No. 17-1245

In the
Supreme Court of the United States

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,

Petitioner,

v.

DAVID CASSIRER, AVA CASSIRER, AND UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

David Boies
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300

Stephen N. Zack
Andrew S. Brenner
Devin Velvel Freedman
BOIES SCHILLER FLEXNER LLP
100 S.E. 2nd St., Ste. 2800
Miami, FL 33131
Tel: (305) 539-8400
Fax: (305) 539-1307

Laura W. Brill
Nicholas Daum
KENDALL BRILL & KELLY LLP
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
Tel: (310) 556-2700
Fax: (310) 556-2705
Counsel for Respondents

QUESTION PRESENTED

Presenting only a question never decided or raised below at all, and relying on an amicus brief filed by the government of Spain in support of petitioner's Ninth Circuit petition for rehearing, a brief which solely argued an issue never raised prior to rehearing, petitioner asks this Court to hold its petition pending the decision in *Animal Science,* which involves the degree of deference to be afforded to a foreign government's legal opinion. The question is whether a hold is justified even though:

- Neither Spain nor petitioner argued to the Ninth Circuit, even on rehearing, that Spain's brief was entitled to any deference,

- Spain's amicus brief was first submitted on rehearing on an issue not previously raised, despite ample opportunity;

- Unlike in *Animal Science*, the Ninth Circuit's decision is not a final judgment (it simply reversed a summary judgment for petitioner and remanded the case for further proceedings),

- The petition is based largely on a false characterization of the record below, and

- Petitioner is wholly owned by Spain and Spain's brief is not an independent or impartial assessment of Spanish law.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, disclosure is hereby made by respondent UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY ("UJFSDC") that there are no parent companies of UJFSDC and no publicly held company owns ten percent (10%) or more of UJFSDC.

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INTRODUCTION

This case concerns a valuable Pissarro painting (the "Painting") that was undisputedly stolen from respondents' family by the Nazis during World War II. It is now being held by petitioner, a 100% Spanish government-owned museum, the Thyssen-Bornemisza Collection Foundation ("TBC"). Claiming that it acquired title to the stolen Painting by adverse possession, Spain refuses to return the Painting to the family, in violation of international agreements.[1] By various procedural means, Spain has dragged out this dispute, originally initiated by a petition to Spain in 2001 followed by this U.S. lawsuit in 2005, for nearly two decades. The Cassirers have prevailed in the Ninth Circuit three times, yet they still do not even have a trial date. The original plaintiff, Claude Cassirer, a Holocaust survivor, passed away in 2010, and his surviving widow is now 98 years old. While this suit remains pending, the museum retains full possession of the Painting and all the revenues it garners from its display.

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[1] In sharp contrast, for example, France not only returns Nazi-stolen art to the families from which it was stolen, it uses genealogical experts to locate the rightful owners. *See* France to hand back Nazi looted art to Jewish family at Louvre (Feb. 12, 2018), https://www.thelocal.fr/20180212/france-hands-back-nazi-looted-art-to-jewish-family.

Under Spanish Civil Code article 1956 ("Article 1956"), stolen movable property cannot be acquired by adverse possession (called "acquisitive prescription" in civil law terminology) by "those who purloined or stole it, or their accomplices or accessories," until specified conditions not present here are satisfied. A. 30.[2] The Cassirers' consistent position has been that Article 1956 defeats TBC's adverse possession claim because TBC is an "accessory" (*encubridor*) within the meaning of Article 1956. The Ninth Circuit agreed and held that, if plaintiffs prove on remand that TBC acquired the Painting with knowledge that it was stolen property, Article 1956 bars TBC's adverse possession defense. A. 65.

In light of this holding, the Ninth Circuit reversed the District Court and remanded for further proceedings. The District Court had granted summary judgment for the museum, rejecting the opinions of the Cassirers' Spanish law expert, and adopting the opinion of TBC's expert that, as a matter of law, TBC cannot be an "accessory" and Article 1956 is inapplicable to TBC. A. 97-103. The Ninth Circuit disagreed. A. 65.

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[2] "A." refers to the page number in petitioner's appendix. "DE" refers to the Ninth Circuit ECF docket entry number, Nos. 15-55550, 15-5551 and 15-55977 (consolidated). "DCDE" refers to the District Court's ECF docket entry number, No. 05-cv-03459-JFW (C.D. Cal.).

The museum's petition does not raise any issue decided by the District Court or by the Court of Appeals. Rather, the petition asserts only that the Ninth Circuit should have given deference to a so-called "amicus" brief filed by the museum's 100% owner, the Kingdom of Spain, A. 132-38, in support of the museum's Ninth Circuit petition for rehearing. The unsupported "amicus" brief solely argued a brand new issue never previously raised by the museum in the District Court or in the Ninth Circuit, despite ample pre-rehearing opportunities to do so.

Spain's rehearing amicus brief argued that Article 1956 applies only if the adverse possessor has been convicted of a crime, even though Article 1956 says nothing of the sort,[3] the argument is contrary to the views of leading Spanish commentators,[4] and even TBC's own Ninth Circuit brief.[5] Spain's amicus brief was not supported by any authority that even mentions Article 1956; instead, the brief relies solely

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[3] Article 1956's full text is included in the Ninth Circuit's opinion. A.30.

[4] *See* DE 144-1 at 4-6; DE 144-2 (articles by Spanish Civil Law experts).

[5] TBC argued to the Ninth Circuit that "[f]or Article 1956 to bar acquisitive prescription, three requirements must be satisfied." A criminal conviction was not listed as one of the requirements. DE 77 at 66.

on an opinion letter from an in-house ministry attorney, which asserts that the application of Article 1956 to an un-convicted adverse possessor would violate the "presumption of innocence." A. 143.[6]

Even on rehearing, neither Spain nor the museum cited *Animal Science* or contended that Spain's brief should be given any level of deference. In its petition for certiorari, TBC does not offer any excuse at all for its failure to do so.

Petitioner admits the untimeliness of its "criminal conviction required" argument (raised for the first time on rehearing), but asserts that it was "unable" to raise it prior to rehearing because the Cassirers had not argued that TBC was an accessory until "the eleventh hour." Pet. Br. 21-23. This is completely false; the Article 1956 "accessory" issue was raised at length by the Cassirers in the District

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[6] TBC's own petition for rehearing does not mention Spain's "presumption of innocence" theory. The TBC petition (DE 136-1) also does not cite any authority that mentions Article 1956. Rather, the petition cites cases involving *ex delicto* liability under Article 116(1) of the Spanish Penal Code. Unlike Article 1956, Penal Code Article 116(1) expressly requires a criminal conviction. DE 144-2 at CAS-008.

Court[7] and the Ninth Circuit,[8] was addressed by TBC in its District Court[9] and Ninth Circuit[10]

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[7] In two separate reports, the Cassirers' expert opined that TBC was an accessory within the meaning of Article 1956. DCDE 279 ¶¶ 4.2 et seq. (section of expert report titled "Qualification of both the Baron and TBC as having acted as accessories in the [Nazi's] crime"; DCDE 298-1 ¶¶ 3 et seq. (section of report titled "REBUTTAL OPINION TO MS. BUERBA'S OPINION REGARDING THE INCLUSION OF THE CONCEPT OF RECEIVER OF STOLEN GOODS WITHIN THE CONCEPT OF ACCESSORY OF A CRIME UNDER ARTICLE 1956 OF THE SPANISH CIVIL CODE").

[8] DE 23-1 at 17-28; DE 90-1 at 23-29.

[9] TBC's expert report contains an entire section titled "Article 1956 of the Spanish Civil Code," which attempts to refute the Cassirers' expert's conclusion that TBC is an "accessory" within the meaning of Article 1956. DCDE 289-1, Ex. 111 ¶¶10-20.

[10] TBC's appellate brief contains an entire section titled "Spanish Civil Code Article 1956 Does Not Preclude Ownership Because the Foundation Is Not an Accessory to the Holocaust." DE 77 at 65-69.

submissions, and was extensively discussed and expressly adjudicated by the District Court.[11]

The Ninth Circuit denied the petition for rehearing without comment. A. 110.

Petitioner now asks this Court to "hold" this case pending the decision in *Animal Science* and to then GVR the case to the Ninth Circuit. However, a "hold" is neither necessary nor appropriate; the petition should be summarily denied because the Ninth Circuit did not decide any issue even remotely related to the issue in *Animal Science*. The "deference" issue was not raised below at all by any party and was not addressed by either court below.

The "Article 1956 requires a conviction" argument was raised for the first time on a petition for rehearing, and the argument was not supported by any pertinent or authoritative authority. Unlike in *Animal Science*, Spain is the museum's 100% owner and is acting in a financial, commercial capacity, not as a regulator. Also unlike in *Animal Science*, the Ninth Circuit's decision is not a final judgment – it simply reversed a summary judgment

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[11] The District Court's opinion contains an entire section titled "Spanish Civil Code Article 1956 is inapplicable," which reviews both parties' experts' opinions regarding the meaning of "accessory" under Article 1956 and deems TBC's expert more persuasive. A. 97-103.

for petitioner and remanded the case for further proceedings. Respondents respectfully ask this Court not to allow petitioner's delaying tactics to succeed.

STATEMENT OF THE CASE

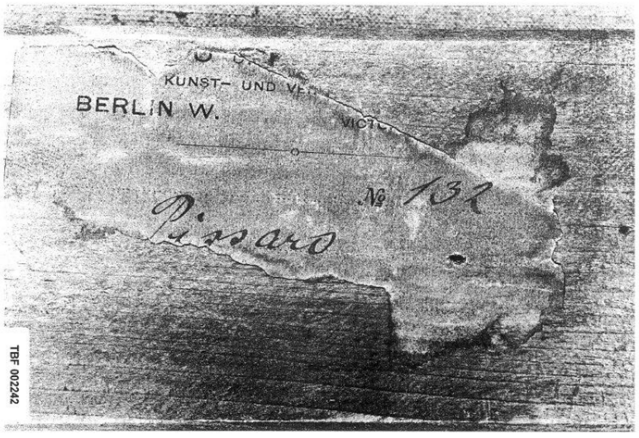
Before World War II, the Cassirer family owned a prominent art gallery and publishing house in Berlin. In 1900, Julius Cassirer bought the subject painting, *Rue Saint-Honoré, Après-midi, Effet de Pluie* oil on canvas @ 1897 by Camille Pissarro. Respondents' great-grandmother, Lilly Cassirer, inherited the Painting in 1926 and displayed it prominently in her home.

In 1939, the Nazis forced Lilly to sell the Painting in exchange for exit visas for her and her husband, and a nominal sum placed into a blocked account. As a Jew, had Lilly not fled Germany when she did, she likely would have been killed, as her sister was, in a concentration camp.

After the war, U.S. Military Law declared all forced sales void, and criminalized the removal of Nazi-looted art from Germany. U.S. Military Law No. 52; 12, Fed. Reg. 2189-02 at 3.15 art. I. Both German and the U.S. military's Court of Restitution Appeals confirmed Lilly as the owner of the Painting, which no one could locate.

By 1951, in violation of U.S. Military Law, the Painting was smuggled out of Germany and into California, where it was sold. Without the Cassirers' knowledge, the Painting was resold within the United States several times by 1976, when it ended up in New York, at the Stephen Hahn Gallery.

In 1976, Baron Hans Heinrich Thyssen-Bornemisza ("the Baron") purchased the Painting from the Stephen Hahn Gallery in New York. Respondents allege the Baron purchased the Painting with knowledge it was stolen property. The Baron was no stranger to the Nazis' looting of art from European Jews; his uncle, Fritz Thyssen, financed Hitler's rise to power, and his father and other family members were in Hitler's inner circle. The Baron made the purchase even though the Painting had then, and still has to this day, the below-pictured torn gallery label that plainly says "Berlin," bears a partial address of the famous Cassirer art gallery, and refers to the "Kunst und Verlagsanstalt" ("art and publishing stablishment") that was unique to the Cassirers in Germany.



The Baron, who consulted with sophisticated art experts, had no basis to believe that the Painting had been lawfully transferred out of Berlin. The Painting also has clearly visible adhesive marks on the back of the Painting, showing that many previous ownership labels were torn off to conceal the Painting's true provenance. The Baron paid a below-market price and made the purchase without even attempting to learn the Painting's whereabouts during the Nazi era from 1933-1945.

Petitioner TBC took possession of the Painting, along with the remainder of the Baron's art collection, as a loan in June 1992. In 1993, the Spanish government authorized the purchase of the Baron's entire collection, including the Painting. Spain bought the collection and gave it to TBC, a 100% government-owned entity.

At the time of the purchase, the Baron and his family controlled 50% of TBC's board of directors. Spain's Minister of Education, Culture, and Sports, the agency from which Spain's "amicus" brief was generated, is the President of TBC's board.

Respondents allege that, just like the Baron, in acquiring the Painting, TBC acted with knowledge that the Painting was stolen property. TBC told its lawyers simply to "assume" the Baron acquired his collection in good faith (despite evidence to the contrary). TBC fully recognized that the Baron lacked title to some of the paintings in the collection, but judged the number small enough to be worth the risk.

After the acquisition, TBC falsified the Painting's history by publishing that the Baron had acquired the Painting from the Galerie Joseph Hahn in Paris, a place that raised no red flags because Pissarro lived in France. TBC hid the true provenance of the Painting by failing to disclose that the Painting went from Berlin to the United States, and that the transfer out of Germany was illegal. As indicated above, however, the Painting itself shows it had been in Berlin, and TBC (and its board member, the Baron) knew the Baron had acquired it from the Stephen Hahn Gallery in New York, not from the Joseph Hahn Gallery in Paris.

Upon discovery of the Painting's actual location in 2000, the family vigorously pursued diplomatic

and Spanish administrative channels for years, including a formal petition to Spain for the Painting's return, to no avail.[12]

PROCEDURAL HISTORY

On May 10, 2005, Claude Cassirer filed this suit. He died in 2010. His children David and Ava Cassirer and the Jewish Federation of San Diego (a beneficiary under Claude's will) were substituted as plaintiffs.

This was the third time this case had gone to the Ninth Circuit, and each time the Cassirers have prevailed. This is TBC's second petition for certiorari. *See* 727 F.3d 613 (9th Cir. 2013); 616 F.3d 1019 (9th Cir. 2010) (*en banc*), *cert. denied*, 131 S. Ct. 3057 (2011).

The proceedings relevant to TBC's petition started in March 2015, when TBC moved for summary judgment on the theory it obtained ownership of the Painting pursuant to Spain's

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[12] TBC incorrectly asserts that "after 1958, no effort was made by the Cassirers or their predecessors to locate the painting." Pet. Br. 2. In fact, the reason the Painting was discovered at all by the family was that Claude Cassirer had discussed the Painting with various people over the years, and one of these people learned of the whereabouts of the Painting in late 1999, and notified Claude.

adverse possession (acquisitive prescription) law. Respondents opposed on a number of grounds, including that 1) the prescription issue was governed by California law, not Spanish law, and 2) even under Spanish law, the museum did not acquire ownership by adverse possession as it was an "accessory" within the meaning of Article 1956.

Finding that Spanish law governed, the District Court granted summary judgment for TBC in June 2015. Judge Walter ruled that TBC could not possibly be an "accessory" within the meaning of Article 1956. Accepting the opinion of TBC's expert and rejecting the opinion of the Cassirers' expert, the Court concluded, based on the definition of "accessory" in the 1973 Spanish Penal Code, that Article 1956 only applies narrowly to persons who act with the intent or purpose "to prevent the offense or crime from being discovered." Concluding that TBC did not act "with the intent of preventing … the Nazis' criminal offenses from being discovered," Judge Walter ruled in TBC's favor. A. 101-02.

On appeal, the Cassirers again argued that California choice-of-law principles governed, that California substantive law governed, and that, in any event, Article 1956 barred TBC from obtaining title by adverse possession under Spanish law. DE 23-1 at 17-28. Respondents fortified their Article 1956 argument with additional authorities, including the definition of "accessory" in article 16 of the Spanish Penal Code of 1870, which was in force

at the time Article 1956 was enacted in 1889. DE 23-1 at 18-23. It was undisputed that, if the 1870 Code's definition of "accessory" applies to Article 1956, rather than the definition in the 1973 Penal Code, then TBC is an accessory and Article 1956 prevents TBC from obtaining title to the Painting through acquisitive prescription if the Cassirers prove that TBC acquired the Painting with knowledge that it was stolen property.

In its opposition brief, TBC asserted that the Cassirers had waived the point by failing to mention the 1870 Code in the District Court, and that in any event the 1870 Penal Code's definition of "accessory" had no bearing on the meaning of this same term in Article 1956. TBC contended that the District Court was correct and that the definition of "accessory" in the 1973 Penal Code (enacted 84 years after Article 1956) should govern the interpretation, rather than the definition in the 1870 Penal Code (which was in force at the time Article 1956 was enacted). DE 77 at 65-69.

In its opinion, the Ninth Circuit first affirmed the District Court's conclusion that Spanish law applied rather than California law. A. 27. However, the appellate court reversed the District Court's narrow reading of Article 1956. Rejecting TBC's waiver argument, the Court of Appeals first concluded that it would consider the 1870 Penal Code definition, as the interpretation of Article 1956 was a pure issue of law. A. 34-35. After reviewing all of the pertinent

Spanish law interpretative factors, the Ninth Circuit held that the 1870 Penal Code definition was more pertinent, that subsequent Penal Code amendments were not intended to change the meaning of Article 1956, and thus, under Article 1956, TBC was an accessory if it acquired the Painting with knowledge that it was stolen property. A. 35-44.

The Ninth Circuit then reviewed the Cassirers' extensive evidence that TBC bought the Painting with such knowledge, and held the evidence was sufficient to create "a triable issue of fact" on the knowledge issue. The Ninth Circuit mentioned, *inter alia*, the false information that the Baron bought the Painting from the Joseph Hahn Gallery in Paris, the suspiciously low price he paid, the torn Cassirer family label, the published 1954 U.S. Court of Restitution Appeals decision confirming Lilly's ownership, and the instruction to the lawyers to "assume good faith." Accordingly, the case was remanded for further proceedings. A. 45-47.

TBC then filed a petition for rehearing, and Spain filed its "amicus" brief. Out of the clear blue, without even the slightest mention in any prior filing, both TBC and Spain argued for the first time that Article 1956 does not apply at all unless the adverse possessor has been criminally convicted. Neither brief cited any authority that even mentions Article 1956. Neither brief mentioned the contrary interpretations of prominent Spanish civil law commentators and TBC's own prior Ninth Circuit

brief. And neither brief cited *Animal Science* or argued that Spain's brief was entitled to any type of deference. The Ninth Circuit denied the petition for rehearing without comment. A. 110.

REASONS FOR DENYING CERTIORARI

1. The Question Presented Was Not Raised Below or Decided by the Ninth Circuit

TBC's petition presents a single question: "Whether a foreign sovereign's interpretation of its domestic law is entitled to conclusive deference…, significant deference…, or no deference…." Petition at i. The petition should be denied because the Ninth Circuit did not decide this question. It was not raised below *at all*, not even on rehearing.

Not only did TBC fail to raise the "deference" issue below, the "foreign sovereign's interpretation" that is purportedly entitled to deference is contained solely in an "amicus" brief filed in support of TBC's petition for rehearing, a brief that raised an issue never previously raised *at all* and took an unsupported position contrary to the statutory text, the views of leading Spanish commentators, and even TBC's own prior Ninth Circuit brief.

TBC is incorrect in its repeated assertion that the Ninth Circuit gave "no deference" to Spain's rehearing amicus brief. In the Ninth Circuit, the summary denial of rehearing is not a decision on the

merits and confers no implication regarding the court's views. *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995).

There is no basis to hold the petition for *Animal Science*. This Court does not "allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001); *accord United States v. Wells*, 519 U.S. 482, 488 (1997) (question presented in a petition for certiorari will only be considered if it was "pressed in or passed on" by the Court of Appeals (quoting *United States v. Williams*, 504 U.S. 36, 42 (1992))); *see* Baker, *A Practical Guide to Certiorari*, 33 Catholic U. L. Rev. 611, 628 (1984) ("There is almost no chance that the Court will take a case to resolve issues raised for the first time in the petition."). This rule applies here fully, because TBC *never* argued the deference issue below.

Moreover, TBC now asks for deference to an "amicus" brief that was not filed until rehearing, a brief that solely makes a contention never previously mentioned to the Court of Appeals, a contention inconsistent with TBC's own prior briefing. This Court, the Ninth Circuit, and virtually all other courts do not normally consider issues raised for the first time at the rehearing stage. *American Surety Co. v. Baldwin*, 287 U.S. 156, 163-64 (1932) (claim

made for first time on rehearing "cannot serve as the basis for review by this Court"); *Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919) (claim made for first time on rehearing "comes too late unless the [lower] court actually entertains the petition and passes upon the point"); *Fields v. Palmdale School Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) ("We do not consider on rehearing new issues previously not raised, briefed or argued.").

TBC does not dispute this. It admits that "[t]his Court has long recognized that, except in exceptional cases, it will not review a question that was *neither* 'pressed [in] nor passed upon below.'" Pet. Br. 22 (quoting *Williams*, 504 U.S. at 41-45). Yet TBC asks this Court to review the "deference" issue, which was not raised below at all, even on rehearing, and no excuse for this failure is offered.

Petitioner also asks this Court to excuse its other failure, its failure to raise the "criminal conviction" issue until rehearing. TBC claims "the question presented could not be pressed below" prior to rehearing because the Cassirers' "eleventh hour accessory-after-the-fact argument" was "raised for the first time on appeal" and was "neither 'pressed [by them] [n]or passed" on by the district court…." Petition at 23 (brackets in original). However, the only "question presented" is the deference issue (never raised below, even on rehearing), not the "criminal conviction" issue (first raised on rehearing).

Furthermore, TBC's "eleventh hour" contentions are all false. In two separate submissions, the Cassirers' expert argued at length to the District Court that TBC was an "accessory" within the meaning of Article 1956. *See* note 7 *supra*. TBC's expert responded with a detailed rebuttal. *See* note 9 *supra*. The District Court agreed with TBC's expert in a detailed section of its opinion explicitly titled "Spanish Civil Code Article 1956 is inapplicable." A. 97-103. In this opinion, Judge Walter analyzed Article 1956 and the competing expert interpretations and concluded, incorrectly, that the "Foundation was not an accessory to the crimes" within the meaning of Article 1956, as a matter of law. *Id*.

On appeal, the Cassirers' primary Spanish law argument in their opening brief was that TBC was an "accessory" within the meaning of Article 1956, under the alleged facts. DE 23-1 at 17-28. In support of this position, the Cassirers did cite new authorities, including the 1870 Penal Code, and this was permissible because "a party can make any argument in support" of a claim presented below; "parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp*., 513 U.S. 374, 379 (1995) (quoting

Yee v. Escondido, 503 U.S. 519, 534 (1992)). *See* Fed. R. Civ. P. 44.1.[13]

TBC had a full and fair opportunity to respond to all of the Cassirers' Article 1956 arguments, including the 1870 Penal Code and other authorities cited on appeal, and it did in fact respond, in an entire section of its appellee brief entitled "Spanish Civil Code Article 1956 Does Not Preclude Ownership Because the Foundation Is Not an Accessory to the Holocaust". DE 77 at 65-69. In that brief, TBC again argued that the definition of "accessory" in Article 1956 should be governed by the definition in the 1973 Penal Code, as the District Court had concluded, not by the definition in the 1870 Penal Code, as the Cassirers submitted. *Id*. TBC claimed that the Cassirers had waived reliance on the 1870 Code and that, in any event, the 1870 Code argument was "misguided," "fundamentally flawed," and based on "circular reasoning" (ignoring evidence that the 1973 amendments to the Penal Code were not intended to change the substantive meaning of the term "accessory" in Article 1956). *Id*. In a statement TBC would later contradict in its rehearing petition, the museum stated:

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[13] In any event, even if respondents had not adequately raised the issue in the District Court, the Court of Appeals properly exercised its discretion to consider this pure question of law. A. 34-35.

> For Article 1956 to bar acquisitive prescription, three requirements must be satisfied:
>
> (1) there must be a crime of theft or robbery (or other similar crime relating to the misappropriation of movable property);
>
> (2) the possessor of the movable property must be a principal, accomplice, or accessory of the crime committed; and
>
> (3) the statute of limitations for the crime committed or an action claiming civil liability arising from that crime must not have expired.

Id. at 66. Unlike the subsequent rehearing petition, the brief did not contend that a criminal conviction was a requirement for Article 1956 to bar acquisitive prescription.

Thus, in contrast to TBC's statements that the "accessory" issue was raised at the "eleventh hour," and that TBC had no opportunity to press it below, the record plainly shows that: 1) the issue was raised in and decided by both lower courts; 2) TBC had a full opportunity to respond to all Article 1956 arguments raised by the Cassirers; and 3) TBC did in fact respond in both courts. Moreover, the petition does not even seek review of the accessory issue. The only question it does present (the

deference issue) was not raised below at all. The petition should therefore be denied.

2. Unlike in *Animal Science*, the Ninth Circuit's Decision Is Not a Final Judgment, Spain Is the Petitioner's 100% Owner, and the Tardy Amicus Brief Is Unsupported

The petition should be denied for several additional reasons even if the Court opts to overlook TBC's failure to raise below the question presented.

A. The Judgment Is Purely Interlocutory

Even when an issue is important enough to warrant review, this Court prefers to take a case after final judgment, to preserve resources and to avoid ruling on issues that may prove not to be dispositive. *Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("[T]his Court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"); *Virginia Military Institute v. U.S.*, 508

U.S. 946 (1993) (opinion of Scalia, J.) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); E. Gressman, et al., Supreme Court Practice § 4.18 (9th ed. 2007). TBC is requesting certiorari of a purely interlocutory decision that merely remands the case for further proceedings.

The Court of Appeals ruled only that disputed issues of fact exist with respect to TBC's acquisitive prescription defense under Spanish law. TBC does not contend that any split among the circuits exists on this point. The Court's ruling on this Spanish law issue is not a ruling on a "question of federal law," let alone an "important question of federal law," Sup. Ct. R. 10, that might warrant an exception to the general rule.

B. Animal Science Is Distinguishable

Another reason to deny certiorari is that there are key differences between the facts of this case and those that led the Second Circuit to conclude in *Animal Science* that the opinion of the Chinese government should be given conclusive deference.

Most significantly, unlike in *Animal Science*, in this case Spain is not a true "amicus." It is TBC's 100% owner and is acting in support of its financial and commercial interests, not as a regulator. Spain's Minister of Education, Culture, and Sports, from whose office the "amicus" brief was generated,

is the President of TBC's Board of Trustees. Spain's "amicus" brief is a litigation position, not an independent and impartial assessment of Spanish law.

It seems unfathomable that any defendant, governmental or otherwise, could be given "conclusive" power to decide a case against it in its own favor. Spanish ministries and agencies do not have such power in Spanish courts,[14] and there is no basis to give Spain such power here. Spain's submission is supported solely by an unsworn opinion letter from an in-house attorney at the Ministry of Education, Culture, and Sports (not the Council of State, the Ministry of Justice, or any entity that has any arguable jurisdiction to enforce or interpret the Civil Code).

In contrast, in *Animal Science*, the amicus brief was filed by the Chinese Ministry of Commerce, the "highest authority within the Chinese Government authorized to regulate foreign trade." *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 837 F.3d 175, 181 (2d Cir. 2016). Here, Spain's amicus brief is solely supported by a letter from a lawyer at a ministry that has no role at all regarding enforcement or interpretation of the Civil Code. The letter does not cite any

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[14] See authorities discussed in the amicus brief of the *Comunidad Judía de Madrid* and the *Federación de Comunidades Judías de España.*

authority that even mentions Article 1956, let alone that suggests Article 1956 applies only if the adverse possessor has been criminally convicted. A. 140-60. The letter makes no effort to reconcile contrary Spanish authority or the contrary statement in TBC's prior Ninth Circuit brief. Thus, even under the Second Circuit's *Animal Science* rule, deference need not be given, as it is not "reasonable under the circumstances presented." 837 F.3d at 189.

CONCLUSION

For almost two decades, the Cassirers have been met with one stonewalling tactic after another. There is no justification for any further delay. The petition for a writ of certiorari should be denied.

Dated: April 6, 2018

Respectfully submitted,

David Boies
Counsel of Record
BOIES SCHILLER
FLEXNER LLP
333 Main Street
Armonk, NY 10504
Tel: (914) 749-8200
Fax: (914) 749-8300

Stephen N. Zack
Andrew S. Brenner
Devin Velvel Freedman
BOIES SCHILLER
FLEXNER LLP
100 S.E. 2nd Street
Suite 2800
Miami, FL 33131
Tel: (305) 539-8400
Fax: (305) 539-1307

Laura W. Brill (State Bar
No. 195889)
Nicholas Daum (State Bar
No. 236155)
KENDALL BRILL &
KELLY LLP
10100 Santa Monica Blvd.
Suite 1725
Los Angeles, CA 90067
Tel: (310) 556-2700
Fax: (310) 556-2705

Counsel for Respondents