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 B'NAI B'RITH INTERNATIONAL, CENTER FOR ART LAW, HOLOCAUST SURVIVORS FOUNDATION USA, RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS, OMER BARTOV, MICHAEL BERENBAUM, DONALD S. BURRIS, EUGENE J. FISHER, RABBI IRVING ("YITZ") GREENBERG, PETER HAYES, MICHAEL J. KELLY, MARCIA SACHS LITTELL, WENDY LOWER, CARRIE MENKEL-MEADOW, MIRIAM FRIEDMAN MORRIS, JOHN PAWLIKOWSKI OSM, CAROL RITTNER, RSM, JOHN K. ROTH, JONATHAN ZATLIN IN SUPPORT OF PETITIONERS

JENNIFER A. KREDER*
LAW OFFICE OF
JENNIFER A. KREDER, PLLC
43 W. 43rd St., Ste. 81
New York, NY 10036-7424
T: (212) 518-1751
F: (941) 251-8474
jen@jenniferkreder.com
**Counsel of Record*

EDWARD MCGLYNN GAFFNEY
1149 South La Jolla
Los Angeles, CA 90035
T: (323) 899-4233
(Of Counsel)

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae[1] have a strong interest in adherence by courts to procedural fairness and historical truth in all cases seeking restitution of Holocaust-era art.

B'nai B'rith International, America's oldest and best-known Jewish advocacy and social service organization, advocates for preserving Holocaust memory and advancing the rights of Holocaust survivors and their heirs.

Center for Art Law is a New York-based nonprofit organization offering the arts community access to legal knowledge that is affordable, practical, and personal. The Center is dedicated to educating members of the general public, including artists and attorneys who defend them, in art authentication, cultural heritage law, and restitution of Nazi-era looted art.

Holocaust Survivors Foundation USA (HSF) is a national coalition of Holocaust survivors and survivor groups. HSF leaders have testified often before Congress about restitution issues, open Holocaust records and archives, and widespread suffering that tens of thousands of survivors have endured after the Holocaust

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[1] This Brief is submitted in accordance with Rule 37 of this Court. Blanket consents have been filed with the Clerk of the Court. No counsel for any party authored this Brief in whole or in part, and no person or entity, other than *Amici*, their members, or counsel, made a monetary contribution to the preparation of submission of this Brief.

due to the unique physical and emotional harms survivors still suffer due to the crimes of the Nazi regime.

Raoul Wallenberg Centre for Human Rights is based in Montreal. It is an international consortium of parliamentarians, scholars, jurists, human right defenders, NGOs, and students united in the pursuit of justice, inspired by Raoul Wallenberg's humanitarian legacy—how one person with the compassion to care, and the courage to act can confront evil and transform can confront evil and transform history.

Omer Bartov is the Birkelund Distinguished Professor of European History at Brown University. His many books include *Mirrors of Destruction* (2000); *Germany's War and the Holocaust* (2003); *Anatomy of a Genocide* (2018), and *Tales from the Borderlands* (2022).

Michael Berenbaum is Director of the Sigi Ziering Institute and Professor of Jewish Studies at American Jewish University. A prolific author, he served as executive editor of the second edition of the *Encyclopaedia Judaica*. He was Project Director of the US Holocaust Memorial Museum and founding Director of its Research Institute. He later served as President of the Survivors of the Shoah Visual History Foundation.

Donald Burris is a senior partner in the law firm of Burris and Schoenberg in Los Angeles and a legal scholar who is an expert on Nazi-looted art cases. He was co-counsel with Randol Schoenberg in the seminal case *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

Eugene J. Fisher is a leading scholar on Judaism and Christianity who has worked to improve relations between Jews and Catholics as a leading staff member of the US Conference of Catholic Bishops (1977-2007). He has written extensively on the repudiation of Christian teaching of contempt for Jews.

Rabbi Irving ("Yitz") Greenberg is a seminal and prolific thinker on the Shoah as a turning point in Jewish and Western culture, and an influential figure in Jewish-Christian dialogue. He was a founding member of the US Holocaust Memorial Council and chaired the Council from 2000 to 2002.

Peter Hayes is Theodore Zev Weiss Holocaust Educational Foundation Professor of Holocaust Studies Emeritus at Northwestern University. He edited *The Oxford Handbook of Holocaust Studies* (2010) and a major anthology on the Shoah, *How Was It Possible?*: *A Holocaust Reader* (2015). He is the author of *Explaining the Holocaust* (2017) and of numerous articles concerning plunder of Jews' property and exploitation of their labor by the Nazi regime.

Michael J. Kelly is the Senator Sekt Professor of Law at Creighton University and director of the "Nuremberg to The Hague" summer program in International Criminal Law. He is author of *Prosecuting Corporations for Genocide* (2016) and over forty articles on international legal topics, including illicit trade in art and antiquities.

Marcia Sachs Littell is Professor Emerita at Stockton University, where she founded America's first

Master of Arts Degree in Holocaust and Genocide Studies. She has written or edited dozens of books and articles and organized numerous conferences, workshops, and teacher training programs on the Holocaust.

Carrie Menkel-Meadow is Chancellor's Professor of Law at UC Irvine School of Law. She is a second-generation Holocaust survivor familiar with the massive plunder of Jewish property by the Nazi regime. A leader in alternative dispute resolution, she is familiar with fact-based decisions on the merits of claims without the high cost and long delay (over twenty years) reflected in the instant case.

Miriam Friedman Morris is the daughter of artist and Holocaust survivor David Friedmann (1893-1980), whose Nazi-looted art inspired her quest to find lost works. She delivered a paper on her search for her father's looted art at the 2009 Prague conference on Holocaust Era Assets.

John Pawlikowski OSM is Professor Emeritus of Social Ethics and former director of Catholic-Jewish Studies at the Catholic Theological Union. He served on the US Holocaust Memorial Council (1980-2015), and as president of the International Council of Christians and Jews (2002-2008).

Carol Rittner, RSM, is Distinguished Professor Emerita of Holocaust and Genocide Studies at Stockton University. She produced *Courage to Care* (1985) a film on rescuers. Rittner co-edited *Different Voices*

(1993) *Rape as a Weapon of War & Genocide* (2012), and *Advancing Holocaust Studies* (2021).

John Roth is Edward Sexton Professor Emeritus of Philosophy at Claremont McKenna College. He served on the US Holocaust Memorial Council, and has published more than fifty books, including *The* Failures of Ethics: Confronting the Holocaust, Genocide, and Other Mass Atrocities (2015), Sources of Holocaust Insight (2020), and Advancing *Holocaust Studies (2021).*

Jonathan Zatlin is Associate Professor of History at Boston University. He coedited (with Christoph Kreutzmüller) *Dispossession. Plundering Germany Jewry, 1933-1945* (2020), and is the author of the forthcoming book *German Fantasies of Jewish Wealth, 1790-1990*.

SUMMARY OF THE ARGUMENT

The HEAR Act of 2016 requires that courts not repeat the mistakes of federal courts that required the Act's adoption in the first place. Courts have relied on unjustified excuses to avoid dealing with uncomfortable truths and the merits of Holocaust-era art claims, as they are required to do in accordance with longstanding foreign and domestic law and policy.

The historical realities of Jews fleeing Nazi Germany moved Congress to push our courts to decide claims on the merits whereas many of our judges

continue to turn a blind eye. Defenses should not be over-extended to bar fair resolution of cases seeking recovery of looted art in light of these realities—*on the merits*. Further, museums are obligated to investigate such sales in researching the provenance of their paintings and cannot be allowed to obfuscate history so as to lead judges to presume a valid good faith sale with the mere existence of a receipt.

ARGUMENT

Respondent Thyssen-Bornemisza Collection (TBC) Foundation has convinced lower courts that Spanish law applies such that no recovery today is possible for Jews forced to flee for their lives. The Ninth Circuit accepted the crucial falsehood that Baron Hans Heidrich Thyssen-Bornemisza, heir to the Thyssen Steel spoils from its Nazi collaboration, and the Respondent TBC Foundation's highly sophisticated curators of his vast art collection from the early-mid 20th Century, did not have sufficient knowledge the Painting was stolen to overcome Spain's six-year adverse possession rule. The principal error of the lower courts is allowing Spanish law to defeat the purpose of the federal HEAR Act and destroy the purpose of relevant California law.

I. California has a Substantial Interest in Enforcing the HEAR Act.

This case hinges on the correct analysis of choice of law. If California law applies, *Rue Saint-Honoré,*

Afternoon, Rain Effect, will be returned to the Cassirer family. Under Spanish law as applied below, the Thyssen-Bornemisza Collection Foundation will retain the painting.

California applies a three-step analysis when determining governmental interests. *See Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107, 137 P.3d 914, 922 (2006). First, the court determines whether the respective law in each jurisdiction is similar or different. *Id*. In this case, the laws in question are in conflict. "Under California law, thieves 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). It is undisputed that the Nazis stole *Rue Saint-Honoré, Afternoon, Rain Effect*, from Lilly Cassirer in 1939. Thus, the Cassirer family is the rightful owner under California law. Spanish law follows acquisitive prescription, which *Amici* assume for the purpose of this brief would allow the Thyssen-Bornemisza Collection to retain the painting. *Id*. at 965.

"Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Kearney* at 107-108.

Third, where true conflict exists, a court must carefully evaluate the interest of each jurisdiction to determine whose interests is "more impaired if its policy were subordinated to the policy another state." *Id*.

California has a strong interest in stopping the trafficking of *all* stolen art. Cal. Civ. Proc. Code § 338 provides that actual discovery of the item is necessary for the statute of limitations to being to run. Recent additions to the Code only strengthen California's strong interest in preserving the property interest for victims of theft. *See* 2021 Cal. Legis. Serv. Ch. 264 (A.B. 287).

Additionally, California's six-year statute of limitations mimics the six-year statute of limitations, running from the date of actual notice, as Congress provided in the HEAR Act. American law and policy at the federal and state level dating back to the War prohibiting trafficking of stolen art is far more important policy than Spain's generic civil law prescription doctrine. California law applies, and the painting must be returned to the Cassirer Family if any effect is to be given to the strong policy of California and the federal HEAR Act.[2]

II. American Policy Crafted During And Since World War II Supports Restitution Of Nazi-Looted Art Today Via U.S. Federal and State Courts.

Diplomats from the State Department played a leading role in securing public commitment by the

[2] As Petitioners' Brief notes, "California's choice of law framework requires consideration of 'all' interests, including those of United States law and diplomatic agreements such as the Washington Principles and Terezin Declaration," including the HEAR Act. Petitioners' Brief, at 11, and note 6.

forty-four nations that adopted the Washington Conference Principles on Nazi-Confiscated Art. *See generally*, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf.

Additionally, the Terezín Declaration, signed by forty-six countries, including the United States and the Kingdom of Spain, emerged from an international conference in June 2009. Signatories committed "to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims* and all the relevant documents submitted. . . ." *See* Prague Holocaust Era Assets Conference: Terezín Declaration, "Nazi-confiscated and Looted Art," 2-3 (June 30, 2009), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf. Special Adviser to the Secretary of State for Holocaust Issues and former Ambassador to the European Union, Stuart E. Eizenstat, was a prominent figure in Holocaust restitution throughout these negotiations.[3] In Washington, he stated:

> We can begin by recognizing this as a moral matter—*we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law* to

[3] *E.g.* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003).

> people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.[4]

U.S. policy dating back prior to D-Day calls for effective, fair, fact-based resolution of Nazi-looted art claims. American diplomats led efforts to warn countries against looting in the London Declaration of January 5, 1943, 8 Dept. St. Bull. 984-85 (1952), which "declare[d] invalid any [coerced] 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.*" (emphasis added).

On June 23, 1943, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas was established. Chaired by Supreme Court Justice Owen J. Roberts, the commission helped the United States Army and Armed Forces protect cultural works in Allied occupied areas. Before completing the work, Roberts wrote to museums urging them to be diligent in checking provenance of new works of art, to ensure that no American museum was purchasing looted art. During World War II, the Monuments, Fine Arts, and Archives Section of the Allied Armies was established to retrieve and return cultural artifacts and materials found during and after the war

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[4] STUART E. EIZENSTAT, "In Support of Principles on Nazi-Confiscated Art," Presentation at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998), http://fcit.usf.edu/HOLOCAUST/RESOURCE/assets/art.htm (emphasis added).

even from crooked art dealers. *See, e.g.*, Michael Kimmelman, "The Void at the Heart of 'Gurlitt: Status Report,'" *The New York Times*, Nov. 19, 2017.

Immediately after the war, the International Military Tribunal at Nuremberg led by Chief Prosecutor Robert Jackson evaluated detailed evidence of coerced sales and declared the plunder of art a war crime and recognizes it thus even today. *See* MICHAEL MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY* (2d ed. 2017).

In April, 1949, Jack B. Tate, Acting Legal Adviser in the Department of State, wrote:

> [The U.S.] Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . . [and] 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.

State Department Press Release No. 296, April 27, 1949.[5]

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[5] Once the Court of Appeals for the Second Circuit was fully informed of the government's views of coerced "transactions" during the Nazi era in Germany, it acted *sua sponte* to reverse its previous ruling in the same case, "by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question." *Bernstein*

This Court must *never forget* what was so obvious during and immediately after the war. Unwinding forced transactions from the Nazi era requires thoughtful consideration of historical realities, not overly simplistic assumptions about how people behave in normal times and when refugees could assert their rights.

No court must ever allow lawyers to corrode the judicial duty of accurate fact-finding by obfuscating the realities about what happened from 1933 to 1945, who benefited, and how their crimes have gone largely unrecognized and unpunished, and their ugly windfalls remain snugly and smugly intact. If the decisions below are not reversed, it could easily have the effect of foreclosing any meaningful access to the judiciary by rightful heirs to hundreds of Jews whose families were dispossessed by adventitious art dealers and official Nazi rules that charged Jews exorbitant sums for a so-called "exit visa." Jews who managed to get out were—to use a term from Nazi-speak—"*gereinigt*" ("cleansed") of nearly all their assets in bank accounts, homes, furnishings, books, and paintings. Doyens of the art world who read *The New York Times* or *The New Yorker* (*see* notes 7 and 8 and accompanying text) surely knew this tale of plunder. Their lawyers surely have read the *Menzel* case cited below. This Court should not turn a blind eye to the dirty hands of those now seeking to profess their innocence.

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v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

Allowing laws of acquisitive prescription, such as Spain's, even with its qualified exceptions such as the one for "encubridores," violates the principles of truth and transparency embedded in U.S. laws such as the HEAR Act.[6] Refusing to allow a fair and full hearing of the Cassirers' claim is yet another instance of counterfactual, unfounded judicial avoidance of difficult truths about the desperation of Jews fleeing for their very lives—and who profited. True, it does not adopt the disgusting language of classical nineteenth-century antisemitism. But, it fails the tests of procedural fairness, scientific commitment to rigorous honesty in historical research, and the moral duty of respect owed to millions *See* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 19 (1994).

Read fairly in the context of the inadequate judicial performance after the adoption of the Washington Principles, and in the context of the testimony at the Senate hearings cited above, the HEAR Act—enacted

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[6] *Amici* agree with the Petitioners' argument, rejected by the Ninth Circuit, that the HEAR Act's six-year limitations period applies "[n]otwithstanding any other provision of Federal or State law *or any defense at law relating to the passage of time"* should of its own force preclude Respondent's defense of acquisitive prescription under Spanish law. . . ." HEAR Act, §5(a) (emphasis added). The HEAR Act establishes the United States' strong interest in preventing Holocaust victims from losing their property without notice, based solely on the passage of time. As unfortunately happened, these U.S. interests were negated along with the Petitioners', by the application of Spanish law that resulted in the award of the Painting to TBC for holding it six years without the Cassirers' knowledge. Case No. 15-55550, Docket No. 110.

by a unanimous Congress—marches to a different drummer. The time to hear and follow that new drumbeat is now.

III. Evaluating Domestic Interest in Restoring a Painting Trafficked In and Then Out of the United States Requires An Understanding Of The All-Encompassing Web The Nazis And Art Market Wove to Exploit Jews.

A. Duress claims were masked as routine commercial transactions.

Sophisticates knew the Nazis used many tactics to mask involuntary transactions in a cloak of legality. *See, e.g.*, WILLIAM L. SHIRER, *THE NIGHTMARE YEARS, 1930-1940* 30 (1992) (quoting the U.S. Consul General in Vienna immediately after the Anschluss of Austria in March 1938: "There is a curious respect for legal formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance.").

From their first days in power, the Nazis forced Jews to abandon their property and flee. New York's leading decision found that fleeing Jews could not be deemed to have abandoned their property. *E.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967), *rev'd on other grounds*, 246 N.E.2d 742 (N.Y. 1969). The Jews' loss of their property as they fled "for their lives was no more voluntary than the relinquishment of property during a holdup." *Id.* The landmark *Menzel* case

reinforced this truth for all Holocaust-era expropriated art cases to come:

> Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner. . . . Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.

246 N.E.2d at 819. District Judge Korman reminded us of this important truth in his concurrence in *Bakalar v. Vavra* about the same gallery that imported the painting in this case in violation of U.S. law:

> The assumption that the Perls Galleries acted in good faith was undermined by its own conscious avoidance. As the New York Court of Appeals explained in the course of upholding the award of damages against it in favor of the good faith purchaser, the Perls Galleries was responsible for the position in which it found itself. Specifically, the Perls Galleries would not have been in that position if it had satisfied itself that it was getting good title from the art gallery from whom it purchased the artwork. Instead, the Perls testified "that to question a reputable dealer as to his title would be an 'insult.'" Perhaps, [the Court of Appeals responded], but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which

> could have been avoided had the insult been risked.

Bakalar v. Vavra, 619 F.3d 136, 150 (2d Cir. 2010) (Korman, J., concurring) (*citing Menzel*, 24 N.Y.2d at 98, 298 N.Y.S.2d 979, 246 N.E.2d 742).

In the present case, the esteemed Stephen Hahn Gallery should have been aware that provenance was an issue. Impressionism was born out of the Cassirer Gallery. Any high-level dealer should have paused when he saw the partial sticker. There is no legitimate reason to remove a gallery sticker.

It is now up to U.S. courts to stop avoiding the uncomfortable truth that Americans engaged in these transactions fenced the goods from a holdup. In this case, it is undisputed that Lilly Cassirer was the victim of such a hold up—in 1939 by actual Nazis.

After the Nazis' seizure of power, the effects of a series of boycotts, discriminatory treatment, conscripted real property and business forfeitures, and specific legal measures served to rapidly undermine Jewish businesses, employees, and professionals. Jews were not only excluded from government service, but state and Nazi Party initiatives progressively drove them out of many trades and professions. RICHARD J. EVANS, THE THIRD REICH IN POWER 1933-1939 392 (2005).

James McDonalds, former High Commissioner for Refugees, detailed the economic devastation of German Jews preventing them from fleeing because of

financial predation. Text of Resignation of League Commissioner for German Refugees, *The New York Times* (Dec. 30, 1935), https://www.wdl.org/en/item/11604/view/1/11/. More than half of Jewish businesses were sold or liquidated by the summer of 1938; the converse was true for non-Jews—they were the ones buying the businesses. Evans, *supra*, at 18.[7]

"Sales" of art owned by Jews to art dealers were not routine commercial transactions. They were forced dispossession to remain alive. Nazi officers were obsessed with art and wanted to accumulate it, which sent art market profiteers into a frenzy. *E.g.*, JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH (1996). Imprisonment of family members was used as a bargaining chip for sales. *E.g.*, SIMON GOODMAN, THE ORPHEUS CLOCK (2015). As for the middlemen profiteering, Hermann Goering did not care whether the art dealers were sympathizers or not—or even Jewish. *See* LEONARD MOSLEY, THE REICH MARSHALL 263 (1974) (Goering instructed part-Jewish dealer Bruno Lohse to deal with the "great many" Jewish art dealers and "forget about the racial background of the dealers with whom you come in contact").

The decisions below deny the Cassirers their cherished family legacy by trashing the memory of the Nazis' brutal campaign of dispossession and murder against the Jewish people, and by minimizing Pissarro

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[7] For a reliable history of the extortion of Jewish property, *see* MARTIN DEAN, ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945 11 (2008).

undeniably was Nazi-looted art, and thereby deny the Cassirers their cherished family legacy. The reasoning employed by the district court and approved by the Ninth Circuit, anesthetizes history and fact and excuses avarice and dishonesty.

The role of Thyssen Steel and his family in the Third Reich's prosecution of World War II are well established in history and the court record. The Baron's uncle Fritz Thyssen, a wealthy German industrialist and close friend of Hermann Goering, helped finance Hitler's rise to power, encouraged other industrialists to do so, and served as a Nazi Reichstag deputy and state councilor. The Baron's father Heinrich Thyssen's companies built U-boats and munitions for the Nazi war machine and profited from slave labor. The Baron's father also purchased art works, a 160-acre stud farm and its valuable racehorses and other property the Nazis confiscated from Jews. The Baron took over his father's companies and inherited much of his art collection from him. He could not be blind to the history.

The district court found that the Baron was a sophisticated art collector "of considerable wealth and standing" with extensive knowledge of the art market, who pored over catalogues and art books before purchasing art works and employed curators and other experts to assist him in evaluating the works he was interested in acquiring. It found:

> The Baron was undoubtedly aware that there had been massive looting of art by the Nazis,

> and it was "generally known" that the Baron's family (although not the Baron specifically) had a history of purchasing art and other property that had been confiscated by the Nazis.

Trial Court Order, at 4-5.

The district court also acknowledged that when the Baron purchased the Cassirers' Pissarro at the Stephen Hahn Gallery in Manhattan in 1976, he was aware of several tell-tale signs it had been looted by the Nazis, and did not investigate its provenance, and thus did not acquire the Painting in good faith:

> The Court finds the following circumstances, when considered together, should have caused the Baron, a sophisticated art collector, to conduct additional inquiries: (1) the presence of intentionally removed labels and a torn label demonstrating that the Painting had been in Berlin; (2) the minimal provenance information provided by the Stephen Hahn Gallery, which included no information from the crucial World War II era and which, contrary to the partial label, did not show that the Painting had ever been in Berlin or in Germany; (3) the well-known history and pervasive nature of the Nazi looting of fine art during the World War II; and (4) the fact that Pissarro paintings were often looted by the Nazis.

Trial Court Order, A-000030. Yet the court refused to conclude the Baron had "actual knowledge," which includes "willful blindness" under Spanish law,

ostensibly because he bought it from a "reputable gallery," paid "full price," and other irrelevant considerations given the obvious evidence it was Nazi-looted art.

Similarly, as for TBC, the district court concluded that it was aware of all the same "red flags" of Nazi confiscation when it acquired the Painting in 1993 from the Baron, but again somehow found a way to excuse its plain guilt:

> [T]he Court concludes that, although the presence of the "red flags" identified *supra* (i.e., the intentionally removed labels, the minimal provenance information provided, the partial label demonstrating that the Painting had been in Berlin, and the fact that Pissarros were frequently the subject of Nazi looting) might have been sufficient to raise TBC's *suspicions* with respect to the Painting, they fall well short of demonstrating TBC's "actual knowledge," i.e. that TBC had *certain knowledge* that the Painting was stolen, or that there was a *high risk or probability* that the Painting was stolen. In other words, although failing to investigate the provenance of the Painting may have been irresponsible under these circumstances, the Court concludes that it certainly was not criminal.

Trial Court Order, at 29.[8]

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[8] TBC also well understood the historical significance of the Cassirer Gallery. ER-1202–04. TBC's website describes at least 20 other paintings in its collection which trace their lineage to, or otherwise reference, the "prestigious" Cassirer Gallery in Berlin. *Id*. These works were either purchased there by the Baron's

B. Returning art to refugees' heirs today does not unfairly punish museums and collectors.

The Nazis allowed select Jewish art dealers to funnel undesired "degenerate" artworks out of Europe to "purify" the German art scene and convert undesirable works into currency to bolster the German economy. *E.g.*, DAVID ROXAN AND KEN WANSTALL, THE RAPE OF ART: THE STORY OF HITLER'S PLUNDER OF THE GREAT MASTERPIECES OF EUROPE (1965); RICHARD CHESNOFF, PACK OF THIEVES: HOW HITLER AND EUROPE PLUNDERED THE JEWS AND COMMITTED THE GREATEST THEFT IN HISTORY (1999). Americans were willing buyers who scooped up bargains and converted them to tax-deductible donations to our esteemed museums and institutions: "The paintings came to America because . . . there was no place else to sell them." *E.g.*, Adam Zagorin, "Saving the Spoils of War," *Time*, 87 (Dec. 1, 1997) (quoting Willi Korte, then consultant on Holocaust losses to the Senate Banking Committee).

The massive quantity of art the Nazis stole was well-known in American art circles, including in the museums and dealers where the Monuments Men went to work. For example, the Met's 1943 Director, Monuments Man[9] Francis Henry Taylor, wrote for

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family, or were otherwise exhibited there, per the published provenances of TBC's own curators. *Id.*; ER-0119–71.

[9] *See* Part III, *infra*. *See also*, *e.g.*, ROBERT EDSEL and BRET WITTER, THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY (2009) (describing the work of the approximately 345 "Monuments Men" and women).

the *New York Times*: "[n]ot since the time of Napoleon Bonaparte has there been wholesale looting and destruction of art property that is going on today in the occupied countries."[10] Taylor was succeeded by Monuments Man James J. Rorimer, who later told the *New York Times*: "[w]hen things are offered for sale, we are very careful to determine whether they are war loot." Milton Esterow, "Europe is Still Hunting Its Plundered Art," *New York Times*, 1 (Nov. 16, 1964) (reporting "From Greece to California, hundreds of art scholars, museum directors, private galleries, and police organizations, including Interpol, the international police organization, are watching for the reappearance of works stolen from museums, churches, libraries, galleries, and private collections.")[11]

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[10] Francis Henry Taylor, "Europe's Looted Art: Can It Be Recovered?," *New York Times*, Sept. 18, 1943, SM 18. *See also New York Times*, "In the Goering Gallery," Feb. 26, 1943, 12; *New York Times*, "Masterpieces of Art Found in Nazi Mine," May 5, 1945, 14; *New York Times*, "Nazi-'Purged' Art Is Acquired Here," June 8, 1941, 21; *New York Times*, "Nazis Deny Art Thefts," Jan. 14, 1943, 3; *New York Times*, "Free Art," June 27, 1942, X5. *See also New York Times*, "New Exhibits Crowd Art Show Calendar," Apr. 21, 1946, 17 (discussing exhibition at Buchholz Gallery of Max Beckman "who was driven from Germany by the Nazis"); *New York Times*, "Nazi-Seized Art Is Shown," June 14, 1947, 4 (discussing Philadelphia show of looted Dutch masters recovered by the Monuments Men); *New York Times*, "Museum to Show Dutch Art Work: Paintings Looted by the Nazis from Netherlands Will Go on View at Metropolitan," June 29, 1947, 17.

[11] In October of 1946, a former OSS (Office of Strategic Services, a U.S. wartime intelligence agency) officer and member of the Art Looting Investigation Unit broke the story with a five-page piece; *see* James Plaut, "Hitler's Capital: Loot from the Master Race," *The Atlantic*, Vol. 178, No. 4 (Oct. 1946) 75-80.

Yet the provenance of *Rue Saint-Honoré, Afternoon, Rain Effect w*as misrepresented for decades. The painting was looted in 1939 by the Nazis. In 1954, the U.S. Court of Restitution Appeals (CORA) declared Lilly to be the rightful owner, but assumed the Painting was lost or destroyed during the War. An American court failing to restitute it tramples on the decades of law and policy to block the United States from being used to traffic in Nazi-looted art and to help victims recover it, including the HEAR Act.

In testifying to Congress in support of the HEAR Act, Ronald S. Lauder offered a strong critique of recent Second Circuit[12] decisions that allowed art world luminaries to get away with their crimes:

> What makes this particular crime even more despicable is that this art theft, probably the greatest in history, was continued by governments, museums and many knowing collectors in the decades following the war. This was the dirty secret of the post-war art world, and

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Journalist Janet Flanner began a lengthy three-part essay on the Great Nazi Art Heist called "The Beautiful Spoils." The essay ran in three consecutive issues of *The New Yorker* beginning in February 1947. Ten years later Harper & Row published Flanner's volume, *Men and Monuments* (1957). *See also* "Restitution of Identifiable Property to Victims of Nazi Oppression," in 44 *Am. J. Int'l. Law* 39 (1950) 39-67.

[12] The court turned New York policy on its head ruling that the burden remained on the heirs to prove duress. *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 300-301 (S.D.N.Y. 2011). These errors were not corrected by the Second Circuit which pressed a heavy thumb on the scales of justice against the ability of heirs to even file a claim.

> people who should have known better, were part of it.[13]

The desirability of promoting the free trade of goods is largely premised on the concept of a good faith purchaser engaged in a routine commercial transaction entitling them to legal peace in the future. Courts cannot hide behind conflicts rules to apply foreign law to allow this unfounded presumption to prevent honest inquiry today. Like when the Perls Galleries that traded in the Menzels' Monet, the middlemen moving *Rue St. Honoré, Afternoon, Rain Effect* (Perls and Hahn) should have known better. Stephen Hahn, a founding member of the Art Dealers Association of America who has donated millions of dollars in artworks to this nation's leading museums, should have reconciled the painting's provenance before eagerly acquiring and selling it. We can no longer allow our admiration for art world luminaries who built our nation's transfixing modern art collections to blind us to uncomfortable truths.

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[13] Testimony of Ronald S. Lauder to Congress in support of the HEAR Act on June 7, 2016, https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf (hereafter "Senate Hearings on HEAR Act"). Lauder is President of the World Jewish Congress, former U.S. Ambassador to Austria, former Chairman (current Board member) of MoMA, founder of the Commission for Art Recovery and co-founder of the Neue Galerie focused on Austrian artists like Gustav Klimt and Egon Schiele.

IV. Decades of U.S. Law and Policy Require Judges to Resolve Claims for Restitution of Nazi-Looted Art on the Facts and Merits without Undue Deference to Foreign Interests Linked with Mass Murder.

As depicted in the chart "Federal Holocaust-Era Art Cases" https://www.lootedart.com/web_images/pdf/Chart%20of%20Dismissed%20Federal%20Holocaust%20Claims.pdf, for sixteen years after the landmark case of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), courts subjected Nazi-era art cases to a presumption of invalidity. Only one claimant, Maria Altmann, successfully recovered Nazi-looted art in federal court.[14] Congress held hearings and drafted legislation designed to correct this line of misguided cases. After developing a factual record, the House and Senate unanimously adopted the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"). President Obama signed it into law. Pub. L. 114-308, 114th Cong., H.R. 6130 (22 U.S.C. § 1621 note) (Dec. 16, 2016). Recovery of the art is an important part of preserving Jewish history and culture, which Hitler sought to wipe from the face of the earth. *See, e.g.*, David Roxan and Ken Wanstall, *supra*.

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[14] Since then, the heirs of Fritz Grunbaum successfully recovered "Woman in a Black Pinafore" and "Seated Woman" on summary judgment in the Supreme Court of New York. *Reif v. Nagy*, 149 A.D. 3d 532 (N.Y. App. Div. 2017), summary judgment for plaintiffs. The same heirs were denied restitution after trial in *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd, Bakalar v. Vavra*, 500 Fed. Appx. 6 (2d Cir. 2012). The federal cases are diametrically opposed as to *fact-finding*.

In *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007). It held that a Holocaust victim's claim expired in 1941, as if the 1938 purported sale were a routine commercial transaction, with no discussion of the very high probability that the sale of the painting resulted from duress in the events leading up to World War II.

This finding implied that the Nazis' power reached only to the borders of the Reich, which is simply false. As recently recognized by the Second Circuit in *Bakalar*, the Nazis pressured Jews to transfer property in exchange for their safety: "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich . . . and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets." *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

The present case is exactly the type of case that the HEAR Act sought to correct.

Dr. Agnes Peresztegi, President of the Commission for Art Recovery, testified:

> The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another.

Agnes Peresztegi, Testimony Before the Senate Judiciary Committee Subcommittees on The Constitution & Oversight, Agency Action, Federal Rights and Federal

Courts, 2 (June 7, 2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf.

Replacing one obstruction with another is exactly what happened in the present case.

Ambassador Ronald S. Lauder stated the purpose of the HEAR Act deftly:

> The term "by the Nazis" includes the Nazis, their allies *and any unscrupulous individuals regardless of their location, who took* advantage *of the dire state of the persecutees*, and the term "confiscation" includes any taking, seizure, theft, forced sale, sale under duress, flight assets, or any other loss of an artwork that would not have occurred absent persecution during the Nazi era.

Testimony of Ronald S. Lauder Before the Senate Judiciary Committee Subcommittees on The Constitution & Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, 2, n.1 (June 7, 2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf (emphasis added).

Like Justice Klein in *Menzel*, Justice Ramos in *Reif v. Nagy*, and Judge Rakoff in *Schoeps v. The Museum of Modern Art and Solomon Guggenheim Foundation*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009), Justice John Paul Stevens knew a "holdup" when he saw one. He stated the point on coercion clearly and bluntly in *Republic of Austria v. Altmann*, 541 U.S. 677, 682-683 (2004). There is particular difference in the details

of cases that come before any court. But the recurrent stories of Nazi-looted property fit a larger pattern and practice. They are an integral and connected part of the criminal conspiracy of the Nazis in their war against Jews. Due process does not require undue deference to a foreign power's desire to hold onto a wonderful piece of art. It requires fairness and respecting American policy—and California policy—to stop using the United States marketplace to traffic in Nazi-looted art during and after the War.

CONCLUSION

For the foregoing reasons, the Court should rule that under FISA state law applies and the Cassirer Family are the rightful owners of *Rue Saint-Honoré, Afternoon, Rain Effect*.

Respectfully submitted,

JENNIFER A. KREDER*
*Counsel of Record

EDWARD MCGLYNN GAFFNEY
(Of Counsel)