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

REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

Petitioners Lillian and Martin Grosz respectfully submit this Reply Brief to address new points raised in the Opposition Brief of Respondent Museum of Modern Art ("MoMA").

MoMA argues that the Petition, involving an appeal from the pre-answer dismissal of an action for replevin and impressment of a constructive trust to reclaim artworks stolen in the Nazi era prior to World War II, presents no federal questions. MoMA argues that the Petition raises only a claim of error in the application of state law to state claims and that the Petition impermissibly attempts to "piggyback" on the petition of certiorari pending in *Von Saher v. Norton Simon Museum of Art,* Docket No 09-1254. This Court invited the views of the Solicitor General in that case. 131 S. Ct. 379 (Oct. 4, 2010). Further, MoMA argues that Petitioners seek to create a federal "judge-made" rule carving out Nazi theft or duress claims. Pet. Opp. 12.

Petitioners seek this Court's review in this case as a result of an erroneous application of the Federal Rules of Civil Procedure that raises compelling federal issues of federal law in three aspects that merit review by this Court under Supreme Court Rule 10(a) and 10(c) for the following reasons. First, the Second Circuit's decision conflicts with this Court's decision in *Republic of Austria v. Altmann.* Second, the Second Circuit approved the use of F.R.Civ.P. 12(b)(6) as an instrument to rewrite and nullify a New York State limitations doctrine approved by New York State's court of last resort by substituting a new "judge-made" federal restitution standard that

would deprive similarly situated claimants of common law remedies of equitable estoppel and equitable tolling, which—for the reasons set forth in the Petition and in this Reply and in conjunction with *Von Saher v. Norton Simon Museum of Art*, certiorari pending—present significant federalism issues warranting review by the Court. Third, the Second Circuit endorsed the use of Rule 12(b)(6) at the pre-answer motion stage as an instrument to dismiss Nazi art restitution cases in a way that abrogates common law remedies inconsistent with Executive policies and Congress's legislative scheme in the Holocaust Victims Redress Act of 1998 which relies on those remedies and poses separation of powers conflicts that this Court should review.

By erroneously construing Rule 12(b)(6) of the Federal Rules of Civil Procedure to permit disputed issues of fact to be resolved on a pre-answer motion, the Second Circuit Court of Appeals has arrived at both a procedure and a result conflicting with U.S. domestic and foreign policy mandating claimants to pursue common law remedies for the return of art stolen during the Nazi era. Rules 12(d) and 56 of the Federal Rules of Civil Procedure provide the procedural safeguards necessary to preserve claimant rights, and this case represents a judicial shortcut that abrogates both those federal safeguards, achieves results inconsistent with state law and this Court's precedent, and, as here, will result in a windfall of stolen art to U.S. museums. Pet. 24, 26.

In light of the foregoing, this case is an appropriate vehicle for resolution by this Court of recurring federal questions of national and international significance regarding the adjudication of restitution claims involving

art stolen by the Nazis during the reign of the National Socialist Party in Germany.

I. There Is A Conflict With *Republic of Austria v. Altmann* That Requires Review

Respondent argues that the Second Circuit's decision does not conflict with *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Respondent mischaracterizes the Petition as arguing the misapplication of a "state statute of limitations to a state law replevin and conversion action." Pet. Opp. 7. But as explained in the Petition, and contrary to Respondent's assertion, this case presents the purely federal legal question of whether a federal court may rely on extrinsic, disputed materials to decide disputed issues of fact on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure in a case against a museum located in the United States where *Altmann* applied a different standard to a foreign museum. *See* Pet. i.

The extent to which a federal judge may construct facts not found on the face of the complaint nor supported by testimony, documentary evidence, or subjected to the adversarial process is a pure and elemental question of federal law. *Altmann* mandates that on a motion to dismiss under F. R. Civ. P. Rule 12(b)(6), the facts in the complaint are assumed to be true and all inferences to be drawn in favor of the plaintiff. In this case, however, the District Court and the Second Circuit did not take the facts alleged in the complaint as true and did not draw all inferences in favor of plaintiff, but instead made findings of fact and credibility determinations, weighed evidence, and drew inferences in favor of Defendant while acknowledging that

Defendant "temporized" its alleged refusal to delay and persuade Petitioners not to sue. Pet. App. 57a. The Second Circuit's decision—which allowed disputed findings of fact based on inadmissible settlement communications not referenced in the complaint to accrue a statute of limitations—bypassed the important protection of F. R. Civ. P. 12(d) requiring a federal court to give notice to the plaintiff and convert a motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure, into a motion for summary judgment before considering extrinsic documents and deciding disputed issues of fact.

Since the Second Circuit's decision conflicts with *Altmann* in a fashion that presents conflicting standards for foreign and U.S. museums, review is warranted.

II. Federalism Conflicts Presented Require Review

In its Opposition Brief, MoMA characterizes as a question purely of state law the Second Circuit's decision affirming a federal court's decision on a pre-answer motion to dismiss to adopt a rule depriving Petitioners of any state law claim due to a state statute of limitations. Pet. Opp. 7. But this case applies federal procedural law in a way that conflicts with state and federal law and policy.

Review is appropriate under Rule 10(a) because New York's court of final resort has endorsed a liberal rule of replevin permitting claims to Nazi-era looted art. This rule implements New York's compelling policy of avoiding becoming a haven for stolen art, based on the traditional common law maxim that no one should take good title from a thief. As presented in the Petition, this case—and other federal cases like it—involves federal courts applying

newly created federal constructive notice doctrines to common law claims, nullifying traditional state common law procedures. Pet. 10-13. This case presents a direct conflict with decisions of New York's highest court. Pet. 17, 18, 20. Dismissing actions on pre-answer motions that forgo discovery and fact-finding into potential equitable tolling defenses under state law—as the Second Circuit has done in affirming a dismissal pursuant to Rule 12(b)(6) where the pleading alleges that a U.S. museum possesses artworks stolen from a Nazi persecutee in violation of federal and international law—applies federal law in a way that conflicts with state law.[1]

This case typifies a recent trend in cases of stolen art of federal courts departing from the traditional role of exercising judicial restraint in the application of Rule 12(b)(6) of the Federal Rules of Civil Procedure to pre-answer motions. Pet. 15-17. Respondent overlooks the similarity between this case and the *Toledo Museum of Art* and *Detroit Institute of the Arts* cases, all of which adopt federal constructive notice doctrines on pre-answer motions. Pet. 15-17. In these cases, federal courts have crafted a variety of constructive notice devices to shortcut the traditional fact-finding required by common law in interpreting the restitutionary devices of replevin and

1. Respondent argues that Petitioners waived objections to consideration of extrinsic materials to resolve disputed facts. Pet. Opp. 10. In fact, Petitioners timely objected in writing to consideration of extrinsic evidence to the District Court in opposition to the motion to dismiss. Docket 23 at 3, 17 n. 1; Petitioners again pointed out the District Court's oversight in a motion to reconsider (Docket 65 at 6-9) and before the Second Circuit (Brief at 36, 39; Reply at 8-10, 24).

impressment of a constructive trust.[2] Likewise, in *Von Saher*, the California legislature sought to reinstate the traditional common law remedy of replevin which had been eliminated through spurious applications of constructive notice doctrines. California's attempt to resurrect the common law remedies at issue in this case was struck down as unconstitutional.

Under the common law, no one can take good title from a thief. Traditional state common law provides for doctrines of equitable estoppel and equitable tolling where, for example, a holder of stolen art has concealed the provenance of the artwork, was in a superior position to know of the artwork's tainted provenance, or would be unjustly enriched by retaining stolen art. Pet. 11-13, 28-30. In a state court, facts must be found and proven and litigants have an opportunity to discover, plead and prove such equitable defenses as equitable estoppel and equitable tolling.[3] If state statutes of limitations are not

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2. Respondent argues that the artist George Grosz should be charged with knowledge that stolen artworks were in MoMA's possession starting in 1956, because Grosz was aware of MoMA's possession of the artworks. This argument is irrelevant and fails because if Flechtheim, Grosz's consignee, sold the works and stole the money, the Grosz heirs would have had no claim of title against MoMA. Thus, the record does not reveal knowledge of Grosz or his heirs that the works were stolen from Flechtheim until 2003.

3. Respondent argues that full discovery occurred below. Pet. Opp. 8. To the contrary, MoMA successfully denied Petitioners access to documents pertaining to other artworks from Alfred Flechtheim's 1933 inventory now in MoMA's collection. In fact, no discovery occurred prior to the motion to dismiss being fully briefed. Pet. App. 66a. The court denied an application to convert to a motion for summary judgment under Rule 56. Pet. App. 8a-30a.

equitably tolled in accordance with state law, the result is a windfall of Nazi looted art to U.S. cultural institutions and private collectors owing to an abrogation of the traditional common law principle voiding title in a thief's tranferee. Pet 28-30.

Respondent argues that, even if the artworks were stolen from George Grosz's Jewish art dealer Alfred Flechtheim in 1933, state law remedies have long-since lapsed. Pet. Opp. 5-6. Under traditional common law, doctrines of equitable tolling and estoppel extend the availability of replevin. Under traditional equity, constructive trusts may be impressed to avoid unjust windfalls. The application of traditional principles of law and equity in a fact-finding context is consistent with Congress's understanding that state law supplied adequate remedies to effectuate the return of stolen property in U.S. museums. Pet. 11-13. Thus, the declarations of the Ninth Circuit and courts in Ohio and Michigan that state remedies are unavailable because Holocaust victims should be imputed with constructive notice as a matter of federal law on a pre-answer motion have essentially federalized state common law, absent this Court's review. (Pet. 14-22).

Review is warranted because if Rule 12(b)(6) is interpreted consistent with the decision in this case and in the *Toledo* and *Detroit* cases, federal law will have carved out an exception for U.S. museums and supplanted the nation's common law rendering a thief's title void. In its Opposition Brief, Respondent concedes that it is "certain" federal law is not empowered to do just that: "Congress has never provided that a defined category of diversity cases involving charges of Nazi theft or duress should be

carved out from *Erie*...." Pet. Opp. 12. Petitioners could not agree more with Respondent that this case should be governed "by the state rules of decision that Congress has made applicable under the Rules of Decision Act." Pet. Opp. 12. Precisely to the point, Petitioners seek review of this case because it is an example of "judge-made federal law" that has abrogated state rules of decision. Pet. Opp. 12.

By denying discovery into such fact-intensive issues as fraudulent concealment and equitable tolling, federal courts applying Rule 12(b)(6) to pre-answer motions have effectively pre-determined the outcome of these claims. Where identifiable stolen chattels are located in the United States, permitting these cases to stand in which the victims are often long dead and the heirs have long been deceived will effectively rubber-stamp the use of Rule 12(b)(6) to systematically deprive claimants of access to traditional common law remedies—virtually ensuring that in all cases arising from decades-old crimes, a museum holding stolen property may successfully shield itself from the reach of the law through skillful equivocation and rhetorical keep-away.

A. Important Questions Of Preemption Require Review

The subject matter of the underlying claims also presents an important question of federal preemption of state law. As argued in the Petition, the Ninth Circuit Court of Appeals has determined that the California legislature's restoration of traditional common law restitutionary remedies that would return Nazi-era looted art to claimants—such as those that Petitioners

advance in this case—constitute "reparations" and thus are preempted by the Executive's foreign policy powers under the foreign affairs doctrine in *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 1016 (9th Cir 2009). Pet. 6,7, 14. The Second Circuit's decision does not treat such claims as reparations. While the Second Circuit's decision prohibitively pares back New York's replevin remedies in conflict with the issues presented herein, it is nonetheless based on the underlying premise that New York State does have the power to permit replevin remedies. If the Ninth Circuit is correct in *Von Saher*, though, New York has no such power. Thus, this case presents an opportunity for this Court to address the important conflict between the Ninth and Second Circuits on the question of a state's power to permit or thwart common law remedies for the return of Nazi-looted art.

III. Separation of Powers Conflicts Require Review

Again, Respondent claims that Petitioner has failed to present a federal issue for review. Pet. Opp. 6-7. As set forth in the Petition, this case presents the opportunity for this Court to review the misuse of Rule 12(b)(6) of the Federal Rules of Civil Procedure to nullify equitable estoppel and equitable tolling of statutes of limitations implicitly relied upon by the Executive and Congress. This misuse of Rule 12(b)(6) conflicts with foreign policy powers of those federal branches. *See* Pet. i. This separation of powers conflict requires this Court's review.

As presented in the Petition, Congress has adopted a remedial scheme in drafting the Holocaust Victims Redress Act of 1998 that relies on traditional legal and equitable remedies to return art stolen during the Nazi

era. Pet. App. 10-13. The act relied on the statement that "there can be no doubt...that state law provides causes of action for restitution of stolen artworks" based in part on MoMA's representations that state law provided such remedies. Pet. 10-12. Respondent does not contest that in the Congressional hearings preceding the Holocaust Victims Redress Act of 1998, the museum community testified before Congress that state law provided adequate remedies to restore these stolen artworks. Pet. 11-12.

The Petition also highlighted the United States' historical role in encouraging restitution for victims of Nazi theft. Pet. App. 8-13. This includes the Executive's adopted foreign policy determining the Nazi regime to be a criminal organization expressed in the London Declaration of 1943 that culminated in urging the U.S. Judicial branch to undo Nazi depredations in what has become known as the "Bernstein" exception to the act of state doctrine recognized by this Court. Pet. 8-10. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 92 S. Ct. 1808 (1972). The Executive has also acceded to the Washington Principles of 1998 and the Terezin Declaration of 2009, expressly repudiating any policies leading to the retention of Nazi-looted art by museums. Pet. 11, 27, 28; Pet. App. 69a-71a; 72a-88a. As former United States Ambassador to the European Union Stuart Eizenstat stated before the Commission on Security and Cooperation in Europe (the U.S. Helsinki Commission), reiterating U.S. foreign policy: "The Terezin Declaration ... urges that courts and other fora that decide art restitution cases base their decisions on the facts of the individual case rather than relying on technical legal grounds such as statutes of limitations...." *Holocaust Era Assets – After the Prague Conference* (May 25, 2010).

Not only did the Second Circuit endorse a dismissal on statute of limitations grounds on a pre-answer motion on facts not appearing in the pleading, the Second Circuit endorsed a procedure that eliminated the requirement of pleading and proving statutes of limitations as an affirmative defense. In doing so, the Second Circuit shut down any ability of a claimant to prove equitable estoppel or equitable tolling. The Second Circuit's departure—along with that of other federal district courts—from the stated Executive and Congressional policy of deciding art restitution claims consistent with the common law frustrates those Executive and Legislative policies and impinges upon their respective powers to conduct foreign policy. This tension requires this Court's review insofar as it conflicts with *Bernstein* and in its supervisory power over the federal judiciary.

CONCLUSION

In sum, in conformance with Rules 10(a) and 10(c) of this Court's rules, this case presents conflicts over the scope of federal preemption, conflicting interpretations of federal procedural law, conflicts between federal and state law, and confusion among courts of appeals, the Executive and Congress as to whether the federal and state legislatures and judiciaries may play a role in returning the spoils of Nazi looting to the victims and their heirs. For the foregoing reasons, and those set forth in the petition, certiorari should be granted.

Date: June 21, 2011

Respectfully submitted,

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