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 GENERATION OF LOS ANGELES, YEHUDA BAUER, MICHAEL J. BAZYLER, MICHAEL BERENBAUM, JUDY CHICAGO & DONALD WOODMAN, TALBERT D'ALEMBERTE, HEDY EPSTEIN, KLARA FIRESTONE, RENEE FIRESTONE, IRVING GREENBERG, CARRIE 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.

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[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.

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[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 Petropoulous, *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; deaccession 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 Interments," *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 *Zschernig 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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