-Maat-Schaapj*, 173 F.2d 72 (2d Cir. 1949), *modified by* 210 F.2d 375 (2d Cir. 1954) (per curiam) (applying 1949 Tate Letter to conduct preceding and during World War II). Further, claims of immunity have traditionally been evaluated as of the time of suit. *See In re Muir*, 254 U.S. 522 (1921) (court considered British requisition of ship for use as admiralty transport at time of suit); *In re Hussein Lutfi Bey*, 256 U.S. 616 (1921) (court considered status

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This Court has set forth a two-part test to answer this question: (1) whether Congress has directed with the requisite clarity that the law be applied retrospectively; and (2) whether application of the new statute produces an impermissible retroactive effect. *I.N.S. v. St. Cyr*, 533 U.S. 289, 316-20 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994).

1. Did Congress clearly intend the FSIA to apply retroactively?

A reasonable argument can be made that the language of the FSIA itself demonstrates an intention to apply the law retrospectively. The preamble of the FSIA concludes "Claims of foreign states to immunity should henceforth be decided by the courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. § 1602. Indeed, in dicta relying on *Landgraf*, the majority in *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994), forcefully made this argument, which is also consistent with the State Department's concurrent pronouncements on the statute it had helped draft,[4] but in conflict with the holdings of two other circuits. *See Carl Marks & Co. v. U.S.S.R.*, 841 F.2d 26 (2d Cir.), *cert. denied*, 487 U.S. 1219 (1988); *Jackson v. People's Republic of China*, 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). Subsequently, in *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the

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of Turkish ship in light of breakoff in relations between United States and Ottoman Turkey at time of suit); *The Gul Djemal*, 264 U.S. 90 (1924) (same); *Compania Espanola de Navegacion Maritima, S. A. v. The Navemar*, 303 U.S.68, 73-74 (1938) (court considered status of ship requisitioned by Spanish government at time of suit); *Ex Parte Republic of Peru*, 318 U.S. 578, 588 (1943) (court considered the good relations between Peru and the United States at time of suit).

4. *See* Letter of Monroe Leigh, Legal Adviser, to Edward H. Levi, Attorney General (November 2, 1976), reprinted in 75 Dept. of State Bull. 649-50 (1976) ("since [the FSIA] will not have any effect whatsoever on the running of the statute of limitations, a continuation of existing policy on attachment until [the effective date] might be the only way a claim for relief could be preserved"); *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 851 (S.D.N.Y. 1978) (State Dept. concurred in applying FSIA to case that arose prior to enactment).

D.C. Circuit moved away from its prior dicta in *Princz*, and adopted the view of the Second and Eleventh Circuits.

This case has not rekindled the conflict. While the District Court adopted the approach of the *Princz* majority in *Altmann I*, the Ninth Circuit Panel resolved this potential split by premising its ruling on the second prong of the retroactivity analysis rather than the first.

2. Does the Expropriation Clause of the FSIA have an impermissibly retroactive effect?

This Court has held that "[t]he inquiry into whether a statute operates retroactively demands a common sense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment.' This judgment should be informed by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" *Martin v. Hadix*, 527 U.S. 343, 357-8 (1999), quoting *Landgraf*, 511 U.S. at 270. As this Court has stated on several occasions, a statute which merely confers or ousts jurisdiction does not normally raise any retroactivity concerns. [5] *Landgraf*, at 274-5. The *Landgraf* rule was in turn clarified by this Court in a unanimous decision in *Hughes Aircraft Co. v. United States ex rel Schumer*, 520 U.S. 939 (1997) in the following language:

> Statutes merely addressing *which* court shall have jurisdiction to entertain a particular cause of action can fairly be said merely to regulate the secondary conduct of litigation and not the underlying

5. In *Dole Food Co. v. Patrickson*, __ U.S. __, 123 S. Ct. 1655 (April 22, 2003), a case brought under the FSIA, this Court confirmed the "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Dole*, *18-*19 (quoting *Keene Corp . v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)). The decision to exercise jurisdiction, being a function of the statutory authority of the court and the status of the parties at the time the suit is brought, can therefore never be impermissibly "retroactive."

> primary conduct of the parties. Such statutes affect only *where* a suit may be brought, not *whether* it may be brought at all.

Hughes, 520 U.S. at 951 (emphasis in original) (citations omitted). In the current case, the expropriation clause of the FSIA operates in exactly the fashion described in *Hughes*, by affecting only *where* the suit may be brought, not *whether* it may be brought at all. It does not unsettle the expectations of the parties, nor does it unfairly attach new consequences to actions taking place before its enactment.

Petitioners do not, and cannot, suggest that they are now, or have ever before been, absolutely immune (both here *and* in Austria) from the claims Mrs. Altmann has asserted. They concede that the claims could always be brought in Austria and have argued that Mrs. Altmann should be required to do so. Where, therefore, a United States citizen seeks redress against a foreign state, a purely jurisdictional statute such as 28 U.S.C. § 1605(a)(3) merely confers jurisdiction in a domestic forum for litigation which the American citizen otherwise would have been forced to bring in the foreign state.[6] This neither unsettles the expectation, nor insults the dignity of the foreign sovereign. *See Nat. City Bank of New York*, 348 U.S. at 363-4 ("No parochial bias is manifest in our courts which would make it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims in our courts when it entertains affirmative suits in its own.")

The Ninth Circuit Panel's Opinion properly distinguishes the current case *on the facts* from the earlier cases in which a sovereign's prior expectation of *absolute* immunity (here and abroad) was upheld *on the facts*. (Petitioners' Appendix A, pp. 20a-21a, distinguishing *Carl Marks* and *Jackson*.) In each of

6. There is no basis for the suggestion that a party has an "expectation" that United States jurisdictional rules governing international disputes will remain the same and that therefore a statute that confers jurisdiction in the United States unsettles the expectations of the parties that United States courts will not assert jurisdiction. If this were true, then every statute that conferred or ousted jurisdiction would raise retroactivity concerns, which is clearly contrary to this Court's holdings in *Landgraf* and *Hughes*.

those cases, the foreign state arguably presumed it was absolutely immune from suit (in its own courts as well as in the United States) when it entered into the commercial transactions at issue. As demonstrated here and in *Altmann II*, Austria could never have held such an expectation because it always has been liable in its own courts for suits seeking the return of Nazi-looted property. Further, the United States consistently took the position during and after World War II that expropriated property would have to be returned and that United States courts could exercise their jurisdiction to affect the restitution of Nazi-looted property.

First, as the Ninth Circuit Panel explained this case concerns the return of property taken in violation of long-standing rules of international law. In March 1938, Austria was annexed by Nazi Germany. As a result, and as part of official state policy, the property of Jews in Austria, including the paintings at issue in this case, was expropriated. As the Ninth Circuit Panel has pointed out, and as numerous courts have held in similar cases, this expropriation was contrary to international law. Indeed, in January 1943, the United States and seventeen of its allies issued the Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory (the "London Declaration"), warning "that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled." 8 Dept. of State Bull. 21-22 (1943). Later that year, in the so-called "Moscow Declaration" of November 1, 1943, Austria was declared the first "victim" of Hitlerite aggression, but at the same time "reminded, however that she has a responsibility which she cannot evade for participation in the war on the side of Hitlerite Germany, and that in the final settlement account will inevitably be taken of her own contribution to her liberation." 9 Dept. of State Bull. 310 (1943).

As an occupied country after March 1938 and at the time of the London Declaration and Moscow Declaration in 1943, Austria of course could have had no "expectation" that it would be immune from actions to return property expropriated from Jews during the War. After the War, Austria

was occupied by the United States and the other Big Four allies and its new government was recognized by the Allies in January, 1946. 14 Dept. of State Bull. 81 (1946). Still under United States control and influence,[7] in May 1946 Austria passed the so-called *Nichtigkeitsgesetz* (Nullity Law), BGBl No. 106/1946 declaring all transactions that occurred as a result of Nazi persecution "null and void." Austria was further obligated by the United States to enact a series of laws designed to accomplish restitution of Nazi-looted property.[8] The first two of these laws, enacted in July 1946 and February 1947, permitted claims by individuals against the Republic of Austria for the return of confiscated property that fell into government hands.[9] Therefore, as early as 1946-47 legislation existed in Austria, a foreign state then occupied militarily by the United States, permitting claims for the return of expropriated property such as the ones made by Mrs. Altmann in this case.[10]

7. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445, *27 (S.D.N.Y. 2002) ("Until the signing of the Austrian State Treaty of 1955, the allies would 'sit in judgment' of the Austrian government, in that all official acts required their approval.").

8. In American controlled areas of Germany, the United States enacted Military Law 59 (approved 10 November 1947), the stated purpose of which was "to effect to the largest extent possible the speedy restitution of identifiable property . . . to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism." The United States insisted that similar legislation be adopted by Austria.

9. First Restitution Act: Federal Law of July 26, 1946, concerning the restitution of seized property at present administered by the Federal Government or the Provincial Governments; Federal Law Gazette/BGBl No.156/1946. Second Restitution Act: Federal Law of February 6, 1947, concerning the restitution of seized property at present held by the Republic of Austria; Federal Law Gazette/BGBl No.53/1947. For the text and a discussion of the related Third Restitution Act of February 1947 permitting claims against third parties see *Altmann v. Commissioner*, 20 T.C. 236 (1953), remanded without opinion, 48 A.F.T.R. (P-H) P1867, 55-2 U.S. Tax Cas. (CCH) P9599 (2d Cir. 1955), a case coincidentally concerning Mrs. Altmann's brother-in-law Bernhard Altmann.

10. The history of Nazi-era expropriations and post-war restitution laws has been recently compiled by the Austrian Historical Commission, (Cont'd)

Meanwhile, in the United States the government also took steps to establish jurisdiction over disputes concerning Nazi-era expropriations. In 1949, the State Department issued a press release along with a letter submitted by Jack B. Tate in the *Bernstein* case announcing that

> it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and . . . the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Press Release No. 296, "Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers," reprinted in *Bernstein*, 210 F.2d at 375-76.[11] Finally, in its 1955 treaty with Austria, the United States continued to insist that Austria return all Nazi-looted property to its former

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whose reports have been published on the website http://www.historikerkommission.gv.at. *See also* Robert Knight, *Restitution and Legitimacy in Post-War Austria 1945-1953*, Leo Baeck Inst. Yearbook XXXVI, pp. 413-441 (1991); Robert Knight, *Ich bin dafur die Sache in die Länge zu ziehen* (Böhlau Vienna, 2000).

11. The contention that the 1949 *Bernstein* letter concerned only the act of state doctrine, and not sovereign immunity, does not dispel the conclusion that the United States did not consider sovereign immunity to be a bar to expropriation claims arising out of World War II. Certainly, as an occupying power, the United States did not permit Germany and Austria to assert a sovereign immunity defense to these claims in their own courts. Indeed, the very first restitution laws enacted in Austria at the behest of the United States were the laws permitting claims against the State of Austria. It seems pointless to speculate what a hypothetical President Truman administration might have done if confronted with this case in the immediate post-war era. But at the very least, based on the statements referenced above, Austria's government could not have had any "expectation" of immunity from these types of claims.

owners.[12] *Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); *See* Appendix C – 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("STRIDA"), Article 26, paragraph 1. In subsequent discussions, the United States confirmed to Austria that "the Government could not prevent private persons from advancing claims or arguing with the Austrian Government." Memorandum of Conversation between Secretary of State John Foster Dulles and Chancellor Julius Raab, May 19, 1958, reprinted in *Foreign Relations of the United States*, *1958-1960*, Vol. IX, pp. 769-70 (1993).[13]

As set forth in Mrs. Altmann's Complaint, Petitioners fraudulently withheld and extorted from Mrs. Altmann the paintings at issue with false claims of ownership dating back prior to the War and with threats of denials of export permits for other artworks (a practice that Austria now concedes was illegal). Petitioners have never been immune from suit for these pernicious acts, nor from suit to recover the looted paintings. Indeed, as an integral part of their otherwise unsuccessful *forum non conveniens* argument below, Petitioners asserted that they could still be sued for the return of the paintings by

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12. Indeed, Congress was told that the treaty "provides that Austria will make restoration or provide compensation to victims of nazism, who were largely those of Jewish faith." Statement of John Foster Dulles, Secretary of State, before the United States Senate Committee on Foreign Relations, June 10, 1955, p. 4.

13. Art claims and unknown claims, such as the ones presented by Mrs. Altmann in the current case, have never subsequently been resolved. In a May 15, 1959 letter regarding the settlement of Article 26 claims for restitution, U.S. Ambassador to Austria H. Freeman Matthews concluded:

> My Government has instructed me to advise you that it may approach the Austrian Federal Government in the future in connection with the settlement of individual claims asserted under Article 26 of the State Treaty which are not presently known to my Government and do not fall within the classes and categories of claims enumerated in paragraphs 1 and 2 of Section A of your note [which do not including artworks].

Settlement of Certain Claims Under Article 26 of the Austrian State Treaty, TIAS 4253, 10 U.S.T. 1158, 1959 U.S.T. Lexis 253 (1959)

Mrs. Altmann in Austria (notwithstanding statute of limitations problems and excessive court costs that in reality make such a suit impracticable). Obviously, Petitioners have never had any expectation of "immunity" with regard to individual claims for the return of Nazi-looted artworks to their former owners.

The expropriation clause of the FSIA attaches no "new legal consequences" to the events at issue in this case. The FSIA was not intended to affect substantive law concerning the rights of foreign states. *First Nat. City Bank*, 462 U.S. at 620-21; H.R. Rep. No. 94-1487 at 12, 1976 U.S.C.C.A.N. 6604, at 6610 ("The bill is not intended to affect the substantive law of liability."). The most Petitioners can argue is that the FSIA allows the case to proceed in the United States, when it might otherwise have been required to proceed in Austria. But this obviously is an argument about *where* the case may be brought, not *whether* it may be brought at all. *Hughes*, *supra*. As such Petitioners have failed to demonstrate an impermissible retroactive effect to the exercise of jurisdiction in this case.

B. The Circuits Are All In Agreement On the Core Issue Of How To Analyze The Retroactivity of the FSIA.

Petitioners' contention that the circuit courts are split on the issue of how to analyze the FSIA's retroactivity is highly misleading. In fact, there is a clear unanimity of approach and a widespread acceptance of the principles set forth in *Landgraf*. That the results in the various cases have differed is a function only of the "common sense, functional judgment" based on the particular facts presented in each case. *Martin*, at 357. Notably, none of the courts that have subsequently reviewed the issue has disagreed with the Ninth Circuit's decision in *Altmann II*.

In *Hwang Geum Joo*, decided the day Petitioners submitted their brief, the Circuit of the District of Columbia studiously avoided a conflict with *Altmann II*, holding only that the assertion of jurisdiction over Japan under the commercial

activity exception of the FSIA, 28 U.S.C. §1605(a)(2), would be impermissibly retroactive because it would conflict with the settled expectations of Japan, arising principally from its 1951 treaty with the United States, that such claims would not be made in United States courts. As the Court noted, and as determined by the Ninth Circuit, no such treaty provision exists with Austria. *Hwang Geum Joo*, 332 F.3d 679 ("Because there was no similar treaty with Germany or Austria, and therefore no similar settled expectation, the opinion in *Altmann* is not relevant to the present case."). Further, with regard to Japan there was no similar statement of policy to the 1949 Tate Letter. *Id.* ("The lack of such a statement . . . distinguishes this case from *Altmann*"). *Altmann II*, the D.C. Circuit concluded, was distinguishable on the facts, not wrongly decided.

A few weeks earlier in *Abrams v. Societe Nationale Des Chemnis De Fer Francais*, 332 F.3d 173 (2d Cir. 2003), the Second Circuit remanded a case concerning the French National Train Company for a determination whether application of the FSIA to provide immunity to a foreign corporation would impermissibly oust jurisdiction that existed prior to the enactment of the FSIA, or whether the French entity could have expected immunity even then. In doing so, the Second Circuit conducted the same retroactivity analysis as the Ninth Circuit Panel and then cited *Altmann II* for the proposition that it was possible that an agency of a foreign state did not have an expectation of immunity for World War II-era claims. In *Abrams*, as in *Hwang Geum Joo*, the Second Circuit did not disagree with or disapprove of the Ninth Circuit's holding or reasoning in *Altmann II*.

Far from a circuit split, the various decisions merely reflect the results of the careful analysis required by this Court in determining whether a particular statute would have an impermissibly retroactive effect under the particular circumstances of each case. As Judge Charles Breyer explained in another recent post-*Altmann II* case, *Cruz v. United States*,

2003 U.S. Dist. LEXIS 10948 (N.D. Cal. 2003), decided June 24, 2003:

> Though Altmann held that the FSIA could be applied retroactively under certain limited circumstances, it did not thereby change the law. . . . Rather, the Ninth Circuit simply applied well-established principles of retroactivity to find that absolute sovereign immunity was not available under the narrow set of facts presented in that case. . . . Altmann changed neither the law of sovereign immunity nor the analysis that the Court was required to conduct to determine whether the FSIA applied to the claims at issue. . . .

Cruz, at *8-*10. Judge Breyer's view of *Altmann II* is clearly correct. The Ninth Circuit's Opinion neither creates new law, nor contradicts the old. There is therefore no legitimate reason to grant a writ of certiorari in this case.

C. No Foreign Policy Interests Are Actually At Stake In This Litigation.

The parade of horribles brought forth by Petitioners (and by the United States Government as *amicus curiae* below) has not, and will not, come to pass. *Altmann II* is a unique case, decided on unique facts that have not translated to other more ill-defined cases. Indeed, it might be respectfully suggested that the United States' presence in this cas as an *amicus* was based on a misguided view of the applicability of the ruling.

One good example of the limited and unique nature of the *Altmann II* ruling is the ruling of Judge Breyer in the *Cruz* case cited above. In *Cruz*, Judge Breyer denied reconsideration of his earlier ruling dismissing a class action lawsuit against Mexico on sovereign immunity grounds, finding that, unlike Austria in *Altmann II*, Mexico had an expectation of immunity for the claims asserted in that case. *Cruz*, at *11.

Similarly, on April 15, 2003, Judge Florence Marie Cooper (the same district court judge who affirmed jurisdiction in *Altmann I*) in a thoughtful opinion dismissed a class action suit asserting World War II-era expropriation claims against

Austria on the grounds of the executive's foreign policy power under the political question doctrine. *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098 (C.D. Cal. April 15, 2003). Judge Cooper's rationale was identical to this Court's reasoning in *Am. Ins. Ass'n v. Garamendi*, __ U.S. __, 156 L. Ed. 2d 376, 2003 U.S. LEXIS 4797 (June 23, 2003), that in the face of a statement of interest by the United States Government asserting that the maintenance of a class action would interfere with an executive agreement between the United States and Austria, the Court could only conclude that the suit would impermissibly interfere with the foreign relations power of the executive branch. *Anderman*, *supra; Garamendi*, *supra* (executive agreement bars state insurance statute related to settled claims)*; see also Roeder v. Islamic Republic of Iran*, __ F.3d __ (D.C. Cir. July 1, 2003) (executive agreement preempts claims against Iran); *Deutsch v. Turner Corp.*, 317 F.3d 1005, *rehearing denied and opinion amended*, 324 F.3d 692 (9th Cir. 2003) (executive agreements and treaties bar various WWII claims).

In sum, in all of the cases cited above, this and other federal courts have demonstrated that *Altmann II* represents no bar to properly dismissing an action based on the executive foreign policy power and the political question doctrine. However, no such concerns arise in this case because the recent executive agreement concluded between the United States and Austria expressly and conspicuously excludes and preserves individual claims for Nazi-looted artworks. *See* Appendix A – Excerpt from Text of January 17, 2001 Joint Statement and Exchange of Notes concerning the establishment of the General Settlement Fund ("Executive Agreement"). Indeed, Mrs. Altmann's counsel participated at the invitation of the State Department in the negotiation of the Executive Agreement, and in connection therewith obtained a letter from Austria specifically affirming to the State Department that the Executive Agreement would not "affect or pertain to" Mrs. Altmann's case.[14] *See* Appendix B — January 17, 2001

14. Initially, Petitioners nevertheless attempted to assert an "act of state" defense based on the Executive Agreement in their motion to dismiss before the District Court below. After objections were raised by the (Cont'd)

Letter from Hans Winkler, Legal Adviser, Austrian Federal Ministry for Foreign Affairs, to Stuart E. Eizenstat, Deputy Secretary of the Treasury.

Unlike perhaps any other World War II-era cases being litigated at this time, the United States has *not* filed a statement of interest in this case because the case does not, by itself, implicate any foreign policy objectives of the United States. To the contrary, the current case is consistent with the United States' view that Nazi-looted artworks should be returned to their original owners. *See United States v. Portrait of Wally*, 2002 U.S. Dist Lexis 6445 (S.D.N.Y. 2002) (action brought by United States to forfeit painting on loan from Austria that had been looted during the Nazi era); Appendix D – Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 18 (1998).[15] Nor does this case conflict with any existing executive agreement or treaty between the United States and Austria. *See Multilateral Austrian State Treaty*, TIAS 3298; 6 U.S.T. 2369; 1955 U.S.T. Lexis 35 (May 15, 1955); Appendix C – 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria ("STRIDA"), Article 26.

(Cont'd)
State Department, Petitioners expressly withdrew the argument that Plaintiff's claims were barred by the act of state doctrine and filed a statement confirming that

> (1) Plaintiff's claims in this action are not subject to the provisions of the Joint Statement and Exchange of Notes, including those provisions regarding legal closure; (2) This action shall not affect the establishment and funding of the General Settlement Fund as provided for in the Joint Statement and Annex A to the Exchange of Notes.

Supplemental Memorandum Re: Motion to Dismiss Under Fed. R. Civ. P. 12(b) filed February 21, 2001.

15. *See also* Stuart Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, December 3, 1998, at http://www.state.gov/www/policy_remarks/1998/981203_eizenstat_heac_art.html; "Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report," December 2000, at http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html; Washington Conference on Holocaust-Era Assets (1988), http://fcit.coedu.usf.edu/holocaust/resource/assets/heac2.pdf.

The State Department long ago stopped issuing suggestions of immunity on behalf of foreign states, and it has not issued one here. *See* 75 Dept. of State Bull. 649 (1976) ("The Department of State will not make any sovereign immunity determinations after the effective date of [the FSIA]. Indeed, it would be inconsistent with the legislative intent of that Act for the Executive Branch to file any suggestion of immunity on or after January 19, 1977.")[16]

The United States Government's belated intervention as an *amicus curiae* in support of Petitioners' petition for rehearing to the Ninth Circuit below was presumably driven by its concern, unfounded as it turned out, that the *legal* holding in *Altmann II* would be broadly applied to prevent dismissal in *Anderman*, *Hwang Geum Joo*, *Cruz* and other similar World War II-era cases where, unlike in *Altmann II*, the Government was obligated to defend its executive agreements and treaties precluding such claims. But the feared result has not come to pass and *Altmann II*, which concerns a very discrete expropriation claim expressly preserved and not settled or barred by any executive agreement or treaty, has properly been distinguished and limited to its unique facts.[17]

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16. The deference normally accorded to the views of the United States Government in cases of this type is therefore less than it would normally be. The United States' role as an *amicus curiae* below merely reflected the current government's views with regard to statutory construction of the FSIA, but was not an expression of the government's foreign policy preferences or goals. Further, the Government's opinion about what a hypothetical Truman administration would have done with regard to an immunity claim in a suit such as this one must be considered purely speculative and of little value to the discussion of the issues in this case, as it is not only contrary to the available historical evidence, including contemporaneous statements issued by the State Department, but wholly unsupported by any other evidence in the record.

17. Presumably the Second Circuit, in deciding the pending appeals in *Garb v. Republic of Poland*, 02-7844 (2d Cir.) and *Whiteman v. Dorotheum*, 02-9361, 02-3087 (2d Cir.), will dispose of those class action cases in the same way as the Courts in *Joo*, *Anderman*, and *Cruz* disposed of theirs, by distinguishing *Altmann II* on the facts. As a result, the State Department's concerns should be resolved.

There being no basis for he contention that the Ninth Circuit Panel misapplied the controlling legal standard governing the retroactivity of jurisdictional statutes, or that a split among the circuits exists, or even that the current case raises foreign policy concerns, Mrs. Altmann respectfully suggests that the case does not meet the criteria for granting a writ of certiorari on the first question presented.

II. THE QUESTION OF WHETHER FOREIGN STATES ARE ENTITLED TO DUE PROCESS PROTECTION IS NOT PROPERLY PRESENTED BY THIS CASE

Personal jurisdiction over a foreign state exists by federal statute where subject-matter jurisdiction exists and where proper service has been made. 28 U.S.C. § 1330(b). Because the Ninth Circuit determined that the requirements for subject-matter jurisdiction under 28 U.S.C. § 1605(a)(3) had been met, and there was proper service of process, the Panel therefore concluded that statutory personal jurisdiction existed over the Petitioners.

Petitioners assign error to this unremarkable conclusion by asserting that "the Ninth Circuit held that personal jurisdiction over foreign nations may be exercised without regard to due process minimum contacts standards." (Petition, p. 8.) But Petitioners are simply wrong in this suggestion – the Ninth Circuit did no such thing. Immediately after concluding that the *statutory* requirements for personal jurisdiction had been met, the Panel wrote: "We also hold that, if the facts are as Altmann alleges, the assertion of personal jurisdiction over the Republic and the Gallery complies with the Due Process Clause of the Fifth Amendment." (Appendix A, p. 26a.) In fact, the Panel engaged in a traditional "minimum contacts" analysis and concluded that "fair play and substantial justice would not be offended if we maintain jurisdiction over Austria in this case." (Petitioners' Appendix A, p. 29a.)

The question raised in the Petition, namely whether foreign states are entitled to a "minimum contacts" analysis under the Due Process Clause of the Fifth Amendment, is one that was first suggested by this Court in *Republic of Argentina*

v. Weltover, Inc., 504 U.S. 607, 619 (1992). The Ninth Circuit has not found it necessary to answer the question, finding instead, as this Court did in *Weltover*, that in any case the minimum contacts standard was satisfied. Thus, the question is not properly raised in this case and the Petition should be denied on that ground.

It should be noted that, unlike the Ninth Circuit, the District Court in *Altmann I* did squarely confront the due process issue and concluded that foreign states were not entitled to a minimum contacts analysis because foreign states are not "persons" under the Fifth Amendment. In so holding, the District Court fell in line with the few other district courts that had squarely addressed this issue. (Petitioners' Appendix B, 68a-74a.) Subsequently, the Circuit for the District of Columbia became the first circuit court to squarely address the issue and came to the same conclusion. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95-100 (D.C. Cir. 2002) (foreign state is not entitled to protection under Due Process Clause and can be sued even without any contacts with the forum). Therefore, not only is there no split of authority, but all of the cases that have answered the question have concluded that foreign states are not entitled to due process protections. A writ of certiorari need not be granted under these circumstances.

Petitioners also quibble with the manner in which the Ninth Circuit applied the traditional minimum contacts analysis. The Panel's jurisdictional analysis is comprehensive and requires no further elaboration, as it is quite obvious that the Petitioners' contacts – selling books and advertising exhibits to United States citizens – are sufficient to confer jurisdiction in a case concerning paintings featured in those books, advertisements and exhibitions. Indeed, it has generally been assumed in the Ninth Circuit that the presence of consulates within the state satisfies the requirements for general jurisdiction over the foreign state. *See Meadows v. Dominican Republic*, 628 F. Supp. 599, 605-608, *aff'd*, 817 F.2d 517, 523 (9th Cir. 1987).

Ignoring this Court's recent holding in *Dole Food* that jurisdiction is determined based on facts existing at the time the case is filed, Petitioners maintain that the Due Process Clause requires that the jurisdictional contacts be present at the time of the acts giving rise to the Complaint. Not surprisingly, there is no authority for this position.[18] Nevertheless, even if one were only allowed to bring claims based on Petitioners' current contacts, this case concerns a continuing violation of law and causes of action sounding in fraud that accrued only in 1999 when Mrs. Altmann discovered that she had been deceived by Austria in the post-war period. Cal. Code Civ. Proc. § 338(d) (fraud action is deemed to have accrued only upon discovery); Cal. Penal Code § 496 (withholding stolen property is actionable); *Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 432-3 (1996) (action for recovery of stolen coins). Therefore, Petitioners' recent contacts with California and the United States are clearly sufficient to establish personal jurisdiction for these timely claims, and provide another basis for rejection of the request for certiorari.

III. THERE IS NO EXHAUSTION OF REMEDIES REQUIREMENT IN THE FSIA

In this case, Mrs. Altmann contends that Petitioners are not immune from suit pursuant to the expropriation exception contained in the second disjunctive clause of 28 U.S.C. § 1605(a)(3). As the Ninth Circuit Panel concluded, all of the provisions of section 1605(a)(3) have been satisfied: (1) the case obviously concerns "rights in property taken in violation of international law;" (2) the property is admittedly "operated" by the Gallery, an agency or instrumentality of Austria; and

18. The lone case relied on by Petitioners, *Steel v. United States*, 813 F.2d 1545, 1549 (9th Cir. 1987), is obviously distinguishable, even if assumed to be correct for this purpose, as it concerned primarily how to determine a party's citizenship for purposes of establishing diversity jurisdiction, not the presence of sufficient contacts to satisfy due process — an analysis which in any case has few black and white rules. *Kulko v. California Superior Court*, 436 U.S. 84, 92 (1978).

(3) the Gallery is "engaged in a commercial activity in the United States."

Notwithstanding Petitioners' failure to persuade either the District Court or the Ninth Circuit Panel with their *forum non conveniens* argument (which they have now dropped), Petitioners seek to revive that failed exhaustion argument by claiming that because Mrs. Altmann has purportedly not exhausted her remedies in Austria this case does not concern "rights in property taken in violation of international law." The argument is without any foundation in the text of the FSIA, and flies in the face of the facts of this case. Apparently it is not enough for Petitioners that their Nazi predecessors imposed confiscatory taxes on Mrs. Altmann's uncle in order to expropriate the paintings at issue. Nor is it enough that Petitioners defrauded Mrs. Altmann's attorney and extorted an agreement by threatening to withhold export permits (a practice Petitioners now concede was illegal and indefensible). Nor is it enough that when Mrs. Altmann attempted to file suit in Austria, Petitioners sought to impose court fees of almost $2 million and refused to waive the statute of limitations.[19] Apparently, Petitioners believe that Mrs. Altmann must prove something more merely to satisfy a jurisdictional statute that requires only that her case concern "rights in property taken in violation of international law." It is hard to imagine what else could be required of her.

If there were another way to resolve this dispute (and avoid three years of jurisdictional motions and appeals), Mrs. Altmann would have tried it. The fact is that she has no other option, and Austria has woefully failed to demonstrate that there is any other avenue open to her. There is simply no possible doubt that this case concerns rights in property taken in violation of international law, and that the statutory requirements of section 1605(a)(3) have been met.

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19. Austria has consistently taken the position that the statute of limitations applicable to restitution claims expired years ago. *See United States v. Portrait of Wally*, 2002 U.S. Dist LEXIS 6445, *63-4y (quoting Petitioners' legal expert Dr. Walter Friedrich as concluding that "all claims [for restitution] have expired long ago."

IV. PUBLISHING AND ADVERTISING ARE COMMERCIAL ACTIVITIES

Petitioners seek review by this Court of the question of whether selling books and advertising exhibitions by a museum can constitute a commercial activity. The question is not worthy of consideration by this Court.

"[W]hen a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA." *Weltover*, 504 U.S. at 614. In essence, "a state engages in commercial activity . . . where it exercises only those powers that can be exercised by private citizens, as distinct form those powers peculiar to sovereigns." *Saudia Arabia v. Nelson*, 507 U.S. 349, 360 (1993). "[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives." *Weltover*, 504 U.S. at 614. The central question is "whether the activity is of a kind in which a private party might engage." *Joseph v. Office of the Consulate Gen. of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987). An activity is commercial if it is of a type that a private person would customarily engage in for profit, without regard to its ultimate purpose. *Gould, Inc. v. Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988).

Museum activities are not peculiar to sovereigns and may be considered commercial activities. *See Boule v. Hutton*, 70 F. Supp. 2d 378 (S.D.N.Y. 1999) ("museum exhibitions relate closely to the commercial market for art"). Indeed, it is increasingly common in both the United States and Austria for private foundations to own and operate museums. Examples include the Getty Museum and the Norton Simon Museum in Los Angeles, as well as the new Leopold Museum in Vienna. Operating a museum is clearly not "peculiar to a sovereign."[20] Furthermore, the marketing of books and other

20. Petitioners misstate the holding of *Aschenbrenner v. Conseil Regional de Haute-Normandie*, 851 F. Supp. 580 (S.D.N.Y. 1994). In *Aschenbrenner*, the Court held that the alleged injury was not sufficiently related to the (Cont'd)

materials related to an exhibition is under any common sense analysis a "commercial activity." As Webster's Dictionary puts it, "commercial" is in the first instance broadly defined as "occupied with or engaged in commerce or work intended for commerce." *Webster's Ninth New Collegiate Dictionary*, p. 264 (Merriam-Webster Spingfield, Mass. 1988).

Petitioners continue to assert that the Gallery's commercial activities in the United States are not sufficient to confer jurisdiction over Petitioners under section 1605(a)(3). However, they fail to cite a single case concerning the application of 1605(a)(3) to support their theory, instead relying solely on cases interpreting the far different requirements of the commercial activity exception set forth in 1605(a)(2). In this regard, Petitioners ignore the Ninth Circuit's prior holding in *Siderman de Blake v. Argentina*, 965 F.2d 699 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993), in which the Ninth Circuit found on far more limited facts (acceptance of American credit cards in a foreign hotel) that jurisdiction existed under the same expropriation clause of the FSIA.

To confer jurisdiction, section 1605(a)(3) requires only one, even unrelated, commercial activity in the United States by the agency or instrumentality of the foreign state owning or operating the expropriated property at issue. *Gabay v. Mostazafan Foundation of Iran*, 151 F.R.D. 250, 255 (S.D.N.Y. 1993). Here, the commercial activities of the Gallery in the United States are substantial and ongoing and are actually closely related to the Complaint. These activities include selling books and advertising and selling tickets to museum exhibitions using and exploiting the very paintings at issue in this case. The fact that these are also "cultural" activities does

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(Cont'd)

commercial activity engaged in by the museum (selling books) so as to permit application of the commercial activities exception of the FSIA. *See* 28 U.S.C. § 1605(a)(2). Unlike the commercial activities exception, however, 1605(a)(3) does not require the cause of action to be in any way related to the commercial activity engaged in by the agency or instrumentality of the foreign state.

not make them any less commercial, as that term is broadly defined in the FSIA in section 1603(d).

By any reasonable measure, based on the record in this case, the Gallery is engaged in commercial activity in the United States. First, it has authored, edited and published a book — "Klimt's Women" — in the United States with Yale University Press. The book includes several of the pictures at issue in this case. An English language guide book, edited and published by the Gallery and featuring on the cover one of the looted pictures of Mrs. Altmann's aunt, has also been available for purchase in the United States. Book selling is a commercial activity, and one that is not "peculiar to a sovereign."

Second, the Gallery advertises its exhibitions in the United States. It attracts American tourists and accepts funds, including American credit card payments, from those tourists when they visit the museum in Vienna. In *Siderman*, the Ninth Circuit considered such activity to be commercial activity in the United States. The Ninth Circuit held that the expropriation exception (and commercial activity exception) applied in the case of an Argentinian hotel that was taken from the plaintiffs where Argentina and the hotel benefited from advertising in the United States, entertained American tourists and accepted their credit cards. *Siderman*, 965 F.2d at 709-10, 712. The Ninth Circuit concluded that the commercial activities Argentina was conducting through the hotel were sufficient to support the exercise of jurisdiction over both the defendants under the expropriation clause of section 1605(a)(3). *Id*. The current case is indistinguishable from *Siderman*, and indeed presents even stronger facts because of the Gallery's overt commercial activity in the United States.

In this case, jurisdiction is sought under the expropriation clause, section 1605(a)(3). That clause requires *no connection* between the expropriation and the commercial activity of the agency or instrumentality of the foreign state (otherwise it would simply be a redundant subset of the commercial activity exception). *See Gabay*, 151 F.R.D. at 255 (under second portion

of § 1605(a)(3), commercial activity "need not have anything to do with the substance of the lawsuit"). Rather, the exception applies when property taken in violation of international law is owned or operated by an agency or instrumentality that is also engaged in a (possibly unconnected) commercial activity in the United States. *Id*. Nowhere in section 1605(a)(3) or in any case interpreting the second disjunctive clause is it stated that the commercial activity must in any way be connected to the property taken in violation of international law.

In any case, the commercial activities of the Gallery in the United States *are* clearly and unequivocally connected with the expropriation of the paintings at issue in this case. The expropriated paintings are used to advertise exhibitions at the Gallery. Further, the Gallery has published in conjunction with Yale University Press in the United States a catalogue of its most recent exhibition, featuring several of the expropriated paintings. The Gallery is deriving income in the United States from its unlawful retention of the paintings sought in this action.[21] Therefore, the last clause of section 1605(a)(3) is clearly satisfied because the Gallery is engaged in a commercial activity in the United States. *Siderman*, 965 F.2d at 709-10, 712; *Los Angeles News Serv. v. Conus Communs. Co. Ltd. Pshp.*, 969 F. Supp. 579 (C.D. Cal. 1997) (Canadian TV broadcast viewable in U.S. was commercial activity in the U.S. sufficient for jurisdiction under the FSIA).

V. THE VENUE QUESTION WAS CORRECTLY DECIDED AND IS NOT APPROPRIATE FOR REVIEW

Lastly, there is neither a split of authority, nor are there any other factors justifying review of the venue question in this case. In cases against a foreign state or its agencies or instrumentalities, venue is governed by 28 U.S.C. § 1391(f). "Venue is not a jurisdictional prerequisite and its presence or absence does not affect a court's authority to adjudicate." *Harris Corp. v. National Iranian Radio and Television*, 691 F.2d

21. Indeed, each time the Gallery accepts payment with a credit card issued by a U.S. bank it is engaging in a commercial activity in the United States. *Siderman*, 965 F.2d at 709-10, 712.

1344, 1349 (11th Cir. 1982). Moreover, the decision whether to grant a venue motion is also reviewed under an abuse of discretion standard. *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986). The district court's discretion extends beyond the determination of facts to the weighing of those facts, *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198, 227 (3d Cir. 2000), and there is not a shred of evidence in the record below to suggest that this discretion was abused.

The Ninth Circuit concluded that venue was appropriate over the Gallery under section 1391(f)(3), because the Gallery is engaged in a commercial activity in the Central District of California. Given the multiple bases for this conclusion, this was not an abuse of discretion, and absolutely no evidence was presented by Petitioners to dispute this finding. Section 1391(f)(3) provides for venue in an action against an agency or instrumentality in any judicial district in which the agency or instrumentality is doing business. As discussed above, the Gallery is obviously engaged in business in the Central District of California by, among other things, selling books and by advertising to and receiving visitors to its museum from within the geographical boundaries of the federal district, whose residents make purchases at the museum with credit cards issued by banks within the district. *Gray v. St. Martin's Press, Inc.*, 929 F. Supp. 40, 45 (D.N.H. 1996) (author could be sued for defamation in state where her book was sold by publisher).

Further, the Ninth Circuit properly held that if venue was proper as to the Gallery, then it was proper as to Austria. The Ninth Circuit correctly held that where venue is appropriate for one defendant, it is also appropriate for the related co-defendants. *See Southmark Prime Plus, L.P. v. Falzone*, 768 F. Supp. 487, 489 (D. Del. 1991) (applying co-conspirator venue theory in RICO case). Section 1391(f) applies in the alternative and does not require two separate trials in two separate districts against the foreign state and its agency and instrumentality.

Based on the authorities cited, it is self-evident that the venue question was properly decided by the Ninth Circuit and in any case the question is not sufficiently weighty to justify review by this Court.

CONCLUSION

For all the foregoing reasons, Mrs. Altmann respectfully requests that the Supreme Court deny review of this matter and allow her finally to proceed with her claims on their merits so that they can be resolved in her lifetime.

Respectfully submitted,

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APPENDIX A — EXCERPT FROM TEXT OF JANUARY 17, 2001 EXCHANGE OF NOTES CONCERNING THE ESTABLISHMENT OF THE GENERAL SETTLEMENT FUND

Exchange of Notes between the Government of the United States of America and the Austrian Federal Government

The Department of State refers the Embassy of Austria to the Preamble and to Articles 1(4), 2(2), 2(3), and 3(3) of the Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund) ("Agreement"), signed October 24, 2000.

Noting the correspondence between the President of the United States and the Federal President of the Republic of Austria, in connection with the Agreement,

Recalling the relevant provisions of the 1955 State Treaty for the Re-establishment of an Independent and Democratic Austria, the 1959 Exchange of Notes Constituting an Agreement between the United States of America and Austria relating to the Settlement of Certain Claims under Article 26 of the Austrian State Treaty of May 15, 1955, as well as the contents of the letter dated December 19, 1961 from Dr. Nahum Goldman, the Chairman of the Committee for Jewish Claims on Austria, to Dr. Josef Klaus, the Austrian Federal Minister of Finance.

The United States welcomes the commitment of the Austrian Federal Government to provide immediate compensation for survivors pursuant to Annex A, paragraph 1, to propose legislation to the Austrian Parliament by April 30, 2001 to establish a General Settlement Fund ("GSF") (providing for a Claims Committee and an Arbitration Panel) in conformity with the principles set forth in Annex A, paragraphs 2 and 3, and to seek changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4.

Appendix A

The United States further welcomes the commitment of the Austrian Federal Government to make good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9.

The United States considers the provision of immediate compensation for survivors pursuant to Annex A, paragraph 1, the General Settlement Fund, established in conformity with the principles set forth in Annex A, paragraphs 2 and 3, the changes in the laws that address social benefits for victims of National Socialism in conformity with Annex A, paragraph 4, and the making of good faith progress on the implementation of the additional measures for victims of National Socialism set forth in Annex A, paragraphs 5-9, to constitute a "suitable potential remedy", as understood by Articles 2(2) and 3(3) of the Agreement, for all claims that have been or may be asserted against Austria and/or Austrian companies, as defined in Annex B, arising out of or related to the National Socialist era or World War II, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art and, subject to the provisions of Annex A, paragraph 10, claims for *in rem* restitution of property owned by Austrian provinces and municipalities.

Upon fulfillment of the commitments of the Austrian Federal Government referred to above, the United States will support all-embracing and enduring legal peace for the above-mentioned claims, as provided for in the Agreement and herein.

The United States agrees that this exchange of notes and the establishment of the GSF shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era or World War II.

Appendix A

Austria's note and this affirmative reply shall constitute an agreement between the United States and Austria, which shall enter into force when Austria notifies the United States, by diplomatic note, that it has implemented its commitments referred to above .

The United States agrees that Annexes A and B shall be integral parts of this agreement.

Annex A

10. *Legal Closure*: The establishment of the GSF in conformity with the principles set forth in *supra* paragraphs 2 and 3, the passage of the legislation necessary to provide victims of National Socialism with the additional benefits referred to *supra* in paragraph 4, and the good faith progress in the implementation of the commitments referred to *supra* in paragraphs 5 to 9, confirmed by a diplomatic note from Austria to the United States, will lead to the dismissal with prejudice of all claims arising out of or related to the National Socialist era or World War II that have been or may be asserted against Austria and/or Austrian companies, excluding claims covered by the Reconciliation Fund, in respect of which the Agreement shall continue to govern, and further excluding *in rem* claims for works of art, by the plaintiffs' attorneys who have signed the Joint Statement and to the United States taking appropriate steps in accordance with Articles 2(2), 2(3) and 3(3) of the Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund "Reconciliation, Peace and Cooperation" (Reconciliation Fund) to assist Austria and Austrian companies in achieving legal closure for all such claims. The term "works of art" is understood to include tangible movable cultural or religious objects.

APPENDIX B — JANUARY 17, 2001 LETTER FROM HANS WINKLER, LEGAL ADVISER, AUSTRIAN FEDERAL MINISTRY FOR FOREIGN AFFAIRS, TO STUART E. EIZENSTAT, DEPUTY SECRETARY OF THE TREASURY

January 17, 2001

Stuart E. Eizenstat
Deputy Secretary of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Dear Deputy Secretary Eizenstat,

This is to confirm that the Exchange of Notes concerning the establishment of the General Settlement Fund, the Joint Statement of January 17, 2001, and any provisions concerning "legal closure" therein, shall not affect or pertain to the matter of *Maria Altman[n] v. Republic of Austria et al.*, currently pending before the United States District Court for the Southern [sic] District of California, because it is a matter of art restitution under the Austrian law. The United States Government has indicated that it will not file a Statement of Interest in the above matter.

Sincerely,

Hans Winkler
Legal Adviser
Austrian Federal Ministry for Foreign Affairs

APPENDIX C — 1955 STATE TREATY FOR THE RE-ESTABLISHMENT OF AN INDEPENDENT AND DEMOCRATIC AUSTRIA ("STRIDA"), ARTICLE 26

1955 State Treaty For The Re-Establishment Of An Independent And Democratic Austria

Article 26

Property, Rights and Interests of Minority Groups in Austria

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13th March, 1938, been subject to forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.

APPENDIX D — HOLOCAUST VICTIMS REDRESS ACT, PUB. L. NO. 105-158, 112 STAT. 18 (1998)

TITLE II—WORKS OF ART SEC. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

Appendix D

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.