

No. 17-1245

In the Supreme Court of the United States

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Petitioner,

v.

DAVID CASSIRER, *et al.*,
Respondents.

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

**MOTION FOR LEAVE TO FILE AND BRIEF FOR
COMUNIDAD JUDÍA DE MADRID AND FEDERACIÓN
DE COMUNIDADES JUDÍAS DE ESPAÑA
AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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**MOTION FOR LEAVE TO
FILE BRIEF OF AMICI CURIAE**

Pursuant to Supreme Court Rule 37.2, the *Comunidad Judía de Madrid* (in English, Jewish Community of Madrid) and the *Federación de Comunidades Judías de España* (in English, Federation of Jewish Communities of Spain) move for leave to file the accompanying brief as *amici curiae* in support of the Respondents David Cassirer, *et al.* The Respondents have consented to the filing of this amicus brief. The Petitioner has withheld consent

Comunidad Judía de Madrid (“**CJM**”) is the main Jewish institution of the Province of Madrid, Spain. CJM’s main purposes are to facilitate and promote the development of Judaism in Madrid in order to guarantee its continuation, to maintain the traditional Jewish values and to strengthen the Jewish community in a plural, open and democratic context. Among its activities are to maintain and promote the memory of the Holocaust (*Shoah*), contribute to the reparation of the wrongs committed against the victims of the Holocaust, and in general resist anti-Semitism.

Federación de Comunidades Judías de España (“**FCJE**”) is the organization that comprises most of the Jewish communities and other local Jewish organizations in Spain. The main mission of the FCJE is to officially represent the Spanish Jews and their local communities before national and international authorities. Among its activities are to maintain and promote the memory of the Holocaust (*Shoah*), contribute to the reparation of the wrongs committed against the victims of the Holocaust, and in general resist anti-Semitism.

The Preamble of Spanish Law 25/1992 refers to FCJE as the “representative entity” of all Jewish communities in Spain *vis-à-vis* the Spanish State, and Article 13 of such Law provides that “[t]he State and [FCJE] shall cooperate in the maintenance and promotion of the Jewish historic, artistic and cultural heritage...”

Pursuant to Article 5 of Spanish Organic Law 7/1980, of July 5, religious communities and their federations have legal personality if registered with the Ministry of Justice of the Kingdom of Spain. Both CJM and FCJE currently have legal personality.

At the core of the *Amici’s* goals and objectives is to seek full reparation for the wrongs and crimes committed against the victims of the Holocaust. This case relates to the recovery by the Respondents of the painting “*Rue St. Honoré, après midi, effet de pluie*” by Camille Pissarro (1897) (the “**Painting**”). The District Court and the parties agree that the Painting was looted from Lilly Cassirer Neubauer (“**Lilly**”) in 1939. Order of the Hon. John F. Walter dated June 4, 2015 (the “**Order**”) Petitioner’s Appendix (“**Pet. App.**”) at 70.

Amici, as leaders of the Jewish Community in Spain, and more locally in Madrid, are devoted to ensure that redress is provided to victims of the Holocaust and their descendants. The Petitioner, as a leading publicly-funded art institution in Spain, is in possession of an artistic work that was stolen by the Nazis. The Petitioner’s continuing possession of the Painting is therefore of great concern to the citizens of Spain, and more particularly to the Jewish communities in Spain and Madrid. *Amici* seek to give

a voice to the Jewish community that is still recovering from one of the largest genocides in history, and the effects of the crimes committed during this period which linger to this day. Further harm and offense is caused to the Jewish population of Spain when a Government-funded institution publicly displays and claims rightful ownership over an artistic work looted by Nazis during the Holocaust. The *Amici* believe that the Petitioner is required to return the Painting to its rightful owner.

Amici's interest in this matter has already been established and accepted by the Ninth Circuit Court of Appeals. The Ninth Circuit accepted *Amici's* brief on its initial consideration of Respondents' appeal, and again on the Petitioner's petition for a rehearing and a rehearing *en banc*. In its decision, the Ninth Circuit made reference to and relied upon *Amici's* brief. Pet. App. 41a. Furthermore, Petitioner acknowledges the importance of the role that *Amici* played in the Ninth Circuit's interpretation of Spanish law and the decision that it reached. Petitioner's Petition for Writ of Certiorari ("**Petition**" or "**Pet.**") at 2, 8.

A number of issues of Spanish law arise from the question presented in the Petition. *Amici* believe that the Petition should be rejected because a Spanish State Attorney's opinion (who is not even the Spanish Chief State Attorney or *Abogado General del Estado*) on Spanish law is only an internal report that does not amount to an official interpretation by the Kingdom of Spain. *Amici* believe that the arguments set forth in its brief will assist the Court in resolving these issues. Because of the importance of the proper interpretation of Spanish law in this case, *Amici* can provide the

Court with a more thorough and informed analysis of the Spanish issues that are relevant to this dispute.

For the foregoing reasons, *Amici* respectfully request that this Court grant leave to participate as *amicus curiae* and to file the accompanying *amicus curiae* brief in support of the Respondents David Cassirer, *et al.*

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*²

Comunidad Judía de Madrid (“**CJM**”) is the main Jewish institution of the Province of Madrid, Spain. CJM’s main purposes are to facilitate and promote the development of Judaism in Madrid in order to guarantee its continuation, to maintain the traditional Jewish values and to strengthen the Jewish community in a plural, open and democratic context. Among its activities are to maintain and promote the memory of the Holocaust (*Shoah*), contribute to the reparation of the wrongs committed against the victims of the Holocaust, and in general resist anti-Semitism.

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² In compliance with Supreme Court Rule 37.6, *Amici* confirm that neither counsel for Petitioner nor for Respondents have authored this brief either in whole or in part, and that no monetary contributions have been made to fund the preparation or submission of the brief other than by *Amici*, its members, or its counsel. *Amici* also confirm that the Respondents have granted consent and that the Petitioner has denied consent to the filing of this *amicus curiae* brief.

The Preamble of Spanish Law 25/1992 refers to FCJE as the “representative entity” of all Jewish communities in Spain *vis-à-vis* the Spanish State, and Article 13 of such Law provides that “[t]he State and [FCJE] shall cooperate in the maintenance and promotion of the Jewish historic, artistic and cultural heritage...”

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a voice to the Jewish community that is still recovering from one of the largest genocides in history, and the effects of the crimes committed during this period which linger to this day. Further harm and offense is caused to the Jewish population of Spain when a Government-funded institution publicly displays and claims rightful ownership over an artistic work looted by Nazis during the Holocaust. The *Amici* believe that the Petitioner is required to return the Painting to its rightful owner.

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A number of issues of Spanish law arise from the question presented in the Petition. *Amici* believe that the Petition should be rejected because a Spanish State Attorney's opinion (who is not even the Spanish Chief State Attorney or *Abogado General del Estado*) on Spanish law is only an internal report that does not amount to an official interpretation by the Kingdom of Spain. *Amici* believe that the arguments set forth in its brief will assist the Court in resolving these issues. Because of the importance of the proper interpretation of Spanish law in this case, *Amici* can provide the

Court with a more thorough and informed analysis of the Spanish issues that are relevant to this dispute.

SUMMARY OF ARGUMENT

The amicus brief filed by the State Attorney for the Ministry of Education, Culture and Sports (“**MECS**”), Pet. App. 132, is only an internal report under Spanish law and does not amount to an official declaration by the Kingdom of Spain of the meaning and application of Article 1956 of the Spanish Civil Code. In accordance with the Spanish Constitution and applicable laws, only the Spanish judiciary has the power to give official binding interpretations to Spanish law. Furthermore, the Kingdom of Spain does not cite any relevant judicial authority to support its interpretation of Article 1956.

ARGUMENT

I. INTRODUCTION

On July 10, 2017, the Ninth Circuit Court of Appeals ruled that the District Court erred in its interpretation of Article 1956 CCiv and remanded the case for further proceedings.³ On September 7, 2017, Thyssen-Bornemisza Collection Foundation petitioned the Ninth Circuit Court of Appeals for rehearing and rehearing *en banc*. On September 18, 2017, the Kingdom of Spain (“**Spain**”) filed an *Application for Permission to File Brief of Amicus Curiae*, together with the accompanying *amicus curiae* brief, to support said petition for rehearing and rehearing *en banc*. Pet. App. 132.

The *amicus curiae* brief included, by way of inclusion in an appendix, an interpretation of Article 1956 CCiv laid out in an internal report written by a Spanish State Attorney (*Abogado del Estado*) for MECS, whose opinions under Spanish law are not binding. The Petitioner now argues before this Court that this interpretation of Spanish law should be afforded substantial deference by the Ninth Circuit Court of Appeals in determining the proper application of Article 1956 CCiv, but cites no authority for such a proposition.

Furthermore, neither Petitioner nor Spain raised the issue of deference at the time of the submission of Spain’s *amicus curiae* brief before the Ninth Circuit

³ For the purposes of this brief, all references to “**CCiv**” or “**Civil Code**” shall be understood to be to the Civil Code of Spain.

Court. Instead, the Petitioner has opted to raise this argument for the first time before the Supreme Court.

II. A STATE ATTORNEY FOR THE KINGDOM OF SPAIN DOES NOT HAVE THE AUTHORITY TO PROVIDE OFFICIAL INTERPRETATIONS OF SPANISH LAW

The Petitioner argues that the question presented in *Animal Science Products, Inc., v. Hebei Welcome Pharmaceutical Co., Ltd.*, No. 16-1220, is identical to the question presented in this case and that *certiorari* should therefore be granted. Importantly, however, the Petitioner fails to note that a State Attorney for Spain does not have the power to issue binding interpretations of Spanish law.

The Spanish Constitution, as the highest source of law in Spain, sets out the duties and functions of the various Spanish administrations. Article 117.3 of the Spanish Constitution provides that “[t]he exercise of judicial authority in any kind of action, both in passing judgment and having judgments executed, lies exclusively within the competence of the Courts and Tribunals established by the law, in accordance with the rules of jurisdiction and procedure which may be established therein.”⁴ Article 5 of Spanish Organic Law 6/1985, on the Judicial Branch, provides that “[t]he Constitution is the highest source of law in the legal system, and binds all judges and tribunals, who will *interpret* and apply the laws and regulations according

⁴ Available in English at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf.

to constitutional precepts and principles...” (emphasis added) Therefore, in accordance with Spanish constitutional precepts and principles, and Spanish statutory law, it is the judiciary that has the official and the *exclusive* power to interpret and apply Spanish law.

This is further bolstered by Article 1.6 CCiv, which provides that “[c]ase law shall complement the legal system by means of the doctrine repeatedly upheld by the [Spanish] Supreme Court in its interpretation and application of statutes, customs and general legal principles.”⁵ This provision is consistent with Article 123.1 of the Spanish Constitution, which provides that the Supreme Court “is the highest judicial body in all branches of justice, except with regard to the provisions concerning Constitutional guarantees.”⁶

Nowhere in Spanish law is a State Attorney given the power to provide an official declaration or interpretation of Spanish law. Spain’s *amicus curiae* brief, labelled as an *informe* (report), is instead the exercise of the State Attorney’s consultative function for the Spanish Government. Article 3.1 of Spanish Law 52/1997 of 27 November 1997 provides as follows:

“The Office of the State Attorney is the upper consultative body of the State Administration, Autonomous bodies and public departments, in accordance with the relevant regulations in

⁵ Available in English at http://www.wipo.int/wipolex/en/text.jsp?file_id=221319#LinkTarget_6329.

⁶ According to Article 161 of the Spanish Constitution, the Spanish Constitutional Court has jurisdiction over Constitutional guarantees. See n. 4, *supra*.

relation to the latter, and without prejudice to the powers granted by law to Undersecretaries and General Technical Secretaries, as well as the special powers attributed to the Council of State as the supreme consultative body of the Government, in accordance with Article 107 of the Constitution and its Organic Law.”

The duties and responsibilities of the State Attorney are thus limited to “consultative” functions, hence why the State Attorney could only issue an internal report instead of an interpretation of a binding or definitive nature. Article 21 of Royal Decree 997/2003, of 25 July 2003 (“**RD 997/2003**”), sets out the situations in which a government body can seek a report from the Office of the State Attorney. Article 22 of RD 997/2003 provides that, “[s]ave as otherwise expressly stated in a law or regulation, the State Attorney’s reports [*informes*] shall be optional and *not binding*.” (emphasis added). This further demonstrates that an internal report from a State Attorney for MECS, charged also with defending MECS in these circumstances, is simply consultative in nature. Where a State Attorney’s report is not binding in nature in accordance with Spanish law, that same report cannot be given, as the Petitioner seeks to argue, substantial deference before U.S. courts. Indeed, the Spanish Government cannot be afforded better treatment in U.S. courts than the treatment enjoyed in Spanish courts.

The State Attorney, in its representative capacity for the Spanish Government, regularly makes representations concerning the interpretation of Spanish law before local courts and tribunals. However, it is only those same courts and tribunals

that can decide on the proper and correct interpretation of the Spanish law at issue. These Spanish courts regularly disregard the opinions of State Attorneys. *See e.g.* Decision of the Spanish Constitutional Court 2016/82786, of 9 May 2016; Decision of the Spanish Constitutional Court 2016/112563, of 23 June 2016; Decision of the Spanish Constitutional Court 2017/12097, of 2 February 2017. It follows from the application of the cited provisions of the Spanish Constitution, and Spanish statutory law, that the State Attorney for MECS does not have the power to issue a binding interpretation of Spanish law.

Furthermore, Article 3.1 of Spanish Law 52/1997 (transcribed above) provides that the State Attorney's functions are inferior to those of the Council of State, being the *supreme* consultative body for the Spanish government. Therefore, even if an administrative body other than the judiciary could give an official and binding interpretation of Spanish law, which is denied, the more appropriate body to issue such interpretation would be the Spanish Council of State as the highest consultative body for the Government. The Council of State, unlike a State Attorney, is recognized in the Spanish Constitution (Article 107 of which provides that “[t]he Council of State *is the supreme consultative body of the Government*. An organic law shall regulate its composition and competence.”) (emphasis added).⁷

Article 1.2 of Spanish Organic Law 3/1980, on the Council of State, explicitly provides that the Council of State shall be separate from the Government in order

⁷ *See* n. 4, *supra*.

to guarantee its objectivity and independence.⁸ The Council of State, whose members include a number of jurists, would be the most appropriate body to provide any official opinions on Spanish law, if they were to be relied upon by a foreign court. Therefore, opinions as to the interpretation of Spanish law, to the extent that they may be relied upon by a U.S. court, must come from the Council of State, and not simply from a lawyer for a branch of the State Attorney's office.

However, nowhere is it provided for that the opinions of the Council of State are binding, and Spanish Courts regularly disregard such opinions. In this vein, Article 2.3 of Spanish Organic Law 3/1980 clearly provides that, “[u]nless otherwise expressly stated in a law, the reports of the Council shall not be binding.”

Finally, the Petitioner quoted with approval a passage from the Brief for the United States as *Amicus Curiae*, *Animal Science Products, Inc. v. Hebei Welcome Pharm. Co.*, No. 16-1220 (Nov. 14, 2017), 2017 WL 5479477 (“**S.G. Brief**”). *See* Pet. 16. Such passage from the S.G. Brief quoted in turn the following language from the Eleventh Circuit: “Among the most logical sources for [a] court to look to in its determination of foreign law are the [relevant] foreign officials.” S.G. Brief at 7-8 (quoting *United States v. McNab*, 331 F.3d 1228, 1241 (11th Cir. 2003), as amended (May 29, 2003)). In the case at hand, as it has been evidenced,

⁸This is in contrast with a State Attorney whose function depends, hierarchically and functionally, on the Office of the State Attorney acting in a representative capacity for the Spanish Government. *See* Law 52/1997 of 27 November 1997, Article 3.5.

the State Attorney for MECS is not even the relevant official to provide an official interpretation of Spanish Law. Only the Spanish Council of State may issue a non-binding official interpretation of Spanish Law.

In light of the foregoing, Spain's *amicus curiae* brief cannot be deemed to be a conclusive statement of Spanish law.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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