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

BRIEF FOR COMUNIDAD JUDÍA DE MADRID AND FEDERACIÓN DE COMUNIDADES JUDÍAS DE ESPAÑA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

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

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[1] In compliance with Supreme Court Rule 37.6, *Amici* confirm that neither counsel for Petitioners nor for Respondent 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 pursuant to Supreme Court Rule 37.3, Petitioners and Respondent have granted blanket consent to the filing of *amicus curiae* briefs by any person, entity or organization in support of either party or neither party.

communities in Spain *vis-à-vis* the Spanish State, and Article 13 of such Law provides that "[t]he State and [FJCE] 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 Petitioners of the painting "*Rue St. Honoré, Après midi, Effet de pluie*" by Camille Pissarro (1897) (the "**Painting**"). It is not in dispute that the Painting was looted from Lilly Cassirer Neubauer in 1939. 824 F. App'x at 452, 454 (9th Cir. 2020) ("***Cassirer IV***"); *Cassirer, et al. v. Thyssen-Bormemisza Collection Found.*, No. 2:05-cv-03459 (C.D. Cal. April 30, 2019) (reproduced by Petitioners at Appendix B ("**Pet. App. B**")), at 20.

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 Respondent, as a leading publicly-funded art institution in Spain, is in possession of an artistic work that was stolen by the Nazis. The Respondent's continuing possession of the Painting is therefore of great interest 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 Respondent is required to return the Painting to its rightful owner.

Amici's interest in this matter has already been established, being previously recognized by the district court, the Ninth Circuit Court of Appeals (four times), and this very Court. More precisely, the Ninth Circuit accepted the *Amici's* brief on its initial consideration of Petitioners' appeal in 2017 and on the Respondent's petition for a hearing and a rehearing *en banc*, also in 2017. Order of the Ninth Circuit Court of Appeals dated July 5, 2017; Order of the Ninth Circuit Court of Appeals dated December 4, 2017. In its 2017 decision, the Ninth Circuit made reference to and relied upon *Amici's* brief. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 964, 970 (9th Cir. 2017) ("***Cassirer III***"). The United States Supreme Court then granted *Amici* leave to file an amicus brief in deciding whether to grant the Respondent's petition for *certiorari*. *Thyssen-Bornemisza Collection Found. v. Cassirer*, 138 S. Ct. 1992 (Mem) (2018). The U.S. District Court for the Central District of California then granted *Amici* leave to file an amicus brief on matters of Spanish law pertinent to the ownership of the underlying property, and this brief was cited in the district court's April 30, 2019 decision. Pet. App. B at 30-31. On Petitioners' subsequent appeal, the Ninth Circuit granted *Amici* leave to file an amicus brief on similar matters, and referred to the amicus brief in its August 17, 2020 decision. *Cassirer IV,* 824 F. App'x at 455. Finally, the

Ninth Circuit granted *Amici* leave to file an amicus brief on Petitioners' petition for a hearing *en banc*. Order of the Ninth Circuit Court of Appeals dated December 11, 2020.

To date, this dispute has been subject to Spanish law, and under Spanish law, the Painting should be returned to Petitioners as the rightful owners. The district court and the Ninth Circuit have misapplied Spanish law throughout the progression of this case, crucially as it concerns the concept of willful blindness [*dolo eventual*] and the elevated diligence required of the Respondent, an expert in the field of art, when making purchases such as the one at issue in this case. *Amici* can provide the Court with an accurate analysis of the relevant Spanish laws at issue in this dispute.

SUMMARY OF ARGUMENT

The Respondent failed to acquire title to the Painting under Spanish law for two primary reasons.

First, as an expert in the field of art, the Respondent is required to comply with an elevated standard of diligence when it comes to buying, selling and borrowing works of art. With respect to the acquisition of the Painting, it failed to comply with this standard.

Second, under Article 1955 of the Spanish Civil Code, the duration of possession of chattel required to obtain good title through acquisitive prescription is normally (i) three years if the possessor can prove good faith; or (ii) six years regardless of the good faith of the possessor. However, Article 1956 of the Spanish Civil Code extends the time of possession required for acquisitive prescription if the chattels were stolen from the rightful owner, and the relevant possessor of the chattel can be considered a principal, accomplice or accessory after the fact ("*encubridores*"). It is undisputed that the Painting was stolen by the Nazis. The question under Spanish law then becomes in this case whether the required duration of possession for acquisitive prescriptive is extended pursuant to Article 1956 because the Respondent qualifies as an *encubridor*. Because the Respondent acquired the Painting with the required level of knowledge to constitute willful blindness [*dolo eventual*] under Spanish law, Article 1956 applies, the time of possession for acquisitive prescription is extended, and consequently the Painting belongs to the Petitioners.

While the application of Spanish law thus should have resulted in a return of the Painting to the

Petitioners, the fact remains that Spanish law should not have been applied in this case. A plain reading of Section 1606 of the FSIA logically necessitates an interpretation favoring the use of the forum state's law as the source for deciding choice of law rules in such cases.

ARGUMENT

I. INTRODUCTION

The courts in this case have improperly identified Spanish law as the applicable law and have then misinterpreted the relevant Spanish legal principles.

On April 30, 2019, the district court concluded that Respondent is the lawful owner of the Painting under Spanish law. Pet. App. B at 34. On August 17, 2020, the Ninth Circuit Court of Appeals ruled that the district court's finding was not clearly erroneous because its finding that Respondent lacked actual knowledge that the Painting was stolen was supported by inferences that may be drawn from the record. *Cassirer IV*, 824 F. App'x at 457. In doing so, both courts erred in their interpretation of Spanish law as it concerns the elevated level of diligence required of purchasers with the expertise of Respondent and the requisite knowledge of risk for willful blindness under Article 1956 of the Spanish Civil Code.

II. THE RESPONDENT IS LEGALLY BOUND TO A HIGHER LEVEL OF DILIGENCE WITH RESPECT TO THE PURCHASING OF ARTWORK

The Respondent is unquestionably an expert in the field of art, and as such must comply with an elevated standard of diligence when it comes to buying, selling and borrowing works of art. This elevated standard is enshrined both in Spanish law and international legal norms.

Article 1104 of the Spanish Civil Code establishes that a higher level or standard of diligence is expected by experts or professionals acting in their respective fields, providing that:

> "[t]he debtor's fault or negligence consists of the omission of the diligence required by the nature of the obligation that corresponds to the circumstances of the persons, the time and the place. Where the obligation should not express the diligence to be used in its performance, the diligence of an orderly *paterfamilias* shall be required."

The Spanish term "*paterfamilias*" is equivalent to the "reasonable person" standard in common law. Thus, the Spanish Civil Code makes it clear that the circumstances of the relevant person, and the time and place in which he or she is acting, should be factors considered in determining whether he or she has met the applicable standard of diligence. In Spanish Supreme Court Judgment, November 22, 1971, STS 1253/1971, FJ 4, the court explained that

the standard for professional negligence "should not be confused with the simple negligence of a careful man, but rather it is that diligence required by the specialty of his knowledge and his technical and professional guarantee." In Spanish Supreme Court Judgement, February 7, 1990, RJ/1990/668, FJ 3, 5, the court reiterated this concept, providing in the context of the standard of care expected of a medical professional, that "his acts shall be guided exclusively by the diligence derived from his special training, and therefore the diligence required . . . shall not be that of the common lay man on the matter, but instead the diligence is one of a professional under the existing circumstances."

It is therefore clear that Respondent should be expected to behave in the same manner that other museums (and especially national museums established by the State) would behave when investigating the purchase of artwork.

In order to better understand the standard of diligence expected from a museum in the acquiring of art, it is useful to consider the Professional Code of Ethics for the International Council of Museums (the "**Code**"). The Code was adopted in 1986, before Respondent came into possession of the Painting.

Concerning the acquisition of illicit material, Article 3.2 of the Code highlights that:

> "[a] museum should not acquire, whether by purchase, gift, bequest or exchange, any object unless the governing body and responsible officer are satisfied that the museum can acquire a valid title to the specimen or object in question and that in

> particular it has not been acquired in, or exported from, its country of origin and/or intermediate country in which is may have been legally owned (including the museum's own country), in violation of that country's laws."

Article 4.4 refers more specifically to artwork deriving from countries during times of conflict, and states that museums "should in particular abstain from purchasing or otherwise appropriating or acquiring cultural objects from any occupied country, as these will in most cases have been illegally exported or illicitly removed." In addition, Article 6.4 requires that any acquisition be registered and documented appropriately, recording all the details regarding the origin of the artwork. Lastly in this regard, Article 8.5 provides that it is highly unethical for museums "to support either directly or indirectly the illicit trade in cultural or natural objects . . . [and] [w]here there is reason to believe or suspect illicit or illegal transfer, import or export, the competent authorities should be notified." Hence, the Code provides the best example of how a reasonable acting and prudent museum should act in the circumstances seen in this case.

Furthermore, the Respondent is legally bound to a higher standard of diligence in accordance with international conventions to which it is a party. Spanish Historical Heritage Law 16/1985 of June 25, 1985, provides that "the Administration shall also remain subject to International Agreements validly entered into by Spain . . . as well as to the compliance with Resolutions and recommendations for the

protection of the Historical Heritage adopted by International Organizations that Spain is a member of." Spanish Historical Heritage Law 16/1985 of June 25, 1985, Seventh Additional Provision.

One such international agreement to which Spain is a member is the UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, signed in Paris on November 17, 1970 (the "**Convention**"). The Convention entered into force in Spain on April 10, 1986. The Preamble to the Convention provides that "it is incumbent upon every State to protect the cultural property existing within its territory against the dangers of theft, clandestine excavation, and illicit export," and their "cultural institutions, museums, libraries and archives should ensure that their collections are built up in accordance with universally recognized moral principles." Spain has therefore committed itself in a legally binding international agreement to ensure that it acts, and that the cultural institutions located therein act, in accordance with the principles and rules contained within the Convention. Article 2.1 of the Convention establishes that:

> "[t]he States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international cooperation constitutes one of the most efficient means of protecting

> each country's cultural property against all the dangers resulting there from."

Article 2.2 provides that "[t]o this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations." The Convention therefore establishes a strong framework for the protection of stolen cultural property and the prevention of its export and import.

Specifically, the purchase of the Painting violates Article 13 of the Convention, which provides that:

> "[t]he States Parties to this Convention also undertake, consistent with the laws of each State: (a) to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property; (b) to ensure that their competent services cooperate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner . . ."

In sum, the above standards represent the level of diligence that should be expected from a national museum. The Respondent's conduct in acquiring the Painting should be measured against how other national museums or peers would have acted in like circumstances, taking into account, pursuant to Article 1104 of the Spanish Civil Code, "the

circumstances of [the Respondent], and the time and place in which they are acting."

Despite the existence of clear red flags, the Respondent deliberately chose not to investigate the Painting's provenance beyond 1980, instead deciding that the Baron had probably acquired the Painting through the acquisitive prescription laws of Switzerland, as highlighted by the district court. Pet. App. B at 10 ("The Kingdom of Spain and its counsel decided to assume that [the Baron] had ownership of the works acquired prior to 1980"). Respondent's counsel at the time even recognized the possibility that some art works *could* have had an illicit origin when they opined that "any fraud or theft affecting title to the paintings which had taken place before the paintings were acquired by the [Thyssen] family would be unlikely to affect more than a single painting, or a small group of paintings." Pet. App. B at 10, 29. Respondent's counsel thus knew in 1993 that they were taking the risk that one or more paintings of the collection could have been forcefully taken from the legitimate owners. As a result, the legal opinion by Swiss counsel explicitly noted that it was qualified:

> "on the assumption that no third party outside of the group of entities controlled by [the Baron] has any claim under any applicable law to recover an object on the basis of prior theft, embezzlement, abuse of trust and similar reasons or on the acquisition or possession in bad faith by [the Baron] or the

> entities he controls." Pet. App. B at 11-12.

Furthermore, Swiss counsel's opinion was "expressly based on the assumption that the Baron had acquired the artworks in good faith," and also subject to the reservation that "[n]o opinion is expressed as to the title to any painting of the Permanent Collection and to any painting selected to be subject to the [Pledge Agreement] which on the basis of bad faith or by reasons not disclosed to us is subject to any encumbrance or right of third parties to which the painting may be subject in the hands of [the Baron's Swiss estate]." Pet. App. B at 16.

The above assumptions were not reasonable for the Respondent to make given the high level of diligence demanded of it by Spanish and international law. If the Respondent had not made such assumptions, it would have discovered the true provenance of the Painting, or at the very least that it had been stolen. The district court and the Ninth Circuit failed to recognize that the Respondent, as an expert in the field of purchasing artwork, was legally required to conduct certain investigations. The Respondent failed to fulfill such legal obligations.

III. ROLE OF SPANISH CIVIL CODE ARTICLE 1956

Because the Painting was undisputedly stolen from Lilly Cassirer Neubauer in 1939, the issue under Spanish law is the duration of possession by the Respondent necessary to grant it good title. While the period for acquisitive prescription is normally three or six years under Article 1955 of the Spanish Civil code (depending on whether the possessor can prove good faith or not), this can be extended by Article 1956.

Article 1956 provides: "Movable property purloined or stolen may not prescribe in the possession of those who purloined or stole it, or their accomplices or accessories, until the crime or misdemeanor, or its sentence, and the action to claim civil liability arising therefrom, should have become barred by the statute of limitations."

In other words, if the Respondent is found to be an *encubridor* (an accessory after the fact) pursuant to Article 1956, the time period for acquisitive prescription is extended by the statute of limitations on the original crime and the action to claim civil liability. The Ninth Circuit and the district court correctly confirmed that receipt of stolen property knowingly would qualify an individual or entity as an *encubridor* under Article 1956. *Cassirer IV*, 824 F. App'x at 454; *Cassirer III*, 862 F.3d at 967-68; Pet. App. B at 27. The applicable extension under Article 1956 for such an *encubridor* would mean that the Respondent would have had to have possessed the Painting until 2019 to acquire title via acquisitive prescription. Pet. App. B at 26-27. Accordingly, because the Petitioners petitioned the Respondent for the Painting in 2001 and filed this case in 2005, if Article 1956 applies, the Respondent has not acquired prescriptive title to the Painting. Pet. App. B at 27. In other words, if Article 1956 applies, Petitioners own the Painting. *Cassirer IV*, 824 F. App'x at 454.

The Respondent has previously argued that the application of the *encubridor* rule under Article 1956 requires a criminal conviction, but this is simply not the case and Respondent's argument has failed for this reason. The plain wording of Article 1956 quite clearly indicates that it applies to both the statute of limitations to prosecute the crime or misdemeanor,

meaning the prosecution has yet to begin, and the statute of limitations to enforce the sentence finding someone guilty of a crime or misdemeanor, whichever is earlier. This principle has been universally recognized, including by prominent Spanish legal scholars and the Spanish Constitutional Court, the highest court in Spain. *See e.g.* Spanish Constitutional Court Judgment No. 12/2016, February 1, 2016, RTC/2016/12), FJ 3; M. Albadalejo García, XXV Comentarios al Codigo Civil, Article 1956. The district court thus correctly dismissed Respondent's position, finding that "the clear statutory language demonstrates that a criminal conviction is not required." Pet. App. B at 30. Accordingly, Spanish law does not require that someone in receipt of stolen property be declared criminally liable in order to be considered an *encubridor* under Article 1956.

IV. LEVEL OF KNOWLEDGE FOR RECEIPT OF STOLEN PROPERTY UNDER SPANISH LAW

Article 1956 extends the time of possession required for acquisitive prescription as to those illicit chattels acquired, *inter alia*, through willful blindness. *Cassirer IV*, 824 F. App'x at 454; Pet. App. B at 28. The Ninth Circuit subsequently confirmed that the Article 1956 knowledge requirement can be satisfied with a showing of willful blindness on the part of the receiver of stolen property. *Cassirer IV*, 824 F. App'x at 455. The key then is the level of knowledge required under Spanish law to constitute receipt of stolen property through willful blindness.

The Spanish Supreme Court, in its judgment of February 24, 2009, RJ/2009/449, FJ 4, held that

willful blindness [*dolo eventual*] is established when the perpetrator:

> "[1] acts despite it being probable that the goods have their origin in a crime against personal property or the socio-economic order *or* when the perpetrator could have perfectly imagined the possibility thereof . . . *or* [2] when the illicit origin of chattel is highly probable in light of the existing circumstances." (Emphasis added).

Proviso 1 thus requires mere probability when the state of mind of the perpetrator would have considered the illicit origin of the goods a probability. This entails an analysis of the personal circumstances of the perpetrator, which in the case at hand would involve recognizing the Respondent as an expert in the matter and therefore holding the Respondent to a higher standard of diligence (See Part II above). Proviso 2 disregards the personal circumstances of the perpetrator and instead focuses on whether a bystander would consider it highly probable that the goods had an illicit origin in light of the concurring circumstances taken on their face.

In one case displaying the proper application of the "could have perfectly imagined" standard in proviso 1, an individual stole jewelry from a home and sold it to another individual, leading to a conviction of the latter for receipt of stolen property. Spanish Supreme Court Judgment, June 28, 2000, RJ/2000/6080, Antecedentes de Hecho Primero y Segundo. The recipient of the stolen property argued that there was insufficient evidence that he was

aware that the property he had received was stolen. *Id.* at FJ 2. The Spanish Supreme Court disagreed and articulated the proper standard for willful blindness in the context of receipt of stolen property:

> "From a thorough examination of the evidence . . . it can be inferred that the defendant did not have direct knowledge of the illicit origin [of the chattel], but he could have perfectly well imagined the possibility of such [illicit origin] . . . so we find ourselves here, not in a situation of direct intent, but instead in a situation of willful blindness [*dolo eventual*] which is perfectly capable of constituting the crime of receiving stolen property." *Id.*

As is clear, when the personal circumstances of the receiver can be ascertained (i.e., proviso 1 applies), one need only to establish that the recipient of illicit chattel "could have perfectly imagined" that the property was stolen. The Spanish Supreme Court confirmed this standard in subsequent years, and lower Spanish courts have continued to recognize and employ it to this day. *See e.g.* Spanish Supreme Court Judgment, February 24, 2009, RJ/2009/449, FJ 4; Spanish Supreme Court Judgment, November 4, 2009, RJ/2010/1996, FJ 5; Las Palmas de Gran Canaria Provincial Court, March 1, 2019, JUR 2019/194217, FJ 2; Álava Provincial Court, May 13, 2019, JUR 2019/224552, FJ 1.

This standard is quite importantly different than the "high risk or likelihood"[2] test, which comes into play when proviso 2 applies. Spanish courts have explicitly identified this as a separate test and Spanish courts at all levels have consistently treated the "could have perfectly imagined" and "high risk or likelihood" standards as distinct for establishing willful blindness. *See e.g.* Valencia Provincial Court, March 14, 2011, 2011 ST 176/2011, FJ Quinto.

While the "could have perfectly imagined" test focuses on the personal circumstances of the perpetrator and examines the probability of illicit origin from the subjective perspective of that perpetrator, here the Respondent as an expert in the art field, such a subjective analysis is not part of the "high risk or likelihood" standard. Instead, under the "high risk or likelihood" test, the personal circumstances of the perpetrator are disregarded and there is instead focus on whether a bystander would consider it highly probable that the goods had an illicit origin in light of the circumstances taken on their face.

The distinction between the tests under provisos 1 and 2 involves not just methods of analysis but extends to the required standard of proof. Since in scenarios under proviso 2 it is more difficult for the court to examine how probable the receiver would consider the illicit origin of the chattel in question, the court is less able to legitimately determine whether the receiver of the chattel "could have perfectly imagined" the illicit origin. Las Palmas de Gran Canaria Provincial Court, April 6, 2009, ST 167/2009,

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[2] In the proceedings before the district court and the Ninth Circuit, the phrases "high risk or likelihood" and "high risk or probability" were used interchangeably when referring to the same legal standard.

FJ Tercero (employing the "perfectly imagined" test because the perpetrator was an industry professional, and finding willful blindness because such an industry professional could have perfectly imagined the illicit origin of the relevant goods due to red flags that would have been apparent to such an experienced professional); Madrid Provincial Court, October 17, 2019, ST 613/2019, FJ Segundo (finding willful blindness because an expert in the sale of vehicles could have perfectly imagined the illicit origins of cars due to red flags that would have been noticed by such an expert, such as the filing off of the vehicle identification number). As a result of these differences between the two provisos, Spanish jurisprudence directs the court to apply a higher standard (high risk or likelihood) under proviso 2, with the objective nature of review, combined with the elevated standard of proof, designed to find willful blindness only when, in the absence of subjective indications of knowledge of probability of illicit origin, the court can determine that a reasonable bystander would have detected such a risk or likelihood.

The Ninth Circuit determined that even if the "could have perfectly imagined" standard is a different, lower standard of proof, the district court's failure to employ it was "harmless" because the Spanish Supreme Court "has not mentioned or applied the perfectly imagined test for willful blindness in a case analogous to the present case. *Cassirer IV*, 824 F. App'x at 455. Specifically, the Ninth Circuit noted that none of the Spanish decisions relied upon by the Petitioners and the *Amici* "involve stolen artwork or a receiver who purchased goods from a seller that had an invoice reflecting that he had purchased the stolen goods from a seller that had an

invoice reflecting that he had purchased the stolen goods from an established and well-known art gallery." *Id.* at 455-456. This position reflects a fundamental misinterpretation of Spanish jurisprudence. A brief explanation of the establishment of such jurisprudence is provided here.

Article 3(1) of the Spanish Civil Code provides that "[r]ules shall be construed according to the proper meaning of their wording and in connection with the context, and with their historical and legislative background and with the social reality of the time in which they are to be applied, mainly attending to their spirit and purpose."

The starting point in the interpretation of any statute is the proper meaning of their wording. When the literal interpretation criterion does not yield a clear and univocal answer, it is necessary to continue with the other interpretative criteria. This has been explained by the Spanish Supreme Court:

> "[A]lthough instrumentally the literal interpretation is usually the starting point in the interpretation process, this does not mean that it is inexorably the end or final point in the interpretative process, especially in such situations, like the one at hand, in which the literal interpretation does not yield a univocal meaning that provides a clear and precise answer to the questions presented." 776/2014, April 28, 2015, RJ/2015/1553.

Furthermore, as opposed to common law systems, Article 1(1) of the Spanish Civil Code provides that "[t]he sources of the Spanish legal system are statutes, customs and general law principles," and then clarifies in Article 1(6) that "[c]ase law shall *complement* the legal system by means of the doctrine repeatedly upheld by the Supreme Court in its interpretation and application of statutes, customs and general legal principles." (Emphasis added). Obviously, to "complement" does not mean to "create" the law, unlike the common law system.

The Supreme Court of Spain has issued a number of decisions interpretating Article 1(6) of the Spanish Civil Code. In its decision of February 15, 1982, the court stated:

> That it is known that, in order for the case law to have such regulatory significance given to it on our Law (Article 1.6 Spanish Civil Code), as well as its effectiveness as precedent, the following requirements are needed: a) various judgments stating uniformly repeated criteria . . .; b) substantial analogy between the facts of the precedent judgments and those submitted to the new appeal or litigation; and c) consequently that the factual cases already decided and those in the appeal either require the application of the same rule as this is appropriate, or, equally, that the

> *ratio decidendi* is the same in all of the cases, without considering the *obiter dictum*, or circumstantial arguments, which are not pre-determinant of the decision, which is the subject of the appeal." No. 4, RJ/1983/689.

In its decision of May 19, 2000, The Spanish Supreme Court held:

> "In order for jurisprudence or legal doctrine to serve as a basis in civil cassation it is necessary that at least two decisions of this Chamber No.1 be cited . . . in which similar cases are decided to the mater subject to decision in the instant cassation appeal . . . [I]t is absolutely essential that there be substantial harmony or coincidence between the cases settled by the judgments pleased and the object of the case in question, which implies analogy between the factual circumstances and between the legal rules to which the creation of the legal doctrine in question is associated. According to this doctrine there is no consistency in pleading generic doctrine which do not express a singular solution in relation to the litigation in question." RJ/2000/3992.

Accordingly, application of the perfectly imagined test by a lower court undoubtedly does not first require the Spanish Supreme Court to apply it in a perfectly, or even near perfectly analogous case to the extent indicated by the Ninth Circuit. Rather, Spanish law merely requires that the relevant court decisions involve scenarios that are sufficiently analogous as to properly provide guidance for interpretation of relevant statutory provisions.

As is the case in common law systems, the establishment of Spanish jurisprudence is on the broader point – the use of the perfectly imagined test to find willful blindness when subjective indications of knowledge of probability of illicit origin can be obtained, such as when one is dealing with an expert in a given field. Whether a subsequent case involves precise circumstances that have been considered by the Spanish Supreme Court (i.e., stolen artwork) is irrelevant, and to suggest that the failure to consider an applicable test because of the lack of such previous, virtually identical cases, is a misinterpretation of Spanish jurisprudence. Instead, the consistent application of this test in willful blindness settings when such subjective indications are available renders it the appropriate test in such scenarios.

In this case, the unique personal circumstances of the perpetrator constitute a crucial factor in properly evaluating willful blindness [*dolo eventual*]. The Respondent is an established expert in art transactions, including the often-illicit origins of available pieces. This expert status makes it significantly easier for the court to gauge the level of knowledge or suspicion that the Respondent likely had with respect to the Painting, given the numerous red flags highlighted by the district court. Pet. App. B

at 21-23. This distinguishes this dispute from other willful blindness cases when the court is presented with scenarios that do not so easily permit it to evaluate the mindset of the actual perpetrator. Accordingly, the "could have perfectly imagined" test is the proper test under Spanish law for this case.

V. EMPLOYING PROPER LEGAL STANDARD LEADS TO THE CONCLUSION THAT THE PAINTING IS OWNED BY PETITIONERS

The district court concluded that Article 1956 of the Spanish Civil Code did not apply because Petitioners failed to prove that "[the Respondent] had *certain knowledge* that the Painting was stolen, or that there was a *high risk or probability* that the Painting was stolen." Pet. App. B at 19 (emphasis in original). The Ninth Circuit subsequently affirmed the district court's conclusion, indicating that it was unconvinced the "perfectly imagined" and "high risk or likelihood" tests were in fact different tests or that the "perfectly imagined" test has a lower standard of proof than the "high risk or likelihood" test used by the district court. *Cassirer IV*, 824 F. App'x at 455. These findings of the district court and the Ninth Circuit contradict unequivocal Spanish legal principles that have been consistently applied by Spanish courts at all levels. With the district court and Ninth Circuit explicitly relying on such misinterpretations in arriving at their respective rulings, it becomes apparent that the application of the correct legal standard, under Spanish law, would have altered the courts' analysis in a significant manner and would almost certainly have led to a

determination that the Painting belongs to Petitioners.

The reality is that the Respondent undoubtedly *could have perfectly imagined* that the Painting had been stolen. The district court itself recognized that there were a number of "red flags," including intentionally removed labels, the torn label demonstrating that the Painting had been in Berlin, the minimal provenance information provided (specifically omitting any information regarding the WWII era), and the fact that Pissaro paintings were frequently the subject of Nazi looting. Pet. App. B at 29. Furthermore, as recognized by the district court, it was "generally known" that the Baron's family "had a history of purchasing art and other property that had been confiscated by the Nazis." Pet. App. B at 5. In fact, the district court stated elsewhere that these very same red flags "should have prompted the Baron to conduct additional inquiries as to the seller's title," and amounted to "sufficiently suspicious circumstances to trigger a duty to investigate." Pet. App. B at 21, 23.

Circumstantial evidence or indicia satisfy the standard of willful blindness [*dolo eventual*]. In this regard, the Spanish Supreme Court expressed that "[t]he Constitutional Court has maintained in various decisions that, where there is a lack of direct evidence, circumstantial evidence is capable of justifying a guilty finding,"[3] and concluded that a cumulus of indicia, or one that is particularly strong, are sufficient to prove knowledge for the purposes of receiving stolen property. Spanish Supreme Court

[3] The Constitutional Court is the highest court in Spain, and the Supreme Court is bound by the decisions thereof.

Judgment, May 19, 2016, RJ/2016/2042, FJ 6. According to the Spanish Supreme Court, examples of indicia that can make it unnecessary to have direct proof of knowledge are:

> "the irregularity of the circumstances of the purchase or method of acquisition, the concealment of the latter, the lack of credibility of the explanations regarding possession of the stolen chattel, the personality of the defendant purchaser or the sellers or conveyors of the chattel or the existence of a negligence or vile price . . . amongst others." Spanish Supreme Court Judgment, February 24, 2009, RJ/2009/449, FJ 4.

The district court and the Ninth Circuit relied entirely on analysis under a "high risk or probability" threshold (by the district court selecting the incorrect standard and by the Ninth Circuit incorrectly finding a lack of a distinction between the standards and incorrectly finding that, even if distinct, the "could have perfectly imagined" test would not apply). The correct interpretation of Spanish law and application of the "could have perfectly imagined" test to the numerous red flags identified by the district court would leave a court with no other reasonable option than to conclude the Respondent possessed the requisite knowledge for willful blindness under Article 1956. Accordingly, as the Ninth Circuit acknowledged, the Painting would belong to Petitioners.

VI. EVEN APPLYING IMPROPER STANDARD LEADS TO THE CONCLUSION THAT THE PAINTING IS OWNED BY PETITIONERS

Even assuming, *arguendo*, that the "high risk or likelihood" standard applied, the facts here satisfy this test.

The district court acknowledged that there were "sufficient suspicious circumstances or 'red flags' which should have prompted the Baron to conduct additional inquiries as to the seller's title." Pet. App. B at 21. The court even likened one such red flag – the presence of intentionally-removed labels – to the filing off of the serial number on a stolen gun, acknowledging that it would cause "clear cause for concern." *Id.* The duty of the Baron to investigate was heightened by the fact that "it is undisputed that the Baron was a very sophisticated art collector." *Id.* at 23. The district court ultimately concluded that "the Baron would have recognized and understood the suspicious circumstances surrounding the Painting." *Id*.

The district court's conclusion that the Baron would have recognized such red flags, including one equivalent to a gun with the serial number filed off, would certainly seem to indicate that the Baron knew there was a high risk or likelihood that the Painting had been stolen. A vehicle identification number being filed off of a stolen car, a red flag quite analogues to both the intentional removal of labels in this case as well as a gun serial number being filed off, has already been determined to constitute a sufficient red flag to find willful blindness under Spanish law. Madrid Provincial Court, October 17, 2019, ST 613/2019, FJ Segundo.

The court's conclusion regarding the Baron's knowledge necessarily must extend to the Respondent, an even more sophisticated, well-established, world-famous national museum. The district court even acknowledged that one of the Respondent's experts "never satisfactorily explained why labels would be intentionally removed," and another conceded that in the case of intentionally-removed labels, "one would have to investigate or learn why those labels had been removed, where the work had been, and what those labels might have been." *Id.* at 22.

Ultimately, the district court failed to ever explain why the numerous red flags should have been suspicious to the Baron, triggering a duty to investigate, yet would not have been sufficiently suspicious for an even more sophisticated national museum, whose purpose is entirely dedicated to the procurement of art. If the district court's own factual analysis of the numerous, unquestionably suspicious circumstances surrounding the Painting, including as applied to the Baron, are viewed in the context of the Respondent's heightened expertise in the field, it becomes an inescapable conclusion that the Respondent knew there was a "high risk or likelihood" that the Painting had been stolen. Accordingly, even under this heightened standard, Petitioners are the rightful owners.

VII. WASHINGTON PRINCIPLES CALL FOR THE RETURN OF THE PAINTING

The district court correctly noted that in December 1998, forty-four countries, including Spain, committed to the Washington Principles on Nazi-

Confiscated Art (the "**Washington Principles**"). Pet. App. B at 33. These principles:

> "appeal to the moral conscience of participating nations and recognize: 'If the pre-War owners of art is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing that this may vary according to the facts and circumstances surrounding a particular case.'" Pet. App. B at 33.

The district court also correctly noted that in 2009, forty-six countries, including Spain, reaffirmed their commitment to the Washington Principles by signing the Terezin Declaration, which:

> "reiterated that the Washington Principles 'were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions.' The Terezin Declaration also 'encouraged all parties including public and private institutions and

> individuals to apply [the Washington Principles] as well." *Id.* at 33.

The district court acknowledged that the Respondent's refusal to return the Painting is inconsistent with the Washington Principles and the Terezin Declaration, but referenced its inability to force the Respondent or Spain to comply with their moral commitments. *Id.* at 34. The Ninth Circuit subsequently commented that "[i]t is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations." *Cassirer IV*, 824 F. App'x at 457, n. 3.

Amici do not contradict the courts' finding that the Washington Principles and the Terezin Declaration are not legally binding, but want to reiterate the courts' recognition that the Kingdom of Spain has affirmatively and unequivocally professed to the international community that it was undertaking a moral commitment to assist in the return of Nazi-looted art to the rightful owners. The *Amici* share the courts' disappointment in the Kingdom of Spain's shameful refusal to satisfy such commitments.

VIII. STATE LAW IS THE PROPER SOURCE FOR CHOICE OF LAW IN FSIA CASES

Throughout the various proceedings in this case, the *Amici* have attempted to guide the various courts through the proper interpretation of Spanish law, as it had been determined to be the applicable law in this dispute. The *Amici* maintain that under Spanish law, for the reasons stated above, Petitioners own the Painting.

The *Amici* have never, however, taken the position that Spanish law should be applied in this case, because it should not. The reasons for this have been explained in detail in the Petitioners' brief, which the *Amici* have carefully reviewed and with which they strongly agree. Specifically, the *Amici* support, *inter alia*, the Petitioners' argument that a plain reading of Section 1606 of the FSIA logically necessitates an interpretation favoring the use of state law as the source for deciding choice of law rules in FSIA cases. Petitioners' Brief, p. 20.

While the *Amici* believe that the Painting should have been returned to the Petitioners under Spanish law, they are confident that a rectification of the choice of law rules in this case will result in the proper law being applied to the facts, the long-awaited, justified return of the Nazi-looted Painting to its rightful owner, and another positive step in the decades-long healing process of the Jewish community.

CONCLUSION

For the foregoing reasons, the *Amici* support Petitioners' position. Furthermore, under Spanish law, the Painting belongs to Petitioners.

Respectfully submitted,

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