No. 18-1057

In the Supreme Court of the United States

MAREI VON SAHER,
Petitioner,
v.
NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,
Respondents.

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

Amicus Curiae Brief Of The 1939 Society, Bet Tzedek And The Joods Historisch Museum (Jewish Historical Museum) In Support Of Von Saher's Petition For Writ Of Certiorari

BENJAMIN G. SHATZ
Counsel of Record
STANLEY W. LEVY,
SHOSHANA S. SPEISER,
DANIELLE C. NEWMAN
MANATT, PHELPS & PHILLIPS, LLP
11355 W. Olympic Blvd.,
Los Angeles, CA 90064
BShatz@Manatt.com
(310) 312-4000

Michael Bazyler
Professor of Law
and
The 1939 Society Law Scholar in Holocaust and Human Rights Studies
DALE E. FOWLER SCHOOL OF LAW
CHAPMAN UNIVERSITY
One University Drive
Orange, CA 92866

Counsel for Amicus Curiae The 1939 Society, Bet Tzedek, and The Joods Historisch Museum

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BRIEF OF AMICUS CURIAE

Amici The 1939 Society, Bet Tzedek and Joods Historisch Museum (The Jewish Historical Museum) submit this brief supporting Marei Von Saher's petition for certiorari.[1]

INTEREST OF AMICUS CURIAE

The 1939 Society, located in Southern California, was formed in 1952 by Holocaust survivors dedicated to Holocaust remembrance and education to support Holocaust survivors and their legacy. The 1939 Society partners with academic institutions to support educational programming to teach the lessons of the Holocaust. These partners include the Chair in Holocaust Studies Program at UCLA (the first in the nation and where Chair Saul Friedlander received a MacArthur Award and Pulitzer Prize for his work on the Holocaust), UCLA's Center for Jewish Studies, California State University Northridge's Graduate Holocaust Studies course, Loyola Marymount University's Jewish Studies Program, and Chapman University's Rodgers Center for

[1] Counsel for Amici authored this brief in whole. No other person or entity other than Amici, their members or counsel made a monetary contribution for preparation or submission of this brief. Amici's counsel timely notified the parties' counsel of their intent to file this amicus brief and received consent.

Holocaust Education. The restitution of Nazi-looted art and ensuring justice for Holocaust victims and their heirs is integral to Society's purpose and mission.

In its mission to be amici in Nazi-confiscated, stolen, or forced sale art cases, The 1939 Society has filed amicus briefs in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (CA9 2017) and *Von Saher v. Norton Simon Museum*, 897 F.3d 1141 (CA9 2018).

Bet Tzedek (Hebrew for "House of Justice"), located in Los Angeles, is a nonprofit public interest law firm founded in 1974 to achieve full and equal access to justice for all vulnerable members of its community, and is an internationally recognized force in poverty law. Bet Tzedek is widely respected for its expertise on reparations claims and has particular expertise in drawing on the World War II historical context to support Holocaust victims' compensation claims. Bet Tzedek has represented over 5,000 survivors and their families in reparations claims. Bet Tzedek's Holocaust Survivors Justice Network received the ABA Pro Bono Publico award.

Bet Tzedek has also litigated Nazi-looted art appeals, including the landmark *Grunfeder v. Heckler*, 748 F.2d 503 (CA9 1984), and has been amicus in many prominent similar cases, including *Republic of Austria v. Altmann*, 541

U.S. 677 (2004), *Von Saher v. Norton Simon Museum*, 564 U.S. 1037 (2011), and *Zuckerman v. Metropolitan Museum of Art* (CA2 2018).

The Joods Historisch Museum (Jewish Historical Museum) is responsible for managing and operating Amsterdam's Jewish Cultural Quarter, the leading institution in the Netherlands dealing with collecting, researching, and exhibiting Jewish cultural heritage. The Jewish Cultural Quarter is an area that includes the Jewish Historical Museum, the JHM Children's Museum, the Portuguese Synagogue, the National Holocaust Memorial, and the newly founded National Holocaust Museum.

The Jewish Historical Museum's Board of Directors and its General Director, Professor Dr. Emile Schrijver, take the following position:

> In all cases in which ownership of a work of art with pre-Holocaust Jewish or non-Jewish ownership has been ascertained beyond reasonable doubt, we are strongly convinced that these works should be returned to the original owners or to their legal representatives. In our own museum practice we always act according to this principle and this is also how we advise our colleagues who have to deal with such cases.

SUMMARY OF ARGUMENT

This case provides a critical opportunity to provide a small measure of justice for the terrible events surrounding the greatest human catastrophe of the modern era, the Holocaust. The Ninth Circuit failed this opportunity. Rather than evaluating a legal claim for Nazi-looted art under a modern-day standard that considers both historical context and current morality, the Ninth Circuit instead issued an opinion dismissing the claim based on the formalistic use of act of state doctrine, a common law abstention doctrine that simply should not apply to the events that took place during the Holocaust. The Museum's refusal to return the art to Von Saher, the rightful heir of the art's prewar owner, renders the art some of the "last prisoners" of World War II.[2]

During World War II, the Nazis plundered European Jewry of approximately 600,000 paintings and works of art, at least 100,000 of which remain missing today.[3] In the 1940s, the Monuments Men, a group of 350 artists, architects, scholars, and curators deployed to Europe to recover and return Nazi-stolen

[2] *See* Bruce Hay, Nazi Looted Art and the Law 1 (Springer Int'l Publ'g 2017).

[3] Stuart Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it*, Wash. Post (1/2/2019).

artworks to their rightful owners, sought to preserve these looted symbols of identity.[4] The artwork they fought to preserve was returned to the countries where it was stolen in the hopes that the original owners or their heirs would regain possession. But "[t]hat hope was misplaced: Most items were sold or incorporated into public and private collections, lost to their rightful owners."[5] Historians now recognize that "[t]he return of looted art is not just about objects; it is about the restoration of dignity and respect to those whose basic humanity was denied."[6]

But this case is not about lost art or lost families. This case is about two artworks, sealed within the walls of the Museum against the will of their rightful heir, Von Saher. It is

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[4] Even 70 years after the end of the war, this service is well-remembered as a valiant and fruitful effort to rescue artworks that would otherwise have remained with those who stole them. House Minority Leader Nancy Pelosi stated, "[They saved the] creativity that connects us to the heritage of civilization." Remarks at Congressional Gold Medal Ceremony Honoring the WWII Monuments Men (10/22/2015).

[5] *Id.*

[6] Deborah Solon, *Returning Stolen Art to Its Rightful Owner is Also About Restoring Dignity*, L.A. Times (12/17/2016).

rare to have a clearly documented heir[7] seeking the return of Nazi-looted art.[8] By refusing to return these paintings, the Museum strips Von Saher of her dignity and denies the paintings' painful history. This Court has the profound opportunity to properly resolve the disposition of a diptych by Cranach the Elder, "Adam" and "Eve," and restore some dignity to the Jewish family stripped of their possessions during the Nazi invasion of the Netherlands.

There is no dispute that that the paintings at issue were stolen by Reichsmarschall Hermann Göring, the No. 2 Nazi (after Hitler), from their Jewish owner. There is also no dispute that appellant Von Saher is last living legal heir of the paintings' prewar owner.

Jacques Goudstikker was the principal of the Goudstikker Gallery located in Amsterdam and owned over 1,200 artworks. After the Nazis invaded the Netherlands in 1940, Jacques, his wife Dési, and their only son, fled the

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[7] *Von Saher*, 897 F.3d at 1144 (explaining how Goudstikker "maintained a blackbook listing all the paintings in the gallery, including the Cranachs").

[8] Colin Moynihan, *The Nazi Downstairs: A Jewish Woman's Tale of Hiding in Her Home*, N.Y. Times (10/5/2018) (citing Sotheby's worldwide head for restitution: "It's so unusual to have a victim of Nazi theft or expropriation who writes everything down. Usually you're trying to join the dots far apart").

Netherlands because they were Jewish. They were forced to leave behind virtually all of their possessions, including the Cranachs. The Nazi theft of the Cranachs took place through a forced sale engineered by Göring.

In 1946, Allied forces, through the Monuments Men, recovered much of the art stolen from Goudstikker, including the Cranachs. The Allies turned over the paintings to the Dutch government to return the art to its rightful owners. That same year, Dési returned to the Netherlands seeking restitution, but encountered an unjust restitution system.

In 1998, the Netherlands adopted the Washington Conference Principles on Nazi-Confiscated Art and established the so-called *Ekkart Committee* (after its chairperson Professor R.E.O. Ekkart) to reinvestigate the restitution system and propose recommendations. The Ekkart Committee recognized that the Dutch government's post-war policies on the restoration of Nazi-looted property to the rightful owners were "extremely cold and unjust" and recommended changes.[9] These issues were far from cured overnight.

It is in this context that Dési settled some claims in 1952, others, including the Cranachs,

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[9] https://www.restitutiecommissie.nl/en/5_repayment_of_sales_proceeds.html.

remained unresolved, leaving the Dutch government with custody. Dési did not seek the restitution of the Cranachs, fearing that the Dutch government would not handle her claim justly and that her claim would be lost forever.

In 1961, George Stroganoff claimed to be the Cranachs' owner.[10] In 1966, the Dutch government sold the paintings to Stroganoff. In 1971, Stroganoff sold the paintings to the Museum, where they hang today. Regardless of Stroganoff's claim, nothing in the record refutes that the Cranachs had clearly been confiscated by the Nazis from the Goudstikker Gallery and delivered to Göring.

Dési and her son both died in 1996, leaving Von Saher as the Goudstikker family's last living legal heir. In 2004, following the Ekkart Committee's recommendations and the Dutch government's policy change, Von Saher filed a claim for items in the Dutch government's possession. The claim was processed by the newly created *Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War*. The committee determined that Goudstikker's loss of possession of these paintings was involuntary as a result of circumstances directly related to the Nazi regime, and that

[10] As the district court explained, the Stroganoff family "never owned" the Cranachs.

the rights to these works were never waived. In 2006, the State Secretary adopted the Committee's conclusions and restituted to Von Saher all works possessed by the Dutch government and taken by Göring. By that time, however, the Cranachs were no longer in the Netherlands but in Pasadena at the Museum. The Museum refuses to return the Cranachs to Von Saher.

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Cultural artifacts like the Cranachs have great meaning. Scholars readily recognize the parallels between plunder and genocide. The rhetoric behind both destructive campaigns undertaken by the Nazis "shared a pathology of domination, subjugation and extermination."[11] During the 20th century, art collecting by Jews signified integration with Western Christian society and, from the Nazi perspective, unacceptably tainted Aryan culture, just as the existence of Jewish people tainted the Aryan race.[12] The Nazis "bought" artwork at far below

[11] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?* 22 Eur. J. of Int'l L. 49, 57-58 (2011).

[12] See Emily Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?* 51 DePaul L. Rev. 1103 (2002);

market value prices through forced sales, to divest Jews of their culture. Given this context, the restitution of Nazi-looted art provides an opportunity to bring justice to Holocaust victims.[13]

The international community's interest in resolving Nazi-looted art controversies is demonstrated by three international conferences, the Washington Conference on Holocaust Era Assets in 1998, the 2000 Vilnius Conference on Holocaust Ear Looted Cultural Assets, and the Prague Holocaust Era Assets Conference in 2009. Attended by delegates of over 40 nations, including the United States and the Netherlands, these conferences recognized the failings in handling restitution claims for Nazi-looted art and produced specific international policies to promote just and fair resolutions. These procedures for restitution are reflected in two documents: (1) the Washington Conference Principles on Nazi-Confiscated Art of 1998, agreed upon by 44 countries and (2) the Terezín Declaration of 2009, agreed upon by 47 countries, both

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Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U.PA. J. Int'l Econ. L. 383, 383-84 (2000).

[13] O'Donnell, *supra* n.11, at 54.

including the United States and the Netherlands.

The Washington Principles established a set of standards addressing the need for international cooperation in resolving the tragic aftermath of the Holocaust. The Terezín Declaration reiterates the Washington Principles' resolve to promote justice for victims of the Nazi regime. Together, these documents generated an international norm, now part of international customary law, that claims involving Nazi-looted art against museums worldwide must be resolved fairly and justly, with the goal of resolving claims on their facts and merits rather than on the basis of technical legal defenses. In November 2018, twenty years after they were established, the Washington Principles were reaffirmed in Berlin in a follow-up conference titled "20 Years Washington Principles: Roadmap for the Future."[14] The Joint Declaration signed at that conference "appeal[ed] to all government bodies and institutions that possess cultural objects, and to all private collectors, to honor the Washington Principles fully and to do their part to fully implement the Principles."[15]

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[14] https://lootedart.com/T1I90B291111.

[15] *See* Joint Declaration, *available at* https://www.lootedart.com/web_images/pdf2018/201

The Ninth Circuit failed to recognize the complex historical and legal context of this case. It incorrectly viewed Dési's decision not to seek restitution of the Cranachs through the lens of 1952 instead of 2018, treating this as an ordinary business transaction taking place during ordinary times, ignoring the context of her decision and the Dutch government's actions. The Ninth Circuit's decision not only misinterprets the facts and circumstances surrounding the sale, but also disregards the laws of equity signed by both countries with an interest in the case. The United States has not only been party to the Washington Principles and Terezín Declaration, but has taken other actions evidencing its fervent commitment to returning art "sold" during the Holocaust to its rightful owners. The Ninth Circuit's insistence on adopting a narrow formalistic approach to this forced sale within the context of the Holocaust is unfathomable. This Court can correct these errors and echo our government's policies as set forth in the Washington Principles and the Terezín Declaration and evidence its commitment to returning Nazi-looted art to its rightful owners.

The Ninth Circuit also incorrectly characterized the Dutch government's private

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sale to Stroganoff as a restitution settlement. This characterization delegitimizes valid claims for Nazi-looted art by Holocaust victims. The Ninth Circuit's opinion may chill settlement discussions between foreign governments or museums and heirs over ownership of Nazi-looted art. The Ninth Circuit misconstrued the complex historical and legal context in which Dési sought to reclaim her family's stolen artwork. The result was neither just nor fair. This Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

Von Saher seeks certiorari to resolve the current split among the Circuits regarding the purpose and application of the act of state doctrine and to rectify the Ninth Circuit's mischaracterization of American foreign policy regarding Holocaust-era property claims. Von Saher asserts that the Ninth Circuit's act of state doctrine analysis creates procedural confusion about whether the doctrine is an affirmative defense or an attack on the merits of a claim. Lastly, Von Saher urges this Court to consider the gravely important public policy concerns that clearly favor adjudicating her claims.

Amici endorse those arguments. From Amici's vantage, however, this litigation presents issues not merely concerning Executive Power or potential procedural

barriers. Rather, it presents questions pertaining to overall justness and fairness of U.S. national interest related to rectifying the devastating loss experienced by an entire population during the Holocaust. This Court should view U.S. policy as a guiding light propelling it towards a just resolution of a post-Holocaust claim and not as a restraint compelling it to follow a foreign government that has repeatedly eschewed its lack of involvement in this dispute.

I.
UNITED STATES FOREIGN POLICY DICTATES THAT VON SAHER'S SUIT SHOULD NOT BE BARRED

United States policy promoting restitution for victims of Nazi forced transfers or sales dates back to at least the Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control 1943. In April 1949, the State Department issued Press Release No. 296, emphasizing the Government's "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the [Nazis]":

> 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 sets forth 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.[16]

Even though U.S. policy on restitution was still inadequate in 1949, this early statement indicates the importance of returning Nazi-looted property to rightful owners and considering historical circumstances when applying the act of state doctrine.

Over the past 20 years, more than 40 countries, including the United States and the Netherlands, have recognized the unfairness inherent in how such claims were initially handled. These countries came together to rectify these errors and demonstrate their dedication to resolving Nazi-looted art controversies through international conferences, producing the Washington Conference Principles on Nazi-Confiscated Art of 1998[17] and the Terezín Declaration of 2009.[18]

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[16] *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (CA2 1954).

[17] https://www.state.gov/p/eur/rt/hlcst/270431.htm.

The United States played a prominent role in drafting these documents, establishing a norm that promotes justice in the Holocaust's tragic aftermath and is now part of international customary law. This norm advocates that Nazi-looted art claims must be resolved fairly and justly, with the goal of resolving them on their facts and merits rather than on technical legal defenses.

The United States has clearly expressed its national interest and policy to the just and fair resolution of Nazi-looted art conflicts. In 2016, Congress unanimously passed the bipartisan Holocaust Expropriated Art Recovery Act ("HEAR Act"), 22 U.S.C. §§ 1621-1627. The HEAR Act "ensure[s] that claims to artwork ... stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." HEAR Act, 22 Pub. L. 114-308, 130 Stat. 1525, § 3. It aims to ensure that "claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezín Declaration." *Id.* at § 2(7).

Most recently, in November 2018, the U.S. Administration sent Special State Department

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[18] https://www.state.gov/p/eur/rls/or/126162.htm.

Envoy for Holocaust Issues Thomas Yazdgerdi and expert adviser to the State Department on Holocaust-era issues Stuart Eizenstat to Berlin, to "recommit to the international effort to return these personal and cultural treasures to the families to which they belong."[19]

Despite overwhelming recognition that claims were mishandled in the Netherlands, the Ninth Circuit viewed both Désis actions in 1952 as a waiver and the Dutch government's later sale to Stroganoff in 1966 as a valid act of state rather than as a continuation of the chain of looting.

This Court should recognize, as the Dutch government did in its 2006 decision, that Désis 1952 decision to forgo making claims on the Cranachs was not a waiver of her rights.[20] The

[19] Eizenstat, *supra*, n.3,; *see also* https://www.deutschland.de/en/ washington-principles-joint-declaration-by-germany-and-the-usa (since the Washington Principles, "Germany has returned over 16,000 individual objects to Holocaust survivors or their families. … Both governments recognize the burdens on large museums of going through their collections, and on smaller museums that lack of staff trained to do provenance research, and aim to encourage and promote their respective efforts").

[20] *See* Pet.App. 41a-42a, 155a-156a (Désí "had suffered an involuntary loss of possession, since the rights to these works were never waived").

Dutch government's 1966 sale to Stroganoff was a taking because it prevented restitution to the rightful owner. Courts and governments have since recognized that the context of the Holocaust blurred the lines of legality in almost every type of proceeding that followed in its aftermath. Accordingly, the act of state doctrine should not be applied in this case.

Like the international community, museums recognize their ethical duty to restore artworks to their rightful owners. Both the American Alliance of Museums ("AAM") and the International Council of Museums ("ICOM") strongly support restitution:

> When faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount. Museums should develop and implement policies and practices that address this issue in accordance with these guidelines …. [I]n order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.[21]

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[21] American Alliance of Museums, Unlawful Appropriation of Objects During the Nazi Era.

These organizations also impose ethical duties on members. Under AAM's Code of Ethics "competing claims of ownership ... should be handled openly, seriously, responsively and with respect for the dignity of all parties involved."[22] Similarly, ICOM requires that "[e]very effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained. … Due diligence in this regard should establish the full history of the item since discovery or production."[23]

The Norton Simon Museum's lack of membership in either of these institutions is telling and its approach starkly contrasts with that of other prestigious institutions that strive to ensure that Nazi-looted art is identified and returned to its proper owners. Between 1999 and 2009, 25 U.S. museums negotiated settlements over Nazi-looted art,[24] and others have proactively sought to return artworks. The Louvre "create[d] a permanent space" for

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[22] https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/.

[23] ICOM Code of Ethics for Museums, § 2.3 (2006), http://archives.icom.museum/ethics.html#section2.

[24] *See* Steve Chawkins, *Hearst Castle to Return Artworks Seized by Nazis*, L.A. Times (4/9/2009).

exhibiting this art, with the intention of returning it to its rightful owners explaining: "Although museums are often suspected of wanting to keep the pieces ... our goal is clearly to return everything that we can."[25]

Similarly, the Museum of Fine Arts, Boston, undertook a Nazi-Era Provenance Research project "[b]ecause of the widespread loss of artwork through wartime looting, Nazi confiscation, and forced sales due to racial persecution."[26] This project strives to "identify objects in the collection that were lost or stolen and never returned to their rightful owners."[27] The MFA pursues these goals by researching and publishing proper provenances to facilitate restitution claims, and has resolved several claims since the project began in 1998.[28] And

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[25] Aurelien Breeden, *Art Looted by Nazis Gets a New Space at the Louvre. But Is It Really Home?* N.Y. Times (2/8/2018); Eleanor Beardsley, *France Hopes Exhibit of Nazi-Stolen Art Can Aid Stalled Search for Owners*, NPR (2/23/2018) ("'If the seller was Jewish, then there's a good chance it was a forced sale.'").

[26] Nazi-Era Provenance Research, MFA Boston (many resolutions involve financial settlements allowing the MFA to continue displaying the work).

[27] *Id.*

[28] Eileen Kinsella, *MFA Boston Reaches Settlement in Nazi-Related Claim Over Rare Figurines*,

Christie's and Sotheby's employ full-time staff to implement the Washington Principles, and "both auction houses decline to deal in art with suspicious Holocaust-era histories."[29]

The Hearst Castle, part of California's State Parks Department, also evinced a commitment to restitution by repatriating to Holocaust survivors' heirs paintings that had been at the castle for decades.[30] As the State Parks Director explained, repatriation presents "an opportunity to right a wrong" and educate the public and "to tell the story over and over, so we don't forget our history."[31]

In the Netherlands, the Museums Association asked museums to investigate the provenance of their collections to compile an inventory of items stolen, confiscated, or sold under duress or other suspicious circumstances

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ArtNetNews (5/4/2017) ("it's a 'moral responsibility of the current possessor to redress these past injustices'"; recently the MFA "reached an agreement with the heirs of a Jewish collector involving seven rare porcelain figurines that have long been shadowed by claims they were sold in the midst of Nazi persecution" allowing the institution to keep the works).

[29] Eizenstat, *supra*, n.3.

[30] Chawkins, *supra* n.24.

[31] *Id.*

between 1933 and the end of World War II.[32] Since 2009, under this Museale Verwervingen project, 42 Dutch institutions have identified 170 artworks suspected of being wrongfully taken.[33] Another 163 member institutions are still investigating their collections. At the Rijksmuseum in Amsterdam, the Netherlands' preeminent national art museum, a team of experts remains dedicated to uncovering questionable provenances. As of October 2018, that team identified in the Rijksmuseum collection 22 potentially Nazi-looted items. A spokesman explained: "The research is important to do justice to history. A museum can only show a piece of art properly if the story and history behind the object is clear."[34]

As these institutions exemplify, museums must ensure that the art on their walls was not ripped from the walls of victims of history's most tragic time, and that the artworks' true story is relayed. These institutions recognize that available information has improved, so

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[32] https://www.musealeverwervingen.nl/en/10/home/.

[33] Sarah Cascone, Dutch Museums Discover Hundreds of Artworks Stolen by the Nazis ArtNetNews (10/11/2018).

[34] *Id.*

their behavior must follow suit.[35] The Ninth Circuit should have recognized that the Museum should not seek loopholes to quash past atrocities by refusing to acknowledge the story behind its art.

Indeed, had the Museum satisfied industry-standard legal and ethical duties and conducted a proper due diligence provenance search before purchasing the Cranachs, it would have discovered that Goudstikker was the rightful owner. The Museum's inadequate diligence deviated substantially from industry standards and signified that it acted, at a minimum, negligently.[36]

The Ninth Circuit ignored these facts and instead rewarded the Museum for its violations of ethical duties—effectively holding that a museum is better off not investigating the origins of its acquisitions. This undermines the

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[35] Phil Hirschkorn, *Why finding Nazi-looted art is 'a question of justice,'* PBS (5/22/2016).

[36] Even Norton Simon's grandson believes that the Cranachs have been mishandled. He was "kicked off" the board for espousing that the Museum should seek "a just and fair" resolution with Von Saher. *See* Hayley Munguia, *Norton Simon's grandson criticized the museum's handling of Nazi-stolen art, now he's off the foundation board*, Pasadena Star News (5/4/2018).

international community's efforts to achieve just and fair results for Holocaust victims.

The Ninth Circuit erred by failing to consider what we know in 2018 and what the Dutch government found in 2006 about the handling of claims in 1952.[37]

"It is estimated that the Nazis stole 20 percent of all Western Art in Europe, or about three million objects."[38] In the 1930s and 1940s, these takings were technically "legal" under the 1933 Reichstag Fire Decree and the Enabling Act.[39] After the Holocaust, these once-valid laws left countries swarmed with claims for stolen property. These countries faced early missteps and errors in handling these claims. In the aftermath of the Holocaust, European countries were overwhelmed by problems and scrambled to create proceedings to address

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[37] *See, e.g.,* Alan Riding, *Dutch Return Art Seized by Nazis*, N.Y. Times (2/6/2006) (discussing the Dutch government's 2006 return of artwork to Von Saher and explaining that in its recommendation it concluded that the sales to Göring and Miedl were "involuntary" and that Dési did not waive her rights).

[38] *Id.*

[39] https://www.ushmm.org/learn/timeline-of-events/1933-1938/reichstag-fire-decree.

them.[40] In so doing, they inadequately handled restitution claims.

Those seeking restitution in 1952 faced a hostile and unsympathetic procedure in the Netherlands. For example, in this case, "the Dutch government went so far as to take the 'astonishing position' that the transaction between Göring and the Goudstikker Gallery was voluntary and taken without coercion." *Von Saher*, 754 F.3d at 722. "Not surprisingly," Dési did not pursue restitution in 1952 because she "decided that she could not achieve a successful result in a sham restitution proceeding to recover the artworks Göring had looted." *Id.*

By the late 1990s, even the Dutch government recognized its earlier errors, as evidenced by the establishment of the Ekkart Committee to investigate art provenance. According to the Ekkart Committee, "the immediate postwar restitution process was 'legalistic, bureaucratic, cold and often even callous.'" *Id.* The Ekkart Committee, in turn, lead to the restoration of approximately 200 works of art to Von Saher in 2006. Since then,

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[40] *See* Hirschkorn, *supra* n.35 (Governments were overwhelmed with problems after the war: 'The last thing they wanted to deal with was some annoying man like my father who said, 'What happened to my mother's teacups?'").

the Netherlands has also participated in international efforts to improve its restitution claim procedures.

Désis perceived inaction in 1952 should not be viewed as a waiver, the act of state doctrine should not be a bar, and the Museum's shirking of ethical duties should not be rewarded. Certiorari should be granted to correct these errors.

The Ninth Circuit erred by classifying the Dutch government's actions that prevented restitution of the Cranachs to Von Saher as official acts of state serving as a jurisdictional bar. The Ninth Circuit further erred by adopting a narrow, historical view of decisions made during the 1950s as if they were made today, neglecting to consider the context of postwar fear and desperation. Both Désis decision not to seek restitution of the Cranachs in 1952 and the Dutch government's sale to Stroganoff were incorrectly categorized and viewed through a hypertechnical legalistic lens rather than one encompassing the context at the time of the actions.

This Court's review is critical to clarify that United States policy considerations are relevant to applying the act of state doctrine. Otherwise, the Ninth Circuit's decision could be read to bar all claims by Holocaust survivors or their heirs to Nazi-looted art because those forced sales were "valid" under the laws at that

time.[41] Given the strong policy and laws aimed at rectifying Nazi forcible takings by providing restitution to the victims, this cannot stand.

II.
THE NINTH CIRCUIT INCORRECTLY CHARACTERIZED A PRIVATE COMMERCIAL SALE AS A CLAIM FOR RESTITUTION UNDER DUTCH LAW, THEREBY DELEGITIMIZING VALID CLAIMS FOR RESTITUTION OF NAZI-LOOTED ART

The Ninth Circuit erred in categorizing the conveyance to Stroganoff as arising from "[t]he Dutch government's sovereign internal restitution process" rather than what really took place: a straightforward commercial sale of the Cranachs from the Dutch government to Stroganoff.[42] The Ninth Circuit's opinion is contradictory. The court concluded that the conveyance of the paintings to Stroganoff constituted an act of state of the Dutch government, premised on the government's restitution process. However, the Dutch government's *sale* to Stroganoff only occurred

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[41] *See* Natalie Rogozinsky, *Stolen Art and the Act of State Doctrine: An Unsettled Past and an Uncertain Future*, 26 DePaul J. Art, Tech. & Intell. Prop. L. 1 (2015).

[42] Pet.App. 18a.

"in exchange for [Stroganof] dropp[ing] his restitution claims," which were not predicated on WWII or Nazi-looting.[43] By misconstruing the facts and law surrounding the Stroganoff sale, the Ninth Circuit delegitimizes valid claims by Holocaust survivors.

While the Ninth Circuit recognized that "the district court found that the Stroganoff family 'never owned' the Cranachs," it dismissed that fact as irrelevant, stating that evidence that the Stroganoff family "even possibly" owned the Cranachs presented a colorable restitution claim and thus provoked an act of state.[44] But it is relevant because it affects whether Stroganoff had a colorable claim. If he never owned the paintings, his claim is not colorable.

Even if Stroganoff's family had owned the paintings at some point, he did not lose the painting to the Nazis. As with civil litigation, anyone can file a restitution claim, but that does not render it "colorable." Stroganoff's claim was not a colorable restitution claim because, by their own terms, the Dutch Royal Decrees limit their coverage to the period of Nazis occupation. The assertion that Stroganoff had "a colorable restitution claim" is, therefore, under any Dutch restitution scheme inaccurate.

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[43] Pet.App. 21a.

[44] Pet.App. 6a.

Stroganoff's purchase further evidences that his claim was not for restitution. Stroganoff reached a deal with the Dutch government to *purchase* the Cranachs in exchange for dropping his restitution claims.[45] Holocaust victims seeking restitution generally do not do so for commercial gain. Rather, Holocaust victims pursue these claims with hopes of attaining a token of recognition, acknowledging past horrors, and righting wrongs.[46] Many survivors seeking restitution want the artwork to remain on public display to share their stories of persecution and perseverance.[47] Restitution is about revealing past horrors, storytelling, and restoring some dignity to families from whom it was stripped.

The Ninth Circuit's categorization also starkly contrasts with the Washington Conference Principles dictating that "consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era." The Stroganoff sale was not a restitution and took place before the U.S. and the Netherlands' policy changes. The sale was simply the result of an ambiguity in the early aftermath of the Holocaust that had to be

[45] Pet.App. 11a.

[46] See Solon, *supra* n.6.

[47] See *id.*, nn.14-19.

corrected. However significant these paintings may be, their lineage is at least as significant.[48]

The Ninth Circuit's characterization of a claim by someone who did not suffer a loss at the hands of the Nazis as "restitution" insults Holocaust survivors' and their heirs' claims. Grouping Stroganoff's claim with Von Saher's dilutes the importance of international efforts promoting restoration of Holocaust-era artworks through legislation and policy. A claim to restore title to artworks looted during the Holocaust must be limited to Holocaust victims and their heirs.

CONCLUSION

The Ninth Circuit's decision carries broad implications that contradict U.S. policy aimed at encouraging survivors and their heirs to come forward. Certiorari and reversal will promote the existing strong policy of the United States in favor of restituting Nazi-looted art.

This case is of great significance not only to Von Saher, but to U.S. policy. The Ninth Circuit's ruling ignores prevailing American and international principles. Amici urge a grant of certiorari and a reversal.

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[48] *See* Moynihan, *supra*, n.8 ("Perhaps more remarkable than the painting is the tale that accompanies it").

Respectfully submitted,

BENJAMIN G. SHATZ
Counsel of Record
STANLEY W. LEVY
SHOSHANA S. SPEISER
DANIELLE C. NEWMAN
MANATT, PHELPS & PHILLIPS, LLP
11355 West Olympic Blvd.
Los Angeles, CA 90064
BShatz@manatt.com
(310) 312-4000

MICHAEL BAZYLER
Professor of Law and
The 1939 Society Law Scholar
in Holocaust and Human Rights
Studies
DALE E. FOWLER SCHOOL OF LAW
CHAPMAN UNIVERSITY

Counsel for Amicus Curiae
The Jewish Historical Museum,
The 1939 Society, and Bet Tzedek