No. 01-1111

In the Supreme Court of the United States

ROBERT H. HOFFMANN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners may assert any valid claim against the United States with respect to paintings by Adolf Hitler and a photographic archive that were owned by one of Hitler's associates and seized in Germany at the end of World War II.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-22a) is not reported in the Federal Reporter, but is published at 17 Fed. Appx. 980. The opinion of the court of appeals on rehearing (Pet. App. 1a-4a) is unreported. The memorandum opinion of the United States District Court for the District of Columbia (Pet. App. 23a-49a) is reported at 53 F. Supp. 2d 483. The opinion of the United States District Court for the Southern District of Texas (Pet. App. 52a-57a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2001. A petition for rehearing was denied on November 6, 2001 (Pet. App. 4a). The petition for a writ of certiorari was filed on January 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves claims with respect to four watercolors painted by Adolf Hitler, which were acquired from him by his personal photographer, Heinrich Hoffmann, and to a photographic archive compiled by Hoffmann and his son, which contains images from the Third Reich. The claims relate both to an archive that was vested in the United States in 1951 (the "vested" archive) and to an additional archive that petitioners allege is in the United States' possession (the "missing" or "non-vested" archive). See Pet. App. 8a, 24a-29a; *Price* v. *United States*, 69 F.3d 46, 48-50, modified on reh'g, 81 F.3d 520 (5th Cir. 1995), cert. denied, 519 U.S. 927 (1996).[1]

At the end of World War II, the United States Army discovered the watercolors and photographic archive in Germany, and took possession of them. The watercolors were transferred to the United States in 1945. The photographic archive was used during the Nuremberg War Crimes Trials. In 1951, the United States Office of Alien Property vested ownership of the archive in the Attorney General pursuant to the Trading with the Enemy Act, 50 U.S.C. App. 41, 42. Vesting Order No. 17,952, 16 Fed. Reg. 6162 (1951) (Vesting Order). See Pet. App. 8a; *Price*, 69 F.3d at 48-52, 54.

The plaintiffs below, and petitioners here, are five citizens and residents of Germany, who claim to be the heirs of Hoffmann and the owners of the watercolors

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[1] Petitioners relinquished their claims against the United States with respect to a distinct Hoffmann archive given to the United States in the early 1980s by Time-Life Inc. See Pet. App. 11a, 50a-51a. Consequently, this brief will not describe the lower courts' rulings with respect to that archive.

and photographic archive, and Billy F. Price, an American businessman who claims to have purchased the legal rights to those properties from Hoffmann's heirs. See Pet. App. 5a-6a; *Price*, 69 F.3d at 48-50.

2. In 1983, petitioners filed their original complaint in the United States District Court for the Southern District of Texas, seeking the return of the watercolors and the photographic archive or, in the alternative, money damages for their conversion. They proffered two bases for the government's waiver of sovereign immunity—the Federal Tort Claims Act (FTCA), 28 U.S.C. 2674, 2680(e) and (k), based on the tort of conversion, and the Little Tucker Act, 28 U.S.C. 1346(a)(2), based on a violation of an implied contract of bailment. See *Price* v. *United States*, 707 F. Supp. 1465, 1468-1473 (S.D. Tex. 1989), rev'd, 69 F.3d 46 (5th Cir. 1995).

The district court held, based on a tort theory, that the United States retained the properties for nearly 40 years in bailment for petitioners and wrongfully converted the properties in 1982 by refusing petitioners' request to return them. The court awarded petitioners nearly $8 million in damages. See *Price*, 69 F.3d at 49; C.A. App. 46 (docket entry 142).

3. The Court of Appeals for the Fifth Circuit reversed. *Price*, 69 F.3d at 49-54.[2]

The court of appeals held that it had subject-matter jurisdiction over the case, because petitioners were

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[2] The government filed simultaneous notices of appeal in the Fifth Circuit and the Federal Circuit, because it was uncertain whether the district court's decision had been based in whole or in part on the Little Tucker Act, 28 U.S.C. 1346(a)(2). After determining that the district court's decision had not been based on the Little Tucker Act, the government moved the Federal Circuit to stay its proceedings. The Federal Circuit dismissed the appeal without prejudice.

asserting only tort claims under the FTCA, and not contract claims under the Little Tucker Act. *Price*, 69 F.3d at 49-50. The court noted that, "[a]lthough [petitioners] pressed several theories of recovery in [the] original complaint, [petitioners'] position before us is that the United States converted the watercolors and archives when they refused [petitioners'] demands for their return in the early 1980s." *Id.* at 49.

The court of appeals dismissed with prejudice petitioners' conversion claim with respect to the watercolors. The court explained that the claim was based upon an alleged conversion that occurred in Germany. Accordingly, the court concluded that the claim was barred by 28 U.S.C. 2680(k), the "foreign country" exception to the FTCA's waiver of sovereign immunity. See *Price*, 69 F.3d at 50-52.

The court of appeals also dismissed with prejudice petitioners' claim with respect to the "vested" archive. The court explained that the Vesting Order was issued pursuant to the Trading with the Enemy Act. The court concluded that, because 28 U.S.C. 2680(e) provides an exception to the FTCA for acts and omissions of government employees under the Trading with the Enemy Act, petitioners' claim was "outside of the subject matter jurisdiction of the district court." The court observed that petitioners' exclusive remedy for the recovery of the "vested" archive was under the Trading with the Enemy Act, but that the two-year period for filing a claim under the Act had long since expired. See *Price*, 69 F.3d at 52-53.

On rehearing, the court of appeals dismissed without prejudice petitioners' claim with respect to the "missing," or "non-vested," archive because petitioners had failed to file an administrative claim under the FTCA. The court stated that all arguments with respect to that

archive could be considered in a separate suit by petitioners that was pending in the district court. See *Price*, 81 F.3d at 521.

Petitioners filed a petition for a writ of certiorari challenging the Fifth Circuit's decision. This Court denied the petition. *Price* v. *United States*, 519 U.S. 927 (1996).

4. Subsequently, in the separate suit, the district court concluded that Price's interest in the properties was based on an alleged assignment that was invalid under the Anti-Assignment Act, 31 U.S.C. 3727, because "Price was not the owner of the property at issue at the time the United States assumed possession and control." Pet. App. 54a. Accordingly, the court concluded that Price was not a proper plaintiff, and that venue was not proper in Texas. *Id.* at 55a-56a. The court dismissed Price, denied all remaining motions without prejudice, and transferred the case to the United States District Court for the District of Columbia. *Id.* at 56a, 57a.

5. After the transfer, the district court granted the government's motion for summary judgment in all respects relevant here. The court held that petitioners could not assert a claim under the Little Tucker Act, 28 U.S.C. 1346(a)(2), because no evidence had been presented of an implied-in-fact contract of bailment between petitioners and the government. Pet. App. 31a-37a. The court also held that petitioners could not assert a claim under the Takings Clause, because the Hoffmann heirs, as non-resident aliens, were not entitled to the protections of the Fifth Amendment in the circumstances presented here. *Id.* at 37a-39a. The court further held that petitioners had no basis for recovery under the FTCA or the Trading with the Enemy Act. *Id.* at 39a-48a. Subsequently, the court

entered judgment in favor of the government. *Id.* at 50a-51a.

6. The United States Court of Appeals for the Federal Circuit affirmed in substantial part. Pet. App. 5a-22a.[3]

The court of appeals declined to consider petitioners' challenge to Price's dismissal from the case because petitioners had failed to preserve the issue for appeal. The court explained that "[o]nce a motion to transfer has been granted and the action has been transferred, the losing party must make a motion to retransfer the case in the transferee district court in order to preserve the issue for appeal." Pet. App. 12a. The court noted that petitioners had made no such motion. *Id.* at 13a.

The court of appeals held that summary judgment was properly granted with respect to petitioners' claim under the Little Tucker Act that the government had breached an implied-in-fact contract of bailment with respect to the watercolors. Pet. App. 14a-16a. The court rejected petitioners' contention that the Army's conduct with respect to the watercolors demonstrated the existence of such a contract, observing that petitioners had failed "to allege that an official with authority actually bound the United States to return

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[3] The court of appeals concluded that it had subject-matter jurisdiction over the appeal, because petitioners had asserted claims under the Little Tucker Act as well as the FTCA. Pet. App. 11a-12a. Petitioners had filed notices of appeal to the Fifth Circuit, the District of Columbia Circuit, and the Federal Circuit, challenging the Texas district court's transfer order and the District of Columbia district court's summary judgment decision and final judgment. The Fifth Circuit dismissed the appeal. The District of Columbia Circuit stayed proceedings pending the disposition of the appeal in the Federal Circuit and then dismissed the appeal after the Federal Circuit issued its decision on rehearing.

the paintings." *Id.* at 15a. In addition, the court observed that the Army had returned other art belonging to the Hoffmanns at about the same time that the watercolors were confiscated, and concluded that such "divergent conduct indicates, if anything, an intent not to return the watercolors." *Id.* at 16a.

The court of appeals held that summary judgment was also proper with respect to petitioners' claim that the government had breached a contract of bailment with respect to the "vested" archive. The court reasoned that, even if such a contract was created, any claim based on it was barred under the Little Tucker Act's six-year statute of limitations, 28 U.S.C. 2401(a). Pet. App. 16a-18a. The court explained that "[a]ny bailment contract that might have been created with respect to the vested portion of the archive plainly was breached in 1951 by the vesting order." *Id.* at 17a. The court rejected petitioners' challenge to the validity of the Vesting Order, concluding that such a challenge was barred by the res judicata effect of the Fifth Circuit's decision. *Id.* at 18a.

Finally, with respect to the "missing" archive, the court of appeals found the facts sufficiently in dispute to preclude a summary judgment disposition. Pet. App. 19a-22a. The court observed that, even if an implied contract of bailment could be found to have existed, petitioners' claim appeared to be barred by the statute of limitations, and directed the district court to consider that issue on remand. *Id.* at 21a-22a. In denying the government's petition for rehearing, the court clarified that all of the government's defenses with respect to the "missing" archive were open for consideration on remand. See *id.* at 1a-3a.

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and turns on the unique facts of this case. This Court declined to review an earlier version of this case. *Price* v. *United States*, 519 U.S. 927 (1996). The same result is warranted here.

1. Petitioners contend (Pet. 14-17) that the court of appeals erred in holding that the Hoffmann heirs, as non-resident aliens, could not assert a Takings Clause claim against the United States in the circumstances of this case. This Court has recognized, however, that Bill of Rights protections do not apply when the United States acts outside its territory with respect to aliens who have no connection to this country. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) (Fourth Amendment does not apply to a search and seizure of property owned by a non-resident alien and located outside the United States); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) (Fifth Amendment right to due process does not apply to non-resident aliens arrested and imprisoned abroad). Nothing in this Court's decisions provides any reason to distinguish, as petitioners suggest (Pet. 15), between non-resident aliens' personal rights and property rights with respect to the extraterritorial application of the Bill of Rights.

Nor do this Court's decisions in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), and *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931), provide any support for petitioners. Those cases involved aliens and property with connections to the United States that are absent here. In *Guessefeldt*, the petitioner, although a German citizen, had lived in the United States for more than 50 years; the Court held that the mere fact that he

was detained in Germany while vacationing there at the outset of World War II did not prevent him from challenging a seizure of his property in the United States under the Trading with the Enemy Act. See 342 U.S. at 310-311, 320. In *Russian Volunteer Fleet*, the petitioner, through its predecessor in interest, had entered into a contract with a United States company for the construction of ships in the United States. See 282 U.S. at 487; Pet. Br. 2-3 in *Russian Volunteer Fleet*, *supra*. Thus, as the Court has explained, such cases "establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country." *Verdugo-Urquidez*, 494 U.S. at 271. The Hoffmann heirs do not satisfy that description.

Petitioners attempt to avoid the distinction recognized in *Verdugo-Urquidez* between the rights of resident aliens and the rights of non-resident aliens by arguing (Pet. 15) that this case involves "property that is physically located within the United States." There is no reason, in law or logic, to conclude that the Hoffmann heirs, although non-resident aliens, became vested with constitutional rights merely because the properties, which the United States seized in Germany, were eventually transferred to the United States. See *Price*, 69 F.3d at 50-52 (recognizing that any conversion of the watercolors occurred in Germany); accord Pet. App. 15a-16a.

2. Petitioners next contend (Pet. 17-20) that the court of appeals erred in holding that the Little Tucker Act's six-year statute of limitations, 28 U.S.C. 2401(a), barred their claim to the "vested" archive because "a statute of limitations does not exist when a thief is in litigation over the stolen property with his victim."

Pet. 17 (capitalization omitted). Petitioners' argument rests on the erroneous premise that international law, specifically the "Hague Treaties," prohibited the United States from acquiring title to property seized in Germany during World War II.

In the first place, petitioners' argument cannot be reconciled with the Convention on the Settlement of Matters Arising Out of the War and the Occupation (Settlement Convention), Oct. 23, 1954, 6 U.S.T. 4411, T.I.A.S. No. 3425. In the Settlement Convention, Germany waived "claims of any kind" of its nationals "arising out of acts or omissions * * * which took place in respect of Germany, German nationals or German property" between June 5, 1945, and October 23, 1954. Gov't C.A. Addendum 22a (ch. 9, art. 3, para. 2 of Settlement Convention). The Settlement Convention supersedes any general principles of law on which petitioners purport to rely. Cf. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148 (1976) (specific statute controls over general).

Moreover, the Settlement Convention and the Hague Treaties address different subjects. The Settlement Convention addresses the resolution of claims arising out of "actions taken or authorized" as a result of the "existence of a state of war in Europe" or the subsequent occupation. Gov't C.A. Addendum 21a-22a (ch. 9, arts. 1 and 3 of Settlement Convention). The Hague Treaties address the conduct of war. The Hague Treaties do not prescribe what arrangements two nations formerly at war with each other may agree to in establishing a new peacetime relationship.

Finally, petitioners are incorrect in characterizing the United States as a common "thief" with respect to the watercolors and the photographic archive. The United States, in acquiring those properties, was

making quintessential public policy decisions. The properties at issue were, and are, considered to be "Nazi Art," which the United States and its allies, pursuant to international agreements at the Yalta and Potsdam Conferences, determined should be confiscated in order to "denazify" Germany. See 3 Charles Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949*, at 1005 (Yalta Conference), 1207 (Potsdam Conference). The United States' seizure of the properties fell within the scope of the Military Government Regulation implementing those international agreements. See Office of Military Government for the United States, *Military Government Regulations, Monuments, Fine Arts and Archives* § 18-401.6 (1947) (authorizing seizure of "[a]ll collections of works of art or other cultural objects the intent and purpose of which are the perpetuation of Militarism or Nazism"). The subsequent vesting of the photographic archive was the result of the same public policy judgments. See, *e.g.*, C.A. App. 1867-1868 (government letter of May 10, 1951, stating, *inter alia*, that the Hoffmann photographic archive fell within the purview of Potsdam Agreement and consequently should be vested).

3. Petitioners further contend (Pet. 21-25) that the court of appeals erred in holding that they had failed to challenge the Vesting Order, which was issued in 1951, within the two-year limitations period provided under the Trading with the Enemy Act. According to petitioners, the statute of limitations did not begin to run until 1989, when petitioners claim to have first learned of the Vesting Order. As the court of appeals concluded, however, petitioners' claim is barred by res judicata, because they had a "full and fair opportunity

to litigate th[e] exact issue in the first action" in the Fifth Circuit. Pet. App. 18a.

In any event, petitioners' contention (Pet. 25) that they did not learn of the Vesting Order until 1989 is factually incorrect. Henriette Hoffmann was told of the vesting in 1964. See C.A. App. 2207; see also C.A. App. 2205, 2211, 2265-2272. And, in 1983, the General Services Administration denied petitioners' request to return the photographic archive, stating that, pursuant to the Vesting Order, the United States owned the archive and the interests of all German nationals in the archive had been divested. See C.A. App. 2228-2229, 2245-2246, 2263-2264. Thus, even if the 1951 Federal Register notice of the Vesting Order were insufficient (which it was not), petitioners had only until 1985, at the latest, to file a challenge to the Vesting Order under the Trading with the Enemy Act. They failed to do so.

Moreover, petitioners, as "enemies" of the United States under the Trading with the Enemy Act at the time that the properties were seized and vested, are not entitled to challenge the Vesting Order. See 50 U.S.C. App. 9(a) (allowing suit for recovery of assets seized under the Act by "[a]ny person not an enemy or ally of [an] enemy"); *Uebersee Finanz-Korporation, A.G.* v. *McGrath*, 343 U.S. 205 (1952); see also *N.V. Handelsbureau La Mola* v. *Kennedy*, 299 F.2d 923, 926-927 (D.C. Cir.) (enemy status of Germany nationals did not end until Oct. 19, 1951), cert. denied, 370 U.S. 940 (1962).

Finally, even if petitioners could challenge the Vesting Order, the challenge would fail on the merits. Petitioners suggest (Pet. 21-22) that no vesting order could validly have issued with respect to German property after January 1, 1947, when trade resumed between Germany and the United States. That argument

cannot be reconciled with the relevant statutory authority. Under the Trading with the Enemy Act, enemy property may be vested in the United States "[d]uring the time of war," 50 U.S.C. App. 5(b)(1)—a period beginning at "midnight ending the day on which Congress has declared or shall declare war" and ending on "the date of proclamation of exchange of ratifications of the treaty of peace, unless the President shall, by proclamation, declare a prior date," 50 U.S.C. App. 2(c). Although there is still no treaty of peace with Germany, Congress passed the Termination of the State of War Between the United States and Germany on October 19, 1951, providing that:

> any property or interest which prior to January 1, 1947, *was subject to vesting* * * *, *or which has heretofore been vested* or seized under [the Trading with the Enemy Act] * * * *shall continue to be subject to the provisions of that Act* in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

H.R.J. Res. 289, 82d Cong., 1st Sess., 65 Stat. 451 (1951) (emphasis added). Thus, property vested before the termination of war on October 19, 1951—which includes property subject to the Vesting Order at issue here, which was dated May 31, 1951—was validly vested.[4]

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[4] Contrary to petitioners' assertion (Pet. 21), vesting authority applies to property both inside and outside the boundaries of the United States. See *Cities Serv. Co.* v. *McGrath*, 342 U.S. 330, 333 (1952) (vesting of debentures physically located outside the United

4. Petitioners finally contend (Pet. 25-27) that the court of appeals denied them due process by declining to review on the merits the Texas district court's dismissal of Price as a plaintiff. No reason exists to disturb the court of appeals' case-specific holding that petitioners failed to preserve their challenge to the dismissal order.

In any event, the district court correctly held that the Anti-Assignment Act, 31 U.S.C. 3727, barred Price from becoming a plaintiff in the case. The Act prohibits any "transfer or assignment of any part of a claim against the United States Government or of an interest in the claim," 31 U.S.C. 3727(a)(1), and provides that "[a]n assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. 3727(b). In short, only the equivalent of a judgment may be assigned, *not*, as here, the potential for a judgment.

It makes no difference whether, as petitioners argued below, the Hoffmann heirs made an assignment of property to Price, as opposed to an assignment of their claims against the United States. This Court has recognized that the Anti-Assignment Act applies to claims by a person who acquires property after a claim against the government arose. See *United States* v. *Shannon*, 342 U.S. 288 (1952) (Anti-Assignment Act prevented plaintiffs, who purchased property damaged by the United States Army, from pursuing previous owners' FTCA claim).

5. This case does not warrant the Court's review for a final reason. All of petitioners' claims with respect to

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States fell within the "broad terms" of the Attorney General's vesting authority under the Trading with the Enemy Act).

the watercolors and the "vested" archive are barred on additional grounds not reached by the court of appeals. Accordingly, even if the Court were to review and reverse any of the court of appeals' rulings, the ultimate outcome of the case would be the same.

First, petitioners' claims are barred under the doctrine of res judicata, or claim preclusion, because they were raised, or could have been raised, in the prior proceeding in the Fifth Circuit. As this Court has explained, "[r]es judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown* v. *Felsen*, 442 U.S. 127, 131 (1979).[5]

Second, petitioners' claims are also barred by the Settlement Convention between the United States and Germany. As noted above (at 10), the Settlement Convention waives German nationals' "claims of any kind" against the United States for "acts or omissions * * * in respect of Germany, Germany nationals or Germany property" that occurred between June 5, 1945, and October 23, 1954. Gov't C.A. Addendum 22a (ch. 9, art.

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[5] Petitioners cannot avoid the application of claim preclusion on the ground that the Fifth Circuit could not have exercised appellate jurisdiction over claims under the Little Tucker Act. Petitioners invoked the Little Tucker Act in the original case in district court. If petitioners had continued to rely on the Little Tucker Act on appeal, the district court's judgment would have been reviewable in the Federal Circuit, rather than the Fifth Circuit. See *United States* v. *Hohri*, 482 U.S. 64, 75-76 (1987). Petitioners, however, explicitly informed the Fifth Circuit that they were pressing only FTCA claims. See *Price*, 69 F.3d at 50 ("[t]he parties are in agreement that only 28 U.S.C. § 1346(b) [the FTCA] could have provided a basis for subject matter jurisdiction in this case").

3, para. 2 of Settlement Convention); see *id.* at 21a (ch. 9, art. 1 of Settlement Convention) (waiving claims arising between September 1, 1939, and June 5, 1945). Accordingly, as the United States informed an attorney for Heinrich Hoffmann, Jr., in 1956, return of the properties to the Hoffmann heirs could occur only though "diplomatic channels." Pet. App. 21a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2002