Supreme Court, U.S.
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No. 10-1385

In The Supreme Court of the United States

MARTIN GROSZ and LILIAN GROSZ,

Petitioners,

v.

THE MUSEUM OF MODERN ART,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly affirmed the district court's decision in a diversity case dismissing plaintiffs' state law claims on state law grounds.

2. Whether a writ of certiorari should issue to review a straightforward application of New York law, when the putative questions presented were neither presented to nor decided by the lower courts, and none of the reasons for granting review specified in S. Ct. Rule 10 apply.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, The Museum of Modern Art states that it is an educational, not-for-profit organization, has no parent corporation(s) and there are no publicly-held corporations that own ten (10) percent or more of its stock.

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RESPONDENT'S BRIEF IN OPPOSITION

The Museum of Modern Art respectfully requests the Court deny the petition for a writ of certiorari to review the unpublished decision of the United States Court of Appeals for the Second Circuit, which unanimously affirmed the district court's dismissal of state law claims as time-barred under New York law.

STATEMENT OF THE CASE

1. New York law applies a three year statute of limitations period to every "action to recover a chattel or damages for the taking or detaining of a chattel." N.Y. C.P.L.R. 214(3). The action accrues, commencing the three year period, when the chattel-owner's demand is refused by a good faith possessor. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 317-18 (1991); *Menzel v. List*, 49 Misc. 2d 300, 304 (N.Y. Sup. Ct. 1966). "[A] refusal need not use the specific word 'refuse' so long as it clearly conveys an intent to interfere with the demander's possession or use of his property." *Feld v. Feld*, 279 A.D.2d 393, 395 (1st Dep't), *appeal denied*, 96 N.Y.2d 717 (2001).

2. This is an action for various state law conversion-related claims to obtain three works of art that have been in the possession of The Museum of Modern Art ("MoMA") for nearly 60 years. Petitioners Martin and Lilian Grosz allege that they are the only living heirs of the late artist George Grosz, and that Grosz consigned those three works

to his dealer, Alfred Flechtheim, sometime before a dispute arose between them in the early 1930s. Pet. App. 38a-39a. On January 12, 1933, Grosz emigrated with his wife and sons from Germany to New York, where he lived until 1959, teaching at the Art Students League. IA32 ¶ 46; IA340 ¶ 34.[1] He continued to correspond with Flechtheim, who also left Germany in 1933, regarding the works in Flechtheim's possession. Pet. App. 39a; IA42 ¶ 101. Flechtheim died in London in 1937, allegedly never having accounted to Grosz for the works. Pet. App. 40a. Grosz continued to live and work in New York for more than two decades, eventually returning to Germany, where he died in July 1959. Pet. App. 45a.

Each of the three works at issue followed a different path to MoMA, which has owned them (and intermittently displayed them) since the early 1950s. Pet. App. 40a-43a; IIA27. During his lifetime, Grosz knew MoMA had the works – the Complaint itself recites Grosz's knowledge that MoMA owned and was exhibiting one of the works (Pet. App. 45a), and subsequent discovery established knowledge of the other two works in 1947 and 1981 (IIA46), *see infra* at n. 9 – but neither Grosz nor his heirs made demand or did anything to recover them. Grosz submitted lengthy post-war compensation claims to Germany for damages for loss of assets and property during the

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[1] Citations to IA# or IIA# refer to pages of the first or second volume of the Second Circuit Joint Appendix.

war, which lacked any mention of the three works in suit. IA43 ¶¶ 108-109; IA165.

On November 24, 2003, more than fifty years after Grosz saw one of the works at issue here, *Portrait of the Poet Max Herrmann Neisse* (1927), at MoMA, petitioners' representative, Ralph Jentsch, wrote to MoMA demanding MoMA give petitioners the three works at issue. Pet. App. 45a. The Complaint attaches that demand letter (IA182) and an April 12, 2006 letter from MoMA (IA185), but none of the intermediate letters between the parties, each transmitted prior to April 2006, which confirm that MoMA had refused petitioners' demand more than three years before they filed the instant suit against MoMA on April 10, 2009.

3. MoMA moved to dismiss the Complaint as time-barred under New York's three-year statute of limitations. Invoking New York's "demand-and-refusal" rule, MoMA demonstrated that it had refused petitioners' demand no later than July 20, 2005, and consequently petitioners' claims had been barred for nine months by the time they filed suit. With its motion, MoMA submitted four intermediate letters between the parties that the Complaint had omitted. Opposing the motion, plaintiffs submitted additional intermediate letters in the correspondence, and did not challenge the submission of any of the letters MoMA submitted, or their authenticity. Contrary to petitioners' assertion otherwise (Pet. 4), the district court expressly found that plaintiffs never objected to the court's consideration of the back-and-forth

correspondence between the parties after the demand. Pet. App. 21a.[2]

While the motion was pending, discovery proceeded. At the end of discovery, a week before MoMA was set to file its motion for summary judgment, the district court granted MoMA's pending motion to dismiss on the ground that the claims were untimely under New York's three year statute of limitations. Pet. App. 13a. The court held that plaintiffs' claims had accrued not later than MoMA's July 20, 2005 letter, holding that as of that date "no reasonable person could have concluded that MoMA agreed with plaintiffs' assertion that they were the rightful owners of the Paintings." Pet. App. 57a. The court relied as well on correspondence from Mr. Jentsch in January 2006, which "make it clear beyond peradventure that Jentsch understood that plaintiffs' demand had been refused." Pet. App. 60a-61a.

Two weeks after the court granted the motion to dismiss, petitioners moved to amend their now-dismissed Complaint and for reconsideration. Petitioners raised several novel (and therefore waived) arguments, including an objection to the district court's consideration of the correspondence. IA16-17 (docket items 61-66). The court denied that motion on

[2] Indeed, plaintiffs themselves annexed the July 20, 2005 letter, which the district court held dispositive (Pet. App. 13a), and other equally dispositive letters, to their proposed Second Amended Complaint. *See* IIA470 ¶¶ 137, 139; *see also* Pet. App. 24a n.3.

March 3, 2010 (Pet. App. 7a-32a), noting, among other things, that petitioners had not objected to MoMA's submission of the intermediate correspondence; had not argued that it was not "integral to the Complaint"; had themselves submitted additional intermediate correspondence; and had at no time argued that the court would have to convert the motion to one for summary judgment in order to consider that correspondence. Pet. App. 10a, 21a-24a. In view of the concession of petitioners' representative Ralph Jentsch, on deposition, that he had "reach[ed] the conclusion that MoMA was not returning these works of art" by July 20, 2005 (Pet. App. 27a, 29a), the district court denied the motion to amend as futile (Pet. App. 30a).

4. On appeal to the Second Circuit, petitioners argued that the district court had incorrectly applied New York's three-year limitations period, again raising new theories not previously raised. By summary unpublished order, the court of appeals rejected petitioners' arguments. The court agreed with the district court's reasoning that the action was time-barred because petitioners did not bring suit within three years of refusal, which took place, at the latest, on July 20, 2005. Pet. App. 4a.[3] A petition for

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[3] The Second Circuit did not reach various alternative or additional grounds establishing that the action was time-barred, including:

a. that under New York law, the delay for 55 years after Grosz knew that his work was in MoMA's

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rehearing and rehearing en banc were summarily denied. Pet. App. 67a.

REASONS FOR DENYING THE PETITION

Review is unwarranted because petitioners asserted only state law claims in their diversity action, and the Second Circuit's affirmance of the district court's dismissal rested squarely on New York law. The purported federal issues framed in the

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collection on display made the claim untimely, *see Lubell*, 77 N.Y.2d at 318 (noting the long-established rule), *aff'g* 153 A.D.2d 143, 147 (1st Dep't 1990); *SongByrd Inc. v. Estate of Grossman*, 206 F.3d 172, 183 (2d Cir.) (delay in withholding demand for seventeen years "was clearly unreasonable" where the plaintiff has actual knowledge of the facts necessary to make a demand"), *cert. denied*, 531 U.S. 824 (2000); *Herrington v. Verrilli*, 151 F. Supp. 2d 449, 461 (S.D.N.Y. 2001) (holding 5-year delay in demand unreasonable and dismissing claim); *Heide v. Glidden Buick Corp.*, 188 Misc. 198 (1st Dep't 1947) (cited approvingly in *Lubell*, holding 15-year delay in demand unreasonable and dismissing claim);

b. additional letters referenced in or integral to the Complaint, including one submitted by plaintiffs, which also confirmed that there had been a clear rejection, understood by plaintiffs, by dates that rendered the claim time-barred as well; and

c. the fact that plaintiffs' claims had in fact been barred long ago by operation of foreign law.

"Questions Presented" are recent, strained inventions that were neither presented to nor decided by the courts below.

Contrary to the first question presented, there is no conflict whatever with *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). That case involved the scope and meaning of the Foreign Sovereign Immunities Act, not, as here, the application of a state law statute of limitations to a state law replevin and conversion action. Petitioners' suggestion of disparate treatment of domestic and foreign museums is a fantasy (which they are ill-suited to complain of), and in any event they never complained of disparate treatment (or cited *Altmann*) on appeal.

Nor is there any conflict between the alleged reliance of U.S. foreign and domestic policy on U.S. courts to restitute stolen property (in fact, Congress has not expanded federal court jurisdiction over such cases beyond what diversity and federal question jurisdiction would provide) and the alleged "collective unwillingness of federal courts to permit claimants access to the federal courts" (which is simply petitioners' characterization of the fact that such claims do not always succeed). *See* Pet. at 6 (Point I). Indeed, that entire formulation is incoherent. No federal question is presented by a federal court's alleged misapplication of state limitations law to a state law claim.

Nor did the courts below deny plaintiffs "access to the federal courts." They afforded plaintiffs repeated opportunities to press their diversity claims. The conclusion that the Complaint failed to state a good claim for relief, reached after months of briefing and full discovery, rested squarely on New York's statute of limitations generally applicable to replevin or conversion claims (which not incidentally has repeatedly been recognized to be more *favorable* to claimants than any other, and petitioners could not surmount even that modest hurdle), not on denial of access.[4] No federal issue is raised by the application of New York's limitations bar in a diversity case governed by New York law, even if that application were incorrect (which it was not).

I. THERE IS NO CONFLICT WITH *REPUBLIC OF AUSTRIA V. ALTMANN*

Nothing in the opinions below – in either the district court's holding that plaintiffs' claims were time-barred under New York's statute of limitations or the Second Circuit's affirmance of those "thoughtful and comprehensive" opinions[5] – conflicts with

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[4] *See Lubell*, 77 N.Y.2d at 318 (recognizing that "[w]hile the demand and refusal rule is not the only possible method of measuring the accrual of replevin claims, it does appear to be the rule that affords the most protection to the true owners of stolen property.").

[5] The Second Circuit panel included two judges with notable experience, and sensitivity to claimants, in similar cases. *See, e.g., Bakalar v. Vavra*, 619 F.3d 136 (2d Cir. 2010)

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Altmann. Plaintiffs never relied on *Altmann* (which addressed the scope of jurisdiction over foreign states under the Foreign Sovereign Immunities Act), and never contended that *Altmann* had any bearing on the New York statute of limitations issue presented by the motion. They never complained that *Altmann* rendered the district court's dismissal erroneous, and never asserted that they (or even MoMA) had been subjected to disparate treatment. No issue of alleged disparate treatment of domestic museums (as compared to foreign museums) was raised or decided below, and therefore none is presented here.

Although petitioners contend (at 26) that "the Second Circuit's sanction of use of extrinsic evidence to dismiss claims against a U.S. museum frustrates federal restitution policy and promotes a procedural standard that lacks uniformity," they do not identify any decisions of other courts of appeals (or this Court) that conflict with the standards identified and applied below (Pet. App. 23a, 36a), and none do.[6]

(Cabranes and Korman, JJ.) (reversing district court judgment for persons holding painting allegedly confiscated by Nazi Germany); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (Korman, J.), *aff'd*, 413 F.3d 183, 186, 14 Fed. Appx. 132 (2d Cir. 2001) (Cabranes, J.).

[6] *See* 2-12 Moore's Federal Practice – Civil § 12.34[2], n. 35 (citing decisions from courts of appeals of the First, Second, Sixth, Seventh and Ninth Circuits holding that courts may consider documents incorporated in the complaint on a motion to dismiss even if plaintiff failed to attach it to his complaint). A long line of Second Circuit authority supports reliance on the

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Even if there were a conflict with *Altmann*, moreover, this case would not be an appropriate vehicle for resolving it, because plaintiffs never raised this procedural argument in briefing on the motion to dismiss, and as the district court held on rehearing, waived it by their own submission of portions of that correspondence and their complaint's reliance on the correspondence, which made it integral to the complaint. *See* Plaintiffs' Opposition to the MTD (S.D.N.Y. docket 23) at 10-12, 22-23; Pet. App. 23a-24a, 36a.

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back-and-forth correspondence which the Complaint selectively attached, including, *e.g.*, *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 44 (2d Cir. 1991) ("Plaintiffs' failure to include matters of which as pleaders they had notice and which were integral to their claim – and that they apparently most wanted to avoid – may not serve as a means of forestalling the district court's decision on the motion."), *cert. denied sub nom. Cortec Indus. v. Westinghouse Credit Corp.*, 503 U.S. 960 (1992); *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000) (allowing consideration of "documents that the plaintiffs either possessed or knew about and upon which they relied in bringing the suit"); *Yak v. Bank Brussels Lambert*, 252 F.3d 127, 130-31 (2d Cir. 2001) (holding that where plaintiffs' complaint rests on the belief that certain Consulting Agreements "were voided . . . , [c]arefully avoiding all mention of the Consulting Agreements does not make them any less integral to her complaint"); *L-7 Designs, Inc. v. Old Navy, LLC*, ___ F.3d ___, No. 10-573-CV, 2011 WL 2135734, at *1 (2d Cir. June 1, 2011) (consideration of emails appropriate because they were "integral" to the negotiation exchange on which the complaint was based).

II. THERE IS NO CONFLICT WITH "U.S. FOREIGN AND DOMESTIC POLICY ON U.S. COURTS TO RESTITUTE STOLEN PROPERTY"

Petitioners attempt to piggyback on *Von Saher v. Norton Simon Museum of Art*, No. 09-1254 (*cert. pending*, filed Apr. 14, 2010), in which the views of the Solicitor General have been requested (and were received on May 27, 2011), but the decision below would not be affected even if this Court were to review the Ninth Circuit's judgment in *Von Saher* over the Solicitor General's opposition, or by any conceivable resolution of that case if review were granted.

The question posed in *Von Saher* is whether § 354.3 of the California Code of Civil Procedure, a special statute of limitations applicable only to "Holocaust-era artwork,"[7] is preempted, and if so whether that issue should be decided under principles of field preemption or conflict preemption. Here, the courts below applied a general statute of limitations. Plaintiffs never argued that New York's statute

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[7] Section 354.3(b) provides in pertinent part:

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

of limitations was preempted, and to the contrary expressly successfully argued for its application.[8]

Neither *Von Saher,* nor its predecessors, *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), conflict with the decision below, or suggest that the ordinary state law rules applicable under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), could be held preempted because of the vaguely identified "federal policy" to which plaintiffs appeal. Whatever "U.S. policies" plaintiffs have in mind that bear on restitution for victims of Nazi theft and duress, one thing is certain: Congress has never provided that a defined category of diversity cases involving charges of Nazi theft or duress should be carved out from *Erie* and governed not by the state rules of decision that Congress has made applicable under the Rules of Decision Act, but by judge-made federal law.[9] The preemption issue on which plaintiffs

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[8] As the district court recognized, plaintiffs alleged the timeliness of their claims by affirmatively pleading demand and refusal, which (contrary to plaintiffs' argument (at 26)) are substantive elements of a conversion claim against a possessor in good faith. *See* Pet. App. 22a-23a.

[9] Nor is this case a plausible candidate for the special federal rule they urge, since the transfers to Flechtheim central to the claims occurred in the 1920s and the record makes plain that Grosz and his sons had notice that the artworks were at MoMA for decades before they filed suit, and that the untimeliness of their claims results from their own lack of diligence, not from Nazi coercion. George Grosz moved to New York in 1933 and lived in Queens and Long Island until his departure for

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seek review is not plausibly a basis for grant of review, when plaintiffs never argued preemption below and sought the application of New York law, not some as-yet-unidentified special federal limitations rule contrary to the Rules of Decision Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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West Berlin in 1959 months before his death, teaching at the Art Students League. The Complaint concedes that Grosz himself saw *Poet* at MoMA in 1953, and letters produced in discovery establish that Grosz knew by 1947 that *Republican Automatons* (1920) had been sold to MoMA and that Grosz's son knew by 1981 that *Self-Portrait with Model* (1928) had been donated to MoMA. Pet. App. 45a; IIA46.

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