No. 19-55616

IN THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Defendant-Appellee.

Appeal from the United States District Court,
Central District of California, Case No. 2:05-cv-03549-JFW-E,
Honorable John F. Walter

PLAINTIFFS-APPELLANTS' RESPONSE TO KINGDOM OF SPAIN'S MOTION TO FILE AMICUS BRIEF

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I. INTRODUCTION

Plaintiffs-Appellants David Cassirer, *et al*., hereby respond to the Kingdom of Spain's motion to file Amicus Brief in support of Defendant-Appellee Thyssen-Bornemisza Collection Foundation, Dkt. 110-1 ("Spain's Motion"). *See* Dkt. 114.

Where, as here, "foreign law is relevant to a case" in federal court, the legal standards governing the weight to be accorded to a foreign government's submission "on the meaning and interpretation" of its own law are set forth in *Animal Science Prods, Inc. v. Hebei Welcome Pharm. Co., Ltd*., 138 S.Ct. 1865, 1869 (2018). There, the Supreme Court held that "[a] federal court should accord respectful consideration to a foreign government's submission," "[b]ut the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other materials." *Id.* at 1869, 1873.

The Court established several criteria that should be considered in determining the weight that is given to the foreign government's stated interpretation of its law:

> [N]o single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Id. at 1873-74. Of particular relevance here, the Court recognized that "[w]hen a foreign government makes ***conflicting statements, … or, as here, offers an account in the context of litigation***, there may be cause for caution in evaluating the foreign government's submission." *Id*. at 1873 (emphasis added).

Under the standards set forth in *Animal Science*, the views expressed in Spain's Amicus Brief (Dkt. 110-2; "Spain's Brief"), and the accompanying "legal report of Undersecretary Eduardo Fernandez Palomares of Spain's Ministry of Culture and Sports," Dkt. 110-1 at 1 (Dkt. 110-3, the "Ministry Report"), are entitled to minimal or no weight in the context of this case and under Fed. R. Civ. P. 44.1.[1]

II. ARGUMENT

A. Spain's Ministry of Culture and Sports Has No "Role" or "Authority" with Respect to Interpretation of the Spanish Civil Code and Has Evident Bias Due to Its Control of TBC

Animal Science directs a reviewing court to consider "the role and authority of the entity or official offering the statement" concerning foreign law. 138 S.Ct. at 1873. Although Spain's Amicus submission is filed by U.S. counsel in the name of the Kingdom of Spain, the substance of Spain's Brief consists of counsel's summary of the Ministry Report and a copy and English translation of the two-page Report

[1] The decision in *Animal Sciences* was grounded in Rule 44.1, and Spain cites to that case and Rule 44.1 in requesting this Court to "consider Spain's assertion of its own interest when analyzing the choice-of-law issue." Spain's Brief, Dkt. 110-2 at 3-4; *see* Spain's Motion, Dkt. 110-1 at 1, 3. Consistent with that approach, Plaintiffs address Spain's submission in accordance with those authorities.

itself. Spain's Brief recites that the Ministry has "issued the legal report" of Undersecretary Palomares (Dkt. 110-2 at 1). But Spain's submission provides no information as to the legal basis for Mr. Palomares, or the Ministry of Culture and Sports, to provide authoritative interpretation concerning the meaning of general provisions of Spanish law such as articles of the Civil Code relating to acquisitive prescription. The Ministry's failure to invoke any such authority is strong indication it does not exist.[2]

On the other hand, as has previously been shown in this case, Spain's "Council of State, whose members include a number of jurists, would be the most appropriate body to provide any official opinions on Spanish law, if they were to be relied on by a foreign court."[3] A brief filed by the Ministry "is only an internal report under

[2] Mr. Palomares refers to "the powers conferred upon him" by two statutes that relate to the organizational structure of the Ministry of Culture and Sports, and to the general powers of undersecretaries of government ministries. Dkt. 110-3 at pdf-2. Review of these laws, however, shows that the undersecretary's power is limited to legal advice concerning the Ministry's regulatory and administrative operations. The laws do not give the undersecretary authority to provide authoritative interpretations of general provisions of Spanish law such as the Civil Code. *See Animal Science*, 138 S.Ct. at 1874-75 (distinguishing *United States v. Pink*, 315 U.S. 203, 218 (1942) on grounds that it involved a declaration interpreting Russian law "obtained by the United States through official 'diplomatic channels'" from the Soviet Union's "Commissariat of Justice"—not, as here, from a ministry having no general authority over legal matters for the nation) (emphasis omitted).

[3] Brief for Amici Comunidad Judia de Madrid and Federacion de Comunidades Judias de Espana at 10, *Thyssen-Bornemisza Collection Found. v. Cassirer*, 138

Spanish law and does not amount to an official declaration by the Kingdom of Spain of the meaning and application of ... the Spanish Civil Code." Jewish Communities Brief at 4, 6-7. Unlike the Ministry, the Council of State is "separate from the Government in order to guarantee its objectivity and independence," and even then "the reports of the Council shall not be binding" under Spanish law and the Spanish courts regularly disregard such opinions. *Id*. at 10.[4]

Separately, the weight of the Ministry's Report is significantly compromised by the pervasive involvement of the Ministry and of Spain in creation and control of TBC. Spain's submissions fail to disclose that the Minister of Culture and Sports, Mr. Palomares's immediate superior, serves as the President ex officio of TBC's Board of Trustees. *See* https://www.museothyssen.org/en/node/8971. Mr. Palomares himself also is an ex officio member of the TBC Board, a majority of whose

S.Ct. 1992, No. 17-1245 (Apr. 6, 2018) ("Jewish Communities Brief"), citing Article 5 of Spanish Organic Law 6/1985.

[4] The questionable status of the Ministry and Mr. Palomares in offering legal interpretations of the Spanish Civil Code stands in sharp contrast to the authority of the Chinese Ministry of Commerce whose legal opinion was at issue in the *Animal Science* decision. There, the ministry was "the highest administrative authority in China authorized to regulate foreign trade," a subject that was directly at issue in the plaintiffs' price-fixing claims against Chinese manufacturers of Vitamin C. 138 S.Ct. at 1870. The ministry provided a detailed factual and legal description of the history and practice of its delegation of authority to "regulate Vitamin C exports" and establish "a regulatory pricing regime mandated by the government of China." *Id*. Yet even with that level of authority, the Supreme Court held that the ministry's legal opinion was entitled only to "respectful consideration." *Id.* at 1869.

members are appointed by the Spanish Government. *Id*. In other words, the Ministry which prepared the Report is responsible for the operation of TBC and has a proprietary interest in its success.

Moreover, as the Supreme Court recognized, "the Kingdom of Spain created and controlled TBC." *Cassirer v. Thyssen-Bornemisza Collection Found.,* 142 S.Ct. 1502, 1506 (2022). Spain admits that it "is keenly interested in the determination of the Painting's ownership in this case." Spain's Motion, Dkt. 110-1, at 2-3. Spain goes on to state:

> [T]he Spanish Government was the reason the Foundation possesses the Painting in the first place. That is, Spain's enactment of Royal Decree-aw11/1993 ("Decree-Law"), in 1993, authorized the Foundation to purchase the Thyssen-Bornemisza Collection, a collection of works that includes the Painting. The Decree-Law provided significant public funds for the highly publicized purchase, and the Spanish Government provided the museum in Madrid where the Foundation has displayed the Painting for decades.

Id. *See also* pp. 12-13 below.

Given the pervasive proprietary involvement of the Spanish government, and particularly the Ministry of Culture and Sports, in the creation, funding, responsibility for, and control over TBC, as well as the tenuous authority of the Ministry to provide interpretations of general provisions of Spanish law, and the absence of meaningful legal analysis in the Ministry Report (which is written entirely in generalities without citing a single substantive statute or court decision), the Report should be accorded minimal or no weight.

B. Spain's Submission of the Ministry Report in the Context of Litigation Makes Its Value Highly Questionable

Animal Science explained that when the foreign government "offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission." 138 S.Ct. at 1873. Here, Spain's submission is made in the context of litigation and, as shown below, is inconsistent with numerous pronouncements by the Spanish government in non-litigation contexts. Further, it is focused on a desired result, rather than undertaking a thorough analysis of the legal principles supporting its proffered interpretation, which then are weighed against California's interests in applying its law—even though Spain concedes that such a comparative interests evaluation must be undertaken by this Court. *See* Spain's Motion, Dkt. 110-1 at 3. Accordingly, Spain's submission should be afforded little or no weight in the Court's analysis. *See, e.g., In re Grand Jury Subpoena*, 749 F.App'x 1, 4 (D.C. Cir. 2018) ("the submissions from the Corporation's own counsel and—later—a regulator from Country A seeking to explain the Corporation's atextual interpretation lack critical indicia of reliability"); *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 495 F.Supp.3d 257, 280 (S.D.N.Y. 2020) ("[T]he Court cannot ignore that the Republic's submission has been offered specifically for the purposes of this litigation, and seemingly in coordination with Plaintiffs…. Given the circumstances surrounding the Republic's submission, the Court is duly cautious of the views it has expressed and is not persuaded.").

As for the balancing of the respective jurisdictions' sovereign interests, Spain's submission makes clear that outside of its direct proprietary involvement in the creation, financing, and control of TBC, its interest revolves around "ensur[ing] a framework of legal certainty for private property." Dkt. 110-3 at pdf-3. While this is an important governmental interest (and one that California strongly recognizes as well), California has important interests in protecting victims of stolen artworks from losing their rightful title without actual knowledge of the work's whereabouts (and that interest is enhanced by the HEAR Act's adoption of the same substantive principle with respect to artworks of victims of Nazi persecution).[5]

These additional interests are critical because California's governmental interests test requires comparing the interests of each jurisdiction "in the application of its own law under the *circumstances of the particular case*." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal.4th 95, 107-08 (2006) (emphasis added). Here, the "particular case" involves a claim to recover a Nazi-expropriated artwork against a museum that asserts title based solely on the passage of time where the rightful owner lacked knowledge of the work's location. As such, the qualitative "nature and strength" of California's additional protections for such victims would be "more

[5] *See* Holocaust Expropriated Art Recovery ("HEAR") Act, Pub. L. No. 114-308, 130 Stat. 1504 (Dec. 16, 2016), section 5(a).

impaired if … not applied" than Spain's general interest (shared by California) in ensuring certainty of title to private property owners. *Id*. at 108.

Furthermore, Spain's participation in acquiring the Baron's collection and establishing TBC and the museum (which it continues to control) is not the kind of *sovereign* interest that is relevant to choice-of-law under the *Kearney* analysis. Spain's interest in this regard is not materially different from the interest of a private defendant, in that it seeks to avoid the loss through litigation of its investment of time, energy, and money. The fact that a government made such investments does not make its interest "sovereign" in a way that is relevant to choice-of-law. As the Supreme Court ruled in this case, under the FSIA, government parties and instrumentalities are subject to the same rules of liability as private parties, including with respect to choice-of-law determinations.

C. Spain's Submission Has Minimal Value Because It Conflicts with Numerous Other Statements and Actions by Spain

Animal Science also requires consideration of the "consistency" of an Amicus' statements about the matter at issue "with the foreign government's past positions." 138 S.Ct. at 1873-74. Applying this standard, Spain's Brief should be viewed with considerable skepticism by the Court. Aside from a passing denial of infringing "international treaties or conventions" (Dkt. 110-3 at pdf-3), the Ministry Report fails to acknowledge Spain's pronouncements relating to human rights and Holocaust

victims, much less explain how its position can be reconciled with those commitments.[6]

Spain's provides no analysis whatever of the many international laws and agreements to which Spain is a party, which call for the return of Nazi looted art to its rightful owners and for ensuring that such disputes are resolved on the merits.[7] Spain freely bound itself to these principles which it pledged to implement, yet it now ignores them. These pronouncements include:

> The 1970 UNESCO Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The signatory countries, including Spain, undertake to prevent "illicit import or export of [cultural] property … [and]

[6] As shown in Plaintiffs' Supplemental Brief, even if some of these international agreements do not have the force of law, *see Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F.App'x 452, 457 n.3 (9th Cir. 2020), they must be taken into account in applying California's choice-of-law rules as clear, resounding declarations of Spain's governmental interests running counter to the arguments of TBC and the litigation-specific arguments here. *See* Pls.Supp.Br. at 4, 18, 25-30.

[7] The Ministry Report is misleading in claiming that the 2018 trial in the district court was "on the merits of the case" (Dkt. 110-3 at pdf-3), an assertion that TBC also makes several times in its briefs. When the phrase "on the merits" is used in the context of Holocaust victim claims—including in international edicts and in the legislative history of §338(c)(3) and the HEAR Act—it is referring to whether the artwork in question in fact belonged to the plaintiffs or their ancestors and was looted by the Nazis, and to when the plaintiffs acquired actual knowledge of their claim and the defendant's possession. It does not refer to a trial concerning whether TBC was an "encubridor," an issue that was significant only because it determined whether the adverse possession period under Spanish law was six years or 26 years. *See* 1-ER-0028-32. That subsidiary issue related to application of a technical "defense at law relating to the passage of time"—which is exactly what the HEAR Act and §338(c) were enacted to preclude.

"facilitat[e] the earliest possible restitution of illicitly exported cultural property to its rightful owner." Art.13.[8]

The 1998 Washington Conference Principles on Nazi-Confiscated Art ("Washington Principles"),[9] and June 30, 2009 Terezin Declaration on Holocaust Era Assets and Related Issues ("Terezin Declaration"), in which participating countries (including Spain) vow to ensure that claims for Nazi-confiscated art be resolved "on the facts and merits."[10]

Parliamentary Assembly of the Council of Europe, Resolution 1205 of November 4, 1999, calling for the restitution of looted Jewish cultural property. Spain is a member.[11]

Vilnius Forum on Holocaust Era Looted Cultural Assets, Declaration of October 5, 2000, asking "all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs." Spain endorsed the Declaration.[12,13]

European Parliament Resolution of December 17, 2003, calling on member states, including Spain, to "be mindful that the return to rightful claimants of art objects looted as part of crimes against

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[8] http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html

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

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

[11] https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16726&lang=en

[12] https://www.lootedartcommission.com/vilnius-forum

[13] https://www.lootedart.com/MG8D3S66604

> humanity is a matter of great interest" pursuant to Article 1 of Protocol 1 to the European Convention of Human Rights."[14]
>
> The European Union, of which Spain is a member, recently adopted sweeping new regulations for application throughout the EU that will tightly control trade in cultural property. Regulation (EU) 2019/880.[15]

These repeated statements in recent years of Spain's national policies and interests (including after this case was filed) were made in circumstances where Spain had no reason to act other than in accordance with its understanding of fundamental human rights. But now, when faced in litigation with the prospect of its instrumentality TBC losing possession of a valuable artwork, Spain focuses solely on the supposed primacy of property rights. The glaring inconsistency between Spain's expression of its national interests in adopting international agreements and protocols, and its insistence here on application of the general acquisitive prescription provisions of the Civil Code, adopted over 130 years ago, is another reason that Spain's submission is entitled to little or no weight.

D. Spain's Litigation Position Lacks Clarity, Thoroughness, and Support, which Further Diminishes Its Weight

In evaluating a foreign government's submission concerning the meaning and interpretation of its own laws, federal courts consider the "clarity, thoroughness, and

[14] https://eur-lex.europa.eu/resource.html?uri=cellar:93c83c0c-33ec-4ca9-9b9a-2df71b87a000.0004.02/DOC_115&format=PDF

[15] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R0880

support" for the government's position. *See Animal Science*, 138 S.Ct. at 1873. Applying these critical factors, Spain's submission falls short in multiple respects.

1. Meritless Due Process Claims. Spain's Brief argues that "[b]ecause of acquisitive prescription, the Foundation has vested ownership rights in the Painting, rights that are protected by Spanish property law and the Foundation's due process rights." Dkt. 110-2 at 2-3. But this argument is neither "thorough" nor well "support[ed]."

Neither foreign governments, nor instrumentalities that they extensively control, have "due process rights." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 96 (D.C. Cir. 2002) ("foreign states are not 'persons' protected by the Fifth Amendment"), citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64 (1989) ("in common usage, the term 'person' does not include the sovereign").

A foreign government entity likewise has no due process rights "if the state so 'extensively control[s]' the instrumentality 'that a relationship of principal and agent is created.'" *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009), quoting *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629, 632 (1983). The record demonstrates that Spain "extensively controls" TBC for purposes the

acquisition and holding of the Cassirers' Painting.[16] As noted, Spain admits that "the Spanish Government was the reason the Foundation possesses the Painting in the first place" (Dkt. 110-1 at 2), and TBC is an "agency or instrumentality of the Kingdom of Spain." *Cassirer III*, 862 F.3d at 957 n.4. Spain controls TBC's Board of Trustees (p. x above). The district court made findings showing Spain's extensive control over creation of TBC (including by imposing "onerous" detailed requirements dictating how TBC must display, care for, maintain, and promote the collection), and funding of TBC's purchase of the Baron's collection, including the Painting, for $350 million. *See* 1-ER-0011-14.

It is ludicrous for Spain and TBC to argue that an entity which never would have existed, or bought the Painting, absent Spain's collaboration with the Baron, and is still controlled by the Spanish government, *see* pp. 4-5 above, should be treated as an independent entity for due process purposes. *See, e.g.*, *TMR Energy, Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005) (where

[16] In a 2016 Amicus brief, the California Attorney General submitted a meticulously detailed compilation of record evidence showing "that the Foundation operated essentially as Spain's agent with respect to the acquisition of the painting at issue, and that it continues to operate as Spain's agent with respect to the painting's possession, maintenance, and display." Brief for Amicus State of California at 17, in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) (*Cassirer III*) (filed Jan. 26, 2016). Although filed in the context of a summary judgment appeal, the facts in the California Amicus brief were confirmed at trial. *See* 1-ER-0011-14.

defendant was created by a parliamentary resolution and governed by legislative acts, with its chairman appointed by the government and expenses paid from the state budget, "from these structural features it is apparent that the SPF is an agent of the State, barely distinguishable from an executive department of the government and should not be treated as an independent juridical entity").

Even if TBC were entitled to due process protections, the argument advanced by Spain (and TBC) concerning due process is circular. The claim is that due process bars application of California substantive law because, under Spanish law, title in the Painting allegedly had already vested in TBC by the time the Cassirers sought its return. *See* Dkt. 110-3 at pdf-3. But that argument assumes the outcome of the very issue that is now before the Court under the Supreme Court's remand order—whether California or Spanish substantive law applies under California choice-of-law rules. And if, as Plaintiffs contend, California law applies, then TBC never had legal title to the Painting, and therefore any due process rule barring state interference with vested property rights would be inapplicable.

The due process argument also is barred by the law of the case doctrine. In *Cassirer III*, this Court applied the HEAR Act's six-year limitations period retroactively to validate Plaintiffs' claims, *Cassirer III*, 862 F.3d at 959-60, notwithstanding that TBC had argued the Act did not "authorize the deprivation of a vested property right." *See* TBC's Rule 28(j) Letter in *Cassirer III* (filed Jan. 17,

2017). This ruling established the law of the case. *See Eichman v. Fotomat Corp*., 880 F.2d 149, 157 (9th Cir. 1989) ("Under the law of the case doctrine a decision of this court in a prior appeal must be followed in all subsequent proceedings in the same case…. The doctrine… 'encompasses a court's explicit decisions as well as those issues decided by necessary implications.'").

2. <u>Lack of Good Faith and Proper Investigation.</u> Spain argues, in direct contravention of the district court's findings, that "the trial held in the United States … established unequivocally that the Foundation had no knowledge of the circumstances in which the painting was removed in the past, and … recognized the diligent pre-acquisition investigation undertaken by the Kingdom of Spain" and that TBC acted "in good faith … in this case." Dkt. 110-3 at pdf-3.

These statements are false and further reduce any weight to which Spain's submission might be entitled. The district court actually determined:

> [B]ecause the Baron did not undertake any reasonable and suitable measures, such as contacting Rewald or another art expert to allay any suspicions he may (and should) have had, the Court concludes that the ***Baron did not possess the Painting in good faith*** and thus the Baron (and Favorita) ***did not acquire good title to the Painting under Swiss law***. Accordingly, because the Baron (and Favorita) did not have good title to the Painting at the time of TBC's purchase, the Court concludes that ***TBC did not become the lawful owner of the Painting*** via the 1993 Acquisition Agreement.

1-ER-0027 (emphases added).

The district court further found that Spain "conducted no investigation of the Painting's provenance or title," despite "the presence of the 'red flags'" indicating likely Nazi theft. 1-ER-0013, 0031. The district court ultimately ruled against Plaintiffs' claim only because, under its reading of Spanish law relating to an "encubridor," "although [TBC's] failing to investigate the provenance of the Painting may have been ***irresponsible under these circumstances***, the Court concludes that it certainly was not criminal." 1-ER-0031 (emphasis added). But a finding that TBC did not act with *criminal* intent does not support Spain's exaggerated claims of "diligent pre-acquisition investigation" or "good faith."

Spain also ignores the Baron's failure to possess the painting in good faith and TBC's potentially "irresponsible" conduct when it claims that application of Spanish law would "ensure a framework of legal certainty" for persons "who conduct … transactions in the territory of Spain legitimately relying on the complete validity of the laws of Spain." Dkt. 110-3 at pdf-3. As noted, there was nothing "legitimate" about the Baron's purchase and later sale of the Painting, which did not even convey good title to TBC. While the interests that Spain asserts in protecting contractual and property rights are generally legitimate, in the particular circumstances of applying California choice-of-law rules to *this* case, *see Kearney*, 39 Cal.4th at 107, choosing Spanish law will effectively validate what might well be called "art laundering," in the sense that the passage of time "washed" the Painting of its tainted title (albeit

without Plaintiffs' knowledge and contrary to the interests of California as expressed in §338(c)(3) and the HEAR Act). TBC is seeking to use Spain's antiquated general property law to divest the rightful owners of title before the owners ever learned of the Painting's whereabouts. This would have been impossible under the laws of every other jurisdiction that had a connection with the Painting, *see* Pls.Supp.Br. at 21-22, thus refuting Spain's claim that its version of adverse possession "can be fully equated with those" of other countries, Dkt. 110-3 at pdf-3.

3. Failure to Respect the Sovereignty of Other States. Spain claims to have "the utmost respect for the sovereignty of the other states of the International Community." Dkt. 110-3 at pdf-2. But its submission ignores the express interests of the United States and California embodied in the HEAR Act and §338(c)(3)—interests that must be considered in applying California choice-of-law rules. As Plaintiffs demonstrated in their Supplemental Brief, these statutes embody government policies to protect the substantive rights of the owners of stolen artworks (and specifically Nazi-looted works in the HEAR Act) by preventing forfeiture of ownership where the victim lacks actual knowledge of their claim. Those government interests are no less weighty because the legislatures implemented them within the framework of statutes of limitations. *See also* Brief of Amicus State of California [Dkt.97] at 5, 7, 10-15.[17]

[17] The core substantive purpose of §338(c)(3) is expressed in the legislative history:

Those government policy interests underlie the statutory command that no U.S. court having jurisdiction over a claim brought by the rightful owner of stolen or expropriated artworks can enforce "any defense at law relating to the passage of time" unless the victim had actual knowledge of their claim against the defendant/possessor of the work. HEAR Act §5(a); Pls.Supp.Br. at 8-10. Acquisitive prescription is, of course, a defense "relating to the passage of time." Indeed, as an adverse possession doctrine, acquisitive prescription is nothing more than a statute of repose and, for that reason, no more "substantive" than a statute of limitations. *See* Pls.Supp.Br. at 20-21.

Spain also ignores the circumstances under which Section 338(c)(3) and the HEAR Act were adopted, as compared to the general prescriptive acquisition provisions of the Spanish Civil Code dating to 1889. The American statutes were enacted specifically in response to this Court's decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592, F.3d 954 (9th Cir. 2010), which invalidated

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> [G]iven the nature of stolen art, the proper trigger for the SOL should be the discovery by the owner of the whereabouts of the work, not the time of theft or even the time of the first public display of the work subsequent to the theft.

SER at 57. Section 2 of HEAR Act reflects the same policy goal. As discussed above in footnote 7, the 2018 trial in this case was not "on the merits" of the Cassirers' claim as that phrase is used in the legislative history.

a California law extending the limitations period for claims to recover "Holocaust era artworks." Within weeks, the California legislature passed §338(c)(3) (making a claim for return of *any* stolen art against a museum timely based on the date of the rightful owner first having actual knowledge of work's location), and Congress then passed the HEAR Act (adopting the same rule with respect to claims against any person whose title derives from "Nazi persecution"). Both legislatures expressed their intent to undo *Van Saher* (*see* SER 39, 49; HEAR Act Findings §2(7)), and adopted the same route to do so, namely precluding forfeiture of looted art victims' ownership rights absent actual knowledge of the stolen property's whereabouts. The prompt and precisely-targeted adoption of these statutes clearly demonstrates the robust interests of the American jurisdictions in these issues. Spain has offered nothing comparable in invoking its general Nineteenth-century law of prescriptive acquisition, particularly in light of its recent adoption of contrary international edicts protecting the property rights of Holocaust victims.

Spain's submission also should also be viewed skeptically for its peculiar claim that applying California law would deny TBC's ownership of the Painting "for the benefit of a *third party*, pursuant to the regulations of a *territory alien* to that transaction." Dkt. 110-3 at pdf-3 (emphases added). The Cassirers are not "a third party;" the Cassirer family indisputably has proven that it owned the Painting when it was expropriated by the Nazis as the family fled Germany during the Holocaust.

Labeling the Cassirers as "third parties" callously disregards this history. Similarly, California is not "territory alien" to the Painting. It is both the place where the Painting was first (illegally) transferred from Germany and sold twice thereafter, and the place where Plaintiffs lived for years before (and after) TBC's acquisition of the Painting, including when they first learned the Painting's whereabouts and their requests for its return were rebuffed by TBC. *See* Pls.Supp.Br. at 1-2, 21-22.

Spain's failure to address these interests of California and the U.S. further demonstrates a lack of "thoroughness, and support" in its Amicus submission.

III. CONCLUSION

For the foregoing reasons, Spain's Amicus submission should be accorded minimal or no weight.

August 1, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the requirements of Ninth Circuit Rule 32. The brief is proportionately spaced in Times New Roman 14-point type. According to the word processing system used to prepare the brief, the word count of the brief is 4903, not including the Table of Contents, the Table of Authorities, the Certificate of Service and the Certificate of Compliance.

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Attorneys for Plaintiffs/Appellants
David Cassirer, The Estate of Ava Cassirer and United Jewish Federation of San Diego County

By /s/ David A. Barrett
David A. Barrett

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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