[ORAL ARGUMENT SCHEDULED FOR JANUARY 10, 2023]

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

Lead Case No. 22-5068

JENNY SCHIEBER, ET AL.

Plaintiffs-Appellants,

-v-

UNITED STATES OF AMERICA

Defendant-Appellee

On Appeal from the Orders and Final Judgments of the
United States District Court for the District of Columbia
Case Nos.
1:21-cv-1371-JDB
1:20-cv-265-FYP
1:20-cv-263-CKK
1:20-cv-266-RDM
1:20-cv-260-FYP

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SUMMARY OF ARGUMENT

Under the Administrative Procedure Act ("APA"), "final agency action for which there is no other adequate remedy in a court" is subject to judicial review. 5 U.S.C. §704. Plaintiffs challenge the denials of their DS-7713s (Statement of Claim) by the Department of State. These denials are final agency actions and Plaintiffs have no other adequate remedy. Accordingly, Plaintiffs' claims are subject to judicial review.

Echoing the district courts, the government contends that the existence of the U.S.-France Agreement[1] – pursuant to which the government created the fund and claims process – precludes judicial review. The government claims that Plaintiffs' APA challenge fails because it is based on international norms that are not part of domestic law.[2]

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[1] *Agreement between the Government of the United States of America and the Government of the French Republic on Compensation for Certain Victims of Holocaust-Related Deportation from France Who Are Not Covered by French Programs*, U.S.-Fr., Dec. 8, 2014, T.I.A.S. No. 15-1101 ("Agreement") [JA 6-37].

[2] The government devotes the majority of its brief to showing why the Agreement is not self-executing and that it does not create a private right of action in favor of the Plaintiffs [Gv't Br., at 14-27]. Plaintiffs submit, however (without conceding), that these arguments are immaterial to the

Plaintiffs' claims arise under the APA, not the Agreement. Plaintiffs do not claim that the government has breached the Agreement. Nor do Plaintiffs seek to enforce the Agreement. Plaintiffs merely wish to have a court to review the reasonableness of the government's denial of their claims for compensation under conventional domestic administrative law principles. That is precisely the function of the APA.

By engaging, among other things, in a formal notice-and-comment procedure in developing the claims forms and related process, the government implemented and incorporated the Agreement's substantive standards pursuant to 22 U.S.C. §§2651a, 2656 and 2668a. By so doing, the government effectively "domesticated" the Agreement's substantive provisions for the limited purposes of APA judicial review. Moreover, the substantive provisions of the Agreement so implemented provide judicially manageable standards to review the government's denials. Finally, when the plain language, structure and purpose of the Agreement are taken into account, there is little doubt that Plaintiffs' claims are entitled to judicial review under the standards incorporated

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reviewability of Plaintiffs' APA claims. Consequently, this Reply focuses on whether the APA claims are cognizable under domestic law.

into the government's forms as well as those additional principles adopted by the State Department in carrying out its functions under the Agreement.

ARGUMENT

I. Plaintiffs' APA claims are based on domestic norms

A. The substantive provisions of the Agreement have been implemented and incorporated by the State Department

It is axiomatic that the APA creates a federal cause of action for one who is adversely affected or aggrieved by agency action provided that **(1)** no statute precludes judicial review [5 U.S.C. §701(a)(1)]; **(2)** the action in question is not one committed by law to agency discretion [5 U.S.C. §701(a)(2)]; and **(3)** there is no other adequate remedy in a court [5 U.S.C. §704]; *Heckler v. Chaney*, 470 U.S. 821, 828 (1985); DEFINING A CAUSE OF ACTION, FEDERAL STANDARDS OF REVIEW, Harry T. Edwards, Linda A. Elliott (2018). In addition, there is a well-settled, strong presumption of reviewability under the APA. That presumption can be overcome "only by clear and convincing evidence, of congressional intent to preclude judicial review. *Kucana v. Holder,* 558 U.S. 233, 251-252 (2010); *Make*

the Road New York v. Wolf, 962 F.3d 612, 623-624, *reh. en banc denied* (D.C. Cir. 2020).

It is undisputed that **(1)** Plaintiffs have been adversely affected by the denials of their compensation claims; **(2)** these denials are final agency actions; **(3)** there is no *statute* that precludes the relief Plaintiffs seek, nor does the Agreement bar judicial review[3]; and **(4)** there is no adequate alternative remedy.[4]

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[3] *See* Opening Brief at 25-28.

[4] The government does not appear to argue on appeal that the action in question is one committed by law to agency discretion [5 U.S.C. §701(a)(2)]. Nor does the government renew its political question defense. In the proceedings below, the government challenged the claims under §701(a)(2). Although the government has filed cross-appeals in *Gutrejman*, *Schneider*, and *Bywalski*, it appears to have abandoned its §701(a)(2) argument, which was not adjudicated by any of the district courts. The government cross-appealed in order to preserve its ability to argue for dismissal on the merits "without resolving any tension in its precedents on the more difficult jurisdictional question." [Gv't Br., at 28, n. 3]. Nowhere in its brief does the government make mention of §701(a)(2) or the political question argument. The government is deemed to have waived these arguments. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 497 (D.C. Cir. 2004) (arguments that parties do not make on appeal are deemed to have been waived, collecting cases); *Jarvis v. Comm'r, Soc. Sec. Admin.*, 2018 WL 6722401, at *1 (D.C. Cir. Dec. 18, 2018) (same). *But see* Gv't Br., at 32, *citing Steenholdt v. Federal Aviation Admin.*, 314 F.3d 633 (D.C. Cir. 2003).

Plaintiffs' claims arise solely under the APA and not the Agreement [*see* Opening Br., at 16-20]. Reduced to its essence, the government's principal argument is that Plaintiffs' claims are based on international and non-domestic norms, taking them outside the purview of the APA. This argument ignores the fact that the State Department has specifically implemented and incorporated the provisions of the Agreement pursuant to its authority under 22 U.S.C. §§2651a, 2656 and 2668a.[5]

Under art. 6(1) of the Agreement, the State Department is charged with determining criteria for compensation entitlement. *See* Agreement, art. 6(1), JA 18 ("In developing criteria for distributing the sum […] the United States shall consider the objectives of this Agreement […]"). These criteria were implemented by the State Department pursuant to

[5] Section 2668a – entitled *Disposition of trust funds received from foreign governments for citizens of United States* — provides that the "Secretary of State shall determine the amounts due claimants, respectively, from each of such trust funds […]." Section 2651a is the general State Department organizational statute and is also a source for the Department's authority to disburse the subject funds. *Cf. Young v. Trump*, 2020 WL 7319434 (N.D. Cal. Dec. 11, 2020), *appeal dismissed sub nom. Young v. Biden*, 2021 WL 3507648 (9th Cir. Mar. 16, 2021) (Section 2651a used to implement Presidential Proclamation by the State Department).

its statutory authority. 80 Fed. Reg. 22604-01, 2015 WL 1802386 (April 22, 2015); 80 Fed. Reg. 37352-02, 2015 WL 3943095 (June 30, 2015).[6]

The implementation and incorporation of the Agreement effectively "domesticated" its substantive provisions and therefore rendered State Department adjudication of individual claims, like those of the Plaintiffs here, subject to judicial review under the APA. *See* Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 695, 723 (2005) ("[…] nothing in the APA indicates that domestic agency decisions in implementing global norms are exempt from APA requirements or subject to a lesser standard of judicial review than comparable purely domestic decisions."); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 78 (2005) (discussing agency implementation of international agreements and judicial review); Elspeth Faiman Hans, *The Montreal Protocol in U.S. Domestic Law: A "Bottom Up" Approach to*

[6] *See* Plaintiffs' Opening Br., at 6, n. 4; *see also* form DS-7713 – attached to Plaintiffs' Opening Brief as Exhibit "A" – (stating that the form and information being collected is "pursuant to the State Department Basic Authorities Act, 22 U.S.C. §§2651a, 2656 and 2668a, and the Agreement […]"

the Development of Global Administrative Law, 45 N.Y.U. J. INT'L L. & POL. 827, 833 (2013) (same).

In *Sluss v. United States Department of Justice, International Prisoner Transfer Unit*, 898 F.3d 1242, 1251 (D.C. Cir. 2018) this Court held that it could look to the substantive provisions of a ***non***-self-executing, international prison transfer agreement because the agreement was implemented by and incorporated in the Transfer of Offenders to or from Foreign Countries Act.[7] *See also* Opening Br., at 20, n. 12. While *Sluss* involved implementation of a non-self-executing international agreement in the context of a *statute*, the same result should ensue when implementation is made by action of the Executive Branch, whether by regulation, policy statements, claims processes or other agency action.

The sole authority cited by the government is this Court's decision in *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929,

[7] The Transfer of Offenders to or from Foreign Countries Act [18 U.S.C. §4100 *et seq*.] is a general statute and does not specifically implement and incorporate the treaty at issue in *Sluss*. The *Sluss* Court, nonetheless, concluded that the Transfer Act was sufficient to "domesticate" the provisions and objectives of the non-self-executing treaty.

942–43 (D.C. Cir. 1988). Assuming *Nicaragua* is still good law[8], it is readily distinguishable from the present case.

In *Nicaragua*, United States citizens living in Nicaragua brought suit seeking injunctive and declaratory relief against the funding of the "Contras" in Nicaragua on the grounds that such funding violated the APA, the Fifth Amendment, the United Nations Charter, and customary international law. With respect to the APA, the plaintiffs argued funding the "Contras" was not in accordance with law because it contravened a decision by the International Court of Justice. *Case Concerning Mil. & Paramilitary Activities in & Against Nicaragua* (Nicaragua, 1986 I.C.J. 14 (June 27, 1986). This Court rejected the argument because the "law"

[8] We note that the holding in *Nicaragua* relied upon by the government has been cited only once in 34 years outside the present litigation. *In re Request from United Kingdom Pursuant to Treaty Between Gov't of U.S. & Gov't of United Kingdom on Mut. Assistance in Crim. Matters in the Matter of Dolours Price*, 685 F.3d 1, 12 (1st Cir. 2012) (citing *Nicaragua* without serious analysis to bar an attempt by criminal defendants to prevent enforcement of subpoenas under a bilateral mutual judicial assistance treaty). Moreover, the continuing vitality of *Nicaragua* in light of contemporary justiciability jurisprudence is open to question. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (articulating the modern-day principles of Article III standing); *Jibril v. Mayorkas,* 20 F.4th 804, 813-814 (D.C. Cir. 2021) (same).

at issue – *i.e.*, the ICJ decision – was "not an operative part of domestic law." *Nicaragua*, 859 F.2d at 943.

In stark contrast to the case at bar, the ICJ decision at issue in *Nicaragua* was never implemented or incorporated by the government in any fashion; quite the opposite. There, the U.S. government consistently objected to the jurisdiction of the ICJ and, therefore, to the final judgment. *See Nicaragua*, 859 F.2d, at 932 (noting that the U.S. government withdrew from the merits phase of the ICJ proceedings, contending that the court lacked jurisdiction over Nicaragua's application); *Medellin v. Texas*, 552 U.S. 491, 528 n. 14 (2008) (noting that United States would "*not* comply" with the ICJ decision [emphasis in original]). Here, however, as we have shown, the State Department implemented the substantive provisions of the Agreement pursuant to its authority under 22 U.S.C. §§2651a, 2656 and 2668a. *See Nat. Res. Def. Council v. Env't Prot. Agency*, 464 F.3d 1, 8 (D.C. Cir. 2006) (suggesting that implemented international treaties would not necessarily be covered by *Nicaragua*'s ruling); *Medellin v. Texas*, 552 U.S. at 528 n. 14

(executive branch implementation of international obligation creates a domestic norm).[9]

B. The APA claims are also based on criteria promulgated by the Department of State

Plaintiffs' claims are also based on the substantive provisions of the Agreement. In implementing the Agreement, including the adjudication process, the State Department – pursuant to its statutory authority – promulgated its own additional criteria to determine eligibility and standards of proof. This fact is evidenced by the content of form DS-7713, which seeks information that is not specifically addressed in the Agreement.[10] *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260

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[9] In *Medellin*, Chief Justice Roberts contrasted *Nicaragua* with *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Can. v. U.S.), 1984 I.C.J. 246 (Judgment of Oct. 12) on the grounds that the National Oceanic and Atmospheric Administration issued a final rule which implemented the ICJ's boundary determination.

[10] For example, although the Agreement states that a surviving spouse is eligible for compensation, nothing in the Agreement addresses how to prove one is a spouse. The State Department, acting on its own initiative, required the submission of "documentation of the marriage." [DS-7713, at 2]. Also, the Agreement does not address the status of individuals who were "stateless." Any State Department determination concerning statelessness was made pursuant to its own internal policies or rules. Another example: The Agreement does not provide any guidance as to situations such as those raised in the case of *Schneider* [Plaintiffs' Opening Br, at 19-20, n. 11]. Simply put, the claims process developed by

(1954) (federal agencies must follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions). This is yet another reason why Plaintiffs' claims are governed by reviewable domestic as opposed to international norms.[11]

II. There is "law to apply" in Plaintiffs' APA claims

Relying on *Heckler v. Chaney*, 470 U.S. 821, 828 (1985) and *Steenholdt v. Federal Aviation Admin.*, 314 F.3d 633, 639 (D.C. Cir. 2003), the government maintains that there must be "law to apply" in an APA challenge. Gv't Br., at 32, citing *Steenholdt*.[12] *See also Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977) (presumption of

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the State Department, while based on the Agreement, was also predicated upon its internal procedures, rules and guidelines.

[11] Because the government did not submit an administrative record in any of the cases below, one cannot determine definitively whether the State Department relied in whole or in part upon any of its own criteria and standards in denying Plaintiffs' compensation claims. *See* District Court Local Civ. Rule 7(n).

[12] These cases interpreted and applied, 5 U.S.C. §701(a)(2), the "committed-to-agency-discretion-by-law" exception to APA judicial review. As noted above (n. 4), the appears to have abandoned any arguments based on §701(a)(2).

reviewability is lost when there is no law to apply). In this case, according to the government, no such "law" exists.

As already discussed, however, there is sufficient "law to apply" – whether that law be the substantive provisions of the Agreement, as "domesticated" by the State Department, or the Department's own criteria that it promulgated in developing the claims process. And, significantly for this case, judicially manageable standards need not be found in formal legislation or regulation. *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) ("Judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes […]"). Thus, the substantive provisions of the Agreement, as adopted by the State Department, should be considered "judicially manageable standards" for purposes of APA review. *Ctr. for Auto Safety v. Dole*, 846 F.2d 1532, 1534 (D.C. Cir. 1988) (self-imposed agency constraints may supply the "law to apply" under *Heckler v. Chaney*); *Keats v. Becerra*, 2021 WL 6102200, at *2 (D.C. Cir. Dec. 3, 2021) (same).

Here, there is more than sufficient "law to apply" for purposes of APA judicial review. In language adopted, implemented and incorporated by the State Department after notice-and-comment

procedures, the Agreement sets out definitive criteria to be applied by the government in evaluating and adjudicating compensation claims.

(a) The U.S. must take into account the objectives of the Agreement (art. 2 and 6(2); JA 15 and 18) in developing criteria for distributing the compensation fund. Those objectives are:

(i) To provide an exclusive mechanism for compensating persons who survived deportation from France, their surviving spouses, or their successors and assigns, who were not able to have access to other Holocaust deportation programs.

(ii) To create a binding international obligation on the part of the United States to recognize the sovereign immunity of France within the United States legal system with regard to Holocaust deportation claims and to undertake all actions necessary to ensure an enduring legal peace at the federal, state, and local levels of the government.

(b) Eligibility for compensation is to be determined in accordance with the criteria set forth in articles 3(1) [French nationals excluded]; 3(2) [Non-French nationals who have received or are eligible to receive compensation under agreements with the French

Government are excluded]; 3(3) [Recipients of compensation under French Decree no. 2000-657 of 13 July 2000 are ineligible]; 3(4) [ineligibility of persons who received compensation for Holocaust deportation from States other than France] [art. 6(2)(b); JA 18; *see also* DS-7713, at 1].

(c) In determining eligibility, the U.S. "shall" rely upon a sworn statement of nationality in accordance with the Annex to the Agreement [art. 6(2)(c); JA 18; *see also* DS-7713].

(d) The U.S. is required to take reasonable steps to provide sufficient notice to persons who may qualify for compensation under the specified criteria [art. 6(4); JA 19].

(e) In "accordance with applicable domestic procedures" the U.S. is to provide an appropriate time for submission of claims [art. 6(5); JA 19].

Compare Agreement, art. 6(1) and 6(2), JA 18, *with Sluss*, 898 F.3d, at 1251 (provision treaty requiring the parties to "bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender," coupled with the mandatory "shall," was considered

sufficient "law to apply." *See also Robbins v. Reagan*, 780 F.2d 37, 48 (D.C. Cir. 1985) ("purpose" of statute was sufficient "law to apply").

Significantly, in *Shawnee Tribe v. Mnuchin*, 984 F.3d 94, 101 (D.C. Cir. 2021) this Court, distinguishing *Lincoln v. Vigil*, 508 U.S. 182 (1993), held that a challenge to the distribution of funds under the Title V of the CARES Act[13] — which provided for a lump-sum fund to assist tribal governments in dealing with the COVID-19 pandemic – was reviewable under the APA given the judicially manageable standards against which to judge the agency action. *Contrast with Steenholdt*, 314 F.3d at 638 (concluding that statute empowering an agency to rescind a specific type of designation "at any time for any reason the Administrator considers appropriate" preclude judicial review.).

III. The background, structure and purpose of the Agreement support judicial review in this case

Before closing, it would be helpful to place the issue before this Court in context. The U.S.-France Agreement was not executed in a vacuum; it was the latest example of bilateral Holocaust compensation

[13] Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136, 134 Stat. 285, *codified at* 42 U.S.C. §801.

agreements entered into the United States and certain European nations, known as "legal peace" agreements.

After years of litigation in U.S. courts by the survivors and heirs of deportees against France and its railroad company, Société Nationale des Chemins de Fer Français ("SNCF"), the victims' claims were routinely dismissed on foreign sovereign immunity grounds with the result that they were left with nothing to redress the crimes of the Holocaust.

Faced with the prospect that Congress would enact legislation removing SNCF's sovereign immunity[14] as well as threats by state governments to exclude SNCF from lucrative procurement

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[14] H.R. 2954, 108th Cong. (2003). According to the bill, -

> §2(a) The United States district courts shall have original jurisdiction, without regard to the amount in controversy, of any civil action for damages for personal injury or death that –
> (1) arose from the deportation of persons to Nazi concentration camps during the period beginning on January 1, 1942, and ending on December 31, 1944; and
> (2) is brought by any such person, or any heir or survivor of such person, against a railroad.

The bill explicitly states that the Foreign Sovereign Immunities Act, 28 U.S.C. §§1601 – 1611, would not apply to such actions. §2(b).

opportunities[15], France finally decided to seek a negotiated solution. These negotiations, commencing in 2012, led to the U.S.-French Agreement.

The drafters of the Agreement adopted the model used to resolve Holocaust compensation claims against Germany, Austria and Switzerland – so called "legal peace" agreements – which did not formally extinguish claims against the perpetrating nations. Rather, the agreements established lump-sum funds from which compensation would be distributed to eligible claimants against a waiver of any right to sue in court. The U.S., for its part, undertook to submit Statements of Interest in any U.S. litigation urging the court to dismiss the case in light of the legal peace agreements and U.S. foreign policy interests.[16] *See*

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[15] Katherine Shaver, "Opposition to Maryland rail line bidder raises questions about accountability for Holocaust," WASHINGTON POST (Mar. 9, 2014)

https://www.washingtonpost.com/local/trafficandcommuting/opposition-to-maryland-rail-line-bidder-raises-questions-about-accountability-for-holocaust/2014/03/09/ddb2a8c2-9f0c-11e3-a050-dc3322a94fa7_story.html (last accessed on November 21, 2022).

[16] *See, e.g.,* Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future", Berlin, Germany, July 17, 2000, U.S.-Ger., T.I.A.S. 13104, 2130 U.N.T.S. 249 (entered into force Oct. 19, 2000). Available at

Graham O'Donoghue, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1135 (2006) (discussing the nature of "legal peace" agreements in the context of Holocaust-era claims).[17]

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https://www.gdv.de/resource/blob/25012/d5de02eafe8a63ceada771034ac60708/international-agreement-741294345-data.pdf (last accessed on November 21, 2022). Germany implemented the Agreement by enacting the *Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'* (Law on the Creation of a Foundation "Remembrance, Responsibility and Future") in the summer of 2000, which entered into force on August 12, 2000 (the "German Foundation Law"); *see also* the Foundation's website at https://www.stiftung-evz.de/en/ (last accessed on November 21, 2022); *see generally Gross v. German Foundation Indus. Initiative,* 549 F.3d 605 (3d Cir. 2008), *cert. denied*, 556 U.S. 1236 (2009) and the lower court decisions for a thorough discussion of the German Foundation Agreement, its backgrounds, genesis and negotiation.

[17] The United States could have elected to treat Holocaust claims belonging to U.S. nationals by way of a Presidential Settlement, but chose not to do so. Presidents have used such agreements to espouse and extinguish claims of U.S. nationals against foreign governments for reasons of U.S. foreign policy. *See generally* Adam S. Zimmerman, *Presidential Settlements,* 163 U. PA. L. REV. 1393 (2015). Over 70 years ago Congress established a statutory framework for the adjudication of such claims under what is now known as the International Claims Settlement Act, 22 U.S.C. §§1621-1627. Today, claims of U.S. nationals are now handled by the Foreign Claims Settlement Commission which has exclusive jurisdiction over all such actions to the exclusion of U.S. courts. *See* 22 U.S.C. §1623g ("The decisions of the Commission with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any court by mandamus or otherwise."). The U.S.-France Agreement applies to claims of foreign as

The U.S.-France Agreement, the implementation of which by the State Department is at issue in this APA litigation, is quite similar to the earlier legal peace agreements upon which it was modeled with one important exception: the $60 million compensation fund created by the Agreement was to be administered exclusively by the United States "according to criteria which it shall determine unilaterally, in its sole discretion, and for which it shall be solely responsible." Art. 6(1), JA 18. *See also* R. Bettauer, *A Measure of Justice for Uncompensated French Railroad Deportees, during the Holocaust*, 20 ASIL INSIGHTS, No. 5 (Mar. 1, 2016) ("*A Measure of Justice*"), at n. 29 (noting that this "this is likely the first time [the Office of International Claims and Investment Disputes in the State Department's Office of the Legal Adviser] has handled a claims program involving claims of foreign nationals against a foreign entity.).

Like the U.S.-French Agreement, the German Foundation Agreement expressly provided that a DM 10 billion compensation fund would be established by that agreement, "subject to legal supervision by

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well as U.S. nationals and does not explicitly or by implication preclude judicial review of State Department adjudication of individual claims.

a German governmental authority" [German Foundation Agreement, art. 3]. Notably, the German Foundation Agreement expressly provides that "any person may request that the German governmental authority take measures to ensure compliance with the legal requirements of the Foundation." *Id.* Even more significant for the case at bar, under the German Foundation Agreement, decisions of the Foundation were not final; rather they were subject to an internal appeals process under German administrative law. Annex "A" of the German Foundation Agreement explicitly provides that decisions made under the Agreement would be subject to "simplified and expedited internal appeals" [Annex A, art. 11]. *See also* Roland Bank, Friederike Foltz, *German Forced Labour Compensation Programme*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Nov. 2020) (discussing internal appeals process); *See also* THE GERMAN COMPENSATION PROGRAM FOR FORCED LABOR: PRACTICE AND EXPERIENCES, ed. by Günter Saathoff, Uta Gerlant, Friederike Mieth and Norbert Wühler (Stiftung "Erinnerung, Verantwortung und Zukunft", Berlin 2017), at 99-101 (discussing

appeals process).[18] The U.S.-France Agreement, modeled after the German Foundation Agreement, should be no different. It should be interpreted and applied to provide applicants like Plaintiffs to appellate review of the agency's decision.

Unlike the German Foundation Agreement, the U.S.-France Agreement does not expressly provide for review of administrative compensation determination. Nevertheless, the Agreement was entered into against the long-standing principles of U.S. administrative law, including the strong presumption of judicial review of final agency action [*Kucana v. Holder*, 558 U.S. at 251-252] and congressional policy creating a private cause of action under the APA for adversely affected persons in the absence of an express right of review. 5 U.S.C. §§702, 704.

CONCLUSION

For all the reasons above, and those in Plaintiffs' Opening Brief, each of the orders below should be reversed, and the cases remanded for

[18]Available at https://www.stiftung-evz.de/en/who-we-are/history/founding-history/#c398 (last accessed on November 21, 2022).

further proceedings on the merits, including the production of the Administrative Record by the government.

Date: November 21, 2022

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