No. 20-1566

In the Supreme Court of the United States

DAVID CASSIRER, ET AL.,
Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, AN AGENCY OR INSTRUMENTALITY OF THE KINGDOM OF SPAIN,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

Amicus Curiae Brief of The 1939 Society, American Jewish Committee, Bet Tzedek, Center for the Study of Law & Genocide, and The Holocaust Education Center in the Desert, Inc. In Support of Petitioners

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Amici The 1939 Society, American Jewish Committee, Bet Tzedek, Center for the Study of Law & Genocide at LMU Loyola Law School, and The Holocaust Education Center in the Desert submit this brief supporting Petitioners David Cassirer et al. in *Cassirer v. Thyssen-Bornemisza Collection Foundation*.[1]

INTEREST OF AMICI CURIAE

The 1939 Society, formed in 1952 as The 1939 Club, is one of the oldest and largest organizations of Holocaust survivors and descendants in the United States. Its members and officers have included Jews that appeared on Schindler's list, including former president Paul Page, a survivor of Schindler's factory who convinced Thomas Keneally to write the book *Schindler's List* and Steven Spielberg to make the film based on it. In 1978, the organization created the very first chair in Holocaust studies in the United States at UCLA (now called The 1939 Society Samuel Goetz Chair in Holocaust Studies, named after one of our former presidents who pioneered Holocaust education in the United States). Twenty-one years ago, the Society initiated a Holocaust Art and Writing Contest at Chapman University for middle and high school students across the country, indeed,

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than Amici, their members, or counsel made a monetary contribution for preparation or submission of this brief. The parties have filed blanket consents to the filing of amicus briefs.

across the world. Between 7,000 and 8,000 students participate annually. Like tens of thousands of other Holocaust survivors, Page and Goetz died while awaiting some measure of compensation for the wrongs they suffered.

With all but one of the original members now deceased, and the remaining survivors past their golden years, the Society now consists of children and grandchildren of survivors and their supporters. Its primary mission is to develop Holocaust remembrance and education, and counter increasing Holocaust denialism.

American Jewish Committee. Founded in November 1906, American Jewish Committee is the leading global Jewish advocacy organization. Its mission is to safeguard the welfare and security of Jews; to strengthen the basic principles of democracy and pluralism around the world; and to enhance the quality of Jewish life.

Bet Tzedek (Hebrew for "House of Justice"), an internationally recognized force in poverty law, was founded in 1974 to achieve full and equal access to justice for all vulnerable members of its community. Bet Tzedek is widely respected for its expertise on Holocaust reparations and has represented over 5,000 survivors in reparations claims, free of charge. Bet Tzedek litigated the landmark case *Grunfeder v. Heckler*, 748 F.2d 503 (9th Cir. 1984) and has been amicus in many Nazi-looted art cases, including *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The **Center for the Study of Law & Genocide** at LMU Loyola Law School, Los Angeles

was inaugurated in 2008, the 60th anniversary year of the adoption of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). The Center is uniquely the first of its kind at any U.S. law school to focus on legal aspects of, approaches to, and solutions for genocide and mass atrocities. Through intellectual research and practical advocacy, the Center focuses on the remedies and victims of genocide and mass atrocities, aiming to help survivors achieve justice.

The Holocaust Education Center in the Desert, Inc. d/b/a Tolerance Education Center, located in Rancho Mirage, California, is a nonprofit organization focused on promoting tolerance, civility, respect and understanding by the elimination of atrocities, hatred, and bigotry. Founded by Holocaust survivor Earl Greif in 2006, it provides tolerance-themed programming, activities, and exhibits to students and adults with the intent of reducing prejudice and promoting diversity.

SUMMARY OF ARGUMENT

Far from ordinary chattel, Nazi-looted art involves a complex historical and legal context. Unlike ordinary movable property, cases about Nazi-looted art significantly (and symbolically) implicate the culture and lives of individuals claiming rightful ownership. Therefore, where parties lay competing ownership claims to a piece of Nazi-confiscated art like the *Rue Saint-Honoré, après-midi, effet de pluie*, by Camille Pissarro (the

"Painting"), the relationship of the parties to the painting, each state's relationship to the painting, and individual state policies regarding restitution of Nazi-looted art generally, are not only relevant, but essential, in determining how a specific piece of Nazi-confiscated art is treated.

To underlie the importance of this unique stolen chattel, countries convened two international conferences: the Washington Conference on Holocaust Era Assets in 1998 and the Prague Holocaust Era Assets Conference in 2009. (A third, follow-up conference is scheduled in Prague in September 2022 during the Czech Presidency of the European Union. *See* Terezín Declaration—Terezín Declaration Conference in 2022, Ministry of Foreign Affairs of the Czech Republic, at https://www.mzv.cz/jnp/en/foreign_relations/terezin_declaration/index.html.) Attended by delegates of over 40 nations, including the United States and Spain, the 1998 and 2009 conferences produced a specific international norm for Nazi-looted art. This norm is reflected in two remarkable documents: (1) the Washington Conference Principles on Nazi-Confiscated Art of 1998, agreed on by 44 countries, and (2) the Terezín Declaration of 2009, agreed on by 47 countries. Both Spain and the United States are signatories.

The international norm, which is now part of international customary law, is that claims involving Nazi-looted art against museums worldwide must be resolved fairly and justly, with the goal of resolving such claims on their merits rather than on the basis of technical procedural rules and defenses.

Though the Principles and the Declaration themselves are viewed not as binding express international law, they are not just empty words. They are the product of multilateral diplomatic conferences where nations come together to lay out new norms, in the same way nations come together when they negotiate treaties. Such statements may not create express treaty obligations, but they are an invocation of customary international law, which is part of our law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that "[i]nternational law is part of our law").[2] At minimum they set equitable standards that nations, public and private museums, art auction houses, and galleries must take into account when presented with claims that art in their collections was confiscated by the Nazis. Courts deciding Nazi-looted art claims likewise must do the same.

Both Spain and the United States are also signatories of the Code of Ethics of the International Council of Museums ("ICOM"), which obligates museums to make "every effort" and exercise "due diligence" to make sure that artwork

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[2] The Court further elaborated: "[W]here there is no treaty, … resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. at 700.

was not "illegally obtained." ICOM Code of Ethics § 2.3.

In addition, the United States has a long history stretching back more than 75 years of supporting the restitution of Nazi-confiscated art.

The two countries' national interests and national policies on this issue are thus aligned.

Here, the only rule of decision that gives effect to those vital shared interests and policies is the rule of English common law as recognized by California, the forum state where this action is being heard: A thief "cannot pass good title to anyone, including a good faith purchaser." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 960 (9th Cir. 2017) (citations omitted). Nothing in the choice-of-law public interest factors or the Foreign Sovereign Immunities Act ("FSIA") requires or militates in favor of using a different choice-of-law rule. Moreover, since California is the place where plaintiffs have long resided and the place where the Painting first traveled after it left Europe, it is only right that California has a strong interest in making sure that its law and policies—which are in accord and do not conflict with those of Spain and the United States in this Holocaust restitution case—are upheld.

To the contrary, the overly mechanical application of Spain's general interest acquisitive prescription law in this case "would permit [Spain] to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts"—a result this Court "decline[d] to permit" in light of the FSIA's

mandate that "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (citing 28 U.S.C. § 1606).[3]

Choice-of-law rules ought to facilitate justice, not impede it. Spain and its agency or instrumentality, Respondent Thyssen-Bornemisza Collection Foundation ("TBC"), can hardly complain that its national policies would be substantially impaired if California's substantive law—including its choice-of-law rules—is applied, given its stated commitment to ensuring that Nazi-looted art claims be resolved on the merits and with the goal of achieving a fair and just resolution. If anything, they would be furthered.

Amici therefore urge this Court to recognize the specific interests at the heart of this case and the unique nature of the property and thereby apply the local law of the California forum, which would lead to the return of the Painting to its rightful owner.

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[3] Even outside the Holocaust context, other well-established norms of international law prohibit the illicit import, export, and transfer of ownership of cultural property, require states to take steps to prevent museums and similar institutions from acquiring stolen cultural property, and advocate for the return of such cultural property to a person with valid title. Both Spain and the United States, along with 138 other nations, are signatories. *See* UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, arts. 2-7, 823 U.N.T.S. 231.

ARGUMENT

I.
Both Spain and the United States Adhere to International Commitments Favoring "Just and Fair Solutions" for Nazi-Looted Art.

International law derives from customary law, international agreements, or general principles of law common to the major legal systems of the world. Restatement (Third) of Foreign Relations Law of the United States § 701 (2015). International laws, in turn, create normative covenants in legal discourse. Here, both Spain and the United States share an interest in applying the law that would most effectively carry out their national policies on Nazi-looted art.

After the atrocities of World War II, the victorious Allies committed themselves to returning the massive amount of art looted by the Nazis to their pre-war owners or successors. This restitution mission was most notably represented by the Monuments, Fine Arts, and Archives (MFAA) program established by the Allies in 1943 (and best known through the Monuments Men Unit of the U.S. Army featured in the hit film *The Monuments Men*).[4] The Washington Principles and the Terezín

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[4] The return of such Nazi-looted art continues to this day. In November 3, 2021, in a ceremony at the Consulate-General of Poland in New York City, two artworks by pre-war Polish artist Adolf Kozarski missing since the end of WWII were returned to the National Museum in Warsaw. *See* Works on Paper from the National Museum in Warsaw, Monuments Men Foundation for the Preservation of Art, at

Declaration are part of this ongoing international commitment.

In 1998, the Washington Conference on Holocaust-Era Art Assets produced a set of equitable principles that "reflect a consensus reached by the representatives of 13 nongovernmental organizations and 44 governments." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014), *cert. denied sub nom.*, *Norton Simon Museum of Art at Pasadena v. Von Saher*, 135 S. Ct. 1158 (2015). The Principles seek to resolve issues related to Nazi-looted art by first identifying art that had been confiscated by the Nazis, and then making "every effort … to publicize" this art in order to locate owners and heirs. *Id*. Signatories further agreed that former owners and their heirs should be "encouraged to come forward," and that "steps should be taken expeditiously to achieve a just and fair solution," including but not limited to developing any "national processes to implement [the] Principles" such as alternative dispute resolution. *Id*.

This international commitment to justice was reaffirmed about a decade later, in 2009, when the Prague Holocaust Era Assets Conference produced a second international agreement, the Terezín Declaration. Both the United States and Spain were signatories to the Terezín Declaration, which not only reiterated support for the Washington

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https://www.monumentsmenfoundation.org/works-on-paper-from-warsaw.

Conference Principles, but also urged that "every effort be made to rectify the consequences of wrongful property seizures" made during the Holocaust. Terezín Decl. ¶ 9. In addition, the Terezín Declaration called for "all stakeholders to ensure that their legal systems or alternative processes … facilitate just and fair solutions with regard to Nazi-confiscated and looted art." Terezín Decl. ¶ 32.

As signatories to the Washington Conference Principles and the Terezín Declaration, both Spain and the United States have voluntarily recognized restitution for victims of the Holocaust as a need that involves—and indeed necessitates—the cooperation of all nations. Because international agreements serve as the most concrete manifestation of multinational policies and interests, the impact of Spain's and the United States' participation in the Washington Conference Principles and Terezín Declaration is directly relevant to the choice-of-law question at issue here. Specifically, the application of Spanish law would serve neither Spain's policy nor the needs of the international system because it would preclude a just and fair resolution of this issue.

II.
The Washington Principles and Terezín Declaration are *Lex Specialis.*

Even if the Spanish policy underlying adverse possession were relevant, the Washington Principles and the Terezín Declaration inherently create a "carve out" for Nazi-looted art. The Declaration encourages "stakeholders to ensure

that their legal systems …, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims." Terezín Decl. ¶ 32.

In other words, despite its own adverse possession laws that may have otherwise granted possession, Spain signed the Declaration which specifically singles out Nazi-confiscated art as a particular category of property that merits different treatment.

In this instance, the particular chattel and the parties involved—Nazi-confiscated art, the Cassirer family, and TBC—are not ordinary subjects.[5] They belong to a specific category of persons and related

[5] A recently published book detailed Paul Cassirer's prominent role in modernizing the European art world in the early 20th century. "The process of commercializing van Gogh started 120 years ago, when German-Jewish art collector Paul Cassirer staged the first showing of the Dutch painter's works in Berlin. … For years, Cassirer had been imploring Johanna van Gogh—the widow of Vincent's brother and sponsor, Theo—to permit him to show some of van Gogh's paintings. A breakthrough came in 1901, when Cassirer was able to show five of van Gogh's works in an annual 'Berlin Secession' exhibition of modernist artists." Matt Lebovic, *How Vincent van Gogh helped Jews break into the world of art—and vice versa*, The Times of Israel (Oct. 24, 2021) (reviewing Charles Dellheim, Belonging and Betrayal, How Jews Made the Art World Modern (2021)). According to Dellheim, that same spirit of risk-taking, accompanied by commercial success, was integral to the Nazis' later branding of both Jews and modern art as "'alien elements' to be eliminated." *Id.*

property singled out by the international community as warranting particular treatment to redress internationally recognized harms. If they were not unique subjects deserving heightened attention and care from the international community, they would not be the subject of the two international agreements reached in Washington, D.C., and Prague.

III.
Any Choice-Of-Law Rule Must Take into Account the Entire Set of Federal Policies Governing the Restitution of Stolen Holocaust Art.

Nothing in the FSIA indicates that Congress intended to create exceptional rules for FSIA cases, much less to put a thumb on the scale in favor of foreign sovereign defendants. What protections Congress did intend foreign sovereigns to enjoy are spelled out in the statute and mostly take the form of limitations on jurisdiction (i.e., immunity determinations), punitive damages, and remedies. *See* 28 U.S.C. §§ 1605, 1606, 1610. Where Congress intended special procedural rules to apply it said so explicitly. *See* 28 U.S.C. § 1608 (setting forth special provisions for service of process and time to respond to the complaint).

Rather, Congressional and Executive intent, expressed through decades of law and policy making, emphasizes the importance of returning Nazi-confiscated property to the rightful owners. From the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (the "London

Declaration"),[6] signed by the United States (recognizing the "systematic spoliation" of Jewish property including works of art), to the 2016 Holocaust Expropriated Art Recovery ("HEAR") Act[7] (aiming to ensure that claims to Nazi-confiscated art are adjudicated in accord with the Washington Principles and the Terezín Declaration) and 2018 Justice for Uncompensated Survivors Today ("JUST") Act[8] (requiring the State Department to report to Congress on the progress of countries participating in the Terezín Declaration), each of those policies represents a deep moral commitment to shaping the law in ways that achieve evident justice—to the extent anyone can undo the enormity of the wrongs perpetrated by the Nazis. The choice-of-law analysis applied by the courts below is devoid of that drive to (belated) justice.

The historical record is clear. The Nazis were guilty of the largest art theft in history, an adjunct to their genocidal policies. *See, e.g.*, David Roxan and Ken Wanstall, The Rape of Art: The Story of Hitler's Plunder of the Great Masterpieces of

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[6] Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control (with covering Statement by His Majesty's Government in the United Kingdom and Explanatory Memorandum issued by the Parties to the Declaration) London, Jan. 5, 1943.

[7] HEAR Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016), § 2(7).

[8] JUST Act of 2017, Pub. L. 115-171, 132 Stat. 1288 (2018), §§ 1(a)(3), 1(b).

Europe (1965); Jonathan Petropoulos, Art as Politics in the Third Reich (1996); Susan Ronald, Hitler's Art Thief: Hildebrand Gurlitt, the Nazis, and the Looting of Europe's Treasures (2015); *see also* Miles Lerman (Chairman, United States Holocaust Memorial Council), Opening Ceremony Remarks at the United States Holocaust Memorial Museum, Proceedings of the Washington Conference on Holocaust-Era Assets at 3 (1999), available at http://www.commartrecovery.org/docs/WashingtonConferenceproceedings.pdf (stating that "the biggest murder of the century … was also … the biggest robbery in history").

Moreover, too many collectors and museums have refused, for reasons better or worse, to restore Nazi-looted art to its rightful owners. *See, e.g.*, Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chap. L. Rev. 1, 9-18 (2017) (describing multiple notable museum-defendants' concerted attempts to "shut down any judicial inquiry into the merits of survivors' heirs claims").

In the absence of any indication to the contrary in the FSIA, the choice-of-law analysis in this case must take into account the entirety of consistent federal policy favoring the restitution of Nazi-confiscated art to its rightful owners.

IV.
California Law Better Serves the Countries' Mutual Interests and Promotes the Need for Harmony and Cooperation in the International System.

Beyond U.S. policy, California itself has repeatedly expressed a policy of reparation for Holocaust victims through legislation designed to remedy their losses directly or indirectly, allowing them to bring their claims for redress in court where they otherwise might have been barred.

In 2002, California enacted Code of Civil Procedure section 354.3, entitling owners of Holocaust-era paintings taken as a result of Nazi persecution during World War II to recover such paintings from "any museum or gallery so long as the action [was] commenced by December 31, 2010." After the Ninth Circuit in 2009 struck down section 354.3 as unconstitutional on the basis of field preemption, "the California Legislature amended § 338, the general statute of limitations provisions … [to provide] for a six-year statute of limitations for 'an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer'" triggered on the "actual discovery" of the painting's location and facts sufficient to indicate that the claimant has a valid claim for the painting. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 615 (9th Cir. 2013) (citing Cal. Civ. Proc. Code § 338(c)(3) (2011)). The court held that this provision was not unconstitutional on the basis of field preemption. *Id*. at 621.

These provisions demonstrate a clear policy—both the United States' and California's—favoring redress for wrongs committed against Holocaust victims, and an opportunity for victims and their heirs to be heard in court.

CONCLUSION

The ultimate goal of choice-of-law doctrines is to furnish a scheme of analysis through which courts may reach a logical and just conclusion. But if one law clearly promotes the mutual policy, it would be neither logical nor just to apply the law of the state that does not. The Washington Principles and Terezín Declaration are fundamentally resolutions about people, not property. What gives the disposition of Nazi-looted art its legal significance is not its sheer artistic or monetary value, but rather its role in the restitution of property looted from the Jews during the Holocaust—a national policy shared by both Spain and the United States.

Respectfully submitted,

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