
In the Supreme Court of the United States

DAVID CASSIRER, et al.,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,

Respondent.

On Petition For A Writ of Certiorari
To The Ninth Circuit Court of Appeals

**Amici Curiae Brief of The 1939 Society,
Bet Tzedek, Center the Study of Law &
Genocide, Loyola Justice for Atrocities Clinic,
Simon Wiesenthal Center, Jewish Federations
of North America, American Jewish
Committee, Holocaust Survivors Foundation
USA, ART ASHES, and Stand With Us
In Support of Petitioners**

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BRIEF OF AMICI CURIAE

Amici The 1939 Society, Bet Tzedek, Center for the Study of Law and Genocide at LMU Loyola Law School, Loyola Justice for Atrocities Clinic, Simon Wiesenthal Center, Jewish Federations of North America, American Jewish Committee, Holocaust Survivors Foundation USA, ART ASHES, and Stand With Us submit this brief supporting Petitioners David Cassier et al.¹

INTEREST OF AMICI CURIAE

The 1939 Society, formed in 1952 as The 1939 Club, is one of the oldest and largest organizations of Holocaust survivors in the United States. Its members and officers have included Jews that appeared on Schindler's list, including former president Paul Page, a survivor of Schindler's factory who convinced Thomas Keneally to write the book *Schindler's List* and Steven Spielberg to make the film based on it. In 1978, the organization created the very first chair in Holocaust studies in the United States at UCLA (now called The 1939 Society Samuel Goetz Chair in Holocaust Studies, named after one of our former presidents who pioneered Holocaust education in the United States). Like tens of thousands of other Holocaust survivors, Page died while awaiting some measure of compensation for the wrongs he suffered.

¹ No counsel for a party authored this brief in whole or in part. No person or entity other than Amici, their members, or counsel made a monetary contribution for preparation or submission of this brief. Counsel of record for all parties received timely notice of this *amicus* brief.

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

Michael Bazyler, Professor of Law and The 1939 Society Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law, is a leading authority on the use of American and European courts to redress genocide and other historical wrongs. His book *Holocaust, Genocide and the Law: A Quest for Justice in a Post-Holocaust World* (Oxford Univ. Press 2016) is a winner of the 2016 National Jewish Book Award.

Bet Tzedek (Hebrew for “House of Justice”), located in Los Angeles, California, is a nonprofit public interest law firm founded in 1974 to achieve full and equal access to justice for all vulnerable members of its community, and is an internationally recognized force in poverty law. Bet Tzedek is widely respected for its expertise on Holocaust reparations and has represented over 5,000 survivors and their families in reparations claims, free of charge. Bet Tzedek’s Holocaust Survivors Justice Network, a national coalition of law firms, corporate legal departments and Jewish social services agencies that was assembled to provide vital legal aid to Holocaust survivors, received the ABA Pro Bono Publico award.

Bet Tzedek has also litigated various Holocaust-era restitution cases, including the landmark *Grunfeder v. Heckler*, 748 F.2d 503 (9th Cir. 1984), and has been amicus in many Nazi looted art cases, including *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Von Saher v. Norton Simon Museum*, 897 F.3d 1141 (9th Cir. 2018) and No. 18-1057 (U.S. 2019).

Stanley Levy is a co-founder of Bet Tzedek and the Founding National Director of The Holocaust Survivors Justice Network, a coordinated network of over 2500 lawyers that have recovered over \$25 million in reparations, for which Stan received the American Bar Association's Pro Bono Publico Award.

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

Founding Director and Professor of Law Stanley Goldman is a widely sought-after legal analyst for television and radio. His 2018 book, *Left to the Mercy of a Rude Stream: The Bargain That Broke Adolf Hitler and Saved My Mother* (Potomac Books

2018), uncovers a piece of history about the undermining of the Nazi regime, the women of the Holocaust and the nuanced relationship between a survivor and her son.

Through partnerships with NGOs, prosecutors, tribunals, and advocates, the **Justice for Atrocities Clinic at LMU Loyola Law School**, Los Angeles, seeks to hold perpetrators of mass atrocities legally accountable and work toward reparations for victims and survivors of international atrocity crimes—genocide, crimes against humanity, war crimes—and serious human rights abuses. The LJAC engages students in claims-based legal work in a wide range of domestic and international tribunals.

LJAC Director and Visiting Associate Professor Rajika Shah has extensive experience litigating international human rights and property restitution cases on behalf of Armenian and Sudanese genocide victims, indigenous groups, and religious and ethnic minorities in numerous complex and high-stakes disputes against foreign sovereigns and commercial entities, at trial and appellate levels, in both international and U.S.-based tribunals.

The Holocaust Survivors Foundation USA 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 due to the unique

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

ART ASHES (“Art Restitution to Assist Survivors of the Holocaust Emergency Services”) is a nonprofit foundation that funds the field of artwork restitution, identifying objects stolen during the Holocaust and acknowledging the families and heirs who are the rightful owners of such art. ART ASHES supports researchers and attorneys working in the field of restitution, along with claimants and heirs, to tell the story of each artwork, the original collectors, and the history of Nazi looting. In acknowledgment of the many Holocaust Survivors still living, the Foundation asks successful claimants to donate a portion of any sale proceeds to nonprofit organizations assisting Holocaust Survivors who live in poverty. Approximately 50,000 Holocaust Survivors live in or near poverty, and require financial assistance for everyday needs such as food, rent, and utilities, and do not receive the medical, dental, mental health, and long-term care they need.

Stand With Us is a California-based organization advocating against antisemitism. The Stand With Us Holocaust Education Center (HEC), headquartered in Los Angeles, brings interactive Holocaust education programs, films and curriculum to schools and communities across North America, through in-person and virtual platforms. The center’s custom-made, interdisciplinary programs are meant to proactively educate students about the Holocaust and also respond to instances of antisemitism experienced by students at specific schools or communities. The

HEC works affirmatively to address the widespread deficiencies in information about the Holocaust, and also to counter the antisemitism connected with Holocaust denial and distortion.

Jewish Federations of North America.

Jewish Federations are the largest collective Jewish philanthropy in North America and raise and distribute more than \$2 billion annually and through planned giving and endowment programs to support flourishing Jewish communities domestically, in Israel, and in 70 countries around the world.

The Simon Wiesenthal Center (SWC) is a leading international Jewish human rights organization founded in 1977 by Rabbi Marvin Hier. It is named in honor of the famed Holocaust survivor and Nazi-hunter, Simon Wiesenthal who devoted his entire life after WWII to bringing 1,100 Nazi War Criminals before the bar of justice. The SWC confronts antisemitism, hate, and terrorism, supports the democratic state of Israel, defends the safety of Jews worldwide, and teaches the lessons of the Holocaust to new generations. The SWC is an accredited Non-Governmental Organization at the United Nations, UNESCO, OSCE, Organization of American States, Latin American Parliament, and Council of Europe. Headquartered in Los Angeles, SWC has offices in New York, Chicago, Miami, Toronto, Paris, Jerusalem, and Buenos Aires. Moriah Films is the two-time Academy Award®-winning film division of the SWC. The Museum of Tolerance, founded in 1993, is the SWC's educational arm.

The American Jewish Committee, founded in 1906, is a leading global Jewish advocacy organization with offices around the world and the United States. Its mission is to safeguard the welfare and security of Jews; to strengthen the basic principles of democracy and pluralism around the world; and to enhance the quality of Jewish life.

SUMMARY OF ARGUMENT

By its decision to continue depriving Jewish victims of the Nazi-looted art that they rightfully own, the Ninth Circuit has failed to heed the express policies of California, the United States, and the international community—all of which endeavor to return stolen works of art (and Nazi-looted art in particular)—to its rightful owners. Moreover, the restoration of *Rue St. Honoré, Afternoon, Effect of Rain* (the “Painting”) to the rightful Jewish heirs through the application of California law promotes Spain’s current policy to acknowledge excesses and reverse confiscations from the World War II period. Compelling legal and moral principles counsel in favor of this Court granting the Cassirers’ petition based on California’s new statute requiring application of California substantive law, vacating the judgment, and remanding for application of California’s new choice-of-law statute, or reversing based on the Supremacy Clause and federal preemption issues raised in the petition.

ARGUMENT: THE DECISION BELOW CONTRAVENES THE EXPRESS INTENT OF CALIFORNIA, THE UNITED STATES, AND THE INTERNATIONAL COMMUNITY

Amici, all of whom are experts in Holocaust reparations, file this brief in the belief that, beyond the indisputable moral dimension here, this case presents a legal issue on which the California legislature, the United States legislative and executive branches, and the international community are all aligned. These governmental

entities have all recognized the importance of returning Nazi-looted art back to its rightful owners. The only bodies that have not joined this consensus are the courts below.

I.

This Court Directed That California Choice of Law Rules Control, and New California Code of Civil Procedure § 338(c)(6) Mandates That California Substantive Law Apply In This Case.

The legal issue to be decided in this decades-long case is whether to apply California law, which does not allow a thief to pass good title, or Spanish law, which permits title to pass even for stolen goods when acquired by adverse possession. Which law applies determines ownership of the Painting, which all parties agree was “legally confiscated” from Lilly Cassirer by Nazi Germany. Under California substantive law, the Painting must be returned to the Cassirers.

The moral dimension of this case is undeniable. Concurring in the Ninth Circuit opinion giving rise to this petition, Judge Callahan lamented, “Sometimes our oaths of office and an appreciation of our proper roles as appellate judges require that we concur in a result *at odds with our moral compass.*” *Cassirer v. Thyssen-Bornemisza Collection Found.*, 89 F.4th 1226, 1246 (9th Cir. 2024) (Callahan, J., concurring) (emphasis added).

Reflecting Judge Callahan’s sentiment, Judge Graber went further in her statement dissenting from the denial of rehearing and rehearing en banc, and demonstrated in detail the glaring errors in the

court’s application of California’s common law choice-of-law framework: “The world is watching. We should reach the result that is both *legally compelled and morally correct*. I am deeply disappointed by this court’s decision, which has the unnecessary effect of perpetuating the harms caused by Nazis during World War II.” *Cassirer v. Thyssen-Bornemisza Collection Found.*, 107 F.4th 882, 884 (9th Cir. 2024) (Graber, J., dissenting) (emphasis added).

Crucially, Judge Graber emphasized that Petitioners deserve their unjustly confiscated art back not just for moral reasons, but also as a matter of law: “The moral dimension of this case does not dictate the legal result. I agree fully with Judge Callahan that, if the law requires it, we must rule contrary to our moral compass. But, here, the law points decidedly in the same direction as our moral compass. And the moral dimension of the case adds significant importance to our reaching the legally correct result.” *Id.* at 892-93.

In 2022, this Court recognized that the Foreign Sovereign Immunities Act (“FSIA”) does not bar Petitioner’s action here because, as the lower courts had held, “the Nazi confiscation of *Rue Saint-Honoré* brought [the Cassirers’] suit against the Foundation within the expropriation exception” of the FSIA. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 112 (2022). In a concise opinion, this Court reversed the Ninth Circuit’s choice-of-law analysis, which had incorrectly used the federal choice-of-law rule to conclude that Spanish law applied and remanded for the application of California’s choice-of-law rule.

Although the Court did not decide the ultimate question of which jurisdiction's law applied, it noted that "the use of a federal choice-of-law rule in the courts below" could have "led to the Foundation keeping the painting when a private museum would have had to give it back." *Id.* at 116. In sum, this Court ruled: "The path of our decision has been as short as the hunt for *Rue Saint-Honoré* was long; our ruling is as simple as the conflict over its rightful owner has been vexed. A foreign state or instrumentality in an FSIA suit is liable just as a private party would be. See [28 U.S.C.] § 1606. That means the standard choice-of-law rule must apply. In a property-law dispute like this one, that standard rule is the forum State's (here, California's)—not any deriving from federal common law." *Id.* at 117.

Thereafter, the Ninth Circuit, purporting to apply California's common law choice-of-law test, *again* held that Spanish law applied. That opinion was flawed for a number of reasons, not the least of which is that it contravenes the collective will of the California legislature, the United States legislative branch, the United States executive branch, and the international community.

In the wake of the Ninth Circuit's opinion, the California legislature enacted California Code of Civil Procedure ("CCP") § 338(c)(6), which provides that California substantive law applies in actions brought by California residents or their heirs to recover stolen artworks held by museums, or covered by the Federal Holocaust Expropriated Art Recovery ("HEAR") Act, i.e., Nazi-looted art. In its findings, the California Legislature called out the

Cassirer Ninth Circuit opinion as exemplary of the problem prompting the new law. It noted that the *Cassirer* “court applied Spain’s law of acquisitive prescription or adverse possession, which is based on the principle of constructive notice that the California courts and legislature have rejected.” Assem. Bill 2867, 2024-2025 Reg. Sess. (Cal. 2024) § 1(e).²

The California Legislature added that “[m]andating California substantive law in stolen art cases will discourage art theft and trafficking in stolen art, and will encourage integrity and diligence in the art market. Further, mandating California substantive law will draw a clear line of liability in litigation, eliminate costly defense tactics, and encourage settlements.” Assem. Bill 2867, 2024-2025 Reg. Sess. (Cal. 2024) § 1(f).

II.

The Legal and Moral Imperatives Align under California Law.

The decision below cannot be divorced from the admonition of U.S. Supreme Court Justice Robert Jackson, Chief Counsel to the United States, in his

² The Legislative findings explain that in 2010, the Legislature rejected the “holding of the Ninth Circuit Court of Appeals in *Von Saher v. Norton Simon Museum* . . . that California law allowed theft victims’ claims to be defeated based on ‘constructive’ rather than actual discovery; [and] amended Section 338 of the Code of Civil Procedure to allow an action to recover stolen art from a museum, gallery, auctioneer, or dealer to be filed within six years of actual discovery, and specifically defined ‘actual discovery’ to exclude ‘any constructive knowledge imputed by law.’” Assem. Bill 2867, 2024-2025 Reg. Sess. (Cal. 2024) § 1(b).

opening remarks at the International Military Tribunal in Nuremberg, who explained that the Nazis “planned and intended conduct that involves *moral as well as legal wrong*.” Hon. Robert H. Jackson, Opening Statement at The Int’l Military Tribunal (Nov. 21, 1945) at ¶ 13 (emphasis added). As the Nuremberg trials showed, the Nazis “organized plundering [of the Jews’ possessions], planned it, disciplined it, and made it official just as [they] organized everything else, and then [they] compiled the most meticulous records to show that [they] had done the best job of looting that was possible under the circumstances.” *Id.* at ¶ 140. Justice Jackson also aptly noted, “The refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in moral sense must be regarded as innocence in law. We challenge that proposition.” *Id.* at ¶ 192.

This case tests whether our system is equal to Justice Jackson’s challenge. As Justice Jackson anticipated, and Judge Graber showed, this is the case where the law and moral sense of mankind must stand together.

Much like California’s recent law, the United States has passed several laws manifesting its intent to return Nazi-pillaged art to its lawful owners. For instance, Congress passed the Holocaust Victims Redress Act and stated its purpose as follows: “[C]onsistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were

confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.” Holocaust Victims Redress Act, PL 105-158, 112 Stat. 15 (Feb. 13, 1998).

Likewise, Congress enacted the Holocaust Expropriated Art Recovery Act (“HEAR Act”), recognizing that “the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe. This systematic looting of the artwork and other cultural property of Jews and other persecuted groups—one of the Nazis’ many crimes against humanity—has been described as the “greatest displacement of art in human history.” S. Rep. 114-394, 1-2 (Dec. 6, 2016). The two stated goals of the HEAR Act are “first, to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration; and, second, to ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.” *Id.* at 6.

The international community is also aligned on the importance of returning Nazi-looted art to its rightful owners. Both the United States and Spain, along with 42 other nations, have professed a commitment to restore Nazi-confiscated art to its rightful owners by signing the Washington Principles, which call on states to make “[e]very effort . . . to publicize art that is found to have been

confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.” *Washington Conference Principles on Nazi-Confiscated Art*, U.S. Dep’t of State ¶ 5. Once the rightful owners or their heirs are identified, “steps should be taken expeditiously to achieve a just and fair solution.” *Id.* at ¶ 8.

Additionally, both Spain and the United States, along with 44 other countries, have signed the Terezin Declaration, which reaffirms the Washington Principles. The Terezin Declaration recognizes “that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45,” and “all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims.” *2009 Terezin Declaration on Holocaust Assets and Related Issues*, U.S. Dep’t of State ¶ 3.

Indeed, in her concurrence, Judge Callahan noted that “Spain, having reaffirmed its commitment to the Washington Principles on Nazi-Confiscate Art when it signed the Terezin Declaration on Holocaust Era Assets and Related Issues, should have voluntarily relinquished the

Painting.” *Cassirer*, 89 F.4th at 1246 (Callahan, J. concurring).

California law is now aligned with these “federal laws, federal policies, and international agreements prohibiting pillage and seizure of works of art and cultural property, and calling for restitution of seized property.” Assem. Bill 2867, 2024-2025 Reg. Sess. (Cal. 2024) § 1(k).

CONCLUSION

The Ninth Circuit’s decision contravenes the express intent of California, the United States, and the international community—all of which endeavor to return Nazi-looted art to its rightful owners. Moreover, the restoration of the painting *Rue St. Honoré* to the rightful Jewish heirs through the application of California law promotes Spain’s current efforts to acknowledge and rectify wrongs of its own authoritarian past.³

Accordingly, *Amici* urge this Court to grant certiorari, vacate the Ninth Circuit’s opinion, and remand for further proceedings on the merits, or reverse based on the Supremacy Clause and federal preemption issues raised in the petition.

³ See Sam Jones, *Spain Passes Law to Bring ‘Justice’ to Franco-Era Victims*, The Guardian (Oct. 5, 2022), at <https://www.theguardian.com/world/2022/oct/05/spain-passes-law-tobring-dignity-to-franco-era-victims>.

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