No. 18-1057

In The
Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM
OF ART AT PASADENA, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF *AMICI CURIAE* CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, acting in their individual and personal capacities, are a bipartisan group of current and former members of the United States Congress:

Representative Carolyn B. Maloney (D-NY-12), the Vice Chair of the Joint Economic Committee, has served in Congress since 1993.

Representative Mel Levine (D-CA-27) served in the House Foreign Affairs Committee throughout his time in Congress from 1983 to 1993.

Representative Brian Higgins (D-NY-26), a member on the House Committee on Ways and Means, has served in Congress since 2005.

Representative Peter "Pete" T. King (R-NY-2), a member of the Homeland Security Committee, has served in Congress since 1993.

Representative Nita M. Lowey (D-NY-17), Chairwoman of the House Appropriations Committee, has served in Congress since 1989.

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[1] No counsel for a party authored this brief in whole or in part. Neither a party nor its counsel, nor any other entity other than *amici curiae* and counsel have made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of the intent of *amici curiae* to file this brief, per Supreme Court Rule 37.2(a). All parties have filed general letters with the Clerk's office consenting to the filing of *amicus curiae* briefs.

Representative Grace Meng (D-NY-6), a member of the House Appropriations Committee, has served in Congress since 2013.

Representative Jerrold "Jerry" Nadler (D-NY-10), the Chairman of the House Judiciary Committee, has served in Congress since 1992.

Representative Kathleen M. Rice (D-NY-4), the Chairwoman on the Subcommittee on Border Security, Facilitation, and Operations, has served in Congress since 2015.

Representative José E. Serrano (D-NY-15), a senior member of the House Appropriations Committee, has served in Congress since 1990.

Representative Paul D. Tonko (D-NY-20), a member of the House Energy and Commerce Committee, has served in Congress since 2009.

Representative Nydia M. Velázquez (D-NY-7), Chairwoman on the House Committee on Small Business, has served in Congress since 1993.

Amici curiae have an interest in seeing that federal courts properly interpret and implement U.S. Holocaust restitution policy. As current and former members of Congress, *amici curiae* have been involved with the federal government's efforts to develop a clear policy regarding Nazi-looted art. Current members of Congress also have an interest in representing their constituents, some of whom are Holocaust survivors or heirs of survivors and are deeply concerned with the

proper interpretation and application of U.S. policy toward restitution of artworks looted by the Nazis.

SUMMARY OF THE ARGUMENT

This case concerns a protracted dispute between an American citizen, Marei von Saher ("von Saher"), and the Norton Simon Museum of Art ("Museum") in Pasadena, California, over two Nazi-looted masterpieces: *Adam* and *Eve*, painted by Lucas Cranach the Elder in the Sixteenth Century (the "paintings" or the "Cranachs"). During World War II, *Reichsmarschall* Herman Goering, Adolf Hitler's second-in-command, took the Cranachs as well as other artworks in the Goudstikker Gallery (which belonged to the family members of von Saher's deceased husband) and he kept the masterpieces for his own private collection. Pet. App. 4a–6a, 42a, 78a.

After the war, the Allies returned the Cranachs (and other art stolen from the Goudstikker Gallery) to the Dutch Government, which sold the paintings to George Stroganoff Scherbatoff in 1966. Pet. App. 11a, 79a. The Museum bought the masterpieces from Stroganoff's agent in 1971, even though at the time of sale the paintings' provenance listed "Herman Goering" under "J. Goudstikker." Pet. App. 11a, 167a.

In 2006, the Dutch Government returned to Petitioner von Saher all of the artworks that were in its possession and taken by Goering from the Goudstikker Gallery. Pet. App. 90a–91a, 155a–156a. This did not

include the Cranachs, which were already in the Museum's possession. Pet. App. 91a. The Museum refused to return the Cranachs to von Saher. Pet. App. 45a. In response, the Dutch Minister for Education, Culture, and Science "refrain[ed] from an opinion regarding the two pieces of art" and expressed that the "State [was] of the opinion that this concerns a dispute between two private parties," not the Netherlands. Pet. App. 91a–92a.

Petitioner von Saher brought this action seeking return of the paintings. The dispute has been pending in the U.S. federal courts for over a decade, and has taken a total of three trips to the Ninth Circuit and has resulted in one prior petition for a writ of certiorari from each party. Pet. App. 10–12. In the most recent decision by the Ninth Circuit, the court relied on the act of state doctrine to conclude that the Museum has good title to the artworks. Pet. App. 5a; *see also* Ross Todd, *Boies Persuades Ninth Circuit to Revive Suit Over Nazi-Looted Art*, The Recorder (July 10, 2017) (observing that it is "rare for cases over Nazi-looted art to get to the merits stage in U.S. courts given the procedural and sovereignty issues they raise"), https://www.law.com/therecorder.

This Court has previously granted certiorari in Holocaust-related cases such as this, "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964); *see also Republic of Austria v.*

Altmann, 541 U.S. 677, 681 (2004) (granting certiorari in a case involving both Nazi-looted art and sovereign immunity issues); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (granting certiorari given "the importance" of determining whether California's Holocaust Victim Insurance Relief Act interfered with foreign affairs).

It is time for this Court to grant review in this case, which presents an optimal vehicle for examining multiple doctrinal uncertainties and circuit splits surrounding the application of the act of state doctrine. As detailed in von Saher's petition, federal circuit courts are split both on the proper application of the act of state doctrine and the deference owed the Legislative Branch under the doctrine. *See* Pet. 14–15, 18–21. *Amici curiae* expand on these two issues, underscoring why guidance on them is needed now.

First, given the sheer number of pieces of Nazi-looted art that were stolen and remain missing, act of state doctrine issues are likely to recur. *See* Stuart E. Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it*, The Washington Post (Jan. 2, 2019) (observing that over 100,000 pieces of Nazi-looted art remain missing). The division among the circuit courts regarding the proper application of the doctrine creates divergent rules for the two major art hubs in the United States: Los Angeles and New York. Under the Ninth Circuit's approach, the gravamen of the act of state doctrine is whether the *validity* of a foreign state's act would be called into question. *See* Pet. App. 5a, 16a. Other courts, like the Second Circuit, take a more flexible view, concluding that the

doctrine's application "requires a balancing" of foreign policy interests outlined by the Legislative and Executive Branches. *See Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2000). This Court should grant the petition to clarify whether, and how, courts must weigh policy interests in this context.

Second, when those policy interests are considered, they weigh against application of the act of state doctrine here. The Nazis' organized and comprehensive campaign of art looting during World War II informs over 70 years of expressions of U.S. policy, including congressional enactments, that both favor restitution of Nazi-looted art and disfavor application of the doctrine. Not only did the decision below fail to discuss these consistent expressions of American policy, a single line in an *amicus curiae* brief jointly filed by the State Department and the Solicitor General does not (as the decision below concluded) compel application of the doctrine. Pet. App. 31a. A proper balancing of interests, including the views of the Executive Branch, dispels the need to apply the doctrine in a case such as this.

ARGUMENT

I. This Court should grant the petition to clarify whether, and how, federal courts must balance competing policy interests before applying the act of state doctrine.

Under the act of state doctrine, "[e]very sovereign state is bound to respect the independence of every

other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). The act of state doctrine has constitutional "underpinnings" that arise "out of the basic relationships between branches of government in a system of separation of powers." *Sabbatino*, 376 U.S. at 423. The doctrine does not, however, "establish an exception for cases and controversies that may embarrass foreign governments"; it "merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990); *accord INS v. Chadha*, 462 U.S. 919, 943 (1983) (observing in the analogous context of the political question doctrine that "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts" on the ground that "the issues have political implications").

Federal circuit courts have developed two divergent conceptions of the purpose and application of the act of state doctrine.

One view, held by the Second, Third, and Fifth Circuits, is that the "touchstone" of the act of state doctrine—the "potential for interference with our foreign relations"—"is the crucial element in determining whether deference should be accorded" to the political branches "in any given case." *See Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 53 (5th Cir. 1979); *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 148 (2d Cir.

2012); *Grupo Protexa, S.A. v. All Am. Marine Slip, a Div. of Marine Office of Am. Corp.*, 20 F.3d 1224, 1237 (3d Cir. 1994); *see also* Michael D. Ramsey, *Acts of State and Foreign Sovereign Obligations*, 39 Harv. Int'l L. J. 1, 38 (1998) (observing that some lower courts have found "an invitation [in this Court's case law] to apply the act of state doctrine in a prudential and discretionary manner, depending on an individual court's assessment of the sensitivity of the international issue presented for decision").

Under this approach, "*before* the doctrine is applied," courts "must weigh in balance the foreign policy interests that favor or disfavor application of the act of state doctrine." *E.g.*, *Republic of Philippines v. Marcos*, 806 F.2d 344, 359 (2d Cir. 1986) (emphasis added). When conducting this balancing of interests, courts defer not only to the judgment of the Executive but also "to the judgment of Congress." *See Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 181 (2d Cir. 1967) (finding "good reason for judicial acceptance of [the Hickenlooper Amendment's] legislative modification of the act of state doctrine"); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").

A second view, adopted by the Ninth Circuit in this case and held also by the Seventh, Eleventh, and D.C. Circuits, is that the act of state doctrine is "wholly

about validity." *See* John Harrison, *The American Act of State Doctrine*, 47 Geo. J. Int'l L. 507, 507 (2016); Pet. App. 16a; *Nocula v. UGS Corp.*, 520 F.3d 719, 728 (7th Cir. 2008) (applying doctrine without first balancing interests); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006); *Riggs Nat'l Corp. & Subsidiaries v. Comm'r*, 163 F.3d 1363, 1368 (D.C. Cir. 1999).

Under this less flexible approach, the doctrine applies when a court must "declare invalid" an act of state. *E.g.*, *Nocula*, 520 F.3d at 728 ("any personal claim by [plaintiffs] seeking to hold [defendant] liable" would "necessarily call for an inquiry into the acts of a foreign sovereign and is barred by the act-of-state doctrine"). In the decision below, the Ninth Circuit held that the act of state doctrine applied (without first conducting a balancing of foreign policy interests favoring or disfavoring application of the doctrine) because awarding von Saher title to the Cranachs required the court to invalidate "three official acts of the Dutch government." *See* Pet. App. 5a.

The approach followed by the Second, Third, and Fifth Circuits would have allowed von Saher to dispute the Museum's title to the Cranachs because it most closely tracks this Court's prior decisions. As this Court has observed, the act of state "doctrine is not an inflexible one," and its "'continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs.'" *First Nat'l City Bank v. Banco Nacional de Cuba*,

406 U.S. 759, 763 (1972) (plurality opinion) (quoting *Sabbatino*, 376 U.S. at 427–28); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (observing that the "conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—departments of the government").

As this Court further observed in *Kirkpatrick*, "sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application." *Kirkpatrick*, 493 U.S. at 409. A "sort of balancing approach could be applied," this Court suggested, to determine whether the scales tip "against application of the doctrine." *Id.* By way of example, this Court suggested that the doctrine need not be applied "if the government that committed the 'challenged act of state' is no longer in existence." *Id.*

The approach of the Second, Third, and Fifth Circuits is faithful to that balancing framework, by declining to apply the act of state doctrine where the foreign government has disavowed an interest in a dispute between private parties. *See Konowaloff*, 702 F.3d at 148 (observing that the doctrine has not been applied where the foreign government repudiates an act of state); *Grupo Protexa*, 20 F.3d at 1238 (declining to apply the act of state doctrine where the court saw "no reason for believing that a judicial inquiry into the validity of the [Mexican] Port Captain's order . . . would hinder the conduct of foreign relations by the United States government").

The divergent approach of the Ninth, Seventh, Eleventh, and D.C. Circuits places form over substance, applying the doctrine even in a case such as this, where there is no reasonable "basis for believing that diplomatic difficulties could arise in the aftermath of this case." *Grupo Protexa*, 20 F.3d at 1238; Pet. App. 31a n.15 (acknowledging that a prior panel of the Ninth Circuit had previously held that "von Saher's claims against the Museum 'do not conflict with foreign policy,' and that this case presents, 'instead, a dispute between private parties' ").

* * *

Amici curiae urge this Court to grant the petition and resolve a circuit split concerning the "proper role of the Judicial Branch in this sensitive area" of the law. *See, e.g.*, *Sabbatino*, 376 U.S. at 407; *Altmann*, 541 U.S. at 681; *Garamendi*, 539 U.S. at 413. Not only is the circuit split ripe for this Court's review, this case also presents an excellent vehicle for revisiting the act of state doctrine.

II. American policy concerning art looted by the Nazis weighs heavily against applying the act of state doctrine here.

A. The forced sale of *Adam* and *Eve* fits within the Nazis' larger campaign of art theft during World War II.

During World War II, between "one-fourth and one-third of Europe's artistic treasure trove was pillaged by the Nazis in an effort to realize Hitler's vision

for Germany as the cultural center of Europe." David Wissbroeker, *Six Klimts, a Picasso & a Schiele: Recent Litigation Attempts to Recover Nazi Stolen Art*, 14 DePaul J. Art, Tech. & Intell. Prop. L. Rev. 39, 40 (2004); *see also* Lucy Dunn Schwallie, *Acts of Theft and Concealment: Arguments Against the Application of the Act of State Doctrine in Cases of Nazi-Looted Art*, 11 UCLA J. Int'l L. & Foreign Aff. 281, 282 (2006) ("Nazis are estimated to have removed over three million art objects from the countries they occupied."); Michael Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts, Summary (NYU Press 2003) ("The Holocaust was not only the greatest murder in history; it was also the greatest theft."), https://muse.jhu.edu/book/7523.

War has historically exposed artworks to both "the practice of taking spoils during or at the close of hostilities" and "the danger of destruction from acts of war." *See* Charles de Visscher, *International Protection of Works of Art and Historic Monuments*, in Law, Ethics and the Visual Arts (John Henry Merryman & Albert E. Elsen eds., 1998). The Nazis stole art for a different purpose. During the Nazis' ascension to power and the war-torn years that followed, the seizure of art became a weapon—a means by which the Nazi government could achieve its "Final Solution" to eradicate Jewish people and culture. Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 Colum. J.L. & Arts 349, 352 (2004); Paulina McCarter Collins, *Has the "Lost Museum" Been Found?*

Declassification of Government Documents and Report on Holocaust Assets Offer Real Opportunity to "Do Justice" for Holocaust Victims on the Issue of Nazi-Looted Art, 54 Me. L. Rev. 115, 124–25 (2002) (observing that, "for Hitler, both the acquisition and cleansing of art was a central part of his plan for a pure Germanic race, his goal being 'to eradicate a race by extinguishing its culture as well as its people'"); *accord* Mark Vlasic, *How can we stop ISIS and the trafficking of our cultural heritage?*, World Economic Forum (Aug. 31, 2015), https://www.weforum.org/agenda/2015/08/isis-trafficking-cultural-heritage/ (the "systematic destruction of cultural symbols embodying Syrian cultural diversity reveals the true intent of [ISIS-perpetrated] attacks"—to "deprive the Syrian people of its knowledge, its identity and history").

The Nazi campaign of art theft evolved from a larger economic policy adopted by the German government shortly after the Nazi party rose to power in 1933. The policy, which aimed to drive Jews and other "enemies of the state" from German economic life, proceeded in two parts. First, it called for the systematic exclusion of Jews from the professions. Karl Lowenstein, *Law in the Third Reich*, 45 Yale L.J. 779, 797 (1936). Second, it separated Jews from their possessions, required them to compile and register with the government inventories of their possessions, and then eliminated their rights to that property. *Id.* at 807.

In the mid-1930s the Nazi government shifted its focus to art. The Nazis sought to rid Germany of "degenerate" modern art, leaving in its place only art that

lived up to an acceptably classical, "Germanic" ideal. *See generally* Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War 3-25, esp. 8–11, 22–23 (Vintage 1995). The "Germanic" ideal left no place for many Impressionist works, which Nazi officials denounced as "unfinished." *Id.* at 18. The Nazis began confiscating such disapproved works from public collections across Germany, including pieces by modern masters like Picasso, Matisse, Van Gogh, and Cezanne. *Id.* at 18, 22–23. In March of 1938, the chairman of the confiscation committee announced that the museums had been "purified." *Id.*

The Nazis' looting of art took place under a guise of legitimacy. Both legislators and judges in Nazi Germany aided the practice, making involuntary transactions look ordinary and legal. *See* Lowenstein, *Law in the Third Reich*, *supra*, at 797, 807. Art theft from museums was also authorized by a series of decrees that called for the seizure of "the entire range of objects of art," including works in public, private, and church collections. Nicholas, The Rape of Europa, *supra*, at 69–70.

The artworks stolen by the Nazis were then "divided up and, depending on their quality and desirability [in the eyes of Nazi evaluators], either transported to Germany or put up for sale." Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art 108 (Basic 1997). The works "put up for sale" suffered a variety of fates. Many artworks—including *Adam* and *Eve*, which the Nazis took

through a forced sale—were directly siphoned off by the high-ranking Nazi official Hermann Goering for his own private collection. *See id.* at 28, 31–32, 36–38 (estimating that Goering "acquired as many as one thousand paintings and other art objects" by purportedly purchasing them, although he in fact "never paid a single cent"); William L. Shirer, The Rise and Fall of the Third Reich: A History of Nazi Germany 942 (Simon & Schuster 1960) (observing that Herman Goering had said, "I intend to plunder and to do it thoroughly").

After World War II, the United States became known as one of the "consumer countr[ies]" for the Nazis' stolen art. Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 660–61 (2000); *see also* Adam Zagorin, *Saving the Spoils of War*, Time, 87 (Dec. 1, 1997) ("The paintings came to America because for more than 10 years during and after the war there was nowhere else to sell them[.]"). The United States earned this ignominious title because purchasers here were willing to embrace the traditionally "lackadaisical 'ask no questions' commercial conventions of the international art trade." Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, *supra*, at 662 (observing that even among reputable dealers and auction houses, it was standard practice to sell stolen art to collectors who, "in the absence of warnings," did not "require a seller to make disclosures about the chain of title"); *see also* Collins, *Has the "Lost Museum" Been Found?*, *supra*, at 126–27 (" 'As early as

1946, the State Department notified museums and other institutions that stolen art was entering the country, but in the years following the war it was not the standard practice for museums, collectors or dealers to investigate the provenance of works they acquired'"); Diane Walton, *Leave No Stone Unturned: The Search for Art Stolen by the Nazis and the Legal Rules Governing Restitution of Stolen Art*, 9 Fordham Intell. Prop. Media & Ent. L.J. 549, 567 (1999) ("[N]either sellers nor buyers exercised sufficient curiosity about the real origins of the paintings.").

The impact of Nazi looting and subsequent trafficking of artwork can still be felt today. "[M]ore than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era." Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, *supra*, at 660; *see also* The Times Editorial Board, *Who has the right to Nazi-looted art*, The Los Angeles Times (Dec. 13, 2018) (estimating the same number of missing artworks). As former U.S. ambassador to Austria and former chairman of the Museum of Modern Art in New York, Ronald Lauder, put it: "because of these large numbers, every institution, art museum and private collection [likely] has some of these missing works." Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, *supra*, at 660; Stephen W. Clark, Selected World War II Restitution Cases, SJ049 A.L.I.-A.B.A. 311 (2004) (listing Nazi-looted art that has appeared in the Los Angeles County Museum of Art, the Met, the Seattle Art

Museum, the Art Institute of Chicago, and other prominent museums in the United States).

* * *

The history of Nazi-era looting not only sheds light on the background for this lawsuit, it also reveals that many cases like von Saher's are likely to continue to be brought before the federal courts. *See* Nicholas O'Donnell, A Tragic Fate—Law and Ethics in the Battle Over Nazi Looted Art (ABA Book Publishing June 2017) (observing that disputes over fine art looted by the Nazis have received renewed attention over the past 25 years). These twin considerations further confirm that the significant policy issues in play here are ripe for review.

B. Over half a century of U.S. policy, including numerous congressional enactments, calls for the return of Nazi-looted art to its rightful owners.

Both during and after World War II, and continuing to this day, the United States has supported—and led—efforts to restore Nazi-looted art to its rightful owners. These expressions of U.S. policy include:

The London Declaration. In 1943, eighteen Nations, including the United States and the Netherlands, signed the London Declaration, which "served as a 'formal warning to all concerned, and in particular persons in neutral countries,' that the Allies intended 'to do their utmost to defeat the methods of dispossession practiced by the governments with which they

[were] at war[.]'" *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 962 (9th Cir. 2010) (*Von Saher I*).

The Allies reserved, in the Declaration, "the right to invalidate wartime transfers of property, regardless of 'whether such transfers or dealings [had] taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport[ed] to be voluntarily effected.'" *Id.* Many credit the Declaration "with laying the foundation for the United States's postwar restitution policy." *Id.*

U.S. Department of State Letter. In 1949, the U.S. Department of State reiterated the United States' "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls; state[d] that it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property; and [established] that the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." *Bernstein v. N.V. Nederlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); *see also Altmann*, 541 U.S. at 688 (noting the U.S. State Department's policy).

Holocaust Victims Redress Act & the Holocaust Assets Commission. In 1998, Congress enacted the Holocaust Victims Redress Act ("HVRA") (Pub. L. No. 105–158, 112 Stat. 15) and the Holocaust Assets Commission Act ("HACA") (Pub. L. No. 105–186, 112 Stat. 611) (June 23, 1998) to assist Holocaust victims. The HVRA expressed: "It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." Pub. L. No. 105–158, 112 Stat. 15 (Feb. 13, 1998).

Washington Conference Principles on Nazi Confiscated Art. In 1998, a meeting of "44 governments, including both the United States and the Netherlands," resulted in the creation of the Washington Conference Principles on Nazi Confiscated art. Pet. App. 50a. Under these principles: (1) "Art that has been confiscated by the Nazis and not subsequently restituted should be identified" and "[e]very effort should be made to publicize" this art "in order to locate pre-War owners and their heirs"; (2) "[p]re-war owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted"; (3) when such heirs are located, "steps should be taken expeditiously to achieve a just and fair solution"; and (4) Nations are

encouraged "to develop national processes to implement these principles." Pet. App. 50a.

Terezin Declaration on Holocaust Era Assets and Related Issues. In 2009, both the United States and the Netherlands agreed to the "legally nonbinding" Terezin Declaration on Holocaust Era Assets and Related Issues. Pet. App. 51a. Under this Declaration, signatories (1) "reaffirmed their support for the Washington Conference Principles"; (2) "encourage[d] all parties[,] including public and private institutions and individuals to apply them as well"; (3) "urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress"; and (4) "urge[d] all stakeholders [A] to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art and [B] to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by the parties." *Id.*

Holocaust Expropriated Art Recovery Act. In 2016, the Holocaust Expropriated Art Recovery Act ("HEAR Act") was signed into law. Pub. L. No. 114-308, 130 Stat. 1524 (Dec. 16, 2016). The HEAR Act, which Congress unanimously passed over 70 years after World War II, eliminates "significant procedural obstacles" that victims of Nazi persecution and their heirs face, by creating a federal statute of limitations (six years from actual discovery of the whereabouts of the

artwork) that facilitates the resolution of such claims on the merits. *Id.* § 2.6.

The HEAR Act further states that U.S. policy is "as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." Pet. App. 113a; *see also Garamendi*, 539 U.S. 396, 420–21 (observing that the "issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century" and that "securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War").

Justice for Uncompensated Survivors Today Act. As recently as 2017, Congress continued to take steps to advance U.S. policy concerning the return of Nazi-looted art. Under the Justice for Uncompensated Survivors Today Act of 2017, which was signed into law in May 2018, the Department of State must report to Congress an assessment of the national laws and enforceable policies of covered countries regarding the identification and return of, or restitution for, assets wrongfully seized or transferred during the Holocaust era, including: (1) the return to the rightful owner of wrongfully seized or transferred property; (2) the restitution of heirless property to assist needy Holocaust survivors; and (3) progress on the resolution of claims for U.S.-citizen Holocaust survivors and family members. Pub. L. No. 115-171, 132 Stat. 1288 (May 09, 2018).

C. A proper balancing of interests, including those expressed by the State Department and the Solicitor General, weighs against the application of the act of state doctrine here.

Considering the strong U.S. policy interests in favor of restituting Nazi-looted art, and the Ninth Circuit's prior conclusion that von Saher's claims against the Museum "do not conflict with foreign policy," this Court should grant the petition to clarify that, in a case such as this, the balance of interests tips against the application of the act of state doctrine. *See* Pet. App. 31a n.15.

An *amicus curiae* brief jointly filed by the Department of State and Solicitor General during earlier proceedings in this case does not shift the balance in favor of applying the act of state doctrine. A single line in that brief provides: "When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings*." Pet. App. 31a.

To start, this statement was made in a brief in which the Department of State and Solicitor General "urged" this Court to deny a "petition for writ of certiorari in *Von Saher I*." Pet. App. 56a. That brief focused on a federal preemption question related to "California Code of Civil Procedure Section 354.3"—an "altogether

different issue from . . . whether [v]on Saher's specific claims against the Museum—in just this one case—conflict with foreign policy." Pet. App. 57a.

Further, a prior panel of the Ninth Circuit was aware of the brief and nevertheless found "an absence of conflict between Von Saher's claims and federal policy," concluding instead that "her claims are in concert with" such U.S. "policy" as the "Washington Principles and Terezin Declaration." Pet. App. 55a.

Finally, nothing in the portion of the brief cited by the Ninth Circuit provides a reasonable "basis for believing that," if von Saher were permitted to pursue her claims, "diplomatic difficulties could arise in the aftermath of this case." *Grupo Protexa*, 20 F.3d at 1238. The Netherlands has disavowed an interest in the dispute over the Cranachs, expressing that the disagreement involves "a dispute between two private parties." Pet. App. 179a. The potential for interference with U.S. foreign relations—the "major underpinning of the act of state doctrine"—is simply missing here. *See, e.g.*, *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion).

CONCLUSION

For the foregoing reasons and those in von Saher's petition for a writ of certiorari, *amici curiae* respectfully urge this Court to grant the petition.

Respectfully submitted,

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