No. 24-

IN THE

Supreme Court of the United States

DAVID CASSIRER, *et al.*,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2022, the Court in this case held that in an action under the Foreign Sovereign Immunities Act, a federal court must apply the forum state's choice-of-law rules, rather than "federal common law," to determine the applicable substantive law. The Court vacated the Ninth Circuit's ruling that Spanish substantive law applied. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022).

Choice-of-law is dispositive here, where the family of a Holocaust survivor sued in California district court to recover a painting stolen by the Nazis and now held by a Spanish state museum. Under California substantive law, a thief can never convey good title and the true owner cannot lose title without actual knowledge of the work's location. Under Spanish law, the holder of stolen property can acquire title by three years of adverse possession, regardless of the owner's knowledge.

On remand from this Court, the Ninth Circuit, purporting to apply California's common law choice-of-law test, again held that Spanish law applied. Following denial of rehearing en banc, the California Legislature unanimously enacted a statute which mandates that "California substantive law shall apply" in pending and future cases brought by California residents to recover stolen artworks in the possession of a museum or covered by the Federal Holocaust Expropriated Art Recovery (HEAR) Act.

Question 1: With California's enactment of a statutory choice-of-law requirement that precludes

the result below, should the Court grant the petition, vacate the judgment, and remand ("GVR") for application of the choice-of-law statute, as is typical practice when an intervening change in law occurs?

In the event that GVR is not granted, the following important questions of federal law are presented:

Question 2: Under the Supremacy Clause, must a state choice-of-law test based on weighing each jurisdiction's "governmental interests" incorporate relevant Federal interests embodied in treaties, statutes, policies, and international agreements?

Question 3: Does Section 5(a) of the HEAR Act, authorizing actions to be brought within six years of "actual discovery" of a stolen artwork's location "[n]otwithstanding any other provision of . . . State law or any defense at law relating to the passage of time," pre-empt application of Spain's adverse possession law?

Question 4: Do treaties, laws, policies, and international agreements of the United States, which proscribe passing of good title to Nazi-looted art, pre-empt the interpretation of California choice-of-law rules to apply Spain's adverse possession law to award title to the Nazis' successor-in-interest?

PARTIES TO THE PROCEEDING

Petitioners, all of whom were plaintiffs in the district court and appellants in the court of appeals, are David Cassirer, the Estate of Ava Cassirer, and the Jewish Federation of San Diego County.

Respondent is the Thyssen-Bornemisza Collection Foundation, an agency or instrumentality of the Kingdom of Spain ("TBC"), which was the defendant in the district court and appellee in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

The Jewish Federation of San Diego County is a nonprofit corporation with no parent corporation and no stock.

RELATED PROCEEDINGS

Cassirer, et al., v. Kingdom of Spain, No. 05-cv-3459, U.S. District Court for the Central District of California. Judgment entered August 30, 2006.

Cassirer v. Kingdom of Spain, et al., Nos. 06-56325, 06-56406, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 8, 2009. En banc judgment entered August 12, 2010 ("*Cassirer I*").

Kingdom of Spain, et al. v. Estate of Claude Cassirer, No. 10-786, U.S. Supreme Court. Petition for writ of certiorari denied June 27, 2011.

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. 12-56159, U.S. Court of Appeals for the Ninth Circuit. Judgment entered Dec. 9, 2013. Petition for panel rehearing and rehearing en banc denied February 11, 2014 ("*Cassirer II*").

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, Nos. 15-55550, 15-55951, 15-55977, U.S. Court of Appeals for the Ninth Circuit. Judgment entered July 10, 2017. Petition for panel rehearing and rehearing en banc denied December 5, 2017 ("*Cassirer III*").

Thyssen-Bornemisza Collection Foundation v. Cassirer, et al., No. 17-1245, U.S. Supreme Court. Petition for writ of certiorari denied May 14, 2018.

Cassirer, et al., v. Kingdom of Spain, No. 05-cv-3459, U.S. District Court for the Central District of California. Judgment entered May 17, 2019.

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No.19-55616, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 17, 2020. Petition for panel rehearing and rehearing en banc denied December 7, 2020 ("*Cassirer IV*").

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. 20-1566, U.S. Supreme Court. Judgment entered April 21, 2022 ("*Cassirer V*").

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. 19-55616, U.S. Court of Appeals for the Ninth Circuit. Order Certifying Question to the California Supreme Court entered May 23, 2023 ("*Cassirer VI*").

Cassirer, et al., v. Thyssen-Bornemisza Collection Foundation, No. S280128, Supreme Court of California. Order denying Certification Request entered August 9, 2023.

Cassirer, et. al., v. Thyssen-Bornemisza Collection Foundation, No. 19-55616, U.S. Court of Appeals for the Ninth Circuit. Judgment entered January 9, 2024 ("*Cassirer VII*").

Cassirer, et. al., v. Thyssen-Bornemisza Collection Foundation, No. 19-55616, U.S. Court of Appeals for the Ninth Circuit. Order Denying Rehearing and Rehearing En Banc entered July 9, 2024 ("*Cassirer VIII*").

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Washington Conference Principles on Nazi-Confiscated Art, U.S. DEP'T OF STATE (Dec. 3, 1998) 33

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Other Authorities

Alex Riggins, *La Mesa heirs of Nazi-looted Pissarro painting lose legal battle to Spanish museum,* The San Diego Union-Tribune, Jan. 10, 2024 6

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Kevin Rector, *A shocking turn: Nazi-looted Pissarro painting won't return to Jewish family*, L.A. Times, Jan. 9, 2024 6

Letter from American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, "To Museums, Art and Antique Dealers, and Auction Houses," 16 U.S. DEP'T OF STATE BULL. 358, 360 (Feb. 23, 1947) 31, 40

Matt Lebovic, *How Vincent Van Gogh helped Jews break into the world of art – and vice versa*, The Times of Israel, Oct. 24, 2021 8

State-War-Navy Coordinating Committee, Return of Looted Objects of Art to Countries of Origin, 16 U.S. DEP'T OF STATE BULL. 358 (Feb. 23, 1947) 30, 40

U.S. Department of State, April 1949 Policy Letter concerning restitution of Nazi-looted property, 20 U.S. DEP'T OF STATE BULL. 592 (Apr. 27, 1949) 31

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OPINIONS BELOW

The opinions of the Ninth Circuit directly at issue in this appeal are published at 89 F.4th 1226 (9th Cir. 2024) ("*Cassirer VII*") and 107 F.4th 882 (9th Cir. 2024) ("*Cassirer VIII*"), and are reproduced at App. A, 1a–40a, and App. B, 41a–67a, respectively.

JURISDICTION

The Ninth Circuit decision affirming the judgment that respondent TBC is the lawful owner of the stolen artwork was issued on January 9, 2024. Petitioners' timely-filed Petition for Panel Rehearing or Rehearing En Banc was denied on July 9, 2024. On September 26, 2024, Justice Kagan granted an Application (No. 24A293) to extend the time to file a petition for a writ of certiorari to December 6, 2024.

This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

California Code of Civil Procedure ("CCP") §338 (c)(6), enacted as part of California Assembly Bill 2867 ("AB 2867") on September 16, 2024, provides:

> (6) Notwithstanding any other law or prior judicial decision, in any action brought by a California resident, or by an heir, trustee, assignee, or representative of the estate of a California resident, involving claims relating to title, ownership, or recovery of personal property as described in paragraph (2) or

> (3) [involving, *inter alia*, stolen artwork], or in the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) (Pub. L. No. 114-308), including claims for money damages, California substantive law shall apply. This paragraph shall apply to all actions pending on the date this paragraph becomes operative or that are commenced thereafter, including any action in which the judgment is not yet final or the time for filing any appeal, including a petition for a writ of certiorari in the United States Supreme Court, has not expired, or, if filed, has not been decided.

AB 2867 is reproduced in full at App. C, 68a–83a.

The Supremacy Clause of the U.S. Constitution, Article VI, Clause 2, is reproduced at App. D, 84a.

The Hague Convention (IV), Arts. 47, 56, 36 Stat. 2277, 2307, 2309 (Oct. 18, 1907), is reproduced at App. E, 85a.

The Holocaust Victims Redress Act, Pub. L. No. 105-158, §202, 112 Stat. 15 (1998), is reproduced at App. F, 86a–88a.

The Holocaust Expropriated Art Recovery (HEAR) Act, Pub. L. No. 114-308, 130 Stat. 1524 (2016), is reproduced at App. G, 89a–95a.

U.S. Military Law No. 52, 12 Fed. Reg. 2189, 2196 (Apr. 3, 1947), 10 C.F.R., 1947 Supp. §3.15 (1947), is reproduced at App. H, 96a–97a.

U.S. Military Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947), 10 C.F.R., 1947 Supp. §3.75 (1947), is reproduced at App. I, 98a.

INTRODUCTION[1]

In 2022, this Court unanimously reversed the Ninth Circuit, holding that under Foreign Sovereign Immunities Act (FSIA) and *Erie* principles, California choice-of-law rules—rather than "federal common law"—apply to determine ownership of a masterpiece Impressionist painting by Camille Pissarro, *Rue St. Honoré, Afternoon, Rain Effect* (the "Painting"). *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107 (2022) ("*Cassirer V*").

The Painting was looted by the Nazis in 1939 from Lilly Cassirer, the great-grandmother of Petitioner David Cassirer, and is now held in Madrid by Respondent Thyssen-Bornemisza Collection ("TBC"), a Spanish government museum. Although TBC concedes the Nazis' theft, it has fought for some 25 years, since the Cassirer family finally discovered the Painting's location and sought its return, to keep possession of this Nazi plunder.

After this Court's 2022 remand, and despite purportedly applying California choice-of-law rules, the Ninth Circuit reached the same result as it had previously—it applied Spanish substantive law. That choice was case-dispositive. *See id.* at 114–16. Under California substantive law, the Painting would belong to the Cassirers because a thief cannot convey good title, and rightful owners cannot be divested of title when they lack actual knowledge of an artwork's

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[1] Throughout this Petition, unless otherwise indicated, all emphases are added and all internal citations are omitted.

whereabouts. But under Spain's 1889 law of acquisitive prescription, as interpreted by the court of appeals, TBC acquired title to the Painting by holding it for three years before the Cassirers even knew where it was and sought its return. *See* App. 3a (cleaned up) ("Under California law, the plaintiff would recover the art while under Spanish law, the plaintiff would not.").

The court of appeals ruled that under California's common law "governmental interest" and "comparative impairment" tests, "the application of California's laws would significantly impair Spain's governmental interests, whereas the application of Spain's laws would only relatively minimally impair California's governmental interests," such that Spanish substantive law, not California law, must apply. App. 38a–39a.

The Ninth Circuit denied Plaintiffs' Petition for Rehearing and Rehearing En Banc. App. 42a. Judge Susan Graber, joined by Judge Richard Paez, filed a vigorous dissenting statement, which meticulously dissected the Panel's misapplication of California choice-of-law criteria;[2] and rued its departure from the federal and international consensus "that artwork stolen by Nazis should be returned to the rightful

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[2] *See* App. 60a–61a ("In sum, applying Spanish law would completely eviscerate California's interests in all realistic cases, whereas applying California's law would impair Spain's interests in only a few cases and, even in those cases, would be consistent with Spain's national policy of allowing recovery of artwork stolen by Nazis. California law applies.").

owner," and its "unnecessary effect of perpetuating the harms caused by the Nazis during World War II." App. 44a, 67a.

With no dispute that the Painting was owned by Lilly Cassirer and looted by the Nazis, shock from the decision reverberated through California and the world.[3] Weeks after the Ninth Circuit denied rehearing en banc, the California Legislature addressed the choice-of-law question. On August 13, 2024, it passed legislation (AB 2867) creating a new section 338(c)(6) of the California Code of Civil Procedure ("CCP"). The statute mandates application of California substantive law in cases brought by California residents to recover stolen artworks in the

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[3] *See, e.g.*, Kevin Rector, *A shocking turn: Nazi-looted Pissarro painting won't return to Jewish family*, L.A. Times, Jan. 9, 2024; Alex Riggins, *La Mesa heirs of Nazi-looted Pissarro painting lose legal battle to Spanish museum,* The San Diego Union-Tribune, Jan. 10, 2024; *Editorial: It's outrageous that a Spanish museum refuses to return Nazi-looted art to the rightful heirs*, L.A. Times, Jan. 13, 2024; *Editorial: 85 years after Nazis stole a Jewish family's Pissarro painting, California may help return it*, L.A. Times, Aug. 10, 2024.

As Judge Graber observed: "The case also has attracted unusually intense media coverage the world over," including "essentially every major newspaper in the United States along with many smaller domestic papers, as well as publications in Spain, Germany, the United Kingdom, France, the Netherlands, Italy, Mexico, Canada, Colombia, Brazil, Argentina, Australia, New Zealand, Israel, South Africa, Hong Kong, Bangladesh, [and] Thailand," which "have recognized the moral dimension, . . . and characterized the case as 'perhaps the highest-profile case of World War II art restitution.'" App. 65a.

possession of a museum, or cases to recover Nazi-looted art under the Federal Holocaust Expropriated Art Recovery Act (HEAR Act). App. 76a–77a. Governor Gavin Newsom signed the bill into law on September 16, 2024. The new law expressly applies to all actions pending on that effective date, and thus by its terms applies to this action. App. 77a.

In light of these circumstances, certiorari should be granted in this case for four independent reasons:

First, California has enacted a statute (AB 2867) which is expressly applicable to pending cases and requires application of California substantive law. As a consequence of this change in the law, the judgment below should be vacated, and the case remanded for application of the current California choice-of-law rule. The Court consistently uses GVR orders where a new law would affect the outcome of a case.

In the event GVR is not granted, this case is the appropriate vehicle to address the following important questions of federal law:

Second, the Ninth Circuit's decision violates the Supremacy Clause by failing to apply relevant Federal treaties, statutes, Executive policies, and international agreements—which prohibit plunder of works of art and call for restitution of looted property—in weighing of California's interests under the State's choice-of-law rules.

Third, these same Federal treaties, statutes, Executive policies, and international agreements pre-empt the Ninth Circuit's application of California

choice-of-law rules to award good title to the transferee of an artwork looted by the Nazis.

Fourth, the HEAR Act pre-empts Spain's adverse possession defense because it provides that a claim to recover Nazi-looted artwork accrues only upon the rightful owner's "actual discovery" of a work's location, "[n]otwithstanding any other provision of . . . State law or any defense at law relating to the passage of time."

STATEMENT OF THE CASE

At the turn of the twentieth century, the Cassirers were one of Europe's most prominent families in business, culture, and academia. Among their achievements, cousins Paul and Bruno Cassirer championed the nascent Impressionist movement in Germany through their prestigious Berlin art gallery and publishing house.[4] In 1900, Paul Cassirer purchased *Rue Saint-Honoré*, an iconic Paris streetscape, directly from Pissarro's exclusive agent in France, Paul Durand-Ruel.

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[4] *See* Matt Lebovic, *How Vincent Van Gogh helped Jews break into the world of art – and vice versa*, The Times of Israel (Oct. 24, 2021), https://www.timesofisrael.com/how-vincent-van-gogh-helped-jews-break-into-the-world-of-art-and-vice-versa/ ("The process of commercializing van Gogh started 120 years ago, when German-Jewish art collector Paul Cassirer staged the first showing of the Dutch painter's works in Berlin. After that exhibition, van Gogh's legacy—and modern art, in general—became intertwined with the trajectory of European Jews, according to historian Charles Dellheim.").

Lilly Cassirer inherited the Painting in 1926 and displayed it prominently over the sofa in her Berlin home. A photograph in evidence, which this Court appended to its 2022 opinion, shows the Painting there, *Cassirer V*, 596 U.S. at 117, and Lilly's grandson Claude Cassirer remembered playing beneath it as a child. There is no dispute that the Nazis coerced Lilly to surrender the Painting in 1939 so that Lilly and her husband Dr. Otto Neubauer could escape from Nazi Germany. *Id*. at 110.

After he was liberated from a detention camp in the desert in French Morocco, Claude Cassirer fled to America in 1941. He became a U.S. citizen in 1947. Mr. Cassirer worked as a professional photographer in New York and Cleveland, where he and his wife Beverly raised their two children, Ava and David. When Lilly's husband Dr. Neubauer passed away in 1958, she moved from England to Cleveland and lived with Claude and his family until she died in 1962. In 1980, Claude and Beverly retired to San Diego, California, where their son David had moved a few years earlier.

Over the years, Claude showed friends and clients the haunting photograph of the Painting in Lilly's parlor, and asked them to watch for it in their travels. After a client told Claude that she saw the Painting listed in a catalog, by early 2000 the family had located the Painting in the TBC museum in Madrid. Through diplomatic channels, Claude asked Spain to return the Painting, but after several years of fruitless negotiations, it refused to do so, notwithstanding its

international commitments to return Nazi-looted artworks.

Claude filed this action in 2005 in the District Court for the Central District of California under the FSIA, asserting claims under California state law for return of property, conversion, and imposition of a constructive trust.[5] Jurisdiction was predicated in part on the museum's extensive commercial activities in the United States and California. *See Cassirer v. Kingdom of Spain*, 461 F.Supp.2d 1157, 1170–76 (C.D. Cal. 2006), *aff'd in part, appeal dismissed in part*, 616 F.3d 1019 (9th Cir. 2010) (en banc).

Discovery showed that in 1951, a Beverly Hills art dealer smuggled the Painting out of Germany and sold it to a Los Angeles collector.[6] It was sold again in California, held privately in Missouri, and ultimately purchased in New York in 1976 by Baron Hans Heinrich von Thyssen-Bornemisza (the "Baron"), heir to the German Thyssen steel empire. The Baron hung the Painting in his private bedroom chambers in Switzerland for over a decade, and sold it in 1993 as part of a gift and sale transaction, involving hundreds

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[5] Following Claude's death in 2010, the present plaintiffs were substituted as his heirs. App. 3a, n.2.

[6] Military Law. No. 52, then applicable in occupied Germany, declared "null and void" any transfer without a license of artworks seized by the Nazis. App. 97a. Although discovery revealed receipts and ledgers relating to the 1951 transaction, *Cassirer v. Thyssen-Bornemisza Collection Found.,* 862 F.3d 951, 956 (9th Cir. 2017) ("*Cassirer III*"), a license was conspicuously missing.

of millions of dollars, in which he and Spain jointly established the Thyssen-Bornemisza Collection Foundation ("TBC"), the defendant in this case. *See generally Cassirer V*, 596 U.S. at 111; *Cassirer v. Thyssen-Bornemisza Collection Found.*, 2019 WL 13240413, at *2–*9 (C.D. Cal. Apr. 30, 2019).

The case's exceptional importance is reflected not only in the Painting's history, but by its decades in litigation, including this Court's prior unanimous decision in the Cassirers' favor, eight decisions by the Ninth Circuit (one en banc), several certiorari petitions, a very limited one-day trial applying Spanish law, a certification request to the California Supreme Court, and the recent California legislation.[7]

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[7] *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), *cert. denied* 564 U.S. 1037 (2011) ("*Cassirer I*") (upholding subject matter jurisdiction under the FSIA); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013) ("*Cassirer II*") (applying the six-year statute of limitations enacted by the California Legislature in 2010, §338(c)(3), and rejecting argument it violated U.S. foreign policy); *Cassirer III,* 862 F.3d 951 (9th Cir. 2017) (holding under federal common law that (a) Spanish substantive law applied, and remanding for trial on whether the Baron and TBC were "accessories" to theft ("encubridors"), and (b) that the Federal HEAR Act six-year statute of limitations applied, but the Act was otherwise inapplicable); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 2019 WL 13240413 (C.D. Cal. Apr. 30, 2019) (awarding Painting to TBC despite findings that the Baron did not buy the Painting in good faith and that TBC's conduct was "irresponsible" given its knowledge of "red flags" of theft, because under Spanish law these facts did not establish "actual knowledge"); *Cassirer v.*

The Ninth Circuit in *Cassirer III* held that Spanish substantive law was applicable under that court's idiosyncratic "federal common law" choice-of-law rule. It nevertheless reversed summary judgment for TBC and remanded for a trial on the narrow issues (i) whether the Baron purchased the Painting in "good faith" under Swiss law, and (ii) whether, under Spanish law, TBC had "actual knowledge" the painting was stolen such that it was an accessory-after-the-fact ("*encubridor*") to the Painting's theft, which would extend the prescription period to 26 years. Such a finding would have precluded TBC from asserting title by adverse possession and entitled the Cassirers to return of the Painting.

The district court found that the Baron was aware of several red flags of theft, yet failed to investigate

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Thyssen-Bornemisza Collection Found., 824 F.App'x 452 (9th Cir. 2020) (affirming award of the Painting to TBC under Spanish law) ("*Cassirer IV*"); *Cassirer V,* 596 U.S. 107 (2022) (reversing Ninth Circuit's use of "federal common law" and remanding for application of California choice-of-law principles); *Cassirer v. Thyssen-Bornemisza Collection Found.,* 69 F.4th 554 (9th Cir. 2023) (certifying choice-of-law question to the California Supreme Court) ("*Cassirer VI*"); *Cassirer VII,* 89 F.4th 1226 (9th Cir. 2024) (holding Spanish law applies under California choice-of-law principles, and awarding title to TBC based on three years' possession) (reproduced in App. A); *Cassirer VIII*, 107 F.4th 882 (9th Cir. 2024) (denying rehearing and rehearing en banc, with dissenting statement by Judge Graber joined by Judge Paez) (reproduced in App. B). All of the Ninth Circuit appeals beginning with *Cassirer III* have been heard by the same Panel (Callahan, Bea, Ikuta, CJJ.).

the provenance of the painting, such that he did *not* acquire the painting in good faith under Swiss law.[8] It also found TBC was aware of all the same red flags of theft as the Baron. But under the court's interpretation of Spanish law, it held that neither the Baron nor TBC had "actual knowledge" the Painting was stolen. The court awarded TBC the Painting because TBC possessed it for more than six years (six years and nine months, to be exact) before Claude learned that it survived the war and TBC had it, then asked for its return. *Cassirer*, 2019 WL 13240413, at *22. The Ninth Circuit affirmed in *Cassirer IV*.

This Court granted the Cassirers' Petition for Certiorari, and on April 21, 2022, unanimously reversed, based on the language of the FSIA, 28 U.S.C. §1606, and *Erie* principles under *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941):

> Section 1606 requires the use of California's choice-of-law rule—because that is the rule a court would use in comparable private litigation. . . . A

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[8] The district court found that the red flags included "(1) the presence of intentionally removed labels and a torn label demonstrating that the Painting had been in Berlin; (2) the minimal provenance information provided by the Stephen Hahn Gallery, which included no information from the crucial World War II era and which, contrary to the partial label, did not show that the Painting had ever been in Berlin or in Germany; (3) the well-known history and pervasive nature of the Nazi looting of fine art during the World War II; and (4) the fact that Pissarro paintings were often looted by the Nazis." *Cassirer*, 2019 WL 13240413, at *16.

> foreign state or instrumentality in an FSIA suit is liable just as a private party would be. See §1606. That means the standard choice-of-law rule must apply. In a property-law dispute like this one, that standard rule is the forum State's (here, California's)—not any deriving from federal common law.

Cassirer V, 596 U.S. at 115, 117. Accordingly, the Court remanded for application of California choice-of-law rules.

Following remand, and after additional briefing and oral argument, the Panel certified the choice-of-law issue to the California Supreme Court, *Cassirer VI*, 69 F.4th at 571–72, because the case raised "important, unresolved public policy ramifications of broad application" under California's choice-of-law framework, *i.e.*, the California rules applicable to "ownership of stolen property." *Id.* at 557.[9] The California Supreme Court declined to accept the certification, however, with Justice Joshua Groban dissenting. D.E. 131.[10]

Proceeding without guidance from the California Supreme Court, the Panel decided the choice-of-law

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[9] The Cassirers had argued both that the record supported the Ninth Circuit applying California substantive law under California's choice-of-law principles, and also that certification to the California Supreme Court would definitively resolve the choice-of-law issue. D.E. 91.

[10] Citations to "D.E." refer to docket entries in the Ninth Circuit appeal of this case, No. 19-55616.

question, holding that California's choice-of-law rules required application of Spanish law, and awarded title to TBC. *See* App. A.

The Cassirers filed a timely Petition for Rehearing and Rehearing En Banc on February 22, 2024. D.E. 155. The Ninth Circuit denied the Rehearing Petition on July 9, 2024, with Judges Graber and Paez dissenting strongly and at length. *See* App. B.

As noted, on August 15, 2024, the Legislature unanimously passed AB 2867, which Governor Gavin Newsom signed into law on September 16, 2024.[11]

AB 2867 enacted new §338(c)(6) of the California Code of Civil Procedure. That provision mandates that California substantive law applies in actions brought by California residents or their heirs to recover stolen artworks held by museums, or covered by the Federal Holocaust Expropriated Art Recovery Act (HEAR Act), *i.e.*, Nazi-looted art. It provides:

> (6) Notwithstanding any other law or prior judicial decision, in any action brought by a California resident, or by an heir, trustee, assignee, or representative of the estate of a California resident, involving claims relating to title, ownership, or recovery of personal property as described in paragraph (2) or (3) [involving, *inter alia*, stolen artwork], or in the Holocaust

[11] The legislative history of AB 2867 is available at: https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=202320240AB2867.

> Expropriated Art Recovery Act of 2016 (HEAR) (Pub. L. No. 114-308), including claims for money damages, ***California substantive law shall apply***.

App. 76a–77a.

By its express terms, the new law applies to all actions pending on its effective date, "including any action in which the judgment is not yet final or the time for filing any appeal, including a petition for a writ of certiorari in the United States Supreme Court, has not expired, or, if filed, has not been decided." App. 77a. The law became effective immediately upon approval by the Governor on September 16, 2024. App. 83a. Accordingly, the statute unquestionably applies to this case.

On September 26, 2024, Justice Kagan granted Petitioners' Application (No. 24A293) to extend the deadline to file a petition for certiorari from October 7, 2024, to December 6, 2024.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI, VACATE THE DECISION BELOW, AND REMAND ("GVR") FOR APPLICATION OF CALIFORNIA'S NEWLY-ENACTED LAW

A. GVR Relief Is Appropriate under the Court's Established Practice, Given Enactment of CCP §338 (c)(6) which Mandates Application of California Substantive Law as the Rule of Decision for Stolen Art Cases

In enacting CCP §338(c)(6), the California Legislature directed that the State's choice-of-law rule in pending and future stolen art cases requires application of California substantive law to determine title to the artworks. All parties, and the courts, agree that California substantive law mandates that title be awarded to the rightful owner's heir, in this case David Cassirer, the last surviving member of Lilly Cassirer's family. *Cassirer VI*, 69 F.4th at 564. Hence, the Ninth Circuit's California choice-of-law decision and resulting judgment are irreconcilable with current California law.

The appropriate remedy in these circumstances, which the Court has frequently applied, is to grant certiorari, vacate the decision below, and remand for application of the statute. *See*, *e.g.*, *Lords Landing Vill. Condo. Council v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997) (standards for ordering GVR when applicable law changes); *Louisiana* v. *Hays,* 512 U. S.

1230 (1994) (ordering GVR in light of new state statute).[12]

The GVR remedy in this case is consistent with the Court's general practice where new controlling law would change the result reached by a lower court. "[T]he GVR order has, over the past 50 years, become an integral part of this Court's practice, accepted and employed by all sitting and recent Justices. We have GVR'd in light of a wide range of developments, including our own decisions, State Supreme Court decisions, new federal statutes, administrative reinterpretations of federal statutes, ***new state statutes***, [and] changed factual circumstances." *Lawrence v. Chater*, 516 U.S. 163, 166–67 (1996). As the Court explained in *Vandenbark v. Owens-Illinois Glass Co.*:

> While cases were pending here on review, this Court has acted to give opportunity for the application by the lower courts of statutes enacted after their judgments or decrees. It has vacated judgments of state courts because of contrary intervening decisions, and has accepted jurisdiction by virtue of statutes enacted after cases were pending before it. . . . These instances

[12] With the new California statute becoming effective prior to the certiorari deadline, Petitioners' request for a GVR is the traditional and most efficient approach. Petitioners also anticipate filing a motion in the district court under Rule 60(b)(6), Fed.R.Civ.P., which would preserve an alternative means for relief from judgment based upon enactment of the new law. *See, e.g., United States v. Wyle*, 889 F.2d 242 (9th Cir. 1989).

> indicate that the dominant principle is that ***nisi prius and appellate tribunals alike should conform their orders to the state law as of the time of the entry***.

311 U.S. 538, 542–43 (1941); *see id*. at 543 ("[U]ntil such time as the case is no longer sub judice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with then controlling decision of the highest state court.").

Although many GVR orders are issued in the context of intervening decisions of this Court or state supreme courts, the practice unquestionably applies to intervening state statutes that would change the outcome of a lower court decision. *See Hays,* 512 U.S. at 1230 ("The judgment is vacated and the case is remanded . . . for further consideration in light of Act 1 of the Second Extraordinary Session of the 1994 Louisiana Legislature."); *Paulussen v. Herion*, 475 U.S. 557, 558–59 (1986) (following Pennsylvania's enactment of new limitations period for paternity suits, the Court vacated and remanded "for further consideration in light of the intervening change in state law"); *Omaha Nat'l Bank v. Nebraskans for Indep. Banking*, 426 U.S. 310, 310–11 (1976) (certiorari granted, Eighth Circuit's judgment vacated, and case remanded to court of appeals for reconsideration in light of an intervening amendment to state law that "may have a substantial bearing on the outcome of this case"); *Watts v. Seward School Bd.*, 381 U.S. 126 (1965) (GVR granted "to allow the Alaska court to consider the effect of the new Alaska statutes upon the case").

As Justice Scalia, who dissented in *Lawrence v. Chater*, noted thereafter, "commonplace" use of GVR "apparently began when we first set aside the judgments of state supreme courts to allow those courts to consider the impact of state statutes enacted after their judgments had been entered." *Thomas v. American Home Prods., Inc.*, 519 U.S. 913 (1996) (Scalia, J., concurring in grant of GVR). "Thus, the present case falls squarely within [the Court's] historical use of the GVR mechanism," *id.* at 914, a conclusion equally applicable here.

B. AB 2867 Was Enacted to Definitively Align California Choice-of-Law in Stolen Art Cases with Fundamental Principles of California and Federal Law

The California Legislature's findings in AB 2867 underscore that the statute's purpose is to align the State's choice-of-law rules with principles of California and U.S. law relating to stolen artworks.

The Legislature referenced the Ninth Circuit's January 2024 *Cassirer* decision by name, as an example of the problem that it was addressing. It found that in applying California's governmental interest test, "the court refused to credit California's laws and interests supporting owners of stolen art, including its rejection of 'constructive discovery,'" and "applied Spain's law of acquisitive prescription or adverse possession, which is based on the principle of

constructive notice that the California courts and Legislature have rejected." App. 71a.[13]

Emphasizing the importance of California's interests, the Legislature further found that AB 2867 "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." App. 73a.

Finally, the Legislature focused on the importance of ensuring that California law parallels relevant federal law and polices, and international agreements:

> This law aligns California law with federal laws, federal policies, and international agreements prohibiting pillage and seizure of works of art and cultural property and calling for restitution of

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[13] The Legislature further noted that previously, in 2010, it had "rejected the [Ninth Circuit's] holding . . . in *Von Saher v. Norton Simon Museum* (9th Cir. 2010) 592 F.3d 954, 969, that California law allowed theft victims' claims to be defeated based on 'constructive' rather than actual discovery," by amending Section 338 "to allow an action to recover stolen art . . . to be filed within six years of actual discovery, and specifically defined 'actual discovery' to exclude 'any constructive knowledge imputed by law.'" App. 70a.

> seized property, as embodied in the Hague Convention of 1907 (and 1899), the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the National Stolen Property Act of 1934, the Holocaust Victims Redress Act, the Holocaust Expropriated Art Recovery Act of 2016, and related federal executive branch policies and international agreements.

App. 73a.

C. State Statutory Choice-of-Law Provisions Are Binding on Federal Courts under *Erie*

Under *Erie* principles and the Rules of Decision Act, 28 U.S.C. §1652, California's statutory choice-of-law rule in CCP §338(c)(6) must be recognized. *See Klaxon*, 313 U.S. at 496.

Under California law, the Legislature's establishment of a conflict rule supersedes California's common law "governmental interest" analysis:

> In general, the governmental interest analysis, which is a product of the common law, . . . does not apply when the California legislature has passed a statute that unambiguously resolves the choice of law issue. . . . Section 2116 . . . unambiguously directs courts to apply the

> law of the jurisdiction of incorporation in suits concerning the internal affairs of the corporation. *See* Cal. Corp. Code §2116. *As a result, the Court need not perform a governmental interest analysis in this case*.

Voss v. Sutardja, 2015 WL 349444, at *7 (N.D. Cal. Jan. 26, 2015). *See, e.g.*, *Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal.App.4th 1436, 1442–43, 1449 (2007) ("Civil Code section 1646, by its express terms, prescribes a choice-of-law rule concerning the interpretation of contracts. . . . [N]otwithstanding the application of the governmental interest analysis to *other c*hoice of law issues, Civil Code section 1646 is the choice of law rule that determines the law governing the *interpretation* of a contract.") (court's emphases); *Barclays Disc. Bank Ltd. v. Levy,* 743 F.2d 722, 725 & n.3 (9th Cir. 1984) ("A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law." (quoting and relying on Restatement (Second) of Conflict of Laws §6(1) (1971))); *Wehlage v. EmpRes Healthcare Inc.*, 821 F.Supp.2d 1122, 1128 (N.D. Cal. 2011) ("Where a statute dictates the choice-of-law, the court need not apply a common law choice-of-law analysis.").

In addition to directing the application of California substantive law to art theft cases, §338(c)(6), which went "into immediate effect" when the Governor signed AB 2867 on September 16, 2024, expressly applies to:

> all actions pending on the date this paragraph becomes operative or that are

> commenced thereafter, including any action in which the judgment is not yet final or the time for filing any appeal, including a petition for a writ of certiorari in the United States Supreme Court, has not expired, or, if filed, has not been decided.

App. 77a. Here, the judgment against the Cassirers was not final on September 16, 2024, in that the time to seek certiorari had not expired, so §338(c)(6) unquestionably applies.[14]

Similarly, under federal law, statutory changes must be applied in pending cases when the legislation so provides. *See, e.g.*, *Plaut v. Spendthrift Farm*, *Inc.*, 514 U.S. 211, 226 (1995) ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.").

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[14] The Ninth Circuit applied a similar express statutory retroactivity provision that was included in the California Legislature's amendment of CCP §338(c)(3) in 2010 to extend the statute of limitations in stolen art cases to six years from the date of plaintiff's actual knowledge. The court applied the new limitations period in two ongoing cases. *See Cassirer II*, 737 F.3d at 616–17; *Von Saher v. Norton Simon Museum*, 754 F.3d 712, 716–19 (9th Cir. 2014).

II. BY FAILING TO INCORPORATE FEDERAL TREATIES, LAWS, POLICIES, AND INTERNATIONAL AGREEMENTS INTO ITS ANALYSIS OF STATE INTERESTS FOR CHOICE-OF-LAW PURPOSES, THE DECISION BELOW VIOLATES THE SUPREMACY CLAUSE

As shown in Point I, the enactment of CCP §338(c)(6) alone supports vacating the decision below. In the event that GVR relief is not granted, however, this case is the proper vehicle to decide several important questions of federal law, including conflicts between the decision below and Supreme Court and other federal circuit decisions, as well as with the Federal Holocaust Expropriated Art Recovery (HEAR) Act.

The Ninth Circuit's failure to even consider, much less incorporate, U.S. Federal treaties, laws, policies, and international agreements in weighing California's laws, policies, and interests supporting the rights of stolen property victims ignores this Court's Supremacy Clause jurisprudence. It also creates a split between the Ninth Circuit, and the First and Second Circuits, and the New York Court of Appeals, which have applied Hague Convention principles and post-World War II U.S. Military Laws to preclude passage of good title to Nazi-looted art and spoils of war. *See* pp. 28–29, *infra*.

Certiorari should be granted because the Ninth Circuit's application of California's common law choice-of-law rule fails the fundamental requirement under the Supremacy Clause that relevant Federal

treaties, statutes, policies, and international agreements must be incorporated into application of state law. *See Testa v. Katt*, 330 U.S. 386, 391 (1947); *Haywood v. Drown*, 556 U.S. 729, 734 (2009) ("federal law is as much the law of the several States as are the laws passed by their legislatures"); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (same). In this case, the balancing process under California's common law governmental interests choice-of-law analysis[15] must include, as part of weighing the impairment of California's interests caused by applying Spanish law, the United States' interests embodied in multiple Federal treaties, statutes, policies, and international agreements. This presents an important issue of Supremacy Clause application not expressly addressed by the Court's prior decisions.

In the proceedings following this Court's remand in *Cassirer V*, California filed two amicus briefs urging application of California substantive law, while also recognizing that its choice-of-law principles were inseparable from Federal and international law and policies: "[U]sing adverse possession to strip the heirs of Holocaust survivors of art Nazis took by force flies in the face of overwhelming state, federal, and

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[15] Under California's "governmental interests" analysis, when two jurisdictions each have an interest in applying their own conflicting laws, a court must "carefully evaluate[] and compare[] the nature and strength" of the respective laws, policies, and interests to "determine which jurisdiction's interests would be more severely impaired" if not applied "in the particular context presented by the case." *Kearney v. Salomon Smith Barney, Inc.,* 39 Cal.4th 95, 100, 107–08 (2006); *see* App. 19a–21a.

international policy supporting its return. . . . California's interests, which Section 338(c) seeks to advance, mirror the commitments of the Federal government and international community." D.E. 97 at 8–9; *see* D.E. 137-2.

The court of appeals' decision entirely ignored these interests. Incorporating these specific Federal interests in protecting the victims of Nazi depredations in weighing California's "governmental interests," it is impossible to conclude that those interests are not more impaired than Spain's interests in application of its 1889 general rules of adverse possession, which were never amended to address the horrors of genocide in the twentieth century.[16]

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[16] As Judge Graber demonstrated in her dissenting statement (*see* App. 43a, 49a, 58a–61a, 64a), and as the Cassirers have argued, Spain's own policy position is mixed at best; its formal expressions of policy, *see* n.19, *infra*, include express protection of the rights of Holocaust victims:

> Spain's interests and policies in this *specific* context—artwork stolen by Nazis—point in *opposing* directions. Spain has a generic interest in applying its archaic adverse-possession rules, including with respect to artwork. But Spain *also* has a stated policy of promoting the recovery of artwork stolen by Nazis. Spain voluntarily signed two treaties—the 1998 Washington Conference Principles on Nazi-Confiscated Art, and the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues—which morally commit Spain to returning artwork stolen by Nazis to the rightful owner.

Plaintiffs' briefing below discusses the Federal interests at length.[17] They include:

> **1. <u>Hague Convention</u>**. The United States is bound by the Hague Convention of 1907, a treaty that outlaws pillage in armed conflicts, and calls for the courts to return looted artworks to the rightful owners. *See* Hague Convention (IV), arts. 46, 47, 56, 36 Stat. 2277, 2307, 2309 (Oct. 18, 1907). *See* App. 85a; *Menzel v. List*, 267 N.Y.S.2d 804, 811 (N.Y. Sup. Ct. 1966) (relying on the Hague Convention in applying state property law, holding that "[w]here pillage has taken place, the title of the original owner is not extinguished"); *Vineberg v. Bissonnette*, 529 F.Supp.2d 300, 307–08 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008) (relying on *Menzel's* discussion of Hague Convention in rejecting good faith buyer's claim to a painting seized by the Nazis because her predecessor-in-interest "did not acquire good title" "as a result of the acquisition of the Painting through [a] forced

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> Spain's interest in applying its general property law will not be significantly impaired by applying California law specifically to artwork stolen by Nazis, which is consistent with Spain's voluntarily undertaken moral commitments.

App. 58a, 60a (emphasis in original).

[17] *See, e.g.*, Plaintiffs-Appellants' Supplemental Brief, D.E. 86, at 21 & n.12, 25–27; Plaintiffs-Appellants' Second Supplemental Brief, D.E. 136, at 1 n.2, 14–20; Plaintiffs-Appellants' Petition for Rehearing, D.E. 155, at 27–30.

sale."); *Matter of Flamenbaum*, 22 N.Y.3d 962, 966 (2003) (citing *Menzel* with approval). Further, as a matter of express U.S. law and policy, Congress and the Executive Branch have applied the Hague Convention to Nazi depredations prior to World War II. *See, e.g*., points 3 and 6 below.

2. U.S. Military Law in Germany. During and after World War II, the United States led the world in invalidating Nazi confiscations and enforcing restitution of looted artworks. For example, Laws No. 52 and 59 of the post-war Allied Military Government of Germany (in effect when the Painting was moved to California in 1951) declared "null and void" any unlicensed transfer of looted artworks and prohibited "any transfer, contract or other arrangement made . . . with the intent to defeat or evade . . . the restitution of any [such] property to its rightful owner." *See* App. 96a–97a; *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F.Supp. 829, 843–45 (E.D.N.Y. 1981) (rejecting good faith purchaser's claim under German property law because "Military Law No. 52 . . . precluded the transfer of good title"), *aff'd* 678 F.2d 1150, 1160 n.18 (2d Cir. 1982). Moreover, under Military Law 59: "Provisions of law for the protection of purchasers in good faith, which would defeat restitution [to rightful owner of property confiscated by Nazis] shall be disregarded." App. 98a; quoted in *Menzel,* 267 N.Y.S.2d at 819.

3. SNWCC Coordinating Committee and Roberts Committee. Shortly after World War II ended, the Executive Branch's State-War-Navy

Coordinating Committee ("SWNCC") reiterated U.S. policy barring importation of Nazi-looted artworks:

> 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.

SWNCC, Return of Looted Objects of Art to Countries of Origin, 16 U.S. DEP'T OF STATE BULL. 358 (Feb. 23, 1947).[18]

The same State Department Bulletin further spelled out U.S. policy in a letter addressed to museums and other institutions, which informed them:

> ***It is, of course, obvious that no clear title can pass on objects that have***

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[18] As the SWNCC memo shows, TBC's predecessors-in-interest also likely violated U.S. criminal law, *i.e.*, the National Stolen Property Act, 18 U.S.C. §§2311, 2314, which outlawed importing stolen property valued over $5,000: "In 1951, the Frank Perls Gallery of Beverly Hills arranged to move the Painting out of Germany and into California to sell the Painting to collector Sidney Brody for $14,850." *Cassirer III*, 862 F.3d at 956.

> ***been looted from public or private collections abroad.***

Id. at 360, Letter from American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, "To Museums, Art and Antique Dealers and Auction Houses" (the "Roberts Commission," chaired by Justice Owen Roberts).

4. State Department's 1949 Policy Letter. In April 1949, the State Department reiterated the U.S. "Government's policy of undoing forced transfers and restituting identifiable property" to Nazi victims, including that "***with respect to claims asserted in the United States*** for the restitution of identifiable property . . . lost . . . as a result of Nazi persecution in Germany, [the policy] ***is to relieve American courts from any restraint upon the exercise of their jurisdiction***," and "***applies generally despite the existence of purchasers in good faith***." 20 U.S. DEP'T OF STATE BULL. 592, 593 (Apr. 27, 1949). *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (relying on April 1949 letter as controlling statement of U.S. government policy).

5. UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970). The signatory countries, including the United States and Spain, undertook to prevent "illicit import or export of [cultural] property . . . [and] "facilitat[e] the earliest possible

restitution of illicitly exported cultural property to its rightful owner."[19]

6. <u>Holocaust Victims Redress Act of 1998 ("HVRA")</u>. The HVRA expressed the sense of Congress that: "***[C]onsistent with the 1907 Hague Convention***, all governments should undertake good faith efforts to facilitate the return of . . . works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." App. 88a. Thus, the HVRA necessitates return of Nazi-looted art where, as here, undisputed proof shows the Cassirer heirs are the rightful owners.

7. <u>Washington Principles (1998) and Terezin Declaration (2009)</u>. The United States, Spain, Germany and over 40 other countries adopted the Washington Conference Principles on

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[19] In addition to the UNESCO Convention, Spain has ignored its commitments as a signatory to the Washington Principles and Terezin Declaration (*see* pp. 32–33, *infra*), as well as the Parliamentary Assembly of the Council of Europe, Resolution 1205 of November 4, 1999; the Vilnius Forum on Holocaust Era Looted Cultural Assets, Declaration of October 5, 2000; the European Parliament Resolution of December 17, 2003; and European Union Regulation (EU) 2019/880. *See* D.E. 86 at 25–27.

Nazi-Confiscated Art (1998)[20] and Terezin Declaration of Holocaust Era Assets and Related Issues (2009)[21] which call for Nazi-looted artworks to be returned to the rightful owner, and for disputes to be resolved "on the facts and merits," and not technical defenses such as the passage of time.

8. **HEAR Act**. In 2016, Congress unanimously passed the Holocaust Expropriated Art Recovery (HEAR) Act, which adopted a national six-year statute of limitations based on "actual discovery" for claims to recover Nazi-looted artworks "[n]otwithstanding any other provision of . . . State law or any defense at law relating to the passage of time." App. 95a. The HEAR Act expressly states that U.S. policy is embodied in the provisions described above: "***the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy*** as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." App. 92a.

9. **2024 Reiteration of Federal Policy Favoring Restitution of Nazi-Looted Art**. On March 5, 2024, at the U.S. Holocaust Memorial

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[20] Available at: https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/.

[21] Available at: https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/.

Museum on the 25th anniversary of adoption of the Washington Principles, Secretary of State Antony Blinken reiterated the fundamental U.S. policy to enable Holocaust survivors and families to recover Nazi-looted art, and the importance of restitution to combat the growing scourge of antisemitism and Holocaust denial. His remarks could have been addressing this very case:

> Of the millions of works of art and cultural property stolen by the Nazis, countless objects still have not been returned to their owners. Today, too many governments, museums, dealers, galleries, and individuals still resist restitution efforts. . . . ***These efforts are more important than ever, as Holocaust distortion and denial are again on the rise . . . and societies who downplay or refute the Shoah foster antisemitism and violence against Jews***."[22]

These numerous, consistent iterations of Federal interests and policies, dating from 1907 to just a few months ago, are "part of the law of every State,"

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[22] Antony J. Blinken, U.S. Secretary of State, Remarks at the 25th Anniversary of the Washington Principles on Nazi-Confiscated Art and Best Practices Event (Mar. 5, 2024), available at: https://www.state.gov/secretary-of-state-antony-j-blinken-video-remarks-at-the-25th-anniversary-of-the-washington-principles-on-nazi-confiscated-art-and-best-practices-event/.

Hauenstein, 100 U.S. at 490, including California's common law choice-of-law rules. The Ninth Circuit's failure even to acknowledge, let alone apply, these interests is not merely a passing error in interpreting California law, but rather a fundamental error of Constitutional dimension to acknowledge the supremacy of Federal law that merits review by this Court.

III. THE HEAR ACT PRE-EMPTS TBC'S ADVERSE POSSESSION DEFENSE

In awarding title to the Painting to TBC, the Ninth Circuit relied on the Spanish law doctrine of acquisitive prescription set forth in Spain's Civil Code Article 1955.[23] According to the court, under Article 1955, "ownership in personal property vests by prescription after either (1) three years of uninterrupted possession of the property in good faith, (2) or six years of uninterrupted possession, even absent good faith." App. 9a n.6. And under Article 1955, the rightful owners' actual knowledge concerning the existence or location of their stolen property is irrelevant.

In contrast, Section 5(a) of the HEAR Act empowers Holocaust survivors and heirs to recover Nazi-looted art within six years "after the ***actual discovery*** by the claimant" of the artwork's location "[n]otwithstanding ***any other provision of*** . . . ***State law*** or ***any defense at law relating to the passage***

[23] English translation from Ministry of Justice available at: https://www.icj.org/wp-content/uploads/2013/05/Spain-Spanish-Civil-Code-2012-eng.pdf.

of time." App. 95a. The HEAR Act's "purpose . . . is to open courts to claimants to bring covered claims and ***have them resolved on the merits***." S. Rep. No. 114-394, 2016 WL 7156565, at *9. The Act explains that the extended limitations period and the "actual discovery" trigger are required by the "unique and horrific circumstances of World War II and the Holocaust," which require survivors and heirs to "painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide." App. 91a–92a.

The Ninth Circuit's interpretation of California law to apply Spain's Article 1955 is pre-empted by the HEAR Act in two ways. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000) (The Court "will find preemption where . . . '[a state law] stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress.'").

First, application of California's choice-of-law rules to allow Spain's adverse possession law to dictate the outcome is expressly pre-empted by the first clause of Section 5(a): "Notwithstanding any other provision of . . . State law. . . " App. 95a. This clause sweeps aside any state law—such as the "governmental interests" test—that results in thwarting the Act's purpose to allow prosecution of "a civil claim or cause of action . . . to recover any artwork . . . that was lost . . . because of Nazi persecution." App. 95a; *see United States v. Novak*, 476 F.3d 1041, 1046 (9th Cir. 2007) ("statutory 'notwithstanding' clauses broadly sweep aside

potentially conflicting laws" (citing *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993)).

Second, on its face, Article 1955 is a "defense at law relating to the passage of time." App. 95a. Thus, it cannot be enforced because the HEAR Act's six-year actual discovery rule applies "[n]otwithstanding . . . any defense at law relating to the passage of time." App. 95a. Indeed, the court of appeals based its award of title to TBC solely on the passage of three years during which TBC publicly possessed the Painting, despite the fact that Claude Cassirer lacked any knowledge of its location during that period. App. 12a. Under the plain language of the HEAR Act, TBC's Article 1955 defense must fail because it "relate[s] to the passage of time."

Following the HEAR Act's enactment, which occurred while the *Cassirer III* appeal was *sub judice* but after oral argument, the parties addressed the statute in one-page letters pursuant to Fed.R.App.P 28(j).[24] With only this truncated discussion before it, the Ninth Circuit applied the HEAR Act to hold that Claude Cassirer timely filed this action within six years of his "actual discovery" that TBC held the Painting. *Cassirer III*, 862 F.3d at 960. But the court then refused to apply the plain words of the "notwithstanding" clause because, it said, "HEAR simply supplies a statute of limitations during which such claims are timely. Thus, HEAR does not alter the choice-of-law analysis this Court uses to decide

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[24] *See* Docket Entries 121, 122 in Ninth Circuit appeal no. 15-55951.

which state's law will govern TBC's claim of title to the Painting based on acquisitive prescription." *Id.* at 964.

The court of appeals' explanation is pure *ipse dixit*. Among other things, it effectively treats adverse possession as a substantive doctrine that is not affected by what the court wrongly assumed was the mere "procedural" definition of a limitations period in the Act. A statute of limitation is substantive, however, particularly as it defines when a claim accrues—which the HEAR Act does by adopting an "actual discovery" rule. *See, e.g., Quality Cleaning Prod. R.C., Inc. v. SCA Tissue N. Am., LLC,* 794 F.3d 200, 205 (1st Cir. 2015) ("'state substantive law must govern' accrual and the statute of limitations alike"); S. Rep. No. 114-394, 2016 WL 7156565, at *9 ("defenses at law related to the passage of time are not merely procedural"); *Bourhis v. Lord*, 56 Cal.4th 320, 328 (2013) ("a statute of limitations is a substantive defense"); *Granny Purps, Inc. v. Cnty. of Santa Cruz*, 53 Cal.App.5th 1, 11 (2020) ("a statute of limitations is a substantive defense, not a procedural matter").

Moreover, adverse possession rules in civil law countries serve the same purpose as statutes of limitations on property rights claims in common law countries—they balance the rights of two presumptively innocent parties—the current possessor's interest in certainty of ownership when acting in good faith against the original owner's interest in recovering their lost or stolen property. If a Spanish statute of limitations were at issue, it clearly would be pre-empted. The formalistic

distinction drawn by the Ninth Circuit ignores the purpose and intent of the Act's clear language.

By precluding reliance on "any . . . State law" to the contrary, and on "any defense . . . relating to the passage of time," App. 95a, the statute cannot be limited the way the Ninth Circuit held; it pre-empts adverse possession in cases involving Holocaust looted artworks. The court's ruling cannot stand in the face of the literal words of the statute. *See, e.g., Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 455 (2022) ("We interpret this language according to its 'ordinary, contemporary, common meaning.'").

IV. FEDERAL TREATIES, LAWS, POLICIES, AND INTERNATIONAL AGREEMENTS PRE-EMPT THE NINTH CIRCUIT'S APPLICATION OF CALIFORNIA CHOICE-OF-LAW RULES

Similarly, if a GVR order is not granted on the basis of CCP §338(c)(6), certiorari should be granted to address the important question whether State choice-of-law rules are pre-empted when their application produces a result that conflicts with treaties, laws, policies, and international agreements of the Unted States.

The provisions of Federal treaties, statutes, policies, and international agreements discussed in Point II above pre-empt the Ninth Circuit's

interpretation of California choice-of-law rules to require application of Spanish law that strips title to a Nazi-looted artwork from the heirs of Holocaust survivors. *See United States* v. *Pink,* 315 U.S. 203, 230–31 (1942) ("state law must yield when it is inconsistent with or impairs . . . the superior Federal policy evidenced by a treaty or international compact or agreement").

The paramount Federal interests here, which forbid plunder of artworks and call for restitution of looted property to the rightful owners or their heirs, particularly including Nazi looted art, are established by the Hague Convention, the HVRA, the HEAR Act, and international agreements of the United States (and Spain), as well as express U.S. Government policies reiterated as recently as a few months ago by Secretary Blinken.

Among other things, as noted above, after World War II, United States law and policy prohibited acquisition of Nazi-looted art because it violated "commitments of the United States under the Hague Convention of 1907;" constituted a Federal crime if valued in excess of $5,000; and "no clear title can pass on objects that have been looted from public or private collections abroad." *See* 16 U.S. DEP'T OF STATE BULL. at 358, 360, pp. 29–31, *supra*. The HVRA, HEAR Act, and Secretary Blinken's statements earlier this year make clear that those binding Federal interests continue to apply. As in *Pink*, the application of California law "as formulated by" the Ninth Circuit would not only "collide with and subtract from" a

century of Federal laws and policies but is in direct conflict with them. 315 U.S. at 231.

CONCLUSION

For the foregoing reasons, Petitioners request that the Court grant certiorari.

December 6, 2024

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APPENDIX A

Opinion of the U.S. Court of Appeals for the Ninth Circuit (January 9, 2024)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 19-55616
D.C. No. 2:05-cv-03459-JFW-E

DAVID CASSIRER; THE ESTATE OF AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,

Plaintiffs-Appellants,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,

Defendant-Appellee.

Appeal from the United States District Court for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted December 12, 2022
Pasadena, California

Filed January 9, 2024

Before: Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

Opinion by Judge Bea; Concurrence by Judge Callahan

* * *

OPINION

BEA, Circuit Judge:

This case is before us after the United States Supreme Court vacated our prior decision. The Court remanded with instructions that we apply California's choice-of-law rules, rather than federal choice-of-law rules, to determine whether California law or Spanish law governs a disputed claim of title to a painting, the *Rue Saint Honoré, après midi, effet de pluie* (the "Painting"), by French Impressionist Camille Pissarro. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 117, 142 S. Ct. 1502, 212 L. Ed. 2d 451 (2022) ("*Cassirer V*").

In 1939 Germany, the Nazis stole the Painting from Lilly Neubauer ("Lilly"), a Jew who was attempting to flee the Nazi regime. After a series of transactions, the Painting is now in the possession of the Thyssen-Bornemisza Collection ("TBC").[1] TBC had purchased the Painting from the Baron Hans Heinrich Thyssen-Bornemisza (the "Baron") in 1993. TBC has publicly

1. TBC is an instrumentality of the Kingdom of Spain.

displayed the Painting at the Museo Nacional Thyssen-Bornemisza in Madrid, Spain, (the "Museum") ever since.

In 2000, Claude Cassirer, a California resident and Lilly's sole heir, learned that the Painting was on display at the Museum in Spain. In 2001, Mr. Cassirer filed a petition with TBC and Spain for the return of the Painting; that petition was denied. In 2005, Mr. Cassirer brought this suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330(a), in the United States District Court for the Central District of California, seeking the return of the Painting from TBC.[2]

After nearly two decades of litigation, the disposition of this case turns on one issue: whether, under California's choice-of-law test, Spanish law or California law applies to determine ownership of the Painting. "[U]nder California law as it currently stands, the plaintiff would recover the art while under Spanish law, the plaintiff would not."[3]

2. Claude Cassirer died in 2010. David and Ava Cassirer, his children, and the United Jewish Federation of San Diego County succeeded to his claims. Ava later died, and her estate is now a substitute plaintiff. Collectively, we refer to these plaintiffs as "the Cassirers."

3. We discuss the relevant laws in detail below. In brief, under Article 1955 of the Spanish Civil Code, TBC has acquired prescriptive title to the Painting because it possessed the Painting in good faith for over three years before the Cassirers brought suit. In contrast, California has not expressly recognized adverse possession of personal property, and as a thief cannot pass title to anyone, including a good faith purchaser, if California law applied, TBC would not have title to the Painting. The Cassirers, as successors to Lilly Neubauer and Claude Cassirer, would have title.

Cassirer v. Thyssen-Bornemisza Collection Found., 69 F.4th 554, 564 (9th Cir. 2023) ("*Cassirer VI*") (citation and internal quotation omitted).

On remand from the United States Supreme Court, we certified to the California Supreme Court the question whether California's choice-of-law test requires application of Spain's laws or California's laws to this dispute. *Id.* at 571-72. The California Supreme Court declined to answer our certified question. Thus, responsibility falls on us to apply California's choice-of-law test—the three-step "governmental interest analysis"—to determine whether Spanish law or California law governs. *See Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 45 Cal. Rptr. 3d 730, 137 P.3d 914, 922 (Cal. 2006).

Applying California's choice-of-law test, we first reaffirm our prior decision, in which we determined that the applicable laws of California and Spain differ and that a true conflict exists with respect to each jurisdiction's interests in applying its laws to this case. *Cassirer VI*, 69 F.4th at 563, 566. We then evaluate Step Three of California's choice-of-law test, the so-called "comparative impairment" analysis, under which we resolve such a conflict by applying the law of the jurisdiction whose governmental interests would be the more impaired were its law not applied. *See Kearney*, 137 P.3d at 934. We conclude that, under the facts of this case, Spain's governmental interests would be more impaired by the application of California law than would California's governmental interests be impaired by the application of Spanish law. Thus, applying California's choice-of-law test, we hold that Spanish law must apply.

Applying Spanish law, TBC has gained prescriptive title to the Painting pursuant to Article 1955 of the Spanish Civil Code. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App'x 452, 456-57 (9th Cir. 2020) ("*Cassirer IV*"). We therefore affirm the district court's order which granted judgment in favor of TBC.

I. FACTS AND PROCEDURAL HISTORY

We discuss only the facts and procedural history relevant to our decision. A full account of this dispute is detailed in the earlier decisions issued by the district court, this Circuit, and the U.S. Supreme Court.[4]

A. Lilly's Ownership of the Painting and The Theft of the Painting

Paul Cassirer, a member of a prominent German Jewish family, purchased the Painting in 1900. Lilly

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4. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc) ("*Cassirer I*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613 (9th Cir. 2013) ("*Cassirer II*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) ("*Cassirer III*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App'x 452 (9th Cir. 2020) ("*Cassirer IV*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 596 U.S. 107, 142 S. Ct. 1502, 212 L. Ed. 2d 451 (2022) ("*Cassirer V*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 69 F.4th 554 (9th Cir. 2023) ("*Cassirer VI*"); *see also Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413 (C.D. Cal. Apr. 30, 2019).

inherited the Painting from Paul. Lilly displayed the Painting at her home in Berlin, Germany, until 1939.

In 1939, Lilly was forced to "sell" the Painting to Jackob Scheidwimmer ("Scheidwimmer"), a Berlin art dealer. Scheidwimmer had been appointed by the Nazi government to obtain the Painting, had refused to allow Lilly to take the Painting with her out of Germany, and had demanded that she sell the Painting to him for 900 Reichsmarks (around $360 at then-prevailing exchange rates) to obtain an exit visa to England. Lilly surrendered the Painting to Scheidwimmer and the 900 Reichsmarks were deposited into a bank account that Lilly was not allowed to access. There is no dispute that the Nazis stole the Painting from Lilly.

After the Nazis forced Lilly to sell the Painting to Scheidwimmer in 1939, Scheidwimmer then forced another German Jewish collector, Julius Sulzbacher ("Sulzbacher"), to exchange three German paintings for the Painting. Sulzbacher was also seeking to escape Nazi Germany. After the Sulzbacher family fled Germany, the Gestapo confiscated the Painting. The exchange and the confiscation took place in Germany.

After the war, the Allies established a process for restoring property to the victims of Nazi looting, authorizing victims to seek restitution of looted property. In 1948, Lilly filed a timely claim against Scheidwimmer for restitution of, or compensation for, the Painting. In 1954, the United States Court of Restitution Appeals published a decision confirming that Lilly owned the Painting.

Lilly, Sulzbacher, and Scheidwimmer believed the Painting had been lost or destroyed during the war. In 1957, after the German Federal Republic regained its sovereignty, Germany enacted a law, the Brüg, which authorized claims for Nazi-looted property. Lilly then dropped her restitution claim against Scheidwimmer and initiated a claim against Germany for compensation for the wrongful taking of the Painting. In 1958, the parties reached a settlement agreement, which provided, in relevant part, that Germany would pay Lilly 120,000 Deutschmarks (the Painting's agreed value as of April 1, 1956), about $250,000 in today's dollars after adjusting for inflation. *See Cassirer V*, 596 U.S. at 110.

B. The Painting's Post-War History

After the Nazis confiscated the Painting, it allegedly was sold at a Nazi government auction in Düsseldorf, Germany. In 1943, the Painting was sold by an unknown consignor at the Lange Auction in Berlin, Germany, to an unknown purchaser for 95,000 Reichsmarks. In 1951, the Frank Perls Gallery of Beverly Hills, California, arranged to move the Painting out of Germany and into California to sell the Painting to collector Sidney Brody for $14,850. In 1952, Sydney Schoenberg, a St. Louis, Missouri, art collector, purchased the Painting for $16,500. The Painting sat in a private collection in St. Louis from 1952-1976. In 1976, the Baron purchased the Painting through the Stephen Hahn Gallery in New York for $275,000. The Baron kept the Painting in Switzerland as part of his collection until 1992, except when it was on public display in exhibitions outside Switzerland.

In 1988, Favorita Trustees Limited ("Favorita"), an entity controlled by the Baron, and Spain reached an agreement with TBC that the Baron would loan his art collection (the "Collection"), including the Painting, to TBC, an entity created and controlled by the Kingdom of Spain. Pursuant to this agreement, Spain created TBC to maintain, conserve, publicly exhibit, and promote the Collection's artwork. Spain agreed to display the Collection at the Villahermosa Palace in Madrid, Spain, and to restore and redesign the palace as the Museum.

After the Villahermosa Palace had been restored and redesigned as the Museum, pursuant to the loan agreement, the Museum received a number of paintings from Favorita, including the Painting, and in 1992, the Museum opened to the public. Since October 10, 1992, the Painting has been on public display at the Museum in Spain.

In 1993, the Spanish government passed Real Decreto-Ley 11/1993, which authorized and funded the purchase of the Collection. Spain bought the Collection by entering into an acquisition agreement with Favorita. TBC paid Favorita and the Baron $350 million for the Collection. TBC required the Baron to provide a $10 million, three-year *prenda*[5] of certain paintings as a security device for the Baron's performance under the terms of his agreement with TBC.

5. *Prenda* means "security, surety," or "pledge" in Spanish. Oxford Spanish Dictionary 661 (3d ed. 2003).

C. Procedural History

Claude Cassirer, Lilly's sole heir, moved to California in 1980 and resided there until his death in 2010. In 2000, Mr. Cassirer learned that the Painting was in the Museum. On May 3, 2001, Mr. Cassirer filed a petition in Spain with the Kingdom of Spain and TBC, seeking the return of the Painting. In 2005, after that petition was denied, Claude Cassirer filed this action, under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1330(a), in the United States District Court for the Central District of California, seeking the return of the Painting. The litigation noted in footnote 4, above, proceeded.

In 2015, the Cassirers moved the district court for an order declaring that the law of California, not the law of Spain, governed the merits of their action.[6] The district

6. Under Article 1955 of the Spanish Civil Code, ownership in personal property vests by prescription after either (1) three years of uninterrupted possession of the property in good faith, (2) or six years of uninterrupted possession, even absent good faith. However, the six-year prescriptive period is tolled for the period during which a criminal or civil action can be brought if the possessor is a principal, accomplice, or accessory (*encubridor*) to the theft. *See Cassirer III*, 862 F.3d at 966. California, in contrast, has not specifically endorsed adverse possession for personal property, *see Cassirer VI*, 69 F.4th at 562, and allows a victim of fine art theft to recover the stolen art from a museum or similar institution so long as he brings suit to recover it within six years of his discovery of its whereabouts, regardless whether the possessor took possession of the property in good faith. Cal. Code Civ. Proc. § 338(c)(3)(A). Moreover, under California law, thieves cannot pass good title to anyone, including a good faith purchaser. *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 173 P. 752, 754 (Cal. 1918).

court recognized that before making this determination, it first had to determine whether it should apply California or federal common law choice-of-law rules. *See Cassirer*, 153 F. Supp. 3d at 1154. The district court held that federal choice-of-law rules governed a case where jurisdiction is premised on the FSIA.[7] *Id.* Applying federal choice-of-law rules, the district court concluded that Spanish law applied to determine the ownership of the Painting. *Id.* at 1155.

Out of an abundance of caution, the district court also applied California choice-of-law rules and reached the same conclusion: that Spanish law applied. *Id.* at 1160. The court reasoned that the Painting "was present in California for less than a year," whereas "for more than twenty years . . . the Painting has been in the possession of an instrumentality of the Kingdom of Spain in Madrid, Spain . . . and that possession in Spain provides the basis for [TBC's] claim of ownership." *Id.* at 1155. The court concluded Spain has a "strong interest in regulating conduct that occurs within its borders," and in assuring individuals acting within its borders that "their title

7. The district court's decision to apply federal-choice-of-law rules in a case arising under the FSIA was based on then-binding Ninth Circuit precedent. *Cassirer*, 153 F. Supp. 3d at 1154 (citing *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991)). The federal choice-of-law test draws from the Second Restatement. Under that approach, a court must consider a set of factors to decide which state has the "most significant relationship" to the case. Restatement (Second) of Conflict of Laws §§ 6, 222. The Second Restatement provides that, in cases of adverse possession of chattel, the local law of the state where the chattel was located at the time of transfer typically governs. Second Restatement, § 246.

and ownership of . . . property [is] certain," whereas "California's interest [in facilitating recovery for one of its residents] is significantly less." *Id.*

Applying Spanish law, the district court ruled that TBC was the rightful owner of the Painting, pursuant to Spain's law of acquisitive prescription,[8] as stated in Article 1955 of the Spanish Civil Code. *Id.* at 1160. The district court therefore entered summary judgment in favor of TBC. *Id.*

On appeal in this Court, consistent with our Circuit's precedent, we applied federal choice-of-law principles to conclude that Spanish property law governed this dispute.[9] *Cassirer III*, 862 F.3d at 961 (citing *Schoenberg*, 930 F.2d at 782).

Applying Spanish law, we considered whether TBC had fulfilled the requirements for ownership of the Painting set forth in Articles 1955 and 1956 of the Spanish Civil Code. *Id.* at 964-76. We explained that acquisitive prescription under Article 1955 is modified by Article 1956, which extends the period of possession necessary to vest title when the person who has possession was a principal, accomplice, or accessory (*encubridor*), *see* Oxford Spanish

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8. Acquisitive prescription is "a mode of acquiring ownership or other legal rights through possession for a specified period of time." *Acquisitive Prescription*, Black's Law Dictionary (11th ed. 2019). The term is synonymous with adverse possession.

9. In so holding, we did not consider how California's choice-of-law rules applied. *See Cassirer III*, 862 F.3d at 961-64.

Dictionary 323 (3d ed. 2003), to the robbery or theft of the property at issue. *Cassirer III*, 862 F.3d at 966. We then held that there was a genuine dispute of material fact as to whether TBC knew the Painting had been stolen when TBC acquired the Painting from the Baron, and therefore whether TBC was an *encubridor* under Article 1956. *Id.* at 975. If TBC were an *encubridor*, it would not have acquired title to the Painting through acquisitive prescription until 2019—six years after the criminal and civil limitations periods had run—long after the Cassirers brought their action in 2005. *Id.* at 966. Therefore, we reversed the district court's order which granted summary judgment in favor of TBC, and remanded for that court to consider whether TBC knew the Painting had been stolen when it acquired the Painting from the Baron. *Id.* at 981.

On remand, the district court conducted an extensive bench trial. The court concluded that TBC was not an *encubridor* under Article 1956 of the Spanish Civil Code, because TBC did not have actual knowledge that the Painting was stolen when it purchased the Painting from the Baron in 1993. *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *20-22. Because TBC had possessed the Painting publicly, as an owner, for over three years in good faith, the district court held that TBC had fulfilled the requirements of Article 1955 of the Spanish Civil Code and had therefore acquired prescriptive title to the Painting. 2019 U.S. Dist. LEXIS 247143, [WL] at *19. It thus entered judgment in favor of TBC. We affirmed. *Cassirer IV*, 824 F. App'x at 457.

The Cassirers petitioned the Supreme Court for certiorari on the question whether a federal court hearing

state-law claims as to title of the Painting, brought under the FSIA, may apply federal common law to determine what state's substantive law governs the claims at issue, or whether the forum state's choice-of-law provisions govern. The Supreme Court granted the petition and held that the FSIA "requires the use of California's choice-of-law rule—because that is the rule a court would use in comparable private litigation." *Cassirer V*, 596 U.S. at 115. Because we had applied federal choice-of-law rules, the Supreme Court vacated our judgment and remanded for us to apply California's "standard choice-of-law rule." *Id.* at 117.

On remand, by majority vote of the panel, we certified the following question to the California Supreme Court:

> Whether, under a comparative impairment analysis, California's or Spain's interest is more impaired if California's rule that a person may not acquire title to a stolen item of personal property (because a thief cannot pass good title, and California has not adopted the doctrine of adverse possession for personal property), were subordinated to Spain's rule that a person may obtain title to stolen property by adverse possession.

Cassirer VI, 69 F.4th at 571-72.[10]

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10. As described below, California's choice-of-law test involves three steps. In our order which certified the question to the California Supreme Court, we concluded that Step One and Step Two were satisfied. *Cassirer VI*, 69 F.4th at 563, 566. Thus, our certified question to the California Supreme Court involved only Step Three. *Id.* at 561.

On August 9, 2023, the California Supreme Court declined to answer the certified question by a 6-1 vote. We thus resumed jurisdiction over the case. We then allowed for the filing of supplemental briefs and amici briefs. It is now our responsibility to determine whether, under California's choice-of-law test, Spain's laws or California's laws apply to determine title to the Painting.

II. JURISDICTION AND STANDARD OF REVIEW

The FSIA, 28 U.S.C. § 1330(a), gave the district court original jurisdiction. We have appellate jurisdiction under 28 U.S.C. § 1291.

We review the district court's factual findings for clear error and its conclusions of law de novo. *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015).

III. ANALYSIS

California applies the "governmental interest approach" to resolve conflict-of-law disputes. *See McCann v. Foster Wheeler*, 48 Cal. 4th 68, 105 Cal. Rptr. 3d 378, 225 P.3d 516, 527 (Cal. 2010). That test proceeds in three steps. At Step One, a court must determine "whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different." *Kearney*, 137 P.3d at 922. If the relevant laws are different, the court then moves to Step Two, under which it "examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict

exists." *Id.* Finally, if there is a true conflict, the court at Step Three "carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* (quoting *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719, 723 (Cal. 1976)). After conducting this analysis, the court "ultimately applies the law of the state whose interest would be the more impaired if its law were not applied." *Id.*

A. Spain's laws and California's laws differ with respect to the ownership of stolen property.

All agree that the relevant Spanish law here is Article 1955 of the Spanish Civil Code. Under that provision, title to movable goods (chattels) prescribes (is granted) to a possessor by either (1) "three years of uninterrupted possession in good faith," or (2) "six years of uninterrupted possession, without any other condition." Spanish Civil Code Art. 1955 (English translation). As we have explained, the six-year prescriptive period is modified and extended by Article 1956. *See Cassirer III*, 862 F.3d at 966. Applying Article 1955 of the Spanish Civil Code to this dispute, we have already held that TBC gained prescriptive title to the Painting that is superior to the Cassirers' claim of title to the Painting under Spanish law. *See Cassirer IV*, 824 F. App'x at 455-57.

Meanwhile, three California laws are relevant to this case. First, unlike Spain, California has not expressly adopted a doctrine of adverse possession for personal

property. *Cassirer VI*, 69 F.4th at 557, 562 (noting that California "has not adopted the Spanish rule 'that title to chattels may pass through qualified, extended possession'"); *see S.F. Credit Clearing House v. Wells*, 196 Cal. 701, 239 P. 319, 322 (Cal. 1925) (declining to consider whether adverse possession "should be applied to personal property").[11] Second, California employs the common law rule that "thieves cannot pass good title to anyone, including a good faith purchaser." *Cassirer VI*, 69 F.4th at 561 (citing *Crocker Nat'l Bank of S.F.*, 173 P. at 754). Third, § 338(c)(3)(A) of the California Code of Civil Procedure extends the statute of limitations under which a plaintiff can bring an action to recover "a work of fine art . . . against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft." Although the general statute of limitations for claims involving the return of stolen property in California is three years, § 338(c)(3)(A) provides that an action must be commenced "within six years of the actual discovery" of the identity and whereabouts of the work of stolen fine art in which the claimant asserts an interest. Cal. Code of Civ. Proc. § 338(c)(3)(A).

In turn, the laws of Spain and California differ regarding the particular issue in question: the ownership

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11. On the other hand, one scholarly opinion suggests that California law does allow a possessor to take title to personal property by prescription. *See* 13 C. Witkin, Summary of California Law, Personal Property § 133 (11th ed. 2022) (explaining that California Civil Code Sections 1000 and 1007 "seem to establish the right to acquire title to personal property by adverse possession . . . .").

of stolen art. *See Cassirer VI*, 69 F.4th at 562. Under Spanish law, a possessor of stolen property can acquire prescriptive title that is superior to the original owner's title. In contrast, under California law as it stands today, a possessor of stolen property does not acquire possessory rights to stolen property that are superior to the rights of the true owner until the statute of limitations expires. Moreover, under Cal. Code of Civ. Proc. § 338(c)(3)(A), the Cassirers would have a forum to bring their claim because Claude Cassirer brought suit in 2005, only five years after he discovered the whereabouts of the Painting in 2000. Thus, although TBC has acquired superior title to the Painting under Spanish law, it has not acquired superior possession rights to the Painting under California law. The laws of Spain and California as applied to this case, therefore, differ.

B. There is a true conflict between Spanish law and California law.

A true conflict exists where each jurisdiction has a "real and legitimate interest in having its [laws] applied under the circumstances presented here." *McCann*, 225 P.3d at 531-32. If a jurisdiction's interests in its laws would not be served were its law applied, the court should apply the law of the jurisdiction that has a real interest in the dispute. *See, e.g., Reich v. Purcell*, 67 Cal. 2d 551, 63 Cal. Rptr. 31, 432 P.2d 727, 730-31 (Cal. 1967) (holding Missouri did not have a real interest in applying its law regarding damages limitation with respect to an accident that occurred in Missouri, because the defendant was a resident of Ohio and Missouri's interest was to shield

Missouri residents from liability). "Although the two potentially concerned states have different laws, there is still no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied." *Hurtado v. Superior Ct.*, 11 Cal. 3d 574, 114 Cal. Rptr. 106, 522 P.2d 666, 670 (Cal. 1974).

We have already concluded that a true conflict exists between Spain's and California's interests in having their laws applied to this case. *Cassirer VI*, 69 F.4th at 564. "[B]oth Spain and California have a legitimate interest in applying their respective laws on ownership of stolen personal property." *Id.* The property laws of Spain and California serve each jurisdiction's real and legitimate governmental interests, both of which seek to "create certainty of title, discourage theft, and encourage owners of stolen property to seek return of their property in a timely fashion." *Cassirer III*, 862 F.3d at 964. Spanish law, for its part, "assures Spanish residents that their title to personal property is protected after they have possessed the property in good faith for a set period of time," whereas California law seeks to deter theft, facilitate recovery for victims of theft, and create "an expectation that a bona fide purchaser for value of movable property under a 'chain of title traceable to the thief,' . . . does not have title to that property." *Cassirer VI*, 69 F.4th at 565 (citing *Suburban Motors, Inc. v. State Farm Mut, Auto. Ins. Co.*, 218 Cal. App. 3d 1354, 1359 (1990)).

Moreover, California's 2010 enactment of § 338(c)(3)(A) evinces its "strong interest in protecting the rightful owners of fine arts who are dispossessed of their property."

Cassirer III, 862 F.3d at 963. California has demonstrated a real interest in returning stolen art to victims of theft, such as the Cassirers.

Thus, we encounter a true conflict between the laws of Spain and California as both Spain and California have a "real and legitimate interest[]" in applying their respective laws to this dispute. *See McCann*, 225 P.3d at 531-32.

C. Spain's governmental interests would be more impaired by the application of California law than would California's interests be impaired by the application of Spanish law.

Because such a true conflict exists, we must resolve that conflict at Step Three of California's choice-of-law test: the comparative impairment analysis. Under that analysis, we determine which jurisdiction's interest "would be more impaired if its policy were subordinated to the policy of the other state." *Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 721, 726 (Cal. 1978). We then apply the law of the state "whose interest would be the more impaired were its law not applied." *Id.*

As the California Supreme Court has instructed, our task in applying the comparative impairment analysis "is not to determine whether the [Spanish] rule or the California rule is the better or worthier rule." *See McCann*, 225 P.3d at 534; *Bernhard*, 546 P.2d at 724 (cleaned up) ("Emphasis is placed on the appropriate scope

of conflicting state policies rather than on the quality of those policies."). Instead, our task is to decide, "in light of the legal question at issue and the relevant state interests at stake—which jurisdiction should be allocated the predominating lawmaking power under the circumstances of the present case." *McCann*, 225 P.3d at 534.

In making this determination, we are directed to measure the interests of each jurisdiction based on "the circumstances of the present case"—the facts of this *particular dispute*—not the jurisdiction's general policy goals expressed in the laws implicated. *See id.* And we do not look only to the jurisdiction's "single subject or rule of law"; rather, we must "identify the distinct state interests that may underlie separate aspects of the issue in question." *Kearney*, 137 P.3d at 924; *see, e.g., Hurtado*, 522 P.2d at 672 (explaining that where a state limits damages for wrongful death actions, three distinct state interests should be evaluated under California's choice-of-law test: compensation for survivors, deterrence of conduct, and limitation, or lack thereof, upon the damages recoverable). Based on the magnitude of the distinct state interests, as derived from the facts of the present dispute, we can then compare the extent to which each jurisdiction's interests would be impaired were its law not applied. *See Kearney*, 137 P.3d at 924.

In sum, our task is to compare, under the facts of this case, (1) the extent to which Spain's interests in providing certainty of title to entities like TBC would be impaired by the application of California law, and (2) the extent to which California's interest in deterring theft and facilitating recovery for victims of stolen art, like

the Cassirers, would be impaired by the application of Spanish law.

The California Supreme Court has identified several factors to evaluate in analyzing the scope of "the distinct . . . interests" a jurisdiction has in applying its laws to a specific case. *See id.* Those factors include the "current status of a statute," *see Offshore Rental*, 583 P.2d at 726-27; the location of the relevant transactions and conduct, *see McCann*, 225 P.3d at 535-37; *Offshore Rental*, 583 P.2d at 728-29; *Kearney*, 137 P.3d at 937-38; and the extent to which one jurisdiction's laws either impose similar duties to the other jurisdiction's laws, or are accommodated by the other jurisdiction's laws, such that the application of the other jurisdiction's laws would only partially—rather than totally—impair the interests of the state whose law is not applied, *see Bernhard*, 546 P.2d at 725-26. We evaluate each factor in turn.

1.

First, we analyze whether the policy underlying a state's law "is one that was much more strongly held in the past than it is now." *Offshore Rental*, 583 P.2d at 726 (citation omitted). "[T]he current status of a statute is an important factor to be considered in a determination of comparative impairment." *Id.* If a particular statute is "infrequently enforced or interpreted even within its own jurisdiction," it has limited application in a conflict-of-laws case. *Id.*[12]

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12. For example, in *Offshore Rental*, the California Supreme Court considered a California cause of action for "negligent injury

The Cassirers argue that Spain's acquisitive prescription law is archaic, and therefore should be afforded little weight, because (1) it is out of step with international consensus supporting the return of Nazi-looted art, including agreements to which Spain is a party, and (2) Spain's six-year acquisitive prescription law for property obtained in bad faith is an outlier compared to other countries. That argument fails.

First, TBC does not claim to have taken prescriptive title under Spain's six-year acquisitive prescription law, which vests title after six years regardless whether the possessor acted in good faith. *Cassirer III*, 862 F.3d at 966. Were that law applied, we previously held that, pursuant

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to a key employee" brought by a California employer against a Delaware corporation for an injury to an employee that occurred on the defendant's premises in Louisiana. 583 P.2d at 722. It was unclear whether § 49 of the California Civil Code recognized such an action. *Id.* at 724. The court assumed that California did recognize the action, which it reasoned "expresse[d] [California's] interest in protecting California employers from economic harm." *Id.* But in applying the comparative impairment analysis, the court discounted California's interest because it had "exhibited little concern" in applying the law. *Id.* at 728. "[N]o California court has heretofore squarely held that California law provides an action for harm to business employees, and no California court has recently considered the issue at all." *Id.* The court also reasoned that the law was "archaic and isolated in the context of the laws of the federal union." *Id* (citation and quotation marks omitted). The court thus discounted California's interest "in the application of its unusual and outmoded statute," as compared to Louisiana's more "prevalent and progressive law" that did not recognize the cause of action. *Id.*

to Article 1956 of the Spanish Civil Code, TBC would not have acquired title to the Painting until 2019—six years after the criminal and civil limitations period had run—and so the Cassirers would have been entitled to the return of the Painting. *Id.* Thus, we find irrelevant the Cassirers' argument that Spain's six-year acquisitive prescription for stolen property is an "outlier compared to all of the other jurisdictions that had contact with the Painting." That provision of the law is not applicable in the "present case." *See McCann*, 225 P.3d at 534. The three-year period of Article 1955 is the basis for TBC's claim.

Second, we reiterate the California Supreme Court's directive that a court's task "is not to determine whether the [foreign jurisdiction] rule or the California rule is the better or worthier rule." *Id.* Rather, the inquiry rests on the "relative commitment of the respective states to the laws involved." *Offshore Rental*, 583 P.3d at 727. The Cassirers' argument strikes at the social worthiness of Article 1955 of the Spanish Civil Code—an invalid basis upon which to weigh the scope of Spain's interests. *See id.*

As we have recognized, "neither jurisdiction has shown any lack of interest in seeing its own law applied." *Cassirer VI*, 69 F.4th at 569. Spain has demonstrated a commitment to enforcing its acquisitive prescription laws and to legislating on the ownership of property located in its territory. *Id.* And California has asserted its strong interest in seeking justice for victims of art theft. *Id.* at 569 n.9. Both California and the Kingdom of Spain filed amicus briefs expressing their strong interests in the application of their respective laws to this dispute.

Therefore, the relative commitment of the jurisdictions to their laws as applied to this dispute does not favor or disfavor the application of either jurisdiction's laws under the comparative impairment approach.

2.

The California Supreme Court has reasoned that the place where the relevant conduct occurs receives significant weight in measuring the interests involved in the comparative impairment analysis. Indeed, a jurisdiction "ordinarily has the predominant interest in regulating conduct that occurs within its borders and in being able to assure individuals and commercial entities operating within its territory that applicable limitations on liability set forth in the jurisdiction's law will be available to those individuals and businesses in the event they are faced with litigation in the future." *McCann*, 225 P.3d at 534 (cleaned up). In such a case, the jurisdiction has a strong interest in "establishing a reliable rule of law" to promote predictability, to allow actors operating within the jurisdiction's borders reasonably to rely on the jurisdiction's law, and to facilitate investment by entities operating within the jurisdiction. *Id.*; *Offshore Rental*, 583 P.2d at 728; *Kearney*, 137 P.3d at 936-37.

In turn, failing to apply a jurisdiction's laws that limit liability with respect to conduct that occurs within its borders will, typically, significantly impair a jurisdiction's real and legitimate interests in promoting reliance on its laws. *See McCann*, 225 P.3d at 534-35; *Kearney*, 137 P.3d at 936-37. This is particularly so when the failure to apply

the jurisdiction's law to conduct within its borders is based solely on the fortuity of the residence or choice of tribunal of an adverse party. *See McCann*, 225 P.3d at 534-35.

In contrast, where none of the relevant conduct occurs in California, a "restrained view of California's interest" in facilitating recovery for one of its residents is warranted. *Id.* at 535. "[P]ast California choice-of-law decisions generally hold that when the law of the other state limits or denies liability for the conduct engaged in by the defendant in its territory, that state's interest is predominant, and California's legitimate interest in providing a remedy for, or in facilitating recovery by, a current California resident properly must be subordinated because of this state's diminished authority over activity that occurs in another state." *Id.* at 536; *see also Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 560 (9th Cir. 2020) ("California's courts have frequently applied foreign laws that serve to protect businesses by limiting liability, even when applying that law precludes recovery by injured California residents.").

We find *McCann* particularly instructive here. There, a former Oklahoma resident was exposed to friable asbestos at his workplace in Oklahoma. 225 P.3d at 518. The plaintiff later moved to California and developed mesothelioma there. *Id.* Breathing in friable asbestos is a known—perhaps the only known—cause of mesothelioma. He then sued his former employer in California state court. *Id.* Oklahoma's statute of repose would have barred the suit, but California's statute of limitations would not have barred the suit. *Id.* Thus, a "true conflict" existed

between California law and Oklahoma law. *Id.* at 533.

Applying the comparative impairment analysis of California's choice-of-law test, the California Supreme Court held that Oklahoma law applied and barred the plaintiff's suit. *Id.* at 537. The court concluded that "a failure to apply Oklahoma law would significantly impair Oklahoma's interest," because all relevant conduct—the exposure to the asbestos—"occurred in Oklahoma." *Id.* at 534. In so reasoning, the court stressed that a jurisdiction "ordinarily has the predominant interest in regulating conduct that occurs within its borders." *Id.*; *see also Castro v. Budget Rent-A-Car System, Inc.*, 154 Cal. App. 4th 1162, 1180, 65 Cal. Rptr. 3d 430 (Cal. Ct. App. 2007) (reasoning that a state has a "presumptive interest in controlling the conduct of those persons" who engage in relevant conduct in the state and that a state has an interest in "not subjecting its residents and businesses to the laws of other states that expand liability").

Thus, applying California law would have significantly impaired Oklahoma's governmental interests in regulating conduct within its borders, because doing so "would rest solely upon the circumstance that after defendant engaged in the allegedly tortious conduct in Oklahoma, plaintiff happened to move to a jurisdiction whose law provides more favorable treatment to plaintiff than that available under Oklahoma law." *McCann*, 225 P.3d at 534. The court reasoned:

> [T]he displacement of Oklahoma law limiting liability for conduct engaged in within

> Oklahoma, in favor of the law of a jurisdiction to which a plaintiff subsequently moved, would—notwithstanding the innocent motivation of the move—nonetheless *significantly impair the interest of Oklahoma* served by the statute of repose. If Oklahoma's statute were not to be applied because plaintiff had moved to a state with a different and less "business-friendly" law, Oklahoma could not provide any reasonable assurance—either to out-of-state companies or to Oklahoma businesses—that the time limitation embodied in its statute would operate to protect such businesses in the future. Because a commercial entity protected by the Oklahoma statute of repose has no way of knowing or controlling where a potential plaintiff may move in the future, subjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move *would significantly undermine Oklahoma's interest in establishing a reliable rule of law* governing a business's potential liability for conduct undertaken in Oklahoma.

Id. at 534-35 (emphases added); *see also Kearney*, 137 P.3d at 937 (explaining that "Georgia has a legitimate interest in ensuring that individuals and businesses who act in Georgia with the reasonable expectation that Georgia law applies to their conduct are not thereafter unexpectedly and unforeseeably subjected to liability for such action" and holding that "restrain[ing] the application

of California law with regard to the imposition of liability for acts that have occurred in the past" was necessary "to accommodate Georgia's interest in protecting persons who acted in Georgia in reasonable reliance on Georgia law").

In contrast, the failure to apply California's statute of limitations would create "a far less significant impairment of California's interest," because none of the relevant conduct occurred in California. *McCann*, 225 P.3d at 535. Although California would not be able to "extend its liberal statute of limitations for asbestos-related injuries or illnesses to some potential plaintiffs," "California's interest in applying its laws providing a remedy to, or facilitating recovery by, a potential plaintiff in a case in which the defendant's allegedly tortious conduct occurred in another state is less than its interest when the defendant's conduct occurred in California." *Id.* In turn, "a restrained view of California's interest in facilitating recovery by a current California resident is warranted in evaluating the relative impairment of California's interest that would result from the failure to apply California law." *Id.*; *see also Castro*, 65 Cal. Rptr. 3d at 444 (reasoning that a California plaintiff's "individual financial circumstance and the possible cost to California taxpayers and businesses [of an uncompensated loss] are . . . not sufficient to reallocate" lawmaking power from the jurisdiction where the conduct occurred to California).

Thus, because all relevant conduct occurred in Oklahoma—and California's only connection to the dispute was the fortuitous residence of the plaintiff in California—Oklahoma law applied under the comparative impairment analysis. *McCann*, 225 P.3d at 537.

Similarly, in *Offshore Rental*, the California Supreme Court—applying the comparative impairment approach—applied Louisiana law over California law to bar a claim by a California plaintiff relating to a physical injury that occurred in Louisiana. 583 P.3d at 728-29. There, the plaintiff, a California corporation, brought a negligence action against the defendant out-of-state corporation, seeking to recover damages that the plaintiff corporation allegedly sustained as a result of an injury that an officer of the corporation suffered while the officer was on the defendant's premises in Louisiana. *Id.* at 722. The California plaintiff (the employer) sued for the value of its lost services under a theory of "negligent injury to a key employee." *Id.* It was unclear whether California law recognized such a claim, but Louisiana law foreclosed such a claim. *Id.* at 724.

The California Supreme Court held that Louisiana law applied and barred the California plaintiff's suit, in part because the relevant conduct (the employee's injury at the defendant's workplace) occurred in Louisiana. *Id.* at 728-29. The court affirmed the trial court's order that had dismissed the plaintiff's claim, reasoning:

> The accident in question occurred within Louisiana's borders; although the law of the place of the wrong is not necessarily the applicable law for all tort actions, the situs of the injury remains a relevant consideration. At the heart of Louisiana's denial of liability lies the vital interest in promoting freedom of investment and enterprise within Louisiana's borders, among investors incorporated both

> in Louisiana and elsewhere. The imposition of liability on defendant, therefore, would strike at the essence of a compelling Louisiana law.

Id. at 728.

Based in part on the fact that the relevant conduct occurred in Louisiana, the California Supreme Court concluded that Louisiana's interests would be the more impaired if its law were not applied and, therefore, held that Louisiana law applied. *Id.* at 728-29.[13]

In sum, California Supreme Court precedent teaches that the place in which the relevant conduct occurs in the particular case is a crucial factor in measuring the jurisdictions' relative interests under the comparative interest analysis. This is because a jurisdiction has a strong interest in "establishing a reliable rule of law"—especially one that may limit future liability—with respect to conduct that occurs within its borders. *See McCann*, 225 P.3d at 535. Furthermore, when California's sole contact to the dispute was the happenstance of the plaintiff's residence there, California's interest in facilitating recovery for that resident was minimal and the extraterritorial reach of its laws was restrained. *See id.*

Here, as in *McCann*, California's governmental interest rests solely on the fortuity that Claude Cassirer

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13. As explained above, *supra* note 12, the California Supreme Court also discounted California's interest because California had "exhibited little concern" for applying its outdated law. *Id.* at 728. But the fact that the accident occurred within Louisiana's borders, and not California's borders, "provide[d] additional support for our limitation of the reach of California law in the present case." *Id.*

moved to California in 1980, at a time when the Cassirer family believed the Painting had been lost or destroyed. *See McCann*, 225 P.3d at 535. Like *McCann*, none of the relevant conduct involving the Painting occurred in California.[14] *See id.* Moreover, although California has evinced a strong interest in returning stolen art to victims of theft, *see* Cal. Code Civ. Proc. § 338(c)(3)(A), a "restrained view of California's interest in facilitating recovery by a current California resident" is warranted. *See McCann*, 225 P.3d at 535 ("California's interest in applying its laws providing a remedy to, or facilitating recovery by, a potential plaintiff in a case in which the defendant's allegedly tortious conduct occurred in another state is less than its interest when the defendant's conduct occurred in California."). In sum, because no relevant conduct with respect of the Painting occurred in California, the impairment of California's interest that would result from applying Spanish law would be minimal. *See id.* Claude Cassirer's decision to move to California—a move that was unrelated to his claim for the Painting—is "not sufficient to reallocate" lawmaking power from Spain to California. *See Castro*, 65 Cal. Rptr. 3d at 444; *McGhee v. Arabian Am. Oil Co.*, 871 F.2d 1412, 1424 (9th Cir. 1989) ("California courts have rejected arguments that a party's contacts with California, unrelated to the cause of action at hand, create a basis for extending the reach of California's law.").

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14. The only conduct connected to the Painting that occurred in California involved the sale of the Painting there in the early 1950s, when the Painting was in California for around a year before its sale to a St. Louis art dealer. But the parties do not claim this sale is in any manner relevant.

In contrast, applying California law would significantly impair Spain's interest in applying Article 1955 of the Spanish Civil Code. For one, because the relevant conduct (TBC's purchase of the Painting and its display in the museum) occurred in Spain—or at least not in California[15]—*McCann* teaches that Spain has the "predominant interest" in applying its laws to that conduct. *See* 225 P.3d at 534. As *McCann* and *Offshore Rental* both make clear, when the relevant conduct occurs within a jurisdiction's borders, that jurisdiction has a strong "interest in establishing a reliable rule of law governing a business's potential liability for conduct undertaken" there. *See id.* at 535; *Offshore Rental*, 583 P.2d at 728-29 (reasoning that a jurisdiction has a "vital interest in promoting freedom of investment and enterprise within [its] borders"); *Arno v. Club Med Inc.*, 22 F.3d 1464, 1469 (9th Cir. 1994) (applying French law to a vicarious-liability claim because Guadeloupe's interest in "encouraging local industry . . . and reliably defining the duties and scope of liability of an employer doing business within its borders" would be more impaired than California's interest in "providing compensation to its residents" would be impaired were its law not applied).

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15. Certainly, some of the Painting's history involves jurisdictions other than Spain: (1) the Nazis' theft of the Painting in 1939, in Germany, (2) the movement of the Painting into California and its sale in 1951, (3) the sale of the painting to a St. Louis, Missouri art collector in 1952, (3) the sale of the Painting to the Baron in New York in 1976, and (4) the Painting's possession and display by the Baron from 1976-1992 in Switzerland. But no one claims that Germany, Missouri, New York, or Switzerland has an interest in applying its laws here.

Moreover, applying California law based only on the Cassirers' choice of residence would mean that Spain could not provide any "reasonable assurance[s]" to persons who possess property within Spain's borders that Article 1955 would ever protect them from replevin or damages actions by California claimants. *See McCann*, 225 P.3d at 534. Rather, applying California law would mean that Spain's law would not apply to property possessed within Spain's borders, so long as the initial owner (1) happened to be a California resident (a fact over which, as in *McCann*, the defendant has "no way of knowing or controlling," *see id.* at 535), and (2) the California resident did not know where the property is located and who possessed it—contrary to Article 1955 of the Spanish Civil Code. Applying California law based only on Claude Cassirer's decision to move to California would "strike at the essence of a compelling [Spanish] law." *See Offshore Rental*, 583 P.2d at 728. And it would contradict the principles from *McCann* and *Offshore Rental*, which recognize the strong interest that Spain has in ensuring its laws will predictably regulate conduct that occurs within its borders. *See McCann*, 225 P.3d at 535 ("[S]ubjecting such a defendant to a different rule of law based upon the law of a state to which a potential plaintiff ultimately may move would significantly undermine Oklahoma's interest.").[16]

16. We recognize that *McCann* and *Offshore Rental* involved causes of action involving bodily injury, whereas this case involves an injury that relates to property. *See Cassirer VI*, 69 F.4th at 561-62. But as in *McCann* and *Offshore Rental*, which involved tort causes of action, the Cassirers' legal interests were also invaded by tortious conduct: conversion of the Painting by the Nazis in Germany. The principles from *McCann* and *Offshore Rental* are

Finally, Spain's interests in promoting reliance, predictability, and investment are especially relevant under the facts of this case, as shown by TBC requiring the Baron to provide a three-year *prenda* specifically to align with Article 1955's prescriptive acquisition period. Applying California law to this case would leave entities in Spain, like TBC, unable to structure and plan their conduct in Spain in reliance on Spain's laws. *McCann* and *Offshore Rental* dictate that such an outcome would significantly impair Spain's governmental interests.

In sum, applying California law to this dispute would significantly impair Spain's interests, whereas applying Spanish law would relatively minimally impair California's interests.

3.

Finally, the California Supreme Court has directed that a court applying the comparative impairment analysis should strive for the "maximum attainment of underlying purpose by all governmental entities." *Offshore Rental*, 583 P.2d at 728 (reasoning that a court should look to "the function and purpose of th[e] laws"). Thus, the court should look to whether one jurisdiction's laws accommodate the other jurisdiction's interests or imposes duties the other jurisdiction already imposes. *See, e.g., Bernhard*, 546 P.2d at 724-26. A state's laws can more readily be discarded if the failure to apply its laws would only partially—rather than totally—impair the policy interests of the jurisdiction

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therefore applicable here.

whose law is not applied. *See Offshore Rental*, 583 P.2d at 726-27. Here, the failure to apply California's laws would only partially undermine California's interests in deterring theft and returning stolen art to victims of theft, which provides further support for limiting the extraterritorial reach of California's laws to this dispute.

An example comes from *Bernhard*. There, a patron became intoxicated at Harrah's Club, a Nevada tavern located near the California border, and thereafter was involved in a car accident in Californi with a California resident. 546 P.2d at 720. Harrah's had advertised in California and solicited customers in California to patronize its business. *Id.* The plaintiff sued Harrah's in California state court for negligently serving alcohol to the patron. *Id.* Nevada had a law which immunized tavern keepers from civil liability for the negligent actions of their patrons, whereas California did not have a law so protecting tavern keepers. *Id.* Nevada law, however, imposed criminal liability on tavern owners who served alcohol to obviously intoxicated patrons. *Id.* at 725.

The California Supreme Court, applying the comparative impairment analysis, held that California law applied, in part because the failure to apply Nevada law would only partially undermine Nevada's interests, whereas the failure to apply California's law would significantly impede California from effectuating its policy interests in protecting against the risks of drunk driving. *Id.* at 724-26. Although the court recognized that application of California law would result in "an increased economic exposure" for Nevada tavern keepers, it

explained that "Nevada's interest in protecting its tavern keepers from civil liability of a boundless and unrestricted nature will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business." *Id.* at 725.

Moreover, the California Supreme Court noted that, since the "act of selling alcoholic beverages to obviously intoxicated persons is already proscribed in Nevada" by criminal law, application of California's rule would not impose "an entirely new duty" on Nevada tavern keepers. *Id.* Because Nevada law already contemplated that tavern keepers could be punished—albeit criminally—for serving intoxicated persons, exposing those businesses to civil liability would only partially undermine Nevada's interests. *Id.* Accordingly, the court concluded that California law should be applied. *Id.* at 725-26.

Here too, applying Spanish law would only partially undermine California's interests in facilitating recovery of stolen art for California residents. California law already contemplates that a person whose art—or other personal property—is stolen may eventually lose the ability to reclaim possession: namely, if the person fails to bring a lawsuit within six years after he discovers the whereabouts of the art. *See* Cal. Code Civ. Proc. § 338(c)(3)(A). If the victim fails to bring a lawsuit within that time, the victim loses the right of possession because he can no longer use the judicial process to enforce his ownership interest. *See, e.g., Harpending v. Meyer*, 55 Cal. 555, 561 (1880) (holding that a plaintiff whose jewelry had been stolen could not recover from a third party because the

statute of limitations had expired). And in such a case, as in Spain, the possessor retains possession rights as against all third parties, even if the property is stolen. *See Rosenthal v. McMann*, 93 Cal. 505, 29 P. 121, 121-22 (Cal. 1892) (explaining that "one having the possession, merely, is the owner as against a wrongdoer," and that possession "is presumed lawful, and as against a trespasser, even one who obtained possession wrongfully was deemed to have been lawfully possessed"); *Nat'l Bank of New Zealand, Ltd. v. Finn*, 81 Cal. App. 317, 253 P. 757, 769 (Cal. Dist. Ct. App. 1927) (noting the "general rule" is that "[a] ctual possession of a chattel at the time of its conversion will sustain trover, except as to the true owner or one claiming under him, even though the title be conceded to be in a third person" (quoting 24 Cal. Jur. § 19)); *Armory v. Delamirie*, 93 Eng. Rep. 664 (K.B. 1722) (holding that the finder and possessor of property has rights superior against all but the rightful owner).

Even under the most generous interpretation of California's no-title-passes-through-theft rule, then, certain victims of theft (i.e., those who do not bring suit to recover the chattel before the statute of limitations expires) will not prevail against subsequent possessors of the chattel. As with the risk of criminal liability for a tavern keeper under Nevada law in *Bernhard*, California law already contemplates the risk that certain victims of art theft will lose the right to reclaim property. *See Bernhard*, 546 P.2d at 725. Thus, failure to apply California's laws will not absolutely undermine California's interest in returning stolen art to victims of theft because California law protects the victim only if a timely suit is filed.

Similarly, Article 1955 of the Spanish Civil Code accommodates California's interest in deterring theft. As we have explained, Spanish law makes it more difficult for title to vest in an "*encubridor*," which includes, "an accessory after the fact," or someone who "knowingly receives and benefits from stolen property." *Cassirer III*, 862 F.3d at 968. If the possessor is proven to be an *encubridor*, Spanish law extends the period in which the property must be possessed before new prescriptive title is created. *Id.* Here, had TBC been an *encubridor*, the Cassirers would have prevailed in this action because TBC would not have gained prescriptive title by the time the Cassirers brought their claim. *See Cassirer III*, 862 F.3d at 966 ("[I]f Article 1956 applies, TBC has not acquired prescriptive title to the Painting."). California's interest in deterring passage of title through theft has, at least in part, been protected.

In sum, applying Spain's laws here would only partially undermine California's interests in deterring theft and in returning stolen art to victims of theft.

IV. CONCLUSION

We conclude that the application of California's laws would significantly impair Spain's governmental interests, whereas the application of Spain's laws would only relatively minimally impair California's governmental interests. As a result, Spain's interests would be more impaired by the application of California law than would California's interests be impaired by the application of Spanish law. Under California's choice-of-law test, then,

we hold that Spanish law applies to determine ownership of the Painting. And pursuant to Article 1955 of the Spanish Civil Code, TBC has acquired prescriptive title to the Painting. *See Cassirer IV*, 824 F. App'x at 457.

We therefore affirm the district court's order which granted judgment in favor of TBC.

AFFIRMED.

CALLAHAN, Circuit Judge, concurring:

Sometimes our oaths of office and an appreciation of our proper roles as appellate judges require that we concur in a result at odds with our moral compass. For me, this is such a situation. As we have previously held, the district court's "finding that the Baron lacked actual knowledge that the Painting was stolen was not clearly erroneous," and thus, "even if the Baron's knowledge could be imputed to TBC, it does not cause TBC to have actual knowledge." *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 824 F. App'x. 452, 456-57 (2020). Furthermore, I fully agree with the opinion's application of California law to the facts in this litigation and the determination that Spain's interests would be more impaired if California law were applied than California's interests would be impaired by applying Spanish law.

Nonetheless, I reaffirm the point we made in footnote three of our opinion in *Cassirer*, 824 F. App'x. at 457. Spain, having reaffirmed its commitment to the Washington Principles on Nazi-Confiscate Art when it signed the Terezin Declaration on Holocaust Era Assets and Related Issues, should have voluntarily relinquished the Painting. However, as we previously held, "we cannot order compliance with the Washington Principles or the Terezin Declaration." *Id.* Our opinion is compelled by the district court's findings of fact and the applicable law, but I wish that it were otherwise.

APPENDIX B

Opinion of the U.S. Court of Appeals for the Ninth Circuit denying rehearing and rehearing en banc and dissenting statement (July 9, 2024)

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 19-55616
D.C. No. 2:05-cv-03459-JFW-E

DAVID CASSIRER; THE ESTATE OF AVA CASSIRER; UNITED JEWISH FEDERATION OF SAN DIEGO COUNTY, a California non-profit corporation,

Plaintiffs-Appellants,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,

Defendant-Appellee.

Filed July 9, 2024

Consuelo M. Callahan, Carlos T. Bea, and Sandra S. Ikuta, Circuit Judges.

Order;
Statement by Judge Graber

* * *

ORDER

The panel unanimously voted to deny the petition for panel rehearing. Judge Callahan and Judge Ikuta voted to deny the petition for rehearing en banc, and Judge Bea so recommended. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35(a). Plaintiffs-Appellants' petition for panel rehearing and rehearing en banc, Dkt. 155, is **DENIED**.

Judges Owens, Friedland, and Collins did not participate in the deliberations or vote in this case.

GRABER, Senior Circuit Judge, with whom Senior Circuit Judge PAEZ joins, respecting the denial of rehearing en banc:

I regret this court's denial of rehearing en banc.

In 1939, Nazis stole a painting by Camille Pissarro from the Cassirers, a prominent Jewish family, in Germany. In 2000, the sole remaining heir, Claude Cassirer, discovered the painting in a Spanish museum that is an instrumentality of Spain. Spain refused to

return the painting, and Claude filed this action against the museum's foundation ("TBC") in 2005.

The only remaining question before this court is whether, applying California's choice-of-law test, California law or Spanish law applies. We must ask, in the context of this particular dispute, which jurisdiction's interest in enforcing its laws would be more impaired by applying the other jurisdiction's law. That inquiry favors applying a new, specific, modern law that will frustrate the purpose of the other jurisdiction's law only minimally. The test disfavors applying an old, general, isolated law that will eviscerate the purpose of the other jurisdiction's law.

The answer here is clear: California's law applies. California's law is new (enacted in 2010), specific to the recovery of stolen art, and consistent with nearly all domestic and international laws; and applying California's law will affect the purpose of Spain's law in only a tiny fraction of cases. By contrast, Spain's law is old (enacted in 1889); applies generally to all private property; and is isolated, contrary to the law of nearly all other jurisdictions, and contrary to Spain's own international commitments to return artwork stolen by Nazis. Finally, applying Spain's law would undermine entirely the purpose of California's law. The panel's opinion concludes that Spain's law applies by misstating the record about TBC's alleged "good faith" purchase of the painting, by applying principles that are inapposite, and by overlooking the relevance of the most important legal sources.

Questions of state law ordinarily do not warrant rehearing en banc. But this case is extraordinary. It has

generated many decisions by the district court; seven published opinions by this court, including one by an en banc panel; and one unanimous published opinion by the Supreme Court reversing our earlier ruling in favor of TBC. In addition to generating significant judicial proceedings, the dispute has garnered intense media coverage and interest from all over the world. This also is the rare case that has not only a legal component, but also a moral component: Consistent with earlier statements by the district court and by the panel as a whole, Judge Callahan's concurrence states that the opinion's result is "at odds with [her] moral compass." *Cassirer v. TBC*, 89 F.4th 1226, 1246 (9th Cir. 2024) (Callahan, J., concurring).

The issue is critically important. The world is watching. We should reach the result that is both legally compelled *and* morally correct. I am deeply disappointed by this court's decision, which has the unnecessary effect of perpetuating the harms caused by Nazis during World War II.

A. California Law, Not Spanish Law, Applies.

California applies a three-step "governmental interest approach" to a conflict of laws. *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 105 Cal. Rptr. 3d 378, 225 P.3d 516, 527 (Cal. 2010). First, the court analyzes the laws of the two jurisdictions to see if the laws differ in the context of the case at issue. *Id.* Second, the court "examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists." *Id.*

Third, the court "carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Id.* (citation and internal quotation marks omitted).

1. California's Law and Spain's Law Differ.

Under California common law, adverse possession does not apply to personal property such as stolen artwork; thieves cannot pass good title; and the rightful owner can bring a claim for the specific recovery of personal property. *Cassirer*, 89 F.4th at 1235. A claim for specific recovery is limited, however, by a statute of limitations found in California Code of Civil Procedure section 338.

For decades, section 338 specified a three-year statute of limitations. In 2002, the California legislature enacted a special, extended statute of limitations specifically directed at artwork stolen by Nazis. *See Cassirer v. TBC* ("*Cassirer II*"), 737 F.3d 613, 616-17 (9th Cir. 2013) (describing the history).[1] In *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1026-30 (9th Cir. 2009), *as amended by* 592 F.3d 954 (9th Cir. 2010), we declared the statute of limitations unconstitutional on the ground of field preemption. The California legislature

1. For ease of reference, I follow the panel opinion's conventions in this case, both in the naming of the earlier opinions in this case and in referring to the plaintiffs as "the Cassirers." *Cassirer*, 89 F.4th at 1229 n.2, 1230 n.4.

then amended section 338 in 2010 to provide, for most claims seeking stolen works of fine art, a six-year statute of limitations, which starts to run only when the rightful owner discovers the personal property. Cal. Civ. Proc. Code § 338(c)(3). We upheld the constitutionality of that provision. *Cassirer II*, 737 F.3d at 617-19.

In sum, California law permits a rightful owner to recover a stolen painting from a museum, but only if the owner sues within six years of discovering the painting. Here, no one disputes that the Cassirers are the rightful owners of the painting and that they brought the underlying action within six years of discovering the painting. So if California law applies, the Cassirers prevail.

Spanish law differs. Article 1955 of the Spanish Civil Code provides that a possessor of personal property gains title by adverse possession after "three years of uninterrupted possession in good faith" or "six years of uninterrupted possession, without any other condition." The only exception is found in Article 1956, which provides a longer adverse-possession period (here, twenty-six years) for the criminals themselves—those who stole the property or had "actual knowledge" that it was stolen. *See generally Cassirer v. TBC* ("*Cassirer III*"), 862 F.3d 951, 965-72 (9th Cir. 2017). In other words, the statute of limitations is three years for good-faith possession, six years for bad-faith noncriminal possession, or twenty-six years for criminal possession. Here, the district court found that TBC did not have actual knowledge that the painting was stolen, and it is undisputed that TBC openly

possessed the property "between 1993 and 1999, the relevant six-year period." *Id.* at 965. So if Spanish law applies, TBC prevails.

2. A True Conflict Exists.

A true conflict exists because "both Spain and California have a legitimate interest in applying their respective laws on ownership of stolen personal property." *Cassirer*, 89 F.4th at 1236 (quoting *Cassirer v. TBC* ("*Cassirer VI*"), 69 F.4th 554, 564 (9th Cir. 2023)) (brackets and internal quotation marks omitted). Because the painting is presently located in Spain, Spain has an interest in applying its general property laws to assure Spanish possessors of title after the passage of time. *Id.* Because the Cassirers are Californian residents, California has an interest in applying its own property law to create certainty of title for its residents. *Id.* "Moreover, California's 2010 enactment of § 338(c)(3)(A) evinces its 'strong interest in protecting the rightful owners of fine arts who are dispossessed of their property.'" *Id.* (quoting *Cassirer III*, 862 F.3d at 963).

3. California Law Applies at Step Three.

The answer in this case hinges on the final step of the analysis. We "carefully evaluate[] and compare[] the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *McCann*, 225 P.3d at 527 (citation and internal quotation marks

omitted). In making that assessment, it is important to emphasize, as the panel's opinion did, two analytical points. *First*, we must measure the interests of the two jurisdictions "based on 'the circumstances of the present case'—the facts of this *particular dispute*." *Cassirer*, 89 F.4th at 1237 (quoting *McCann*, 225 P.3d at 534). *Second*, the analysis does *not* ask "whether the Spanish rule or the California rule is the better or worthier rule." *Id.* at 1236 (brackets omitted) (quoting *McCann*, 225 P.3d at 534). Instead, we ask, as a factual matter, in the context of this particular dispute, which jurisdiction's interest would be more impaired by applying the other jurisdiction's law. *McCann*, 225 P.3d at 534. We apply "the law of the state whose interest would be more impaired if its law were not applied." *Id.* at 527 (citation and internal quotation marks omitted).

Two factors, both independently and in combination, compel the conclusion that California law applies: (a) the history and current status of Spain's and California's laws, and (b) the function and purpose of those laws. Considering those two factors, we must determine (c) the relative impairment of Spain's and California's interests and policies. The panel opinion errs in its application of those two factors, and it relies almost exclusively on a third factor that has no application here: (d) the nonexistent conduct of the plaintiffs in Spain.

a. History and Status of the Laws

The California Supreme Court has looked to "the history and current status of the states' laws." *Offshore*

Rental Co. v. Cont'l Oil Co., 22 Cal. 3d 157, 148 Cal. Rptr. 867, 583 P.2d 721, 727 (Cal. 1978). A jurisdiction's interest in applying an "antique" or "archaic" law is weaker than a jurisdiction's interest in applying a more recent law addressing a more specific subject matter. *Id.* at 726. In two distinct ways, this factor weighs in favor of applying California's law.

California's law is the result of significant effort by the California legislature to address a specific, modern problem: the recovery of artwork stolen by Nazis. As noted above, to address that problem, California enacted one law in 2002 and immediately enacted a replacement after we struck down the first law in 2010. There is no doubt that California's law is the result of particularized attention to a modern problem, not application of an old law to a new problem.

By contrast, Spain's law is "antique," *id.*; it is a generally applicable property law enacted in the 19th century, and it has never been amended despite significant historical events such as the World Wars and the international consensus supporting the return of artwork stolen by Nazis. The law appears to be a result of "the proverbial inertia of legal institutions." *Id.* at 727.[2]

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2. In an earlier opinion, the panel suggested that both laws were equally antique because California's substantive common law is also old. The panel wisely chose not to include that point in its most recent opinion, because the point finds no support in California precedent. California courts regularly consider the vintage of statutes of limitations or repose in weighing a conflict of laws. *E.g., McCann*, 225 P.3d at 527; *Ashland Chem.*

Spain's law is antique in a second sense, too. "If one of the competing laws is archaic and isolated in the context of the laws of the federal union, it may not unreasonably have to yield to the more prevalent and progressive law." *Id.* at 726. Spain's law is certainly isolated "in the context of the laws of the federal union." *Id.* TBC has cited the laws of only *one* state, Louisiana, in support of its contention that Spain's laws are not isolated. TBC Supp. Br., Dock. No. 138, at 17 (2023). Even Louisiana's law is questionably relevant in the specific context of art stolen by Nazis, in light of Congress' enactment of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016), which is intended to increase recovery, throughout the nation, of stolen art by victims of Nazi theft. Regardless, even if Spain's law possibly comports with the law of *one* out of 50+ jurisdictions in the United States, that fact merely proves that Spain's law is isolated. Spain's law also runs counter

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Co. v. Provence, 129 Cal. App. 3d 790, 181 Cal. Rptr. 340, 341 (Ct. App. 1982). California's substantive law allows a possessor to retain property unless a timely suit is filed. In the context of this particular dispute, the only relevant part of California law is the statute of limitations. No one has ever disputed that the Cassirers are the rightful owners and that the painting was stolen; the only question concerned the statute of limitations. *See, e.g., Cassirer II*, 737 F.3d 613 (entire opinion rejecting TBC's challenges to California's statute of limitations). To address the situation underlying this specific dispute and others like it, the California legislature had no reason to modify the underlying substantive law; instead, the California legislature had reason to—and did—modify its statute of limitations, thus evincing California's overall attention to the specific modern problem. The myopic reasoning of the panel's earlier opinion is illogical and without support in California law.

to the prevailing modern international trend. *See, e.g.*, German Civil Code (BGB) § 932; Swiss Civil Code (ZGB) Arts.3(2), 728; Cassirers' Supp. Br., Dock. No. 136, at 15-18 (2023) (describing the return of paintings from other jurisdictions); Cassirers' Supp. Br., Dock. No. 86, at 25-27 (2022) (listing international treaties urging the return of art stolen by Nazis to the rightful owner).[3]

In sum, California's law is specific, recent, and fully consistent with the modern trend both domestically and internationally, while Spain's law is generalized, old, and counter to the "more prevalent and progressive law," *Offshore Rental*, 583 P.2d at 726, of nearly every other state and the international consensus. This factor independently and strongly supports the application of California's law in the particular circumstances of this case: the recovery of art stolen by Nazis.[4]

The panel's opinion disputes neither that Spain's law is old and generalized nor that it runs counter to the overwhelming domestic and international consensus.

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3. The German law is found at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p3791, and the Swiss law is reproduced at ER 22-23.

4. The California Supreme Court *also* considers whether the law is "infrequently enforced or interpreted even within its own jurisdiction, and, as an anachronism *in that sense*, should have a limited application in a conflicts case." *Offshore Rental*, 583 P.2d at 726 (emphasis added). It is unclear whether a Spanish court has ever applied its property law to artwork stolen by Nazis but, even if so, the law remains anachronistic in the *other senses* mentioned by *Offshore Rental* and discussed in text.

Cassirer, 89 F.4th at 1238. Instead, the opinion dismisses those factors for two reasons. Neither is persuasive.

First, according to the opinion, "[t]he Cassirers' argument strikes at the social worthiness" of Spain's law. *Id.* That is decidedly not so. The facts that Spain's law is old and generalized and isolated, whereas California's law is recent and specific and common, are just that—facts on the ground. No judgment is required as to which jurisdiction's law is more *worthy*. Even if one held the view that Spain's law is more socially worthy, that view would not change the facts just recounted: new vs. old; specific vs. generalized; and common vs. isolated. And California's choice-of-law test selects the modern, specific law over an antique, isolated one. *Offshore Rental*, 583 P.2d at 727-28.

Second, the panel's opinion asserts that none of that matters because TBC held the painting in good faith; the three-year limitations period under Spanish law applies; and the *good-faith provision* is consistent with the law in some jurisdictions. *Cassirer*, 89 F.4th at 1233, 1238. The panel's opinion is mistaken.

There has *never* been a finding that TBC held the painting in good faith. The only finding made by the district court was that TBC's actions were not *criminal* because it lacked *actual knowledge* of theft. *Cassirer v. TBC*, No. CV 05-3459-JFW (Ex), 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *20-*22 (C.D. Cal. Apr. 30, 2019). The question of TBC's good faith or lack of good faith was never addressed because TBC held the painting for *six years* before the Cassirers discovered it, rendering

irrelevant whether the three-year or the six-year period applied. *See Cassirer III*, 862 F.3d at 965 ("The parties agree TBC's possession was peaceful from 1993 until 1999," which was "the relevant six-year period."). For support, the panel's opinion cites only a single page of the district court's 2019 decision, *Cassirer*, 89 F.4th at 1233 (citing *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *19), but that page states only the district court's finding that "TBC has possessed the property . . . for more than 6 years (from 1993 to 1999)," *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *19. Until this panel's recent decisions, no court in this case has ever suggested that the three-year statute of limitations applies. To the contrary, both we and the district court have referred to "the relevant six-year period" of 1993 to 1999. *Cassirer III*, 862 F.3d at 965; *accord Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *19.

Moreover, TBC clearly lacked good faith. Spain bought the painting from Baron Hans Heinrich Thyssen-Bornemisza. The district court concluded that the Baron held the painting in *bad faith*, because of several "red flags" found on the painting itself. *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *16, *19. Those red flags included "the presence of intentionally removed labels" from the painting which, the district court found, should have raised suspicions. *Id.* at *16. The court credited a declaration that there is "no legitimate reason" to remove labels; the "removal of such labels is like filing off the serial number on a stolen gun—clear cause for concern." *Id.* Other red flags included the presence of "a torn label demonstrating that the Painting had been in

Berlin," "the fact that Pissarro paintings were often looted by Nazis," and "the well-known history and pervasive nature of the Nazi looting of fine art during the World War II." *Id.* Those same red flags apply equally to Spain's later purchase of the painting. And an additional red flag applies to Spain's purchase from the Baron: the district court found that it was "generally known" that the Baron's family "had a history of purchasing art and other property that had been confiscated by the Nazis." *Id.* at *4.

In sum, TBC bought the painting from a family well known for trafficking in art stolen by Nazis; the Nazis targeted Pissarro paintings; a torn label revealed that this particular Pissarro painting had been in Berlin; and the painting had missing labels akin to a filed-off serial number—yet TBC declined to investigate *at all* the provenance of the painting. TBC may have lacked actual knowledge that the painting was stolen, but there is little question that, had the district court reached the question, it would have ruled that TBC lacked good faith.

Notably, the Cassirers raised this precise issue—that TBC's possession was *not* in good faith—prominently in their petition for rehearing. PFR at 20-22. TBC *failed to address it* in the Response, implicitly acknowledging that the Cassirers are correct on this point. The panel's opinion plainly misstates the record, and that misstatement caused legal error.

Viewing the record in proper light, the factors discussed above independently and strongly support the application of California's law.

b. Function and Purpose of the Laws

The second factor in California's comparative impairment analysis is "the function and purpose" of each jurisdiction's laws. *Offshore Rental*, 583 P.2d at 727. We must apply the law that achieves the "maximum attainment of underlying purpose by all governmental entities." *Id.* at 726 (citation omitted). That determination requires "identifying the focal point of concern" of the respective laws and "ascertaining the [c]omparative pertinence of that concern to the immediate case." *Id.* at 726 (citation omitted).

Applying California's law here would affect the purpose of Spain's law only minimally. Spain's law allows possessors of personal property to gain title after the passage of time, and its purpose is to "assur[e] Spanish residents that their title to personal property is protected." *Cassirer*, 89 F.4th at 1236 (citation omitted). Applying California's law here and in other cases involving artwork stolen by the Nazis would result in only a very small impairment of the purpose of Spain's law. Thousands, if not millions, of property transactions occur every year in Spain, but only a miniscule number of them involve artwork stolen by Nazis, or even fine art more generally. The purpose of Spain's law is entirely unaffected except in the tiniest sliver of cases.

Applying Spain's law, by contrast, would eviscerate entirely the function and purpose of California's law except in the rarest of circumstances, which appear never to have occurred. California's law allows the recovery of stolen

artwork as long as the rightful owner files suit within six years, and its objectives are to deter theft, facilitate recovery for victims of theft, and "protect[] the rightful owners of fine arts who are disposed of their property." *Id.* (quoting *Cassirer III*, 862 F.3d at 963). Applying Spain's law here and in other cases involving artwork stolen by Nazis would *completely* undermine the function and purpose of California's law. The only possibility of non-impairment would be a hypothetical, rare case in which the possessor is personally a criminal, triggering the longer statute of limitations, and the rightful owner discovers the artwork quickly enough.

The panel's opinion focuses on those rare cases, *id.* at 1245, but it is important to emphasize just how rare—or perhaps nonexistent—those cases are. As an initial matter, the burden of proving that the possessor is a criminal is incredibly high: a plaintiff must prove that the possessor had *actual knowledge* that the painting was stolen. Moreover, Spain's law allows recovery from criminals only if the rightful owner brings suit quickly enough—here, within twenty-six years. Applying that analysis to the facts of this particular dispute leads to a remarkable conclusion: Let's assume that all purchasers before TBC—the Nazis in Germany and the purchasers in California, Saint Louis, and Switzerland—were criminals because they had actual knowledge that the painting was stolen. If any of those purchasers had moved to Spain and displayed the painting, Spanish law would deny recovery to the Cassirers, *even against a criminal*, because the criminal would have gained title by the passage of twenty-six years. In other words, the possibility that a plaintiff

could prove that a possessor was criminal in a case in which the extended statute of limitations *mattered* is theoretical only; it would not avail the Cassirers.

The panel's opinion also reasons that California's objectives are not impaired because California law allows suit only within six years of discovery. *Id.* at 1244-45. If the rightful owner waits too long to sue, then Spain's law doesn't affect the result, so the purpose of California's law is not impinged in every case. *Id.* That reasoning is illogical and a red herring. The purpose of California's law is to require the return of stolen artwork *but only if the plaintiff brings suit within six years*. There is simply no frustration of California's purpose in situations in which the plaintiff fails to file a timely action, just as there is no frustration of California's purpose in cases in which the defendant prevails for reasons having nothing to do with the conflict of laws (lack of personal jurisdiction, suit brought by someone other than the rightful owner, failure to prove that the artwork was stolen, and so on).

In sum, applying California's law would impair Spain's interests in only a miniscule number of cases, whereas applying Spanish law would completely eviscerate California's interests in all realistic cases.

c. Relative Impairment of Spain's and California's Interests and Policies

The two factors discussed above compel the conclusion that California law applies. (1) California's law is new, specific to stolen fine art, and consistent with modern

trends domestically and internationally, and Spain's law is old, general to all personal property, and isolated with respect to domestic and international laws. (2) Applying California's law will have only a tiny effect on the function and purpose of Spain's law, but applying Spain's law will completely undermine the function and purpose of California's law. Putting the two factors together, California's interests and policies would be entirely undermined by applying Spain's law, but applying California's law will affect Spain's interests and policies in only a tiny number of cases. Therefore, California law applies.

Yet another consideration specific to this particular dispute bolsters that conclusion. Spain's interests and policies in this *specific* context—artwork stolen by Nazis—point in *opposing* directions. Spain has a generic interest in applying its archaic adverse-possession rules, including with respect to artwork. But Spain *also* has a stated policy of promoting the recovery of artwork stolen by Nazis. Spain voluntarily signed two treaties—the 1998 Washington Conference Principles on Nazi-Confiscated Art, and the 2009 Terezin Declaration on Holocaust Era Assets and Related Issues—which morally commit Spain to returning artwork stolen by Nazis to the rightful owner.[5] Those treaties are not legally binding (if they were, Spanish law would track California law and there

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5. The treaties are available at https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/ and https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/.

would be no conflicts analysis). But California law asks whether the jurisdiction's *interests and policies as a whole* would be impinged. Here, whatever interest Spain has in enforcing its general adverse-possession rules to artwork stolen by Nazis is counterbalanced by its internationally declared, specific policy of returning that narrow category of artwork. Spain's overall interests and policies would be affected only minimally.

Those treaties have real effects. As a direct result of those treaties, the United States and other signatories have enacted legislation that allows rightful owners—including rightful owners in Spain—to recover artwork found in those nations. *See, e.g.*, Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, 1525-26 § 3(1) (2016) (stating that the primary purpose of the Act is to "ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration"); Cassirers' Supp. Br., Dock. No. 136, at 15-18 (2023) (describing the effect of the treaties in other nations).

Once again, this reasoning does not judge the social worthiness of Spain's policies. Instead, it merely acknowledges the simple fact that Spain has signed the treaties. Spain could have declined to sign the treaties. Or it could have signed only the parts of the treaties having to do with topics other than stolen artwork. But it did not. It voluntarily chose to sign the treaties in full, thus expressing its national policy of encouraging the return

of artwork stolen by the Nazis. Indeed, the district court found that Spain's failure to return the Cassirers' painting is inconsistent with those commitments, *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *26.

A precedent by the California Supreme Court is instructive. In *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 128 Cal. Rptr. 215, 546 P.2d 719 (Cal. 1976), a club in Nevada allegedly served alcohol to an intoxicated person from California, who then crashed her car in California, and the victim sued the club. California law, at the time, allowed suits against taverns that serve alcohol to intoxicated persons, but Nevada law did not. *Id.* at 721. The court held that Nevada had a strong interest in enforcing its laws to taverns located in-state. *Id.* But the court held that the case turned on the fact that the club in Nevada *voluntarily* advertised in California. *Id.* at 725. Nevada's interest "will not be significantly impaired when as in the instant case liability is imposed only on those tavern keepers who actively solicit California business." *Id.* The same reasoning applies here. Spain *voluntarily* chose to sign the treaties, and Spain's interest in applying its general property law will not be significantly impaired by applying California law specifically to artwork stolen by Nazis, which is consistent with Spain's voluntarily undertaken moral commitments.

In sum, applying Spanish law would completely eviscerate California's interests in all realistic cases, whereas applying California's law would impair Spain's

interests in only a few cases and, even in those cases, would be consistent with Spain's national policy of allowing recovery of artwork stolen by Nazis. California law applies.

d. The Nonexistent Conduct of the Plaintiffs in Spain

The panel's opinion devotes most of the analysis to a factor that applies with only ordinary force. It is undisputed that a jurisdiction has a general interest in regulating the conduct of defendants in that jurisdiction. Applied here, it is undisputed that Spain has a general interest in applying its property laws because the painting is found in Spain and because TBC possessed the painting there. We have held repeatedly that Spain certainly has an interest in regulating the property interests of persons and entities, like TBC, who possess property in Spain. *Cassirer*, 89 F.4th at 1236; *Cassirer VI*, 69 F.4th at 565; *Cassirer III*, 862 F.3d at 963. Indeed, that general interest is what gives rise to the conflict—at step two of California's choice-of-law test, described above—with California's competing "strong interest" in this case. *Cassirer*, 89 F.4th at 1236 (quoting *Cassirer III*, 862 F.3d at 963). Spain's interest in its generic property laws and in regulating the conduct of defendants in Spain applies with ordinary force here.

The panel's opinion, though, gives that factor undue weight in the context of this particular case. The general principle that a jurisdiction has an interest in regulating conduct within its borders applies with especially strong

force, the California Supreme Court has held, in a specific circumstance not present here: when a plaintiff voluntarily enters the jurisdiction and is harmed in that jurisdiction. In several cases, including the two cases principally cited by the panel's opinion—*Offshore Rental*, 583 P.2d 721, and *McCann*, 225 P.3d 516—the California Supreme Court has held that, because a plaintiff voluntarily entered the other jurisdiction and was harmed there, it is reasonable to apply that other jurisdiction's law. The court's reasoning for applying the general principle—a jurisdiction has an interest in regulating conduct within its borders—with special force plainly turned on the fact that *the plaintiff had voluntarily entered the jurisdiction and been harmed there*.

In *Offshore Rental*, the plaintiff's employee visited Louisiana and was injured in a car crash there. 583 P.2d at 722. The court applied Louisiana law and reasoned as follows: "*By entering Louisiana, plaintiff exposed itself to the risks of the territory*, and should not expect to subject defendant to a financial hazard that Louisiana law had not created." *Id.* at 728 (emphasis added) (citation, internal quotation marks, and brackets omitted).

In *McCann*, the plaintiff alleged that he was injured by asbestos exposure in Oklahoma. 225 P.3d at 518. The court applied Oklahoma law because the exposure "occurred in Oklahoma in 1957, at a time when plaintiff was present in Oklahoma and was an Oklahoma resident." *Id.* at 534. The *McCann* court summarized the reasoning in *Offshore Rental* and held:

> By parity of reasoning, *because plaintiff in the present case was in (and, indeed, a resident of) Oklahoma at the time of his exposure to asbestos*, for which he claims [the defendant] should be held responsible, it is reasonable to conclude that he "should not expect to subject defendant to a financial hazard that [Oklahoma] law had not created[.]"

McCann, 225 P.3d at 535 (emphasis added) (second brackets in original) (quoting *Offshore Rental*, 583 P.2d at 728).

That reasoning plainly does not apply here, because the Cassirers *never voluntarily took the painting to Spain*. The panel's opinion fails to address that key distinction. Instead, the opinion focuses myopically on *the defendant's* conduct only; it disregards entirely that the plaintiffs never took any relevant action in Spain.

The California Supreme Court's special solicitude of another jurisdiction's authority to regulate conduct within its borders plainly turned on the plaintiff's voluntary entry into that jurisdiction. Where, as here, that specific circumstance is not present, a jurisdiction's general interest in regulating matters within its borders carries only ordinary weight. The heavy reliance in the panel's opinion on cases such as *Offshore Rental* and *McCann* is unwarranted.

4. Conclusion

Proper application of California's choice-of-law test to this case compels the conclusion that California law applies.

B. This Case is Exceptionally Important.

This case is the rare one that is exceptionally important notwithstanding that it concerns an issue of state law only.

We have published seven opinions in this case over the past fifteen years. The case is so important that we granted rehearing en banc after an earlier opinion, *Cassirer v. Kingdom of Spain*, 590 F.3d 981 (9th Cir. 2009) (order), and the Supreme Court granted certiorari from a different earlier ruling, *Cassirer v. TBC*, 142 S. Ct. 55, 210 L. Ed. 2d 1024 (2021).

As Judge Callahan noted, unlike most cases, this particular case has a strong moral component. *Cassirer*, 89 F.4th at 1246 (Callahan, J., concurring). And the result in this case is at odds with her moral compass. *Id.* Similarly, the district court held that Spain's actions are inconsistent with that nation's moral and treaty commitments. *Cassirer*, 2019 U.S. Dist. LEXIS 247143, 2019 WL 13240413, at *26. And the full panel has acknowledged the moral component of the case. *Cassirer v. TBC* ("*Cassirer IV*"), 824 Fed. Appx. 452, 457 n.3 (9th Cir. 2020) (unpublished).

The moral dimension of this case does not dictate the legal result. I agree fully with Judge Callahan that,

if the law requires it, we must rule contrary to our moral compass. *Cassirer*, 89 F.4th at 1246 (Callahan, J., concurring). But, here, the law points decidedly in the same direction as our moral compass. And the moral dimension of the case adds significant importance to our reaching the legally correct result.

The case also has attracted unusually intense media coverage the world over. Articles have been published in essentially every major newspaper in the United States along with many smaller domestic papers, as well as publications in Spain, Germany, the United Kingdom, France, the Netherlands, Italy, Mexico, Canada, Colombia, Brazil, Argentina, Australia, New Zealand, Israel, South Africa, Hong Kong, Bangladesh, Thailand, and regional publications in Europe and Asia more generally. The media understandably have recognized the moral dimension, too, and have characterized the case as "perhaps the highest-profile case of World War II art restitution." *The Nazis forced a Jewish woman to hand over a priceless painting. 85 years later, judges said her family can't have it back.*, Business Insider (Jan. 11, 2024); *see, e.g., Editorial: It's outrageous that a Spanish museum refuses to return Nazi-looted art to the rightful heirs*, L.A. Times (Jan. 13, 2024) ("It is shameful that the museum and the Spanish government refuse to do what is just and moral, which is to return the painting that Lilly Cassirer hung on the wall of her apartment in Berlin."); '*The Pissarro case': a moral dilemma for Spain*, El Pais (Jan. 12, 2024); *Madrid's Thyssen Museum hangs on to Pissarro painting looted by Nazis*, Le Monde (Feb. 2, 2024) ("Although a California appeals court ruled in favor of the cultural institution

against the descendants of the despoiled Jewish family, the legal victory is causing unease."); *Jewish groups in Spain are troubled by their government's decision to cling onto a painting looted by the Nazis*, Business Insider (Jan. 24, 2024) ("In a shock[ing] legal decision earlier this month, a California court determined that Spain has the right to hold onto a valuable painting looted by the Nazis rather than returning it to the family of the Jewish woman it was stolen from.").

The world is watching. We should apply the law correctly to this high-profile and morally weighty case. Nor is the contrary result unfair to Spain or its instrumentality, TBC. TBC may have lacked actual knowledge that the painting was stolen, but there is no unfairness in requiring TBC to relinquish it. As described above, despite several strong red flags suggesting that the painting had been stolen by Nazis, TBC voluntarily chose not to investigate *at all* the painting or its provenance. Nothing required TBC to investigate, but TBC bore the risk that its rightful owner would make a claim.

C. Conclusion

If this case involved an ordinary thief and an ordinary object—a heist of an expensive jewel, say—then the application of Spanish law likely would make sense for many of the reasons given in the panel's opinion. But this case involves artwork stolen by Nazis. That distinction matters, when analyzing California's choice-of-law rules, because California has legislated specifically with respect to the return of artwork stolen by Nazis and because the

international community, including the United States and Spain, has coalesced around the principle that artwork stolen by Nazis should be returned to the rightful owner. Nor is this a case where the plaintiff chased an advantageous forum; Claude Cassirer moved to California in 1980, more than a decade before Spain bought the painting, and two decades before he discovered the painting. California's choice-of-law test asks which jurisdiction's interests and policies would be more impaired by applying the other jurisdiction's law. A straightforward application of that test in the particular circumstances of this case leaves no doubt: California's interest would be completely impaired, but Spain's interests and policies would be impaired only minimally and only in a few cases.

I regret this court's failure to rehear this case en banc.

APPENDIX C

Enrolled Copy of California Assembly Bill 2867, signed into law by Governor Gavin Newsom on September 16, 2024

Assembly Bill No. 2867

CHAPTER 257

An act to amend Section 388 of, and to add Section 338.2 to, the Code of Civil Procedure, relating to civil actions, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 16, 2024.
Filed with Secretary of State September 16, 2024.]

LEGISLATIVE COUNSEL'S DIGEST

AB 2867, Gabriel. Recovery of artwork and personal property lost due to persecution.

Existing law provides that in the case of a theft of any article of historical, interpretive, scientific, cultural, or artistic significance, a cause of action is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, the aggrieved party's agent, or a law enforcement agency. Existing law requires a civil action against a museum, gallery, auctioneer, or dealer for the recovery of works of fine art that were unlawfully taken or stolen, including a taking or theft by means of fraud or duress, to be commenced within 6 years of the actual discovery by the claimant or their

agent of the identity and whereabouts of the work of fine art and information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art. Existing federal law, the Holocaust Expropriated Art Recovery Act of 2016, establishes a statute of limitation for claims to recover artwork and other property, as defined, stolen or misappropriated by the Nazis between 1933 and 1945.

This bill would provide that California substantive law shall apply in actions to recover fine art or an item of historical, interpretive, scientific, or artistic significance, including those covered by the Holocaust Expropriated Art Recovery Act of 2016, brought by a California resident or their heirs, as specified.

This bill would also permit a California resident or a representative of the estate of a California resident, as specified, to bring an action for damages or to recover artwork or personal property, as defined, that was stolen or otherwise lost as the result of political persecution. The bill would permit such actions to be brought within six years of the discovery of relevant facts, as provided. This bill would also permit those who discovered relevant facts prior to the effective date of this bill, to bring such actions within 6 years of the discovery of the relevant facts or within 2 years of the effective date of this bill, whichever is later. The bill would permit a cause of action previously dismissed on specified grounds to be brought again under these provisions within 2 years of either the effective date of the bill or the entry of final judgment and the termination of all appeals, whichever is later.

This bill would declare that it is to take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. (a) Under California law, a thief cannot convey good title to stolen works of art, and the true owner cannot be divested of ownership without actual discovery of their rights in, and the location and possessor of, the artwork.

(b) In 2010, the Legislature affirmed these principles when it rejected the holding of the Ninth Circuit Court of Appeals in Von Saher v. Norton Simon Museum (9th Cir. 2010) 592 F.3d 954, 969, that California law allowed theft victims' claims to be defeated based on "constructive" rather than actual discovery; amended Section 338 of the Code of Civil Procedure to allow an action to recover stolen art from a museum, gallery, auctioneer, or dealer to be filed within six years of actual discovery, and specifically defined "actual discovery" to exclude "any constructive knowledge imputed by law."

(c) The legislative history of paragraph (3) of subdivision (c) of Section 338 of the Code of Civil Procedure explained that the "imputation of 'constructive' discovery . . . does not lead to equitable results when works may be displayed anywhere in the world and traffickers engage in purposeful concealment"; approved judicial decisions that applied actual discovery and rejected constructive

discovery in stolen property cases, such as Naftzger v. American Numismatic Soc'y (1996) 42 Cal. App. 4th, 421; and stated that the amendments reaffirmed the State's commitment "to the rule that a thief cannot convey good title, and that stolen art should be returned to its rightful, original owner."

(d) In a recent Ninth Circuit Court of Appeals decision, the court refused to credit California's laws and interests supporting owners of stolen art, including its rejection of "constructive discovery." The court in Cassirer v. Thyssen-Bornemisza Collection Foundation (9th Cir. 2024) 89 F.4th 1226, held that California's "governmental interests" test for choice of law required Spanish substantive law, not California law, to apply in a case by Claude Cassirer, a Holocaust survivor and long-time California resident, to recover an Impressionist masterpiece looted by the Nazis from his grandmother, and now held by a Spanish government-owned museum.

(e) The Cassirer court held under Spanish law that the museum acquired "good title" after three years of possession, even though Mr. Cassirer did not know the museum had the painting. In so doing, the court applied Spain's law of acquisitive prescription or adverse possession, which is based on the principle of constructive notice that the California courts and Legislature have rejected.

(f) Mandating California substantive law in stolen art cases will discourage art theft and trafficking in stolen

art, and will encourage integrity and diligence in the art market. Further, mandating California substantive law will draw a clear line of liability in litigation, eliminate costly defense tactics, and encourage settlements.

(g) It is the intent of the Legislature to align California law with federal laws, policies, and international agreements, which prohibit pillage and seizure of works of art and cultural property, and call for restitution of seized property.

(h) In 2016, the United States Congress cited and followed California law in enacting a national six-year statute of limitations based on actual discovery for claims for Nazi-looted art, in the Holocaust Expropriated Art Recovery (HEAR) Act. The HEAR Act's six-year discovery rule applies "notwithstanding . . . any defense at law relating to the passage of time." The provisions of this act mandating application of California substantive law will reinforce the HEAR Act's preclusion of defenses at law "relating to the passage of time."

(i) It is the intent of the Legislature that California families (or heirs of Californians) whose art was looted based on persecution, including Holocaust survivors and heirs, who did not have an opportunity to bring those claims with the certainty that California law would supply the rule of decision, to be able to do so, and that the law apply retroactively for families who would be eligible to use the new law, but for whom the six-year limitations period would have already passed, or whose prior cases were rejected based on the defenses proscribed in Section

338.2 of the Code of Civil Procedure, to be added by Section 3 of this act.

(j) 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), Conflict of Laws: "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."

(k) 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. This law aligns California law with federal laws, federal policies, and international agreements prohibiting pillage and seizure of works of art and cultural property and calling for restitution of seized property, as embodied in the Hague Convention of 1907 (and 1899), the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the National Stolen Property Act of 1934, the Holocaust Victims Redress Act, the Holocaust Expropriated Art Recovery Act of 2016, and related federal executive branch policies and international agreements.

SEC. 2. Section 338 of the Code of Civil Procedure is amended to read:

338. Within three years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for trespass upon or injury to real property.

(c) (1) An action for taking, detaining, or injuring goods or chattels, including an action for the specific recovery of personal property.

(2) The cause of action in the case of theft, as described in Section 484 of the Penal Code, of an article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, the aggrieved party's agent, or the law enforcement agency that originally investigated the theft.

(3) (A) Notwithstanding paragraphs (1) and (2), an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or the claimant's agent, of both of the following:

(i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts

sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.

(ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.

(B) This paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including an action dismissed based on the expiration of statutes of limitations in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute.

(C) For purposes of this paragraph:

(i) "Actual discovery," notwithstanding Section 19 of the Civil Code, does not include constructive knowledge imputed by law.

(ii) "Auctioneer" means an individual who is engaged in, or who by advertising or otherwise holds the individual out as being available to engage in, the calling for, the recognition of, and the acceptance of, offers for the purchase of goods at an auction as defined in subdivision (b) of Section 1812.601 of the Civil Code.

(iii) "Dealer" means a person who holds a valid seller's permit and who is actively and principally engaged in, or conducting the business of, selling works of fine art.

(iv) “Duress” means a threat of force, violence, danger, or retribution against an owner of the work of fine art in question, or the owner’s family member, sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or to acquiesce to an act to which the person would otherwise not have acquiesced.

(v) “Fine art” has the same meaning as defined in paragraph (1) of subdivision (d) of Section 982 of the Civil Code.

(vi) “Museum or gallery” shall include any public or private organization or foundation operating as a museum or gallery.

(4) Section 361 shall not apply to an action brought pursuant to paragraph (3).

(5) A party in an action to which paragraph (3) applies may raise all equitable and legal affirmative defenses and doctrines, including, without limitation, laches and unclean hands.

(6) Notwithstanding any other law or prior judicial decision, in any action brought by a California resident, or by an heir, trustee, assignee, or representative of the estate of a California resident, involving claims relating to title, ownership, or recovery of personal property as described in paragraph (2) or (3), or in the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) (Pub. L. No. 114-308), including claims for money damages, California

substantive law shall apply. This paragraph shall apply to all actions pending on the date this paragraph becomes operative or that are commenced thereafter, including any action in which the judgment is not yet final or the time for filing any appeal, including a petition for a writ of certiorari in the United States Supreme Court, has not expired, or, if filed, has not been decided.

(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

(e) An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or the aggrieved party's agent, of the facts constituting the cause of action upon the bond.

(f) (1) An action against a notary public on the notary public's bond or in the notary public's official capacity except that a cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or the aggrieved party's agent, of the facts constituting the cause of action.

(2) Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or the aggrieved party's agent, of the facts constituting the cause of action or within three years from the performance of the notarial act giving rise to the action, whichever is later.

(3) Notwithstanding paragraph (1), an action against a notary public on the notary public's bond or in the notary public's official capacity shall be commenced within six years.

(g) An action for slander of title to real property.

(h) An action commenced under Section 17536 of the Business and Professions Code. The cause of action in that case shall not be deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action.

(i) An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.

(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.

(k) An action commenced under Division 26 (commencing with Section 39000) of the Health and Safety Code. These causes of action shall not be deemed to have accrued until the discovery by the State Air Resources

Board or by a district, as defined in Section 39025 of the Health and Safety Code, of the facts constituting grounds for commencing the action under its jurisdiction.

(*l*) An action commenced under Section 1602, 1615, or 5650.1 of the Fish and Game Code. These causes of action shall not be deemed to have accrued until discovery by the agency bringing the action of the facts constituting the grounds for commencing the action.

(m) An action challenging the validity of the levy upon a parcel of a special tax levied by a local agency on a per parcel basis.

(n) An action commencing under Section 51.7 of the Civil Code.

(o) An action commenced under Section 4601.1 of the Public Resources Code, if the underlying violation is of Section 4571, 4581, or 4621 of the Public Resources Code, or of Section 1103.1 of Title 14 of the California Code of Regulations, and the underlying violation is related to the conversion of timberland to nonforestry-related agricultural uses. These causes of action shall not be deemed to have accrued until discovery by the Department of Forestry and Fire Protection.

(p) An action for civil penalties commenced under Section 26038 of the Business and Professions Code.

SEC. 3. Section 338.2 is added to the Code of Civil Procedure, to read:

Appendix C

338.2. (a) A California resident, or an heir, trustee, assignee, or representative of the estate of a California resident, may bring an action for damages, other financial recovery, title, recovery, or ownership, of artwork or other personal property that was taken or otherwise lost as a result of political persecution.

(b) Notwithstanding any other law, actions brought pursuant to this section shall be commenced within six years of the actual discovery by the claimant or the claimant's agent, of both of the following:

(1) The identity and the whereabouts of the artwork or other personal property. Where there is a possibility of misidentification of the object in question, the identity can be satisfied by the identification of facts sufficient to determine that the artwork or other personal property is likely to be the artwork or other personal property that was unlawfully taken or stolen.

(2) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or other personal property that was unlawfully taken or stolen.

(c) If a claimant had actual knowledge of the facts described in subdivision (b) prior to the enactment of this section, any action brought pursuant to this section shall be commenced within of six years of actual discovery or two years from the enactment of this section, whichever is later.

(d) For purposes of this section the following definitions shall apply:

(1) "Artwork or other personal property" means any of the following:

(A) Pictures, paintings, and drawings.

(B) Statuary art and sculpture.

(C) Engravings, prints lithographs, and other works of graphic art.

(D) Applied art and original artistic assemblages and montages.

(E) Books, archives, musical instruments, musical objects, and manuscripts, including musical manuscripts and sheets, and sound, photographic, and cinematographic archives and mediums.

(F) Sacred and ceremonial objects.

(G) Objects of cultural significance.

(2) "Political persecution" means persecution of a specific group of individuals based on their membership in a protected class under the state's Unruh Civil Rights Act (Section 51 of the Civil Code).

(e) Notwithstanding any other provision of law or prior judicial decision, in any action brought pursuant to this

section or in the Holocaust Expropriated Art Recovery Act of 2016 (HEAR) (Pub. L. No. 114-308), California substantive law shall apply.

(f) In an action brought pursuant to this section, where an item specified in subdivision (d) is taken or lost as a result of political persecution, clear title is not conveyed to any subsequent purchaser or owner. Defenses that the defendant acquired the title in good faith, by acquisitive prescription, or by adverse possession, and the defense of laches do not apply to cases brought under this section.

(g) An action may be brought by a claimant who, prior to the enactment of this section, brought a claim to recover personal property that was stolen or lost due to political persecution, and the case was dismissed by a court based on any of the defenses listed in subdivision (f), or based on any procedural basis such as standing, personal jurisdiction, or subject matter jurisdiction. Any such actions shall be commenced within two years of the effective date of this section or the entry of a final judgment and the termination of all appeals, including any petition for a writ of certiorari, whichever is later.

(h) A prevailing plaintiff shall be entitled to reasonable attorney's costs and fees.

SEC. 4. The provisions of this Act are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

SEC. 5. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure that California law is applied as specified herein in any pending or future cases brought by California residents, it is necessary that this act take effect immediately.

APPENDIX D

Supremacy Clause of the U.S. Constitution, Article VI, Clause 2

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * *

APPENDIX E

Hague Convention (IV), Arts. 46, 47, 56, 36 Stat. 2277, 2307, 2309 (Oct. 18, 1907)

Section III.—Military Authority over the Territory of the Hostile State.

* * *

Article 46.

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Article 47.

Pillage is formally forbidden.

* * *

Article 56.

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction, or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

APPENDIX F

Holocaust Victims Redress Act, Pub. L. No. 105-158, 112 Stat. 15 (1998)

An Act

To provide redress for inadequate restitution of assets seized by the United States Government during World War II which belonged to victims of the Holocaust, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Victims Redress Act".

* * *

TITLE II—WORKS OF ART

SEC. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs

of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

SEC. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

* * *

APPENDIX G

Holocaust Expropriated Art Recovery Act of 2016 (HEAR), Pub. L. No. 114-308, 130 Stat. 1524 (2016)

An Act

To provide the victims of Holocaust-era persecution and their heirs a fair opportunity to recover works of art confiscated or misappropriated by the Nazis.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Holocaust Expropriated Art Recovery Act of 2016".

SEC. 2. FINDINGS.

Congress finds the following:

(1) It is estimated that the Nazis confiscated or otherwise misappropriated hundreds of thousands of works of art and other property throughout Europe as part of their genocidal campaign against the Jewish people and other persecuted groups. This has been described as the "greatest displacement of art in human history".

(2) Following World War II, the United States and its allies attempted to return the stolen artworks to their countries of origin. Despite these efforts, many works of art were never reunited with their owners. Some of the art has since been discovered in the United States.

(3) In 1998, the United States convened a conference with 43 other nations in Washington, DC, known as the Washington Conference, which produced Principles on Nazi-Confiscated Art. One of these principles is that "steps should be taken expeditiously to achieve a just and fair solution" to claims involving such art that has not been restituted if the owners or their heirs can be identified.

(4) The same year, Congress enacted the Holocaust Victims Redress Act (Public Law 105–158, 112 Stat. 15), which expressed the sense of Congress that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.".

(5) In 2009, the United States participated in a Holocaust Era Assets Conference in Prague, Czech Republic, with 45 other nations. At the conclusion of this conference, the participating nations issued the Terezin Declaration, which reaffirmed the

1998 Washington Conference Principles on Nazi-Confiscated Art and urged all participants "to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.". The Declaration also urged participants to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.".

(6) Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations, which typically bar claims within some limited number of years from either the date of the loss or the date that the claim should have been discovered. In some cases, this means that the claims expired before World War II even ended. (See, e.g., Detroit Institute of Arts v. Ullin, No. 06–10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).) The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-

confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

(7) Federal legislation is needed because the only court that has considered the question held that the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art. In Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2009), the United States Court of Appeals for the Ninth Circuit invalidated a California law that extended the State statute of limitations for claims seeking recovery of Holocaust-era artwork. The Court held that the law was an unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs, which includes the resolution of war-related disputes. In light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(8) While litigation may be used to resolve claims to recover Nazi-confiscated art, it is the sense of Congress that the private resolution of claims by parties involved, on the merits and through the use of alternative dispute resolution such as mediation

panels established for this purpose with the aid of experts in provenance research and history, will yield just and fair resolutions in a more efficient and predictable manner.

SEC. 3. PURPOSES.

The purposes of this Act are the following:

(1) To ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.

(2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

SEC. 4. DEFINITIONS.

In this Act:

(1) ACTUAL DISCOVERY.—The term ‘‘actual discovery’’ means knowledge.

(2) ARTWORK OR OTHER PROPERTY.—The term “artwork or other property” means—

(A) pictures, paintings, and drawings;

(B) statuary art and sculpture;

(C) engravings, prints, lithographs, and works of graphic art;

(D) applied art and original artistic assemblages and montages;

(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and

(F) sacred and ceremonial objects and Judaica.

(3) COVERED PERIOD.—The term "covered period" means the period beginning on January 1, 1933, and ending on December 31, 1945.

(4) KNOWLEDGE.—The term "knowledge" means having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof.

(5) NAZI PERSECUTION.—The term "Nazi persecution" means any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period.

SEC. 5. STATUTE OF LIMITATIONS.

(a) IN GENERAL.—Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—

(1) the identity and location of the artwork or other property; and

(2) a possessory interest of the claimant in the artwork or other property.

* * *

APPENDIX H

U.S. Military Law No. 52, 12 Fed. Reg. 2189, 2196 (Apr. 3, 1947), 10 C.F.R., 1947 Supp. § 3.15 (1947)

§ 3.15 Blocking and control of property; Law No. 52—

(a) *Article I; categories of property.*

* * *

(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.

(b) *Article II; prohibited transactions.* (1) Except as provided in this section, or when licensed or otherwise authorized or directed by Military Government, no person shall import, acquire or receive, deal in, sell, lease, transfer, export, hypothecate or otherwise dispose of, destroy or surrender possession, custody or control of any property:

(i) Enumerated in paragraph (a) of this section;

(ii) Owned or controlled by any Kreis, municipality, or other similar political subdivision;

(iii) Owned or controlled by any institution dedicated to public worship, charity, education, the arts and sciences;

(iv) Which is a work of art or cultural material of value or importance, regardless of the ownership or control thereof.

* * *

(e) *Article V; void transactions*. Any prohibited transaction effected without a duly issued license or authorization from Military Government, and any transfer, contract or other arrangement made, whether before or after the effective date of this section, with the intent to defeat or evade this section or the powers or objects of Military Government or the restitution of any property to its rightful owner, is null and void.

APPENDIX I

U.S. Military Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947), 10 C.F.R., 1947 Supp. § 3.75 (1947)

RESTITUTION OF IDENTIFIABLE PROPERTY; LAW NO. 59 [ADDED]

§ 3.75 *General provisions—(a) Article 1; basic principles.* (1) It shall be the purpose of Law No. 59, as set forth in §§ 3.75 to 3.90, inclusive, to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from January 30, 1933, to May 8, 1945, for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of §§ 3.75 to 3.90, inclusive, deprivation of property for reasons of nationality shall not include measures which under recognized rules of international law are usually permissible against property of nationals of enemy countries.

(2) Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of §§ 3.75 and 3.90, inclusive, even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where §§ 3.75 to 3.90, inclusive, provide otherwise.