



Choice of Law and Nazi-Looted Art Restitution: Cassirer v. Thyssen-Bornemisza Collection Foundation

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ABSTRACT

On April 21, 2022, the Supreme Court came to an unanimous decision in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, a case concerning the legal ownership of a valuable painting by Camille Pissarro that was appropriated by the Nazi regime during the 1930s when its Jewish owners fled to the United States. After World War II, the painting changed ownership several times, ultimately to be acquired by Baron Hans Heinrich who sold it to the Thyssen-Bornemisza Collection Foundation in the Kingdom of Spain. After sixteen years of litigation and four appeals to the Ninth Circuit, the Supreme Court vacated and remanded the case back to the Ninth Circuit. The opinion, written by Justice Kagan, contended that in a suit raising non-federal claims against a foreign state or instrumentality under the FSIA, a court should determine the substantive law by using the same voice of law rule applicable in a similar suit against a private party. This paper will introduce the facts of *Cassirer*, present its procedural history, and dissect its treatment before the United States Supreme Court. This analysis will conclude with a discussion of the potential implications of the *Cassirer* decision on future Nazi-looted art claims.

Keywords: Nazi-Looted Art, Art Law, Choice of Law, Foreign Sovereign Immunities Act, Federal Common Law, Erie Doctrine, Conflict of Laws, Nazi Appropriated Art, *Cassirer*, Baron Hans Heinrich von Thyssen-Bornemisza, Restatement (Second) Conflict of Laws, Interest Analysis, Exceptions to Sovereign Immunity

INTRODUCTION

“... [H]ave we here in the United States done enough to ensure equitable solutions? I believe we have done a great deal, but we still could and should do much more.” - Ronald S. Lauder¹

The ransack and ravage of art and cultural property is an unfortunate aspect of war.² The looting of art during World War II presents specific and noteworthy factual features.³ The Nazi regime looted art at an enormous scale with methodical ruthlessness⁴ from the period between about 1933 to 1945.⁵ Nazis indiscriminately looted art across Europe,⁶ but this injustice was greatest upon Europe’s

Jews.⁷ Such despoliation was central to the Nazi leadership’s Final Solution, or *die Endlösung der Judenfrage*.⁸ The 1946 Nuremberg Tribunal⁹ recognized that such deliberate economic devastation and destruction of cultural property could destroy the heritage and continuity of a group, and set the stage for the ultimate, total extermination of that group.¹⁰ Such actions are war crimes under international law.¹¹ The contemporaneous international art world saw the “advent of Nazism and the bizarre goings-on of its art establishment were regarded at first as a passing phenomenon which would require some

¹ *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the Subcomms. on the Const., Oversight, Agency Action, Fed. Rts. & Fed. Cts. of the S. Comm. on the Judiciary*, 114th Cong. 2 (2016) (statement of Ambassador Ronald S. Lauder, Chairman of the Council, World Jewish Restitution Organization).

² Teresa Giovannini, *The Holocaust and Looted Art*, 7 *ART ANTIQUITY & L.* 263 (2002).

³ *Id.*

⁴ Mark I. Labaton, *Restoring Lost Legacies*, Los Angeles Lawyer June 2018, at 34-35. (It is estimated that around 20 percent of European art was pillaged, worth over \$2.5 billion by 1945 (\$34 billion today).

⁵ S.1564 - 105th Congress (1997-1998): Holocaust Victims Redress Act, S.1564, 105th Cong. (1998).

⁶ See generally Robert M. Edsel, *Saving Italy: The Race to Rescue a Nation’s Treasures from the Nazis* (2013) (demonstrates the extent of Nazi art looting from Gentiles).

⁷ Sue Choi, *The Legal Landscape of the International Art Market After the Republic of Austria v. Altmann*, 26 *Nw. J. Int’l L. & Bus.* 168 (2005).

⁸ *Id.*

⁹ Charter of the International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 14 November 1945 - 1 October 1946).

¹⁰ Choi, *supra* note 7 at 168.

¹¹ See *supra* note 9 at 109.

minor adjustments in international dealings.”¹² Nonetheless, buying continued throughout war time with little regard for provenance.

Since the late 1930's¹³ the United States art market has profited off the fruit of a mass, systematic disenfranchisement of Jews and their cultural property by the Nazi Regime.¹⁴ American art dealers and collectors took advantage of the Nazi's liquidation of such properties, causing a “bizarre” phenomenon in the American art market.¹⁵ Historians estimate that during this period a massive number Nazi-looted artworks flooded the American art market with an estimated total worth of over \$7 billion today.¹⁶

For almost half a century after the Second World War there was no meaningful effort to resolve the many issues surrounding Nazi-looted artworks.¹⁷ Such neglect disregards the American common law rule that even good faith purchasers for value cannot obtain good title to stolen property.¹⁸ The era of oversight began to end in the 1990's, beginning with the first case of Nazi-looted art restitution in the United States of Degas' *Landscape with Smokestacks*.¹⁹ That same year, the New York District Attorney seized *Portrait of Wally* by Egon Schiele, a Nazi-looted artwork that was on loan from an Austrian Museum to the Museum of Modern Art.²⁰ This seizure ignited a legal upheaval,²¹ and later caused *Portrait of Wally* to be dubbed the “face that launched a thousand lawsuits.”²²

As a result of renewed national and global attention to the matter of Nazi-looted art in the 1990's,²³ American policy and courts have given the attention to claimants that they deserve. Significantly, the United States was a signatory of the 1998 the Washington Principles,²⁴ which were promulgated at the Washington Conference on Holocaust Era Assets.²⁵ The Washington Principles are a set of mutually and non-binding guidelines for participating countries to refer to when dealing with Nazi-looted art.²⁶ These guidelines were intended to represent a consensus of genuine, yet unenforceable, principles among signatory's cultural institutions. Although the Washington Principle were promulgated with effort and good, they do not begin to resolve the myriad of issues surrounding Nazi-looted art. The unenforceable nature of these guidelines has given cultural institutions around the world the option to cherry pick which of these standards they follow and when, often to the disadvantage of claimants.²⁷

There has yet to be a codified solution to the issues that the Washington Principles pose. Early on the statutory front, the Holocaust Victims Redress Act of 1998 (“the 1998 Act”) expressed that “all governments should undertake good faith effort to facilitate the return” of Nazi-looted property.²⁸ The 1998 Act was followed by the 2016 Holocaust Expropriated Art Recovery Act (“HEAR Act”).²⁹ This legislation aims to relinquish the choice of law issue of varying statute of limitations bars on the claimants, since such bars hinder claimant's opportunity to litigate a case

¹² Choi, *supra* note 7 at 27.

¹³ Lynn H. Nicholas, *The Rape of Europa*, 16, 1994.

¹⁴ See generally Van L. Hayhow, *Is there an Effective US Legal Remedy for Original Owners of Art Looted During the Nazi Era in Europe?* (2015) (Master's thesis, Harvard Extension School) (Harvard Library).

¹⁵ *Id.*

¹⁶ Labaton *supra* note 4, at 36.

¹⁷ Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chap. L. Rev. 1 (2017).

¹⁸ Amended Complaint, *Meyer v. Board of Regents of the University of Oklahoma*, No. 13 Civ. 3128 (S.D.N.Y. Jan. 10, 2014).

¹⁹ Noah Isackson, *Settlement Reached in Degas Fight*, ASSOCIATED PRESS, August 14, 1998.

²⁰ Kreder, *supra* note 17.

²¹ Kreder, *supra* note 17.

²² *Portrait of Wally*: P.O.W. (Andrew Shea, David D'Arcy, and Barbara Morgan, 2012).

²³ See generally *Washington Conference Principles on Nazi-Confiscated Art*, (Dec. 3, 1998).

²⁴ *Washington Conference Principles on Nazi-Confiscated Art*, (Dec. 3, 1998), available at <http://www.state.gov/p/eur/rt/hlcast/122038.htm>. The Washington Principles are as follows:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in

light of the passage of time and the circumstances of the Holocaust era.

5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. 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, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

²⁵ Hayhow, *supra* note 14, at 31.

²⁶ *Id.*

²⁷ Hayhow, *supra* note 14, at 90.

²⁸ S.1564 - 105th Congress (1997-1998): Holocaust Victims Redress Act, S.1564, 105th Cong. (1998).

²⁹ S. 2763, 114 Cong. (2016) (enacted).

on its merits.³⁰ In 2018 the bipartisan Justice for Uncompensated Survivors Today Act (“JUST Act”) was signed into existence, which demands that the Department of State reports to Congress the global state of Nazi-looted art law.³¹

These policies were enacted in effort to address the many and varied legal issues that began to arise with the litigation of Nazi-looted art disputes. There are several cases of interest, but it is impossible to give due credit to each of them here. Each dispute involves a chronicling of its unique facts and legal consequences. Instead, I will introduce some of these legal issues here, and further discuss them in later analysis.

Due to the international nature of Nazi-looted art disputes, the Foreign Sovereign Immunities Act (FSIA), choice of law doctrine, civil litigation, and federal common law are highly implicated. It is important to point out that the legislative solutions discussed have left some of these central procedural questions unanswered and at the discretion of the courts. This has left open opportunities for litigation, as in the case of *Cassirer v. Thyssen-Bornemisza Collection Foundation*.³² This paper will introduce the facts of *Cassirer*, present its procedural history, and dissect its treatment before the Supreme Court of the United States. This analysis will conclude with a discussion of the potential implications of the *Cassirer* decision on future Nazi-looted art claims.

BACKGROUND: FACTS AND HISTORIOGRAPHY

“Although the legal issue before us is prosaic, the case’s subject matter and background are anything but” – *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 U.S. 1502 (2022).

The Nazi period is marked by its anti-Semitic policies and violence. Today, the term “Nazi” is a ubiquitous synonym for evil and devastation. In 1920, the newly formed Nazi Party declared their intention to segregate Jews from all aspects of German society.³³ The party leader, Adolf Hitler,

rose to power in 1933.³⁴ From 1933 until the outbreak of World War II in 1939, German Jews became subject to more than 400 regulations that restricted their public and private lives.³⁵ After the outbreak of war, life for German Jews became deadly.

This is the landscape in which Lilly Neubauer, a German Jewish woman from a prominent family of publishers and gallery owners, was struggling to survive.³⁶ When attempting to flee Germany in 1939 Lilly was faced with a decision; to give up the family’s prized artwork, *Rue Saint-Honoré, dans l'après-midi. Effet de pluie* by Camille Pissarro (the “painting”), in exchange for money to fund a visa to flee the country,³⁷ or stay in Germany and perish alongside her family in the concentration camps.³⁸ Paul Cassirer purchased the painting in 1900, which Lilly inherited in 1926.³⁹ This Nazi-era inequity resulted in the forced sale of the painting in exchange for just \$360,⁴⁰ a selling price well below fair market value for a masterpiece by the famed French impressionist Pissarro. Today, the piece is worth about \$40 million.⁴¹

After the War, the United States established a process for restoring personal property to the victims of Nazi looting, including artwork.⁴² In 1954 Lilly filed a claim for the painting under Military Law No. 59, and the United States Court of Restitution Appeals confirmed her as the true owner.⁴³ Lilly, however, believed that the painting was lost or destroyed during the war, and had little hopes for being reunited with the prized piece.⁴⁴ Under such presumption, she converted her claim to be against the German Federal Republic and reached a settlement where she was paid approximately 120,000 Deutschmarks (about \$13,000)⁴⁵ as compensation.⁴⁶ It has been established by precedent, and agreed upon in this dispute, that such settlements do not disqualify ancestors from making claims on Nazi-looted artworks.⁴⁷

What happened to the painting immediately after the forced sale is unknown.⁴⁸ The Nazis had several methods

³⁰ *Id.*

³¹ S. 447, 115 Cong. (2018) (enacted).

³² Brief for Cassirer et al. as Amici Curiae Supporting Petitioners, *Cassirer v. Thyssen-Bornemisza Collection Foundation* (2021) (No. 20-1566).

³³ United States Holocaust Memorial Museum, *Holocaust Encyclopedia*, Antisemitic Legislation 1933-1939, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Angelique Chrisafis, *Heir to Jewish refugees given US court backing to reclaim masterpiece*, *The Guardian* (Sept. 11, 2009), <https://www.theguardian.com/artanddesign/2009/sep/11/return-masterpiece-us-court-tell>.

³⁷ Sarah Cascone, ‘Can Everyone Agree This Is a Beautiful Painting?’: A Divided U.S. Supreme Court Reviews a Rare Art Case Over a Nazi Looted Pissarro, *ARTNews* (Jan. 19, 2022), <https://news.artnet.com/art-world/supreme-court-pissarro-case-2061185>.

³⁸ Linda S. Mullenix, *Federal Courts: What Law Applies to Nazi-Appropriated Art Under the Foreign Sovereign Immunity Act?*, Public Law and Legal Theory Research Paper Series Number 590, 32, 32 (2021).

³⁹ Suzanna Sherry, *A quest to reclaim a Pissarro masterpiece hinges on the Erie doctrine*, *SCOTUSblog* (Jan. 16, 2022, 11:58 AM), <https://www.scotusblog.com/2022/01/a-quest-to-reclaim-a-pissarro-masterpiece-hinges-on-the-erie-doctrine/>.

⁴⁰ Cascone, *supra* note 37.

⁴¹ Sherry, *supra* note 39.

⁴² Jim Porter, *Who Owns Pissarro’s “Rue Saint-Honoré In The Afternoon, Effect of Rain”?* (Aug. 4, 2017), <https://portersimon.com/owns-pissaros-rue-saint-honore-afternoon-effect-rain/>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Sherry, *supra* note 39.

⁴⁶ Porter, *supra* note 42.

⁴⁷ *Id.*

⁴⁸ *Id.*

for the organization, sale, or disposal of artworks.⁴⁹ In 1952 the painting resurfaced in the United States, when it was sold to a private collector by the name of Franx Perls in California.⁵⁰ Later, in 1976, the painting was acquired by a New York collector by the name of Baron Hans Heinrich⁵¹ at fair market value for \$300,000.⁵² Sometime in 1988, the Baron agreed to loan the painting to the Thyssen-Bornemisza Collection ("TBCF") in Madrid, Spain. In 1989 the Spanish government funded the purchase of the painting for the TBCF.

Between 1958 and 1999 Lilly nor her heirs sought to locate the painting, still likely under the assumption that it was destroyed in the war.⁵³ The grandson of Lily Neubauer, Claude Cassirer,⁵⁴ began to search for the painting and elicited assistance in doing so. In December 1999, by way of a catalogue, a client of Cassirer discovered the location of the painting at TBCF in 2001.⁵⁵

PROCEDURAL HISTORY

Upon the discovery, Cassirer filed a petition in Spain against TBCF, requesting the restitution of the painting.⁵⁶ The petition was denied.⁵⁷ He then pursued "diplomatic channels" in effort to regain possession of the painting, but failed.⁵⁸ After exhausting those options, Cassirer then sued TBCF and Spain under the FSIA in the District Court for the Central District of California (the "District Court"). This action led to years of litigation in District Court and appeals to the Ninth Circuit Court of Appeals (the "Circuit Court") on various claims. The suit was brought under the FSIA, which is a jurisdictional statute that functionally confers original jurisdiction on federal district courts in suits against foreign states to the extent they are not entitled to immunity and provides that a foreign state is not immune from suit.⁵⁹ The purpose of FSIA is to provide "foreign states and their instrumentalities access to federal courts only to ensure uniform application of the doctrine of sovereign immunity."⁶⁰ Under this jurisdictional basis, Cassirer maintained that California law should apply, which would make him the rightful owner of the painting. Conversely, under Spanish law, Spain and TBCF had good title to the painting.⁶¹

Both parties to this dispute, and the District Court, concluded that the painting was forcibly and wrongly taken from Lilly.⁶² This conclusion is unique in that many Nazi-looted art cases turn on the question of duress⁶³ in the sale, and many defendants try to use a lack of duress to support their claims to title.⁶⁴ Claimant-plaintiffs often have difficulty in establishing that duress was "factually made out and [had an] effect on the transaction."⁶⁵

Several other issues, however, arose in the dispute, which proceeded for some ten years in District Court and appeals to the Circuit Court. These disagreements include theories of FSIA jurisdiction, the statute of limitations, the application of the HEAR Act, and whether the federal common law or state choice of law rules applied.⁶⁶

The District Court applied federal common law and Spanish substantive law to the case.⁶⁷ Thus, TBCF was found to be the rightful owner of the painting.⁶⁸ In further support, the District Court applied California's choice of law rule, the comparative impairment approach. This choice of law regime considers which jurisdiction's interest will be seriously impaired if not applied by examining the genuine, non-hypothetical interests of each jurisdiction.⁶⁹ In the course of such analysis, the District Court found Spain's interest outweighed California's interests, further supporting their finding.⁷⁰

On appeal to the Circuit Court, Cassirer argued that although California's choice of law regime favored the defendants,⁷¹ California's substantive law favored restitution to the claimant.⁷² The Circuit Court disagreed with Cassirer's argument, contending that under FSIA federal common law applies, and thus, Spanish substantive law dictated the outcome.⁷³ The Circuit Court, however, also disagreed with the District Court's interpretation of Spanish substantive law. Instead, the Circuit Court found a triable issue of material fact; was the Baron and TBCF accessories to the Nazi theft of the painting? The case was remanded to make such a factual determination.⁷⁴

The District Court grappled with the charged factual question, ultimately deciding that the Baron and TBCF should have been aware of the suspicious circumstances

⁴⁹ See discussion *infra* Section I.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Mullenix, *supra* note 38 at 33.

⁵³ *Id.*

⁵⁴ Cascone, *supra* note 37.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Sherry, *supra* note 39.

⁵⁹ 28 U.S.C. § 1330(a).

⁶⁰ Bank of New York v. Yugoport, 745 F.3d 599 (2nd Cir. 2014).

⁶¹ Sherry, *supra* note 39.

⁶² *Id.*

⁶³ Norman Palmer, *Museums and the Holocaust: The Futility of Litigation*, 5 ART ANTIQUITY & L. 233 (2000).

⁶⁴ Evelien Campfens, *Nazi-Looted Art: A Note in Favour of Clear Standards and Neutral Procedures*, 22 ART ANTIQUITY & L. 315 (2017).

⁶⁵ *Id.*

⁶⁶ Cassirer v Thyssen-Bornemisza Collection Found., (C.D. Cal. May 24, 2012), *aff'd in part, rev'd in part*, 737 F3d 613 (9th Cir 2013).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Bernhard v. Harrah's Club, 16 Cal. 3d. 313, 546 P2d 719 (1976).

⁷⁰ Cassirer v Thyssen-Bornemisza Collection Found., 737 F3d 613 (9th Cir 2013).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

clouding the painting's provenance, but they had no actual knowledge that the painting had been coercively and wrongfully sold.⁷⁵ Predictably, Cassirer filed a petition for a writ of certiorari, asking the Supreme Court to review the choice of law question, arguing that there is a disagreement over whether the federal common law's choice of laws or the forum's choice of laws test should dictate in FSIA claims.⁷⁶ The Supreme Court granted the writ for certiorari in September 2021 and Supreme Court heard oral argument January 18, 2022.⁷⁷

ISSUE BEFORE THE COURT

If the defendant in this case were a private museum or collection, this case would have been brought under diversity jurisdiction, which allows federal courts to hear state law disputes between parties from different states or between American and foreign citizens.⁷⁸ As noted above, however, this case was brought against a foreign sovereign, Spain, and one of its instrumentalities, TBCF.⁷⁹ Thus, jurisdiction, on the theory of diversity, does not apply, but as determined by the lower court, jurisdiction rests on FSIA.

This case ultimately asks the Court to consider whether a federal court should apply the forum state's choice of law rules, or general federal common law in cases brought against a foreign state under the FSIA.⁸⁰ In the FSIA, Congress provided that foreign sovereign defendants should be liable "to the same extent as a private individual under similar circumstances."⁸¹ Thus, the crux of the issue⁸² is a question of the Erie doctrine.⁸³ The adjudication of such matter is decisive for the legal framework for Nazi-looted art disputes since many Nazi-looted art claimants bring action against a foreign state for recovery of their works.

The Supreme Court heard oral arguments for this case on Tuesday, January 18, 2022. Most of the Justices did not reveal hints as to their persuasion during questioning and did not ask any questions at all. The line of inquiry was largely focused on 28 U.S.C. § 1606 and the broader consequences of affirming the Circuit Court's decision.⁸⁴ Notably, Justice Kagan and Justice Thomas asked how a sovereign entity can be treated "'in the same manner' as a private party if a different set of laws applied."⁸⁵ All agreed on one thing, however: Justice Breyer asked the petitioner's counsel, "Can everyone agree that it's a beautiful painting?" to which there were no objections.⁸⁶

It is important here to understand and further discuss the Erie doctrine question that has arisen as a part of this dispute, as this case is at its core a choice of law dispute. The choice of law between California and Spanish law is analogous to the issue that arises in federal courts when there is a state law claim brought under jurisdiction based on diversity of citizenship.⁸⁷ The Erie doctrine, the product of *Erie Railroad Co. v. Tompkins*, requires the application of state law in federal court. This doctrine was further refined by *Klaxon Co v. Stentor Co.* which demands federal courts choose which states law to apply by looking to state choice-of-law doctrines.⁸⁸ Together, these two rules mean that if Cassirer had brought an action against a private gallery in this matter, California choice of law rules would apply.

Indeed, as discussed above, FSIA alters such a determination. In another revision of Erie doctrine, the Court in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba* stated that "[W]here state law provides a rule of liability governing private individuals. The FSIA requires the application of that rule to foresing states in similar circumstances."⁸⁹ The precedent of the 2nd, 5th, 6th, and District of Columbia Circuits follows the *Klaxon* and *First Nat'l City Bank* rules, which would command the application of California choice of law rules.⁹⁰ This rule is fashioned in accordance with the well-settled choice of law doctrine that "[c]onflict rules may be outcome determinative . . . and are deemed to be substantive for purposes of *Erie*."⁹¹ Alternatively, the Ninth Circuit strays from these precedents and applies a federal common law doctrine.⁹²

A. Petitioner's Argument

During oral arguments, the petitioners, advocated for by David Boies, and Assistant to the Solicitor General Masha Hansford, laid out the three basic principles of their argument; (i) under the FSIA Respondent is a foreign state not entitled to immunity, (ii) 28 U.S.C. § 1606 provides that a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances, and (iii) if the respondent were a private museum and every other circumstance was exactly the same, California choice of law would apply.⁹³

In conclusion, Boies argues the Court should draw from these three principles that California choice-of-law rules must apply, as any other rule would permit courts to apply different choice-of-law rules and, as a result, different

⁷⁵ *Id.*

⁷⁶ Sherry, *supra* note 39.

⁷⁷ *Id.*

⁷⁸ Mullenix, *supra* note 38 at 34.

⁷⁹ *Id.*

⁸⁰ Sherry, *supra* note 39.

⁸¹ 28 U.S.C. § 1606

⁸² Mullenix, *supra* note 38 at 36.

⁸³ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

⁸⁴ See generally Transcript of Oral Argument, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 747 (2022) (No. 20-1566).

⁸⁵ Sherry, *supra* note 38.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 461 U.S. 611, 622 (1983).

⁹⁰ Brief for Petitioner at 8, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S Ct 747 (2022).

⁹¹ Brief of Amicus Curiae Mark B. Feldman at 6, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S Ct 747 (2022).

⁹² *Id.*

⁹³ Transcript of Oral Argument, at 3-4, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 747 (2022) (No. 20-1566).

substantive rules to foreign states than would be applied to private parties.⁹⁴ A finding on the Respondent's theory would be a clear violation on the face of 28 U.S.C. § 1606.⁹⁵ Similarly, Hansford echoed that "the clear language of [S]ection 1606 clearly resolves this case."⁹⁶ This sentiment was supported by the brief of *Amici Curiae*,⁹⁷ which cited *Bostock v. Clayton Cnty.*, which held that "[o]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives."⁹⁸ The Brief of *Amicus Curiae* Mark B. Feldman, a drafter of FSIA, further advocated this line of logic, contending that Congress's intent with the FSIA was expressly to not to create a new body of federal conflicts law for suits brought under FSIA.⁹⁹ The argument of congressional intent, coupled with the textually-based evidence raised above, provides a strong argument for the Petitioners.

Amicus Curiae Mark B. Feldman further raised other potential legal and political issues that would arise from the Court diverging from *Klaxon* in FSIA disputes. For one, "displacement of state conflicts rules would undermine" the foundational case *Republic of Austria v. Altmann*.¹⁰⁰ In consideration of this theory, Feldman points out that significant questions of retroactivity would plague the Court for years should the decision favor Respondents.¹⁰¹

During oral arguments, Chief Justice Roberts went on to press Boies on the second point of Respondent's argument, arguing that the application of the principle of 28 U.S.C. § 1606 to this extent would be too broad, or in some cases, "absolutely [make] no sense."¹⁰² In response, the advocate for the Respondent pushed back, reminding the Chief that the FSIA only "kicks in" with respect to commercial activities.¹⁰³

Additionally, Petitioners argued that foreign policy concerns should be taken into account later, at the liability stage of analysis, to which Chief Justice Roberts and Justice Sotomayor seemed to agree.¹⁰⁴ Some of these foreign policy concerns were pointed out by *Amicus Curiae* Feldman, and include the United States and Spain's status as parties to both the Washington Conference Principles and Convention on the Means of Prohibiting and

Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1920, TIAS 7008, 823 UNTS 231 (hereinafter "the UNESCO Convention").¹⁰⁵ Feldman contends that "[t]he Foundations failure to examine the painting's provenance when it purchased the painting and its refusal to return the painting flout the international consensus; the decision below undermines public policy important to California and the United States."¹⁰⁶

B. Respondent's Argument

Alternatively, the Respondents, advocated for by Thaddeus Staudber, argued the FSIA does not provide such a clear resolution of the case. The Respondents argue that nothing in the FSIA mandates federal courts sitting in judgment of a foreign state's acts must employ the forum's choice-of-law regime, especially when the forum has little or no connection to the claims.¹⁰⁷ The result of such a claim would determine that Congress did not intend California's choice-of-law test to determine the substantive law at issue, thus the decision would fall in favor of Respondents.¹⁰⁸ This argument rests more fundamentally on the precedent of the Ninth Circuit.

Citing *Verlinden B. V. v. Central Bank of Nigeria* 461 US 480 (1983), and *Germany v. Philipp*,¹⁰⁹ Respondent's contend that the FSIA establishes a federal regime with the purpose of uniform treatment in regard to foreign states. Thus, the choice of law analysis would clearly be federal common law, one that is not in the area of traditional state interests.¹¹⁰ Furthermore, Respondent identifies that *Klaxon* recognizes that federal courts exercising diversity jurisdiction must apply the forum's choice of law, but notes that cases under FSIA do not fall under diversity jurisdiction.¹¹¹

IMPLICATIONS OF CASSIRER V. THYSSEN-BORNEMISZA COLLECTION FOUNDATION AND CONCLUDING REMARKS

At the onset of analysis, it is important to note that Cassirer's painting was clearly and unjustly expropriated by the Nazi Party. One must always acknowledge the grave circumstance of the period from 1933-1945 for Europe's Jews. The unfortunate procedural hurdles as discussed above only extenuate and perpetuate the

⁹⁴ *Id.* at 4.

⁹⁵ *Id.*

⁹⁶ *Id.* at 20.

⁹⁷ Brief for Petitioner at 8, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S Ct 747 (2022).

⁹⁸ *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020)

⁹⁹ Brief of *Amicus Curiae* Mark B. Feldman at 2, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S Ct 747 (2022).

¹⁰⁰ *Id.* at 8.

¹⁰¹ *Id.*

¹⁰² Transcript of Oral Argument, at 6, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 747 (2022) (No. 20-1566).

¹⁰³ *Id.* at 8.

¹⁰⁴ Sherry, *supra* note 38.

¹⁰⁵ Brief of *Amicus Curiae* Mark B. Feldman at 16, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S Ct 747 (2022).

¹⁰⁶ *Id.*

¹⁰⁷ Transcript of Oral Argument, at 31, *Cassirer v Thyssen-Bornemisza Collection Found.*, 142 S.Ct. 747 (2022) (No. 20-1566).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 40.

¹¹⁰ *Id.* at 41.

¹¹¹ *Id.*

historical injustices of the Second World War and the devastation of the Holocaust.

The Court unanimously vacated and remanded the case.¹¹² The opinion, written by Justice Kagan, held that in a suit raising non-federal claims against a foreign state or instrumentality under the FSIA, a court should determine the substantive law by using the same voice of law rule applicable in a similar suit against a private party.¹¹³ Thus, in *Cassirer*, “that means applying the forum State’s choice-of-law rule, not a rule deriving from federal common law.”¹¹⁴

The Court reasoned that only the same choice-of-law rule can guarantee the use of the same substantive law, which is the only way to ensure equitable application of the law.¹¹⁵ The Court analogizes the case to a hypothesized suit against a private museum enduring comparable private litigation under similar circumstances.¹¹⁶ In such a hypothetical, California choice-of-law rule would apply, and thus, should indeed apply to *Cassirer*. Kagan concludes that there is “[s]cant justification . . . for federal common law making in this context.”¹¹⁷

This decision will have far-reaching implications for Nazi-looted art cases due to their often-international nature. It is important to note that the Court did not discuss such effects in the opinion, so any further discussion of *Cassirer*’s effects is largely speculative. In a broader context, the application of Erie doctrine, choice of law doctrine, and

overall civil procedure will also be fundamentally affected. Additionally, this case will affect other nuanced determinations of FSIA matters.

As discussed, this case is paramount to the legal framework of Nazi-looted art restitution law in America. The central purpose of this paper is to examine the factual and procedural history of *Cassirer v. Thyssen-Bornemisza Collection Foundation*, analyze the parties’ arguments, and consider the potential legal and political implications of the decision. This paper’s main contribution to this complex and varied area of law is an early analysis of the dispute, prior to the substantive and final decision reached by the lower court.¹¹⁸

At its core, this paper assembled and organized research resources for future academic study. The primary resources for the above discussion include the oral arguments heard on January 18, 2022, the Court’s opinion, lower court documents, briefs of Amici Curiae, an informal interview with Georgetown University Law Center Professor Mark B. Feldman, and relevant news articles. There are a few limitations to this paper which leave the subject open to further study and development. It is important to note that the Court has not yet relied on *Cassirer*, so it is impossible to know its practical effect. Additionally, as noted above, the lower court has yet come to a decision.

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¹¹² *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 142 U.S. 1502 (2022).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ This study was written and researched prior to the 9th Circuit Court of Appeals’ decision.

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