No. 10-

IN THE

Supreme Court of the United States

MARTIN GROSZ AND LILIAN GROSZ,

Petitioners,

v.

THE MUSEUM OF MODERN ART,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

By summary order, the Second Circuit affirmed a district court's dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure of a complaint alleging timely claims that artworks held by the Museum of Modern Art were stolen in Nazi-era Germany. In so doing, the Second Circuit sanctioned a departure from the traditional role of U.S. courts as a post-War means of redress for victims of theft of readily identifiable property during wartime—particularly to undo Nazi-era theft and duress transactions. Because the issue of access by victims of the Nazis to federal courts for restitutionary remedies for stolen property has received disparate treatment by the various circuits, the Second Circuit's decision raises exceptionally important issues requiring resolution by this Court.

Two questions are presented:

1. On a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, may a federal court rely on materials extrinsic to a complaint to decide disputed factual issues governing the accrual of statutes of limitations, where this court in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) applied a different standard to a foreign museum?

2. Where the Executive and Congress have adopted a remedial scheme that relies on traditional legal and equitable remedies to return art stolen during the Nazi era to its true owners and where a state statute of limitations requires actual notice to trigger accrual, does a federal court impermissibly frustrate the Executive's foreign affairs powers by adopting a doctrine of constructive notice where that doctrine will cause a forfeiture of rights to stolen artworks?

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The opinion of the United States Court of Appeals for the Second Circuit is reported at *Grosz v. Museum of Modern Art*, 403 Fed. Appx. 575 (2d Cir. 2010). The Second Circuit affirmed the January 6, 2010 decision of the United States District Court for the Southern District of New York, reported at 2010 WL 88003 (S.D.N.Y. Jan. 6, 2010). Judgment was entered on January 11, 2010. The United States District Court for the Southern District of New York denied reconsideration by decision dated March 3, 2010. Pet. App. 1a-66a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Second Circuit's opinion was rendered December 16, 2010. Petitioners sought rehearing on December 29, 2010. The Second Circuit denied the Petition for Rehearing or Rehearing *En Banc* on February 9, 2011. Pet. App. 67a-68a.

STATEMENT OF THE CASE

Petitioners seek a review of a decision of the Second Circuit that permitted the Museum of Modern Art to invoke a statute of limitations defense. Petitioners filed a complaint alleging conversion and seeking replevin of three paintings by the artist George Grosz ("Paintings") currently located at the Museum of Modern Art ("MoMA") in New York and claimed by Petitioners, the undisputed heirs of George Grosz ("Grosz"). Petitioner Lilian Grosz

is a New Jersey resident, and Petitioner Martin Grosz is a Pennsylvania resident. The value of the Paintings exceeds $75,000 and MoMA is located in New York, so the district court had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(2).

Grosz was a world-renowned German artist who fled Nazi persecution in 1933. Grosz left his artworks in his Berlin studio and in the care of his Jewish art dealer, Alfred Flechtheim, a Nazi persecutee who also fled Nazi Germany in 1933. The Paintings were lost during this flight due to Nazi persecution. In 1937, Flechtheim died in London.

After fleeing Hitler, Grosz landed in 1933 in New York City, where he raised his family through the end of World War II. After the war, Grosz and his family filed claims against Germany for all artworks lost by Grosz. By the time Germany determined the works to be lost due to Nazi persecution, Grosz was dead.

In 1994, the Grosz family retained art historian Ralph Jentsch to trace artworks stolen from Grosz. After a decade-long search, in 2003, Jentsch discovered documents revealing how the Paintings were stolen from Flechtheim and Grosz. Jentsch promptly wrote to MoMA demanding the Paintings' return. Following the demand, the Grosz Heirs and MoMA agreed that MoMA would hold the Paintings and work with Jentsch to investigate the title of the Paintings. From 2003 through 2006, the parties shared research and engaged in extensive settlement communications.

During settlement negotiations, in response to Jentsch's expressed concerns that MoMA had refused the Grosz Heirs' claims, MoMA Director Glenn Lowry repeatedly denied that he had refused the claims and reassured Jentsch that he had no power to make any refusal, writing on January 18, 2006, "As I have told you many times … any decision on a matter like this must be considered by the Museum's Trustees." 2d. Cir. App., Vol. I, A-323. Throughout that period, Lowry repeatedly asserted that only the Board of Trustees had the power to refuse the Grosz heirs' claims to the Paintings. 2d. Cir. App., Vol. I, A-191, A-323.

On April 11, 2006, MoMA's Board of Trustees voted to refuse to return the Paintings. 2d. Cir. App., Vol. II, A-326-335. On April 12, 2006, MoMA sent a notice of the refusal to the Grosz Heirs. 2d. Cir. App., Vol. I, A-186. Prior to that notice, no representative of MoMA told Jentsch or any of the Plaintiffs that the museum's trustees had decided to reject Plaintiffs' claims.

MoMA's Associate General Counsel Henry Lanman reiterated the April 12, 2006 refusal date in a letter on June 26, 2008 to Plaintiffs' counsel David Rowland: "At the conclusion of his investigation, Mr. Katzenbach recommended to the Museum's Board of Trustees that it reject your clients' claims, a decision that was communicated to your clients on April 12, 2006." 2d. Cir. App., Vol. II, A-540.

On April 10, 2009, the Grosz Heirs filed this action alleging a claim for conversion, replevin, and to impress a constructive trust based on MoMA's April 12, 2006 refusal to return the Paintings. The complaint was commenced

within three years of the April 12, 2006 refusal date stated in the aforementioned letters and the Complaint. MoMA moved to dismiss the action as time-barred. MoMA appended settlement communications to the motion papers, including a letter dated July 20, 2005 from Lowry offering to share ownership of the Paintings—a letter that was not referred to nor relied on in the Complaint. 2d. Cir. App., Vol. I, A-187. The Petitioners objected to consideration of extrinsic evidence. The district court denied the arguments on statute of limitations grounds.

The district court issued a decision and order dated January 6, 2010. Pet. App. 33a-36a. The district court determined that MoMA's retention of the Paintings following Petitioners' original demand letter in November 2003 was an implicit "refusal" triggering a three-year statute of limitations under New York's demand-and-refusal rule as a matter of law. The district court stated of the July 20, 2005 Lowry letter offering to share ownership of the Paintings that "Lowry's temporizing language was almost certainly designed to entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation." Pet. App., 58a-59a. However, the district court also found the offer to share ownership in that letter also to be a "refusal" triggering New York's three-year statute of limitations for conversion as of July 20, 2005. Pet. App., 54a, 56a. Finding the three-year statute of limitations to have expired prior to Petitioners filing this action on April 10, 2009, the district court dismissed the complaint and denied leave to amend.

Petitioners appealed, contesting the District Court's application of New York's demand-and-refusal rule on these grounds: (i) since Petitioners had consented to

MoMA's possession of the Paintings pending the outcome of the investigation, no conversion occurred and thus the statute of limitations was not triggered prior to April 12, 2006; (ii) Rule 408 of the Federal Rules of Evidence and Rule 12(b)(6) of the Federal Rules of Civil Procedure forbid consideration of extrinsic evidence on a motion to dismiss, particularly an inadmissible offer to compromise; (iii) the July 20, 2005 Lowry letter was not a refusal and could not reasonably be construed as such under New York law; (iv) Lowry had no actual or apparent authority to make a refusal as required by New York law; (v) even if a refusal had occurred, New York law entitled Petitioners to equitable estoppel based on Lowry's temporizing behavior and MoMA Assistant General Counsel Lanman's later representation that MoMA had refused Petitioners' demand on April 12, 2006; and (vi) the complaint alleged timely claims of unjust enrichment and constructive trust.

On December 16, 2010, the Second Circuit summarily affirmed the district court's decision dismissing without leave to replead.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO CONSIDER THE CONFLICT BETWEEN THE RELIANCE OF U.S. FOREIGN AND DOMESTIC POLICY ON U.S. COURTS TO RESTITUTE STOLEN PROPERTY AND THE COLLECTIVE UNWILLINGNESS OF FEDERAL COURTS TO PERMIT CLAIMANTS ACCESS TO THE FEDERAL COURTS

In addressing unfinished business of World War II, both Congress and the Executive relied on federal courts as a forum to unwind transactions resulting from Nazi persecution. In 1998, Congress relied on pre-existing state law remedies and access to the courts in crafting solutions for true owners to recover Nazi-era stolen artworks. After 1998 however, a wave of federal judicial decisions developed constructive notice doctrines that effectively denied Holocaust-era property claimants the opportunity to reclaim stolen property. In *Von Saher v. Norton Simon Museum of Art,* No. 091254, 131 S. Ct. 379 (Oct. 4, 2010), a petition for certiorari currently pending, this Court solicited the views of the Solicitor General on the judicial invalidation of a State's attempt to provide remedies to claimants seeking to recover art stolen in the Nazi-era. This Petition presents for review the same central questions: the degree to which federal courts may deprive claimants to artworks stolen during the Nazi era of traditional common law remedies and the extent to which such denial inhibits the Executive's power to set foreign policy and the remedial scheme envisioned by Congress.

A. The Issue Of Access To Traditional Restitutionary Remedies Is Implicated In *Von Saher,* Now Pending On Certiorari To The Ninth Circuit.

In *Von Saher*, *supra*, 131 S.Ct. 379, this Court sought the views of the Solicitor General in a petition for certiorari challenging a decision of the Ninth Circuit holding unconstitutional California's extension of a statute of limitations for Holocaust victims to recover Nazi-looted artworks from California museums. *See* 131 S.Ct. 379; Petition for Writ of Certiorari, 2010 WL 1557533, at *3, *7. Reviewing the efforts of recent Administrations to remedy the problem of recovering stolen art from museums, the Ninth Circuit noted that the history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 578 F.3d 1016, 1029 (9th Cir. 2009) modified *en banc* at 592 F.3d 954. Although the Ninth Circuit's *en banc* panel affirmed the decision on other grounds, the original panel in *Von Saher* pointed out a central truth: that federal action in the area of providing relief to claimants of artworks stolen during the Holocaust is pervasive and that whether and if remedies are available to claimants is essentially a question that by tradition has been dictated by the foreign policy of the federal government. Accordingly, this Petition seeking review of the Second Circuit's denial of traditional state remedies implicates the same important question of U.S. foreign policy in favor of providing restitutionary remedies to victims of Nazi art theft raised in the *Von Saher* petition.

B. U.S. Foreign And Domestic Policy Chose The Federal Judiciary As The Vehicle For Supplying Restitutionary Remedies In Federal Courts For Nazi Theft And Duress Where Jurisdictionally Appropriate, And The Federal Judiciary Accepted And Has Traditionally Exercised That Role

In 1954, at the behest of the U.S. State Department, the Second Circuit reversed its earlier decision declining to review Nazi depredations under the act of state doctrine, and it decided that the U.S. District Court for the Southern District of New York would provide a forum for redress of Nazi property crimes against its victims. *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (quoting Jack B. Tate). Ever since, the federal courts have played this valuable role and have been relied upon by the Executive to do so.

1. U.S. Foreign Policy Consistently Opposed Nazi-Era Property Crimes

Outrageous acts of persecution and spoliation are well known and were reported regularly on the front pages of the *New York Times*. *Church of the Lukumi Babalu Aye v. City of Hialeah* (91-948), 508 U.S. 520 (1993). The London Declaration of January 5, 1943, signed by the United States and seventeen other nations, served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war…." Pet. App., 89a-90a; *Von Saher,* 578 F.3d 1016, 1023 (9th Cir. 2009).

After the Allied victory over the Third Reich in 1945, the United States reaffirmed the commitment of the 1943 London Declaration by requiring European nations to repudiate all purported transactions in art stolen by the Nazis between 1933 and 1945 and to draft laws mandating return of all property stolen from Nazi persecutees. After the Allies withdrew from Europe in the 1950's at the start of the Cold War, Western Europe largely ignored those commitments to assist the return of hundreds of thousands of stolen artworks to the rightful, legal owners.

2. Post-War Property Recovery Efforts And The Role Of The U.S. Courts

The U.S. worked diligently to restore stolen artworks to their true owners for years thereafter. In 1951, a U.S. State Department bulletin proclaimed: "For the first time in history, restitution may be expected to continue for as long as works of art known to have been plundered during a war continue to be rediscovered." Hall, Ardelia R., *The Recovery of Cultural Objects Dispersed During World War II,* 25 Dept. St. Bull. 337, 339 (1951). In 1954, once the State Department made clear that federal courts should provide a forum for restitution of property stolen or obtained by Nazi duress, the Second Circuit stripped Nazi Germany of sovereign immunity. In so doing, the court cited a crucial letter of the Legal Adviser:

> This Government has consistently opposed the forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or people subject to their controls…. The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property

> (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

Bernstein, 210 F.2d 375, 376 (quoting Jack B. Tate); *Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved In Nazi Forced Transfers*, 20 Dep't State Bull. 592, 592-93 (1949).

During this period, in accord with the doctrine of separation of powers, the judiciary deferred to the role of the Executive in articulating the role that courts should play by providing traditional common law remedies to victims of Nazi depredations.

C. Congress Enacted The Holocaust Victims Redress Act of 1998 Based On The Presumption That The Judicial Branch Would Continue To Provide Adequate Restitutionary Remedies Grounded In State Law For Holocaust-Era Claimants Of Stolen Art

Following the collapse of the Soviet Union, the Executive branch renewed its efforts to provide remedies worldwide for victims of Nazi property crimes. Congress followed suit, passing legislation to promote uncovering crimes and to ensure that stolen property would be returned. In doing so, the Executive and Congress relied on the Judiciary to continue to play its role in effectuating state-law based restitutionary remedies.

1. Executive Action To Provide Redress For Victims Of Nazi Property Crimes

Consistent with its restitution policy, the United States spearheaded efforts to reclaim Nazi-looted artwork and obtained new commitments from nations, including nations of the former Soviet Union, to facilitate restitution to the true, legal owners of stolen property pursuant to merits-based determinations of ownership. The United States' efforts are embodied in the Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998) (Pet. App. 69a-71a) and the declaration of forty-six nations that adopted the Terezin Declaration (30 June 2009) (Pet. App. 72a-88a). Respondent Museum of Modern Art participated in and supported the Washington Principles, which affirmatively welcome potential claimants to come forward. To honor obligations under the Washington Principles, numerous countries set up restitution commissions.

2. Congressional Understanding That State Law-Based Remedies Would Provide Adequate Relief For Nazi Crime Victims

In 1998 Congress passed the Holocaust Victims Redress Act (the "HVRA"). In doing so, it solicited testimony of U.S. museums:

> "When public awareness of Nazi-Looted art increased during the 1990's Congress considered enacting legislation to set standards for returning stolen art. Museum directors, however, testified that they could better handle the subject themselves, resulting in codes

> of ethics promulgated by [the Association of American Museum Directors and American Association of Museums]...."

Graefe, Emily, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473 (March 2010). In enacting the HVRA, Congress concluded that no federal remedy was necessary to effectuate restitution of stolen art in the United States because pre-existing state law remedies sufficed. *Orkin v. Taylor*, 487 F.3d 734, 739 -741 (9th Cir. 2007) (holding that because Congress believed that state law provided pre-existing adequate remedies, the HVRA did not imply a federal remedy). As the Ninth Circuit observed:

> [T]he legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners.
>
> * * *
>
> Finally, ... there can be no doubt—as this case amply demonstrates—that *state law provides causes of action for restitution of stolen artworks. … Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services,* 105th Cong., 2d Sess. (1998).

Orkin, 487 F.3d at 739-741 (emphasis supplied). Accordingly, the current legal scheme initiated by the Executive and relied upon by Congress is for the federal judiciary to diligently enforce the restoration of stolen artworks to the true owners using the traditional common law and equitable remedies available in state law.

D. Federal Courts Have Established Post-1998 A Variety of Measures To Effectively Deny Remedies To Holocaust-Era Claimants

After Congress acted in 1998, federal courts nationwide have adopted constructive notice doctrines having the effect of frustrating the workings of traditional common law restitutionary remedies and denying redress to claimants of artworks stolen in the Nazi era. *See*, Kreder, J., *Guarding the Historical Record From the Nazi-era Art Litigation Tumbling Toward the Supreme Court,* 159 U. Pa. L. Rev. PENNumbra 253 (2011). This nullification of the common law and principles of equity has taken several forms.

1. In *Von Saher*, The Ninth Circuit Construed California's Statute of Limitations To Deny Remedies To The Very Persons That The Legislature Sought to Assist: Victims Of Nazi War Crimes

California's statutes of limitations have been interpreted in such a way as to deny claimants of Nazi-era looted artworks relief. When the California legislature tried to restore the *status quo ante* and to extend the statute of limitations to afford claimants relief, the Ninth Circuit struck the statute down as unconstitutional. In

doing so, the Ninth Circuit has directly challenged the remedial scheme envisioned by Congress in enacting the HVRA. A petition for certiorari is pending, and this Court has solicited and is awaiting the Solicitor General's views. *Von Saher,* 1315 S.Ct. 379 (2010).

2. Judicial Federalization Of Constructive Notice Doctrines Inhibits Both The Broad Role Of Congress In Shaping Foreign Policy Objectives And The More Specific Power Of The Executive To Refine The Foreign Policy Of The Nation And To Take Care That It Be Faithfully Executed

In 1998, Congress was correct in believing that the common law provides remedies for restitution of stolen property, since traditional common law would give claimants a jury trial on whether they had notice or should reasonably have discovered the whereabouts of Nazi-looted artworks.[1] After the adoption of the Washington Principles, however, museums suing Holocaust victims persuaded the courts to dismiss ownership claims pursuant to Rule 12(b)(6) by imputing to the victims constructive notice of Nazi-era transactions. *See, e.g., Toledo Museum of Art v. Ullin*, 477 F.Supp.2d 802; *The Detroit Institute of Arts v. Ullin*, 2007 WL 1016996; *Orkin*, 487 F.3d at 739 -741. To be sure, not all federal courts have been hostile to

1. In jurisdictions that follow the discovery rule for accrual of statute of limitations of conversion claims, both actual and constructive notice are factual questions, determined by a jury. *Schwartz v. Cincinnati Museum Association*, 35 Fed. Appx. 128, 131, 2002 WL 554492 at *4 (6th Cir. 2002)(Ohio law); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d at 9 (Massachusetts law).

claimants alleging Nazi theft or duress. *See, e.g., Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010) (vacating trial court's dismissal under Swiss law and remanding for findings under New York law); *Vineberg v. Bissonnette*, 548 F.3d 50 (1st Cir. 2008)(granting summary judgment on Nazi duress sale); *Schoeps v. Museum of Modern Art,* 594 F.Supp.2d 461 (S.D.N.Y. 2009)(denying museum's motion for summary judgment and finding genuine issue of fact as to whether museum had unclean hands due to knowledge of misappropriation).

It is fair, however, to note the growing tendency among federal judges to impute knowledge of Nazi era transactions to persecuted victims and to observe that this tendency is itself contrary to the common law principle that such questions are reserved for the jury and must be pleaded and proven. Some federal judges have overlooked the dictates of the common law—with the Fifth Circuit notably permitting Louisiana law to launder title to stolen art.[2]

In one example of a federal court using constructive notice to trigger a statute of limitations, *Toledo Museum of Art v. Ullin*, the district court, in considering a museum's quiet title action against heirs of a Jewish Nazi persecutee, dismissed the heirs' counterclaims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, even though the court acknowledged that the defendants disputed

2. The Fifth Circuit has permitted Louisiana's prescriptive laws to launder title to allegedly stolen property located in Louisiana. Louisiana grants title to a holder of stolen property after ten years of possession under the doctrine of acquisitive prescription. *Dunbar v. Seger-Thomschitz,* 615 F.3d 574 (5th Cir. 2010) cert. den. 131 S. Ct. 1511 (Feb. 22, 2011).

the existence of a sale or that they had knowledge of the artwork's location and provenance. The district court imputed an earlier constructive notice date because the Toledo Museum's possession of the artwork was "easily discoverable". 477 F.Supp.2d at 806 n. 1-808.

In an even more problematic instance, in *The Detroit Institute of Arts v. Ullin*, a carbon copy of the Toledo case brought against the same heirs on the same day in retaliation for coming forward under the Washington Principles, the district court determined that the discovery rule did not apply since it was a "commercial conversion" case, so Michigan's statute of limitations started running in 1938, the time of the alleged forced transaction. 2007 WL 1016996 at *3. As Professor Kreder observes, "A consequence of the suit is that the painting remains on display as if Ms. Nathan had been perfectly free to engage in fair commercial transactions while on the run from a genocidal regime." Kreder, J., *Guarding the Historical Record* at 261.

In an additional example of courts adopting problematic constructive notice doctrines, the Ninth Circuit, in affirming a dismissal pursuant to Rule 12(b)(6) a claim based on a coerced sale by Jewish heirs to a painting in California, the Ninth Circuit observed: "Had the Orkins investigated any of those publicly-available sources, they could have discovered both their claim to the painting and the painting's whereabouts long before the 2002 internet rumor was posted." *Orkin,* 487 F.3d at 738.

In sum, the trend of federal courts' constructive notice doctrines nullifying traditional common law restitutionary remedies contrary to the expectations of the Executive

and Congress is widespread, creating an urgent national need for this Court to exercise its supervisory powers to restore proper restraint and respect for traditional common law and equity. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

E. The Second Circuit's Denial Of Access To The Courts Based On An Implied Refusal And Equivocation Nullifies New York's Statute Of Limitations Rules Protecting True Owners Of Stolen Art

The Second Circuit's decision warrants review by this Court because it has nullified an important protection of true owners of stolen property that is well-grounded in New York law and that was retained at the request of the federal government as a measure to combat the traffic in stolen art. By affirming the district court's decision nullifying this protection, the Second Circuit has thus defeated an important federal policy of encouraging states to adopt rules that will protect interstate commerce from traffic in stolen property. The Second Circuit's decision further warrants review because it fairly presents an example of the post-1998 judicially-crafted constructive notice doctrines denying access to the courts, and thus presents important national and international issues conflicting with federal policy that this Court should address. *See* Kreder, J., *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship of the Public Trust?*, 88 Or. L. Rev. 37, 59-75 (2009).

1. Because An Actual Refusal Gives A True Owner Fair Notice Of The Need To Protect Property Rights, The Second Circuit's Endorsement Of An Implied Refusal Rule Defeats An Important Protection Under New York Law That Serves To Avoid Forfeitures By True Owners Of Stolen Artworks

New York case law has long protected the right of the owner whose property has been stolen to recover that property, even if it is in the possession of a good-faith purchaser for value. *Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18, 569 N.E.2d 426, 567 N.Y.S.2d 623 (1991) *citing Saltus & Saltus v Everett*, 20 Wend 267, 282 (1838). New York courts have explicitly chosen and endorsed the demand-and-refusal statute of limitations rule because it is the most protective of true owners of stolen art. *Guggenheim* at 317-318.[3] Under New York law, a cause of action for replevin against the good-faith purchaser of a stolen chattel accrues when the true owner makes demand for return of the chattel and the person in possession of the chattel refuses to return it. *Id.* at 317-318. Until demand is made and refused, possession of the stolen property by the good-faith purchaser for value is not considered wrongful. *Id.* at 318.

A refusal must be unqualified to constitute a refusal under New York's demand-and-refusal rule. *Ball v. Liney*, 48 N.Y. 6, 12 (1871) (only an unqualified refusal to

3. In *Guggenheim*, the New York Court of Appeals explicitly criticized the Second Circuit for incorrectly grafting a due diligence requirement on true owners of stolen art. *Guggenheim* at 318-319 criticizing *DeWeerth v. Baldinger,* 836 F.2d 103 (2d Cir. 1987) *cert denied* 486 U.S. 1056 (1928).

return Plaintiffs' property would constitute a conversion); *McEntee v. New Jersey Steamboat Co.*, 45 N.Y. 34 (1871) (refusal to deliver goods to a person entitled to receive them constitutes a conversion unless the refusal is qualified).

The reason that New York requires an actual, unequivocal and unqualified refusal is to protect a true owner of property from the risk of forfeiture in any ambiguous situations. Under New York law, where a situation is unclear, the true owner of property is not at risk. Critically, the Second Circuit's decision endorses an implied refusal rule that flips this presumption and shifts the risk of loss during lengthy negotiations to true owners of stolen property, rather than, as New York requires, to the possessor. The Second Circuit's nullification of this important protection for true owners of stolen property frustrates important federal interests and implicates important federal policies relating to the administration of justice in protecting good faith settlement negotiations as a means of fostering dispute resolution.

2. New York Retained Its Demand-And-Refusal Rule At The Behest Of The Federal Government To Effectuate An Important Federal Policy Endorsed By The Executive Branch; The Second Circuit's Endorsement Of An Implied Refusal Rule Frustrates The Executive's Policy Against Defeating The Trafficking Of Stolen Art

New York's demand-and-refusal rule was preserved in part at the request of the federal government to carry out the important federal policy of fighting the traffic in

stolen art. New York rejected less protective measures at the behest of the U.S. State Department, the U.S. Department of Justice, and the U.S. Information Agency:

> Governor Cuomo vetoed the measure … on advice of the United States Department of State, the United States Department of Justice and the United States Information Agency *(see, 3 U.S. Agencies Urge Veto of Art-Claim Bill,* NY Times, July 23, 1986, at C15, col 1). In his veto message, the Governor expressed his concern that the statute "[did] not provide a reasonable opportunity for individuals or foreign governments to receive notice of a museum's acquisition and take action to recover it before their rights are extinguished." The Governor also stated that he had been advised by the State Department that the bill, if it went into effect, would have caused New York to become "a haven for cultural property stolen abroad since such objects [would] be immune from recovery under the limited time periods established by the bill."
>
> The history of this bill and the concerns expressed by the Governor in vetoing it, when considered together with the abundant case law spelling out the demand and refusal rule, convince us that that rule remains the law in New York and that there is no reason to obscure its straightforward protection of true owners by creating a duty of reasonable diligence.

Guggenheim, 77 N.Y.2d at 318 -319 (1991).

In affirming the district court's decision permitting an implied refusal or alternatively implying a refusal from equivocal communications on a Rule 12(b)(6) motion, the Second Circuit's decision failed to give effect to a state limitations provision that would have allowed a claim to Nazi-looted art to be resolved on the merits. In doing so, the Second Circuit joined the federal courts nullifying common law remedies and defeating the federal policy of returning property looted during the Holocaust to its rightful owners.

Review of the Second Circuit's decision is warranted because by permitting the district court to imply a refusal from MoMA's mere retention of the Paintings, by drawing unfavorable inferences from settlement communications that the district court itself found to be "temporizing", and by permitting MoMA to assert Lowry's authority to issue a refusal without having to prove it, the Second Circuit impermissibly nullified law established by the New York Court of Appeals. By doing so, the Second Circuit's decision caused petitioners to forfeit remedies and property protected under New York law, unjustly creating a windfall for the MoMA based on its inequitable conduct during settlement negotiations.[4] In sum, the Second

4. The district court held: "Nothing in the rule's history or purpose suggests that a party who receives a demand, and who thereafter acts in a manner that is inconsistent with the demander's claim to ownership, should be held not to have 'refused' the demand simply because he failed to recite some magic words of rejection. Actions, as we all know, can sometimes speak louder than words." Pet. App., 52a-53a. "If MoMA's failure to return the Paintings for more than a year and a half after plaintiffs demanded them did not constitute a refusal as a matter of law (and this Court thinks that it did), then the July 20, 2005 letter—in which the defendant

Circuit has endorsed a rule forcing the true owner to guess at the meaning of equivocal settlement communications at the risk of forfeiting property, thereby sacrificing clarity and frustrating the important restitutionary and settlement policies built into the demand-and-refusal rule.

F. Petitioners Seek Review Of The Second Circuit's Decision Because It, Like The Ninth Circuit's Decision In *Von Saher,* Frustrates A Remedial Plan For Nazi-Era Crime Victims Consonant With Federal Restitution Policy

Since the Executive and Congress have entrusted the courts with carrying out the job of restoring artworks stolen in the Nazi era, the Second Circuit's affirmance denying Petitioners frustrates the remedies envisioned by the Executve and Congress. The Ninth Circuit's opinion in *Von Saher* similarly challenges both the Executive's policy choice of confiding the fact-finding necessary in recovery of stolen artworks to the sound discretion of the judiciary and is a direct challenge to Congress's policy choice in enacting the HVRA in reliance on continued confidence in the courts to achieve restitution through pre-existing remedies. In these decisions, both the Second Circuit and Ninth Circuit have failed to apply clearly applicable state law remedies furthering the important federal policy of

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clearly communicated its intent to keep [the Paintings] despite plaintiffs' demand—was an act utterly inconsistent with plaintiffs' claim of right. It thus constituted the sort of refusal contemplated by the demand and refusal rule." *Id.* at 54a; "Lowry's July 20, 2005 letter, coupled with the museum's continued retention of the works after it was sent, indicates its continuing intent to interfere with the rights asserted by plaintiffs in their demand. This is all the 'refusal' the law could possibly require…." *Id.* at 56a.

promoting the restitution of Nazi-looted artwork in U.S. museums and of resolving claims on the merits. Although the return of Nazi-looted artwork has important foreign policy implications that concern the federal government, Congress made the considered judgment to allow claims for restitution of this property to be made primarily under state law. *Orkin* 487 F.3d at 740. Without review from this Court, the conflict between the Executive's policies, congressional choices, and the post-1998 decisions expanding the various constructive notice doctrines will have irreparably harmed national and international confidence in the ability of the courts to adhere to traditional common law in carrying out its functions and will have irreparably frustrated the Executive's ability to conduct foreign policy, an important concern of this Court. *Medellin v. Texas*, 552 U.S. 491 (2007). Therefore, this Court's review is critical to determine whether the policy choices made by the Executive and Congress to confide in the courts is still a viable one. This Court's review is essential to ensure that the traditional state court remedies prescribed by Congress and the Executive be made available to litigants and not be disturbed by decisions like the Second Circuit's, the Ninth Circuit's in *Von Saher*, and the other decisions crafting constructive notice doctrines that have the effect of depriving claimants of access to justice.

II. REVIEW IS WARRANTED TO CONSIDER THE CONFLICT BETWEEN THE DIVERGENT PROCEDURAL STANDARD APPLIED TO A U.S. MUSEUM BY THE SECOND CIRCUIT ON A RULE 12(b)(6) MOTION WITH THIS COURT'S TREATMENT OF AN AUSTRIAN MUSEUM IN *REPUBLIC OF AUSTRIA V. ALTMANN*

This Court has previously instructed that in a case involving possession and concealment of Nazi-looted art against an Austrian museum, all well-pleaded allegations are to be deemed true on a motion to dismiss. The Second Circuit, by affirming the district court's consideration of settlement communications to work a forfeiture against the claimants, has created the problematic appearance that U.S. museums will not be subjected to the same standard as foreign museums. Significantly, the Second Circuit's decision has also undermined important federal policies favoring offers of compromise by permitting the district court to consider the offer in evidence and permitting the offer to work a forfeiture on a motion to dismiss, making review of this decision especially important.

A. In *Altmann,* This Court Assumed The Truth of Allegations of Nazi Art Looting, Possession And Concealment Against An Austrian Museum and Should Require That The Same Standard Be Applied To A U.S. Museum

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court treated the allegations of the complaint as true and drew all inferences in the light most beneficial to the complainant. The parallels between *Altmann* and this case are striking, yet, in the present action where

the allegations involved a U.S. museum, the Second Circuit affirmed a dismissal in which the district court weighed evidence, made credibility determinations, drew inferences in favor of the defendant and resolved disputed issues of fact relating to Respondent's affirmative defense of limitations on a motion to dismiss pursuant to Rule 12(b)(6).

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be dismissed if it "fail[s] to state a claim upon which relief can be granted." This Court has made clear that a court presented with a Rule 12(b)(6) motion must assume the truth of the allegations presented in the complaint and is restricted from considering materials outside of the complaint. Notably, in *Altmann*, this Court faced the same scenario presented in this case: the remarkable facts of Nazi expropriation of Austria's Jewish population in the 1930's and a decades-long pattern of concealment by a museum. In *Altmann*, this Court explicitly reaffirmed the unremarkable proposition that on a motion to dismiss, a court must assume the allegations of the complaint to be true. 541 U.S. at 680; *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 589 (2007).

Regardless of the ultimate merits, cases involving cultural property and museums invoke great sensitivities relating to national identity and cultural pride. The United States has asked foreign nations to undergo a painful process of self-examination, bringing back wartime memories. In this context, the Second Circuit's sanction of a markedly different treatment on a motion pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure of a U.S. museum facing allegations similar

to those faced by the Austrian museum in *Altmann* risks creating the problematic perception that U.S. courts are not willing to subject domestic museums to the same scrutiny prescribed for foreign museums. Accordingly, given the important international repercussions, the Second Circuit's departure from this Court's teachings in *Altmann* warrants review here.

B. The Second Circuit's Sanction Of Use Of Extrinsic Evidence To Dismiss Claims Against A U.S. Museum Frustrates Federal Restitution Policy And Promotes A Procedural Standard That Lacks Uniformity

The Second Circuit's decision approved a dismissal of a claim—based upon a settlement communication extrinsic to the complaint that contested a factual issue—after drawing negative inferences from documents extrinsic to the complaint containing offers of compromise made during settlement communications. The Second Circuit has thus permitted an intrusion on the traditional province of the jury and closed the courthouse doors based on factual findings without first developing a record.

Generally, on a Rule 12(b)(6) motion a court may not dismiss a case based upon an affirmative defense such as a statute of limitations, the validity of which is not apparent from the face of the complaint. *See Blue Tree Hotels Inv. (Canada) Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212 (2d Cir. 2004). The limited nature of materials that a court can consider when confronted with a Rule 12(b)(6) motion is reinforced by Federal Rule of Civil Procedure 12(d) which mandates converting to a summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure.

In the specific context in which this issue is raised, the Second Circuit's permitting a district court to take procedural shortcuts not authorized by the Federal Rules of Civil Procedure has the effect of denying claimants of stolen artworks of even the opportunity to present evidence in support of their cases or to engage in discovery that would support their claims. Where the Executive has taken an international stand urging resolution of claims on the merits, the Second Circuit's approval of such shortcuts gives the appearance to the international community that claimants are not receiving a fair opportunity to be heard. Given these foreign policy ramifications, this Court's guidance in reestablishing both the perception and reality of justice is critical.

C. Judicial Nullification Of Common Law Doctrines To Deprive Claimants of Remedies Poses Particularly Important Concerns Warranting This Court's Exercise of Its Supervisory Powers

Traditional common law principles require a jury to determine such issues as actual or constructive notice or whether a disputed fact triggering a statute of limitations occurred. This Petition warrants review because the Second Circuit's affirmation of a district court order that overlooked Petitioner's right to have factual disputes determined by a jury in disregard of the accepted and usual course of judicial proceedings (S. Ct. Rule 10(a)) is part of a trend of federal courts engaging in nullification of traditional state law remedies to such an extent that this Court should exercise its supervisory powers.

The Washington Principles encouraged heirs to come forward and present their claims. By permitting the

district court to rely on extrinsic materials protected by Rule 408 of the Federal Rules of Evidence to trigger statutes of limitations, the Second Circuit's decision discourages compliance with the Washington Principles and jeopardizes this Court's policies favoring offers of compromise. This risks creating a general atmosphere of unhealthy gamesmanship and sharp practice in settlement negotiations. In this particular case, in light of the international importance of the issues involved, the Second Circuit's decision presents an important opportunity for this Court to provide guidance on these important issues of civil procedure, which is subject to its supervisory authority. *See* Eugene Gressman et al., *Supreme Court Practice*, § 4.15, at 273 (Ninth Ed. 2007) ("On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary.").

III. REVIEW IS WARRANTED BECAUSE THE SECOND CIRCUIT'S DECISION, TOGETHER WITH OTHER DECISIONS DEPRIVING RESTITUTIONARY REMEDIES, RISK MAKING U.S. MUSEUMS HAVENS FOR STOLEN ART

The practical result of the Second Circuit's decision is a forfeiture in favor of an entity that may not be the true owner of property belonging to it. If this and other post-1998 decisions stand, true owners of art stolen during the Nazi era are left with no restitutionary remedies against U.S. museums. Accordingly, U.S. museums risk becoming havens for the tens of thousands of potentially stolen artworks in their collections. This is an important issue for this Court to address before another generation of victims passes from this earth—and it was not the result intended by the Executive and Congress when the role of

carrying out U.S. restitution policy was delegated to the discretion of the courts.

After being advised by newspapers, magazines, formal government warnings of the risks of acquiring artworks entering the U.S. after 1932 that were created prior to 1946, U.S. museums spent decades accumulating great collections European art, often without asking for provenance paperwork. This system gave wealthy patrons large tax deductions and filled U.S. museums with toxic assets at taxpayer expense. In 2006, James Cuno, director of the American Association of Museum Directors ("AAMD"), confessed that "the amount of research to be undertaken on the tens of thousands of works of art that, by definition, may have Nazi-era provenance problems is significant, requiring large allocations of staff time and money…." Testimony of AAMD President James Cuno to Congress, July 27, 2006 (http://www.aamd.org/advocacy/documents/Testimony--JCuno.pdf).

Following World War II, European nations enacted the world's strictest privacy laws at the behest of the Allies. Paradoxically, these privacy laws, intended to prevent the rise of another Hitler, had the unintended consequences of depriving populations of displaced survivors of information regarding who their relatives are and what they owned. Litigation commenced in U.S. courts together with U.S. diplomatic efforts finally forced Western European nations to confront Nazi pasts, to start to open up records, and to engage in restitution and compensation efforts. *See* Eizenstat, Stuart E., *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (PublicAffairs, January 7, 2003). U.S. museums, in the best position to publish the

provenances of artworks and to determine true owners after 1945, instead remained silent as three generations of Holocaust survivors—many with claims to the museums' art—died. Leaving stolen art in the hands of those who have acted so inequitably is deeply unfair.

The Second Circuit's decision and the Ninth Circuit's decision in *Von Saher*, raise the specter that U.S. museums will receive a windfall of stolen property because of judicial nullification of common law remedies. These decisions, if left unreviewed by this Court will leave stolen art in U.S. museums irretrievable by true owners. In relying on pre-existing common law remedies and the ability of the judiciary to enforce these remedies in crafting the Holocaust Victims Remedies Act of 1998, Congress could not have intended and did not intend the grotesque result of blocking victims from recovering property and giving museums an unjust windfall.

If litigants are denied recourse through the courts, the United States will have no effective means of complying with the standards it imposes on other nations. Given the policy of the Executive to urge foreign governments and museums to disgorge stolen property from their collections and given Congress' reliance on traditional common law remedies to return art stolen during the Nazi era to its true owners, the decision of the Second Circuit, together with other federal court decisions denying common law remedies, puts the federal judiciary at great risk of sanctioning an inequitable result—immunizing U.S. museums from scrutiny of the potentially stolen art in their collections—raising an issue of tremendous national and international importance and cultural significance warranting this Court's review.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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