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 a Foreign State,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* MARK B. FELDMAN, FORMER U.S. DEPARTMENT OF STATE ACTING LEGAL ADVISER IN SUPPORT OF PETITIONERS

MARK B. FELDMAN
2800 McKinley Place NW
Washington, DC 20015
(202) 321-2690
markfeld4@gmail.com

NICHOLAS M. O'DONNELL
Counsel of Record
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
(617) 338-2814
nodonnell@sullivanlaw.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

Mark B. Feldman has been practicing law for sixty years, including sixteen years in the U.S. Department of State (1965-1981), and has been teaching foreign relations law at Georgetown University Law Center. As Deputy and Acting Legal Adviser (1974-1981), he was the State Department attorney primarily responsible for preparing the revised bill submitted to Congress by the Ford Administration that became the Foreign Sovereign Immunities Act of 1976 ("FSIA" or "the Act"), 28 U.S.C. § 1602 *et seq*. In 1974-75, he held extensive consultations with stakeholders, other U.S. agencies, academics, and practicing attorneys to develop a consensus measure that Congress would consider.

Section 1606 of the Act, at issue in this proceeding, was developed by the Executive Branch in the Ford Administration. 28 U.S.C. § 1606. *Amicus* participated in drafting this provision and the section-by-section analysis included in H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976) ("House Report"). He also edited the FSIA expropriation exception to immunity on which jurisdiction is founded in this case. 28 U.S.C. § 1605(a)(3).[2]

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[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 *amicus* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] *Amicus* deleted the phrase "political subdivision" from the second prong as submitted to Congress by the Nixon Administration.

At the State Department, Professor Feldman also played a key role in developing U.S. law and policy concerning international trade in cultural property of doubtful provenance. Among other matters, he led the U.S. delegation that negotiated and largely shaped the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, TIAS 7008, 823 UNTS 231 (the "UNESCO Convention") that was implemented by Congress in 1983. *See* Convention on Cultural Property Implementing Act, Pub. L. No. 97-446, 19 U.S.C. § 2601 *et seq.* ("CCPIA"). One hundred forty-one nations are now party to the UNESCO Convention.

After leaving government service, Professor Feldman chaired an ABA committee on foreign sovereign immunity that developed the 1988 amendments to the FSIA and testified before Congress on the proposed amendments. He was the prime mover of the arbitration exception to immunity adopted by Congress as 28 U.S.C. § 1605(a)(6).

Professor Feldman's interest in this matter is to confirm the intent of Congress not to create a new body of federal conflicts law for suits against foreign states. The FSIA establishes uniform standards for determinations of foreign state immunity; it was "not intended to affect the substantive law of liability." House Report at 12.

SUMMARY OF ARGUMENT

1. Petitioners' claims are based on state law; they assert traditional rights to stolen property. The FSIA provides a federal framework for litigation against foreign states governing immunity, jurisdiction and execution of judgments; it does not affect the law governing disputes between litigants. *Id.* at 12.

Congress did not authorize the courts to create a new body of federal conflicts law for suits brought under the FSIA. To the contrary, Section 1606 of the Act expressly provides that a foreign state not entitled to immunity "shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." 28 U.S.C. § 1606. Application of federal common law to claims based on state law would violate accepted principles of federalism.

2. The weight given below to Spain's interest in Respondent Thyssen-Bornemisza Collection Foundation (the "Foundation") is inconsistent with Section 1606 and subverts the expropriation exception to immunity. 28 U.S.C. § 1605(a)(3).

3. Rejecting Petitioners' title to *Rue St. Honoré, après-midi, effet de pluie* (*Rue St. Honoré, Afternoon, Rain Effect)* by Camille Pissarro (the "Painting") severely impairs important California, U.S. and international interests in (a) discouraging illicit international trade in cultural property and (b) promoting restitution of cultural property confiscated by the Nazi regime in the WWII era. Common law tradition and California law hold that a thief cannot pass good title to stolen

property even to a bona fide purchaser. The decision by the court of appeals is also at odds with the policy not only of the United States and California, but also of Spain as a signatory to the Washington Conference Principles on Nazi-Confiscated Art (the "Washington Principles") and the Terezin Declaration on Holocaust Era Assets and Related Issues (the "Terezin Declaration") of 2009.

ARGUMENT

I. THE FSIA REQUIRES APPLICATION OF STATE CONFLICTS RULES TO CLAIMS ARISING UNDER STATE LAW.

A. The FSIA forbids the creation of a separate body of federal conflicts rules for suits against foreign states.

The FSIA was initiated—by the Executive Branch—to transfer responsibility for immunity determinations from the Department of State to the judiciary and to establish objective standards for judicial decision. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983). The statutory text was drafted mainly by State and Justice Department attorneys, and the section-by-section analysis submitted by the Executive was adopted in the House and Senate committee reports. *See* House Report.

When the bill first submitted to Congress by President Nixon in 1973 drew objections, the Administration was told that Congress could not process a

measure of this scope and complexity unless the bill commanded a broad consensus. Charles N. Brower, Acting Legal Adviser in the Nixon-Ford transition, asked *amicus* to coordinate the inter-agency effort to forge that consensus. After two years of work, State and Justice developed a new bill and a revised section-by-section analysis that the Ford Administration submitted to Congress on October 31, 1975.

The Ford bill, adopted by Congress in all relevant respects, made substantial changes in a few provisions and added technical improvements, including a new Section 1606 spelling out that in all respects other than punitive damages, a foreign "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. The explanation, drafted by the Executive and adopted by Congress, is simple: the Act "is not intended to affect the substantive law of liability." House Report at 12. *Verlinden*, 461 U.S. at 488–89 (quoting 28 U.S.C. § 1606) ("When one of these [§ 1605(a)(1) or § 1605(a)(2)] or the other specified exceptions applies, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.' "); *see also Bank of New York v. Yugoimport*, 745 F.3d 599, 609 n.8 (2d Cir. 2014) (The FSIA "provides foreign states and their instrumentalities access to federal courts only to ensure uniform application of the doctrine of sovereign immunity.").

Respondent's case for a federal common law rule rests on a fundamental misconception of one sentence in the House Report: "Such broad jurisdiction in the

Federal courts should be conductive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." *Id.* at 13. The Executive drafters of this text may have felt that federal judges might be more friendly to foreign powers than would state judges, but their interest in uniformity was limited to determinations of immunity. The drafters were well aware that following *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) ("*Erie*"), the constitutional scope for federal common law was limited,[3] and that applying federal conflicts rules in cases arising under state law would have created serious political problems.

As the Court noted in *First Nat'l City Bank v. Banco Para El Comercio Exterior De Cuba* ("*Bancec*"), 462 U.S. 611, 622 n.11 (1983), the FSIA was intended to create a "'uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts" but there was no suggestion that Congress authorized the Judiciary to create substantive rules, including conflicts rules, affecting claims against foreign states. Rather, the Court recognized that Section 1606 directs the courts to ensure that:

> the foreign state shall be liable in the same manner and to the same extent as a private

[3] *See also Rodriguez v. FDIC*, 140 S. Ct. 713 (2020) ("Judicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative powers' in Congress and reserves most other regulatory authority to the States.").

> individual under like circumstances . . . . Thus, where state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances. The statute is silent, however, concerning the rule governing the attribution of liability *among* entities of a foreign state.

Id. The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality.

Further, the Court's holding in *Republic of Aus. v. Altmann* that the FSIA applies to events preceding its enactment relies in good part on the fact that the Act regulates "assertions of immunity" not "actions protected by immunity." 541 U.S. 677, 697 (2004). The Court explained:

> The aim of the presumption [against retroactivity] is to avoid unnecessary *post hoc* changes to legal rules on which parties relied in shaping their primary conduct.

Id. at 696. This is because:

> The limitation is essentially substantive. In contrast, the FSIA simply limits the jurisdiction of federal and state courts to entertain claims against foreign sovereigns.

Id. at 695 n.15.

Conflict rules may be outcome determinative, as in this case, and are deemed to be substantive for purposes of *Erie*. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313

U.S. 487 (1941). It follows that Section 1606 precludes judicial creation of federal conflicts rules that might produce different substantive results in cases brought under the Act from those reached in private litigation. Displacement of state conflicts rules would undermine *Altmann* and raise difficult questions of retroactivity.

B. Respondent's federal common law theory is refuted by the text of the Act.

Section 1606 states:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages . . . .

28 U.S.C. § 1606.

As noted above, the Executive drafters who added Section 1606 to the FSIA also added an explanation to the legislative history to go with it: "The bill is not intended to affect the substantive law of liability." House Report at 12. Congress has prescribed that the same rules affecting liability apply in cases brought under the FSIA as in civil litigation between private parties. One, and only one, exception is made—to protect foreign states from punitive damages. Federal common law cannot trump applicable state conflicts rules.

Respondent does not challenge this reading, but argues that Section 1606 cannot apply to *any* case brought under the expropriation exception to immunity, 28 U.S.C. § 1605(a)(3), because "a private individual cannot commit a public, sovereign act." Respondent's Brief in Opposition to Petition for Certiorari at 27. This theory has no merit and has no bearing on this case in any event. Germany is not a party, and the Nazi confiscation of the Painting is not disputed. No public act by Spain is at issue in this matter. The Foundation purchased the Painting from a private collector, ignored the Painting's provenance and stands before the Court in the same position as any receiver of stolen property.[4]

Respondent's suggestion that the Foundation's acquisition of the Painting was a "public act" because public funds were used for the purchase (*id.*) is refuted by the statutory definition of "commercial activity" and by the case law. Section 1603(d) of the Act specifies that "[t]he commercial character of an activity shall be determined by reference to the nature of the . . . act, rather than by reference to its purpose." Even military procurements are commercial for FSIA purposes; procurement of boots for the army is the classic example. State Department Legal Adviser Monroe Leigh explained to Congress:

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[4] Foreign instrumentalities may be prosecuted in the United States for commercial conduct that is criminal. *U.S. v. Turkiye Halk Bankasi A.S.*, No. 20-3499-cr, 2021 U.S. App. LEXIS 31806, at *14-15 (2d Cir. Oct. 22, 2021).

> The substantive provision on commercial activities appears in section 1605(a)(2). However, the definition of a "commercial activity" is of central importance . . . . Under the definition, one determines whether an act is commercial by looking at its "nature" and not at its "purpose." This would mean, for example that a foreign state's purchase of grain from a private dealer would always be regarded as commercial, even if the grain were to serve some important government purpose.

Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. On Admin. Law & Governmental Rels. of the H. Comm. on the Judiciary, 94th Cong. 27 (1976). *See Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) ("[T]he issue is whether the particular actions that the foreign state performs . . . are the type of actions by which a private party engages in trade and traffic or commerce."); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993), ("[W]hether a state acts 'in the manner of' a private party" to engage in commercial activity is thus "a question of behavior, not motivation . . . .").

More broadly, Section 1606 applies on its face to *all* actions brought under the Act; excluding property takings would step outside the Act's "comprehensive framework." *Republic of Arg. v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014). Thus, the United States was correct in 2010 to inform the Court that *jurisdiction* in this case does not affect Respondent's *liability* one way or the other.

> Although the FSIA authorizes United States courts to exercise subject-matter jurisdiction over a foreign state or instrumentality that possesses property that was unlawfully expropriated, the FSIA does not itself affect the substantive liability of those foreign entities. Thus, whether the plaintiff has a valid cause of action or whether the foreign state has a valid defense, including one based on the act of state doctrine, does not affect the jurisdiction of United States courts to adjudicate those questions.

Brief for the United States as *Amicus Curiae*, *Kingdom of Spain v. Estate of Claude Cassirer*, 564 U.S. 1037 (2011).[5]

Finally, liability "in the same manner and to the same extent as a private individual under like circumstances" does not mean in the same manner as when a private person is liable for expropriation; a private person cannot commit a taking. It means, in this case, that Respondent's liability shall be adjudicated in the same manner as if its predecessor in interest (the Baron Hans Heinrich Thyssen-Bornemisza, or the "Baron," an individual) were the defendant. The same rules of decision must apply to Respondent as would have applied to the Baron. Once a sovereign defendant is within the federal courts' jurisdiction (which

[5] No act of state defense has been alleged in this matter and none could be. As shown above, Respondent's purchase of the Painting was a commercial transaction.

Respondent is), the rules of decision are the same as they would be for any other party.

C. The fact that a defendant is an instrumentality of a foreign state is not relevant to choice of law.

The decisions below to apply Spanish law in this case gave undue weight to factors that should have no bearing on choice of law in FSIA cases: (1) the Foundation is an instrumentality of the Spanish state, and (2) Spain used public funds to purchase the Painting for the Respondent. The district court stated:

> Spain unquestionably has an interest in serving these policy goals and applying its law of adverse possession to the Foundation's claim of ownership, especially given that the Foundation is an instrumentality of the Kingdom of Spain and the Painting has been located within its borders for over twenty years.

Cassirer v. Thyssen-Bornemisza Collection Found., 153 F. Supp. 3d 1148, 1157 (C.D. Cal. 2015) rev'd and remanded, 862 F.3d 951 (9th Cir. 2017). The court of appeals followed, "In a highly publicized sale, Spain provided TBC public funds to purchase the Collection, including the Painting." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 963 (9th Cir. 2017).

This reasoning destroys the parity between the parties required by Section 1606, the expropriation exception to immunity and the FSIA as a whole. Applying *any* rule of decision based on who the defendant is

discriminates against plaintiffs. The State Department drafters did not intend to give foreign states a substantive advantage in cases brought under the Act, and Congress would not have approved (and more importantly did not approve) that approach.

Finally, this concern for parity between parties is even more acute in cases brought under the expropriation exception to foreign state immunity. 28 U.S.C. § 1605(a)(3) provides jurisdiction in U.S. courts for claims concerning rights in property taken in violation of international law when the required commercial connections with the United States are present. That jurisdiction has been established here.[6] Allowing a foreign state defendant that has been found properly subject to the jurisdiction of U.S. courts to plead its own law as a defense regardless of the circumstance in a case where no "act of state" is alleged would void the expropriation exception of any meaning and frustrate the intent of Congress. As noted in *Bancec*, "the law of the state of incorporation normally determines issues relating to the internal affairs of a corporation . . . . Different conflicts principles apply, however, where the

[6] In this case, the defendant is an instrumentality, not the foreign government, and jurisdiction rests on the second prong of Section 1605(a)(3) which requires only that the property at issue "is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). As noted in the House Report "Under the second category, the property need not be present in connection with a commercial activity of the agency or instrumentality." House Report at 19.

rights of third parties external to the corporation are at issue." 462 U.S. at 622 n.11.

II. THE DECISION BELOW VESTING STOLEN PROPERTY IN RESPONDENT IS CONTRARY TO INTERNATIONAL NORMS ENDORSED BY BOTH SPAIN AND THE UNITED STATES.

For generations, international trade in cultural property has been fueled by war, theft, and looting of archeological sites. These abuses are still serious problems, but it is no longer acceptable to keep the fruits of such plunder. International norms, based on the UNESCO Convention and the Washington Principles,[7] delegitimize trade in stolen cultural property, and scarcely a month passes without a scandal involving the illegal importation or collection of stolen art.[8]

One hundred forty-one nations are party to the UNESCO Convention; forty-four signed the Washington Principles. Today, no serious auction house or responsible museum would touch an important object of dubious provenance—certainly not a French masterwork taken by the Nazis from a Jewish family in Berlin. "Almost every major museum in the West now treats '1970' as a hardline rule and will refuse to

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[7] *See* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

[8] *See, e.g.*, Malia Politzer and Spencer Woodman, Denver museum to return looted relics to Cambodia after U.S. moves to seize them, *Washington Post*, Nov. 10, 2021.

acquire material that left its country of origin after that year without full documentation." Alexander Herman*, Institute of Art and Law* ("Herman IAL"), Fifty years on: the meaning of the 1970 UNESCO Convention, June 10, 2020, https://ial.uk.com/fifty-years-on-unesco-convention/.

The extended proceedings in this case have established: (1) the Painting was stolen from the Cassirer family by the Nazi regime in 1939; (2) the Baron was not a bona fide purchaser when he acquired the Painting from an American gallery in 1976; and (3) Respondent did not examine the Baron's title to the Painting when it acquired his collection in 1993.[9] Nonetheless, the court below awarded title to Respondent on grounds that the Spanish rule of acquisitive prescription applies. That rule vests title to movable property

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[9] There is no dispute that Painting was stolen from the Cassirer family by the Nazi regime in 1939 before Respondent acquired it in 1993 from the Baron. The district court likewise held in its findings of fact that the Baron was not a bona fide purchaser because he ignored red flags about the Painting's provenance and connection to victims of Nazi art looting (and thus did not pass good title to Respondent). *Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case 2:05-cv-03459-JFW-E (C.D. Cal.), Findings of Fact and Conclusions of Law, ECF No. 621 (Apr. 30, 2019), at 7 ("Despite the minimal provenance information provided to the Baron by the Stephen Hahn Gallery, the presence of what appear to be intentionally removed labels, and the presence of a torn label demonstrating that the Painting had been in Berlin, there is no evidence that the Baron made any inquiries regarding the Painting's provenance or conducted any investigation of the Painting's provenance before purchasing it."); *see also id.* at 23 ("[T]he Court concludes that there were sufficiently suspicious circumstances to trigger a duty to investigate.").

in any possessor who is not an accessory to the theft "by six years of uninterrupted possession without any other condition." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d at 965 (citing Ministerio de Justicia, *Spain Civil Code* 220 (2009) (English translation)).

Spain and the United States are both party to the UNESCO Convention and both signed the Washington Principles. The Foundation's failure to examine the Painting's provenance when it purchased the Painting and its refusal to return the Painting flout the international consensus; the decision below undermines public policy important to California and the United States.

A. International trade in stolen cultural property is illicit.

U.N. efforts to control trade in stolen cultural property were initiated by countries, like Mexico, victimized by pillage of irreplaceable cultural resources, but these efforts did not gain traction until 1970 when the United States decided to support that project. The U.S. delegation succeeded in modifying the comprehensive Secretariat draft to make it possible for art-importing nations to join.[10] The UNESCO Convention

[10] Report, U.S. Delegation to the Special Committee of Government Experts to Examine the Draft Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, UNESCO House, Paris, France (Apr. 13-24, 1970).

is a complex instrument,[11] but the basic principle is clear:

> The 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 . . . 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.

Article 2. One treaty commitment the United States was happy to accept provides:

> The States Parties . . . also undertake, consistent with the laws of each State to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.

Article 13 (c).

Initially, the State Department led U.S. enforcement with bilateral agreements and emergency import controls[12]—added to the implementing legislation by *amicus* after consultations with stakeholders. *See Cultural Property Treaty Legislation: Hearing on H.R. 3403 Before the Subcomm. on Trade of the H. Comm.*

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[11] Paul Bator, Essay on the International Trade in Art, 34 Stanford Law Review 275, 373 (1982).

[12] *See* CCPIA; 19 U.S.C. §§ 2603, 2606, 2609.

on Ways and Means, 96th Cong. 4 (Sept. 27, 1979) (statement of Mark B. Feldman, Deputy Legal Adviser, U.S. Department of State).[13] But Customs and federal prosecutors have expanded enforcement with investigations, seizures and prosecutions[14] often relying on the National Stolen Property Act. 18 U.S.C. §§ 2311-2318 (2006). *U.S. v. Davis*, 648 F. 84 (2d Cir. 2011) (upholding seizure painting that had been stolen from a French museum and was imported "contrary to law" pursuant to 19 U.S.C. § 1595a by virtue of the National Stolen Property Act).[15] Most recently, Section 6110 of the Anti-Money Laundering Act of 2020 (enacted as part of the National Defense Authorization Act) amended the Bank Secrecy Act to include in the definition of "financial institution" a "person engaged in the trade of antiquities, including an advisor, consultant, or any other person who engages as a business in the solicitation or the sale of antiquities, subject to

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[13] *See also Hearings on H.R. 5643 and S. 2261 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 23 (1978).

[14] *See, e.g.*, *U.S. v. McClain*, 545 F.2d 988 (5th Cir. 1977); *U.S. v. Schultz*, 333 F.3d 393 (2d Cir. 2003); Mark B. Feldman, *Reform of U.S. Cultural Property Policy*, Cult Prop. News (Apr. 10, 2014) (https://culturalpropertynews.org/mark-b-feldman-reform-of-u-s-cultural-property-policy/).

[15] *See also United States of America v. One Cuniform Tablet Known as the "Gilgamesh Dream Tablet,"* 1:20-cv-02222-AMD-PK (E.D.N.Y.), Decree of Forfeiture and Order for Delivery, ECF No. 35 (Jul. 26, 2021); Press Release, U.S. Department of Justice, Looted Cambodian Antiquities In Denver Museum Are Subject Of Forfeiture Action Filed In Manhattan Federal Court (Nov. 8, 2021), https://www.justice.gov/usao-sdny/pr/looted-cambodian-antiquities-denver-museum-are-subject-forfeiture-action-filed.

regulations prescribed by the Secretary [of the Treasury]." Anti-Money Laundering Act of 2020, H.R. 6395, 116th Cong. Pub. L. No. 116-283, (2021).

Over time, other art-importing nations have followed the U.S. lead,[16] and the European Union, of which Spain is a member state, has adopted sweeping new regulations for application throughout the EU that will tightly control trade in cultural property.[17] Regulation (EU) 2019/880 of the European Parliament and of the Council of 17 April 2019. The UNESCO Convention commitment to combat illicit trade in stolen cultural property has become the established international norm. Alexander Herman, *Restitution: The Return of Cultural Artefacts* (Lund Humphries 2021) at 75. As it stands, the museum world "will refuse to acquire material that left its country of origin after [1970] without full documentation."[18]

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[16] *See, e.g.*, *Gesetz zum Schutz von Kulturgut* (*Kulturgutschutzgesetz–KGSG*) (BGBl. I S. 1914) (Germany's sweeping cultural property protection law of 2016).

[17] This followed the enactment of the (Fifth) Directive (EU) 2018/843 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing in 2018, a broad regulation that enforces transparency and which has had a significant effect on the commercial art and antiquities market. *See, e.g.*, "Anti-Money Laundering for the art and finance market," Deloitte, https://www2.deloitte.com/lu/en/pages/art-finance/solutions/dkyc-aml-art-and-finance-industry.html.

[18] Herman IAL, *supra*.

B. Forty-four nations have agreed to promote settlement of claims to Nazi-Confiscated art on the merits and Congress has repeatedly endorsed that policy.

The 1998 Washington Conference on Holocaust-Era Assets organized and hosted by State Department resulted in forty-four nations—including Spain—signing the Washington Principles. The Washington Principles (and successive declarations in Vilnius in 2000 and the Terezin Declaration in 2009) called on participating nations to set aside legalist formalities in pursuit of reaching "fair and just solutions."

Ambassador Stuart E. Eizenstat has explained to the Court that this call to action "expressed the signatories' sense that these claims should be 'resolved . . . based on the facts and merits of the claims,' and not on technicalities" (like the passage of time with respect to the indisputably looted Painting). *See* Motion for Leave to File and Brief of Ambassador Stuart E. Eizenstat as *Amicus Curiae* in Support of Petitioners, *de Csepel et al. v. Republic of Hungary*, 139 S. Ct. 784 (2019) at 15.

So too, Congress, has called the Nazi theft of art the "greatest displacement of art in human history." Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, § 4(3) (2016) ("HEAR Act"); *see also* 28 U.S.C. § 1605(h)(2)(a) (2016) (the Foreign Cultural Exchange Jurisdictional Immunity Clarification Act); Holocaust Victims Redress Act (HVRA), Pub. L. No. 105-158, 112 Stat. 15

(1998). Most recently, Congress passed the Justice for Uncompensated Survivors Today (JUST) Act, Pub. L. No. 115-171, 132 Stat. 1288 (2017) (the "JUST Act"), which directs the Secretary of State to compile a report on the progress of various countries in addressing Holocaust restitution. In March of 2020, the State Department issued its report pursuant to the JUST Act which notes that Spain's Commission on Holocaust-era Assets "did not conduct an investigation regarding the movement of looted works through Spain or sufficiently research existing art collections in Spain to ascertain whether they included works of art looted by Nazi Germany." *See* United States Department of State, "The JUST Act Report," https://www.state.gov/wp-content/uploads/2020/02/JUST-Act5.pdf. This very case is also highlighted in the JUST Act report.

The commercial art market has responded to this call to action as well. Christie's and Sotheby's, the two largest auction houses in the world, will not trade in Nazi-looted art unless disputes are resolved. Christie's Director of Restitution Monica Dugot explained the principles and process in her testimony before the Senate Judiciary Committee in 2016 as part of the consideration that led to the HEAR Act. In sum: Christie's expert team vets nearly every pre-1945 work offered for sale. It looks for "sensitive names"—like the Cassirers—that indicate "an artwork may have been in a victim's collection, or in the possession of a notorious Nazi collector—like Jakob Scheidwimmmer, the "purchaser" from Lilly Cassirer of the Painting, or

"physical signs of confiscation, markings, labels, and other signs"—like those that the Baron ignored in 1976. *See The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage*, *Hearing on S. 2763 Before the Subcommittee on the Constitution, Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. (Jun. 7, 2016) (Statement by Monica Dugot, International Director of Restitution and Senior Vice President, Christie's);[19] *see also* Christie's Guidelines for Dealing with Nazi-Era Restitution Issues, https://www.christies.com/en/services/restitution-services/guidelines.[20] It is beyond serious debate that if a consignor today brought the Painting to any reputable auction house or dealer under the circumstances that the Baron brought the Painting to Spain, it would be unsellable and might well be retained by the auctioneer until a resolution of the claim could be worked out. Had the Baron gone to the market rather than to Spain, the Cassirers might well already have the Painting back.

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[19] https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Dugot%20Testimony.pdf.

[20] Standard due diligence also includes reviewing databases of claimed lost works, in particular the Art Loss Register. *See* Nicholas M. O'Donnell, *A Tragic Fate—Law and Ethics in the Battle Over Nazi-Looted Art* (Ankerwycke 2017) at 53, 76; *see also* Responsible Art Market Initiative, Art Transaction Due Diligence Toolkit, https://responsibleartmarket.org/guidelines/art-transaction-due-diligence-toolkit/.

American museum associations have taken similar approaches. In 1998, the Association of Art Museum Directors convened a "Task Force on the Spoliation of Art During the Nazi/World War II Era, (1933-1945)." The American Alliance of Museums (the largest museum association in the United States) has also devoted considerable attention to the ethics of the matter. Both associations have issued sets of ethical guidelines that reject the knowing retention by museums of Nazi-looted art[21]—as the Foundation continues to do here.

The district court below decried Spain's failure to comply with the Washington Principles:

> Spain and [the Foundation's] refusal to return the Painting to the Cassirers is inconsistent with Spain's moral commitments under the Washington Principles [on Nazi-Confiscated Art] and Terezin Declaration . . . It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations. . . .

Cassirer v. Thyssen-Bornemisza Collection Foundation, Case 2:05-cv-03459-JFW-E (C.D. Cal.), Findings of Fact and Conclusions of Law, ECF No. 621 (Apr. 30, 2019),

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[21] Association of Art Museum Directors, Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945), (Jun. 4, 1998), (https://aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf); *see also* American Alliance of Museums, Unlawful Appropriation of Objects During the Nazi Era, (https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/#main).

at 9. The Washington Principles are not merely "moral" promises. They are "political commitments" made in formal diplomatic engagements entitled to serious consideration in any choice of law analysis. Some of this country's most weighty commitments are political, *e.g.*, the Atlantic Charter (Aug. 14, 1941), the Helsinki Accords, Conference on Security and Cooperation in Europe (1975). *See* Curtis A. Bradley, Ashley Deeks, Jack L. Goldsmith, FOREIGN RELATIONS LAW: CASES AND MATERIALS 407-418, Walter Kluwers, 7th ed. 2020 at 407-418. These arrangements do not create formal legal obligations under international law and states party to them may withdraw, but participating states are expected to comply.

C. Prescription of the Painting would be contrary to California public policy.

Most America states, including California, uphold the venerable common law tradition that a thief cannot pass good title to stolen property. *See Menzel v. List*, 49 Misc. 2d 300 (N.Y. Sup. Ct. 1966), modified, 28 A.D.2d 516 (N.Y. App. Div. 1967), rev'd, 24 N.Y.2d 91 (1969); *see also*, *e.g.*, *Pate v. Elliott*, 61 Ohio App. 2d 144, 146 (Ohio Ct. App. 1978) ("In this country no one can obtain title to stolen property however innocent he may have been in the purchase; public policy forbids the acquisition of title through the thief.") (internal citations omitted); *Koch v. Branch*, 44 Mo. 542, 546 (1869) ("Public policy, as well as private rights, demands that the settled rule, that no title can pass through a thief, should not be relaxed, and those who

buy it of him should be compelled to give up the property.").

California has a strong interest in assuring the rightful ownership of fine art and the integrity of trade in cultural property. The legislature provided "a longer, six-year limitations period from the date of actual notice for claims for the recovery of unlawfully taken or stolen fine art," Cal. Civ. Proc. Code § 338(c)(3)(B), because California has an "interest in determining the rightful ownership of fine art . . . ." *Cassirer et al. v. Thyssen-Bornemisza Foundation Collection*, Nos. 15-55550, 15-55951, 15-55977, Brief for the State of California as *Amicus Curiae* Supporting Plaintiffs-Appellants and Supporting Reversal, ECF No. 36-1 (Jan. 26, 2016), at 3. The amendment was intended to provide an incentive for museums and galleries to fulfill their "important role" of researching and publishing provenance information about works in their possession "in order to encourage the prompt and fair resolution of claims." *Id.* (citing Cal. Stats. 2010, ch. 691, § 1(a)(1), (2)).

CONCLUSION

For the foregoing reasons, *amicus* respectfully submits that the Court should vacate the judgment of the court of appeals and remand for further proceedings.

Respectfully submitted,

NICHOLAS M. O'DONNELL
Counsel of Record
SULLIVAN & WORCESTER LLP
One Post Office Square
Boston, MA 02109
(617) 338-2814
nodonnell@sullivanlaw.com

MARK B. FELDMAN
2800 McKinley Place NW
Washington DC 20015
(202) 321-2690
markfeld4@gmail.com