No. 24-652

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 UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE MONUMENTS MEN AND WOMEN FOUNDATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Cited Authorities

Page

Statutes

Page

Treatises

Other Authorities

Cited Authorities

Page

Page

INTERESTS OF THE AMICUS CURIAE

The Monuments Men and Women Foundation ("Amicus") is a nonprofit organization, created to raise worldwide awareness about the men and women who served in the Monuments, Fine Arts, and Archives section of the U.S. and Allied militaries' Civil Affairs division during and after World War II; to honor their achievements; and to complete their unfinished mission of returning missing art to the rightful owners.[1]

Thanks partly to early work of the Monuments Men and Women, in late 1944, the Military Governments of the United States, Great Britain and France jointly prepared a law for the control of property in conquered German territory; then, this law—Allied Military Law No. 52—became effective by proclamation in each segment of Germany as Allied troops occupied it. *See* Jo M. Ferguson, "Military Government Property Laws in Occupied Germany," 37 Ky. L.J. 45, 46 (1948).[2] At the time, one Franz R. ("Frank") Perls reportedly was serving in Europe as a U.S. military translator.[3] Later, Perls opened

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to its preparation or submission. The parties were provided timely notice of amicus's intent to file this brief.

2. *See also* Hans Dölle and Konrad Zweigert, *Gesetz Nr. 52 ueber Sperre und Beaufsichtigung von Vermoegen*, 339-40 (C.E. Poeschel, Stuttgart 1947). The title roughly translates as "Law No. 52 on the Blocking and Supervision of Assets."

3. *See* Christel Hollevoet-Force, "Frank R. Perls," *The Modern Art Index Project* (Metro. Museum of Art, Mar. 2018) [*https://doi.org/10.57011/ZLYU8415*].

the art gallery in Beverly Hills, California that arranged for exporting Lilly Cassirer's looted Painting from Munich, Germany to Los Angeles in 1951. *See* Findings of Fact and Conclusions of Law (the "FFCL"), at 23, *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. CV 05-3459-JFW (Ex) (C.D. Cal. April 30, 2019) [2019 U.S. Dist. LEXIS 247143, *56] (finding that Perls knew the Painting was sold from Munich).[4] That transfer was null and void (and also, a crime) under Allied Military Law No. 52.

By ignoring the lawless conduct of Perls and his collaborators and its clear legal consequences—clear, under the decades-old precedent of *Kunstsammlungen zu Weimar v. Elicofon*, 536 F. Supp. 829, 843-45 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982)—the Amicus believes the decision in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 89 F.4th 1226 (9th Cir. 2024) [*Cassirer VII*] undermines the U.S. commitments to the international rule forbidding spoils of war in works of art (*see Menzel v. List*, 49 Misc. 2d 300, 305-08 (N.Y. Supr. Ct. 1966)) and to stopping the traffic of stolen cultural property. No less importantly, it offends the ideal behind those commitments: namely, the Rule of Law. As then-General Eisenhower rightly said, "I do know that for democracy, at least, there always stand beyond the materialism and destructiveness of war the ideals for which it is fought." Dwight D. Eisenhower, "Art in Peace and War," 4:9 Metro. Museum of Art Bull. 221, 223 (May 1946). Unless corrected by this Court now, *Cassirer VII* abandons this ideal, in favor of Spain's interest.

4. "Painting" and the other terms and abbreviations defined in the Petition for a Writ of Certiorari have their same meanings herein. "__-ER-__" refers to volume __ and page __ of the Excerpts of Record filed by the Cassirers in the Ninth Circuit on Oct. 7, 2019 (Dkt. 11-1).

The trial record contains a copy of Law No. 52. (5-ER-1048-49.) The Cassirers also raised Law No. 52 in their opening Brief to the Ninth Circuit (Dkt. 10, filed on Oct. 7, 2019) at 8, 47 and their Supplemental Brief (Dkt. 86, filed June 27, 2022) at 21. Their appeal also urged that "the 'prevalent and progressive' international consensus" of treaties and international agreements support California's interest in stopping the putative successors of Nazi thieves from gaining and transferring title in stolen art works. *See* Dkt. 86 at 25-27; *id.* at 21 n.12; *see* also Reply Brief (Dkt. 46, filed Feb. 28, 2020) at 3. As their appeal also argued, Spain's reliance on its domestic law of acquisitive prescription by TBC in this case "is in contravention of international agreements to which it is a party." *Id.* at 24. Yet, *Cassirer VII* disregards all of that. Therefore, Amicus has authorized the filing of this brief.

SUMMARY OF ARGUMENT

Cassirer VII raises federal questions of exceptional importance and should be corrected by this Court now. The Ninth Circuit's recognition of a superior governmental interest in enforcing Articles 1955 and 1956 of the Spanish Civil Code—when making *Cassirer VII*'s state-law "comparative impairment analysis" (*see* 89 F.4th at 1236-45)—conflicts with overriding federal laws and interests. By giving effect to Spain's law that title to movable goods prescribes after three or six years of possession, the Ninth Circuit's state-law analysis disregards federal law forbidding transport of stolen property; international obligations of the United States forbidding art as spoils of war; and the American principle that Executive and Legislative Branch determinations of foreign policy and the National Government's control over foreign affairs preempt state law.

The post-war foreign policies of the United States and its Allies were understood and intended to mean that "restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered." *See* The Recovery of Cultural Objects Dispersed During World War II, 25 Dep't of State Bull. 337, 339 (Aug. 27, 1951). But that important Allied victory ends here, if the *Cassirer VII* decision stands. Claude Cassirer only (re)discovered the Painting in 2000 (*see* 89 F.4th at 1235), yet the Ninth Circuit held TBC had acquired title even before—as early as June 21, 1996, three years from the date of June 21, 1993 (*see* FFCL at 12; 2019 U.S. Dist. LEXIS 247143, *28) when TBC had obtained the Painting from the Baron.

ARGUMENT

A. International Law and U.S. Foreign Policy Limit and Preclude the Ninth Circuit's (Mis)Application of California State Choice-of-Law Rules.

This Court has (until now) "express[ed] no view" concerning whether or when to apply any limits on the application of state law in FSIA cases (like this case) that might be "derived from the Constitution, applicable treaties or statutes, international comity, the Act of State doctrine, or other sources reflecting distinctly federal interests." *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 142 S. Ct. 1502, 1510 & n.3 (2022) [*Cassirer V*] (cleaned up). As urged by the United States, "[t]he federal government's exclusive constitutional authority over foreign affairs limits the application of a State's law to foreign conduct where the state law conflicts with the Nation's foreign policy or interferes in an area of exclusively federal control." Brief of the United States as Amicus Curiae (filed in No. 20-1566 on Nov. 22, 2021), at 21.

State law "is naturally preempted to the extent of any conflict with a federal statute," such as "where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (cleaned up). State law may also be preempted when it "intrudes on the power to make and resolve war." *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 965-66 (9th Cir. 2010). When state law is preempted, "its application is unconstitutional, under the Supremacy Clause." *Crosby*, 530 U.S. at 388.

The Cassirers cited Law No. 52 before this Court too, in *Cassirer V. See* Brief for Petitioners at 4 & n.1, 11 n.6 (filed in No. 20-1566 on Nov. 15, 2021). As applied (or misapplied) by the Ninth Circuit now in *Cassirer VII*, California's choice-of-law rules would conflict with the foreign policy of the United States in resolving World War II (including Law No. 52), the Executive's implementation of the Hague Convention of 1907 and the National Stolen Property Act when resolving the war, and the subsequent acts of Congress regulating Nazi looted art.

1. The *Cassirer VII* Decision Conflicts with the Expressed Foreign Policy of the United States, with Federal Statutes such as the National Stolen Property Act and the Holocaust Victims Redress Act, and with Art. 56 of the Hague Convention of 1907.

The district court correctly found that "TBC's refusal to return the Painting to the Cassirers is inconsistent with

the Washington Principles and the Terezin Declaration." FFCL at 34; 2019 U.S. Dist. LEXIS 247143, * 81. Both the U.S. and Spain are signatories of those principles and that declaration. The Ninth Circuit's decision nevertheless to accept TBC's reliance on Spanish law, as a basis for continuing its refusal to return the Painting, therefore conflicts with the foreign policy of the United States—expressed by the Executive Branch in signing those international declarations. *Cassirer VII* makes no mention of them, but the concurring opinion notes that the same panel previously concluded "we cannot order compliance" with them. *See* 89 F.4th at 1246 (Callahan, J.) (citing *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App'x 452, 457 n.3 (9th Cir. 2020) [*Cassirer IV*]). That rationale simply fails to address this Court's unanswered question: Whether or when "other sources reflecting distinctly federal interests" (other than the FSIA itself) may impose limits on the application of choice-of-law rules under state law. *See Cassirer V*, 142 S. Ct. at 1510 & n.3. For this reason alone, certiorari is warranted.

The Terezin Declaration of 2009 shares one of the same objectives with Allied Military Law No. 52. The Supreme Headquarters, Allied Expeditionary Force ("SHAEF") issued Law No. 52 in late 1944. It provided that property held by Nazi Germany was blocked and controlled, and further, that:

> (2) Property which has been the subject of transfer under duress, wrongful acts of confiscation, dispossession or spoliation, whether pursuant to legislation or by procedures purporting to follow forms of law or otherwise, is hereby declared to be equally subject to seizure of possession or title, direction,

> management, supervision or otherwise being taken into control by Military Government.

Allied Mil. L. No. 52, Art. I, § 2, *reprinted as amended*, 12 Fed. Reg. 2189, 2196 (April 3, 1947) (5-ER-1048).[5] Thus, by its terms, Law No. 52 made the Painting subject to Military Government control—since, "[t]here is no dispute that the Nazis stole the Painting from Lilly." *See Cassirer VII*, 89 F.4th at 1231. And that has legal consequences, because the law further commanded:

> (1) Except as hereinafter provided, or when licensed or otherwise authorized or directed by Military Government, no person shall . . . transfer, export . . . or surrender possession, custody or control of any property:
>
> . . .
>
> (iv) Which is a work of art or cultural material of value or importance, regardless of the ownership or control thereof.

Allied Mil. L. No. 52, Art. III, § 1 (as amended April 3, 1945) (5-ER-1048). A violation of Law No. 52 could be met with "any lawful punishment, including death," under Art. VIII (ER 1049). But Art. V's prohibition was legally self-executing, even without criminal prosecution, because prohibited transactions are "null and void:"

> Any prohibited transaction effected without a duly issued license or authorization from

5. A state government archive in Stuttgart has a copy of a poster, of the kind used to disseminate Law No. 52 in occupied Germany, dated August 1, 1945. *See http://www.landesarchiv-bw.de/plink/?f=1-108596-1.*

> Military Government and any transfer, contract or arrangement made, whether before or after the date of this law, with the intent to defeat or evade the powers or objects of Military Government or the restitution of any property to its rightful owner is null and void.

Id., Art. V (5-ER-1048).

Law No. 52 did not "merely suspend[] the validity" of any otherwise-applicable rules for acquiring title to property "until the law went out of effect." *Elicofon*, 536 F. Supp. at 843 n.14. Rather, by nullifying and voiding the transfer of stolen art or cultural material from Germany, the legal effect of Art. V—as the result in *Elicofon* shows—is to preempt the conflicting application of choice-of-law rules (under state law) that would otherwise validate the asserted title of a subsequent transferee such as TBC. Analogous to this case under the FSIA (*see* 28 U.S.C. § 1606), *Elicofon* was a diversity case where state law applied, pursuant to the federal Rules of Decision Act (28 U.S.C. § 1652). The defendant invoked the German "*Ersitzung*" doctrine that would allow a good-faith purchaser to obtain title in stolen property after passage of ten years. *See* 536 F. Supp. at 830, 832. The court held the original thief in Germany had been a servant of the true owner (which precluded *Ersitzung*); and that anyway, "Military Law No. 52 . . . , ***in any event***, precluded the transfer of good title." *Id.* at 845 (emphasis added). Similarly, even if California law here would otherwise point toward choosing Spain's law of acquisitive prescription of title after passage of three or six years, TBC could not obtain good title to the stolen Painting—not in any event. In no event could TBC (or anyone else but the heirs of Lilly Cassirer) obtain good title to the Painting.

As just quoted, Law No. 52 applied to any works of art, "regardless of the ownership or control thereof." Thus, it anticipated future restitution of property stolen from privately-owned collections like Lilly Cassirer's, and Art. V expressly nullified past or future transactions intended to avoid restitution of such property "to its rightful owner." Yet *Cassirer VII*'s choice of Spain's Article 1955 defeats that purpose, by validating TBC's claim over the rightful owner's claim—namely, Lilly Cassirer's claim. Notably, Spain had been warned that just such a provision as Law No. 52 would be coming. In January 1943, the U.S. and Allies jointly issued "a formal warning . . . in particular to persons in neutral countries" (such as neutral Spain), making clear that the three Allies "reserve[d] all their rights to declare invalid any transfers of, or dealings with, property. . . ." *See* Declaration Regarding Forced Transfers of Property in Enemy-Controlled Territory, 8 Dep't of State Bull. 21, 21-22 (Jan. 9, 1943). An earlier panel of the Ninth Circuit quoted the very same international warning in another case, as disfavoring immunity under the FSIA for expropriating Nazi-looted paintings in Austria. *Altmann v. Republic of Austria*, 327 F.3d 1246, 1246-47 (9th Cir. 2003), *aff'd*, 541 U.S. 677 (2004). Law No. 52 does just what the Allies had warned.

Cassirer VII also conflicts with the other Allied policies (*see* 25 Dep't of State Bull. at 339) that were understood and intended to mean that restitution may be expected for as long as plundered works of art continue to be "rediscovered." In December 1945, an official U.S. commission circulated a letter to museums, art and antique dealers and auction houses. Copies of that letter were circulated again by the U.S. Department of State in early 1947 and reprinted in the official bulletin:

"Where the source or origin objects may be obscure or suspicious and where the objects may be of special artistic importance, the Commission would appreciate being informed. . . ." *See* Letter to Museums, Art and Antique Dealers and Auction Houses, Dec. 10, 1945, *reprinted in* 16 Dep't of State Bull. at 359-60 (Feb. 23, 1947). The letter continued: "It is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad." *Ibid.*

The February 1947 bulletin was officially published, only after the U.S. State-War-Navy Coordinating Committee (the "SWNCC," pronounced "Swink") had jointly approved a policy memorandum on January 28, 1947 entitled "Return of Looted Objects of Art to Countries of Origin." This SWNCC memorandum announced:

> The introduction of looted objects of art into this country is contrary to the general policy of the United States and to the commitments of the United States under the Hague Convention of 1907 and in case of objects of a value of $5,000 or more is a contravention of Federal law. It is incumbent on this Government, therefore, to exert every reasonable effort to right such wrongs as may be brought to light.

16 Dep't of State Bull. at 358. The National Stolen Property Act (codifed as amended in 18 U.S.C. §§ 2311, 2314, 2315) applies to importing from abroad any stolen property with a value of $5,000 or more—such as the Painting clearly was, when the Frank Perls Gallery arranged for selling it "to collector Sidney Brody for $14,850." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 956 (9th Cir. 2017) [*Cassirer III*].

2. The Ninth Circuit's State-Law Analysis Is Preempted by those Federal Interests.

U.S. treaties and federal statutes preempt conflicting state laws. Executive Branch determinations of foreign policy are also preemptive, at least when expressed by international agreements. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 (2003). Moreover, a state law may be "preempted because it infringes upon the federal government's exclusive power to conduct foreign affairs, even though the law ***does not*** conflict with a federal law or policy." *Von Saher*, 592 F.3d at 963 (emphasis added). When the stolen Painting was trafficked in, through and out of the U.S. (including through California), the Painting was a prohibited spoils of war under the 1907 Hague Convention. This was prohibited, precisely because the Nazis had stolen the Painting. Nazi Germany was the vanquished state that we and our Allies had unconditionally defeated. Article 47 forbids pillage; and Article 56 provides that "[a]ll seizure of . . . works of art and science is forbidden, and should be made the subject of legal proceedings." *See* 36 Stat. 2277, 2307, 2309 (Oct. 18, 1907).[6]

President Theodore Roosevelt, Jr. ratified the Hague Convention on February 23, 1909. *See* 36 Stat. at 2277. Its provisions were certainly well known to the Americans who worked to prepare and carry out the conquest and occupation of Germany. They can be traced directly back to President Abraham Lincoln's issuance of "General Orders No. 100: Instructions for the Government of the

6. Spain is party to an earlier Hague Convention with its own version of Articles 47 and 56 that contain nearly identical text. *See* 32 Stat. 1803, 1822, 1824 (July 29, 1899).

Armies of the United States in the Field" (April 24, 1863), which was commonly known in the U.S. Army as the "Lieber Code," after its author Franz ("Francis") Lieber. *See* James G. Garner, "General Order 100 Revisited," 27 Mil. L. Rev. 1, 1, 33 (1965). For instance, Article 35 of the Lieber Code afforded protection for works of art that was "similar to the protections of Article 56 of the 1907 Hague Regulations." Garner, *supra*, 27 Mil. L. Rev. at 34. Like Article 47 of the Hague Convention, the Lieber Code in Article 44 prohibited "all pillage or sacking, even after taking a place by main force."

Codifying and adopting these international standards under Presidents Lincoln and Roosevelt effectively repudiated the Napoleonic practices that had made seizing property from conquered territory one of the main motivations for conducting war. *See* Raymond J. Dowd, "Lincoln, Napoleon and Hitler Walk into a Bar," Kunst und Recht Journal für Kunstrecht, Urheberrecht und Kulturpolitik (Feb. 2025, forthcoming). Consequently, as the SWNCC's January 1947 policy memorandum expressed (*see* 16 Dep't of State Bull. at 358), the U.S. was indeed barred by its treaty obligations under Article 56 from allowing the Painting to be imported from Germany. Emulating the 1946 judgment at Nuremburg, Congress later legislated in the Holocaust Victims Redress Act (the "HVRA") that "the same international legal principles applied among states"—specifically *including* Article 56—"should be applied to art and other assets stolen from victims of the Holocaust." *See* Pub. L. No. 105-158, § 201(1), (2) and (5), 112 Stat. 15, 17 (Feb. 13, 1998).[7] Congress and

7. At Nuremburg, the International Military Tribunal convicted individual Nazis of crimes for violating the 1907

the Executive (not the Judiciary, and not the States) have competence over foreign affairs of this nature. *See Crosby*, 530 U.S. at 386.

Spain's conflicting and essentially Napoleonic interest in applying its domestic Article 1955 (and thus, the need for federal preemption of applying California's state law choice-of-law rule to do so) is also evident from the Painting's obviously "obscure or suspicious" provenance. *See* 16 Dep't of State Bull. at 359-60. The same Allied governments agreed in July 1946 upon "a common demarche to be made to the neutrals," including Spain. *See* Statement of Policy with Respect to the Control of Looted Articles, July 8, 1946, *reprinted in* 25 Dep't of State Bull. at 340 (Aug. 27, 1951). Under this international demarche: "The governments of the neutral countries shall, furthermore, alert their public opinion with regard to their interest in looted articles . . . , requesting that all suspicious cases be notified to the police and other governmental services." *Ibid.* Today, TBC is "an instrumentality of the Kingdom of Spain." *Cassirer VII*, 89 F.4th at 1230 n.1. Yet TBC has (obviously) not shared the same "interest" that the Allies jointly demanded. The district court found that "[t]he Kingdom of Spain and TBC's counsel again generally ***assumed*** that the Baron had acted in good faith" (FFCL at 15, 2019 U.S. Dist. LEXIS 247143, *37; emphasis added) but that—to the contrary—when the Baron obtained the Painting in October 1976 from the Stephen Hahn Gallery in New York, "there were sufficiently suspicious circumstances

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Hague Convention. *See* Oona Hathaway & Scott Shapiro, *The Internationalists: How A Radical Plan to Outlaw War Remade the World*, 290-91 (Simon & Shuster 2018).

to trigger a duty to investigate under Swiss law" (FFCL at 23, 2019 U.S. Dist. LEXIS 247143, *56). Still, *Cassirer VII* now awards title to TBC after a passage of three years (*see* 89 F.4th at 1229 n.3), despite those same four suspicious "red flags" confronting TBC throughout that time. *See* FFCL at 21-23 (quoted partially in the Petition at 13 n.8), 2019 U.S. Dist. LEXIS 247143, *51-57. All those same red flags remained apparent and unchanged in June 1993 when the Baron trafficked the Painting to TBC.

In short, the Ninth Circuit's analysis conflicts with the very federal interests that consistent U.S. policy and practice have sought to uphold. This is so, partly for one of the same reasons why the Cassirers' opening appeal brief also urged that California's state interest would be more impaired than Spain's would be, under the "comparative impairment" approach to choice-of-law. *See* Dkt. 10 at 47. California, like New York (and every U.S. state), has a "strong public policy to ensure that the state does not become a haven for trafficking in stolen cultural property, or permitting thieves to obtain and pass along legal title." *See Reif v Nagy*, 175 App. Div. 3d 107, 132, 106 N.Y.S.3d 5 (N.Y. App. Div. 2019) (citations omitted). The congruent federal treaties, agreements, laws and interests against importing and trafficking stolen property (generally) and spoils of war (in particular) limit and preclude awarding ownership of the looted Painting to TBC.

* * *

The latest act by Congress on Nazi-looted art is the HEAR Act of 2016. Congress legislated, it said, partly to overcome the result of the Ninth Circuit's decision

in *Von Saher*. *See* HEAR Act § 2(7), 130 Stat. at 1525. Still, "[i]t is the law of the case"—according to the Ninth Circuit—"that HEAR does not conflict with Article 1955." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.3d 554, 583 (9th Cir. 2023) [*Cassirer VI*]. That very much overstates the earlier holding in *Cassirer III*, which said nothing about whether applying California choice-of-law analysis to invoke Article 1955 conflicts with the HEAR Act. *See* 862 F.3d at 964. Regardless, "law of the case" is only binding on *lower* courts, after a higher court has made a decision. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). And this Court explicitly did not decide whether federal interests limit applying state-law analysis here. *See Cassirer V*, 142 S. Ct. at 1510 & n.3.

Clearly though, *Cassirer VII*'s application of California choice-of-law analysis to follow Spain's domestic Article 1955 conflicts with the federal interest in the HEAR Act too—on top of conflicting with Law No. 52 and the other Executive actions, with HVRA § 201, and with the Hague Convention. HEAR Act § 5(a) displaces "any other provision of Federal or State law or any defense at law relating to the passage of time." 130 Stat. at 1526. The Ninth Circuit's decision applying California law to choose Spain's law that allows TBC to defeat the Cassirers' claim after three or six years of uninterrupted possession (*see* 89 F.4th at 1232 n.6) violates that statute.

3. Those Same Federal Laws and Interests Also Preclude TBC's Previously-Waived Assertion that the "Domestic Takings Rule" Immunizes It from Suit under the FSIA and *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021).

Waiver of sovereign immunity, "either explicitly or by implication," is a basis for exercising jurisdiction over claims against a foreign state or its agencies and instrumentalities under the FSIA. 28 U.S.C. § 1605(a)(1). Before this Court, TBC waived FSIA immunity by arguing the merits of the choice-of-law for deciding these claims in *Cassirer V. See* TBC's Brief in Opposition at 1, 2, Case No. 20-1566 (filed July 29, 2021) (describing the case as one "in which ***an exception to the [FSIA] permits a court to exercise jurisdiction***" and as one "where a foreign sovereign has been stripped of its immunity"; emphasis added); Brief of Respondent at i (Dec. 15, 2021) (urging a revision of the "Question Presented," by characterizing the lower courts in this case as "federal court[s] hearing a state-law claim against a foreign instrumentality ***pursuant to an exception to immunity*** under the [FSIA]"; emphasis added).

TBC also continued to litigate these claims, on their merits, after this Court's remand to the Ninth Circuit—again, raising no further challenges to the exercise of jurisdiction to hear them under the statutory exception to foreign sovereign immunity that applies here. *See* TBC's Supplemental Brief (Dkt. 88), filed June 27, 2022; TBC's Additional Brief on Application of California's Choice-of- Law Test (Dkt. 138), filed Sept. 29, 2023. Belatedly, and only after the *Cassirer VII* decision had ruled in

TBC's favor on the merits, TBC argued that "[b]ased on *Philipp*, the Foundation reasserts its lack [of] subject matter jurisdiction defense under the FSIA, an issue this Court *must* consider in deciding plaintiffs' petition [for rehearing of *Cassirer VII*]." TBC's Response to Plaintiffs/Appellants' Petition for Rehearing and Rehearing En Banc, at 18 (Dkt. 170), filed April 5, 2024. Notably, the case of *Federal Republic of Germany v. Philipp*, 592 U.S. 169 (2021), had been decided more than a year *prior* to the choice-of-law ruling on the merits by this Court in *Cassirer V* and long before TBC's victory on the choice-of-law argument in *Cassirer VII*. Those explicit statements, as well as TBC's acts of litigation conduct, effectively waived its newly "reasserted" defense invoking lack of jurisdiction under the FSIA.

In *Philipp*, this Court upheld the "domestic takings rule" (*see* 592 U.S. at 176), which is a rule of statutory interpretation to the effect that the FSIA's expropriation exception's "reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals." 592 U.S. at 179-80 (quoting *Republic of Austria v. Altmann*, 541 U. S. 677, 713 (2004) (Breyer, J., concurring)). On its face, this construction of the statutory exception for "property taken in violation of international law" (under 28 U.S.C. § 1605(a)(3)) would have no effect on the Cassirers' claims here: "Ms. Cassirer was not a German citizen at the time of Nazi Germany's taking of the Painting since, according to the Nazis' citizenship laws at that time, '[a] Jew cannot be a citizen of the Reich.'" *See* Mem. and Order Re: Defendants' Motion to Dismiss, *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1165 (C.D. Cal. 2006) (quoting a translation of the Reichs Citizenship Law (Nov. 14, 1935), Art. 4(1)), *aff'd*, 616

F.3d 1019 (9th Cir. 2010) (en banc). And *Philipp* expressly declined to consider whether "the sale of the Welfenschatz is not subject to the domestic takings rule because the consortium members were not German nationals at the time of the transaction." *See* 592 U.S. at 187 (noting that Germany contended this argument had been forfeited in that case).

Furthermore—and no less importantly—both Law No. 52 and the 1907 Hague Convention comprise parts of the international law of property that falls within *Philipp*'s construction of the expropriation exception (and thus, outside the domestic takings rule), thereby precluding TBC's own waived argument now. *Philipp* reasoned that "[t]he exception [in § 1605(a)(3)] places repeated emphasis on property and property-related rights, while injuries and acts we might associate with genocide are notably lacking." 592 U.S. at 182. Articles 47 and 56 of the Hague Convention forbid the pillage of art, while saying literally nothing about genocide. Article V of Law No. 52 nullifies transfers (whether done before or after the law's effective date) with intent to defeat or evade the restitution of any property to its rightful owner—while not mentioning genocide whatsoever. For that matter, there is also nothing about genocide in the above-mentioned 1943 declaration of the Allies (quoted in *Altmann*, 327 F.3d at 1246-47); in the 1946 Allied demarche to neutrals like Spain; in the 1947 SWNCC memorandum (acknowledging the Hague Convention and the National Stolen Property Act); nor in the 1951 memorandum of the State Department that "restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered."

As explained by Ferguson, *supra*, 37 Ky. L.J. at 46, Law No. 52 was promulgated by the Executive, in agreement with international Allies, in planning for the control of property during the occupation that would resolve the war—all entirely without regard for any genocide. Thus, TBC's argument fails (even if not otherwise waived) because it overlooks that the domestic takings rule itself grows from "deep roots not only in international law but also in United States foreign policy." *See Philipp*, 592 U.S. at 177. As required by international law under the Hague Convention, the United States and its Allies jointly adopted laws and policies to ban the export of stolen art and to restore the ownership of stolen property located in Germany. That makes all such property that anyone (such as Dr. Urban in Munich or Frank Perls in Beverly Hills) took from Germany "property taken in violation of international law" under § 1605(a)(3)—regardless of whether the Nazis and their collaborators had also violated international law by stealing or coercing a transfer of the property from a Jew, a political dissident, a disloyal Nazi, or anyone else that Adolf Hitler and his thugs regarded as an enemy of National Socialism.

B. The Petition Raises Questions of Exceptional Importance Because *Cassirer VII* Permits a Foreign Sovereign to Claim Spoils of War—in Conflict with Federal Criminal Law and Established International Obligations.

The trial decision found that Lilly Cassirer's looted Painting was trafficked through the U.S. at least seven times during 25 years (1951-1976), crossing interstate and international borders repeatedly. *See* FFCL at 3-6, 2019 U.S. Dist. LEXIS 247143, *8-11. Perls in Beverly

Hills arranged for Dr. Urban in Munich to export it to Brody in Los Angeles; then, Brody returned it to the Perls gallery; Perls passed it to Knoedler & Co. in New York; Knoedler passed it to Sydney Schoenberg in St. Louis; the Schoenberg estate (presumably) passed it to the Hahn gallery in New York; the Hahn gallery purported to sell it to the Baron; and the Baron shipped it to Switzerland. *Ibid*. The Ninth Circuit reasoned, "[t]he only conduct connected to the Painting that occurred in California involved the sale of the Painting there in the early 1950s, ... [b]ut the parties do not claim this sale is in any manner relevant." *Cassirer VII*, 89 F.4th at 1242 n.14. Incorrectly, that rationale overlooks the Cassirers' appellate brief (mentioned *supra*) arguing about California's interest in not becoming a haven for trafficking stolen art. *See* Dkt. 10 at 47. More importantly, by elevating Spain's asserted interest, *Cassirer VII* denigrates the federal commitments of the United States under the Hague Convention, which Law No. 52 implemented in resolving the war with Nazi Germany, and the policy of the National Stolen Property Act, applicable to interstate and foreign commerce in stolen objects worth $5,000 or more.

By doing so, the Ninth Circuit implicitly tells the international legal community that the U.S. and its component states are surrendering their interest in regulating the traffic in stolen cultural property from Nazi Germany. Customary international law grows by developing international legal consensus. *The Paquete Habana*, 175 U.S. 677 (1900). Like the "French prize tribunals" (*id.* at 694-95), the "judgments and opinions of national judicial tribunals" such as the Ninth Circuit and this Court receive "substantial weight" in determining whether a rule has become international law. *See*

Restatement (Third) Foreign Relations Law of the U.S., § 103 (1987). Until *Cassirer VII*, national courts in the U.S. have "decline[d] to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force." *In re Flamenbaum*, 22 N.Y.3d 962, 966 (2013) (citing *Menzel*, 49 Misc. 2d at 305-08).[8] The armed forces of the United States and its Allies had occupied Germany when the Painting was taken in 1951 from Munich to Los Angeles. For that very reason, *Cassirer VII* breaks from the previously-consistent international practice.

CONCLUSION

Upholding Germany's own international claim for recovery of stolen property in the *Flamenbaum* case contributed to the same consistent practice described *supra*—to wit, the 1907 Hague Convention itself, as well as the Allies' 1943 declaration on the restitution of looted property; the Allied promulgation of Law No. 52 in 1944 for the control of property in occupied Germany and its anticipated restitution to the rightful owners; the 1946 Allied demarche to Spain and other neutrals to look out for looted property; the 1947 SWNCC memorandum (acknowledging the Hague Convention and the National Stolen Property Act); the 1951 memorandum of the State Department that "restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered;" and of course, the Terezin Declaration. The *Elicofon* decision had also

8. In *Menzel*, the looted Chagall painting had been trafficked by Frank Perls's brother Klaus and Klaus's wife Amelia, trading as "Perls Galleries" in New York. *See* 49 Misc. 2d at 302.

followed this practice. Congress aimed to cement this practice (for private claims like the Cassirers') in HVRA § 201 and HEAR Act § 5(a). HVRA § 201 directs that Article 56 of the Hague Convention should be applied to art stolen from Holocaust victims like Lilly Cassirer. By breaking from all of that, *Cassirer VII* threatens to disrupt the consensus of international custom, much for the worse.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Monuments Men and Women Foundation

Dated: February 3, 2024

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX — 1944 T.J. DAVIS.
SHAEF MEMO ON LAW NO. 52

~~RESTRICTED~~

SUPREME HEADQUARTERS
ALLIED EXPEDITIONARY FORCE

APO 757 (Main)
AG 014.1-1 (Germany) GAP-AGM 21 November 1944

SUBJECT: Prohibition of Sale and Export of Works of Art in Germany

TO : All Concerned

Law 52, Article II, paragraph 3(d) of Proclamations, Laws and Ordinances, published in connection with the Military Government of Germany, forbids the sale, transfer and export of works of art and other cultural material. Its purpose is to make possible the restoration to their rightful owners of loot taken from other countries. In furtherance or this purpose, personnel of the Allied Expeditionary Forces in occupied German territory will not purchase or otherwise traffic in such objects.

By command of General EISENHOWER:

/s/
T. J. DAVIS
Brigadier General, USA
Adjutant General