Nos. 19-351, 19-520

In the Supreme Court of the United States

FEDERAL REPUBLIC OF GERMANY, ET AL., PETITIONERS,

V.

ALAN PHILIPP, ET AL., RESPONDENTS.

ALAN PHILIPP, ET AL., CONDITIONAL CROSS-PETITIONERS,

V.

FEDERAL REPUBLIC OF GERMANY, ET AL.,
CONDITIONAL CROSS-RESPONDENTS.

ON PETITION AND CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS AND CONDITIONAL CROSS-PETITIONERS

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Introduction

Germany—the perpetrator of the Holocaust and the reason the term genocide was coined—has asked the Court to take this case and to side with the argument that Nazi persecution of German Jews did not violate international law within the meaning of the expropriation exception of the Foreign Sovereign Immunities Act ("FSIA," 28 U.S.C. § 1605(a)(3)). Notwithstanding eighty years of clear and consistent policy to remove obstacles to jurisdiction over Nazi property crimes, the Brief for the United States as Amicus Curiae (the "Amicus Brief") agrees implicitly with this ahistorical assertion. The Court need not take the invitation. The Amicus Brief's principal objection is in fact with the very existence of the expropriation exception, but that quarrel is with Congress. It does not merit *certiorari*.

The Amicus Brief's suggestion that the Court grant *certiorari* on the question concerning the remaining availability of an international comity defense is equally misplaced. As noted in the Respondents' Brief in Opposition, Germany's petition muddles two key concepts commonly referred to as "comity" that are actually very different things. Yet the Amicus Brief opens by laying out the principles of adjudicatory comity, which have nothing to do with this case for the simple reason that there was no adjudication in Germany to which to defer or consider respect. That leaves the very different question of prudential exhaustion, which the Court of Appeals rightly rejected consistent with this Court's guidance in *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 141 (2014). To the extent that judicial abstention may be appropriate in *some* cases brought under the FSIA, this is already available through *forum non conveniens*—a defense of which Petitioners availed themselves but abandoned on appeal after the District Court ruled against them. *Philipp v. Fed. Republic of Germany*, 248 F. Supp. 3d 59, 83 (D.D.C. 2017). Put another way, this case does not present a vehicle to vindicate any U.S. interest.

I. The Expropriation Exception Argument Does Not Merit Certiorari.

The Amicus Brief states that "no other circuit has adopted the reasoning of either the Seventh or the D.C. Circuit," but that is not quite the case. True, the D.C. Circuit's holding—the expropriation exception applies to genocidal takings—follows a decision that the Seventh Circuit reached years earlier. *See Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 667 (7th Cir. 2012) (applying expropriation exception to claims "for property expropriated pursuant to and as an integral part of a widespread campaign to deprive Hungarian Jews of their wealth and to fund genocide, a long-recognized violation of international law."). But in fact, both the Seventh and the D.C. Circuits were preceded by the Ninth Circuit, which held Austria and Spain, respectively, were amenable to jurisdiction under the expropriation exception for Nazi art thefts. *Altmann v. Republic of Aus.*, 317 F.3d 954, 968 (9th Cir. 2002); *see also Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 n.2 (9th Cir. 2010); *Davoyan v. Republic of Turk.*, 116 F. Supp. 3d 1084, 1102 (C.D. Cal. 2013). Moreover, the Amicus Brief's footnote citation to the holding in *Mezerhane v. República Bolivariana de Venezuela* shows that the Eleventh Circuit has recognized that the expropriation exception applies to genocidal takings. 785 F.3d 545, 551 (11th Cir. 2015) (distinguishing facts from cases that "involved the taking of property in the context of genocide" and favorably citing the Seventh and D.C. Circuit cases). Recently, a District Court in the Fourth Circuit adopted the D.C. Circuit's holding in this case in ruling that the theft of an art collection from a Dutch Jew properly states a claim for a taking in violation of international law that satisfies that element of § 1605(a)(3).[1] *Berg v. Kingdom of the Neth.*, Civil Action No.: 2:18-cv-3123-BHH, 2020 U.S. Dist. LEXIS 84489, at *32–33 (D.S.C. Mar. 6, 2020). In other words,

[1] This case from the Fourth Circuit, which the Amicus Brief does not acknowledge, belies the Amicus Brief's claim that further development in the Courts of Appeal is unlikely.

every one of the four Courts of Appeals to consider the question, as well as a recent District Court decision in the Fourth Circuit, agree with the result here. Thus, a lopsided balance against Germany's interpretation has become only more so, and it does not warrant the Court's review. The D.C. Circuit's plain-text interpretation is the consensus view and there is no split to review.

Cases are only rarely maintained under the expropriation exception, which requires both (1) a taking in violation of international law; and (2) a commercial nexus with the United States. This Court recently clarified that this is a high bar, and it protects many defendants from ever addressing the merits of a case. A court must "decide the foreign sovereign's immunity defense '[a]t the threshold' of the action." *Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1314; 1324 (2017) (*quoting Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983)). The plaintiff faces a substantial burden on a motion to dismiss under the FSIA. "Where . . . the facts are not in dispute, those facts bring the case within the scope of the expropriation exception only if they do show (and not just arguably show) a taking of property in violation of international law." *Id.* at 1324.

In the relatively few cases where jurisdiction over a foreign sovereign does exist, "statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts." *Republic of Aus. v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring). In deciding this case, the Court of Appeals has merely left open a very narrow door, available to very few plaintiffs. Indeed, in the *Berg* case noted above, the defendant Dutch instrumentalities successfully moved to dismiss at the threshold stage notwithstanding the applicability of the FSIA. *Berg*, 2020 U.S. Dist. LEXIS 84489, at *45–46. The issues posed in this case will rarely recur, and will even more rarely lead to full-fledged litigation, so this case does not require the Court's intervention.

The Amicus Brief also inexplicably minimizes the clear statement of policy in the Holocaust Expropriated Art Recovery (HEAR) Act of 2016. Pub. L. No. 114–308, 130 Stat. 1524. The HEAR Act was not enacted in a vacuum; it was the next step in this country's long and just history of intervening in support of Holocaust victims. The Amicus Brief dismisses the HEAR Act's importance because the law contains no cause of action, but that misses the point entirely; the HEAR Act is merely the latest clear expression of nearly eighty years of American leadership prioritizing the redress of Nazi art theft crimes since the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control of 1943,[2] before Nazi Germany had even been defeated. Instead, the Amicus Brief incorporates the arguments of Judge Katsas's dissent that, for reasons already briefed, are in fact an objection to the policy and scope of the FSIA that can only be changed by Congress—as Congress shown itself willing to do when warranted. The Amicus Brief lays out the history of the restrictive view

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[2] Known to history as the "London Declaration," it states in relevant part that the countries making it:

> Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practi[c]ed by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.
>
> Accordingly the Governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war or which belong or have belonged, to persons, (including juridical persons), resident in such territories. This warning applies whether such transfers of dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

of sovereign immunity, but then concedes that § 1605(a)(3) is an explicit deviation from that approach. Amicus Brief at 10. The place for that debate is not here.

The Amicus Brief also endorses Germany's argument that the expropriation exception applies only to cases regarding an "international law of takings." This language is nowhere in the FSIA's text. Instead, Germany relies on a provision that appeared in a prior version of the Restatement of Foreign Relations. Even if this language from the prior Restatement could be used to curtail the expropriation exception, that exception would nonetheless apply to the present case. That provision acknowledges state responsibility for "a taking by the state of the property of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation[.]" RESTATEMENT (THIRD) OF FOREIGN RELATIONS (LAW OF THE UNITED STATES), § 712 (1987).

Germany's taking of property was not for any legitimate public purpose, it was discriminatory, and it was not accompanied by provision for just compensation. Only one wrongful aspect is required; all exist here. Further, in the context of the Holocaust, the question is not whether the victims were nationals of other states, but whether they were actually recognized as citizens of their own country. *See Cassirer*, 616 F.3d at 1023 n.2. By 1935, Germany no longer recognized the plaintiffs' Jewish relatives as Germans. There is no need for *certiorari* where a different legal ruling would not change the ultimate outcome.

Finally, the argument first offered by Germany, and then adopted by the Amicus Brief, that Plaintiffs somehow did not previously contest[3] that the sale was a domestic taking is both

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[3] Germany contended in its Reply that Plaintiffs "argue—for the first time—that even if the expropriation exception is interpreted according to the consensus view, the takings alleged in this case are not domestic takings, because Nazi Germany stripped Jews of citizenship. Opp. 22–24. Plaintiffs have never before raised this argument or disputed that this is a domestic taking. Their waived argument cannot be raised for the first time to avoid this Court's review."

incorrect and legally irrelevant. Plaintiffs have disputed that argument at every step and have always maintained that Nazi property crimes against German Jews are not domestic takings immune from scrutiny. This is because, *inter alia*, the United States has recognized since 1945 (at least until the Amicus Brief) that Jews ceased to be equal citizens on January 30, 1933,[4] not some later arbitrary date of the perpetrator's choosing. Germany chose not to treat Jews as Germans in 1933; Germany cannot complain now that Jews in 1935 must be considered Germans to escape responsibility. First Amended Complaint at ¶ 57 (Supp. App. 29). When Germany moved to dismiss the Amended Complaint, relying explicitly on the domestic takings rule, Plaintiffs responded:

> More importantly, *Simon* disposes of the Defendants' "domestic takings" argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims. Defendants' first Motion to Dismiss, already struggling to differentiate *Abelesz*, revealed their true colors on the issue when they took the position that the taking of the Welfenschatz did not qualify as a taking in violation of international law because it "preceded the Holocaust by several years." *See* Defendants' Motion to Dismiss, October 30, 2015, at p. 27. And while the current Motion wisely backed off of this alarmingly revisionist contention, the core of their argument has not changed: that German Jews under duress in 1935 have no cognizable complaint against the acts of the Nazi government.

Philipp et al. v. FRG et al., Case 1:15-cv-00266-CKK, Plaintiffs' Opposition to Motion to Dismiss (ECF Docket No. 19), May 11, 2016, at p. 31. Plaintiffs responded similarly on appeal:

> More importantly, *Simon* disposes of the Defendants' "domestic takings" argument because, as in *Simon* and *de Csepel*, the Nazis' genocidal rampage is at the very heart of the Plaintiffs' claims. *Simon* dispenses with the aforementioned contention that there is no taking merely because the Welfenschatz itself was not

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Petitioner's Reply at 7–8. The Amicus Brief merely cites the Petitioner's Reply without any apparent scrutiny of the record that shows precisely the opposite.

[4] *See, e.g.*, Military Government Law No. 59, *Restitution of Identifiable Property* (passed November 29, 1947) (transactions between January 30, 1933 and May 8, 1945 involving members of groups that were "to be eliminated in [their] entirety from the cultural and economic life of Germany" under German control—Jews principally among them—were presumptively acts of confiscation and subject to return).

> liquidated or used to finance directly Germany's murder of six million European Jews. *Simon* explains why that is genocide: the persecution and systematic organized plunder of Jews was the first step in the Holocaust.

Philipp et al. v. FRG et al., No. 17-7064 (consolidated with No. 17-7117), Brief of Appellees at 28 (D.C. Cir. Feb. 22, 2018). The Amicus Brief's contention that it was *never* argued is puzzling.

Even if Plaintiffs had never made the argument, however, they would be free to do so now. "Appellees, as the prevailing parties, may of course assert any ground in support of that judgment, 'whether or not that ground was relied upon or even considered by the trial court.'" *Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979) (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)); *see also, e.g.*, *United States v. Street*, 917 F.3d 586, 596 (7th Cir. 2019) ("Much as an appellee is free to argue alternative grounds to support a judgment without filing a cross-appeal, the government was free to argue different grounds supporting the same bottom-line recommendation[.]"); *Edwards v. UPS*, 16 F. App'x 333, 338 (6th Cir. 2001) ("An appellee may assert grounds to support the district court's decision that were not raised below, but only if the issue is raised as an alternative argument to support the lower court's judgment."); *United States v. Lieberman*, 971 F.2d 989, 996 n.5 (3rd Cir. 1992) ("[A]n appellee may proffer alternative arguments to support the district court's decision without filing a cross-appeal.").

II. There Are No Issues of International Comity That Warrant Review.

Adjudicatory comity is not at issue here after the District Court ruled against Petitioners' adjudicatory comity argument, and after Petitioners chose not to raise that issue on appeal. *See Philipp*, 248 F. Supp. 3d at 81 ("Defendants first assert that international comity requires the Court to defer to the decision of the Advisory Commission."). The Amicus Brief nonetheless references adjudicatory comity prominently—devoting nearly three full pages to a question not involved in the petition: "[T]he doctrine of international comity . . . permits courts to recognize the 'legislative, executive or *judicial acts* of another nation[.]'" Amicus Brief, 3 (*quoting Hilton*

v. Guyot, 159 U.S. 113, 164 (1895)) (emphasis added). This case does not involve any "judicial acts" by Germany. There is neither a judgment already reached abroad, nor a related proceeding in a German court. This case, therefore, does not present the issue of what deference our courts may show to ongoing proceedings or judicial resolutions abroad. *See JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005) (explaining that adjudicatory comity involves "the discretion of a national court to decline to exercise jurisdiction over a case before it when that case is pending in a foreign court with proper jurisdiction."). The Amicus Brief's devotion to the topic expresses the desire to foster enforcement of final judgments, a desire that cannot be vindicated or resolved in this case. Whether *NML Capital*'s guidance affects adjudicatory comity is therefore not a question before the Court, and the Amicus Brief effectively talks past this actual case in leading with a discussion of adjudicatory comity.

Germany, of course, champions the more controversial doctrine of prudential exhaustion, arguing that plaintiffs with valid FSIA claims should be required to exhaust their remedies abroad—an argument that depends on a Seventh Circuit decision which, in the words of the RESTATEMENT (FOURTH), "add[ed] a substantive requirement for jurisdiction that is not supported by the statute or its legislative history." § 455, Reporter's Note 11 (discussing *Fischer v. Magyar Allamvasutak Zrt*, 777 F.3d 847 (7th Cir. 2015)). Consistent with that reasoning, the Court of Appeals has disallowed the novel defense of prudential exhaustion but has also held: "the ancient doctrine of *forum non conveniens* is not displaced by the FSIA." *Simon v. Republic of Hung.*, 911 F.3d 1172, 1181 (D.C. Cir. 2018). Further, the Amicus Brief concedes that *Fischer* is *wrong*: "The Seventh Circuit, however, mistakenly described its application of comity as 'impos[ing] an *exhaustion requirement* that limits where plaintiffs may assert their international

law claims.' *Fischer*, 777 F.3d at 857 (emphasis added)." Amicus Brief at 20, n.2. The Amicus Brief shows that the entire foundation of the petition's comity argument is flawed.

To the extent that the Amicus Brief supports U.S. courts' discretion to abstain from jurisdiction when there is an alternative and appropriate forum, that interest is already served by the doctrine of *forum non conveniens*. That doctrine remains available to sovereign defendants (indeed, Defendants asserted *forum non conveniens* unsuccessfully in the District Court before abandoning it on appeal). *Philipp*, 248 F. Supp. 3d at 83. That doctrine, as the United States explains in recommending against a grant of *certiorari* in the case of *Simon v. Republic of Hungary*, is a heavily fact-dependent determination. *Simon v. Republic of Hungary*, No. 18-1447, Brief for the United States as Amicus Curiae at p. 9 ("[T]he court of appeals' reversal of the district court's *forum non conveniens* dismissal—is a factbound claim of error that does not merit further review."). The Amicus Brief's argument that a complex, factor-intensive prudential exhaustion defense should be added to the FSIA would undue careful Congressional work and force courts and litigants back to the pandemonium that prevailed before the FSIA.

The Amicus Brief unsuccessfully attempts to distinguish Congress's insertion of an exhaustion requirement into only one part of the FSIA. As argued previously, the addition of an exhaustion requirement into one, but not all, exceptions to immunity in the FSIA means that as a matter of basic textual interpretation that Congress considered but rejected the applicability to the statute as a whole. The Amicus Brief has no real answer for this, protesting that "Congress added the terrorism exception to the FSIA some 20 years after the enactment of the statute." Amicus Brief at 18. That temporal distance does not affect the language's plain meaning. More relevant—but unaddressed—is Congress's revision of this very exception in 2016 in the Foreign Cultural Exchange Jurisdictional Clarification Act, Public Law No: 114-319 (2016) (the

"FCEJCA"). The FCEJCA amended § 1605(a)(3) to exclude temporary exhibition loans of cultural objects from the "commercial activity" necessary to satisfy the commercial nexus component of the expropriation exception (effectively overruling by statute the result in *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298 (D.D.C. 2005)). Yet while narrowing FSIA jurisdiction—now forty years after the enactment of the FSIA (to use the Amicus Brief's frame of reference) and exactly twenty years after the insertion of the terrorism exception—Congress made an explicit exception for claims concerning Nazi-looted art. In other words, in enacting a law that *limited* the reach of the FSIA expropriation exception and having already articulated an exhaustion requirement for terrorism claims, Congress expressly *preserved* the scope of such claims when they arise out of Nazi confiscation. And although Congress was actively amending the FSIA, and although it had shown it knew how to express exhaustion requirements, it otherwise left the statute as it was.

Moreover, the Amicus Brief misapprehends how prudential exhaustion would play out in this case on a theoretical remand, making it a bad vehicle for any legal issues of concern. As an initial matter, Plaintiffs already attempted to resolve their claim before Germany's non-binding Advisory Commission, the only option available to them. Below, Germany boasted that the Advisory Commission is "the mechanism established by Germany under the Washington Principles to hear such disputes" and that "Plaintiffs had their chance to present their claim on the merits before the Advisory Commission." *Philipp v. Fed. Republic of Germany*, No. 17-7064 (consolidated with No. 17-7117) Brief for Appellants at 46, 56 (D.C. Cir. Dec. 1, 2017). Plaintiffs already exhausted their only option for dispute resolution in Germany.

Exhaustion would not be required here in any event. Exhaustion is not required when "such remedies are clearly sham or inadequate, or their application is unreasonably prolonged."

RESTATEMENT (THIRD), § 713 cmt. f. "There is no need to exhaust local remedies when the claim is for injury for which the respondent state firmly denies responsibility[.]" *Id.* Both exceptions apply here. The Plaintiffs could not receive any judicial remedy in Germany, and Germany has firmly denied that it did anything wrong regarding its "purchase" of the Welfenschatz. *See Philipp v. F.R.G., Petition for Rehearing en Banc*, p. 3 n.1 (D.C. Cir. Sept. 7, 2018) ("Defendants vigorously dispute Plaintiffs' allegations that the sale of the Welfenschatz was forced, that the sale constituted an expropriation, and that this supposed expropriation violated international human rights law."). The Amicus Brief also adopts uncritically Germany's suggestion that there is a "dispute" about whether Plaintiffs could sue in Germany. There is no dispute. Germany's own expert Jan Thiessen conceded that the possibility of suing in Germany is purely speculative. App. at 203-206. No interests served by international comity are served in remanding a case to the District Court for consideration of a hypothetical possibility. Further, Germany's denial of responsibility disposes of the prudential exhaustion requirement entirely, even if Plaintiffs could obtain some remedy in Germany (which they cannot). Finally, exhaustion is not required for claims of "universal concern," such as allegations regarding genocide. *See, e.g., Sarei v. Rio Tinto, Pub. Ltd. Co.*, 550 F.3d 822, 824 (9th Cir. 2008); RESTATEMENT (FOURTH), § 413. Even if Germany could mount a comity-based exhaustion defense, the defense would fail, and there is no basis to remand for that futile assertion.

III. Any Recommendation that the Court Grant Certiorari Should Include the Conditional Cross-Petition.

The Court of Appeals answered the essential question with respect to the expropriation exception—that it applies to genocide and the case should return to the District Court now with that guidance. If, however, the Court concludes that *certiorari* were warranted on Germany's petition, it is critical that the Court also grant the conditional cross-petition. The conditional

cross-petition asks for the plain text of the FSIA to be upheld: the phrase "A foreign state shall not be immune" means a foreign state (here, Germany) is not immune when the required elements are satisfied. If the Court decides the expropriation exception worthy of clarification, it should speak to both halves of the law's elements. Plaintiffs respectfully submit that Germany's policy-oriented arguments to narrow the FSIA should not take precedence to the exclusion of resolving the plain meaning of statutory text.

There is a more pronounced circuit split on the question of commercial nexus than there is on the takings aspect of the expropriation exception to which Germany objects—particularly after the takings balance was skewed further in Plaintiffs' favor in the *Berg* decision in South Carolina. That split has only widened since the petition for certiorari was filed in *de Csepel v. Republic of Hungary*, No. 17-1165 that the Court ultimately declined to grant. The Ninth Circuit holds that either test is sufficient, and the Eleventh Circuit appears to have agreed recently in asserting jurisdiction over Venezuela by stating that expropriated property "'need not be present' in the United States, so long as the agency or instrumentality of the foreign state owns or operates it (or property exchanged for it) and is engaged in commercial activity in the United States." *Comparelli v. Republica Bolivariana De Venez.*, 891 F.3d 1311, 1326 (11th Cir. 2018) (expropriation exception requires that "at least one of the two statutory nexus requirements are satisfied."); *Cassirer*, 616 F.3d at 1038 (cert. denied June 27, 2011); *Altmann*, 317 F.3d at 969 (instrumentality's commercial activity rendered Austria subject to jurisdiction).

By contrast, the Second and D.C. Circuits hold that the test for the foreign state is distinct from that for the instrumentality. *See Arch Trading Corp. v. Republic of Ecuador*, 839 F.3d 193, 205–06 (2d Cir. 2016) (applying the same approach expressed in this case). The *Berg* court followed the *de Csepel/Philipp* holding as well. The landscape is unsettled, to say the very least,

around the country. Yet to grant Germany's petition but not the Plaintiffs' as the Amicus Brief suggests would place before the Court only one part of a statute on which there is disagreement among the Courts of Appeal, disagreement that would continue unresolved regardless of how the Court ultimately ruled on Germany's petition. And the D.C. Circuit's holding regarding the expropriation exception deserves attention because, under the current state of the law, sovereigns that illegally seize property are incentivized to create sham instrumentalities to escape responsibility, which would jeopardize the U.S.'s jurisdictional framework and the important principles of international law that it seeks to enforce.

RESPECTFULLY SUBMITTED

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