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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE COMMISSION FOR ART RECOVERY AS *AMICUS CURIAE* IN SUPPORT OF CERTIORARI AND PETITIONER

AGNES PERESZTEGI
Of Counsel
SOFFER AVOCATS
4 Rue Quentin Bauchart
75008 Paris, France
33 (0)1.53.23.02.00

OWEN C. PELL
Counsel of Record
SEQUOIA KAUL
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200
opell@whitecase.com

Counsel for Amicus Curiae

287358

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

Page

STATUTES AND OTHER AUTHORITIES

Cited Authorities

Page

Cited Authorities

Page

Cited Authorities

Page

INTEREST OF *AMICUS CURIAE*

The Commission for Art Recovery ("CAR") respectfully submits this *amicus curiae* brief in support of the Petition for Writ of Certiorari.[1] CAR is a New York-based nonprofit organization, dedicated to seeking justice for victims of Nazi art theft during the Holocaust. CAR is not a claims organization, and only engages directly with Holocaust-looted art claims if doing so furthers policies and processes promoting restitution, including the recognition that theft of cultural objects during genocide is a crime against humanity. Over the past fifteen years, CAR has worked closely with governments, lawyers, scholars, and art experts to safeguard the legal rights of Holocaust survivors and heirs, and to encourage the adoption of practices and principles that redress the injustices surrounding Holocaust-looted art.

CAR has an interest in this case because the Ninth Circuit's decision on Act of State grounds ignores the unprecedented nature of the Holocaust and fundamentally misinterprets the historical stance of the United States regarding Nazi-looted art. During the Third Reich, the Nazis stole hundreds of thousands of museum-quality artworks by artists such as Pablo Picasso, Johannes Vermeer, Gustav Klimt, and, of course, Lucas Cranach the Elder—the artist whose paintings are at issue here.

---

1. Both parties consented to amicus submissions by a blanket consent filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution to its preparation or submission.

The return of "Adam"[2] and "Eve,"[3] as two of the most iconic paintings in the Western canon, is of particular significance. The Cranachs are perhaps the most high-profile artworks still unreturned to their rightful owners; indeed, every art history student would easily recognize them.[4] In light of their unmistakably tainted provenance, the Cranachs—as presently displayed by the Norton Simon—represent not the glory of mankind's beginning, but a stain left by the Holocaust.

SUMMARY OF ARGUMENT

The horrors of the Holocaust are unparalleled. During the Third Reich, the Nazi government masterminded and executed a systematic looting campaign unprecedented in scope and unwavering in cruelty. Holocaust looting encompassed more than traditional notions of wartime plunder, and included outright theft, "Aryanization," and the forced sale of Jewish property—all which played an integral role in the destruction of European Jewry. But what made Holocaust looting truly distinct was the manner by which the Third Reich turned traditional precepts of property law upside down, using seemingly legal means to strip Jews of private property while commingling that property with looted state and religious property scattered across Europe. European countries then lacked legal precedent to address the problems created by this

2. *Adam*, Norton Simon Museum, https://www.nortonsimon.org/art/detail/M.1971.1.P (last visited Mar. 10, 2019).

3. *Eve*, Norton Simon Museum, https://www.nortonsimon.org/art/detail/M.1991.1.P (last visited Mar. 10, 2019).

4. *See, e.g.*, Penelope J. E. Davies et al., Janson's History of Art: The Western Tradition 19 (8th ed. 2010).

mass of looted property, and struggled to do systematic justice to Holocaust victims after World War II.

Because the very nature of Holocaust looting renders claims involving Nazi-looted art vastly different from ordinary property disputes, it has long been a tenet of U.S. policy to invalidate transfers of property stolen by the Nazis. Indeed, as early as 1951, the State Department recognized that "[f]or the first time in history, restitution may be expected to continue for as long as the works of art known to have been plundered during a war continue to be rediscovered."[5] This case proves the wisdom of that statement. Hundreds of thousands of works of art belonging to victims of Nazi persecution are still missing—these works have been aptly termed "the last prisoners of war."[6]

In holding that the Act of State doctrine prevents the examination of whether the Norton Simon Museum acquired valid title to the Cranachs, the Ninth Circuit made three fundamental errors, which could color how other courts will analyze the many Holocaust-looted art cases still percolating through the court system. *First*, the Ninth Circuit ignored the unique nature of Holocaust-looted art and how it affects the status of that property. *Second*, the Ninth Circuit ignored the unique and consistent response by the United Sates to Holocaust looting: Since 1943, the United States has made clear that

5. Ardelia Hall, The Recovery of Cultural Objects Dispersed During World War II, 25 Dep't St. Bull. 337, 339 (1951).

6. Emily J. Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners*, 51 DePaul L. Rev. 1103 (2002).

even seemingly legal *state actions* having the effect of furthering Holocaust looting should not be given effect. Rather, U.S. policy favors the rightful owner. *Third*, the Ninth Circuit's use of the Act of State doctrine to protect tainted title to looted art located in the United States is directly at odds with the U.S. government's explicit directive that, in assessing the effects of Holocaust-era decrees on property rights, U.S. courts are "relieve[d] . . . from any restraint . . . to pass on the validity of the acts of Nazi officials." *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

ARGUMENT

I. THE UNIQUE NATURE OF NAZI LOOTING MUST BE CONSIDERED IN ASSESSING HOLOCAUST-ERA ART CLAIMS

The Nazi regime murdered six million men, women, and children simply because they had Jewish blood. From 1933 to 1945, the Nazis wielded the rule of law as a tool of oppression, enacting over 400 decrees and regulations aimed at eradicating "Jewish corruption" from all spheres of life across German-controlled Europe.[7] For each victim, death was only the final step in a state-administered process of exclusion, expropriation, and extermination. Indeed, "The Nazi regimentation of inhumanity we characterize as the Holocaust, marked most horrifically

7. *United States* v. *Goering*, Judgment, 6 F.R.D. 69, 79-82, 126-30 (Int'l Mil. Trib. 1946) [hereinafter Nuremberg Judgment]; *see also* Raphael Lemkin, Axis Rule in Occupied Europe 25-31, 75-90 (Joseph Perkovich ed., 2d ed. 2008).

by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews." *American Ins. Assn.* v. *Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting). Of the hundreds of anti-Jewish measures enacted by the Nazi regime, those aimed at Jewish property created "an almost inescapable legal net which the Nazis used to snare their victims."[8] Across Europe, Jewish businesses and assets (including art and cultural property) were subject to forced "legal" sale to "Aryan" trustees for a fraction of their value.[9]

It is well documented that art was especially prized by the Nazis, who competed fiercely to obtain Jewish-owned artworks by any means necessary.[10] But the Nazis' policy of looting art was not designed simply to enrich the Third Reich; it was integral to Adolf Hitler's goal of eliminating all vestiges of Jewish culture and identity.[11] To

8. Jonathan Petropoulos, Art as Politics in the Third Reich 84 (1996).

9. Richard Z. Chesnoff, Pack of Thieves: How Hitler and Europe Plundered the Jews and Committed the Greatest Theft in History 8–9 (2001); Jonathan Petropoulos, The Faustian Bargain: The Art World in Nazi Germany 27 (2000). *See also* Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War 104 (1995).

10. *See, e.g.*, Michelle I. Turner, *The Innocent Buyer of Art Looted during World War II*, 32 Vand. J. Transnat'l L. 1511, 1513-19 (1999); Hector Feliciano, The Lost Museum 37-38 (Hector Feliciano & Tim Bent trans., 1997); Nicholas, *supra* note 9, at 9–10, 41–49.

11. *See* Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998) ("The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage . . . .").

that end, the Nazis masterminded an unprecedented and systematic looting campaign, by which desirable artworks were meticulously inventoried and then stolen, confiscated, or "purchased" from Jewish owners desperate to escape German-controlled Europe. All told, the Nazis and their local collaborators looted millions of works of art from Jews—the greatest "thefticide" in history.[12]

Immediately upon invading the Netherlands in May 1940, the Nazi occupiers began to implement anti-Jewish policies and, through a series of regulations, isolated and stripped Dutch Jews of both property and citizenship.[13] In short order, Germany imposed discriminatory registration laws, placed all Jewish businesses under Nazi control, and auctioned off Jewish-owned art collections. There is no dispute here that the Goudstikker collection was subjected to this treatment. By May 1942, the Nazis had forced Dutch Jews to transfer all monetary and other valuable assets to *Lippmann, Rosenthal & Co.* ("*Liro*"), a "looting institution" set up exclusively for that purpose. Mass deportations commenced that same year, and empty Jewish homes were ransacked. All remaining Jewish-owned property of value, including art, was then confiscated by the Nazis and taken to *Liro*, which kept a

12. Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 Cardozo L. Rev. 601, 602 (1998) (using the term "thefticide" to describe what was "the greatest mass theft on the occasion of the greatest mass murder in history").

13. Petropoulos, *supra* note 8, at 139–44; Annemarie Marck & Eelke Muller, *National Panels Advising on Nazi-Looted Art in Austria, France, the United Kingdom, the Netherlands and Germany*, *in* Fair and Just Solutions? Alternatives to Litigation in Nazi-Looted Art Disputes: Status Quo and New Developments 41-90 (Evelien Campfens ed., 2015).

running inventory of looted art.[14] Ultimately, less than 20% of the pre-war Dutch Jewish population of 140,000 survived the Holocaust.[15]

Nothing about Holocaust-era looting resembled ordinary property loss. Jews lucky enough to escape Nazi-occupied Europe faced both practical and legal obstacles to regaining looted property. Having been stripped of all rights to property under law, Jews lacked any real capacity—even from afar—to make inquiries into what may have happened to their possessions or seek recourse through normal legal or commercial channels. The Nazis also used apparently legal means to divest Jews of their property, further complicating the ability of survivors to challenge the loss of cherished artworks during the post-war period.

The Allies were aware of the Nazi regime's widespread looting campaign and viewed it as violating longstanding international law and customs of war.[16] In 1943, as the tide of war turned, the United States and its Allies issued a

---

14. Marck & Muller, *supra* note 13, at 71-72.

15. Michael J. Bazyler et al., Searching for Justice After the Holocaust: Fulfilling the Terezín Declaration and Immovable Property Restitution 292-93 (2019).

16. Under the 1907 Hague Convention, confiscation of private property and "[a]ll seizure of . . . works of art" in times of war was expressly forbidden. Hague Convention Respecting the Laws and Customs of War on Land, Arts. 46 & 56, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. Indeed, one of the architects of Nazi Germany's looting campaign, Alfred Rosenberg, was indicted for and convicted of the crime of looting at the Nuremberg War Crime Trials, and was hanged. *See* Nuremberg Judgment, *supra* note 7, at 293-96.

solemn warning. The London Declaration promised that the Allies would "do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war against [on behalf of] the countries and peoples who have been so wantonly assaulted and despoiled."[17] Recognizing that Nazi Germany was attempting to cloak "the stealing and forced purchase of works of art" in seeming legality, the Allies specifically "reserve[d] their rights to declare invalid any transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected."[18] Each Allied government then was tasked with effectuating that promise.[19]

In London, the Dutch government-in-exile enacted a series of emergency decrees forbidding all transactions with the Nazis and preemptively declaring all such transactions null and void.[20] In 1945, the United States enacted Military Law No. 52, which prohibited all trafficking of art and other cultural property from

17. 1943 Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (Jan. 5, 1943), *reprinted in* 8 Dep't St. Bull. 21 (1943) ("London Declaration").

18. *Id.*

19. Ardelia Hall, U.S. Program for Return of Historic Objects to Countries of Origin, 1944-1954, 31 Dep't St. Bull. 493, 495 (1954).

20. Besluit Rechtsverkeer in Oorlogstijd 7 juni 1940 [Dutch Decree on War-time Legal Transactions], Stb. 1940, A6 (Nr.).

U.S.-occupied territories.[21] Military Law No. 59 then declared presumptively invalid all transfers of property from groups persecuted by the Third Reich.[22] The Allies expressly recognized that Holocaust looting was in a category all its own; its sheer scale and unique nature rendered the legal niceties of ordinary property law inadequate. Thus, Holocaust-looted art assumed special status in U.S. policy—the ultimate goal being restitution of that property to its rightful owners.

II. U.S. POLICY NEVER GAVE EFFECT TO HOLOCAUST-ERA LOOTING

At the end of the war, the Allies implemented measures to catalogue looted art and disseminate those lists to art dealers and museums. Complicating that task was that private property looted by the Nazis had been commingled with looted state and religious property, *and* had often been moved to locations scattered across Germany.[23] Ultimately, the Allies left legal restoration of ownership rights to individual governments.[24] At the July 1945 Potsdam Conference, President Truman approved the external restitution process by which the United States repatriated identifiable art and other cultural

21. U.S. Military Law No. 52 (Blocking and Control of Property), 12 Fed. Reg. 2187, 2196 (Apr. 3, 1947).

22. U.S. Military Law No. 59 (Restitution of Identifiable Property), 12 Fed. Reg. 7979, 7983 (Nov. 29, 1947).

23. *See generally* Nicholas, *supra* note 9.

24. *Id.* at 323. *See, e.g.*, Memorandum for the Coordinating Committee, Allied Control Authority (Berlin, Dec. 6, 1945), Foreign Relations of the United States: Diplomatic Papers, 1944-1945, General: Political and Economic Matters, vol. ii, 956-58.

objects recovered by the Allied Forces to their country of origin. Receiving nations, in turn, were expected to reunite rightful owners with that property.[25]

Central to U.S. policy was the understanding that Nazi-looted art was "tainted" by the Holocaust. Specifically, works of art that changed hands during the Third Reich "would never be saleable."[26] Hence, under Military Law No. 59, a subsequent holder of Nazi-looted art—even one allegedly having acquired it in good faith—was subordinated to the rights of the original owners.[27] Consistent with this legal principle, art recovered in the U.S. Zone of post-war Germany was returned to originating countries on the *express condition* that the receiving government agree to hold artworks "as custodians" until those works could be returned to their rightful owners.[28] Indeed, the return of "Adam" and "Eve"

---

25. This determination was made by the Interdivisional Committee on Reparations, Restitution, and Property Rights, established by the U.S. State Department in November 1943 for the purpose of carrying out the external restitution of Nazi-looted art.

26. Hall, *supra* note 5, at 339.

27. U.S. Military Law No. 59, *supra* note 22, § 3.75(2) ("Property shall be restored to its former owner . . . even though the interest of other persons who had no knowledge of the wrongful taking must be subordinated."). Echoing the London Declaration, Law No. 59 included any transaction "contra bono mores, threats or duress, or an unlawful taking of any other tort." *Id.* § 3.76(1).

28. The text on the "receipt and agreement for delivery of cultural objects" from the U.S. Zone reads: "The said Government hereby agrees . . . as custodians, pending the determination of the lawful owners . . . ." NARA M1941, Records Concerning the Central Collection Points ("Ardelia Hall Collection"), OMGUS Headquarters Records 1938-1951.

to the Netherlands in 1945 was just so conditioned on their ultimate restitution. Thus, the fact that Dutch post-war policies treated this custodial property as "owned" by the Netherlands—a policy the Dutch government has now expressly repudiated[29]—never found approval in U.S. policy or practice.

The London Declaration was an "early warning system" to potential U.S. acquirers that art emanating from post-war Europe was presumptively tainted. Subsequently, the U.S. government made clear that "introduction of looted objects of art into this country is contrary to the general policy of the United States" and that "[i]t is incumbent upon this Government, therefore, to exert every reasonable effort to right such wrongs as may be brought to light."[30] Under this policy, the U.S. State Department issued explicit warnings to all museums, art dealers, and universities not to acquire artworks with undocumented or incomplete provenance.[31] Despite these warnings, the State Department ultimately recovered

29. In 2000, the Prime Minister wrote that the Dutch government "fully recognizes—looking back with the knowledge and eyes of today—that there has been too much formalism, bureaucracy and especially bleakness in the restitution process [of the 1940s and 50s]. For this, the government expresses sincere regret and offers apologies to those who then suffered . . . ." *See* Wouter Veraart, *Two Rounds of Postwar Restitution and Dignity in the Netherlands and France*, 41 L. & Soc. Inquiry 956, 966 (2016).

30. *See* Hall, *supra* note 19, at 495-96.

31. *See, e.g.*, *id.* at 493-98. One such State Department letter explained that the Government shared with "American institutions" its "responsibility . . . to recover and return to owner nations . . . works of art[] . . . looted, stolen or improperly dispersed from public and private collections in war areas and brought to the United States during and following World War II." Hall, *supra* note 5, at 340.

nearly 4,000 looted artworks in the United States for restitution to their countries of origin.[32]

Remarkably, as early as 1951, the State Department realized that "[f]or the first time in history, restitution may be expected to continue for as long as the works of art known to have been plundered during a war continue to be rediscovered."[33] Today, almost 75 years after the end of World War II, the task of returning artwork "confiscated" by the Nazis remains unfinished. Hundreds of thousands of looted artworks are still missing, and these works—stolen from victims of Nazi persecution and never returned—have been aptly termed "the last prisoners of war."[34]

The U.S. Congress has taken steps in response to the sheer number of claims and attendant litigation that continue to arise—as well as the legal hurdles that continue to confront true owners of Holocaust-looted art. In 1998, to reiterate U.S. policy on the return of Nazi-looted art to its rightful owners, Congress enacted the Holocaust Victims Redress Act.[35]

---

32. Milton Esterow, *Europe is Still Hunting Its Plundered Art: Hundreds of Millions of Treasures Elude Postwar Search*, N.Y. Times, Nov. 16, 1964, at 1 (reporting that 3,978 stolen art objects were recovered in the United States between 1945-1962).

33. Hall, *supra* note 5, at 339.

34. Henson, *supra* note 6; *see also* Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 Eur. J. Int'l L. 49, 51 (2011); Hector Feliciano, Owen Pell, & Nick Goodman, *Nazi-Stolen Art*, 20 Whittier L. Rev. 67, 72 (1998).

35. Holocaust Victims Redress Act of 1989, Pub. L. No. 105-158, 112 Stat. 15 (1998).

Directly addressing works of art, the Act states: "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."[36] Solidifying its commitment to this policy, the United States created the Presidential Advisory Commission on Holocaust Assets ("PCHA") to investigate the progress of Holocaust-era restitution since the 1943 London Declaration.[37] The PCHA's report reflected "a general sense that the closing of the millennium demands that Western society seek to effect the maximum measure of justice possible for the victims of Nazi crimes."[38] Those findings marked a renewed commitment to uncovering the truth about the past—a commitment that "has been, and must remain, a fundamental component of American democracy's pursuit of justice and human dignity."[39]

---

36. *Id.* § 202.

37. The PCHA was created by the U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105-186, 122 Stat. 611 (1998), which passed Congress by unanimous support and was signed into law by President Clinton on June 23, 1998.

38. Presidential Advisory Comm'n on Holocaust Assets in the U.S., Plunder and Restitution: The U.S. and Holocaust Victims' Assets: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report, i-ii (2000).

39. Specifically, the report recognizes that "restitution of Holocaust-era assets involves not only the material restitution of what was stolen, but also the moral restitution that is accomplished by confronting the past honestly and internalizing its lessons." *Id.*

Then, in 2016, Congress went further, taking measures "to ensure that claims to Nazi-confiscated art are adjudicated [in a fair and just manner] in accordance with United States policy . . . ."[40] Recognizing the "unique and horrific circumstances of World War II and the Holocaust," Congress passed the Holocaust Expropriated Art Recovery (HEAR) Act of 2016 with bipartisan support, creating a six-year federal statute of limitations to file a claim only after a claimant has discovered the identity and location of a looted work.[41] Thus, U.S. policy

40. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, §§ 2(1), (6)-(7), 3, 5(a), 130 Stat. 1524, 1524-26 (2016) [hereinafter HEAR Act]. Indeed, due to the turmoil of the Holocaust period and the sheer passage of time, information regarding looted artworks is often fragmented or lost completely. Significantly, the Dutch government now recognizes this as to Holocaust-looted art claims. Marck & Muller, *supra* note 13, at 78 (translating June 22, 2012 Letter of the Dutch Secretary of State for Education, Culture and Science to the Lower House); *see also* Petition for Writ of Certiorari, *Von Saher* v. *Norton Simon Museum of Art*, No. 18-1057 (filed Feb. 14, 2019), at 15-16.

41. HEAR Act at § 5(a). Following the HEAR Act, several Nazi-looted art claims against museums and private art collectors have survived motions to dismiss on statute of limitations grounds. *See, e.g.*, *Gowen* v. *Helly Nahmad Gallery*, 2018 N.Y. Misc. LEXIS 1625 (Sup. Ct., N.Y. Cty., May 8, 2018) (rejecting, *inter alia*, gallery's statute of limitations defense to claim for Modigliani painting that was subject to forced sale during the Holocaust); *Reif* v. *Nagy*, 2018 N.Y. Misc. LEXIS 3560 (Sup. Ct., N.Y. Cty. Apr. 6, 2018) (adjudicating title rights of heirs to two Schiele drawings against professional art dealer, and holding that the HEAR Act "compels [courts] to help return Nazi-looted art to its heirs" and instructs them "to be mindful of the difficulty of tracing artwork provenance due to the atrocities of the Holocaust era, and to facilitate the return of property where there is reasonable proof that the rightful owner is before us").

has never given effect to Holocaust looting in the United States, and that policy has been consistent since World War II.

III. U.S. POLICY HAS NEVER ALLOWED THE ACT OF STATE DOCTRINE TO PROTECT TAINTED TITLE TO NAZI-LOOTED PROPERTY LOCATED IN THE UNITED STATES

Consistent with its policy during and after World War II, the United States has unequivocally stated that the Act of State doctrine has no application to claims testing the effects of confiscatory Nazi decrees as to property located in the United States. In 1949, for example, the State Department intervened in the Second Circuit in support of claimants dispossessed as a result of Nazi persecution.

In *Bernstein* v. *Van Heyghen Freres Societe Anonyme*, Arnold Bernstein, a German Jew, sought to recover property from his shipping business, which had been subject to forced transfer by the Nazis. 163 F.2d 246, 247 (2d Cir. 1947) (Hand, J.). Bernstein's first claim to recover his property was dismissed under the Act of State doctrine,[42] with the Court noting that the United States had not "indicated any positive intent to relax to doctrine that our courts shall not entertain actions of the kind at bar." *Id.* at 251. Bernstein then sued the transferees of his second shipping line for damages and lost profits resulting from the initial seizure by the Nazis, but his claim was

42. Judge Hand reasoned that, although "a German court would have held the transfer unlawful at the time it was made, . . . a court of the forum will not undertake to pass judgment upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." *Bernstein*, 163 F.2d at 251.

again dismissed on Act of State grounds. *Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 76 F. Supp. 335, 340 (S.D.N.Y. 1948), *aff'd*, 173 F.2d 71 (2d Cir. 1949).

In response, Jack Tate, the Legal Advisor of the State Department, issued the now famous "*Bernstein* Letter," rejecting use of the Act of State doctrine and expressing the affirmative policy of the United States "with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution, . . . to relieve American courts from any restraint upon the exercise of their jurisdiction to pass on the validity of the acts of Nazi officials."[43] Based on the *Bernstein* Letter, the Second Circuit reversed itself in a *per curiam* decision and allowed Bernstein to proceed on the merits, permitting him to recover damages and lost profits. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

During this period, and consistent with *Bernstein*, the Second Circuit also allowed the Dutch government to pursue bearer bonds located in the United States which had been confiscated by the Nazis during German occupation of the Netherlands. *See State of Netherlands* v. *Fed. Res. Bank*, 201 F.2d 455, 456 (2d Cir. 1953). In granting comity to a decree of the Dutch government-in-exile, the Second Circuit expressly hinged recognition on the fact that the

43. Press Release, U.S. Dep't of State, Jurisdiction of U.S. Courts Re Suites for Identifiable Property Involved in Nazi Forced Transfers (Apr. 27, 1949) ("*Bernstein* Letter").

Dutch decree in issue was designed specifically *to protect* the title of the true owners. Thus, Judge Clark recognized "the claim to protective possession by [the Netherlands] under its obligation to act only for the conservation of the rights of the former owners." *Id.* at 461. As such—under *Bernstein* and *Federal Reserve Bank*—foreign state decrees relating to Nazi asset looting are only given effect to the extent they align with established U.S. policy protecting the rights of true owners.

By using the Act of State doctrine to shield a private museum in possession of Holocaust-looted property in the United States from the claims of its rightful owner, the Ninth Circuit ignored this precedent, and ignored U.S. policies from 1943 onward respecting the restitution of art stolen or forcibly sold during the Third Reich. Instead, the Ninth Circuit dismissed the directive of *Bernstein* in a single footnote. Although noting that the State Department has restricted the application of the Act of State doctrine by "freeing up courts to pass upon the validity of the acts of Nazi officials," the Ninth Circuit reasoned: "we do not pass upon the validity of the acts of Nazi officials; rather, we pass upon the validity of the acts of the Dutch government." *Von Saher* v. *Norton Simon Museum of Art*, 897 F.3d 1141, 1154 n. 13 (9th Cir. 2018) (internal quotation marks and citations omitted).

This facile reasoning ignores that the Dutch government effectively validated Nazi looting by treating Holocaust-looted property as "ownerless" and thereby the property of the Dutch state—*including* for purposes of denying return to its true owners and then selling that looted property. This position (which the Netherlands has now expressly repudiated) not only runs counter to

longstanding U.S. policy meant to prevent such abuses of law, but ignores the facts of *Bernstein* and belies the broad purpose of the State Department's intervention in that case.

It is of no consequence that the *Bernstein* Letter to the court referred to "acts of Nazi officials" and not those of the Dutch government. *Bernstein* is directly on point, as it involved a claim against a private holder of proceeds of property confiscated by Germany rather than against the German government itself. The point was that the Act of State doctrine would not be used to shield a private party holding property in the United States, the title of which was tied to the illegal acts of the Nazi regime. This mirrors the position of the Norton Simon.

The Ninth Circuit's use of the Act of State doctrine also runs counter to U.S. policy regarding how museums were expected to act toward Holocaust-looted property. It was never U.S. policy to protect from examination the good faith of U.S. museums in acquiring art looted by the Nazis. To the contrary, the United States warned museums not to acquire or possess works of art with tainted provenance and stressed that such acquisitions would not be considered valid. Thus, the Norton Simon was on notice that its conduct in acquiring works like the Cranachs might be challenged, and cannot now be allowed to invoke the Act of State doctrine to shield its knowledge and claimed good faith from review. U.S. law and policy is clear: No matter how many times looted property changes hands, that property remains tainted by the Holocaust.[44]

---

44. The Act of State doctrine is not implicated in Nazi-looted art claims where theft and forced transfers of art and other valuables by Nazi Germany were declared void *ab initio*. It is an age old maxim

Accordingly, it is unnecessary for a court to pass judgment on the validity of any "act" of the Dutch government in order to adjudicate the rights of the parties here. As this Court held when it last spoke on the Act of State doctrine: "Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *W.S. Kirkpatrick & Co.* v. *Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990). Museums like the Norton Simon bear the risk of acquiring art stolen by the Nazis and understand that restitution to the rightful owners takes priority over the interests of any subsequent possessor, thus obviating the need for a court to question the now repudiated acts of the Dutch government.

The United States has time and time again expressed the importance of resolving Holocaust-era claims on the merits, and has precluded legal fictions—such as the idea that the Netherlands had clean title to looted art it held in custody for its true owners—to frustrate valid claims. As was made clear in *Bernstein*, the policies underlying the Act of State doctrine are therefore inapplicable to Holocaust-looted art claims.[45] Given the continued flow

---

of U.S. law that a thief cannot convey good title; the Nazi campaign of plunder and genocide did not divest their victims of ownership, nor in its aftermath did the Allies intend for the victims' property to escheat to the state. Indeed, both the analysis and the outcome should be the same as if the Cranachs were transferred to the museum by the Nazis themselves.

45. *See Gowen*, 2018 N.Y. Misc. LEXIS, at *8 (explaining that the *Bernstein* Letter as well as longstanding "historical and public policy driven interests in adjudicating claims involving artwork looted during the Nazi regime" make the Act of State doctrine inappropriate in Holocaust-era art cases).

of Holocause-looted art claims requiring adjudication, it is imperative that U.S. courts consistently apply "just and fair" principles in these cases. In the words of Stuart Eizenstat, former Commissioner of the PCHA:

> "No self-respecting government, art dealer, private collector, museum or auction house should trade in or possess art stolen by the Nazis. We must all recommit to faithfully implementing the Washington Principles before Holocaust survivors breathe their last breath. We owe it not only to those who lost so much in the Holocaust but also to our own sense of moral justice."[46]

The Act of State doctrine should thus not factor into Holocaust-looted art cases against domestic museums, and this Court should make that clear.

---

46. Stuart E. Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it.*, Wash. Post, Jan. 2, 2019, https://www.washingtonpost.com/opinions/no-one-should-trade-in-or-possess-art-stolen-by-the-nazis/2019/01/02/01990232-0ed3-11e9-831f-3aa2c2be4cbd_story.html?utm_term=.5a4da8352058.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit.

Dated: March 14, 2019

Respectfully submitted,

AGNES PERESZTEGI
Of Counsel
SOFFER AVOCATS
4 Rue Quentin Bauchart
75008 Paris, France
33 (0)1.53.23.02.00

OWEN C. PELL
Counsel of Record
SEQUOIA KAUL
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-8200
opell@whitecase.com

Counsel for Amicus Curiae