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

REPLY BRIEF FOR PETITIONERS

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I. GVR IS APPROPRIATE IN THIS CASE

A. Equitable Considerations Favor GVR

This case meets the test that GVR is available "as may be just under the circumstances." 28 U.S.C. §2106. TBC's arguments that a GVR order would be "unfair" or "inequitable" (Opp. 15–18) are meritless. At most, they raise matters that TBC might assert in the lower courts on remand.

In terms of justice in the broadest sense, as Judge Graber observed below: "[T]he moral dimension of the case adds significant importance to our reaching the legally correct result." App. 65a (dissenting statement). Indeed, "this is the case where the law and moral sense of mankind must stand together." Amici Brief of 1939 Society, *et al.*, at 13 (citing Justice Jackson's Nuremberg Trial opening statement).

This Court held in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022) ("*Cassirer V*") that California's choice-of-law rules apply to determine the parties' substantive claims. The Legislature, having full authority to prescribe choice-of-law, did so in unanimously passing AB 2867. *See* App. C. The law adds Code of Civil Procedure ("CCP") §338(c)(6), which provides that "[n]otwithstanding any other law or prior judicial decision," in any action brought by a California resident to recover stolen art held by a museum, or

described in the Holocaust Expropriated Art Recovery (HEAR) Act, "California substantive law *shall apply*." App. 76a–77a.[1]

Contrary to TBC's claim (Opp. 3–4), there is nothing "unjust" about a legislature changing the law of a State when a particular event has illustrated and galvanized the need for change.[2] That is what happened here, and the resulting law must be judged according to what it actually provides.

AB 2867 does not single out TBC for special treatment. On the contrary, it adds Code of Civil Procedure ("CCP") §338(c)(6), which applies "[n]otwithstanding any other law or prior judicial decision" to, inter alia, "*any action*," pending or future, "brought by a California resident" "against a museum, gallery, auctioneer, or dealer" for "recovery of a work of fine art." *See* App. 74a, 76a–77a.

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[1] Throughout this brief, all emphases are added, and internal citations omitted.

[2] In attempting to discredit the legislation, TBC quotes a memo prepared by a legislative committee staff member. However, staff memos and committee reports may be considered only "when the meaning of a statute is uncertain," *Hutnick v. U.S. Fid. & Guar. Co.*, 47 Cal.3d 456, 465 n.7 (1988), which is not the case here. Conversely, the "specific and detailed" findings in the statutory text, which Petitioners discuss below (at 3, 6–7), were passed by the entire Legislature subsequent to the staff memo, and "are given great weight." *Young v. Superior Ct. of Solano Cnty.*, 79 Cal.App.5th 138, 157 (2022) (quoting *California Hous. Fin. Agency v. Elliott,* 17 Cal.3d 575, 583 (1976)).

The statute contains detailed findings concerning California's history of legislation addressing stolen art claims and reiterating California's strong public policy rejecting "constructive discovery" as a basis to defeat a claim by the rightful owner to recover stolen art. *See* Pet. 20–22.

Accordingly, in light on the statutory findings and the broad applicability of §338(c)(6), it is unquestionably a proper exercise of legislative power. It must be applied by the courts, and a GVR is the simplest and most efficient way to do so.

TBC argues the statute "attempts to circumvent the 'choice of law' question" (Opp. 4–5), ignoring that the Legislature can displace common law. As the statutory findings recognize: "The Legislature has the authority to mandate California substantive law as the rule of decision in specified matters as indicated in California case law and Section 6(1), Restatement (Second), Conflicts of Laws: 'A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.'" App. 73a. *See* Pet. 22–24.

TBC's claim that a GVR would be "unjust" because there was a "full and fair merits trial," Opp. 2, 15–18, is a red herring. The one-day trial in 2018 addressed solely whether TBC was an "encubridor" under Spanish law, which in the district court's view required smoking-gun proof of "actual knowledge" the Painting was stolen. *See* Supp.App. 64a. But if Spanish law is inapplicable, the trial is irrelevant.

B. A Different Outcome Following GVR Is Likely

TBC argues GVR should be denied because there is not a "reasonable probability that the decision below rests upon a premise that the lower court would reject" upon further consideration. Opp. 19. TBC is wrong. A "dominant principle" in ordering GVR is "to give opportunity for the application by the lower courts of statutes enacted after their judgments," because courts "should conform their orders to the state law as of the time" the case is finally decided. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 542–43 (1941). The Court has "GVR'd in light of a wide range of developments, including…new state statutes." *Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996).

The decision below cannot survive under California's *current* law. As the court of appeals recognizes, and TBC has never disputed, "if California law applied, TBC would not have title to the Painting. The Cassirers…would have title." App. 3a & n.3 (cleaned up). Because §338(c)(6) now directs application of California substantive law, GVR is appropriate.

TBC raises a laundry list of arguments in opposition to application of §338(c)(6). Opp. 19–23. Again, while these arguments are flawed and misdirected, and TBC may choose to argue them on remand, they provide no reason to deny GVR.

TBC first argues §338(c)(6) "is unconstitutional and subject to federal preemption." Opp. 19. Citing

the Government's amicus brief in *Cassirer V*, TBC argues §338(c)(6) "would require application of California substantive law to cases having little or no connection to California." Opp. 4, 6, 21. But if DOJ believed that applying California substantive law were constitutionally suspect on the facts here, it would have said so. The constitutional analysis, on a case-by-case basis, is unchanged with choice-of-law now governed by statute rather than common-law rules.

In any event, California's "aggregation of contacts with the parties and occurrence" amply satisfy *Allstate Ins. Co. v. Hague* standards, 449 U.S. 302 (1981) (Opp. 6):

- The Painting was physically present in California when smuggled there in 1951 (in violation of Allied Military Law 52 and U.S. criminal law) and sold twice by a Beverly Hills gallery. Pet. 10 & n.6.

- Claude and Beverly Cassirer retired to San Diego in 1980 to join their son David, the Petitioner here, and lived there until their deaths in 2010 and 2020 respectively.

- Claude resided in California when he first discovered the Painting was held by TBC, requested its return, and filed suit in 2005.

- Claude created a California family trust which held his interest in the Painting, and included

the San Diego Jewish Federation as a beneficiary.

- TBC's extensive commercial activities in California and the United States were exhaustively detailed in the district court's finding of jurisdiction over TBC under 28 U.S.C. §1605(a)(3). Pet. 10.

C. There Is No Discrimination

TBC argues §338(c)(6) "discriminate[s] against the foreign state" and interferes with "the federal government's…authority over foreign affairs." Opp. 6, 8.

The law is not discriminatory. Legislatures, as well as Congress, frequently are inspired to legislate by real-life events and court decisions. Mentioning the motivation in the statute or legislative history does not make a new law "discriminatory." In this regard, the Legislature identified the *Cassirer* case as an illustration of why a definitive choice-of-law rule was necessary. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) (upholding a new law that "affected the adjudication of [named] cases…by effectively modifying the provisions at issue in those cases").

The Legislature was responding to the fact that important State interests, including the "actual knowledge" trigger for limitations periods, could be nullified under the common-law rule:

> This law effectuates California's established laws and public policies against theft and trafficking in stolen property; precluding a thief from passing good title to any subsequent purchaser of stolen property; protecting the rights of true owners to recover stolen artwork and other items of cultural property; and precluding the true owners of stolen property from being divested of title without actual knowledge of their rights in and the location of the property.

See App. 71a–73a.

In implementing these State policies, §338(c)(6) does not discriminate against Spain or any other jurisdiction, domestic or foreign. Under *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), California's legislated choice-of-law rule must be applied by federal courts. *See* U.S. Amicus Brief at 8, *Cassirer V*, 2021 WL 5513717 (FSIA's policy of "defer[ence] to a State's substantive policy choices in claims against…foreign sovereigns …applies to the *entirety of a State's law*"). It therefore applies to make TBC "liable in the same manner and to the same extent as a private individual under like circumstances." *Cassirer V*, 596 U.S. at 114 (quoting 28 U.S.C. §1606).

D. Section 338(c)(6) Is Not Preempted

TBC's half-hearted claim that there might be a "[p]otential federal preemption issue" (Opp. 20) is meritless. TBC cites Ninth Circuit caselaw finding that "foreign policy field preemption" invalidated a 2002 California law (CCP §354.3) extending the limitations period *only* for actions to recover Nazi-looted art. Opp. 20; *see Von Saher v. Norton Simon Museum*, 592 F.3d 954, 967–68 (9th Cir. 2010).

A later Ninth Circuit decision in the instant case forecloses TBC's argument. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013) ("*Cassirer II*"), upheld 2010 amendments to CCP §338(c) (enacted in response to *Von Saher*), which replaced CCP §354.3 and adopted a six-year limitations period from date of actual discovery for *all* stolen art claims against museums. As *Cassirer II* recognized, "[w]hile §354.3 covered only claims to recover 'Holocaust-era artwork,' §338(c)(3) extends to '*any* work of fine art,'" and the fact that it "*may* permit Holocaust-era claims is not the test for preemption." *Id.* at 619 (court's emphasis). Section 338(c)(6) likewise applies to *all* claims against museums for stolen art.

Section 338(c)(6)'s reference to the HEAR Act serves merely to identify a category of cases to which the choice-of-law rule applies, in addition to cases against museums under §338(c)(2) and (3).[3] This

[3] *See* App. 76a ("…in any action…involving claims…*as described in* paragraph [336(c)] (2) *or* (3), *or* in the [HEAR] Act…California substantive law shall apply.").

addition affords relief to California claimants seeking to recover Nazi-looted art held by *non-museum* defendants. The statute is applicable here, however, without regard to the HEAR Act, by virtue of its reference to §338(c)(3) (action against a museum). TBC thus lacks standing to challenge the HEAR Act reference. *See California v. Texas*, 593 U.S. 659, 678–79 (2021) (no standing where invalidating "allegedly unlawful provision" would not impact enforceability of other statutory provisions). In any event, AB 2867 contains a severability clause. *See* App. 82a.

E. TBC Has No Due Process or Vested Rights

TBC argues §338(c)(6) would "deprive TBC of its ownership right, which vested in 1996 in Spain, where the Painting had been since 1992." Opp. 22. But foreign governments have no due process rights. *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) ("foreign states are not 'persons' protected by the Fifth Amendment," citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) ("the term 'person' does not include the sovereign")); nor does a government entity like TBC "if the state so 'extensively control[s]' the instrumentality 'that a relationship of principal and agent is created.'" *Frontera Resources Azerbaijan Corp. v. State Oil Co.*, 582 F.3d 393, 400 (2d Cir. 2009). TBC admits it is an agency or instrumentality of the Kingdom of Spain, *see Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1027 (9th Cir. 2010) (en banc) ("*Cassirer I*"), and the district court findings show TBC operated essentially as Spain's agent in

acquiring the Painting and in its continuing possession and display. *See* Supp.App. 25a–26a; Amicus Brief for State of California at 17–23, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 2016 WL 358496.

Finally, even if TBC were entitled to due process protections, its "vested rights" argument is meritless because it is circular. It assumes the outcome of the very question at issue, namely whether California or Spanish substantive law applies.

F. GVR Is Far Preferable to Alternative Avenues of Relief

TBC argues that Petitioners "can pursue their relief" through a pending Rule 60(b)(6) motion,[4] or by bringing a new action under another provision of AB 2867, CCP §338.2. Opp. 24–25; App. 82a (AB 2867 §3). But those "alternate routes," Opp. 24–25, do not justify denial of GVR and would be particularly inefficient. Each would entail time-consuming preliminary motions, with TBC then likely raising the same opposing arguments it makes here, and appeals thereafter. A GVR, by contrast, would avoid years of added delay, while presenting the dispositive issues to the Ninth Circuit or district court for prompt decision.

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[4] Petitioners filed a Rule 60(b)(6) motion in the district court on January 28, 2025, as a protective measure because Ninth Circuit law suggests a Rule 60 motion based on a new statute may be untimely if filed after the direct appeal process concludes. *See Ratha v. Rubicon Resources, LLC*, 111 F.4th 946, 957–58 (9th Cir. 2024). The district court granted the parties' joint request to stay the motion pending this Court's disposition of the Petition.

Grzegorczyk v. U.S., 142 S.Ct. 2580 (2022) (Opp. 24), is not remotely comparable. There, the government, in confessing error and requesting GVR, had the immediate, unilateral ability to grant relief by using the President's pardon power. *Id.* at 2581. Here, Petitioners can otherwise obtain relief only through further judicial proceedings on top of an already 20-year litigation marathon. A GVR provides the most direct route to a final determination.

A GVR also is consistent with the new statute, which provides that §338(c)(6), "*shall apply* to all actions pending on the date [AB 2867] becomes operative," App 77a, *i.e.*, September 16, 2024, which includes this action. Petitioners thereafter continued the direct appeal process in timely seeking certiorari and GVR.

II. ALTERNATIVELY, CERTIORARI IS WARRANTED TO ADDRESS PETITIONERS' SUPREMACY CLAUSE AND FEDERAL PREEMPTION ARGUMENTS

The Petition demonstrated that the Ninth Circuit's decision applying California common law choice-of-law principles failed to account for the Federal interests that are part of the law of every state. *See* Pet. 25–35. These same sources of Federal law and policy also preempt contrary application of state choice-of-law rules. *Id.* 35–41.

TBC's Opposition repeatedly dodges these arguments by asserting that "national or international policy is irrelevant to California's

choice-of-law rule," Opp. 27, and then restating the Ninth Circuit's erroneous application of that rule. As Petitioners showed, the balancing of interests under the California rule must address national and international policy, laws, and treaties because "federal law is as much the law of the several States as are the laws passed by their legislatures." Pet. 26 (quoting *Haywood v. Drown*, 556 U.S. 729, 734 (2009)).

This is not an "invitation to reconsider the constitutionality of virtually every state's choice-of-law test." Opp. 27. Rather, it raises important questions under the Supremacy Clause and pre-emption principles, not previously addressed by the Court, whether in *applying* those tests, Federal interests must be considered as part of the forum state's interests. Pet. 27–35, 39–41.

TBC has no meaningful answer to Petitioners' pre-emption argument that the HEAR Act by its literal words precludes recognition of Spain's law of acquisitive prescription. Pet. 35–39. It merely copies block quotes from the Ninth Circuit's superficial decision to the contrary, *see* Opp. 29–35, which are refuted by the statutory language.[5]

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[5] TBC's suggestion to obtain the Solicitor General's views (Opp. 35–36) is unnecessary to address the procedural and discretionary question whether to grant GVR. As to foreign affairs issues, the Court already has heard the Government's views in its amicus brief and argument supporting Petitioners in *Cassirer V*.

III. TBC CANNOT RELITIGATE SUBJECT MATTER JURISDICTION

TBC is wrong in arguing it is immune from suit under the FSIA's expropriation exception, 28 U.S.C. §1605(a)(3), citing *Fed. Republic of Germany v. Philipp*, 592 U.S. 169 (2021). Opp. 36–37. TBC vigorously litigated and lost the issue of subject matter jurisdiction years ago, and that determination is binding. Indeed, a year after this Court decided *Philipp*, it recognized that jurisdiction is established in this case:

> At a prior stage of this litigation, the courts below held that the Nazi confiscation of *Rue Saint-Honoré* brought Claude's suit against the Foundation within the expropriation exception. See 461 F.Supp.2d 1157, 1176–77 (C.D. Cal. 2006), aff'd, 616 F.3d 1019, 1037 (9th Cir. 2010) (en banc), cert. denied, 564 U.S. 1037 (2011). That determination, which is no longer at issue, meant that the suit could go forward.

Cassirer V, 596 U.S. at 111–12.

TBC litigated the jurisdictional issue for some five years. Based on fact-finding that TBC never challenged, the courts rejected the same "domestic takings" argument that TBC raises again here. *See Cassirer v. Kingdom of Spain*, 461 F.Supp.2d 1157, 1165–66 (C.D. Cal. 2006) (finding "domestic takings" principle inapplicable because Lilly Cassirer was not

a German citizen when the Painting was expropriated). The Ninth Circuit affirmed in *Cassirer I*, and certiorari was denied. 564 U.S. 1037 (2011).

Relitigation is prohibited by the law-of-the-case and jurisdictional finality doctrines. "When there are multiple appeals taken in the course of a single piece of litigation, law-of-the-case doctrine holds that decisions rendered on the first appeal should not be revisited on later trips to the appellate court." *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 350 (D.C. Cir. 1995) (applying doctrine to subject-matter jurisdiction under FSIA). Principles of jurisdictional finality also bar reconsideration of subject-matter jurisdiction determinations. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982).

CONCLUSION

For the foregoing reasons, and those stated in the Petition, Petitioners request that the Court grant certiorari.

February 18, 2025

Respectfully submitted,

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