Docket No. 16-56308

In the
United States Court of Appeals
for the
Ninth Circuit

MAREI VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA
and NORTON SIMON ART FOUNDATION,

Defendants-Appellees.

Appeal from a Decision of the U.S. Dist. Court for the Central Dist. of California, No. 07-CV-02866-JFW-JTL • Honorable John F. Walter

---

BRIEF OF *AMICI CURIAE* MEMBERS OF CONGRESS E. ENGEL AND J. NADLER AND FORMER MEMBERS OF CONGRESS M. LEVINE AND R. WEXLER SUPPORTING REVERSAL OF THE ORDER GRANTING SUMMARY JUDGMENT

THOMAS R. KLINE
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
202-567-7594 Telephone
866-875-6492 Facsimile

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

International Conferences and Conventions

Other Authorities

STATEMENT OF CONSENT

Pursuant to FRAP 29(3)(a), Plaintiff certifies that it endeavored to obtain the consent of all parties to the filing of this *amicus* brief. Proposed *amici* approached Appellant and Appellees to request consent to file this brief in a letter delivered via email to Appellees' attorneys on March 22, 2017. Appellant consented; Appellees refused to consent, stating only that they take no position on the proposed *amicus* brief. Plaintiff has accordingly filed herewith a Motion for Leave to File its *Amicus Curiae* brief.

STATEMENT OF AUTHORSHIP AND FUNDING

Plaintiff's counsel had no involvement in the authoring of this brief. Plaintiff's counsel did not contribute money intended to fund the preparation or submission of this brief. No other person or organization contributed money intended to fund the preparation or submission of the brief.

STATEMENT OF IDENTITY AND INTEREST

Proposed *amici*, acting in their personal and individual capacities, are the following:

- Congressional Representative Eliot Engel
- Congressional Representative Jerry Nadler
- Former Congressional Representative Mel Levine
- Former Congressional Representative Robert Wexler

All of the signers have an interest in seeing that federal courts properly interpret and implement U.S. Holocaust restitution policy. As current and former members of Congress, the signers have been involved with the federal government's efforts to develop a clear policy regarding Nazi-looted art.

In addition, current members of Congress have an interest in representing their constituents, some of whom are Holocaust survivors or heirs of survivors and are deeply concerned with the proper interpretation and application of U.S. policy towards restitution of artwork subject to a claim of Nazi-era art looting. Each *amicus* requests Court permission to file the attached brief in his personal and individual capacity.

SUMMARY OF ARGUMENT

For the first time in American jurisprudence – and ignoring decades of efforts by Congress, the Executive Branch, and the courts to grapple with the special problems raised by Nazi-era art looting – the District Court has ruled that a Nazi art looter acquired title to paintings he received through a forced sale. This decision stands U.S. law and policy on its head, ruling that Hermann Göring, the worst of the worst Nazi art looters ("I intend to plunder and to do it thoroughly"[1]) acquired title to property that all parties agree was the subject of a forced sale, then awarding ownership to the Norton Simon Museum as Göring's successor-in-

[1] William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* 942 (Simon & Schuster 1960).

interest. The lower court concludes that the Dutch government received title from Göring, although post-War restitution policy and practice emphasized the return of looted objects to the victims from whom they were taken. Here, there was no mystery about the victim, nor can there be any doubt about applicable U.S. law and policy, which urge that Nazi art looting victims receive a just, fair, and on-the-merits resolution of their claims. Only by ignoring U.S. law and policy is the District Court able to rule in Defendant's favor.

The District Court's ill-considered decision to disregard the long and important history of U.S. Holocaust restitution policy, as established by the Congress and the Executive Branch and affirmed by the courts, should be reversed.

ARGUMENT

U.S. policy concerning restitution of works of art looted by the Nazis is based on more than seven decades of efforts to remedy the unprecedented looting and destruction of cultural objects by the Nazi government of Germany. As this Court held, one of the pillars of that U.S. policy is to call for "concerted efforts to achieve expeditious, just, and fair outcomes when heirs claim ownership to looted art." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014). The District Court instead decided the case under antiquated Dutch law, ignoring U.S. policy which should be paramount.

I. The Sources of U.S. Holocaust Restitution Policy

U.S. policy on the restitution of cultural assets looted during armed conflict is rooted in decades-old ideas of the importance of fairness and decorum in war.[2] Indeed, the Hague Convention IV (1907), which concerned the laws and customs of war, dictates that it is forbidden during armed conflict to "destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[3] The Nazis' rampant and well-organized looting of art and cultural objects in The Netherlands and throughout the territories they conquered therefore violated long-standing international customs and norms.

Aware that the Nazis were perpetrating such crimes on an unprecedented scale, the Western Allies condemned Nazi plundering of art even as the War raged and the loss of life was becoming incalculable and unimaginable. Issued at the time of the Battle of Stalingrad, the London Declaration "reserve[d] all [the Allies'] rights to declare invalid any transfers of, or dealings with, property…whether such transfers or dealings [took] the form of open looting or plunder, or of transactions

[2] For instance, Louis XVIII repatriated a number of paintings looted by Napoleon to Prussia in 1814. *See, e.g.*, Cecil Gould, *Trophy of Conquest: The Musée Napoléon and the Creation of the Louvre* 70-77 (1965).

[3] Hague Convention No. IV, Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, sec. II, ch. I, art. 23(g), Oct. 18, 1907, 36 Stat. 2277, T.S. 539.

apparently legal in form, even when they purport to be voluntarily effected."[4] *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 957-58 (9th Cir. 2010). Göring's acquisition of *Adam* and *Eve* was one such forced sale, as all parties accept.

Recognizing the complexities of restitution – including the difficulty of locating former owners and handling foreign language documents, and the likelihood that the liberated countries would want a say – President Truman approved an external restitution policy at the 1945 Potsdam Conference under which the U.S. and the other Allies would restore objects to the countries from which they had been taken.[5] The policy enabled individual countries to handle the restoration of property to owners "in whatever way they see fit."[6] *See Von Saher*, 592 F.3d at 957-58, 961-62. But the goal was restitution to the *victims*. For example, after the War ended, American authorities in the U.S. zone in Germany promulgated Military Law No. 59 on Restitution of Identifiable Property (Nov. 1947), intended "to effect to the largest extent possible the speedy resolution of

[4] Inter-Allied Declaration Against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, Jan. 5, 1943, in 1 *Foreign Relations* 444 (1943). The United States was one of the 16 signatories.

[5] Report, Art Objects in US Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574-575].

[6] U.S. Dep't of State, Memorandum from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Recommendations on Restitution, Apr. 10, 1944, 1, NACP, RG 59, Lot 62D-4, Box 49, State/Notter [320633-644].

identifiable property… to persons who were wrongfully deprived of such property."[7]

Despite these efforts, in the early 1990s the U.S. government began to recognize that post-War attempts to return Nazi-looted artworks to their proper owners *via* the efforts of countries of origin had not been entirely successful. Many works were never reunited with their owners. A surprising number had made their way onto the U.S. market, and into American museums and private collections. *Von Saher*, 592 F.3d at 958.

By the late 1990s, lingering Holocaust restitution claims, some of which were starting to surface in contentious court battles,[8] sparked further action by the United States. In particular, Congress enacted two laws in 1998 to provide assistance to Holocaust victims: the Holocaust Victims Redress Act (Pub. L. 105–158, 112 Stat. 15) (HVRA) and the Holocaust Assets Commission Act (Pub. L. 105–186, 112 Stat. 611) (HACA). In addition to earmarking $5 million for archival research into the inadequate restitution of assets, HVRA expressed Congress' intention to "undertake good faith efforts to facilitate the return of private and public property… to the rightful owners in cases where assets were confiscated

[7] Available at: http://www.dfs.ny.gov/consumer/holocaust/present_day_restitution/US%20Military%20Law%2059.pdf.

[8] *See, e.g.*, Ron Grossman, *Battle over War-loot Degas Comes to Peaceful End*, Chicago Tribune, Aug. 14, 1998; *United States v. Portrait of Wally*, 663 F. Supp. 2d 232, 236 (S.D.N.Y. 2009) ("protracted" legal dispute began in 1998).

from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." HACA, in turn, established the Presidential Advisory Commission on Holocaust Assets, charged with issuing recommendations for promoting research, education, and legislation to aid restitution efforts. In its December 2000 Report, the Commission noted that, in spite of the heroic efforts of the Monuments, Fine Arts and Archives officers (better known as the Monuments Men) and others, the post-War "restitution policy formulated in Washington, D.C. and implemented in the countries in Europe occupied by the United States could never fully address the unimaginable dimension and complexity of restituting assets to victims of the Holocaust." Among its recommendations, the Report stressed that "[t]he President should urge Congress to pass legislation that removes impediments to the identification and restitution of Holocaust victims' assets."[9]

Along with renewed Congressional efforts under the 1998 HVRA and HACA to assist Holocaust victims, heirs and survivors, it became apparent to the Executive Branch that U.S. policy on the restitution of Nazi-looted art should be more equitable. To promote this principle, the State Department hosted the Washington Conference on Holocaust-Era Assets in late 1998, which brought

[9] Presidential Advisory Commission on Holocaust Assets in the United States, *Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR-142* (Dec. 2000).

together more than 40 governments and numerous non-governmental organizations with an interest in the fate of Holocaust assets. The event culminated in the Washington Principles on Nazi-Confiscated Art, guidelines that call for provenance research of national collections, efforts to locate the victims who lost artworks due to Nazi policies, and just and fair resolutions of restitution claims. The Principles encourage countries to take steps "expeditiously to achieve a just and fair solution" to claims involving identifiable art that had not yet been restituted.[10] The Washington Principles underscore the U.S.'s long-standing view that wartime looting is fundamentally wrong and should be remedied to the fullest extent possible.

U.S. policy on restitution of Nazi-looted art, as developed by Congress and the Executive Branch in 1998 and as articulated in the Washington Principles, dramatically impacted other countries' policies. Numerous countries renewed and amplified their commitment to "just and fair" resolution of restitution claims based on allegations of Nazi-era art looting. In addition to the developments

[10] The Washington Conference Principles were based on guidelines developed earlier the same year by the Association of Art Museum Directors. Association of Art Museum Directors, *Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era* (1933-1945), June 4, 1998 (available at https://www.aamd.org/sites/default/files/document/Report%20on%20the%20Spoliation%20of%20Nazi%20Era%20Art.pdf) ("If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.").

in The Netherlands, Germany adopted the Berlin Declaration, Austria gave up time-related defenses, and the United Kingdom created the Spoliation advisory panel.[11] The International Council of Museums (ICOM) developed its own policy for museums in 2001.[12] Private entities followed suit, with the Art Dealers Association of America developing a restitution policy for Nazi-looted objects in 2006 and Christie's doing the same in 2009.[13]

Following 1998, international conventions affirmed the U.S.'s position as a global leader in advancing the Washington Principles' goal of "just and fair" resolution of Holocaust-related art claims. The Vilnius International Forum on Holocaust-Era Looted Cultural Assets (2000) was attended by 38 countries – including the United States – that agreed to take all reasonable measures to

---

[11] Common Statement (Gemeinsame Erkärung) (1999) (http://www.lostart.de/Webs/EN/Datenbank/Grundlagen/GemeinsameErklaerung.html;jsessionid=0E5CF67C5171B9F3947B295C5763942E.m1#Start); Austrian Art Restitution Law (Kunstrückgabegesetz), BGBl. I Nr. 181/1998 (1998) (http://www.commartrecovery.org/docs/TheAustrianArtRestitutionLaw.pdf); United Kingdom's Holocaust (Return of Cultural Objects) Act, HL Bill 57, 54/4 (2009) (http://www.lootedart.com/web_images/pdf/ukpga_20090016_en.pdf). (http://archives.icom.museum/spoliation.html).

[12] International Council of Museums, *Spoliation of Jewish Cultural Property* (2001) (http://archives.icom.museum/spoliation.html).

[13] Art Dealers Association of America, *Guidelines Regarding Art Looted During the Nazi Era* (2006) (http://www.dfs.ny.gov/consumer/holocaust/countries/USA/aada_guidelines.pdf); Christie's Restitution, *Our Guidelines for Nazi-era Art Restitution Issues* (2009) (http://www.christies.com/services/restitution-services/guidelines/).

implement the Washington Principles and to promote domestic legislation that would assist in identifying and returning Nazi-looted cultural assets.

Less than a decade later and at the behest of the State Department, 46 nations convened for the Prague Conference on Holocaust Era Assets (2009), again affirming their ongoing commitment to the Washington Principles. The Prague Conference concluded with a speech by the Czech Republic's Prime Minister Jan Fischer, who emphasized that restitution claims should be decided on the merits of the claims and not on technical grounds. Fischer's closing remarks, which announced the Terezin Declaration and was agreed to by participating countries, urged them "to ensure that their legal systems…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."[14] The Terezin Declaration thus directs nations to renew their efforts and thoroughly implement the Washington Principles.

Today, the U.S. remains committed to the "speedy resolution of identifiable property" and the external restitution policy. *See* Brief of U.S. as Amicus Curiae at 17, *Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254 (U.S.), 2011 WL 2134984. Current U.S. policy dictates that Holocaust restitution claims

[14] Available at: http://www.holocausteraassets.eu/program/conference-proceedings/declarations/.

be resolved on the presumption that any transfer or alleged "sale" of property by a persecuted individual or firm in Nazi-occupied territory was wrongful, and should be considered null and void in the absence of contrary evidence. *See Vineberg v. Bissonnette*, 529 F. Supp. 2d 300, 307 (D.R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008) (Nazi forced sales "properly classified as looting or stealing"); *Menzel v. List*, 267 N.Y.S.2d 804, 811 (Sup. Ct. 1966) (Nazi party could not convey good title to art taken during war because seizure of art during wartime constituted "pillage, or plunder… [which is the] taking of private property not necessary for the immediate prosecution of [the] war effort, and is unlawful").

Following the leadership of the Congress, U.S. interest in just and fair resolutions of wartime looting claims continues today. In the past year, bills were introduced in Congress related to the wartime looting of cultural assets and two of them passed: the Holocaust Expropriated Art Recovery Act (Pub. L. No. 114-308, 130 Stat. 1524) (HEAR Act), signed into law in 2016; and the Protect and Preserve International Cultural Property Act (Pub. L. No. 114-151, 130 Stat. 369) (restricting the import of Syrian antiquities), also signed into law in 2016.[15]

[15] Also reflecting Congressional policy and priorities, in December 2016, Congress passed The Foreign Cultural Exchange Jurisdictional Immunity Clarification Act (Pub. L. No. 114-319, 130 Stat. 1618), amending 28 U.S.C. § 1605(a)(3) to allow the State Department to grant immunity and bar lawsuits against artworks on temporary loan from a foreign museum to an American institution *and providing an exemption for artworks subject to a claim of Nazi-era or other persecution-related taking.*

The HEAR Act – passed unanimously, more than 70 years after the end of World War II – reflects Congress' understanding of the special challenges still posed by Holocaust art recovery claims. Seeking to eliminate the "significant procedural hurdles" that victims of Nazi persecution and their heirs face, the Act creates a federal statute of limitations – six years from actual discovery of the whereabouts of the artwork – to facilitate the resolution of such claims on the merits, rather than on the basis of timeliness. HEAR Act, Sec. 2(6). Lawmakers in the House and the Senate recently introduced the Justice for Uncompensated Survivors Today (JUST) Act (H.R. 5653/S. 3142, 2017) as a follow-up on the HEAR Act, calling for the State Department to monitor whether countries are meeting their commitment to adopt national laws and policies that aid Holocaust survivors in reclaiming property. Such actions evidence a strong continuing Congressional interest in the application of existing law and policy regarding Holocaust assets.

U.S. policy on the restitution of Nazi-looted art is unmistakably clear. As set forth by this Court at an earlier stage in this case, the six primary tenets of this policy are:

> 1) a commitment to respect the finality of appropriate actions taken by foreign nations to facilitate the internal restitution of plundered art; 2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of pre-war owners and their heirs; 3) the encouragement of pre-war owners and their heirs to come forward and claim art that has not been

> restituted; 4) concerted efforts to achieve expeditious, just, and fair outcomes when heirs claim ownership to looted art; 5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and 6) a recommendation that every effort be made to remedy the consequences of forced sales.

Von Saher, 754 F.3d at 721. The sum total of these points is that the United States is firmly committed to provide a just and fair means for the restitution of Holocaust claims on the merits, on principles of fairness and not based on legal technicalities.

II. The District Court Committed Reversible Error In Rejecting U.S. Holocaust Restitution Policy.

A. U.S. Policy Dictates That Holocaust Restitution Claims Should Be Decided On The Merits.

The U.S. has long been a leader in the development of post-World War II restitution policy. One of the foundations of that policy is that claims should be decided on their merits, under an ethical, moral policy approach, and with efforts to achieve a "just and fair solution" to claims. Washington Principles (*supra*); Terezin Declaration (*supra*). *See also Steinberg v. Int'l Com. on Holocaust Era Ins. Claims,* 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944 (2005), *quoting* 2001 letter from Ambassador Bindenagel, then the State Department's Special Envoy for Holocaust Issues ("As a matter of policy, the United States Government believes that the resolution of Nazi-era restitution and compensation matters, including those related to insurance, should be handled through dialogue, negotiation and cooperation, rather than subject victims and their families to the prolonged

uncertainty and delay that accompany litigation."). The current case puts the reason for such a policy in stark relief; as this Court pointed out, "Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims." *Von Saher*, 754 F.3d at 722. And yet, the District Court defied U.S. policy in denying her claim on highly technical grounds, without regard to the merits.

The U.S.'s commitment to developing a just and fair approach to speedy resolution of Holocaust restitution claims makes clear that the District Court erred in ignoring federal policy. For good reason, courts in this country give great weight to policy statements from the political branches of government, particularly with respect to foreign policy-related matters. *See, e.g., Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) ("it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments…. the political branches are well situated to consider sensitive foreign policy issues"); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) ("the nuances of the foreign policy of the United States… are much more the province of the Executive Branch and Congress than of this Court").

This Court, in this very case, already cautioned the lower court that U.S. policy carries great weight. *Von Saher*, 754 F.3d at 721 (setting forth the leading tenets of U.S. policy on the restitution of Nazi-looted art). In the last appeal, this

Court specifically reached a conclusion quite different from the District Court's, saying "There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations.'" *Id.* at 719-20, *citing Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). Yet the District Court ignored these instructions, declined to consider or even mention U.S. restitution policy, and hid behind a "require[ment]" of its own making to "apply a 'strictly legal' approach" in order to strip Plaintiff of her title to the artworks. *Von Saher v. Norton Simon Museum*, No. 2:07-cv-02866-JFW-SS (C.D. Cal. Aug. 9, 2016) ("August 9 Order") at 17.

B. U.S. Policy Also Dictates That Holocaust-Looted Objects Should Be Returned to the Owners by the Countries of Origin.

In granting summary judgment to Defendant, the lower court's decision flies in the face of another basic tenet of U.S. restitution policy: that through external restitution, property looted by the Nazis and recovered by the Allies was to be returned to the owner. External restitution never intended to transfer title to the country of origin, as doing so would essentially hold a theft to be a valid transfer.

The lower court reached precisely that absurd result in this case, finding that "because [a Dutch special committee] revoked the automatic invalidity of the Göring transaction in 1947, that transaction was 'effective' and the Cranachs were

considered to be the property of Göring… [In 1955, his 'enemy' property] automatically passed in ownership to the Dutch State." August 9 Order at 13. The District Court, relying on its own reading of antiquated and superseded Dutch Royal Decrees, came to the bizarre conclusion that because "automatic invalidity" under a particular Dutch decree failed, title flowed to a high-ranking Nazi official who stole the Cranachs, rather than to the true owner – plaintiff Marei von Saher.

Courts from around the nation agree that U.S. policy and law both mandate that a thief cannot acquire or transfer title. *See* Sec. I, *supra*; *Vineberg*, 529 F. Supp. 2d at 308 (thief "acquires not a semblance of right, title, or interest in his plunder"); *United States v. Enger*, 472 F. Supp. 490, 541 n.20 (D.N.J. 1978) (proposition that a thief has no "interest in the property as against the rightful owner" is "so well settled as to require no elaborate citation of authority in its support"); *Menzel*, 267 N.Y.S.2d at 811 ("Where pillage has taken place, the title of the original owner is not extinguished."). The actions of a thief like Göring, who robbed countless Jews of their property and their lives, must not be legitimized by a U.S. court.[16] News sources and other public records are replete with accounts of

[16] Göring was one of 19 defendants convicted of war crimes by the International Military Tribunal at Nuremberg. *See* Robert H. Jackson, *Final Report to the President on the Nuremberg Trials*, Oct. 7, 1946 (available at: http://www.jewishvirtuallibrary.org/nuremberg-trial-defendants-hermann-wilhelm-goering); Janet Flanner, *Annals of Crime: The Beautiful Spoils*, New Yorker, Mar. 1, 1947, at 34 (characterizing "Göring's wartime art deals" as "heartless, shifty, pseudo-legitimate, [and] semi-blackmail"). Looting and destruction of works of art

artworks forcibly purchased by Göring from the Goudstikker Gallery, then restituted to Plaintiff von Saher in recent years. *See, e.g.*, Stephen W. Clark, ALI-ABA Course of Study, *Legal Issues in Museum Administration*, Apr. 6-8, 2016. This history reflects widespread acceptance of the principles of U.S. law that a thief does not receive and cannot transfer title, and that the application of legal technicalities like those cited by the District Court works manifest injustice in Holocaust cases.

The District Court's insistence that it is required to take a "'strictly legal' approach" (August 9 Order at 17) is utterly groundless: the Dutch decrees it relies upon are outdated, and were discredited and discarded by the Dutch government long ago (as well as rejected by the international community, led by the United States), and replaced with more just and fair principles of restitution based on the merits of the claim. As with its decision to apply Dutch law in the first place,[17] the District Court provides no rationale for its heavy reliance on outdated and

---

were among the war crimes for which Göring was indicted and convicted. He committed suicide before he could be hanged.

[17] The court pays scant attention to the critically important choice of law issue, concluding that Dutch law applies because Plaintiff did not argue otherwise. August 9 Order at 10 n.5. In fact, Plaintiff argued below and on this appeal that U.S. policies, including those reflected in several international pacts it signed, govern this case. Also, Plaintiff's motion for summary judgment cites and relies upon several California laws and cases. Choice of law questions are reviewed *de novo* on appeal. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1157 (9th Cir. 2012).

superseded Royal Decrees A6, E100, and E133, except for its unexplained repudiation of policy considerations.

The last time the Dutch State treated the Royal Decrees as relevant to post-War claims was in 2001, when the Court of Appeals rejected Plaintiff's restitution claim on the grounds that E100 was the exclusive recourse for relief related to wartime transactions. Immediately after that decision, the Dutch government announced a new restitution policy, acknowledging that "the Dutch government's handling of restitution in the immediate postwar period [was] 'legalistic, bureaucratic, cold and often even callous.'" August 9 Order at 8. The new policy took "a more policy-oriented approach… in which priority is given to moral rather than strictly legal arguments." *Id.*[18] By ignoring an earlier contrary court decision and restituting hundreds of works to the successor to the Goudstikker Gallery under its new policy, the Dutch government has recognized that it has no interest in the continuing application of its outdated and narrow-minded post-War laws. Restitutions Committee, *Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Collection*, Dec. 19, 2005 ("The Committee must observe relevant government Policy…. [I]n 1999, the court could not take

[18] Even immediately post-War, "the Dutch State recognized that [whether it acquired ownership of restituted artworks was] not beyond doubt or without substantial risk, and that there was 'no unchallengeable right of ownership of the State.'" August 9 Order at 6.

into consideration the expanded restitution policy the government formulated after that, which renders the Committee able and imposes an obligation on the Committee to issue a recommendation [that] is based more on policy than strict legality.").[19] A U.S. court should have no greater reason to apply outdated and discredited Dutch law and policy than does the Dutch government itself.

No reasonable argument can be made – under Dutch or U.S. law or policy – that title properly transferred from the Goudstikker Gallery to Göring, a key lynchpin in the District Court's reasoning. No U.S. court decision legitimizing Göring's despicable acts against humanity can be found – other than the lower court decision now before this Court. Likewise, no principle of U.S. policy supports the conclusion reached by the lower court that the Dutch State acquired title to the Cranachs when it obtained them under the Allies' external restitution approach, then failed to return the artworks to the rightful owners. We can identify *no* other U.S. cases to rule that a forced transaction transferred title to the Nazi thief, or to award title in an artwork to a successor of a Nazi thief based on the forced sale itself.[20] The reason for the absence of such cases is clear: under U.S.

---

[19] Available at: http://www.restitutiecommissie.nl/en/recommendations/recommendation_115.html

[20] *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), *cert. denied*, 562 U.S. 1221 (2011), decided under Louisiana law, is not an exception. In *Dunbar*, the claimant alleged that the painting in question was sold to the plaintiff-possessor by a Jewish art dealer without authority and that ownership of the painting was transferred under duress. The court held that the plaintiff properly acquired title

law and policy, *a thief cannot transfer title*. *Museum v. S (In re Estate of Flamenbaum)*, 1 N.E.3d 782, 710-11 (N.Y. 2013) ("we decline to adopt any doctrine that would establish good title based upon the looting and removal of cultural objects during wartime by a conquering military force… Allowing the [possessor] to retain the tablet [the antiquity at issue] based on a spoils of war doctrine would be fundamentally unjust."). The lower court's decision flouting U.S. law and policy as established by Congress and the Executive Branch and as uniformly enforced by the courts calls out to be corrected.

CONCLUSION

The parties agree that the twin paintings at issue in this case were the subject of a forced sale and ended up in the hands of Hermann Göring. Forced sales were standard practice for Nazi art looting, and ownership of the paintings should be resolved consistent with U.S. law and policy. U.S. policy on restitution of artworks looted by the Nazis has been well defined by the Congress and the Executive Branch, as previously held by this Court and others. That policy is neither complex

---

later, upon the expiration of Louisiana's prescription period, not at the time of acquisition.

Similarly, in *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015) (appeal pending), the court found that a Spanish foundation acquired ownership of the painting by adverse possession in Spain under Spanish law – not that the thief himself acquired or passed title. Neither *Dunbar* nor *Cassirer* holds that the looters received and transferred title, and neither applies Anglo-American legal principles. In both cases, title was *created* under civil code principles through the passage of time coupled with other events, rather than obtained through a seizure or forced sale.

nor obscure, and includes the principle that Holocaust claimants should, wherever possible, have their claims adjudicated promptly and on the merits so they may receive a just and fair resolution of their claims.

The lower court's disregard for U.S. policy has led to a major injustice: denial of title and right to possession of paintings stolen from the rightful owner through a forced sale and delivered to one of the most heinous of the Nazi leaders on the grounds that, under outdated and superseded Dutch law, the villain received title. The *amici* urge this Court to reject the lower court's findings and ensure that justice is done under U.S. law and consistent with U.S. policy.

STATEMENT OF RELATED CASES

Pursuant to Circuit Court Rule 28-2.6, *amici* are unaware of any related cases.

Dated: March 28, 2017 Respectfully submitted,

s/ Thomas R. Kline

THOMAS R. KLINE
COUNSEL OF RECORD
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
202-567-7594 Telephone
866-875-6492 Facsimile

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this *amici curiae* brief complies with FRAP 29(d) and the type-volume limitation of FRAP 32(a)(7)(B) and Circuit Court Rule 32-1 because it contains 5,074 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii).

Undersigned counsel certifies that this brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because this brief has been prepared in a proportionally-spaced 14-point Times New Roman Typeface using Microsoft Word 2016.

Dated: March 28, 2017 Respectfully submitted,

s/ Thomas R. Kline

THOMAS R. KLINE
COUNSEL OF RECORD
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
202-567-7594 Telephone
866-875-6492 Facsimile

Attorneys for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the Court and all counsel of record via the Court's electronic filing system on March 28, 2017.

Dated: March 28, 2017 Respectfully submitted,

s/ Thomas R. Kline

THOMAS R. KLINE
COUNSEL OF RECORD
L. EDEN BURGESS
CULTURAL HERITAGE PARTNERS, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
202-567-7594 Telephone
866-875-6492 Facsimile

Attorneys for Amici Curiae