No. 19-55616

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID CASSIRER, et al.,
Plaintiffs-Appellants,
v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California

No. 2:05-cv-03459-JFW
Hon. John F. Walter, Judge

MOTION OF STATE OF CALIFORNIA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS IN SUPPORT OF REVERSAL

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July 6, 2022

The State of California respectfully seeks leave to file the attached brief as amicus curiae in this proceeding, in which California residents and Plaintiff-Appellants (hereinafter "Cassirers") seek the rightful return of a Painting that Nazis wrongfully stole from their family during the Holocaust. The Court should grant leave because California's brief amicus of only 3,475 words attests first-hand to California's substantial interests central to the State's choice-of-law analysis—the very question before the Court.

The Supreme Court has held that California's choice-of-law analysis should apply and remanded this case to this Court to review the District Court's 2015 application of California's choice-of-law analysis. This Court must thus now determine, using California's choice-of-law analysis, which law applies to this dispute—that of Spain or that of California.

Central to any analysis under California's 3-step choice-of-law test is a determination of the State's interest in the dispute. The court determines whether the laws of each jurisdiction differ; examines whether these laws conflict; and determines which jurisdiction's interests would be substantially more impaired if subordinated. *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107-08 (2006).

The District Court incorrectly determined that California had a lesser interest than Spain in its law applying to the dispute. It misidentified the laws at issue in

the first part of California's choice-of-law analysis. Then, in the third part of the analysis, it improperly applied a long-abandoned "most significant contacts" theory, it all but ignored California's specifically crafted and recently amended statutory and legal framework, and it ignored parties' expectations.

California has long asserted its strong interest in seeking justice for art theft victims.[1] Indeed, it filed amicus curiae briefs in two prior proceedings in this lawsuit, and in a similar lawsuit where a California resident sought return of Nazi-looted art in the possession of a museum. *See id.*

The State asked the Cassirers and Defendant-Appellee through their respective counsel for consent to file an amicus brief in this action by e-mail on July 6, 2022. The Cassirers have consented to the filing of the State's amicus brief; Defendant-Appellee has indicated that it opposes the motion.

The State of California respectfully requests that leave be granted to file the attached amicus brief, because its interest is central to California's choice-of-law

[1] *See*, *e.g.*, California's amicus briefs in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) (hereinafter cited as "*Von Saher I*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d (9th Cir. 2013); *Von Saher v. Norton Simon Museum Pasadena*, 754 F.3d 712 (9th Cir. 2014); and *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017).

analysis applicable to this dispute, and it is uniquely positioned to convey this interest.[2]

Dated: July 6, 2022

Respectfully submitted,

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[2] Indeed, Defendant-Appellee highlights this interest in its Supplemental Brief, Docket 88, at 18, n.7.

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INTRODUCTION AND STATEMENT OF INTEREST

The District Court misapplied California choice-of-law rules in this lawsuit seeking the return of a Painting that the Nazis stole during the Holocaust. In ruling against Appellants ("Cassirers"), the District Court incorrectly determined that Spain had a greater interest than California in its law applying to the dispute. It minimized California's substantial interests, shared by the federal government and international community, in assisting its residents in recovering works of art stolen from their families during the Holocaust.

California has long asserted its strong interest in seeking justice for art theft victims.[1] We now submit this brief to ensure that California's laws, including California Code of Civil Procedure section 338(c) and California's choice-of-law analysis, "are uniformly and adequately enforced." *See* Cal. Const., art. V, § 13.

The District Court erred in its application of California's three-part choice of law test. The District Court misidentified the relevant laws (the first part) and erred regarding which jurisdiction would be more impaired were its laws not to apply

[1] *See*, *e.g.*, California's amicus briefs in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2010) (hereinafter cited as "*Von Saher I*"); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d (9th Cir. 2013); *Von Saher v. Norton Simon Museum Pasadena*, 754 F.3d 712 (9th Cir. 2014); and *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017).

(the third part). In doing so, the District Court gave short shrift to California's strong interest in ensuring that its residents can recover stolen art.

ARGUMENT

The Supreme Court remanded this proceeding for this Court to review the District Court's application of California's choice-of-law analysis, under which the Court concluded that Spain had a more substantial interest in its general laws on adverse possession than California's specific laws on the recovery of stolen art. The District Court erred in doing so.

I. THE DISTRICT COURT MISAPPLIED CALIFORNIA'S "GOVERNMENTAL INTEREST" TEST

Under California choice-of-law principles, courts apply the "governmental interest analysis" by carefully examining "the governmental interests or purposes served by the applicable statute or rule of law of each of the affected jurisdictions." *Kearney v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 100 (2006). That inquiry has three steps. The court determines whether the laws of each jurisdiction are different; examines whether these laws conflict; and determines which jurisdiction's interests would be substantially more impaired if subordinated. *Id.* at 107-08.

A. The District Court Misidentified the Relevant Laws

The District Court misapplied the first prong of California's test: whether the laws of the relevant jurisdictions differ "with regard to the particular issue in

question." *Kearney*, 39 Cal. 4th at 107. It only compared Spain's recognition of adverse possession for personal property versus the Court's finding that "California has not extended the doctrine of adverse possession to personal property." *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F.Supp.3d 1148, 1156 (C.D. Cal. 2015) (hereinafter cited as "Order"). California's relevant law, however, is not the absence of adverse possession laws, but rather the detailed and balanced framework California developed over decades to ensure that victims of art theft can seek the return of their property. The California laws at issue in this art theft dispute are raised in the Cassirers' complaint: causes of action for the imposition of a constructive trust, the return of personal property, conversion, and unjust enrichment.

In 1983, California amended Section 338(c) to permit such claims to be brought within three years of "actual"—rather than "constructive"—discovery of the stolen item's whereabouts. Hearing on AB 2765 Before the Assemb. Comm. on Judiciary Analysis (Cal. May 4, 2010), in Appellants' Supplemental Excerpts of Record, 36 (Dkt. 87; hereinafter cited as "SER"). In 2010, the Legislature amended Section 338(c) again, extending the statute of limitations for art theft claims against museums to six years, and clarifying that California law follows the "actual discovery" rule to resolve a conflict in its appellate courts. Cal. AB 2765, ch. 691, 2010 Cal. Stats. (codified as amended at Cal. Civ. Proc. Code § 338(c); hereinafter

"Cal. AB 2765").[2] In contrast, Spain's laws that govern this issue are its general adverse possession laws, which cover *any* movable property. Order at 1160 (citing Spanish Civil Code art. 1941-1948, and 1955).

The District Court failed to focus on the dispute raised in the complaint—whether the Cassirers are entitled to the return of their Painting under California law—and instead focused only on the Foundation's affirmative defense that it "acquired ownership of the Painting by adverse possession." Order at 1155. It failed to identify the legal framework California developed to address disputes over stolen art as described in Section 338(c)'s legislative history. SER at 39-40.

Regarding the second prong, this case presents a "true" conflict because, as the District Court concluded, California's interest in protecting its residents from art theft "is especially strong" and could not be reconciled with Spain's interest in providing certainty to defendants. Order at 1157. Like Spain's adverse possession laws, California's Section 338(c) serves the common goal of ensuring certainty of title by limiting the time period (six years), the types of defendants (museums), and the types of claims (those filed by December 30, 2017). But California errs on the side of fairness to art theft victims instead of certainty of title to purchasers, by prohibiting adverse possession of stolen property and prohibiting a thief from

[2] Indeed, this Court's observations regarding this conflict in another case involving art stolen during the Holocaust prompted the amendments to Section 338(c). SER at 37-39 (citing *Von Saher I*).

passing good title, even to good faith purchasers. Spain, of course, "does not have in [sic] interest in protecting receivers of stolen property." Appellee's Supplemental Brief, 2 (Dkt. 88).

B. California's Interests will be More Substantially Impaired

Courts look to several factors under the final "comparative impairment" prong of California's test. These factors include "the place of the wrong," *Offshore Rental, Inc. v. Cont'l Oil Co.*, 22 Cal. 3d 157, 168 (1978); whether the laws are "directed specifically" at the question at issue or are "general in nature," *Cooper v. Tokyo Elec. Power Co. Holdings*, 960 F.3d 549, 563 (9th Cir. 2020); whether the laws are "archaic and isolated" or align with modern legal trends, *Offshore Rental*, 22 Cal. 3d at 165; and how best to achieve "maximum attainment of [the] underlying purpose" of each jurisdiction's laws, including the parties' reasonable expectations, *id.* at 168-69. Here, each factor favors application of California law.

1. Because many wrongs occurred in multiple jurisdictions, the Painting's current location is not as important

The District Court focused almost exclusively on the fact that the Foundation possesses the Painting in Spain. Order at 1159-60. Its analysis echoed the "most significant contacts" test used in federal choice-of-law analysis, which California has long rejected. *Offshore Rental*, 22 Cal. 3d at 161 (California does not follow the "most significant contacts theory").

In cases where the *entire wrong* occurs in one jurisdiction, courts often consider the place of the wrong as a key component of the substantial impairment analysis. *E.g., Cooper,* 960 F.3d at 562-63 (nuclear disaster in Japan); *Offshore Rental*, 22 Cal. 3d at 161 (negligent injury in Louisiana); *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 74 (2010) (asbestos exposure in Oklahoma).

Here, the Painting originally was taken under duress in Germany, trafficked through California, held in Missouri, trafficked through New York, held in and trafficked through Switzerland, and then, finally, arrived in Spain four decades after the initial theft. Order at 1151. California and Spain are similarly situated regarding the location of the wrong: the Painting made its way through each jurisdiction years after the original theft in Germany, the most egregious wrong. Because Spain was not the sole—or even principal—place of the wrong, and because its interests in that regard are no stronger than California's, the District Court wrongly concluded that this factor *favored* the application of Spanish law.

The District Court also framed California's interest as resting largely on the original victim's grandson Claude Cassirer's "fortuitous decision" to move to California. Order at 1159. But forum shopping is a red herring. Mr. Cassirer moved to California in 1980, long before the 1993 sale to Spain and his 2000 discovery of the Painting, unlike the *McCann* plaintiff who moved *after* asbestos exposure in Oklahoma. Order at 1152; *McCann*, 48 Cal. 4th at 74. And the door is closed to

future California litigants because Section 338(c) required extended claims to be brought by December 2017. Applying California's substantive laws on conversion and return of stolen property in this isolated, unique case thus would not substantially impact the certainty Spain seeks in its adverse possession laws.

2. California's modern law on recovering stolen art from museums outweighs Spain's older adverse possession law

An "archaic and isolated" law should "yield to the more prevalent and progressive law." *Offshore Rental*, 22 Cal. 3d at 165 (emphasis removed); *accord Kearney*, 39 Cal. 4th at 124-25. But the District Court never considered this factor.

Offshore Rental concerned a California business whose "key" employee had been negligently injured in Louisiana. 22 Cal. 3d at 160. California allowed a claim under a master-servant theory while Louisiana did not. *Id*. at 169. The Court only identified four other states that still adhered to California's theory. *Id*. at 167 n.7. "[N]o California court [had] recently considered the issue at all," while Louisiana had then recently joined the "main stream" of jurisdictions rejecting such liability. *Id*. at 167-68. The Court reasoned that California's interest in "its unusual and outmoded statute is comparatively less strong than Louisiana's" interest in the application of its more modern, prevalent approach. *Id.* at 168.

Here, it is California's law that is more contemporary and more aligned with the laws of other jurisdictions. California updated Section 338(c) regarding recovery of stolen art in 2010, Cal. AB 2765, ch. 691; Spain enacted Article 1955

in 1889 and has not amended it since. *Compare* C. C. art. 1955, B.O.E. n. 206, 2016 (Spain), *with* Royal Decree of 24 July 1889 Publishing the Civil Code art. 1955, July 24, 1889 (Spain), https://www.boe.es/buscar/doc.php?id=BOE-A-1889-4763 (same language since 1889).

Moreover, California laws mirror that of other jurisdictions in not allowing a thief to convey good title, even to a good-faith purchaser. The laws of California, New York, and the Uniform Commercial Code (U.C.C.), among others, all stand for the proposition that a thief cannot transfer good title to stolen art.[3]

Spain's law stands in contrast to these laws. It applies without regard to circumstances or the nature of the personal property, and thus sanctions art theft and permits title to stolen art to pass simply through passage of time, i.e., by adverse possession.

The District Court also overlooked the reality that Spain's adverse possession law is an outlier; it fails to respect the unique concerns of descendants of victims of Holocaust-era art theft. Like the master-servant theory in *Offshore Rental*, using adverse possession to strip the heirs of Holocaust survivors of art Nazis took by

[3] *See*, *e.g.*, *Naftzger v. American Numismatic Society*, 42 Cal. App. 4th 421, 432-433(1996) ("Stolen property remains stolen property, no matter how many years have transpired from the date of the theft.") *Suburban Motors, Inc. v. State Farm Mut. Ato. Ins. Co.*, 218 Cal.App.3d 1354, 1361 (1990); U.C.C. § 2-403; *Bakalar v. Vavra,* 619 F.3d 136, 141 (2d Cir. 2010) (New York law prohibiting thieves from passing good title applied over Swiss law permitting adverse possession regarding art stolen in Holocaust).

force flies in the face of overwhelming state, federal, and international policy supporting its return. 22 Cal. 3d at 160. California's interests, which Section 338(c) seeks to advance, mirror the commitments of the Federal government and international community urging the immediate return of Nazi-stolen art.

In 2016, after the District Court's decision, Congress enacted the Federal Holocaust Expropriated Art Recovery ("HEAR") Act, H.R. 6130, 114th Cong. (2016). The HEAR Act adopts California's rule, providing that the federal statute of limitations to recover Nazi-stolen art does not begin until the plaintiff's date of "actual discovery." *Id*. at § 5(a). Like California, the Federal government has embraced a limitations period that starts only upon actual discovery of the identity and location of the item and a possessory interest in it.

California's interests also align with the chorus of voices from the international community urging the return of Nazi-stolen art. Indeed—its position regarding the Painting aside—Spain was part of that international consensus, ratifying both the Washington Principles of 1998 and the Terezin Declaration of 2009. *Cassirer v. Thyssen-Bornemisza Collection Found*., 824 Fed. Appx. 452, 457 n.3 (9th Cir. 2020).

Signed by 44 nations, the Washington Principles provide, in relevant part:

> "If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution."

Washington Principles, cited in *Cassirer*. 824 Fed. Appx. at 457 n.3.

Spain and 45 other countries reaffirmed this commitment in the Terezin Declaration, which likewise urged countries to exercise their moral responsibilities to return Nazi-confiscated art and cultural property to Holocaust victims "in order to achieve just and fair solutions." Terezin Declaration, cited in *Cassirer*, 824 Fed. Appx. at 457 n.3.

The District Court and this Court noted this disconnect between Spain's policy commitments and pronouncements on the global stage and its actions on the legislative front and in this lawsuit. Order at 1168; *Cassirer*, 824 Fed. Appx. at 457 n.3. ("It is perhaps unfortunate that a country and a government can preen as moralistic in its declarations, yet not be bound by those declarations."). But the District Court overlooked that, while these accords may not be formally binding, they do factor into the choice-of-law analysis by illustrating that Spain itself has publicly disclaimed on multiple occasions the result that applying Spanish law here would produce. That further counsels in favor of the application of California law.

3. California's specific law on recovering stolen art from museums should supersede Spain's general adverse possession law

A separate factor in the third prong of California's choice-of-law analysis is the relative specificity and generality of the two jurisdictions' laws at issue. If one jurisdiction's law is "directed specifically" at the type of dispute before the court,

while another jurisdiction's law is "general in nature," the more specific law is preferred. *Cooper*, 960 F.3d at 563; *see also id.*at 565; *Kearney*, 39 Cal. 4th at 125; *Rustico v. Intuitive Surgical, Inc.*, 993 F.3d 1085, 1093 (9th Cir. 2021) ("Connecticut does not treat product liability claims differently than general tort claims: it has prescribed the same limitations period for both types of claims"). California law specifically addresses the "vexing" issue facing victims of stolen art; as noted above, a primary catalyst in Section 338's amendments was this Court's decision in a separate case seeking the return of stolen art. SER at 37-39 (citing *Von Saher I*).

The District Court minimized the specific nature of California's law by dismissing Section 338(c) as purely "procedural," as compared to Article 1955's "substantive" adverse possession of stolen movable property, without support for that distinction. Order at 1159-60. Its focus on the "absence" of an adverse possession law ignored that California changed its laws to ensure in a comprehensive framework that thieves cannot pass good title, that owners of stolen art have the opportunity to file claims timely using an "actual discovery" standard, and that "any party" may raise "all equitable and legal affirmative defenses and doctrines, including, without limitation, laches and unclean hands." Cal. Code Civ. Proc. § 338(c)(5).

Cooper, concerning injuries suffered in the wake of the 2011 Fukushima nuclear meltdown, is instructive. 960 F.3d at 554. The Japanese government had enacted a Compensation Act for nuclear disasters with a victim claims process. *Id.* at 555. Service members sued General Electric and the power plant's operator in California for damages from radiation exposure. Both companies moved to dismiss under Japanese law. *Id*.

As to General Electric, the Court held that "Japan's Compensation Act is directed *specifically* at accidents at a nuclear facility; California's products liability rules are *general in nature and presumably cover everything from toasters to airplanes*." 960 F.3d at 563 (emphasis added). And the Court found that the operator was subject "to a series of *special rules regarding its responsibility following a nuclear disaster*." *Id*. at 565 (emphasis added). Because of these specific laws, the Court found Japan's interests more substantial than California's. *Id*. at 563, 565.

Here, California enacted Section 338(c)(3)(A) to address the unique and vexing problem facing victims of stolen art that had fallen into the hands of museums. SER at 37.[4] By contrast, Article 1955 is a general adverse possession

[4] AB 2765's findings describe California's strong public interest regarding stolen art and its measured approach to incentivize prompt pursuit of claims while encouraging museums (subject to the extended six-year limitations period) to research the provenance of potential purchases, while allowing them affirmative defenses. Cal. AB 2765, § 1.

statute that "presumably cover[s] everything from toasters to airplanes." *Cooper*, 960 F.3d at 565. Section 338(c) thus provides California's balanced response to the issue of stolen art, including adoption of specific time periods to ensure that art owners hasten their claims.

4. Applying California law will achieve maximum attainment of underlying purpose of all laws based on the parties' expectations

Finally, courts consider the "maximum attainment of underlying purpose by all governmental entities" of the respective jurisdictions' laws. *Offshore Rental*, 22 Cal. 3d at 166 (internal quotation marks omitted); *Kearney*, 39 Cal. 4th at 124-25. As the California Supreme Court explained:

> [T]he policy underlying a statute may also be less "comparatively pertinent" if the same policy may easily be satisfied by some means other than enforcement of the statute itself. Insurance, for example, may satisfy the underlying purpose of a statute originally intended to provide compensation to tort victims.

Offshore Rental, 22 Cal. 3d at 166.

Offshore Rental held that "a business corporation" was particularly able to plan for injuries and purchase insurance in advance when it sent its employees abroad. 22 Cal. 3d at 166. "The fact that parties may reasonably be expected to plan their transactions with insurance in mind" may "constitute a relevant element" in the choice-of-law analysis—insurance could have made the plaintiff whole and would have met California's interest in recognizing master-servant liability. *Id*. Conversely, because the defendant's Louisiana operations involved people coming

from "diverse states," the defendant "would most reasonably have anticipated" needing insurance based only on Louisiana law. *Id*. at 169. The "fact that [a party] does not usually calculate [its] risk and plan [its] insurance program accordingly, hardly detracts from the consideration that [it] can fairly be made to bear the consequences of not doing so." *Id*. at 168-69 (quoting Albert Ehrenzweig, A Treatise on the Conflict of Laws 575-76 (1962)). The Court thus reasoned that "the burden of obtaining insurance for the loss at issue here is most properly borne by the plaintiff corporation." *Id*.

The California Legislature considered this exact point in extending the limitations period for claims against museums and not individual buyers. It intended that museums, as "sophisticated" and "typically insured" purchasers, be incentivized to assist rightful owners recover their art. SER at 40.

Maximum attainment of underlying purposes thus favors California's interest. The Foundation was created to effectuate Spain's $350 million purchase of the Baron's collection, including the Painting. *Cassirer*, 862 F.3d at 957. The Foundation "investigated title to the works in the Collection" and "did a second title investigation." *Id*. Like in *Offshore Rental*, the Foundation could have purchased art title insurance to protect its $350 million investment in the collection

that included the Painting.[5] Such insurance would have made the Foundation whole in this circumstance—addressing Spain's purpose of its adverse possession laws in certainty of title by compensating a buyer.

Like the Louisiana defendant in *Offshore Rental*, the Cassirers were in no position to protect themselves, either initially when the art was stolen, or subsequently, because there was no way to insure something that had already been stolen.

CONCLUSION

California has long and vigorously enforced the ability of its residents to recover stolen art, including recent changes to its statutes of limitation in 2010, to ensure that victims of stolen art be given the opportunity to recover their art. California's balancing of the respective interests of museums and individual owners contrasts with Spain's approach in applying its century-hold adverse possession law, without considering the specific and unique issues confronting the owners of stolen art, especially that stolen by the Nazis. The District Court's judgment should be reversed.

[5] "Art title insurance is a one-time premium and it covers the property for the period the insured (and his or her heirs) owns the piece." Insurance Institute, *Insuring Art* (Apr. 2013) https://www.insuranceinstitute.ca/en/cipsociety/information-services/advantage-monthly/0413-Insuring-Art (last visited July 1, 2022).

Dated: July 5, 2022

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UNITED STATES COURT OF APPEALS
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