12-55733

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MAREI VON SAHER,

Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA and NORTON SIMON ART FOUNDATION,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California

No. 07-CV-02866-JFW-JTL
The Honorable John F. Walter, Judge

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLANT MAREI VON SAHER

KAMALA D. HARRIS
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
MARK BRECKLER
Chief Assistant Attorney General
LOUIS VERDUGO, JR.
Senior Assistant Attorney General
ANGELA SIERRA
Supervising Deputy Attorney General

ANTONETTE BENITA CORDERO
Deputy Attorney General
CATHERINE Z. YSRAEL*
Deputy Attorney General
State Bar No. 162498
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2685
Fax: (213) 897-7605
Email:
Catherine.Ysrael@doj.ca.gov
*Counsel of Record
Attorneys for Amicus Curiae State of California

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTEREST OF THE STATE OF CALIFORNIA

Pursuant to Ninth Circuit Rule 29-2, California Attorney General Kamala D. Harris submits this brief on behalf of the State of California in support of Plaintiff/Appellant Marei Von Saher ("Von Saher"). California Code of Civil Procedure section 338[1] governs the limitations periods for tort claims, including claims for the recovery of stolen fine art. Cal. Civ. Proc. Code § 338(c)(3) (West 2012). The district court below precluded Von Saher from asserting common law claims within the time prescribed by this statute, holding that to do so would conflict with the federal government's express foreign policy regarding the restitution of looted Holocaust-era artwork.

The Attorney General of California is constitutionally designated as the chief law officer of the State, and has the duty to see that the laws of the State "are uniformly and adequately enforced." Cal. Const., art. V, § 13; *see also D'Amico v. Bd. of Med. Exam'rs*, 11 Cal.3d 1 (1974) (finding Attorney General has broad common law powers related to the protection of the public interest). In addition, with limited exceptions, the Attorney General

[1] Unless otherwise indicated, all statutory references are to the California Code of Civil Procedure.

has charge, as attorney, of all legal matters in which the state is interested. Cal. Gov't Code §12511 (West 2012).

To the extent that disposition of this appeal may implicate the constitutional validity of Section 338(c)(3) in light of asserted federal power over foreign affairs, California has a significant interest in the proceedings. For these reasons, the State of California respectfully submits this brief.

STATEMENT OF PROCEEDINGS

Von Saher initially brought her claims under Section 354.3 to recover two paintings she alleged were taken by the Nazis during World War II. Section 354.3 extended the statute of limitations specifically – and solely – for actions to recover artwork looted during the Holocaust. The district court subsequently granted the motion of Defendant/Appellee Norton Simon Museum of Art at Pasadena ("Norton Simon") to dismiss Von Saher's complaint, finding that Section 354.3 violated the foreign affairs doctrine.

This Court agreed, finding that Section 354.3 was unconstitutional under a theory of field preemption. Although there was no specific current federal policy regarding the restitution of Holocaust-era artwork, the Court agreed with the district court that Section 354.3 "intrudes on the power to make and resolve war, a power reserved exclusively to the federal

government by the Constitution." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965-966 (9th Cir. 2010), *cert. denied*, __ U.S. __, 131 S.Ct. 3055, 180 L. Ed. 2d 885 (2011) ("*Van Saher I*").

The Court remanded the case, however, "[b]ecause it is possible Saher might be able to amend her complaint to bring her action within § 338. . . ." *Von Saher I*, 592 F.3d at 957. In doing so, the Court noted the existence of a split among California appellate courts regarding when the statute of limitations under Section 338 commenced for property stolen prior to 1983. *Id*. at 968.

In April 2010, Von Saher filed a petition for writ of certiorari in the United States Supreme Court (*Von Saher v. Norton Simon Museum of Art at Pasadena*, No. 09-1254), which was denied in July 2011. __ U.S. __, 131 S.Ct. 3055, 180 L. Ed. 2d 885 (2011). The federal government, through its Acting Solicitor General, filed an amicus curiae brief in that proceeding urging the Supreme Court to deny the petition because this Court's decision did not warrant review. Brief for the United States as Amicus Curiae, *Von Saher v. Norton Simon*, No. 09-1254 (May 2011), at 20.

While the petition for certiorari was pending, the California Legislature passed legislation that resolved the split regarding when the statute of limitations under Section 338(c) commenced, amending Section

338 to clarify that claims for the recovery of stolen works of fine art brought against a museum, gallery, auctioneer or dealer do not accrue until "actual discovery" of both the identity and whereabouts of the work and information supporting a claim of ownership. Cal. Stats. 2010, ch. 691 (AB 2765), *see now* Civ. Proc. Code § 338(c)(3). The amendment also extended the limitations period for these claims from three to six years. *Id*.

After her petition was denied, Von Saher filed an amended complaint under the statute of limitations of Section 338(c)(3), alleging she did not actually discover that the paintings were on display at the Norton Simon until October 2000. On March 22, 2012, the district court again dismissed the case, holding that Von Saher's claims violated the foreign affairs doctrine. This time the court held that the claims conflicted with an express foreign policy advanced in the Acting Solicitor General's brief to the Supreme Court, preferring the finality of bona fide restitution proceedings of foreign governments. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2012 U.S. Dist. LEXIS 39291, at * 23-24 (C.D. Cal., Mar. 22, 2012) ("*Von Saher II*").

ARGUMENT

The Constitution neither expressly grants the federal government general power over foreign affairs, nor expressly denies all such power to

the states. However, the Supreme Court has articulated a "foreign affairs doctrine," based on several provisions of the Constitution, which reserves particular foreign affairs powers exclusively to the federal government. *See, e.g., American Ins. Ass'n.v. Garamendi*, 539 U.S. 396, 413-14, (2003); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *Von Saher I*, 592 F.3d at 960 ("The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power.").

It is recognized that a "state law must give way" when it is in "clear conflict" with an "express federal policy" in the foreign affairs context. *Garamendi,* 539 U.S. at 421, 425; *see also Von Saher I,* 592 F.3d at 960.

But even assuming that the United States has an express current foreign policy respecting the finality of foreign restitution proceedings, the federal government has admitted that the policy does not preclude Von Saher from pursuing her property claims under a general statute of limitations. Section 338, the statute of limitations under which Von Saher brought her claims, applies generally to *any* claims for the specific recovery

of stolen or looted art -- without reference to any particular country or conflict.[2]

As such, Section 338 presents no "clear conflict" with any foreign policy. To the extent that Norton Simon argues to the contrary, the argument should be rejected.

I. THE FOREIGN AFFAIRS DOCTRINE DOES NOT PRECLUDE COURTS FROM APPLYING GENERAL STATUTES OF LIMITATIONS TO HOLOCAUST-ERA ARTWORK CLAIMS.

A. This Court's Precedent Acknowledges That Courts Have a Role in Adjudicating Holocaust-Era Property Claims.

Numerous courts – and the United States itself, in its amicus brief – have accepted that Holocaust-era art claims may be brought under statutes of limitations that are generally applicable to the recovery of stolen property.

Under this Court's jurisprudence, the foreign affairs doctrine is only implicated when a State attempts to *legislate* remedies specifically targeting thefts related to an international dispute to which the United States was a party. But the Court's jurisprudence does not purport to preclude *adjudication* of claims for recovery of stolen art that are timely under

[2] Section 338 only addresses whether a claim is *timely,* and does not implicate the merits of such claim. Nor does Section 338 preclude defenses to claims brought under the statute. *See* Civ. Proc. Code § 338(c)(5).

general statutes of limitations *just because* the art and the theft relate to an international dispute to which the United States was a party.

On that point, this Court's decision in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) is instructive, even if the Court's pertinent observation arose in a different context. In *Alperin,* the Court found that plaintiffs' Holocaust-era property claims did not violate the political question doctrine, and, therefore, could be adjudicated by the courts. The Court favorably compared the claims presented by the plaintiffs in that case with the claims at issue in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004). Recognizing that the Supreme Court in *Altmann* was not squarely addressing the political-question issue, this Court observed:

> Nonetheless, that the Court [in *Altmann*] *allowed* the case to proceed underscores that *courts have a place in deciding Holocaust-era claims concerning looted assets*.

Id. at 551 (citation omitted) (emphasis added).

In *Von Saher I*, to be sure, this Court rejected Von Saher's reliance on *Alperin* to validate Section 354.3, distinguishing between a state's *legislation* specifically targeting Holocaust-era wrongs (as the Court said was the case with Section 354.3) and a state court's *adjudication* of Holocaust-era theft claims in the context of a more broadly applicable tort statute (as had been the case in *Alperin*):

> Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims. Here, the relevant question is whether the power to wage and resolve war, including the power to *legislate* restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution. We conclude that it has.

Von Saher I, 592 F.3d at 967 (emphasis added).

Accordingly, this Court's precedent does not compel a holding that Von Saher's action for recovery of stolen art works is barred by the foreign affairs doctrine; her action is a species of common law tort recovery, allegedly brought within a period of limitations that applies broadly to thefts of fine art, without regard to the circumstances of the theft.[3]

B. The Federal Government Has Acknowledged that Holocaust-Era Artwork Claims Brought Under Generally Applicable Statutes of Limitations Do Not Conflict With Federal Policy.

The Acting Solicitor General's amicus brief, on which the district court relied to find a preemptive federal policy, implicitly embraces the distinction between facially neutral statutes and those that specifically create

[3] As the district court noted, the Norton Simon appears to have conceded that California acted within its traditional competence in amending Section 338. *See Von Saher II*, 2012 U.S. Dist. LEXIS 39291, at * 15, fn. 5. Likewise, the district court does not dispute that Section 338 is a statute of general applicability.

claims for Holocaust-era thefts of art.[4] In asserting a federal interest in foreign affairs, including the power to make and resolve war, the Solicitor General noted:

> There . . . is considerable force to the court of appeals' view that, by targeting the claims of Holocaust survivors and their heirs to Nazi-confiscated art, *rather than merely applying to such claims a law of general applicability*, California has impermissibly intruded upon foreign affairs prerogatives of the federal government.

Brief of the United States as Amicus Curiae, *supra*, at 13.

The Acting Solicitor General made this point throughout his brief, by contrasting Section 354.3 with other generally applicable statutes:

> This case does *not* involve the application of a state statute or common law of general applicability that addresses matters of traditional state interest and only incidentally touches on foreign affairs prerogatives of the United States government.

Brief of the United States as Amicus Curiae, *supra*, at 10 (emphasis added). Indeed, in urging the Supreme Court to deny Von Saher's petition for certiorari, the Acting Solicitor General explicitly raised the possibility that

[4] *Amicus* does not concede that the Acting Solicitor General's brief is itself sufficient to establish an express federal policy. However, the court need not reach that issue. Whether or not it suffices to establish federal policy, the brief supports the proposition that Holocaust-era art claims can be brought under a generally applicable statute of limitations without running afoul of the foreign affairs doctrine.

Von Saher's claims might proceed under a general statute of limitations without interfering with foreign affairs:

> It is . . . possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities. *See Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Circ. 2010), *cert. denied,* 131 S.Ct. 1612 (2011); *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 578-9 (5th Cir. 2010) *cert. denied,* 131 S.Ct. 1511 (2011).

Id. at 22.

The Acting Solicitor General's reliance on the referenced cases is instructive. In *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), *cert. denied,* __ U.S. __, 131 S.Ct. 1612, 179 L. Ed. 2d 501 (2011), the court held that the time period for bringing claims for stolen Nazi artwork was governed by state statutes of limitations rather than a "federal common law authority" asserted by defendant. In that case, the plaintiff brought a quiet title action against a defendant who claimed that the painting at issue had been confiscated by the Nazis from her deceased husband's family. 615 F.3d 574, 575.

On appeal from the grant of summary judgment, the defendant argued that the state statute of limitations (under which her claim of title would be time-barred) was preempted by "the foreign policy of the

Executive Branch." *Id.* Specifically, the defendant argued that Louisiana's statute of limitation was "preempted by the 'Terezin Declaration,' a non-binding document promulgated at the Prague Holocaust Assets Conference of June 30, 2009." *Id.* at 576. Defendant further argued that "federal courts displace otherwise applicable state law *whenever* it conflicts with or frustrates important federal interests or policies." *Id.* (emphasis in original).

The court of appeals rejected this broad-sweeping proposition, noting:

> No court has ever adopted what Appellant is urging here--some form of special federal limitations period governing all claims involving Nazi-confiscated artwork. In such cases, courts have consistently applied state statutes of limitations.

615 F.3d at 576-7 (citations omitted). Moreover, the court found that "no interstate or international disputes [were] implicated" in the case "that require[d] creation of a uniform federal rule of law." *Id.* at 577.

The *Dunbar* court also rejected defendant's argument that applying Louisiana's statute of limitations "would unconstitutionally intrude on the President's authority to conduct foreign affairs." *Id.* at 578. The defendant cited the policy represented by the Terezin Declaration, because it "expresses a preference to adjudicate claims for recovery of Nazi-

confiscated artworks on their facts and merits." *Id*. at 578-9. The court rejected this argument, holding:

> In this case, Louisiana has not pursued any policy specific to Holocaust victims or Nazi-confiscated artwork. The state's prescription periods apply generally to any challenge of ownership to movable property. La. Civ. Code art. 3544 (1870); La. Civ. Code art. 3506 (1870). Louisiana's laws are well within the realm of traditional state responsibilities. In exercising its strong interest in regulating the ownership of property within the state through these prescriptive laws, Louisiana has not infringed on any exclusive federal powers. Appellant presents no proof that U.S. policy on behalf of Holocaust victims is committed to overriding generally applicable state property law. The type of preemption established by *Garamendi* is thus inapplicable; Louisiana's prescriptive laws are not preempted by the Terezin Declaration, U.S. foreign policy, or the President's foreign affairs powers.

615 F.3d at 579.

The First Circuit came to a similar conclusion in *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *cert. denied,* __ U.S. __, 131 S.Ct. 1612, 179 L. Ed. 2d 501 (2011), another case referenced by the Acting Solicitor General. In *Museum of Fine Arts,* the court of appeals applied a state statute of limitations applicable to tort and replevin claims to defendant Seger-Thomschitz's counterclaim to recover a painting she claimed her relative was forced to sell under duress after Austria was annexed by Nazi Germany in 1938. The court held that defendant's claims were time-barred under Massachusetts law. *Id.* at 9.

Segar-Thomschitz argued to the First Circuit that the state statute of limitations conflicted with the federal government's foreign policy, relying upon the Terezin Declaration and similar declarations, as well as the federal Holocaust Victims Redress Act. *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d at 12. The circuit court rejected this argument, noting first that these documents "are, for the most part, phrased in general terms evincing no particular hostility toward generally applicable statutes of limitations." *Id.* at 12. The court concluded that: "None of this language is sufficiently clear and definite to constitute evidence of an express federal policy against the applicability of state statutes of limitations to claims for the recovery of lost, stolen, or confiscated art." *Id.* at 13.

Discounting defendant's argument about a "clear conflict" with federal law, the court recognized that States have a particularly strong interest in their generally applicable statutes of limitations:

> The Supreme Court indicated in *Garamendi* that it is appropriate to "consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring the state law preempted." 539 U.S. at 420. The enactment of generally applicable statutes of limitations is a traditional state prerogative, and states have a substantial interest in preventing their laws from being used to pursue stale claims.

Museum of Fine Arts v. Seger-Thomschitz, 623 F.3d at 13. The court concluded that Massachusetts' statute was not preempted under *Garamendi*. *Id.* at 14.

CONCLUSION

For the reasons set forth above, the State of California respectfully requests that the Court reject any argument that the validity of Von Saher's action permitted under Section 338(c)(3) is necessarily foreclosed by *Von Saher I*.

Dated: October 9, 2012

Respectfully Submitted,

KAMALA D. HARRIS.
Attorney General of California
MANUEL M. MEDEIROS
State Solicitor General
MARK BRECKLER
Chief Assistant Attorney General
LOUIS VERDUGO, JR.
Senior Assistant Attorney General
ANGELA SIERRA
Supervising Deputy Attorney General
ANTONETTE BENITA CORDERO
Deputy Attorney General

/S/ CATHERINE Z. YSRAEL_
CATHERINE Z. YSRAEL
Deputy Attorney General
Attorneys for Amicus Curiae
State of California

CERTIFICATE OF COMPLIANCE
FOR 12-55733

☐ 4. **Amicus Briefs**.

☒ Pursuant to Fed.R.App.P 29(d) and 9th Cir.R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

October 9, 2012
Dated

/S/Catherine Z. Ysrael
Catherine Z. Ysrael
Deputy Attorney General

CERTIFICATE OF SERVICE

Case Name: **Von Saher v. Norton Simon Museum** No.: **12-55733**

I hereby certify that on October 9, 2012, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF

APPELLANT MAREI VON SAHER

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

I further certify that some of the participants in the case are not registered CM/ECF users. On October 9, 2012, I have caused to be mailed in the Office of the Attorney General's internal mail system, the foregoing document(s) by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within three (3) calendar days to the following non-CM/ECF participants:

Donald S. Burris
BURRIS SCHOENBERG & WALDEN, LLP
Suite 800
12121 Wilshire Blvd.
Los Angeles, CA 90025-1171

E. Randol Schoenberg
BURRIS SCHOENBERG & WALDEN, LLP
Suite 800
12121 Wilshire Blvd.
Los Angeles, CA 90025-1171

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 9, 2012, at Los Angeles, California.

Alexis J. Beard	/s/Alexis Beard
Declarant	Signature

51175009.doc