

No. 10-1385

IN THE
Supreme Court of the United States

MARTIN GROSZ, LILIAN GROSZ,
Petitioner,

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**

**BRIEF *AMICUS CURIAE* OF THE
ASSOCIATION FOR RESEARCH INTO CRIMES
AGAINST ART, THE ENTERTAINMENT,
MEDIA, INTELLECTUAL PROPERTY AND
SPORTS LAW SECTION OF THE NEW YORK
COUNTY LAWYERS' ASSOCIATION, SECOND
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MENKEL-MEADOW, ARTHUR R. MILLER,
STEPHEN SMITH, MEL WEISS, *ET AL.*, AS
AMICI CURIAE IN SUPPORT OF GRANTING
THE WRIT OF CERTIORARI**

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STATEMENT OF INTEREST

*Amici*¹ have diverse backgrounds and various sorts of life experience. We are artists and art collectors; curators and historians of art and culture; educators and moral philosophers; legal scholars and practitioners.

We are religiously diverse—Jews, Christians, and nonbelievers. But all agree with one of the *Amici*, who wrote: “No statement, theological or otherwise, should be made that would not be credible in the presence of burning children.” Irving Greenberg, “Judaism, Christianity, and Partnership after the Twentieth Century,” in *Christianity in Jewish Terms* 27 (Peter Ochs, ed. 2000). Rabbi Greenberg’s caution extends beyond theology; it includes statements in lawyers’ briefs and judicial opinions.

The focus of historical scholarship by *Amici* is on modern Europe and more particularly on the Shoah (Hebrew for “disaster” or “catastrophe”). All *Amici*—whether trained as historians or not—find a common purpose in sustaining the burden of accurate memory of the events of the Shoah. We urge that these things never be forgotten so that they will never be repeated.

¹ This brief is submitted in accordance with Rule 37 of this Court. Counsel of record for both parties received notice at least 10 days prior to the due date of the intention of *Amici* to file this brief. All counsel have consented to the filing of this brief. The consent letters (e-mails) have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amici*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Particular interests of *Amici* are set forth in the Appendix.

SUMMARY OF ARGUMENT

Amici do not intimate in this brief a view on the merits of claims to restitution asserted by Petitioners or Respondents. Instead, we address the matrix within which this case and several others have been proceeding through the lower federal courts in the past several years. We urge the Court to take a decisive role in correcting fundamental constitutional errors that have recurred frequently in these cases, and are likely to keep recurring until this Court gives further guidance on these troubled matters.

1. The enormity of the war crimes and crimes against humanity known collectively as the Shoah is staggering—the number of those who were murdered is rounded off to the nearest million. Yet crude denial of this epiphenomenon increases at an alarming rate around the world. *See, e.g.,* Deborah Lipstadt, *Denying the Holocaust: The Growing Assault On Truth and Memory* (1993). No one in high office in this country denies the reality of the crimes of the Shoah. Yet the recurrent experience of the *Amici* is that when it comes to the “unfinished business”² of the Shoah at the heart of this case—restitution of property illegally seized during the twelve long years of Nazi persecution—awareness about the basic contours of events recedes.

² Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003).

Part I describes official German-Austrian judicial approval of discriminatory economic regulations and brutal police power destroyed property rights during the era of National Socialism (1933-1945), and it comments on recent decisions of lower federal courts seemingly unaware of these facts.

2. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), Austria claimed it was immune as a foreign sovereign from litigation in American federal courts. Although Austria accepted the restrictive view of sovereign immunity, the Solicitor General urged its absolute immunity. Brief for United States as *Amicus Curiae* 2003 WL 22811828 at 28. This Court ruled that the expropriation exception of the Foreign Sovereign Immunity Act applied in *Altmann* and should have retroactive effect.

Since *Altmann*, this Court has consistently declined to review any case presenting similar claims for restitution. Left without further guidance from this Court, lower federal courts have in almost all cases denied restitution and have ignored the express concern of American diplomats favoring resolution of claims *on the merits*.

The time has come for the Court to address again the issue of restitution of Nazi-looted art. In 2004 the Court had to face the fact that stolen art gracing the walls of a famous museum in Vienna was subject to litigation in a federal court. In this case and another currently pending on its docket—*Saher v. Norton Simon Museum of Art*, No. 09-1254, *cert. pending*, 131 S.Ct. 379 (2010)—the Court now has an opportunity to review cases claiming that looted art hangs in famous museums in Manhattan and Pasadena.

The Court should exercise its jurisdiction in either or both of these cases because lower federal courts have repeatedly distorted federalism in two opposite ways. *Grosz* presents the question whether federal courts have constitutional power to transform a state law issue such as a century-old “demand and real refusal” rule into an “implied refusal” rule, in apparent disregard for *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Saher* espouses the extreme view that federal courts may invalidate positive law adopted unanimously by the California Legislature on the dubious ground of “dormant federal foreign policy preemption.” Both views are constitutionally infirm. Neither is necessary or useful to the clearly stated federal policy of trying to find a sensible way dealing with claims for restitution of Nazi-looted art.

Part II explores the history of fruitful interaction of the federal government and the several States since World War II to avert the possibility that this country would become a safe haven for stolen property—the very reality now unfolding without any supervisory guidance from this Court.

3. In two recent decisions of this Court, *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), this Court has empowered lower federal Courts to dismiss claims lacking apparent plausibility. *Twombly-Iqbal* did not authorize a crude judicial demolition project to remove without fair development of factual records nearly every claim for restitution of Nazi-looted art to be decided since *Altmann*.

Part III shows that a precipitous approach to Holocaust-era claims is by no means required by the decisional law of this Court, is unauthorized by Congress, and is contrary to the best efforts of the

Executive from World War II to the present to achieve imperfect justice for victims of the Shoah.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant the Writ to Ensure that Lower Courts Assess Fairly Claims for Restitution of Property Looted in the Era of Nazi Persecution.

Looting of property and destruction of cultural heritage has been going on as long as history has recorded conflicts. Its antiquity, however, does not make it acceptable, either in law or morality. On the contrary, looting is specifically identified as a war crime in the famous Lieber Code, *Instructions for the Government of Armies of the United States in the Field*, Arts. 37-38 (1863), and is expressly prohibited in the Hague Convention IV, *Laws and Customs of War on Land*, Arts. 46-47, 56 (prohibiting confiscation of private property, pillage, and seizure of works of art) (1907).

From the earliest period of Nazi rule, the Third Reich enforced confiscatory legislation and brutal tactics against a defenseless Jewish minority. The victims of the Shoah were forced to transfer their own private wealth through special taxes, departure fees, and “Arianization” of Jewish homes and businesses, to promote the general welfare of non-Jews in the Third Reich, to foot the bill of the Kristallnacht pogroms, and to underwrite the Wehrmacht. For those who did not survive, the grand larceny ultimately financed mass murder. *See, e.g.,* Martin Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945* (2008); Götz Aly, *Hitler’s Beneficiaries: Plunder, Racial War, and*

the Nazi Welfare State (2007); Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (1991).

One particular form of Nazi theft—art heist—is staggering. The Task Force for International Cooperation on Holocaust Education, Remembrance, and Research reports that “an estimated 650,000 artworks were confiscated by the Nazis in occupied Europe.... [I]t is estimated that between 100,000 to 200,000 works are still missing.” John R. Crook, *Brief Notes*, 105 AM. J. INT’L L. 160, 161 (2011). See also Eizenstat, *Imperfect Justice*, *supra*, at 187.

This enormous robbery also had a specifically Jewish component. Artworks of great value were stolen from Jews not only by brute force of arms, but also through forced sales of treasures to pay confiscatory fees for exit visas or to obtain foreign currency necessary to emigrate.

These facts were not recently unearthed. Shortly after the war ended in Europe, the US Army secured vast treasuries of hoarded art. Pictures of General Eisenhower and his staff at these sites were featured in mass circulation newspapers. Two members of this Court took a lead role on these issues decades ago. On the view that no one should profit from these gross crimes, Justice Owen Roberts—Chair of the American Commission for the Protection and Salvage of Artistic and Historical Monuments in War Areas—wrote in 1945 to American museums, art institutions and art dealers warning them against trafficking in art whose provenance was “obscure or suspicious.” As lead counsel at the Nuremberg International Military Tribunal, Justice Jackson approved the prosecution of the war crime of looting, proved by entering into evidence the very documents the Nazis themselves assembled as they went about their massive theft.

See also Janet Flanner, “Annals of Crime: The Beautiful Spoils,” *The New Yorker* (Feb. 22, 1947): 31-36ff., (March 1, 1947): 33-38ff., (Mar, 8, 1947): 38-42ff.; David Roxan and Ken Wanstall, *The Rape of Art* (1964).

It is now beyond any doubt that museums, universities, and private art collectors—including many in this country—snapped up artworks at bargain prices in the period from 1933-1945 and the decade or so after the war. See, e.g., Lynn E. Nicholas, *The Rape of Europa: the Fate of Europe’s Treasures in the Third Reich and the Second World War* (1994), Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World’s Greatest Works of Art* (1997); Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany* (2000).

In the wake of all this scholarship, *Amici* find it alarming that some federal judges make light of or even call into question events described in complaints filed in their courts. See *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 575 (5th Cir. 2010) (central claim placed in inverted commas, as if to cast doubt on whether Nazis *really* “confiscated” the painting at issue in case, or whether claimant’s ancestor was *truly* a victim of a “forced sale”).

In 1998 Ambassador Stuart Eizenstat and colleagues in the State Department enabled forty-four countries to agree to a body of principles about the restitution of stolen art and the recovery of cultural heritage, collectively known as the “Washington Principles.” Pet. App. 69a-71a. In 2009 forty-six nations asserted the duty to “ensure that their legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-

confiscated and looted art, and ... make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits.*" Terezín Declaration, Pet. App. 80a. In his keynote address to the Prague conference Ambassador Eizenstat famously noted:

I am ... concerned by the tendency for holders of disputed art to seek redress in technical defenses to avoid potentially meritorious claims, including statutes of limitation, adverse possession; de-accession laws; and export control laws which bar the export of looted art back to their rightful owner, even when its ownership has been established.

Some holders of artworks have not honored the Principles and have gone to great lengths to retain objects in the face of facially valid claims. In the United States, declaratory judgments are being used to make it more difficult for claimants to prove their ownership. Other holders of art have simply refused to consider claims, thereby forcing the claimants either to give up their claims or engage in expensive and difficult legal proceedings.

I am also concerned by the tendency of holders of disputed art to seek refuge in statutes of limitation and laches defenses in order to block otherwise meritorious claims even in situations where the claimant has not been provided with provenance information. Given the nature of the Holocaust and the Cold War that followed, many families simply were unaware or only partially aware of their heritage. The difficulty in getting documentation and the uncertain nature of the current restitution process creates further

uncertainty. For a defendant to take advantage of circumstances totally beyond the control of the claimant compounds the grotesque nature of the original crime.

Stuart E. Eizenstat, Head of U.S. Delegation to the Prague Holocaust Era Assets Conferences, *Opening Plenary Session Remarks*, (June 28, 2009) <http://www.state.gov/p/eur/rls/rm/2009/126158.htm>

Thus, the federal government has publicly undertaken a moral commitment before nearly all other countries involved in these matters to provide claimants a serious and effective means of achieving restitution. Unlike the United Kingdom and a number of other countries, the United States has not built a commission to resolve such claims. Thus, going to court to assert a “garden variety” state law conversion or replevin-type claim remains the only legal mechanism to seek restitution of Holocaust-era art in the United States. Patricia Youngblood Reyhan, “A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art,” 50 DUKE L.J. 955 (2001). Yet federal courts are dismissing claims such as the present one on grounds that are unprincipled and border on the frivolous. This is a national embarrassment. These decisions render the Nation out of compliance with the very principles it led the world to adopt.

Courts often construe time-bar doctrines in Holocaust-era art cases in a way that faults survivors and their heirs for waiting too long to seek restitution, even though in most cases it would have been impossible or futile to seek restitution earlier, thereby distorting discovery rule jurisprudence. Jennifer Anglim Kreder, “Guarding the Historical

Record from the Nazi-era Art Litigation Tumbling Toward the Supreme Court,” 159 U. PA. L. REV. PENNUMBRA 253, 260–62 (2011).

In an egregious example of such rulings, a district judge in Michigan granted to a museum quiet title over stolen art on the ground that the discovery rule was inapplicable. He reached this astonishing conclusion because of a judicially invented policy encouraging plaintiffs “to diligently pursue their claims.” This led the judge to conclude that the Michigan statute of limitation ran in 1938, before the war had even begun and decades before a prominent American museum hung stolen art on its wall. *Detroit Inst. of Arts v. Ullin*, 2007 WL 1016996, at *3 (E.D. Mich. Mar. 31, 2007).

Neither courts dismissing claims for restitution described in Professor Kreder’s article nor the *amicus* briefs recently submitted to the Court by the Solicitor General cite with approval or attempt to distinguish *Bernstein v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954) (reversing an earlier judicial order once the court became aware of the views of the Executive Department expressed in the “Tate Letter” written by Jack B. Tate, Acting Legal Advisor, Department of State). This Court is, of course, aware of the Tate letter, which it cited in *Altmann, supra*, 541 U.S. at 689-690.

Since lower federal tribunals and the Acting Solicitor General and current Legal Adviser appear to overlook its significance, we cite it here as the Court decides whether to review this case:

[The U.S.] Government’s opposition to forcible acts of dispossession of a discriminatory and

confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . . [and] the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, 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.

II. The Court Should Grant the Writ to Correct Grave Constitutional Errors in Federalism that Interfere with Traditional and Legitimate State Interests in Setting Meaningful Guidelines for Defining When to Extend or to Toll a Statute of Limitation, and that Exaggerate the Federal Interest in Complete Control over All Aspects of the Nazi-Looted Art Field.

In the view of the *Amici*, two Nazi-looted art cases now pending on the Court's docket—this one, No. 10-1385, and *Saher v. Norton Simon Museum of Art*, No. 09-1254—illustrate a deep misunderstanding of federalism that threatens to become pervasive in the many Nazi-looted art cases now percolating in the courts of appeals.

For this reason, *Amici* part company with the Acting Solicitor General, who recently filed two briefs of the United States as *Amicus Curiae* in response to this Court's request for views, urging the Court to deny the writ of certiorari in *Saher*. See No. 09-1254, Brief of the United States, 20-22. Without commenting on the cert-worthiness of *Saher* at length, we view as sensible the reasons offered for granting the writ set forth in the Petition and the recently filed Second Supplemental Brief in Support of Petition,

and in the Briefs *Amicus Curiae* filed by the State of California and by Bet Tzedek.

We offer comments on the decisions of the Ninth Circuit in *Saher* and the Second Circuit in this case not because they are in conflict with one another, but because both cases reflect an extreme position attempting to destroy the key role of States in the task of restituting property after so massive an assault on a religious and ethnic minority as the wanton violence of the Shoah. See Lucy S. Dawidowicz, *The War Against the Jews, 1933-1945* (1975).

Horrific conflicts in other contexts illustrate the possibility that the pain of atrocities may recede or even be healed. But in each instance—South Africa or Rwanda, Guatemala or El Salvador—truth-telling usually precedes reconciliation. Lies and coverups do not heal the injuries of war, especially war on a massive and inhuman scale.

The Solicitor General recently proclaimed a similar truth boldly, denouncing the shameful deception of this Court by his predecessor during World War II. The Court relied to its detriment on misrepresentations about the plausibility of serious risk to national security posed by the Issei and Nissei. David Savage, “U.S. Official Cites Deceits in WWII Internments,” *Los Angeles Times*, 2011 WLNR 10395372 (May 25, 2011). The threats to national security posed by those who were rounded up and involuntarily “relocated” were akin to what Justice Thurgood Marshall would later describe in a different context as “imaginable but totally implausible evils.” *Wolman v. Walter*, 433 U.S. 229, 260 (1977) (Marshall, J., concurring and dissenting).

Three days later, the Solicitor General filed a brief urging this Court to deny review in a case involving actual victims of the same war seeking redress for real crimes—not imaginable or implausible ones—committed by a very real enemy against their ancestors.

Whether this result is required under this Court's ruling about an earlier California law, the Holocaust Victim Insurance Relief Act of 1999, might be illustrated in a fragment from a recent imaginary but entirely plausible conversation in Berkeley between Harriet Boaltwoman (an earnest young student at a local law school) and Sojourner Truth IV (a professor who is the only living descendant of a woman renowned for succinct analysis of the law at a moment before women were admitted to the bar; see *Bradwell v. Illinois*, 83 U.S. 130 (1872)).

HB: Who allowed Ms. Saher a forum in which to place a petition for redress of grievance about art looted by Hermann Göring?

ST: The unanimous legislature—a pretty fractious body—decided to clarify the timeliness of claims by victims of a war crime called looting to traditional state law remedies such as replevin.

HB: Who nullified the law?

ST: Not the Republican Governor, who has state constitutional authority to veto legislation he deems unwise, but who in this instance was happy to sign the law. It was two federal circuit judges purporting to act on the authority of the Supreme Court in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

HB: Where in *Garamendi* does the Court require this result?

ST: Nowhere. No one suggests there is an *actual* conflict between the state law nullified by the court of appeals and a current Act of Congress or any other federal policy.

HB: So why did the court of appeals strike down a law extending a statute of limitation?

ST: Because it conflated *Garamendi* with *Zscher-nig v. Miller*, 389 U.S. 489 (1968), a case that spoke to dormant foreign policy power, or the need of the federal government to occupy the entire field of foreign policy, including the power to begin and end a war.

HB: Are you sure there is no basis for the court's view in some congressional hearing?

ST: Positive. About a decade ago Congress considered the adjudication of claims relating to Holocaust-era property. At that time Congress assumed that State law governing property disputes would be the most plausible vehicle for resolving disputes over rightful ownership of Nazi-looted art that could not be reconciled in ADR or through a negotiated settlement.

HB: How about some federal policy articulated by someone in the Executive Branch?

ST: Not really. The record from the London Declaration in 1943 to the Prague conference in 2009 is a pretty consistent repudiation of looting. At first, the Army thought the job was just to get looted art back to the country of origin. But then the policy shifted to return of stolen property to its rightful owner.

HB: What about judicial deference to the Executive Branch for setting foreign policy?

ST: That used to be the norm. So Learned Hand refused to criticize a confiscation of property perpetrated when Germany was known as the Third Reich. But Jack Tate, the Legal Adviser at State during the Eisenhower Administration, wrote a strong letter stating that courts may freely impose legal consequences on the Nazis without anyone in Bonn or Berlin being offended. That led the Second Circuit to change its mind in the *Bernstein* case.

HB: But as I recall dormant Commerce Clause analysis, the sleeping beauty of this power is that nobody in the federal government has to exercise any regulatory power, no?

ST: That's right. It keeps the States out of an area of decision-making in which they don't belong.

HB: Don't States retain the right or the power under the Tenth Amendment to define the time within which someone may bring a lawsuit?

ST: That depends. The Justice Department filed a brief with the Court suggesting that recovery of property stolen during a war is not a "traditional state interest" and that defining access to State tribunals under those circumstances is not a "traditional state responsibility."

HB: But didn't the Ninth Circuit say recently that California *may* protect victims of the Armenian Genocide?

ST: Yes, that's what a different panel concluded. I think they said: "Yes, we can!"

HB: Did the State Department object because Turkey might be displeased?

ST: Nope. Not a word from State.

HB: So California may protect victims of the Armenian Genocide, but not victims of the Shoah?

ST: I'm stumped on that one. Maybe it's time for the Supremes to have another thought about this whole dormant foreign policy preemption thing. Justice Ginsburg noted in her *Garamendi* dissent: "We have not relied on *Zschernig* since it was decided." That was in 1968.

A. States May Validly Enact Legislation Extending or Tolling A Statute of Limitation over Holocaust-Era Claims without Offending against any Federal Interest in Conducting or Bringing a War to an End.

Grosz offers the Court a vehicle for clarifying that the several States are free to establish various procedural norms governing access to their State tribunals for adjudication of property disputes, include those involving Holocaust-era art.

States may, of course, establish differing substantive standards about presumptions of ownership. In some states, mere possession of a piece of property may indeed count for something like nine points of the law. Other States, such as New York, may enact a law seeking to protect its reputation as the art capital of the world and insisting on much more rigorous demonstration of plausible evidence of rightful ownership. *Bakalar v. Vavra*, 619 F. 3d 136, 141-142 (2d Cir. 2010).

As the record in *Grosz* reflects, New York may also establish procedural norms governing how a statute of limitation is to be construed. The principal issue in this case—one of “pure law,” not simply a spat over who did what and to whom—is over the application or misapplication of the “demand and refusal” rule, announced over a century ago, *Goodwin v. Wertheimer*, 99 N.Y. 149, 1 N.E. 404 (1885), and followed continuously in New York’s courts ever since. Under this rule a claimant of stolen goods must *demand* that the possessor return the stolen property. Then the burden shifts to the possessor, who must *authorize* an *unequivocal* refusal of the demand. *Universal Credit Co. v. Lowell*, 2 N.Y.S. 2d 743 (City Ct. 1938) (in a matter still open to negotiation, there was neither an adequate demand nor a clear-cut refusal).

The New York Court of Appeals reiterated and clarified this rule in *Guggenheim v. Lubell*, 77 N.Y. 2d 311 (1991). The highest state tribunal was forced to wait for an appropriate case to emerge on its docket to correct the erroneous tightening of its straightforward rule by a federal court gratuitously adding that the claimant or true owner act “with diligence.” *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d. Cir.), *cert. denied*, 513 U.S. 1001 (1994).

The Second Circuit in *Grosz* has now repeated the same mistake it made in *DeWeerth*. This case presents a pure question about a rule of law: Do federal courts have constitutional power to transform a unique, century-old “demand and *real* refusal” rule into an “*implied* refusal” rule, based on improper use of off-the-record settlement conversations?

Under *Erie* federal judges exercising diversity jurisdiction may not rewrite State law, but must simply apply it to the case before them. New York's unique demand-and-refusal rule is the most protective of true owners of stolen art. This Court should grant the writ to protect the legitimate interests of New York from having its policy choices needlessly nullified by a lower federal court.

B. The Federal Interest in Setting Policies on Nazi-Looted Art Is Paramount in a Case of Actual Conflict, But Does not Occupy the Field.

Saher offers the Court a good vehicle for clarifying that foreign policy has always been a complementary responsibility shared by the federal government and the several States.

Some foreign policy powers are exclusive to the federal government: the congressional powers to declare war, appropriate funds for military expenditures, and regulate the armed forces; the Senatorial consent to ambassadors and treaties; and the Executive powers relating to ambassadors and treaties and commanding the armed forces.

But States have a vital—even essential—role to play. For example, the Holocaust Claims Processing Office of the New York State Banking Department helps locate lost and stolen art, www.claims.state.ny.us/hist.htm, and States are free under *Erie* to articulate state law governing disputes over lost and stolen property.

Amici favor the creation of alternative mechanisms to resolve these disputes without the cost and delay of litigation. But in the absence of any systemic support for such mechanisms and in the wake of a

series of aggressive moves by museums to shut down claims on technical grounds without even adhering to their promises of transparency of provenance documents, it is naïve for the Solicitor General to pin all federal hopes on ADR and settlement negotiations. *See* No. 09-1254, Brief for the United States as *Amicus Curiae*, at 18.

Indeed, in the wake of serious judicial misuse of correspondence discussing potential settlement in the *Grosz* case in clear violation of Rule 408, Fed. R. Evid., such feigned interest in promoting ADR and settlements is worse than feeble. It is an abandonment of decades of strong diplomacy supporting the federal interest in protecting restitution of Nazi-looted art to its rightful owners.

III. The Court Should Grant the Writ to Require that Attentiveness to Historical Data, Not Raw Judicial Hunch, Serve as the Basis for Determinations of Plausibility.

This Court in *Iqbal* recently attempted to clarify for lower court judges that “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950. Context-specificity and common sense should, of course, inform all decision-making, especially that of federal judges sworn to behave as independent magistrates.

Yet the experience of *Amici* discloses that several cases discussed in this brief, including *Grosz*, are vulnerable to overconfidence in a capacity to grasp the significance of past events merely by being a judge, without any attentiveness to historical data

some judges evidently neither know about nor even want to. This oversight leads in turn to mistaken judgments. In short, differentiating between common sense and common nonsense is harder than one imagines if a knotty problem is dismissed summarily as a stale claim.

Professor Thomas Haskell, an expert in historical methodology, explains the recurrent problem of relying on common sense:

Common sense is a high tribunal, never ignored with impunity. And yet its limitations are deservedly notorious, partly because of its commonness, but also because it is in motion. Far from being the fixed standard it always pretends to be, common sense is a historical phenomenon, about which histories can and should be written. And as common sense changes, so do the explanatory schemes it authorizes.

Thomas L. Haskell, *Objectivity Is Not Neutrality* 5 (1998).

In fact, societal “common sense” often presumes that historical claims cannot or should not be viable today, either because too much time has passed or because of ungrounded beliefs about the proper role of courts. *E.g.*, Sir Norman Rosenthal, Editorial, *The Time Has Come for a Statute of Limitations*, ART NEWSPAPER, Dec. 2008, at 30, available at www.theartnewspaper.com/article.asp?id=16627.

The problem is exacerbated when cases do not get out of the starting gate into merits discovery because they have been dismissed on technical grounds. The instant case is but one of many dismissed on technical grounds without proper consideration of the violent context within which the events narrated

were occurring. This sadly accounts for erroneous “fact-finding” that is itself improper in the context of a motion to dismiss under Rule 12(b)(6).

Though steeped in experience and common sense, most judges lack training in historical method. Most are aware of the history of World War II in general terms, but not with sufficient specificity to render well-informed, critical assessments of data that must precede an evaluation of the plausibility of Holocaust-era claims they face.

Like the rest of us, well-meaning and thoughtful judges can make improper factual assumptions. For example, the district court in the instant case based her conclusion on the dismissal of the suit on a general assumption that Holocaust survivors and their heirs have waited too long to file suit. Another court mischaracterized a survivor as having the “same opportunity to obtain the evidence” as one of the most prestigious museums in the world. *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010).

One district court did not comprehend that a transfer in Switzerland could have resulted from Nazi coercion. *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 804 (N.D. Ohio 2006).

Another district court treated a forced sale in Nazi Germany as though it were a routine commercial transaction under the UCC, and on that basis barred the claim as of 1941. *Detroit Inst. of Arts v. Ullin*, 2007 WL 1016996 (E.D. Mich. 2007). This error is particularly egregious because, as a condition for the possibility that Germany and Austria might return to the family of nations, the United States insisted that in their constitutive documents these countries

expressly repudiate all so-called “transactions” during the National Socialist period. *See, e.g.*, Austrian Nullity Act (May 15, 1946); State Treaty of Austria (1955).

During the first Holocaust-era art trial in forty years, the district judge rejected the proffered report of a distinguished historian presenting detailed evidence of Nazi confiscation. The result was predictable. Record evidence shows that Fritz Grunbaum was arrested in Vienna shortly after the Anschluss, taken to Dachau, and forced to sign a document surrendering all his property—including many artworks—to the Nazis. After Fritz was murdered, the Nazis also forced his wife to sign a similar surrender of all interests in his estate. Yet the judge ruled out coercion in these “transactions.” *Bakalar v. Vavra*, 2008 WL 4067335.

Judge Edward Korman—who presided for years over the major class action litigation on the Shoah in the 1990s, *see Eizenstat, Imperfect Justice, supra*, at 83-85, 121-122, 166-170, 180—sat by designation in the *Bakalar* appeal, and wrote the opinion of the court of appeals reversing the district court. 619 F. 3d 136 (2d Cir. 2010). On remand, previous issues persist; the district court still refuses to look at the expert witness report.

In *Grosz*, the district court viewed itself as confronted “with a legal, not a historical, question.” Pet. App. 20a. This self-understanding falsely dichotomizes the act of judging. Discerning good and bad, true and false typically requires attentiveness to facts. Questions about an event (Who? What? When? Where?) usually precede questions for understanding (Why?). The district court in *Grosz* suggested—wrongly and without supporting evidence—that the

Jewish art dealer Flechtheim went out of business in 1933 because he was in “acute financial troubles” Pet. App. 39a, and had committed “financial missteps.” Pet. App. 40a. Speculative guesswork—always improper—is egregious in the procedural setting of a ruling on a 12(b)(6) motion. Factual errors, moreover, are easily corrected by attentiveness to unassailable information about systematic boycotting and extortion of Jews to gain their property from the very inception of the bureaucratic regulations of Hitler’s lawyers and judges. See Martin Dean, *Robbing the Jews*, and Ingo Müller, *Hitler’s Justice*.

Trial courts cannot be expected to know, upon filing, the complete historical context of all cases that come before them, but this Court should not turn a blind eye to widespread lower court ignorance of widely known historical facts about the Shoah that has badly infected decision-making as to whether a claim is plausible.

This country has frequently expressed repugnance to war-time theft—from the prohibition of looting during the American Civil War, through our ratification of the Hague Convention defining looting as a war crime in 1907, through our announcement in the London Declaration of 1943 that this crime would be vigorously prosecuted, Pet. App. 89a-90a, to our leadership in the formation of the Washington Principles (1998) on restitution of looted art, Pet. App. 69a-71a, and our similar role in the formation of the Terezín Declaration (2009), Pet. App. 72a-88a.

Neither the Solicitor General nor counsel for one of the Nation’s greatest cultural treasures should now be heard to denigrate or diminish the global significance of these federal commitments. The justice sought in these cases is imperfect, but we are

bound to strive for it in the darkness after Nazi Germany's systematic efforts to destroy completely the entire Jewish community in Europe.

It is much too soon to ignore what Miles Lerman—a resistance fighter in Nazi-occupied Poland—told the Washington Conference in 1998:

What really shocked the conscience of the world was the discovery that even after the war, some countries tried to gain materially from this cataclysm by refusing to return to the rightful owners what was justly theirs. The refusal to respond to these rightful claims was a great injustice, a moral wrong which cannot be ignored.

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CONCLUSION

For the reasons stated above, the Court should grant the Writ.

Respectfully submitted,

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APPENDIXStatements of Particular Interests of *Amici Curiae*
Organizations and Communities

The Association for Research into Crimes against Art (ARCA) is an interdisciplinary think tank/research group on contemporary issues in art crime. This international non-profit organization studies issues in art crime and cultural property protection, runs educational programs, and consults on art protection and recovery issues brought to them by police, governments, museums, places of worship, and other public institutions. ARCA joins this brief not to intimate a view on the merits of the the ownership of the artworks in dispute in this case, but simply to express its deep concerns about two themes: (1) ongoing effects of the largest art heist in human history: the looting of artworks in the era of National Socialism in Germany from 1933-1945, in Austria after the Anschluss in 1938, and in many countries of Europe throughout World War II, and (2) the necessity for transparency and open access to provenance documents in all museums and art galleries.

The Section on Entertainment, Media, Intellectual Property and Sports Law (EMIPS) is a subgroup of the New York County Lawyers Association (NYCLA),¹ one of the largest and most influential county bar associations in the country. From its inception in 1908, NYCLA quickly earned the reputation of being at the forefront of most legal debates in the country, and has regularly facilitated fresh, independent perspectives on the judicial system. The expertise of

¹ NYCLA's Board of Directors did not review this brief and hence the Association takes no position on it.

members of the EMIPS section in intellectual property leads us to join the concerns of this brief for transparency in ownership of works of art as it relates to paintings or other works of art that were lost or stolen during the period of Nazi persecution, 1933-1945.

Second Generation of Los Angeles is an association of sons and daughters of Jewish Holocaust Survivors. Its principal goals are: (1) to provide and promote a supportive environment within which children of Holocaust survivors (and their families) may explore their shared history and legacy, (2) to work in furtherance of Holocaust education and commemoration, (3) to provide support for the Los Angeles Museum of the Holocaust/Martyr's Memorial, and (4) to provide support for the State of Israel.

Persons (Institutional Affiliation
for Identification Purposes Only)

Yehuda Bauer is Professor Emeritus of History and Holocaust Studies at the Avraham Harman Institute of Contemporary Jewry at the Hebrew University of Jerusalem and the Director of the International Center for Holocaust Studies at Yad Vashem, the Holocaust Martyrs' and Heroes' Remembrance Authority of the State of Israel, located in Jerusalem. He has published or edited many books and scholarly articles on the Shoah. For example, he is the author of *Jews for Sale?: Nazi-Jewish Negotiations, 1933-1945* (1994); *A History of the Holocaust* (rev. ed. 2001); *Rethinking the Holocaust* (2000); and *The Death of the Shtetl* (2010).

Michael J. Bazylar is a Professor of Law and The "1939" Club Law Scholar in Holocaust and Human Rights Studies at Chapman University School of Law

in Orange, California, where he teaches a course on Law and the Holocaust. He is the author of *Holocaust Justice: The Battle for Restitution in America's Courts* (2003), and the editor of *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (2005).

Rabbi Bernard Dov Beliak is the founding president of the Hamif Gash Foundation.

Rabbi Michael Berenbaum served as Editor-in-Chief of the *Encyclopedia Judaica* (2d ed. 2008) and as project director of the U.S. Holocaust Memorial Museum. He is a Holocaust Scholar whose writings include *A Promise to Remember: The Holocaust in the Words and Voices of Its Survivors* (2003); *The World Must Know: The History of the Holocaust Told in the U.S. Holocaust Memorial Museum* (1993); and *The Vision of the Void: Theological Reflections on the Works of Elie Wiesel* (1979). He edited *Witness to the Holocaust* (1997) and *A Mosaic of Victims: Non-Jews Persecuted and Murdered by the Nazis* (1990). With Michael J. Neufeld he co-edited *The Bombing of Auschwitz: Should the Allies Have Attempted It?* (2000). With Abraham J. Peck, he co-edited *The Holocaust and History: The Known, the Unknown, the Disputed, and the Reexamined* (1998). With Betty Rogers Rubenstein he co-edited *What Kind of God?: Essays in Honor of Richard L. Rubenstein* (1995). With Yisrael Gutman he co-edited *Anatomy of the Auschwitz Death Camp* (1994). With John K. Roth he co-edited *Holocaust: Religious and Philosophical Implications* (1989). He is also the executive producer of "Desperate Hours" (2001), a documentary film about the Shoah in Turkey.

T. David Bomzer is counsel in the law firm of Day Pitney LLP, in its New York City office, and is a Co-Chair of the Section on Entertainment, Media,

Intellectual Property and Sports Law in the New York County Lawyers Association. A graduate of the Benjamin N. Cardozo School of Law and of the Polytechnic Institute of NYU, Mr. Bomzer practices in the areas of patent litigation, patent procurement and related opinion drafting.

Judy Chicago and *Donald Woodman* are artists. They are the co-authors of *The Holocaust Project: From Darkness to Light* (1993), an account of their journey to several concentration camps and death camps in Europe, and the photography and painting that ensued from this journey. The volume includes a study of the suffering, including torture and death, inflicted upon prisoners detained at the slave labor camps around Mauthausen, Austria, and in the death camps at Auschwitz and Treblinka in occupied Poland.

Talbert D'Alemberte is President Emeritus and Professor of Law at Florida State University. During his term as president of the American Bar Association (1991-1992), he edited an ABA report, *Blueprint for Improving the Civil Justice System*, which included strong support for various mechanisms of alternative dispute resolution. D'Alemberte has been involved for many years in the modern dispute resolution movement, chairing the first ABA committee on the subject and later served as a mediator, most notably in the water dispute between Alabama, Florida, and Georgia. In recognition of D'Alemberte's contributions to the field of ADR, the ABA Section of Alternative Dispute Resolution gives an award each year named for D'Almberte to a lawyer who contributes significantly to ADR.

Marion F. Deshmukh is Robert T. Hawkes Professor of History at George Mason University, where she teaches German and European cultural history and German art history, including courses on 19th and 20th Century Germany, 19th and 20th Century German and Austrian Art, the Third Reich and Holocaust.

Hedy Epstein is a survivor of the Shoah who left her home in Kippenheim, Germany in 1939 at the age of 14 as part of the Kindertransport to England. Her story is narrated in the Academy-Award winning film “Into the Arms of Strangers: Stories of the Kindertransport” (Mark Jonathan Harris, 2001) and in the companion volume of the same title. She lives in St. Louis, Missouri, and has been involved for decades in Holocaust education at all levels. For decades she has been engaged in human rights and social justice issues, especially in fair housing in the Greater St. Louis Area, and in the search for a just resolution of the Israeli-Palestinian conflict.

Hector Feliciano is an art historian and the author of *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (1998).

Klara Firestone is the founder and current President of Second Generation of Los Angeles. Klara is a long time member of the Board of the Los Angeles Museum of the Holocaust. She also served as the Second Generation representative to the Council of Post-War Holocaust Organizations. She has lectured frequently on the Holocaust to schools and organizations, and has received many awards for community service to the Holocaust survivor community.

Renee Firestone is a native of Hungary and a survivor of the Nazi killing center at Auschwitz/Birkenau. Her story is narrated in the Academy-Award winning documentary film “The Last Days” (James Moll, 1998). She lives in Beverly Hills, California, and has been involved for decades in Holocaust education at all levels, including service as a lecturer at the Museum of Tolerance (Simon Wiesenthal Center) in Los Angeles, as well as a Board member and lecturer at the Los Angeles Museum of the Holocaust. In 2010 the University of Redlands presented her with its first honorary degree—Doctor of Educational Justice.

Rabbi Irving Greenberg was from 1974 to 1997 the founding president of the Jewish National Center for Learning and Life (CLAL). From 1997 to 2000 he served as the President of the Jewish Life Network: Steinhardt Foundation. From 2000 to 2002 he served as the Chair of the United States Holocaust Memorial Museum Council. He is the author of numerous books, including *Living in the Image of God: Jewish Teachings to Perfect the World – Conversations with Rabbi Irving Greenberg* (edited by Shalom Freedman 1998); *For the Sake of Heaven and Earth: The New Encounter between Judaism and Christianity* (2004).

Grace Cohen Grossman is an art historian and curator who lives in Los Angeles, California.

Douglas Kinsey is Associate Professor of Art Emeritus at the University of Notre Dame and a prolific artist, whose work—primarily monotypes—has been featured in many exhibitions and retrospectives. His wife Marjorie Kinsey is an art historian who has taught courses in art history at the University of Notre Dame and at St. Mary’s College.

Roberta Kraus is the General Counsel of Vivaro Corporation, the world's largest phone card company, with headquarters in New York City. Ms. Kraus is a Co-Chair of the Section on Entertainment, Media, Intellectual Property and Sports Law in the New York County Lawyers Association. A graduate of the Benjamin N. Cardozo School of Law, where she received an LL.M. in intellectual property, she also served as Senior Counsel for the NYC Law Department.

Marcia Sachs Littell is Professor of Holocaust and Genocide Studies and Director of the Master of Arts Program in Holocaust and Genocide Studies at the Richard Stockton College of New Jersey. Her publications include *Liturgies on the Holocaust: An Interfaith Anthology* (1986); *Holocaust Education: A Resource Book for Teachers and Professional Leaders* (1985). *Confronting the Holocaust: A Mandate for the 21st Century*. co-edited with *Stephen Feinstein and Karen Schierman*(1998), *Women in the Holocaust: Responses, Insights, Perspectives* (2001); and *A Century of Genocide co-edited with Daniel Curran and Richard Libowitz* (2002). She is the senior research consultant to the Philadelphia Center on the Holocaust, Genocide and Human Rights.

Hubert G. Locke is professor emeritus at the University of Washington. He is the author of *Searching for God in Godforsaken Times and Places: Reflections on the Holocaust, Racism, and Death* (2003); *Learning from History: A Black Christian's Perspective on the Holocaust* (2000); *The Black Anti-Semitism Controversy: Protestant Views and Perspectives* (1994). He is the editor of *Exile in the Fatherland: Martin Niemöller's Letters from Moabit Prison* (1986); *The Barmen Confession: Papers*

from the Seattle Assembly (1986), and *The Church Confronts the Nazis: Barmen Then and Now* (1984). With Marcia Sachs Littell he co-edited *Holocaust and Church Struggle: Religion, Power, and the Politics of Resistance* (1996), and *Remembrance and Recollection: Essays on the Centennial year of Martin Niemöller and Reinhold Niebuhr, and the Fiftieth year of the Wannsee Conference* (1996). With Franklin H. Littell he co-edited *What Have we Learned?: Telling the Story and Teaching the Lessons of the Holocaust: Papers of the 20th Anniversary Scholar's Conference* (1993), and *The German Church Struggle and the Holocaust* (1974), and he is the co-founder of The Scholars' Conference on the Holocaust and the Churches.

Carrie Menkel-Meadow is a second-generation survivor of the Shoah. She is the A.B. Chettle, Jr. Professor of Law, Dispute Resolution and Civil Procedure at the Georgetown Law Center, and Professor of Law at the University of California, Irvine School of Law. She is a prolific scholar and lecturer on alternative mechanisms of dispute resolution. In addition to her scholarship, research and teaching, Professor Menkel-Meadow often serves as a mediator and arbitrator in public and private settings and has trained lawyers, judges, diplomats, and mediators in the United States and on five continents.

Arthur R. Miller is a University Professor at New York University School of Law. He is a co-author (with Jack Friedenthal, Helen Hershkoff and John Sexton) of *Civil Procedure: Cases and Materials* (10th ed., 2009) and the co-author (with Charles A. Wright) of *Federal Practice and Procedure* (2001).

Carol Rittner, R.S.M., is Distinguished Professor of Holocaust & Genocide Studies, and the Dr. Marsha Raticoff Grossman Professor of Holocaust Studies at The Richard Stockton College of New Jersey. She is the author, editor, or co-editor of numerous publications, including *Courage to Care: Non-Jews Who Rescued Jews During the Holocaust* (1986); *Different Voices: Women and the Holocaust* (1993); *Living with our Differences: Beyond Hate* (1994); *The Holocaust and the Christian World* (with Steven Smith and Irena Steinfeldt, 2000); “Good News” after Auschwitz?: *Christian Faith within a Post-Holocaust World* (2001); *Pius XII and the Holocaust* (2002), *Will Genocide Ever End?* (2002), and *Genocide in Rwanda: Complicity of the Churches?* (2004). Dr. Rittner’s current research interests include rescue during the Holocaust and other post-Holocaust genocides; and, the use of rape as a weapon of war and genocide in the twentieth and twenty-first centuries.

John K. Roth is the Edward J. Sexton Professor Emeritus of Philosophy and the Founding Director of the Center for the Study of the Holocaust, Genocide, and Human Rights (now the Center for Human Rights Leadership) at Claremont McKenna College, where he taught from 1966 through 2006. In addition to service on the United States Holocaust Memorial Council and on the editorial board for Holocaust and Genocide Studies, he has published hundreds of articles and reviews and authored, co-authored, or edited more than forty books, including *Genocide and Human Rights: A Philosophical Guide*; *Gray Zones: Ambiguity and Compromise in the Holocaust and Its Aftermath*; and *Ethics During and After the Holocaust: In the Shadow of Birkenau*. With Peter Hayes, Roth is currently editing the *Oxford Handbook of Holocaust Studies* for the Oxford University Press.

Lucille A. Roussin is the founding Director of the Holocaust Restitution Claims Practicum at the Benjamin N. Cardozo School of Law in New York City, where she also teaches a seminar on Remedies for War Time Confiscation. She earned a Ph.D. in Art History & Archaeology from Columbia University and her law degree from the Cardozo School of Law. She was Deputy Research Director of the Art and Cultural Property Team of the Presidential Commission on Holocaust Assets in the US, and was an associate in the Art and International Law Practice Group at Herrick, Feinstein LLP in New York City. She is currently a member of the Cultural Properties Legislation Committee of the Archaeological Institute of America and Vice Chair of the Art and Cultural Heritage Committee of the American Society of International Law, serves on the Board of the Lawyers Committee for Cultural Heritage Preservation, and is a member of the Art Law Committee of the Association of the Bar of the City of New York. She participated in the international conference on Restitution of Holocaust-Era Assets in Prague in June of 2009.

William L. Shulman is the President of the Association of Holocaust Organizations, an informal network of groups engaged in Holocaust and Genocide Studies throughout the United States, and in educational programs related to these themes.

Stephen D. Smith is a theologian with a particular interest in the impact of the Holocaust on religious and philosophical thought and practice. His publications include *Making Memory: Creating Britain's First Holocaust Centre*; *Forgotten Places: The Holocaust and the Remnants of Destruction*; and *The Holocaust and the Christian World*. He founded the

UK Holocaust Centre in Nottinghamshire, England, and cofounded the Aegis Trust for the prevention of crimes against humanity and genocide, and was also the inaugural Chairman of the Holocaust Memorial Day Trust, which runs the National Holocaust Memorial Day in the United Kingdom. He is currently the Executive Director of the Shoah Foundation Institute for Visual History and Education at the University of Southern California.

Fritz Weinschenk was born in Mainz, Germany, of Jewish parents. In 1935 his family emigrated to the United States to escape Nazi persecution of Jews. He fought in World War II with the US Army and survived the landing at Omaha Beach. From 1946 to 1950 he served as a member of the US Army Counter Intelligence Corps in Germany. Admitted to the Bar of New York in 1953, he was active in many restitution and indemnification cases. From 1962 to 1995 he served as a Commissioner to German courts and prosecutors in over 200 Nazi-crimes cases, and was twice awarded the *Bundesverdienstkreuz* (Federal Service Award). He obtained the degree of *Doktor Juris* from Mainz University *summa cum laude*. His record of *pro bono* service includes membership on the Board of the United Restitution Organization, the Conference on Jewish Material Claims against Germany, and the Jewish Philanthropic Fund of 1933, Inc.

Mel Weiss served as lead counsel in important class action lawsuits that sought to structure effective remedies for claims relating to assets seized by the Nazis and held illegally by other entities or individuals in this country and abroad; see Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II*

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83-88, 116-75, 222-56 (2003). Mr. Weiss also founded the Holocaust Art & Remembrance Foundation. As a private collector of art, he supports full transparency in establishing the provenance of art or other objects of human and sacred value that may have been stolen during the era of Nazi persecution.