

No. 10-257-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MARTIN GROSZ, LILIAN GROSZ,
Plaintiffs-Appellants,
-against-

**THE MUSEUM OF MODERN ART, Herrmann-Neisse with Cognac, Painting by Grosz, Self-Portrait
with Model, Painting by Grosz and Republican Automaton, Painting by Grosz,**
Defendants-Appellees.

**On Appeal from the United States District Court for the Southern District of New York
Civil Action N. 09-cv-3706(CM)(THK) (Hon. Coleen McMahon)**

**Brief Amicus Curiae of American Jewish Congress, Commission for Art Recovery;
Filippa Marullo Anzalone, Yehuda Bauer, Michael J. Bazylar, Bernard Dov Beliak,
Michael Berenbaum, Donald S. Burris, Judy Chicago and Donald Woodman,
Talbert D'Alemberte, Marion F. Desmukh, Hedy Epstein, Hector Feliciano,
Irving Greenberg, Grace Cohen Grossman, Marcia Sachs Littell, Hubert G. Locke,
Carrie Menkel-Meadow, Arthur R. Miller, Carol Rittner, John K. Roth,
Lucille A. Roussin, William L. Shulman, Stephen D. Smith and Fritz Weinschenk,
In Support of Plaintiffs-Appellants and Reversal**

Edward McGlynn Gaffney, Jr. *
Valparaiso Univ. School of Law
656 S. Greenwich Street
Valparaiso, IN 46383
T: 219-465-7860
F: 219-465-7860
Edgaffneyjr@gmail.com
**Counsel of Record*

Jennifer Anglim Kreder
Salmon P. Chase College of Law
Northern Kentucky University
Nunn Hall, Nunn Drive
Highland Heights, KY 41042
T: 859-572-5889
F: 859-572-5342
jkreder@insightbb.com

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

TABLE OF APPENDICES ix

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) x

RULE 26.1 CORPORATE DISCLOSURE STATEMENT..... xi

STATEMENT OF INTERESTS OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. FEDERAL COURTS SHOULD ENCOURAGE
EFFECTIVE AND REASONABLE DISPOSITION
OF COMPLEX CLAIMS 5

A. The Dismissal Of This Case Fits A Broad Pattern
Of Judicial Decisions After
Republic of Austria v. Altmann, 541 U.S. 677 (2004),
Dismissing Claims To Restitution Of Holocaust-era
Assets Not On The Merits Of The Claim, But On
Formalistic Readings Of Procedural Fairness..... 6

B. The Dismissal Of The Claims For Restitution Of
Nazi-looted Art On Purely Technical Grounds Violates
The Letter And Spirit Of Federal Policy Favoring
Expeditious Restitution Of Property To The Victims
Of Nazi Persecution..... 7

C. The Dismissal Of This Case Violates The Letter
And Spirit Of Rule 408 Of The Federal Rules Of
Evidence, Which Fosters Open, Transparent
Communication Among Parties To Achieve A
Meaningful Resolution Of Their Conflict..... 12

- II. Evidence Relating To The Most Massive Art Heist In Human History Should Not Be Ignored Or Trivialized In The Judicial Disposition Of Claims Relating To Restitution Of Holocaust-Era Assets 15
 - A. Wholesale Dismissal Of Nazi-looted Art Cases Violates Relevant Standards Requiring District Courts To Determine The Plausibility Of Factual Allegations By Focusing On The Broad Context Of Historical Events And By Drawing Reasonable Inferences From Reliable Accounts Of These Events 15
 - B. Trial Courts Charged With The Duty Of Establishing Factual Records Should Include Reasonably Grounded Historical Explanations Of Events Relevant To The Issues Before The Courts 16
 - C. Courts Deciding Nazi-looted Art Cases Should Take Judicial Notice Of The Broad Consensus Among Historians On The Nazi Spoliation Of Jews And Other Persecuted Groups, Including The Political “Enemies Of The State.” 18
- III. Trial Courts Charged With The Duty Of Establishing Factual Records Relating To Nazi-looted Art Should Allow Broad Access To Documents Relevant To Disputes About The Provenance Of Artworks 25
 - A. The District Court Should Be Reversed Because Its Order Dismissing The Case Is Based On Unsupported Guesswork Rather Than Determinations Of Facts Grounded In The Record 25

B. Giving Museums Or Auction Houses An Evidentiary Privilege Over Documents In Their Possession Or Allowing Them To Claim Confidentiality About Ownership And Sales Of Works Of Art Is Utterly Inconsistent With Clearly Established Federal Policy Against Looting Throughout The Entire Twentieth Century And Into The Current Century 26

CONCLUSION 30

APPENDIX

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<u>FEDERAL CASES</u>	PAGE(S)
Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).....	5, 22, 23, 24
Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)	5, 22, 23, 24
Bernstein v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949).....	8
Bernstein v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2d Cir. 1954).....	9
Grosz v. Museum of Modern Art, No. 09 Civ. 3706, 2010 Westlaw 88003 (S.D.N.Y. Mar. 3, 2010)	<i>passim</i>
Holzer v. Deutsche Reichsbahn Gesellschaft, 159 Misc. 830, 290 N.Y.S 181 (N.Y. Sup. Ct. 1936).....	19
Rein v. Socialist People’s Libyan Arab Jamahiriya, 568 F.3d 345 (2d Cir. 2009).....	12
Republic of Austria v. Altmann, 541 U.S. 677 (2004).....	6
Shady Grove Orthopedic Assocs. v. Allstate Ins., 130 S. Ct. 1431 (2010).....	26
Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006).....	7
<u>FEDERAL RULES</u>	
Fed. R. App. P. 29(a)	1
Fed. R. Civ. P. 8(c).....	26
Fed. R. Civ. P. 12(b)(6).....	5, 22, 29
Fed. R. Evid. 408	<i>passim</i>

<u>OTHER SOURCES</u>	PAGE(S)
8 Dept. St. Bull. 21 (1943).....	9, 27
26 Dept. St. Bull. 984-85 (1952).....	8
American Association of Museums, <u>Guidelines Concerning the Unlawful Appropriation of Objects During the Nazi Era</u> , Nov. 1999, amended, April 2001, http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm	11
Association of Art Museum Directors, <u>Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era</u> , June 4, 1998 http://www.aamd.org/papers/guideln.php	11, 13, 14, 24
Association of Art Museum Directors, <u>Governance</u> , http://www.aamd.org/about/#Governance	11
Avraham Barkai, “Arieserung,” 1 <u>Encyclopedia of the Holocaust</u> (Israeel Gutman, ed, 1990).....	9
Avraham Barkai, <u>From Boycott to Annihilation: The Economic Struggle of German Jews</u> (William Templar, trans., 1989).....	18
Louis Brandeis, <u>Other People’s Money – and How Bankers Use It</u> (1914).....	29
David Cesarani, <u>Becoming Eichmann</u> (2004)	17
<u>Charter of the International Military Tribunal</u> , August 8, 1945, & supplemental information http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html#Rosenberg	9
Commission for Looted Art in Europe, <u>Vilnius Forum Declaration</u> , Oct. 5, 2000	10, 27
Convention Respecting the Laws and Customs of War on Land art. 47, 56, Oct. 18, 1907, 36 Stat. 2277, 15 U.N.T.S. 9	27
Lucy Dawidowicz, <u>The War Against the Jews, 1933-1945</u> (1975)	3

<u>OTHER SOURCES</u>	PAGE(S)
Martin Dean, <u>Robbing the Jews</u> (2008)	17, 18
Charles de Jaeger, <u>The Linz File: Hitler’s Plunder of Europe’s Art</u> (1981).....	20
Stuart E. Eizenstat, <u>Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II</u> (2003)	2, 10, 29
Stuart E. Eizenstat, <u>Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II</u> , 37 Van. J. Transnat’l L. 333 (2004).....	3
Milton Esterow, <u>Europe Is Still Hunting Its Plundered Art</u> , N.Y. Times, Nov. 16, 1964	21
Richard J. Evans, <u>The Third Reich in Power</u> (2005)	17, 18
Hector Feliciano, <u>The Lost Museum</u> (1997).....	23
Janet Flanner, <u>Annals of Crime: The Beautiful Spoils</u> , The New Yorker, Feb 22, 1947	21
Janet Flanner, <u>Annals of Crime: The Beautiful Spoils</u> , The New Yorker, Mar. 1, 1947	21
Janet Flanner, <u>Annals of Crime: The Beautiful Spoils</u> , The New Yorker, Mar. 8, 1947	21
Ester Tisa Francini, et al, <u>Flight Goods – Stolen Goods: The transfer of cultural assets in and via Switzerland 1933-1945 and the question of restitution</u> 318 (Independent Expert Commission, Switzerland – World War II, 2001).....	23
<u>German Fugitives Tell of Atrocities at Hands of Nazis</u> , N.Y. Times, March 20, 1933	19
Götz Aly, <u>Hitler’s Beneficiaries: Plunder, Racial War, and the Nazi Welfare State</u> (2007)	17

	PAGE(S)
Jennifer Anglim Kreder, <u>The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?</u> , 88 Or. L. Rev. 37 (2009).....	12, 20, 26
Henry La Farge, <u>Lost Treasures of Europe</u> (1946).....	20
Deborah E. Lipstadt, <u>Denying the Holocaust: The Growing Assault on Truth and Memory</u> (1993)	16
Karl Loewenstein, <u>Law in the Third Reich</u> , 45 Yale L.J. 779 (1936)	19
Glenn D. Lowry, <u>Testimony Before the House Banking & Financial Services Committee</u> , February 12, 1998	21
Joan M. Lukach, <u>Hilla Rebay: In Search of The Spirit in Art</u> (1983)	20
<u>Restitution of Identifiable Property; Law No. 59</u> , 12 Fed. Reg. 7983 (Nov. 29, 1947).....	10
Ingo Müller, <u>Hitler’s Justice: The Courts of the Third Reich</u> (1991).....	17
MoMA meeting of the Board of Trustees minutes, April 11, 2006	15
The Museum of Modern Art, <u>The Provenance Research Project</u> , http://www.moma.org/collection/provenance/	28
Lynn Nicholas, <u>The Rape of Europa</u> (1994).....	22
William S. Paley, <u>As it Happened, a Memoir</u> (1979).....	20
Jonathan Petropolous, <u>The Faustian Bargain</u> (2000).....	20
Jonathan Petropolous, <u>Art As Politics in the Third Reich</u> (1996)	20
Prague Holocaust Era Assets Conference: Terezin Declaration (2009), http://www.state.gov/p/eur/rls/or/126162.htm	<i>passim</i>
James J. Rorimer, <u>Survival: The Salvage and Protection of Art in War</u> (1951)	20

	PAGE(S)
David Roxan and Ken Wanstall, <u>The Rape of Art</u> (1965).....	21
William L. Shirer, <u>The Nightmare Years, 1930-1940</u> (1984)	17
Francis Henry Taylor, <u>Europe’s Looted Art: Can it Be Recovered?</u> , N.Y. Times, Sept. 19, 1943.....	20
<u>Text of Resignation of League Commissioner on German Refugees</u> , N.Y. Times, Dec. 30, 1935	18
Otto D. Tolischus, <u>Hitler will Seize Property of Foes</u> , N.Y. Times, July 15, 1933	19
U.S. State Department, <u>Washington Conference Principles on Nazi-Confiscated Art</u> , Dec. 3, 1998.....	<i>passim</i>
Adam Zagorin, <u>Saving the Spoils of War</u> , Time, Dec. 1, 1997.....	21

TABLE OF APPENDICES

	Page
A. Particular Statements of Interest of <i>Amici Curiae</i>	a-1
B. Disposition of Federal Holocaust-Era Art Claims Since 2004	a-7
C. Washington Conference Principles on Holocaust-Era Assets Dec. 3, 1998	a-9
D. Prague Holocaust Era Assets Conference: Terezín Declaration June 30, 2009	a-10
E. Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era, June 4, 1998	a-18
F. Letters from MoMA Director Lowry to Ralph Jentsch July 20, 2005, January 18, 2006 and April 12, 2006 (Appendix F)	a-22

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14 point Times New Roman.

Date: June 22, 2010

Jennifer Anglim Kreder

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici, American Jewish Congress and Commission for Art Recovery have no corporate parents, and no publicly traded company holds and ownership interest in any of the *amici*.

Date: June 22, 2010

Jennifer Anglim Kreder

STATEMENT OF INTERESTS OF *AMICI CURIAE*

*Amici*¹ are Jewish community leaders and organizations, Holocaust educators, artists and art historians, and legal scholars and practitioners dedicated to the promotion of alternative dispute resolution. The particular interests of the *amici* are set forth in Appendix A.

Amici do not assert an opinion on the merits of the restitution claims asserted by the Plaintiffs-Appellants. For various reasons corresponding to experience, training, and competence of the *amici*, all of the *amici* support policies that encourage prompt and reasonable settlement of complex Holocaust-era claims. This goal can often be achieved more efficaciously through alternative dispute resolution than through litigation.

The principal interest of *amici* in this litigation is that the opinion of the district court effectively undermines the goal of expeditious resolution of claims related to Nazi-looted art and other Holocaust-era assets in two ways. First, the refusal of the district court to toll the statute of limitations while the parties were engaged in substantive negotiations to try to settle the case *encourages* current possessors of Nazi-looted art to run the clock in feigned

¹ This brief is submitted in accordance with FED. R. APP. P. 29(a). Counsel for *amici* certify that counsel of record for all parties received notice of at least 10 days prior to the due date of the *amici's* intention to file this brief and that all counsel have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

negotiation. When the purpose of “negotiation” is not to achieve resolution of a dispute on the merits, but to defeat claims on technical procedural grounds such as statute of limitations and laches, the effect is a charade. Second, the effect of the district court’s order *discourages* future *bona fide* negotiation between claimants and museums or other parties holding Nazi-looted art, since claimants may now perceive time spent in serious negotiation as futile or as a tool for defendants to prevail on technical grounds.

Neither of these effects is mandated by federal policies relating to evidentiary standards, to the function of a district court in assembling reliable information relevant to making informed records, or to the goal of effective resolution of competing claims about Nazi-looted art.

Summary of Argument

In the 1990s, several efforts in this country sought to address some of the issues of gross injustice that remained unaddressed decades after World War II. The goal was modest: to achieve a measure of “imperfect justice”²

² See Stuart E. Eizenstat, Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II (2003) [hereinafter “Eizenstat”]. Ambassador Eizenstat has served as Special Envoy for Holocaust Issues during the Clinton and Obama Administrations. He organized and chaired the Washington Conference on Holocaust-Era Assets in 1998 and served as Head of the U.S. delegation to the Prague Conference in 2009. His account describes seeking “imperfect justice” for:

those who placed their most precious assets in the safest banking system in Europe--in Switzerland--to keep them out of Hitler's clutches (for fifty

for the victims of the “war against the Jews.”³ One of these efforts was to promote effective and equitable disposition of restitution claims such as the one in the case at bar.

Amici urge three considerations in handling such claims. First, federal courts should defer to important foreign policy goals embedded in the Washington Principles of 1998 and the Terezín Declaration of 2009. These important documents encourage the use of less costly, more efficient means of resolving claims, and resolution of claims on the merits rather than by reliance on technical legal defenses. These documents also require reassessing the recent trend of *de facto* judicial presumption against restitution of Holocaust-era assets.

Second, we urge that settlement discussions and diligent efforts to investigate should not become the basis for forfeiture of property on limitations grounds. Rule 408(a), Fed. R. Evid., specifies that settlement

years after the war, they were unable to recover them); those who were forced into brutal slavery and forced labor at the hands of German and Austrian employers and were never compensated (most of these, by the way, were non-Jews in Eastern Europe); those whose hard work, businesses, and apartments were confiscated and never restituted after the war; those whose insurance policies were never paid; and more broadly, those whose entire culture was stolen from them.

Stuart E. Eizenstat, Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II, 37 Van. J. Transnat'l L. 333, 333 (2004).

³ See Lucy Dawidowicz, The War Against the Jews, 1933-1945 (1975). Dawidowicz describes the entire Nazi period (1933-1945) as a war that targeted Jews, deprived them of *liberty*, dispossessed them of their homes and almost all forms of *property*, and took *life* by the millions.

communications are inadmissible to show the invalidity of a claim. On the other hand, Rule 408(a)(2) specifically permits use of settlement communications for the limited purpose of “negating a contention of undue delay” – relevant to the doctrines of statutes of limitation, laches and tolling. Proper construction of Rule 408 is of particular concern to *amici* because of the lengthy, complex investigation required to bring to light the true nature of seemingly voluntary Nazi-era property transfers. Negotiation and settlement must be encouraged to achieve non-litigious resolution of claims to property stolen in the greatest art heist of history, with traces of the grand larceny erased by Nazi perpetrators and hidden by many subsequent beneficiaries. Courts should not reward museums and other possessors of art that entice claimants to spend time negotiating so that the limitations period will run before they realize the need to get to a courthouse.

Third, federal courts should allow the full light of history to illuminate a record to determine whether a complaint is plausible and should survive a motion to dismiss. More specifically, because provenance evidence is highly relevant to the resolution of disputes over rightful ownership, federal courts should not treat such evidence as confidential or privileged, or – as

the district court did in this case – as “rank hearsay”⁴ unworthy of supporting an allegation in a complaint filed before the discovery process even begins.

Argument

I. Federal Courts Should Encourage Effective And Reasonable Disposition Of Complex Claims.

Federal courts are accustomed to complex litigation. The more complex, the more attentive the courts must be to details, but in all cases the courts owe to litigants even-handed administration of justice. Regardless of complexity, courts may not dismiss a case on impermissible predicates such as those that have emerged in disputes over Holocaust-era assets. In such cases, courts are confronted with painful historical facts that cannot be denied by wishing them to disappear. This Court should not ignore these hard facts by affirming an order dismissing the case under Rule 12(b)(6), Fed. R. Civ. P., when this order is clearly improper even under Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), discussed in section II.A. below.

On the contrary, federal courts presented with Nazi-looted art claims should take judicial notice of the context of the original theft to fully understand how the works came to be “lost.” Courts must also focus on the

⁴ Grosz v. Museum of Modern Art, No. 09 Civ. 3706 , 2010 Westlaw 88003, at *5 (S.D.N.Y. Mar. 3, 2010).

pervasive reality of dubious “transactions” often relied upon in arguments relating to provenance (i.e., chain of possession of works of art). Thus, courts adjudicating Nazi-looted art claims need to acknowledge the full complexity of the historical facts, discussed in section II.B below.

A. The Dismissal Of This Case Fits A Broad Pattern Of Judicial Decisions After Republic of Austria v. Altmann, 541 U.S. 677 (2004), Dismissing Claims To Restitution Of Holocaust-era Assets Not On The Merits Of The Claim, But On Formalistic Readings Of Procedural Fairness.

In Republic of Austria v. Altmann, 541 U.S. 677 (2004), a Holocaust survivor in her eighties prevailed against the claim of a foreign government – supported by the Bush administration – that federal courts lack jurisdiction over a foreign sovereign that possesses Nazi-looted art. In Appendix B, we include a chart that summarizes all other federal Nazi-looted art cases since Altmann. In every other judgment except the one with the most egregious facts, the courts have rejected the restitution claims, typically on procedural grounds such as a federal construction of a state statute of limitations or on the affirmative defense of laches.

So eager have some museums and private collectors in this country been to remove the dark cloud of the Nazi past from their title to disputed artworks that many of them have gone to court as *plaintiffs* seeking swift dismissal without addressing the merits of rightful ownership. For example,

in Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006), a district judge actually held that *the statute of limitations ran in 1943*, before the Allies had landed on the beaches of Normandy, let alone defeated the *Wehrmacht* and liberated survivors in work camps and mass killing centers.

Analogously, the present case was dismissed on the theory that settlement communications triggered the limitations period under New York's "demand and refusal" rule despite the mandate in Rule 408, Fed. R. Evid., that such evidence be used only to *negate* a contention of undue delay. These cases, and the cases summarized in Appendix B, appear to reflect either a categorical refusal to permit fact finding or – worse – a *de facto* presumption that survivor's and heirs' claims to Nazi-looted art are invalid.

B. The Dismissal Of The Claims For Restitution Of Nazi-looted Art On Purely Technical Grounds Violates The Letter And Spirit Of Federal Policy Favoring Expeditious Restitution Of Property To The Victims Of Nazi Persecution.

Both the *de facto* presumption against the legitimacy of Nazi-looted art restitution claims in which some federal courts have indulged and the summary disposition of these claims without reference to the complex historical factors delaying assertion of owners' claims violate foreign policy goals pursued by the United States and the Allies during and immediately

after World War II, and in recent diplomatic breakthroughs in 1998, 2000, and 2009.

In the normal course of judicial administration touching on foreign policy, federal judges typically defer to determinations of policy matters by the executive branch. For example, in 1949 this Court ruled inadmissible the statements of a Jewish victim of Nazi persecution describing his brutal imprisonment by the Nazis that led him to “transfer” major assets under duress, on the ground that to do so would denigrate a foreign country. Bernstein v. N. V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 173 F.2d 71 (2d Cir. 1949). In 1952, however, Jack B. Tate, Acting Legal Advisor in the Department of State, clarified:

[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.⁵

⁵ 26 Dept. St. Bull. 984-85 (1952) (the “Tate letter”).

Once this Court was fully informed of the government's views of coerced "transactions" during the Nazi era in Germany, it promptly reversed its previous ruling in the same case.⁶

U.S. diplomats led efforts to warn other countries against looting in the landmark London Declaration of January 5, 1943, 8 Dept. St. Bull. 21 (1952), which "declare[d] invalid any [coerced] transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected." Immediately after the war, the Nuremberg Tribunal evaluated detailed evidence of coerced sales similar to the aryanization⁷ of George Grosz's art at stake in this case, and the plunder of art was declared a war crime and is so recognized today. At Nuremberg, it was perfectly clear to the fact finders who had done what and to whom.⁸

Shortly thereafter in Bonn and Vienna it was equally clear that, in order to rejoin the human family, Germany and Austria had to repudiate *all*

⁶ Bernstein v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375, 376 (2d Cir. 1954).

⁷ See Avraham Barkai, "Ariesierung," 1 Encyclopedia of the Holocaust 84-87 (Israel Gutman, ed., 1990).

⁸ For example, Alfred Rosenberg, head of infamous *ERR* art looting unit, was convicted and sentenced to death by hanging. E.g., <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html#Rosenberg>.

spurious “transactions” of the entire Nazi era, including art “deals” that were really seizures. E.g., Restitution of Identifiable Property; Law No. 59, 12 Fed. Reg. 7983 (Nov. 29, 1947) (Military Government Law 59). It is distressing that in a federal courtroom today what used to be as clear as day has now become as obscure as the night and fog.

Current foreign policy requires deference like this Court gave to the Tate letter. Diplomats from the State Department played a leading role⁹ in securing public commitment by the forty-four nations that adopted the Washington Conference Principles on Nazi-Confiscated Art¹⁰ and the Terezín Declaration,¹¹ which emerged from the international conference hosted by the Czech Republic in June 2009. These declarations call for effective, fact-based resolution of Nazi-looted art claims. Principle eleven of the Washington Principles encourages nations “to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.”

⁹ See Eizenstat, *supra*, note 2, at 187-204 (Chapter 9 on looted art entitled “The Barbarians of Culture”).

¹⁰ U.S. State Dep’t, Washington Conference Principles on Nazi-Confiscated Art, Dec. 3, 1998, <http://www.lootedartcommission.com/Washington-principles>. We include the full text of this document in Appendix C. These Principles were reaffirmed in Vilnius, Lithuania, in 2000. Commission for Looted Art in Europe, Vilnius Forum Declaration, Oct. 5, 2000, <http://www.lootedartcommission.com/vilnius-forum>.

¹¹ See Terezín Declaration, June 30, 2009, http://www.holocausteraassets.eu/files/200000215-35d8ef1a36/TEREZIN_DECLARATION_FINAL.pdf. We include the full text of this document in Appendix D (*Nazi Confiscated and Looted Art* ¶ 2 encourages nations to use “alternative processes” to litigation based on “facts and merits” of claims).

The Terezín Declaration states in its principles under the heading “Nazi-Confiscated and Looted Art”:

3. . . . [W]e urge all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims* and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order *to achieve just and fair solutions, as well as alternative dispute resolution*, where appropriate under law. (Emphasis added)

To give credit when due, this development in foreign policy was sparked in no small measure by Guidelines issued by the Association of American Museum Directors (“AAMD”) in June 1998.¹² For this very reason, *amici* are deeply troubled not only by the district court’s misreading of the correspondence between the Director of the MoMA Glenn Lowry and Ralph Jentsch, but also with the fact that Lowry, currently AAMD’s Vice President at Large,¹³ could engage in conversation with a claimant that makes a mockery of any serious negotiation over disputed title to an artwork. See Section I.C, below.

¹² AAMD, Report of the AAMD Task Force on the Spoliation of Art During the Nazi/World War II Era, June, 4 1998, <http://www.aamd.org/papers/guideln.php> [hereinafter “AAMD Guidelines”]. We include this document as Appendix E. See also American Association of Museums Guidelines Concerning the Unlawful Appropriation of Objects during the Nazi Era, Nov. 1999, amended Apr. 2001, http://aam-us.org/museumresources/ethics/nazi_guidelines.cfm (similar guidelines).

¹³ AAMD, Governance, 2010, <http://www.aamd.org/about/#Governance>.

C. The Dismissal Of This Case Violates The Letter And Spirit Of Rule 408 Of The Federal Rules Of Evidence, Which Fosters Open, Transparent Communication Among Parties To Achieve A Meaningful Resolution Of Their Conflict.

The district court improperly based its dismissal of this case on its reading of isolated snippets of ongoing written and oral communications between Lowry and Jentsch.¹⁴ It is fundamental policy to encourage communication for negotiation and settlement purposes.¹⁵ Precisely in order to secure meaningful negotiations, federal courts should, under circumstances such as those found here, toll the state statute of limitations for the duration of negotiation and settlement discussions.

To rule otherwise would effectively bar claimants and museums and other possessors of Nazi-looted art from doing thorough, detailed, often time-consuming provenance research before arriving at the courthouse door, a result pushed by some museums in this country.¹⁶ To allow MoMA to use settlement negotiations as a tool to delay ownership claims past the statute of limitations is not only unjust, but is in direct contradiction to the text and

¹⁴ We include the letters from Lowry to Jentsch dated July 20, 2005, January 18, 2006, and April 12, 2006, in Appendix F.

¹⁵ E.g., Rein v. Socialist People's Libyan Arab Jamahiriya, 568 F.3d 345, 352 (2d. Cir. 2009).

¹⁶ See Jennifer Anglim Kreder, The New Battleground of Museum Ethics and Holocaust Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?, 88 Or. L. Rev. 37 (2009) (analyzing museums' filing of declaratory judgments before claimants have had sufficient time to complete provenance research).

spirit of the Washington Principles, Terezín Declaration and AAMD Guidelines discussed in section I.B above.

The unquestionable purpose of Rule 408, Fed. R. Evid., is to foster the policy of favoring settlement and negotiation over litigation. This policy necessarily requires that adequate time be given to settle the claim. Failure to toll the statute of limitations in complex Nazi-looted art cases while the parties research the facts and provenance has two effects: first, claimants will be unlikely to participate in good faith to negotiate complex claims; second, museums and other possessors of art are encouraged to engage in strategies to draw out negotiation past the statute of limitations. Both effects are contrary to the intention of the drafters of Rule 408.

Rule 408(a)(2) specifically provides that “conduct or statements made in compromise negotiations regarding the claim” may not be used to prove the invalidity of a claim. The district court searched through the Lowry-Jentsch letters to construct from words isolated from context the requisite demand and refusal under New York law – despite Lowry’s continued, clear representations that he lacked the authority to speak for MoMA until the Board voted upon Nicholas Katzenbach’s recommendation.¹⁷ Up to that point, moreover, the circumstances of the negotiation were akin to David

¹⁷ Grosz, at *11.

and Goliath: Jentsch, an art historian unaware of the legal significance of specific words, versus Lowry, Director of one of the most esteemed institutions in the nation advised by sophisticated counsel and a Board of Directors fully aware of the significance of reciting Lowry’s powerlessness to convey definitive “magic words of rejection.”¹⁸ Instead – as the district court candidly acknowledged and then ignored – Lowry used “temporizing language . . . almost certainly designed to entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation.”¹⁹

Ultimately the district court concluded that a seemingly friendly letter from Lowry to Jentsch, indicating that MoMA wanted to continue to work toward a just and fair solution, was a “refusal.”²⁰ The language about setting up a timeframe to continue research for years and an agreement to share ownership forever in no way would put Jentsch or the Grosz foundation on notice that MoMA had “refused” to continue working towards an agreement. This cooperation in search of a just and fair solution, instead of litigation, is exactly what the Washington Principles, Terezín Declaration, and AAMD Guidelines encourage.

¹⁸ Id., at *9.

¹⁹ Id., at *13.

²⁰ Id.

MoMA's express refusal came on April 12, 2006, in a letter notifying the Grosz heirs that its Board of Trustees accepted the recommendations of Katzenbach that MoMA had no obligation to return and should not return the Paintings. *Amici* note that Katzenbach based his conclusion on the idea that the Grosz claims would be time-barred, not because of the facts and merits of the claim.²¹ It was at this time, and not before, that MoMA refused the claim, and, in accord with New York law and with Rule 408, Fed. R. Evid., the statute of limitations began to run. Moreover, Lowry's "temporizing language" calls out for application of the equitable doctrines of tolling and estoppel.

II. Evidence Relating To The Most Massive Art Heist In Human History Should Not Be Ignored Or Trivialized In The Judicial Disposition Of Claims Relating To Restitution Of Holocaust-Era Assets.

A. Wholesale Dismissal Of Nazi-looted Art Cases Violates Relevant Standards Requiring District Courts To Determine The Plausibility Of Factual Allegations By Focusing On The Broad Context Of Historical Events And By Drawing Reasonable Inferences From Reliable Accounts Of These Events.

What judges think of their function and task undoubtedly informs their understanding of their power or jurisdiction. *Amici* most emphatically do not suggest that, in order to right the egregious injury of the Holocaust, judges may impose a bias against museums or current possessors of art.

²¹ MoMA meeting of the Board of Trustees minutes, April 11, 2006, page 2.

Neither may they sustain a general bias against claimants. Either form of bias would violate the most ancient requirement of judicial ethics: to judge with even-handed justice. Whatever the blindfold over the eyes of Lady Justice might mean, it is surely not permission to overlook, let alone to forbid attention to, relevant information about the provenance of a disputed artwork.

B. Trial Courts Charged With The Duty Of Establishing Factual Records Should Include Reasonably Grounded Historical Explanations Of Events Relevant To The Issues Before The Courts.

The district court viewed itself as confronted “with a legal, not a historical, question.”²² This view is a false dichotomizing of the judicial function. Judges cannot be expected to know intimately the historical context of all cases that come before them. Perhaps this is why the district court so candidly diminished the significance of the historical events that she casually disregarded in the opinion in this case. But in cases like this one, attentiveness to what happened seventy to eighty years ago augments executive efforts to resolve the “unfinished business” of World War II and guards against assaults upon truth and memory. Cf. Deborah E. Lipstadt, Denying the Holocaust: The Growing Assault on Truth and Memory (1993).

²² Grosz, at *22.

From the very beginning of the Nazi era, law and jurisprudence became a strong component of justification of regulations that deprived “enemies of the State” of their liberty and property, and these deprivations led in turn to mass murder. See, e.g., Ingo Müller, Hitler's Justice: The Courts of the Third Reich (1991). Indeed, the “legalized” grand larceny became a form of financing the mass murder.²³

Hence it is not only appropriate, but even necessary, in cases such as this for judges to consider the historical reality in Nazi Germany and German-occupied Europe. The *Führerprinzip* demanded unquestioning loyalty to the concentrated power of a “unitary executive.” Both legislators and judges in Nazi Germany participated in the normalization of practices of State grand theft that were engineered to make involuntary transactions appear “ordinary and legal” from the very first weeks of the Nazi regime early in 1933, even before the infamous racist Nuremberg laws of “blood and honor” in 1935, and the final push to a “Final Solution.”

²³ See, e.g., Martin Dean, Robbing the Jews (2008); Götz Aly, Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State (2007); Richard J. Evans, The Third Reich in Power 322-411 (2005); David Cesarani, Becoming Eichmann 67 (2004). Immediately after the *Anschluss* in March of 1938, the U.S. Consul General in Vienna observed: “There is a curious respect for legal formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance.” William L. Shirer, The Nightmare Years, 1930-1940 30 (1984).

C. Courts Deciding Nazi-looted Art Cases Should Take Judicial Notice Of The Broad Consensus Among Historians On The Nazi Spoliation Of Jews And Other Persecuted Groups, Including The Political “Enemies Of The State.”

Jews were systematically excluded from professions and forced to compile inventories to streamline the systematic despoliation of their property from 1933 to 1942 when Jews had little or no property left to rob, and when the focus turned to “cost-efficient” mass murder in the death camps of occupied Poland.²⁴ It is a gross distortion of reality to suggest that the financial despair of Jews in 1933 during widespread, sporadic boycotts until the passage of the first Nuremberg law in 1935 resulted from a series of isolated private set-backs brought about by generalized, severe financial conditions akin to the Great Depression.²⁵ The National Socialist platform, adopted as official German state policy as of 1933, was committed to driving Jews and other “enemies of the State” out of economic life.

In 1935, James McDonald resigned on moral grounds from his post as High Commissioner for Refugees. McDonald detailed the economic devastation of German Jews and noted that many wanted to flee but could not because of financial predation between 1933 and 1935.²⁶

²⁴ Dean, supra note 23.

²⁵ See Richard J. Evans, The Third Reich in Power 382 (2005); Avraham Barkai, From Boycott to Annihilation: The Economic Struggle of German Jews (1989).

²⁶ Text of Resignation of League Commissioner on German Refugees, N.Y. TIMES, Dec. 30, 1935.

As early as 1933, the *New York Times* (and other periodicals) published articles documenting Nazi seizures of property of critics of the Nazi regime.²⁷ The *New York Times* decried: “To Be a Jew Is Held a Crime.”²⁸ As of January 1, 1936, Professor Karl Lowenstein wrote for the *Yale Law Journal*: “Jews are finally driven out even from the remaining nooks and crannies of economic life by the official economic boycott, more or less endorsed by the courts.”²⁹ “Obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination. Legal titles were voided and property confiscated under the pressure of party members and officials.”³⁰ Judges in New York were presented with and understood these facts as early as 1936.³¹

The historical record leaves no serious doubt that – both during and immediately after the war – the Nazi practice of spoliation of Jewish treasures and other “degenerate” art was common knowledge among insiders of the art world. For example, in a 1938 letter to a Guggenheim Foundation curator, the famous artist Otto Nebel described the Nazis’ plans to liquidate

²⁷ Otto D. Tolischus, Hitler will Seize Property of Foes, N.Y. Times, July 15, 1933, at 1.

²⁸ German Fugitives Tell of Atrocities at Hands of Nazis, N.Y. TIMES, Mar. 20, 1933, at 1, 5.

²⁹ Karl Loewenstein, Law in the Third Reich, 45 Yale L.J. 779, 797 (1936).

³⁰ Id. at 807.

³¹ See Holzer v. Deutsche Reichsbahn Gesellschaft, 159 Misc. 830, 290 N.Y.S. 181 (N.Y. Sup. Ct. 1936), aff’d sub nom. 252 A.D. 729, 299 N.Y.S. 748 (N.Y. App. Div. 1937, aff’d in part, modified in part, 277 N.Y. 474, 14 N.E.2d 798 (1938)).

“degenerate art”: “[T]he entire German museum collections in modern art are involved! . . . I believe that one shouldn’t help transform works of art into armaments – and that, after all, would be the end result. But that is my own opinion, and it needn’t bother anyone.”³² Francis Henry Taylor, former Director of the Metropolitan Museum of Art, condemned Nazi-looted art trafficking in the *New York Times* on September 19, 1943.³³ Moreover, the “Monuments Men” of the Monuments, Fine Arts and Archives Program sought tirelessly to secure tremendous caches of stolen art and reconstitute it to the countries of victims. After their return from Germany, many became museum directors and academics in prestigious colleges and universities and told their stories.³⁴ After the war, the State Department and other agencies, governments and organizations issued warnings about looted objects infecting the market and publicized lists of stolen art and the identities of traffickers,³⁵ including two names found in the provenance records in this case. News stories ran in publications such as *The New Yorker*, which in

³² Joan M. Lukach, Hilla Rebay: In Search of The Spirit in Art 121 (1983). See generally Jonathan Petropolous, The Faustian Bargain (2000); Jonathan Petropolous, Art As Politics in the Third Reich (1996).

³³ Francis Henry Taylor, Europe’s Looted Art: Can It Be Recovered?, N.Y. Times, Sept. 19, 1943, at SM18.

³⁴ See James J. Rorimer, Survival: The Salvage and Protection of Art in War (1951); Henry La Farge, Lost Treasures of Europe (1946); Charles de Jaeger, The Linz File: Hitler’s Plunder of Europe’s Art (1981). Some art collectors told stories of having purchased looted art. William S. Paley, As It Happened, a Memoir 107 (1979) (CBS Chairman).

³⁵ See, e.g., Kreder, supra note 16, at 88-89.

1947 published a series of three articles by the renowned cultural commentator Janet Flanner detailing the massive character of the Nazi practice of spoliation of Jewish and other “degenerate” art.³⁶

In 1998, MoMA director Lowry acknowledged in congressional testimony the “...rapacity of the Nazis and their collaborators,” estimating that “tens of thousands” of pieces of art were stolen by the Nazis.³⁷ Another historian has stated: “The paintings came to America because for more than 10 years during and after the war there was no where else to sell them[.]”³⁸

Some American museums would have us believe that the art world was oblivious to the infection of the market until 1998, but the story of the Nazis stealing more art than any regime in history, surpassing even Napoleon, was widely told – even front page news.³⁹ Theodore Rousseau, a former OSS officer who became a curator of paintings at the Metropolitan Museum of Art, thought it was “absurd” for U.S. museums to miss out on the fire sales: “[I]t’s absurd to let the Germans have the paintings the Nazi

³⁶ Janet Flanner, Annals of Crime: The Beautiful Spoils, The New Yorker, Feb. 22, Mar. 1, Mar. 8, 1947 at 31, 33, 38.

³⁷ Glenn D. Lowry, Testimony Before the House Banking & Financial Services Committee, February 12, 1998.

³⁸ Adam Zagorin, Saving the Spoils of War, Time, Dec. 1, 1997, at 87 (quoting Willi Korte, consultant on Holocaust losses to the Senate Banking Committee).

³⁹ See David Roxan & Ken Wanstall, The Rape of Art (1965); Milton Esterow, Europe Is Still Hunting Its Plundered Art, N.Y. Times, Nov. 16, 1964, at 1.

bigwigs got, often through forced sales, from all over Europe. Some of them ought to come here [to U.S. museums].”⁴⁰

The revival of interest in Holocaust-era assets in the 1990s after declassification of archives, which allowed some to begin the costly search for family and assets, does not negate the fact that the art world had contemporaneous knowledge about the massive infection of the market starting in 1933. MoMA acquired one of the Grosz paintings at issue in 1947, and another in 1954.⁴¹ Not caring does not equate to not knowing.

Some current possessors of this property, including some of the world’s most esteemed museums like MoMA, have argued that Jews and opponents of National Socialism were all able to engage freely in voluntary transfer of property within the Third Reich after 1933. This may have been possible in some instances, but was emphatically not true generally.

All that is required to preclude dismissal under Rule 12(b)(6), Fed. R. Civ. P., under Twombly-Iqbal is factual allegation, facial plausibility, reasonable inferences, and attention to context.⁴² Factual allegations are given a presumption of truth, but must be more than a recitation of the

⁴⁰ Lynn Nicholas, The Rape of Europa 439 (1994).

⁴¹ Grosz, at *2.

⁴² Iqbal, 129 S.Ct. at 1937, citing Twombly, 550 U.S. at 555-56.

elements of a cause of action and conclusory statements.⁴³ Determining the plausibility of a factual allegation is “context-specific, requiring the reviewing court to draw on its experience and common sense.”⁴⁴

In this case, a German modernist artist later deemed to be an “enemy of the State,” fled Germany in January 1933, leaving his work with Jewish art dealer Alfred Flechtheim. Later, Flechtheim also fled. The Nazis aryanized Flechtheim’s galleries in November 1933.⁴⁵ The district court suggested that the reason why Flechtheim went out of business was that he was in general financial distress. This erroneous judgment is unadorned with any citation to evidence in the record or acknowledgement of systematic boycotting and extortion of Jews starting in 1933 and imposition of the Flight Tax, matters appropriate for judicial notice.

The dismissal of this case cannot be squared with the standards announced in Twombly and Iqbal. On the contrary, the massive Nazi theft of art is well documented not only as a general historical fact, but also as a specific fact about Flechtheim’s galleries in Berlin and Dusseldorf. There is also a powerful historical consensus about the Nazi program of selling stolen

⁴³ Id.

⁴⁴ Id.

⁴⁵ Ester Tisa Francini, et al, Flight Goods – Stolen Goods: The transfer of cultural assets in and via Switzerland 1933-1945 and the question of restitution 318 (Independent Expert Commission, Switzerland 2001). See generally Hector Feliciano, The Lost Museum 155-164 (1997).

artwork to American collectors and museums. It is further acknowledged that the chief obstacle complicating provenance research is that the Nazis went out of their way to disguise their grand larceny as though it was only a series of open transactions between willing sellers and buyers. In the light of such uniform scholarly consensus, this Court should hold that the Complaint satisfies the Twombly-Iqbal standard of plausibility.

This Court should also reverse the ruling of the district court concerning the statute of limitations. The view that Lowry's "temporizing" language triggered the statute of limitations in the context of a complex provenance dispute flies in the face of the AAMD Guidelines, Washington Principles and Terezín Declaration. The lack of any clear language to refuse the Grosz heirs' demand until April 12, 2006, is controlling. Solid equitable grounds also support the tolling of the limitations period: (1) conformity with U.S. foreign policy, (2) Rule 408, Fed. R. Evid., and (3) Lowry's own language, "almost certainly designed to entice plaintiffs to continue negotiating and to prevent the dispute from becoming public or escalating into litigation."⁴⁶

⁴⁶ Grosz, at *13.

III. Trial Courts Charged With The Duty Of Establishing Factual Records Relating To Nazi-looted Art Should Allow Broad Access To Documents Relevant To Disputes About The Provenance Of Artworks.

For the historical reasons outlined above in section II.B, provenance research in the case of specific works of Nazi-looted art – such as Grosz’s art – often necessitates extensive research of archives of multiple institutions in many nations. The haste of the district court to dismiss this case – anomalous when compared to the length of time for disposition of most civil litigation – is egregiously wrong in the particular circumstances of Holocaust-era claims.

It is bad enough that victims are often blamed for their misfortune. It is worse that victims of grand larceny and mass murder have had to wait for over half a century for any remedy to achieve “imperfect justice.” It is outrageous that judges are now eroding these efforts to achieve “imperfect justice.”

A. The District Court Should Be Reversed Because Its Order Dismissing The Case Is Based On Unsupported Guesswork Rather Than Determinations Of Facts Grounded In The Record.

As noted above in section II.B, individual rights were nonexistent for Jews and other “enemies of the State,” as defined by the Nazi party, after 1933. Yet possessors of Nazi-looted art, including prominent institutions, have distorted history and convinced federal judges to accept the wildly

implausible view that Jews had no one but themselves to blame for their financial plight until implementation of the Nuremberg Laws, and often museums push the date back even further.⁴⁷ The district court in this case went beyond the face of the complaint to decide a motion to dismiss on the ground of an affirmative defense, the statute of limitations. In doing so, the district court improperly engaged in determinations of fact and in value judgments not supported by the factual record in the case. This further distorts history and law.⁴⁸

B. Giving Museums Or Auction Houses An Evidentiary Privilege Over Documents In Their Possession Or Allowing Them To Claim Confidentiality About Ownership And Sales Of Works Of Art Is Utterly Inconsistent With Clearly Established Federal Policy Against Looting Throughout The Entire Twentieth Century And Into The Current Century.

The most ancient records of war, including classic literature such as Homer's Iliad and Virgil's Aeneid, depict wartime seizure of enemy property, but there were – and are – rules. “To the victor belong the spoils,” the ancient adage reads, but it absolutely does not apply to Nazi looting.

⁴⁷ See Kreder, supra note 16, at 62 (Toledo Museum of Art won suit alleging 1938 sales of paintings it bought in 1939 were voluntary), 65 (MoMA/Guggenheim declaratory claim – sale date uncertain), 71 (MFA-Boston declaratory claim implying that 1938 Vienna sale after *Anschluss* to known art trafficker was voluntary), 75 (purchaser won declaratory judgment regarding transfer after Viennese owner imprisoned in Dachau).

⁴⁸ In unexplained, flat contradiction to Rule 8(c), Fed. R. Civ. P., the district court ruled that claimants in art cases bear the burden of pleading “the statute of limitations in their complaint[s].” 2010 Westlaw 88003, at *23; see Shady Grove Orthopedic Assocs. v. Allstate Ins., 130 S.Ct. 1431 (2010) (demonstrating primacy of federal procedure in the face of conflicting state law).

International law governing the use of force has prohibited looting for centuries. For example, Article 46 of the Hague Convention of 1907 forbids the confiscation of private property. Article 47 forbids pillage. Article 56 specifically forbids "[a]ll seizure of ... works of art." The antiquity of this war crime does not make it moral or legal, any more than the antiquity of rape, torture, and killing of unarmed, non-threatening civilians would justify any of those war crimes.

We have detailed above, pp. 8-10, American foreign policy against looting affirmed by the London Declaration of 1943, in the criminal charges prosecuted at the Nuremberg Trials, and in the post-war requirement that Germany and Austria nullify all "transactions" relating to the dispossession of victims of Nazi persecution through the entire Nazi era. We have also stressed the importance of the Principles of the Washington Conference of 1998, the Vilnius Forum Declaration of 2000 and the Terezín Declaration of 2009. As demonstrated in the Washington Principles, nullifying the transactions requires transparency of provenance documents:

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives *should be open and accessible* to researchers... (emphasis added).
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.

MoMA has expressly and publicly agreed to these principles.⁴⁹ It should not now be heard to repudiate even the simplest of these directives. MoMA advertises on its own website its openness and willingness to provide the provenance documents to any serious researcher: “Please note that the Museum’s archival records for all collection works are open, as they always have been, to serious researchers.”⁵⁰ Moreover, MoMA’s website states:

In April 2000, The Museum of Modern Art's director, Glenn D. Lowry, joined other American museum directors to present testimony before The Presidential Advisory Commission on Holocaust Assets, reaffirming the museum community's commitment both to assist in the discovery of objects unlawfully appropriated during the Holocaust period and to make information on collection provenance more widely available.⁵¹

MoMA recognized the importance of access to documents relevant to provenance of Holocaust-era artworks – and so should federal courts.

Research into the facts of claims about Nazi-looted art is doubly difficult: at the outset the Nazis sought to hide the real nature of their theft; now the possessors of stolen art are typically reluctant to admit it. For these two reasons this Court should not allow any possessor of art with relevant

⁴⁹ The Museum of Modern Art, 2009, [The Provenance Research Project](http://www.moma.org/collection/provenance/), <http://www.moma.org/collection/provenance/>.

⁵⁰ Id.

⁵¹ Id.

information about provenance to refuse to disclose it in the normal course of discovery. MoMA's defense of "confidentiality" of documents within its possession leads ineluctably to an inference⁵² that this evidence does not support its claim to undisputed ownership of the art at issue in this case. The Court should require the "disinfectant" that Justice Brandeis understood to be best: "sunlight."⁵³

The return of property stolen by the Nazis is desired not only in high value cases that motivate federal litigation, but also for objects sought for cultural or sacred character (e.g., Torah scrolls) or for its association with family members murdered during the Holocaust (e.g., photographs). In his remarks at the opening of the Conference on Holocaust-Era Assets in Washington, D.C., in December of 1998, famous survivor Elie Wiesel noted:

The duty to remember covers not only big accounts, huge palaces, and rare art collections but also less wealthy families, small merchants, cobblers, peddlers, school teachers, water carriers, beggars; the enemy deprived them of their pathetically poor possessions, such as a prayer book, a shirt, a comb, eyeglasses, toys. In other words: the poor victims were robbed of their poverty.⁵⁴

As painful as the burden of this memory may be, we dare not forget.

⁵² In an appeal from dismissal on a 12(b)(6) motion, all reasonable inferences should be drawn against the moving party (Defendant-Appellee MoMA).

⁵³ Louis Brandeis, Other People's Money – and How Bankers Use It (1914).

⁵⁴ Elie Wiesel, "Foreword," *in* Eizenstat, supra note 2, at xi.

Conclusion

For the reasons stated above and in the briefs of the Plaintiffs-Appellants, the judgment of the district court should be reversed.

Respectfully submitted,

Edward McGlynn Gaffney, Jr. *
Valparaiso Univ. School of Law
656 S. Greenwich Street
Valparaiso, IN 46383
T: 219-465-7860
F: 219-465-7872
edgaffneyjr@gmail.com
**Counsel of Record*

Jennifer Anglim Kreder
Salmon P. Chase College of Law
Northern Kentucky University
Nunn Hall, Nunn Drive
Highland Heights, KY 41042
T: 859-572-5889
F: 859-572-5342
Krederj1@nku.edu

Attorneys for Amici Curiae

APPENDIX

APPENDIX A
Particular Statements of Interest of Amici Curiae

Organizations and Communities

The **American Jewish Congress** is a civil rights organization based in New York City, with several regional chapters throughout the country. It is motivated by the need to ensure the creative survival of the Jewish people, deeply cognizant of the Jewish responsibility to participate fully in public life, inspired by Jewish teachings and values, informed by liberal principles, dedicated to an activist and independent role, and committed to making its decisions through democratic processes. Its mission is to protect fundamental constitutional freedoms and American democratic institutions, particularly the civil and religious rights and liberties of all Americans and the separation of church and state; to advance the security and prosperity of the State of Israel and its democratic institutions, and to support Israel's search for peaceful relations with its neighbors in the region; to advance social and economic justice, women's equality, and human rights at home and abroad; to remain vigilant against anti-Semitism, racism, and other forms of bigotry, and to celebrate cultural diversity and promote unity in American life; and to invigorate and enhance Jewish religious, institutional, communal and cultural life at home and abroad, and seek creative ways to express Jewish identity, ethics and values.

The Commission for Art Recovery works in different countries to determine suitable solutions, legislative or otherwise, to the still unfinished business of returning art taken by the Nazis or as a result of their policies. In cooperation with lawyers, scholars, art experts, and other appropriate groups, we identify the best plans and help put them into practice; then we maintain an advisory role, monitoring progress and ensuring that research results are made public. Through negotiation, we encourage European governments to put into practice the Principles adopted at the Washington Conference on Holocaust-Era Assets in December 1998 and reinforced by the Declaration adopted at the Vilnius International Forum of Holocaust Era-Looted Cultural Assets in October 2000, and in the Terezín Declaration that concluded the Prague Conference on Holocaust-Era Assets in June of 2009. The Commission for Art Recovery favors amicable resolution of art-ownership disputes, but when this fails we have brought litigation against a government or an institution that is unreasonably resistant to legitimate claims for the return of stolen art.

Persons (Institutional Affiliation for Identification Purposes Only)

Filippa Marullo Anzalone is a Professor of Law and Associate Dean for Library and Technology Services at Boston College Law School in Newton, Massachusetts, where she teaches a seminar on Art Law.

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. Bazyler 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.

Donald S. Burris is senior partner in the firm of Burris, Schoenberg & Walden, LLP, in Los Angeles. He was co-counsel with his partner Randol Schoenberg in the landmark litigation, *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

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" (2000) and in the companion volume of the same title. She lives in St. Louis, and for decades she has been engaged in human rights and social justice issues, especially in fair housing in the Greater St. Louis Area. She has also been involved for decades in Holocaust education at all levels.

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).

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.

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.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 and 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.

Appendix B
Disposition of Federal Holocaust-Era Art Claims Since 2004
CASES LOST BY HOLOCAUST VICTIMS OR THEIR HEIRS

	Case Name	Case Number	Citation or Court in Which Pending	Disposition
1	<i>Grosz v. MoMA</i>	09-cv-3607	Appeal noticed to 2d Cir. from S.D.N.Y. Jan. 11, 2010 slip op.	Motion to dismiss granted after improper factual conclusions about when demand was refused.
2	<i>Bakalar v. Vavra</i>	08-5119-cv	Awaiting 2d Cir. Opinion on Appeal. Oral argument was Oct. 9, 2009, 2008 WL 4067335, at *6 (S.D.N.Y. Sept. 2, 2008)	Claimant lost after trial, incorrect exclusion of Holocaust art historian expert report, choice-of-law determination and interpretation of Swiss law analyzed in brief of <i>amici</i> .
3	<i>Boston MFA v. Seger-Thomschitz</i>	08-10097-RWZ	Appeal noticed to 1st Cir. from D.Mass. May 28, 2009 slip op.	Court granted museum's motion for summary judgment declaring its superior interest in painting.
4	<i>Dunbar v. Seger-Thomschitz</i>	08-711	Appeal noticed to 5th Cir. 2009 WL 1911008 (E.D.La. July 2, 2009).	Prescriptive ownership by present-day possessor under Louisiana law; motion for summary judgment granted.
5	<i>Westfield v. Germany</i>	Civ.A. 3:09-0204	Appeal noticed to 6 th Cir. 2009 WL 2356554 (M.D. Tenn., July 28, 2009).	Court ruled that Germany could not be sued under the Foreign Sovereign Immunity Act (FSIA) for any taking of property during the war without even citing <i>Bernstein</i> .
6	<i>Von Saher v. Norton Simon Museum of Art</i>	07-56691	Remanded from 9 th Cir. to C.D. Cal. 2009 WL 2516336, (9th Cir. Aug. 19, 2009).	Struck down all claims filed pursuant to California statute extending limitations period to 2010 and remanded to determine whether statute of limitations has run on common law conversion claim. Petition for <i>certiorari</i> filed with Supreme Court.
7	<i>Orkin v. Taylor</i>	05-55364	Petition for cert. to SCOTUS denied. 487 F.3d 734 (9th Cir. 2007).	Holocaust Victims Redress Act did not create a private right of action. State law claims barred by statute of limitations.
8	<i>Detroit Inst. of Arts v. Ullin</i>	06-10333	2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).	Declaratory judgment issued to museum and claimants' state law claims dismissed on statute of limitations grounds.
9	<i>Toledo Museum of Art v. Ullin</i>	3:06 CV 7031	477 F. Supp. 2d 802 (N.D. Ohio 2006).	Declaratory judgment issued to museum and claimants' state law claims dismissed on statute of limitations grounds (claim accrued in 1938 and expired in 1941, before the end of WWII).

CASE WON BY HOLOCAUST VICTIM OR HEIR IN FEDERAL COURT

Case Name	Case Number	Citation or Court in Which Pending	Disposition
<i>Vineberg v. Bissonnette</i>	08-1136	548 F.3d 50 (1st Cir. 2008).	Affirmed D. R.I. summary judgment in favor of claimant. Only case won by a claimant in federal court since 2004.

CASES SETTLED AFTER COMPLAINT FILED IN FEDERAL COURT

<i>Museum of Modern Art v. Schoeps</i>	07 CV 11074	549 F. Supp. 2d 543 (S.D.N.Y. 2008), 594 F. Supp. 2d 461 (S.D.N.Y. 2009).	Settled on eve of trial.
<i>U.S. v. One Oil Painting Entitled "Femme en Blanc" By Pablo Picasso</i>	CV 04-8333FMCAJWX	362 F.Supp.2d 1175 (Mar. 31, 2005).	Parties settled after the present-day possessor filed a declaratory judgment action against the claimant after removing the painting from California on the eve of a hearing on a temporary restraining order in the state court case filed by the claimant. The California trial court judge then dismissed the California state case for lack of subject matter jurisdiction. The U.S. government then filed this civil forfeiture action seizing the painting. Settled.
<i>Republic of Austria v. Altmann</i>	03-13	541 U.S. 677 (2004).	FSIA applies to allow jurisdiction over foreign sovereign regardless of whether the conduct at issue predates the FSIA. Claimant won after consenting to arbitration in Vienna.

CASES STILL PENDING IN DISTRICT COURT

<i>United States v. Portrait of Wally, A Painting by Egon Schiele</i>	99 Civ. 9940 (MBM)	2002 WL 553532 (S.D.N.Y. Apr. 12, 2002).	Civil forfeiture action filed after grand jury subpoena to seize painting was quashed in state court in 1998. Federal case has been pending since 1999. Trial set for 2010.
<i>Cassirer v. Spain</i>	CV 05-3459-GAF(CTX)	461 F. Supp. 2d 1157 (C.D. Cal. 2006).	Court denied Spain's motion to dismiss on FSIA grounds under the expropriation exception. Interlocutory appeal affirmed this ruling Sept. 8, 2009. Rehearing en banc Mar. 24, 2010.

See also #6 above.

Appendix C

Washington Principles on Holocaust-Era Assets (December 3, 1998)

<http://www.state.gov/www/regions/eur/holocaust/heacappen.pdf>

On December 3, 1998, 44 governments participating in the Washington Conference on Holocaust-Era Assets endorsed the following principles for dealing with Nazi-looted art.

In developing a consensus on non-binding principles to assist in resolving issues relating to Nazi-confiscated art, the Conference recognizes that among participating nations there are differing legal systems and that countries act within the context of their own laws.

1. Art that had been confiscated by the Nazis and not subsequently restituted should be identified.
2. Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives.
3. Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted.
4. In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era.
5. Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs.
6. Efforts should be made to establish a central registry of such information.
7. Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted.
8. If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case.
9. If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution.
10. Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership.
11. Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

**Appendix D. Prague Holocaust Era Assets Conference: Terezín Declaration
(June 30, 2009)**

Upon the invitation of the Prime Minister of the Czech Republic we the representatives of 46 states listed below met this day, June 30, 2009 in Terezín, where thousands of European Jews and other victims of Nazi persecution died or were sent to death camps during World War II. We participated in the Prague Holocaust Era Assets Conference organized by the Czech Republic and its partners in Prague and Terezín from 26-30 June 2009, discussed together with experts and non-governmental organization (NGO) representatives important issues such as Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution, Immovable Property, Jewish Cemeteries and Burial Sites, Nazi- Confiscated and Looted Art, Judaica and Jewish Cultural Property, Archival Materials, and Education, Remembrance, Research and Memorial Sites. We join affirming in this

Terezín Declaration on Holocaust Era Assets and Related Issues

- Aware that Holocaust (Shoah) survivors and other victims of Nazi persecution have reached an advanced age and that it is imperative to respect their personal dignity and to deal with their social welfare needs, as an issue of utmost urgency,
- Having in mind the need to enshrine for the benefit of future generations and to remember forever the unique history and the legacy of the Holocaust (Shoah), which exterminated three fourths of European Jewry, including its premeditated nature as well as other Nazi crimes,
- Noting the tangible achievements of the 1997 London Nazi Gold Conference, and the 1998 Washington Conference on Holocaust-Era Assets, which addressed central issues relating to restitution and successfully set the stage for the significant advances of the next decade, as well as noting the January 2000 Stockholm Declaration, the October 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets,
- Recognizing that despite those achievements there remain substantial issues to be addressed, because only a part of the confiscated property has been recovered or compensated,
- Taking note of the deliberations of the Working Groups and the Special Session on Social Welfare of Holocaust Survivors and their points of view and opinions which surveyed and addressed issues relating to the Social Welfare of Holocaust Survivors and other Victims of Nazi Persecution, Immovable Property, Nazi Confiscated Art, Judaica and Jewish Cultural Property, Holocaust Education, Remembrance and Research, which can be found on the weblink for the Prague Conference and will be published in the Conference Proceedings,
- Keeping in mind the legally non-binding nature of this Declaration and moral responsibilities thereof, and without prejudice to applicable international law and obligations,

1. Recognizing that Holocaust (Shoah) survivors and other victims of the Nazi regime and its collaborators suffered unprecedented physical and emotional trauma during their ordeal, the Participating States take note of the special social and medical needs of all survivors and strongly support both public and private efforts in their respective states to enable them to live in dignity with the necessary basic care that it implies.
2. Noting the importance of restituting communal and individual immovable property that belonged to the victims of the Holocaust (Shoah) and other victims of Nazi persecution, the Participating States urge that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress of property, which were part of the persecution of these innocent people and groups, the vast majority of whom died heirless.
3. Recognizing the progress that has been made in research, identification, and restitution of cultural property by governmental and non-governmental institutions in some states since the 1998 Washington Conference on Holocaust-Era Assets and the endorsement of the Washington Conference Principles on Nazi-Confiscated Art, the Participating States affirm an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions regarding cultural property, including Judaica that was looted or displaced during or as a result of the Holocaust (Shoah).
4. Taking into account the essential role of national governments, the Holocaust (Shoah) survivors' organizations, and other specialized NGOs, the Participating States call for a coherent and more effective approach by States and the international community to ensure the fullest possible, relevant archival access with due respect to national legislation. We also encourage States and the international community to establish and support research and education programs about the Holocaust (Shoah) and other Nazi crimes, ceremonies of remembrance and commemoration, and the preservation of memorials in former concentration camps, cemeteries and mass graves, as well as of other sites of memory.
5. Recognizing the rise of Anti-Semitism and Holocaust (Shoah) denial, the Participating States call on the international community to be stronger in monitoring and responding to such incidents and to develop measures to combat anti-Semitism.

The Welfare of Holocaust (Shoah) Survivors and other Victims of Nazi Persecution

Recognizing that Holocaust (Shoah) survivors and other victims of Nazi persecution, including those who experienced the horrors of the Holocaust (Shoah) as small and helpless children, suffered unprecedented physical and emotional trauma during their ordeal.

Mindful that scientific studies document that these experiences frequently result in heightened damage to health, particularly in old age, we place great priority on dealing with their social welfare needs in their lifetimes. It is unacceptable that those who suffered so greatly during the earlier part of their lives should live under impoverished circumstances at the end.

1. We take note of the fact that Holocaust (Shoah) survivors and other victims of Nazi persecution have today reached an advanced age and that they have special medical and health needs, and we therefore support, as a high priority, efforts to address in their respective states the social welfare needs of the most vulnerable elderly victims of Nazi persecution – such as hunger relief, medicine and homecare as required, as well as measures that will encourage intergenerational contact and allow them to overcome their social isolation. These steps will enable them to live in dignity in the years to come. We strongly encourage cooperation on these issues.

2. We further take note that several states have used a variety of creative mechanisms to provide assistance to needy Holocaust (Shoah) survivors and other victims of Nazi persecution, including special pensions; social security benefits to non-residents; special funds; and the use of assets from heirless property. We encourage states to consider these and other alternative national actions, and we further encourage them to find ways to address survivors' needs.

Immovable (Real) Property Noting that the protection of property rights is an essential component of a democratic society and the rule of law,

Acknowledging the immeasurable damage sustained by individuals and Jewish communities as a result of wrongful property seizures during the Holocaust (Shoah),

Recognizing the importance of restituting or compensating Holocaust-related confiscations made during the Holocaust era between 1933-45f and as its immediate consequence,

Noting the importance of recovering communal and religious immovable property in reviving and enhancing Jewish life, ensuring its future, assisting the welfare needs of Holocaust (Shoah) survivors, and fostering the preservation of Jewish cultural heritage,

1. We urge, where it has not yet been effectively achieved, to make every effort to provide for the restitution of former Jewish communal and religious property by either in rem restitution or compensation, as may be appropriate; and

2. We consider it important, where it has not yet been effectively achieved, to address the private property claims of Holocaust (Shoah) victims concerning immovable (real) property of former owners, heirs or successors, by either in rem restitution or compensation, as may be appropriate, in a fair, comprehensive and nondiscriminatory manner consistent with relevant national law and regulations, as well as international agreements. The process of such restitution or compensation should be expeditious, simple, accessible, transparent, and neither burdensome nor costly to the individual claimant; and we note other positive legislation in this area.

3. We note that in some states heirless property could serve as a basis for addressing the material necessities of needy Holocaust (Shoah) survivors and to ensure ongoing education about the Holocaust (Shoah), its causes and consequences.

4. We recommend, where it has not been done, that states participating in the Prague Conference consider implementing national programs to address immovable (real)

property confiscated by Nazis, Fascists and their collaborators. If and when established by the Czech Government, the European Shoah Legacy Institute in Terezín shall facilitate an intergovernmental effort to develop non-binding guidelines and best practices for restitution and compensation of wrongfully seized immovable property to be issued by the one-year anniversary of the Prague Conference, and no later than June 30, 2010, with due regard for relevant national laws and regulations as well as international agreements, and noting other positive legislation in this area.

Jewish Cemeteries and Burial Sites Recognizing that the mass destruction perpetrated during the Holocaust (Shoah) put an end to centuries of Jewish life and included the extermination of thousands of Jewish communities in much of Europe, leaving the graves and cemeteries of generations of Jewish families and communities unattended, and

Aware that the genocide of the Jewish people left the human remains of hundreds of thousands of murdered Jewish victims in unmarked mass graves scattered throughout Central and Eastern Europe,

We urge governmental authorities and municipalities as well as civil society and competent institutions to ensure that these mass graves are identified and protected and that the Jewish cemeteries are demarcated, preserved and kept free from desecration, and where appropriate under national legislation could consider declaring these as national monuments.

Nazi-Confiscated and Looted Art Recognizing that art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the Fascists and their collaborators through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 and as an immediate consequence, and

Recalling the Washington Conference Principles on Nazi-Confiscated Art as endorsed at the Washington Conference of 1998, which enumerated a set of voluntary commitments for governments that were based upon the moral principle that art and cultural property confiscated by the Nazis from Holocaust (Shoah) victims should be returned to them or their heirs, in a manner consistent with national laws and regulations as well as international obligations, in order to achieve just and fair solutions,

1. We reaffirm our support of the Washington Conference Principles on Nazi-Confiscated Art and we encourage all parties including public and private institutions and individuals to apply them as well,

2. In particular, recognizing that restitution cannot be accomplished without knowledge of potentially looted art and cultural property, we stress the importance for all stakeholders to continue and support intensified systematic provenance research, with due regard to legislation, in both public and private archives, and where relevant to make the results of this research, including ongoing updates, available via the internet, with due regard to privacy rules and regulations. Where it has not already been done, we also

recommend the establishment of mechanisms to assist claimants and others in their efforts,

3. Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders 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 to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property, in order to achieve just and fair solutions, as well as alternative dispute resolution, where appropriate under law.

Judaica and Jewish Cultural Property Recognizing that the Holocaust (Shoah) also resulted in the wholesale looting of Judaica and Jewish cultural property including sacred scrolls, synagogue and ceremonial objects as well as the libraries, manuscripts, archives and records of Jewish communities, and

Aware that the murder of six million Jews, including entire communities, during the Holocaust (Shoah) meant that much of this historical patrimony could not be reclaimed after World War II, and

Recognizing the urgent need to identify ways to achieve a just and fair solution to the issue of Judaica and Jewish cultural property, where original owners, or heirs of former original Jewish owners, individuals or legal persons cannot be identified, while acknowledging there is no universal model,

1. We encourage and support efforts to identify and catalogue these items which may be found in archives, libraries, museums and other government and non-government repositories, to return them to their original rightful owners and other appropriate individuals or institutions according to national law, and to consider a voluntary international registration of Torah scrolls and other Judaica objects where appropriate, and

2. We encourage measures that will ensure their protection, will make appropriate materials available to scholars, and where appropriate and possible in terms of conservation, will restore sacred scrolls and ceremonial objects currently in government hands to synagogue use, where needed, and will facilitate the circulation and display of such Judaica internationally by adequate and agreed upon solutions.

Archival Materials Whereas access to archival documents for both claimants and scholars is an essential element for resolving questions of the ownership of Holocaust-era assets and for advancing education and research on the Holocaust (Shoah) and other Nazi crimes,

Acknowledging in particular that more and more archives have become accessible to researchers and the general public, as witnessed by the Agreement reached on the archives of the International Tracing Service (ITS) in Bad Arolsen, Germany,

Welcoming the return of archives to the states from whose territory they were removed during or as an immediate consequence of the Holocaust (Shoah),

We encourage governments and other bodies that maintain or oversee relevant archives to make them available to the fullest extent possible to the public and researchers in accordance with the guidelines of the International Council on Archives, with due regard to national legislation, including provisions on privacy and data protection, while also taking into account the special circumstances created by the Holocaust era and the needs of the survivors and their families, especially in cases concerning documents that have their origin in Nazi rules and laws.

Education, Remembrance, Research and Memorial Sites Acknowledging the importance of education and remembrance about the Holocaust (Shoah) and other Nazi crimes as an eternal lesson for all humanity,

Recognizing the preeminence of the Stockholm Declaration on Holocaust Education, Remembrance and Research of January 2000,

Recognizing that the Universal Declaration of Human Rights was drafted in significant part in the realization of the horrors that took place during the Holocaust, and further recognizing the U.N. Convention on the Prevention and Punishment of the Crime of Genocide,

Recalling the action of the United Nations and of other international and national bodies in establishing an annual day of Holocaust remembrance,

Saluting the work of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF) as it marks its tenth anniversary, and encouraging the States participating in the Prague Conference to cooperate closely with the Task Force, and

Repudiating any denial of the Holocaust (Shoah) and combating its trivialization or diminishment, while encouraging public opinion leaders to stand up against such denial, trivialization or diminishment,

1. We strongly encourage all states to support or establish regular, annual ceremonies of remembrance and commemoration, and to preserve memorials and other sites of memory and martyrdom. We consider it important to include all individuals and all nations who were victims of the Nazi regime in a worthy commemoration of their respective fates,

2. We encourage all states as a matter of priority to include education about the Holocaust (Shoah) and other Nazi crimes in the curriculum of their public education systems and to provide funding for the training of teachers and the development or procurement of the resources and materials required for such education.

3. Believing strongly that international human rights law reflects important lessons from history, and that the understanding of human rights is essential for confronting and

preventing all forms of racial, religious or ethnic discrimination, including Anti-Semitism, and Anti-Romani sentiment, today we are committed to including human rights education into the curricula of our educational systems. States may wish to consider using a variety of additional means to support such education, including heirless property where appropriate.

4. As the era is approaching when eye witnesses of the Holocaust (Shoah) will no longer be with us and when the sites of former Nazi concentration and extermination camps, will be the most important and undeniable evidence of the tragedy of the Holocaust (Shoah), the significance and integrity of these sites including all their movable and immovable remnants, will constitute a fundamental value regarding all the actions concerning these sites, and will become especially important for our civilization including, in particular, the education of future generations. We, therefore, appeal for broad support of all conservation efforts in order to save those remnants as the testimony of the crimes committed there to the memory and warning for the generations to come and where appropriate to consider declaring these as national monuments under national legislation.

Future Action Further to these ends we welcome and are grateful for the Czech Government's initiative to establish the European Shoah Legacy Institute in Terezín (Terezín Institute) to follow up on the work of the Prague Conference and the Terezín Declaration. The Institute will serve as a voluntary forum for countries, organisations representing Holocaust (Shoah) survivors and other Nazi victims, and NGOs to note and promote developments in the areas covered by the Conference and this Declaration, and to develop and share best practices and guidelines in these areas and as indicated in paragraph four of Immovable (Real) Property. It will operate within the network of other national, European and international institutions, ensuring that duplicative efforts are avoided, for example, duplication of the activities of the Task Force for International Cooperation on Holocaust Education, Remembrance and Research (ITF).

Following the conference proceedings and the Terezín Declaration, the European Commission and the Czech Presidency have noted the importance of the Institute as one of the instruments in the fight against racism, xenophobia and anti-Semitism in Europe and the rest of the world, and have called for other countries and institutions to support and cooperate with this Institute.

To facilitate the dissemination of information, the Institute will publish regular reports on activities related to the Terezín Declaration. The Institute will develop websites to facilitate sharing of information, particularly in the fields of art provenance, immovable property, social welfare needs of survivors, Judaica, and Holocaust education. As a useful service for all users, the Institute will maintain and post lists of websites that Participating States, organizations representing Holocaust (Shoah) survivors and other Nazi victims and NGOs sponsor as well as a website of websites on Holocaust issues.

We also urge the States participating in the Prague Conference to promote and disseminate the principles in the Terezín Declaration, and encourage those states that are

members of agencies, organizations and other entities which address educational, cultural and social issues around the world, to help disseminate information about resolutions and principles dealing with the areas covered by the Terezín Declaration.

A more complete description of the Czech Government's concept for the Terezín Institute and the Joint Declaration of the European Commission and the Czech EU Presidency can be found on the website for the Prague Conference and will be published in the conference proceedings.

List of States: Albania, Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France FYROM, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Montenegro, The Netherlands, Norway, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, United States, Uruguay, The Holy See (observer), Serbia (observer)

APPENDIX E

Report of the AAMD Task Force on the Spoliation of Art during the Nazi/World War II Era (1933-1945)

June 4, 1998

AAMD Statement of Purpose: "The purpose of the AAMD is to aid its members in establishing and maintaining the highest professional standards for themselves and the museums they represent, thereby exerting leadership in increasing the contribution of art museums to society."

I. Statement of Principles

A. AAMD recognizes and deplors the unlawful confiscation of art that constituted one of the many horrors of the Holocaust and World War II.

B. American museums are proud of the role they, and members of their staffs, played during and after World War II, assisting with the preservation and restitution of hundreds of thousands of works of art through the U.S. Military's Monuments, Fine Arts and Archives section.

C. AAMD reaffirms the commitment of its members to weigh, promptly and thoroughly, claims of title to specific works in their collections.

D. AAMD urges the prompt creation of mechanisms to coordinate full access to all documentation concerning this spoliation of art, especially newly available information. To this end, the AAMD encourages the creation of databases by third parties, essential to research in this area, which will aid in the identification of any works of art which were unlawfully confiscated and which of these were restituted. Such an effort will complement long-standing American museum policy of exhibiting, publishing and researching works of art in museum collections in order to make them widely available to scholars and to the general public. (See III. below.)

E. AAMD endorses a process of reviewing, reporting, and researching the issue of unlawfully confiscated art which respects the dignity of all parties and the complexity of the issue. Each claim presents a unique situation which must be thoroughly reviewed on a case-by-case basis.

II. Guidelines

AAMD has developed the following guidelines to assist museums in resolving claims, reconciling the interests of individuals who were dispossessed of works of art or their heirs together with the fiduciary and legal obligations and responsibilities of art museums and their trustees to the public for whom they hold works of art in trust.

A. Research Regarding Existing Collections

1. As part of the standard research on each work of art in their collections, members of the AAMD, if they have not already done so, should begin immediately to review the provenance of works in their collections to attempt to ascertain whether any were unlawfully confiscated during the Nazi/World War II era and never restituted.

2. Member museums should search their own records thoroughly and, in addition, should take all reasonable steps to contact established archives, databases, art dealers, auction houses, donors, art historians and other scholars and researchers who may be able to provide Nazi/World-War-II-era provenance information.

3. AAMD recognizes that research regarding Nazi/World-War-II-era provenance may take years to complete, may be inconclusive and may require additional funding. The AAMD Art Issues Committee will address the matter of such research and how to facilitate it.

B. Future Gifts, Bequests, and Purchases

1. As part of the standard research on each work of art:

(a) member museums should ask donors of works of art (or executors in the case of bequests) to provide as much provenance information as possible with regard to the Nazi/World War II era and

(b) member museums should ask sellers of works of art to provide as much provenance information as possible with regard to the Nazi/World War II era.

2. Where the Nazi/World-War-II-era provenance is incomplete for a gift, bequest, or purchase, the museum should search available records and consult appropriate databases of unlawfully confiscated art (see III below).

(a) In the absence of evidence of unlawful confiscation, the work is presumed not to have been confiscated and the acquisition may proceed.

(b) If there is evidence of unlawful confiscation, and there is no evidence of restitution, the museum should not proceed to acquire the object and should take appropriate further action.

3. Consistent with current museum practice, member museums should publish, display or otherwise make accessible all recent gifts, bequests, and purchases thereby making them available for further research, examination and study.

4. When purchasing works of art, museums should seek representations and warranties from the seller that the seller has valid title and that the work of art is free from any claims.

C. Access to Museum Records

1. Member museums should facilitate access to the Nazi/World-War-II-era provenance information of all works of art in their collections.

2. Although a linked database of all museum holdings throughout the United States does not exist at this time, individual museums are establishing web sites with collections information and others are making their holdings accessible through printed publications or archives. AAMD is exploring the linkage of existing sites which contain collection information so as to assist research.

D. Discovery of Unlawfully Confiscated Works of Art

1. If a member museum should determine that a work of art in its collection

was illegally confiscated during the Nazi/World War II era and not restituted, the museum should make such information public.

2. In the event that a legitimate claimant comes forward, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.

3. In the event that no legitimate claimant comes forward, the museum should acknowledge the history of the work of art on labels and publications referring to such a work.

E. Response to Claims Against the Museum

1. If a member museum receives a claim against a work of art in its collection related to an illegal confiscation during the Nazi/World War II era, it should seek to review such a claim promptly and thoroughly. The museum should request evidence of ownership from the claimant in order to assist in determining the provenance of the work of art.

2. If after working with the claimant to determine the provenance, a member museum should determine that a work of art in its collection was illegally confiscated during the Nazi/World War II era and not restituted, the museum should offer to resolve the matter in an equitable, appropriate, and mutually agreeable manner.

3. AAMD recommends that member museums consider using mediation wherever reasonably practical to help resolve claims regarding art illegally confiscated during the Nazi/World War II era and not restituted.

F. Incoming Loans

1. In preparing for exhibitions, member museums should endeavor to review provenance information regarding incoming loans.

2. Member museums should not borrow works of art known to have been illegally confiscated during the Nazi/World War II era and not restituted unless the matter has been otherwise resolved (e.g., II.D.3 above).

III. Database Recommendations

A. As stated in I.D. (above), AAMD encourages the creation of databases by third parties, essential to research in this area. AAMD recommends that the databases being formed include the following information (not necessarily all in a single database):

1. claims and claimants

2. works of art illegally confiscated during the Nazi/World War II era

3. works of art later restituted

B. AAMD suggests that the entity or entities creating databases establish professional advisory boards that could provide insight on the needs of various users of the database. AAMD encourages member museums to participate in the work of such boards.

April 30, 2001

**Addendum
to the Report of the AAMD Task Force on the Spoliation of Art during the
Nazi/World War II Era (1933-1945)**

The Presidential Advisory Commission on Holocaust Assets in the United States has issued a report dated December 15, 2000. The Commission found that museums are committed to continuing provenance research on works in their collections and to disseminating the information obtained.

Specifically, the Commission acknowledged the commitment of the American museum community that (1) works created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period will be identified and disclosed and all provenance information in the possession of museums regarding those works be disclosed; (2) such provenance information will be disclosed, even where there are no known gaps; and (3) provenance research by museums will be a continuing process with additional information disclosed as it becomes known.

The Commission recognized that provenance research is difficult, expensive and time-consuming, often involving access to records that are hard or impossible to obtain, and that most museums lack the resources to accomplish this.

The Commission further found that the museum community has begun to develop tools to achieve full disclosure and will participate in the process of creating a searchable central registry of Nazi/World War II Era cultural property held by American museums, beginning with European paintings and Judaica.

Consistent with the report of the Commission, the Task Force issues the following addendum to its June 1998 report:

It should be the goal of member museums to make full disclosure of the results of their ongoing provenance research on those works of art in their collections created before 1946, transferred after 1932 and before 1946, and which were or could have been in continental Europe during that period, giving priority to European paintings and Judaica.

APPENDIX F

The Museum of Modern Art

July 20, 2005

Glenn D. Lowry
Director

Ralph Jentsch
Via Marianna Dionigi, 29
I-00193 Roma
Italy

Dear Ralph,

Please excuse my delay in responding to your letter of June 14, 2005 but I have been traveling and am only now catching up with my correspondence.

I enjoyed our recent meeting and continue to appreciate the frank and open dialogue that we have created together in order to deal with the Grosz estate's questions concerning the two paintings and one drawing of Grosz at the Museum of Modern Art that are under discussion.

I am concerned that we may have a different interpretation over some of what has been said in the last two years about these works and I want to clarify our position in order to avoid—given the importance of the issues under consideration—any confusion. We have, as you know, a fiduciary obligation to our collection. Before we remove a work from the Museum's collection, we need to establish convincing and conclusive evidence that another party – in this instance the Estate of George Grosz -- has ownership rights superior to the Museum's. Anyone seeking to challenge MoMA's ownership rights must prove his claim, not the other way around. For this reason, I think it is critical to state clearly that I never said – nor could I have said-- that MoMA would reconstitute the Grosz works if no documents could be found contradicting the documentation for your initial restitution claim.

That said, we appreciate the collegial manner in which we have worked with you and remain committed to continuing that process. I think it is fair to say that we have now reached a point where it appears that no more information currently available for us to consider, a point on which I sense, we both agree. We have, however, reached somewhat different conclusions about the results of our extensive study of the provenance of *Portrait of the Poet Max Herrman Neisse*: we believe that the available evidence does not lead to any definitive conclusion that challenges the Museum's ownership of the picture.

In fact, much of what we know argues in favor of MoMA's clear title. The Museum purchased the painting in good faith for a fair price in 1952 from a dealer who was a long-time friend of George Grosz. Grosz knew that the Museum had acquired the work. Indeed, Alfred Barr, another friend of Grosz, invited the artist to the Museum to sign the canvas. The Museum has now owned and exhibited *Max Herrmann Neisse* for more than a half century. Thus, while we are fully aware and take note of the artist's 1953 reference to a "stolen" picture – presumably *Max Hermann Neisse* – we urge that it must

be understood in the totality of all of the circumstances and all of the existing evidence and documentation.

In a spirit of friendship and recognition of the limitations on the present state of our knowledge about the provenance of this work, I suggested the possibility of shared ownership of *Max Herrmann Neisse* at our May 31 meeting. I did this not out of a conviction that the picture was tainted in some way, but because shared ownership would be a gracious, amicable means of addressing the fact that we may never be able to understand fully the work's history in the decades before the Museum purchased it in 1952.

Even more important, an agreement to share the picture would best serve George Grosz's artistic legacy. MoMA has demonstrated its commitment to this artist since the days of Alfred Barr's friendship with the artist in the 1930's. We want to continue to present Grosz's art in the context of the world's best modern and contemporary art, and we would be willing to share the picture so that the Grosz Foundation could present it in an appropriate manner, as well.

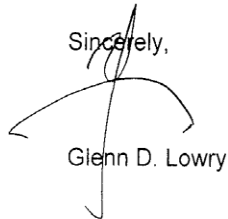
I proposed five or ten year benchmarks as opportunities for MoMA and the Grosz Foundation to review their positions and to consider any new information that might come to light. If further research produced conclusive facts, one way or another, either the Foundation or MoMA could withdraw its ownership claims. If no new or conclusive evidence comes to light, the shared arrangement could continue, more or less in perpetuity.

I think our greatest difference of opinion, however, concerns *Self-Portrait with a Model*. Although we are aware of the restitution of a painting with similar provenance, based on the material that you have shared with us, and on our own extensive research—much of which we have done in collaboration with Yale University-- we cannot reach the conclusion that restitution of either of this picture, or of the drawing, *Republican Automaton*, would be appropriate at this time.

Our goal, like yours, is to do what is right and to do so in a manner that best serves the needs of George Grosz. To this end, I think the best course of action would be for us to meet together with Peter Grosz and his brother, if he is available, to review the facts and determine an appropriate course of action. I have taken the liberty of talking to Peter, who is amenable to such a discussion. We agreed that the early fall would be an appropriate time for us to get together. I have asked my office to take the lead in setting up a meeting for us and look forward to seeing you then.

With best wishes for a pleasant summer,

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn D. Lowry". The signature is written in a cursive style with a large, sweeping initial "G".

Glenn D. Lowry

P. Grosz

The Museum of Modern ArtGlenn D. Lowry
Director

January 18, 2006

Ralph Jentsch
Via Marianna Dionigi, 29
I-00193 Roma
Italy

Dear Ralph,

I am writing in response to your three letters dated January 5, 2006, as well as an additional letter dated January 17. As I have told you many times, including at our meeting in early January, any decision on a matter like this must be considered by the Museum's Trustees. Accordingly, I want to advise you about the Museum's intended course of action prior to the Board's determination and also to clarify certain points raised by your correspondence. Additionally, I take issue with your characterization of the content of our discussions; random snippets cannot possibly convey the substance of a four-hour meeting, even if you had quoted accurately and in proper context, which you have failed to do.

For more than two years, The Museum of Modern Art has done precisely what I promised we would do when I first wrote to you in December 2003: thoroughly research the provenance of *Portrait of the Poet Max Hermann-Neisse* and *Self-Portrait With Model*. Our research has involved several staff curators as well as third parties. One of these researchers, Laurie Stein, is a respected authority on German provenance research and was a consultant for Switzerland's Independent Expert Commission -Second World War II (the Bergier Commission). MoMA's researchers have broken considerable new ground in culling through voluminous records in archives, libraries, galleries, and law firms in the United States and Europe. We shared all of our findings with you.

MoMA has acted and will continue to act in a responsible, measured manner in considering the Grosz heirs' claim. We do not believe that you have acted likewise. Incomprehensibly, you refused to allow Ms. Stein to be present for our December meeting, significantly handicapping a full discussion of the facts. Your unwillingness to discuss the facts openly and frankly is disappointing because it contradicts your agreement that it is necessary and appropriate to do so. You have now imposed a February 3 "deadline" for the Museum to surrender the two pictures, despite several proposals that could have resolved this situation, including binding arbitration or mediation, or temporary joint ownership pending further research. The demands of scholarship cannot and should not be defined by an artificially imposed deadline.

On the facts as we now understand them, your assertion of title in *Max Hermann-Neisse* and *Self-Portrait With Model* is unsubstantiated. The Museum, mindful of its obligation to the public trust and its historical commitment to the art of George Grosz, cannot respond favorably to claims based on the unsupported assumptions and assertions that you present as fact.

Grosz himself understood and appreciated the Modern's commitment to his art. The first drawing MoMA ever purchased, in 1929, was by George Grosz. The Museum's first Director, Alfred Barr, met the artist in the late twenties in Berlin and maintained the acquaintance for decades. The facts strongly support not only the Museum's belief that it has good title to these pictures, but also the artist's knowledge and satisfaction that they were in MoMA's collection. *Self-Portrait With Model*, for example, was given to the Museum in 1954 by an acquaintance of Grosz, a Dutch émigré named Leo Lionni. (In light of your concerns about the low auction price in Amsterdam in 1938, it is worth noting that the painting failed to sell for \$115 at a 1951 Parke Burnett auction; the Amsterdam price, reached during the Depression and at a time when Grosz's work was often not selling at any price, is not that far from the price level during New York's post war prosperity.)

MoMA 11 West 53 Street, New York, NY 10019-5497 Tel: (212) 708-9773 Fax: (212) 708-9744 glenn_lowry@moma.org

19-JAN-2006 20:23

S.02

DBM0000891

The Museum purchased *Max Herrmann-Nelisse* for a fair price from Charlotte Weidler, who supported the work of contemporary European artists. Curt Valentin, who worked for many years with Alfred Flechtheim, Grosz's one-time dealer and a man well known to Grosz, handled the sale. The Museum immediately placed the picture on public view and tried to arrange for the artist to come to the Museum to sign the painting. Grosz was living in New York City at the time. In this context, any concerns about the painting's ownership could have been quickly and easily resolved by informing Barr—or Valentin. But Grosz said nothing, and more than a half-century later you present a passing reference to a "stolen" picture in a pair of rambling 1953 letters to third parties in Europe as proof positive of his ownership, when all of the knowledgeable parties are long dead and whatever records might have existed are immeasurably more difficult to locate.

In fact, there is not a shred of evidence that the painting was "stolen." Apart from the quizzical 1953 reference, never uttered before or again, nothing in the artist's voluminous records or correspondence so much as hints at foul play with this or any other painting. Neither the artist nor his heirs mentioned this painting in restitution claims asserted after the war (despite the fact that the restitution commission repeatedly asked Grosz for more detail so that they could expedite his claim, and despite the fact that his sons later pursued the claim as adults).

The Museum of Modern Art has demonstrated that it is willing to engage in serious, scholarly provenance research on works in its collection. We have further demonstrated that, where the facts support it, we are willing and able to conclude that a claim is legitimate and that someone else has an ownership right superior to the Museum's. In 1999, for example, after several years of research and discussions, we were persuaded by the factual record that heirs of the Russian artist Kazimir Malevich had a credible claim to works in our collection and resolved the claim.

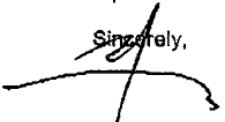
No such compelling facts exist in this instance. Notwithstanding that, and beyond our considerable efforts to research the Grosz works and to treat your inquiries with respect and diligent attention, the Museum intends to take another important step. The Museum's Board of Trustees has commissioned a third party of unquestionable integrity, without any prior connection to MoMA, to review the totality of the facts and to report on an appropriate course of action. We take this extraordinary step not out of any sense of uncertainty about our conclusions, or any wavering in our resolve, but rather to obtain an intelligent, candid, independent assessment of the situation.

The individual invited to perform this review is Nicholas Katzenbach, former United States Attorney General and Under Secretary of State. We will provide Mr. Katzenbach unlimited access to our records and research, including all of the material provided by you. We have encouraged him to speak with whomever he wishes, and to seek any additional information he thinks relevant.

Despite your previous refusal to engage in mediation, arbitration, or any of the other potential means of resolution suggested by the Museum, I very much hope that you will make time to speak with Mr. Katzenbach and present the facts as you see them.

In view of the foregoing, the Museum of Modern Art has determined not to respond to your ultimatum, but will follow the course of action described above. Please be advised that I do not intend to communicate with you until after the Museum's Trustees receive Mr. Katzenbach's report and have made a decision.

Sincerely,



Glenn D. Lowry

cc: Martin Grosz ✓
Peter Grosz ✓

The Museum of Modern Art

Glenn D. Lowry
Director

April 12, 2006

BY FAX 011 (39 06 32110163)

Ralph Jentsch
Via Marianna Dionigi, 29
I-00193 Roma
Italy

Dear Ralph,

I wrote to you on January 18 about our intention to engage Nicholas Katzenbach, a former United States Attorney General, to provide MoMA's trustees with an independent analysis and recommendation regarding your claim to two George Grosz paintings in the Museum's collection. Our decision to do this followed more than two years of shared research and discussions, including your rejection of our offers to share ownership or to refer the matter to mediation or arbitration.

Mr. Katzenbach has now completed his review and presented his report. I enclose a copy. The Museum's Board of Trustees has unanimously decided to accept Mr. Katzenbach's report and to abide by its findings. Accordingly, the Museum of Modern Art rejects your demand for *Portrait of the Poet Max Hermann-Neisse* and *Self-Portrait with Model*. The Museum remains open to further discussion in the event that material new information emerges.

Sincerely,



Glenn D. Lowry

cc: Peter Grosz (by mail)
Martin Grosz (by mail)

CERTIFICATE OF SERVICE

The undersigned counsel certifies that, on June 22, 2010, she caused to be served the Brief of Amici Curiae upon:

Ms. Margaret Dale
Proskauer Rose LLP
1585 Broadway
New York, NY 10036-8299
Counsel for Defendant-Appellee

David Rowland, Esq.
Rowland and Petroff
2 Park Avenue
New York, New York 10016
Counsel for Plaintiff-Appellant

Raymond Dowd
Dunnington, Bartholow & Miller LLP
1359 Broadway, Suite 600
New York, New York 10018
Counsel for Plaintiff-Appellant

by transmitting a PDF via email and sending one courtesy copy via 1st class mail, prepaid. The required number of copies of the Brief were sent via Fed Ex and email to the Clerk of Court on June 22, 2010.

/s/

Jennifer A. Kreder