No. ____

In the Supreme Court of the United States

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,
Petitioners,

v.

MAREI VON SAHER,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RONALD L. OLSON
LUIS LI
FRED A. ROWLEY, JR.
ERIC P. TUTTLE
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
fred.rowley@mto.com

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
NICOLE RIES FOX
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

QUESTION PRESENTED

This Court has emphasized that courts should "proceed 'with the circumspection appropriate when … adjudicating issues inevitably entangled in the conduct of our international relations,'" and has declined to "second-guess" the Executive's views on foreign policy matters. *Munaf v. Geren*, 553 U.S. 674, 689, 702 (2008) (quoting *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 383 (1959)). This case involves an action brought under California law to recover paintings that were forcibly purchased by the Nazis in the Netherlands during World War II, recovered by U.S. forces, and returned to the Dutch government under the United States' external restitution policy.

In 2011, the Solicitor General filed an amicus brief in this case—joined by the State Department Legal Advisor—stating the Executive's views on U.S. foreign policy concerning claims to Nazi-looted artworks recovered by U.S. forces and how that policy applies to the very transactions and artworks at issue. The district court held that allowing this action to proceed would conflict with U.S. foreign policy, as explained by the Solicitor General, and dismissed the case. In the decision below, a divided panel of the Ninth Circuit reversed. The Ninth Circuit's decision rests on its conclusion—sharply refuted by the dissent—that the Solicitor General's statement of the U.S. foreign policy implicated by this case was not entitled to respect because it was "not … convincing." App. 23a.

The question presented is whether the Ninth Circuit, in holding that this action should proceed, properly second-guessed and rejected the Executive Branch's U.S. foreign policy determinations.

RULE 29.6 STATEMENT

Petitioner Norton Simon Museum of Art at Pasadena, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Museum of Art at Pasadena.

Petitioner Norton Simon Art Foundation, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Art Foundation.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

APPENDIX

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

Petitioners Norton Simon Museum of Art at Pasadena and Norton Simon Art Foundation (Norton Simon) respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-4a) is reported at 754 F.3d 712. The order of the court of appeals denying rehearing (App. 101-02a) is not reported. The order of the district court granting Norton Simon's motion to dismiss (*id.* at 41-59a) is reported at 862 F. Supp. 2d 1044.

JURISDICTION

The court of appeals entered judgment on June 6, 2014 (*id.* at 1a), and denied Norton Simon's timely petition for rehearing on August 14, 2014 (*id.* at 101a). On August 22, 2014, the court of appeals granted Norton Simon's motion to stay the mandate pending this Court's review. *Id.* at 100a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

The divided Ninth Circuit decision below directly contravenes the precedents of this Court and those of other circuits by rejecting the Executive's statement of U.S. foreign policy and substituting the court's own views on "what U.S. foreign policy is" in the sensitive matters implicated by this case. App. 35a (Wardlaw, J., dissenting). The Executive clearly set forth its views on the controlling U.S. foreign policies in an amicus brief submitted to this Court in 2011 by the Solicitor General and the State Department Legal Adviser. The Ninth Circuit's refusal to respect the Executive's foreign policy judgments not only led it to the wrong

result, but also establishes a blueprint for overriding the Executive's views on U.S. foreign policy anytime a court is "not … convinc[ed]" (*id.* at 23a) by the Executive's articulation of U.S. foreign policy or its diplomatic interests in a dispute. That approach usurps the Executive's constitutional responsibility to decide U.S. foreign policy and is a recipe for confusion and unrest in the conduct of the nation's foreign affairs.

The plaintiff in this case, Marei von Saher, seeks to invoke the U.S. courts to recover *Adam* and *Eve*, two life-sized panels painted in the sixteenth century by Lucas Cranach the Elder (the Cranachs). The paintings were forcibly purchased by the Nazis in the Netherlands during World War II, later recovered by U.S. forces and returned to the Dutch government, and eventually purchased by Norton Simon from a third party. The United States returned the Cranachs to the Dutch government under an external restitution policy that was approved by President Truman and remains extant today. That policy gives to the Dutch government responsibility for resolving issues concerning artworks returned by U.S. forces. Over the past half century, the Dutch government has conducted multiple restitution proceedings for plaintiff and her predecessor. Although plaintiff secured the return of hundreds of artworks through these proceedings, the Dutch courts concluded that there was no reason to excuse her predecessor's "'conscious and well-considered'" decision not to seek restitution for certain artworks—including the Cranachs—in post-war proceedings. App. 32-33a (citation omitted).

The just and final resolution of claims to Nazi-looted art has been a matter of intense interest to the United States and its allies since at least the London Declaration of 1943. The Solicitor General's 2011 brief

carefully articulates U.S. foreign policy in this sensitive area. Among other things, the brief explains that the United States has a "continuing interest" in respecting the "finality" of the post-war restitution process "when appropriate actions have been taken by a foreign government concerning the internal restitution of art [like the Cranachs] that was externally restituted to it by the United States following World War II." App. 120a. The brief further explains that the Netherlands has conducted "bona fide post-war internal restitution proceedings" consistent with U.S. foreign policy; that plaintiff and her predecessor had an "adequate opportunity" to press their claims through such restitution proceedings; and that the United States "has a substantial interest in respecting the outcome of that nation's proceedings." *Id.* at 122-23a.

On remand from this Court's denial of certiorari in 2011, the district court concluded that U.S. foreign policy, as set forth in the Solicitor General's brief, precludes plaintiff's attempts to recover the Cranachs through litigation in the U.S. courts. *Id.* at 57a. The court reasoned that under the foreign affairs doctrine, plaintiff's lawsuit impermissibly seeks a remedy that conflicts with the one chosen by the Executive in adopting external restitution. *Id.* The Ninth Circuit reversed. *Id.* at 1a, 29a. Critical to the Ninth Circuit's decision was the court's conclusion that the Executive's articulation of U.S. foreign policy was not controlling. *Id.* at 23a. In holding that this case should proceed, the court stated that it did "not find convincing the Solicitor General's position." *Id.* Embracing the central theme of plaintiff's appeal, the Ninth Circuit repeatedly criticized the Solicitor General's articulation of U.S. foreign policy in this case, and ultimately

concluded that this litigation did not interfere with U.S. foreign policy—as the court saw it.

Judge Wardlaw dissented. "The United States," she observed, "has articulated the foreign policy applicable to the very artwork and transactions at issue here." *Id.* at 29a. It was wrong for the panel to second-guess the Executive's "quintessential policy judgment[s]," including the adequacy of the Dutch restitution process, because "'[i]t is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments.'" *Id.* at 33-34a (quoting *Munaf v. Geren*, 553 U.S. 674, 700-01 (2008) (alteration in original)). Judge Wardlaw also cautioned that, "[f]or the federal courts to contradict the State Department on this issue, as is necessary to decide this appeal in [plaintiff]'s favor, would 'compromise[] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'" *Id.* at 34a (quoting *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 424 (2003) (alteration in original)). Accordingly, she would have given effect to the Executive's articulation of U.S. foreign policy and affirmed the district court's decision.

The respect owed by the Judiciary to the Executive's U.S. foreign policy determinations is a matter of undeniable and recurring importance. As this Court has held, the Judiciary is not suited to "second-guess" the Executive on such matters, particularly where, as here, substituting the Judiciary's views on U.S. foreign policy "would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Munaf*, 553 U.S. at 702. The Ninth Circuit's refusal to give effect to the Executive's

foreign policy views was dispositive in its decision to allow this case to proceed. But more fundamentally, the Ninth Circuit's decision invites courts to override the Executive's foreign policy determinations in any number of sensitive contexts, whenever courts—which are ill-equipped to evaluate foreign policy—deem the Executive's views "not … convincing." App. 23a.

This Court's review is warranted.

STATEMENT OF THE CASE

A. U.S. Foreign Policy On Nazi-Looted Art

During its march through Europe, the Third Reich not only committed untold human atrocities but looted troves of treasured art. Following World War II, the United States adopted a policy of "external restitution": it would return property taken by the Nazis and recovered by Allied forces to their countries of origin rather than directly to particular claimed owners. App. 4-5a. The external restitution policy was an outgrowth of the Inter-Allied Declaration of January 5, 1943 (or London Declaration), under which the Allies had reserved the right to invalidate enemy property transfers. *Id.*; *see id.* at 105a.

The United States chose external restitution after concluding that "restoration to individual owners is a matter for [the countries of origin] to handle in whatever way they see fit." C.A.E.R. 482 (State Dep't Memo, Recommendations on Restitution (Apr. 10, 1944)).[1] The government appreciated that such issues were bound to be complex, especially where original owners "received part payment for property taken

---

[1] "C.A.E.R." refers to the Excerpts of Record filed in the Ninth Circuit on October 2, 2012. "C.A.S.E.R." refers to the Supplemental Excerpts of Record filed on December 4, 2012.

from them under duress" or where it was "impossible to locate the original owners or their heirs." *Id.* Under this policy, once the "external restitution had been made [to the country of origin], the United States would play no further role in disposition of the property." App. 105a; *id.* at 51a, 73a. President Truman formally approved the external restitution policy at the Potsdam Conference in 1945, in a statement titled "Art Objects in the U.S. Zone." C.A.E.R. 466-74. American forces implemented the policy under order of General Eisenhower.

Under the United States' external restitution policy, the deadline for filing restitution claims to recovered artwork lapsed in 1948. App. 105-06a; *id.* at 14a. But the Executive has affirmed the United States' continuing commitment to the external restitution policy and the results of that policy. *Id.* at 120a; *id.* at 14a. In addition, as difficulties emerged with the implementation of post-war restitution policy in the decades following the war, the United States has worked with other nations to develop a "more equitable approach to recovery of Nazi-looted art," *id.* at 108a, complementing its external restitution policy.

In 1998, the United States hosted the Washington Conference on Holocaust Era Art Assets, in which 44 governments participated, including the United States and the Netherlands. *Id.* at 108-09a. The Conference produced the Washington Principles on Nazi-Confiscated Art, a "non-binding" set of norms. C.A.E.R. 494 (*Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998)). The Washington Principles encouraged countries "expeditiously to achieve a just and fair solution" for claims to artwork "confiscated by the Nazis and not subsequently restituted." *Id.* While recognizing that "there are

differing legal systems and that countries act within the context of their own laws," *id.*, the Washington Principles encourage national efforts to identify and publicize Nazi-looted art, and to return it to its pre-war owners, App. 109a; *id.* at 55a.

In June 2009, representatives of 46 governments participated in the Prague Holocaust Era Assets Conference, including the United States and the Netherlands. This Conference produced the Terezin Declaration on Holocaust Era Assets and Related Issues (Terezin Declaration), a set of "non-binding" and "moral" principles built on the Washington Principles. C.A.E.R. 496-503 (*Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009)). The Terezin Declaration emphasized the need for countries 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." *Id.* at 499.

As the Solicitor General advised this Court in his 2011 amicus brief, the United States' external restitution policy "supports the fair and just resolution of claims involving Nazi-confiscated art, while also respecting the bona fide internal restitution proceedings of foreign governments." App. 109a. Accordingly, "[w]hen a foreign nation … has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings." *Id.* at 123a.

B. Cranachs And Dutch Restitution Proceedings

1. Cranachs

This case vividly illustrates the sort of difficult questions that the Executive anticipated when it adopted the external restitution policy at the close of World War II. The Cranachs were painted in the sixteenth century by a German Renaissance painter. According to plaintiff, the Soviet Union seized the Cranachs from a Ukrainian church in the 1920s. *Id.* at 2a. The Soviets sold the Cranachs in 1931 as part of an auction titled "The Stroganoff Collection," which featured artworks confiscated from the noble Stroganoff family. *Id.*; *see also Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18, 20 (S.D.N.Y. 1976). Over the Stroganoff family's protest, the Cranachs were purchased by plaintiff's predecessor-in-interest, a prominent Dutch art dealer, Jacques Goudstikker. *Id.*

In 1940, Nazi Germany invaded the Netherlands, and Goudstikker was forced to flee by sea. App. 2a. Reichsmarschall Hermann Göring and his henchman, Alois Miedl, forcibly purchased much of Goudstikker's assets in two transactions. In the first, Göring took most of the inventory of Goudstikker's art gallery, including the Cranachs; in the second, Miedl took Goudstikker's real property, the art dealership, and some artworks and other personal property. *Id.* at 43a.

In 1945, American soldiers from the 101st Airborne Division recovered the Cranachs and other works looted by Göring in Germany at the close of the war. *Id.* at 4a. The following year, after they were identified at the Munich Central Collection Point, U.S. forces returned the Cranachs and other works from the Goudstikker collection to the Netherlands under the United States' external restitution policy. *Id.* at 44a.

2. 1951 Dutch Restitution Proceeding

In 1946, Goudstikker's widow (Goudstikker himself died at sea while fleeing the Nazis) returned to the Netherlands and began working with counsel and other advisers to recover her family's property. App. 106a; C.A.E.R. 155, 832-33. Pursuant to the London Declaration, the Dutch government issued Restitution of Legal Rights Decree E-100, which established procedures for restitution claims and set a deadline of July 1951 for such claims. App. 5a; C.A.E.R. 34, 160. Dutch restitution law required claimants who received money in forced sales to pay over Nazi proceeds as a condition of recovering their property. App. 5a.

After negotiating with the Dutch government, Ms. Goudstikker filed a timely restitution petition seeking return of the property taken by Miedl. *Id.* at 6a. However, Ms. Goudstikker chose *not* to claim restitution for the artworks taken in the Göring transaction—including the Cranachs—due to the requirement that claimants relinquish Nazi payments. *Id.* According to plaintiff, such a claim would have been "futile" because the Dutch restitution process was unfair and designed to "keep" recovered art "in Dutch Museums." C.A.E.R. 833-36. Ms. Goudstikker settled her petition with the Dutch government under protest in 1952, receiving most of the Miedl property in exchange for returning a portion of the Miedl payment. C.A.E.R. 171-77; App. 6a. She never filed a claim for the Göring works, and the Dutch restitution deadline lapsed in 1951. App. 32a (Wardlaw, J., dissenting).

3. 1961 Stroganoff Restitution Claim And Sale And Transfer Of The Cranachs

A decade later, a Stroganoff heir—U.S. Naval Commander George Stroganoff-Scherbatoff—filed a

restitution claim of his own with the Dutch government for the Cranachs and other paintings. *Id.* at 45a. As plaintiff herself has recognized, Stroganoff claimed that the paintings belonged to his family, and "that the Dutch Government had no right, title or interest in the panels." *Id.* at 8-9a. In 1966, the Dutch government settled that claim by transferring the Cranachs and another painting to Stroganoff, in exchange for consideration, including a monetary payment. *Id.* at 45a. Stroganoff later sold the Cranachs to the Norton Simon foundations in 1970-71. *Id.* Since then, the paintings have been displayed by the Norton Simon Museum in Los Angeles and by other museums on loan.

4. 1998 Dutch Restitution Proceeding

Plaintiff, Goudstikker's daughter-in-law, became Goudstikker's sole remaining heir in 1996. App. 7a. In 1998, plaintiff filed a new restitution claim with the Dutch government, seeking return of the Göring artworks. *Id.* The Dutch State Secretary of Education, Culture, and Science (State Secretary) rejected plaintiff's claim in its entirety, finding that it was time-barred and that Ms. Goudstikker's 1951 restitution proceeding was "conducted carefully" even "under present standards." C.A.E.R. 156; App. 32a.

Plaintiff appealed to the Court of Appeals in the Hague, asserting claims seeking: (1) "all properties that Herman Göring obtained from [Goudstikker] and over which the State gained control," and (2) the "sales price" for any such property sold by the State. C.A.E.R. 156-57. Plaintiff's claims thus included the Cranachs under her own allegations in this case, which aver that the Dutch government sold the Cranachs to Stroganoff in settlement of his restitution claim. *See*

2007 Complaint, ¶¶ 29-30, ECF No. 1; C.A.E.R. 837; App. 107a.

The Dutch Court of Appeals rejected plaintiff's claims. The court stressed that "nearly 50 years have now elapsed" since the deadline for post-war claims passed, and held that there were "no grounds" for ordering "restoration of rights with respect to the Göring transaction." C.A.E.R. 160, 161; *see* App. 108a. The court further stated that Ms. Goudstikker had been represented by "expert legal advisors" in the 1951 proceeding and could have submitted a claim for the Göring works, but made a "conscious and well considered decision" not to do so for "well-founded reasons." C.A.E.R. 161; *see* App. 108a In addition, the court rejected plaintiff's contention that the 1950s proceedings violated "international law," finding that "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights." C.A.E.R. 161.

5. 2004 Dutch Restitution Proceeding

In 2001, in response to the Washington Principles, the Netherlands decided to "depart from a purely legal approach of the restitution of 'war art'" in favor of a "more moral" approach in certain circumstances. C.A.E.R. 185; App. 121-22a. The Netherlands established a new Restitution Committee to hear claims for Nazi-looted artworks in the Dutch government's possession. C.A.E.R. 185. But the Netherlands elected not to adopt the new approach for monetary claims against the Netherlands for works it had sold or transferred, or for claims against a private party for such works unless the party consented to the Committee's jurisdiction. C.A.E.R. 108; App. 121-22a.

In 2004, plaintiff filed a renewed claim seeking Goudstikker works in the custody of the Dutch State. App. 36a. In a report "based more on policy than strict legality," the Restitution Committee deemed plaintiff's claim for the Göring works "still admissible," and recommended return of those works in the Dutch State's possession. C.A.E.R. 175. The State Secretary adopted the Committee's recommended result, but rejected its reasoning. The Secretary found that the Dutch Court of Appeals had given "a final decision in this case," that this case was "a matter of restoration of rights which has been settled," and that it therefore was "not included in the current restitution policy." C.A.E.R. 187. Nevertheless, based in part on the "manner in which the matter was dealt with in the early Fifties," the Secretary agreed to return over 200 Göring works still in the Dutch State's possession. *Id.*

C. This Litigation

1. Dismissal Order And Initial Appeal

In 2007, plaintiff filed this action in the U.S. District Court for the Central District of California, invoking California Code of Civil Procedure section 354.3, a special statute that revived otherwise time-barred claims seeking the recovery of Nazi-looted artworks. The district court granted Norton Simon's motion to dismiss plaintiff's claims, holding that the foreign affairs doctrine preempted Section 354.3 and plaintiff's claims were otherwise time-barred. App. 92-99a.

The Ninth Circuit affirmed the preemption holding, reasoning that section 354.3 "infringe[d] on the national government's exclusive foreign affairs powers." *Id.* at 62a. In doing so, the court recognized that "the Cranachs were returned to the Netherlands through the U.S. external restitution program," *id.* at 74a, and

that plaintiff's action implicated "restitution decisions made by the Dutch government and courts," *id.* at 83a. The Ninth Circuit remanded, however, to give plaintiff an opportunity to replead her claims under the generally applicable limitations period. *Id.* at 85a-89a.

2. Solicitor General's Amicus Brief And This Court's Denial Of Certiorari

Plaintiff sought certiorari, and this Court called for the views of the Solicitor General. In May 2011, Acting Solicitor General Neal Kumar Katyal filed a brief on behalf of the United States—joined by State Department Legal Advisor Harold Hongju Koh—recommending that certiorari be denied. The Solicitor General's brief surveyed the U.S. foreign policy implicated by this case. Among other things, the brief explained that "this case concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings," App. 119a; that "the Dutch government has afforded [plaintiff] and her predecessor adequate opportunity to press their claims, both after the War and more recently" through "bona fide" Dutch restitution proceedings, *id.* at 122-23a; and that the United States thus "has a substantial interest in respecting the outcome of that nation's proceedings," *id.* at 123a. The Court denied certiorari.

3. Proceedings Below

In 2011, plaintiff filed an amended complaint under a new law that was enacted by California to extend the limitations period for personal property claims against museums from three years to six years, beginning from "the actual discovery" of the claim. Cal. Civ. Proc. Code § 338(c)(3)(A). Norton Simon moved to dismiss again, arguing, *inter alia*, that plaintiff's claims for

relief under state law (rather than the limitations provision itself) were preempted under the foreign affairs doctrine. Norton Simon maintained that the relief plaintiff seeks conflicts with U.S. foreign policy, as set forth by the Solicitor General's brief, including the longstanding policy on external restitution.

The district court granted Norton Simon's motion, holding that "the United States' policy of external restitution and respect for the outcome and finality of the Netherlands' bona fide restitution proceedings, as clearly expressed and explained by the Solicitor General in his amicus curiae brief, directly conflicts with the relief sought in Plaintiff's action." App. 57a. The court explained that, whereas U.S. foreign policy is to respect the "outcome and finality" of the Dutch restitution proceedings, "[p]laintiff's action seeks to trump and interfere with United States foreign policy, by relying on an entirely different remedy for the restitution of Nazi-looted art, i.e. the laws of the State of California." *Id.* In reaching that conclusion, the court rejected plaintiff's argument that it should "second-guess the Executive Branch's statement and interpretation of its own foreign policy." *Id.* at 56a.

A divided panel of the Ninth Circuit reversed. After undertaking its own review of U.S. foreign policy in this area, the panel held that plaintiff's claims in fact "are in concert with" U.S. foreign policy. App. 19a. The panel majority rejected the Executive's statement of U.S. foreign policy in the Solicitor General's brief, stating that it was "not … convincing," unworthy of "too much credence" or "serious weight," and "worrisome," "troublesome," and "concern[ing]." *Id.* at 21-23a. The panel majority also complained that "the SG goes beyond explaining federal foreign policy and appears to make factual determinations," and criticized

the Solicitor General's statement that the Cranachs were subject to Dutch restitution proceedings. *Id.* at 22a. The majority remanded for further consideration of Norton Simon's act-of-state defense. *Id.* at 24-28a.

Judge Wardlaw dissented. In her view, the court was "not at liberty to find that the State Department's articulation of U.S. foreign policy is not 'convincing,'" and had improperly substituted its views for the Executive's on "what U.S. foreign policy is." *Id.* at 35a. She rejected the majority's distinction between foreign policy and the factual determinations that underlie it as "unworkable," observing that U.S. "foreign policy often relies on factual assumptions inseparable from the policy itself." *Id.* at 37a n.4. Judge Wardlaw concluded that the Executive's foreign policy determinations, as explained in the Solicitor General's brief, "bind[] the federal courts" and "should end our many years of involvement with the Cranachs as well." *Id.* at 40a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit grounded its 2-1 decision below in its conclusion that the Solicitor General's statements on the U.S. foreign policy implicated by this case were not entitled to deference because they were "not … convincing" and not worthy of "credence." App. 23a, 22a. The Ninth Circuit's disparaging treatment of the Solicitor General's brief—and the Executive's foreign policy views—directly contravenes the precedents of this Court and those of other circuits. Those precedents hold that the Judiciary is not suited to "second-guess" the Executive on foreign policy determinations, particularly where, as here, doing so "would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this

area." *Munaf v. Geren*, 553 U.S. 674, 702 (2008). The respect owed by the Judiciary to the Executive's foreign policy statements is a matter of exceptional and recurring importance, and the Ninth Circuit's refusal to accord such respect was the determinative factor in its decision below. Certiorari is warranted.

I. THIS COURT HAS STRESSED THE DEFERENCE OWED TO THE EXECUTIVE ON FOREIGN POLICY MATTERS

The Constitution commits to the Executive the "'vast share of responsibility for the conduct of our foreign relations.'" *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (citations omitted). Accordingly, "it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. at 700-01. "The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area." *Id.* at 702.

In a variety of contexts, this Court has repeatedly admonished courts to proceed with "'circumspection'" when "'adjudicating issues inevitably entangled in the conduct of our international relations,'" *id.* at 689 (citation omitted), and to "give serious weight to the Executive Branch's view of … cases' impact on foreign policy," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). *See also, e.g.*, *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005) (acknowledging this Court's "customary policy of deference to the President in matters of foreign affairs"); *Crosby v. National Foreign Trade Council*,

530 U.S. 363, 386 (2000) ("We have … consistently acknowledged that the 'nuances' of 'the foreign policy of the United States … are much more the province of the Executive Branch and Congress than of this Court.'" (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983))); *Regan v. Wald*, 468 U.S. 222, 233 (1984) (referencing "the classical deference to the political branches in matters of foreign policy"); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("[M]atters relating 'to the conduct of foreign relations ... are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" (quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952))); *United States v. Nixon*, 418 U.S. 683, 710 (1974) ("[T]he courts have traditionally shown the utmost deference to Presidential responsibilities … involving foreign policy considerations[.]"). This cardinal principle of judicial restraint flows directly from the different roles the Constitution assigns the Branches of Government.

Deference to the Executive is especially warranted where the Executive expressly advises the courts on the effect that a particular action may have on U.S. foreign policy interests. This Court has consistently declined to second-guess such determinations. *See, e.g.*, *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 233 (1986) (deferring to Executive's decision not to certify foreign nation as having violated treaty); *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 768 (1972) (plurality opinion by Rehnquist, J.); *see also Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) ("The [Department of State] certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the

continued retention of the vessel interferes with the proper conduct of our foreign relations.").

In *Munaf*, for example, the Court considered whether habeas jurisdiction could be exercised "to enjoin our Armed Forces from transferring individuals detained within another sovereign's territory to that sovereign's government for criminal prosecution." 553 U.S. at 689. The Court stressed that the "[t]he nature of that question requires us to proceed 'with the circumspection appropriate when adjudicating issues inevitably entangled in the conduct of our international relations.'" *Id.* (citation omitted). Moreover, the Court specifically declined to "second guess" the Solicitor General's representations on the U.S. foreign policy that would be impacted by granting the relief requested in the case—explaining that to do otherwise would "undermine the Government's ability to speak with one voice in this area." *Id.* at 702.

Likewise, in *First National City Bank v. Banco Nacional de Cuba*, 400 U.S. 1019 (1971), the Court reversed a decision for failing to accord the requisite deference to the views of the Executive in a case impacting U.S. foreign policy concerning Cuba. The Second Circuit initially held that Cuba's confiscation of the defendant bank's properties in Cuba was an act of state foreclosing judicial inquiry. *See Banco Nacional de Cuba v. First Nat'l City Bank*, 431 F.2d 394, 389-99 (2d Cir. 1970). This Court reversed and remanded for "reconsideration in light of the views of the Department of State … transmitted to this Court by the Solicitor General." 400 U.S. at 1019. On remand, the Second Circuit again refused to defer to the Executive's views that dismissal under the act-of-state doctrine would *not* advance U.S. foreign policy interests. *Banco Nacional de Cuba v. First National*

City Bank, 442 F.2d 530, 538 (2d Cir. 1971). This Court reversed, holding that "where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts." 406 U.S. at 767-70 (plurality).

Heeding this Court's precedents, the practice of other courts of appeals also has been to defer to the Executive's statements on U.S. foreign policy.[2]

II. AS THE DISSENT EXPLAINED, THE NINTH CIRCUIT'S DECISION DIRECTLY CONTRAVENES THIS COURT'S PRECEDENTS AND SUBSTITUTES THE COURT'S VIEWS FOR THE EXECUTIVE'S ON CLASSIC FOREIGN POLICY MATTERS

As Judge Wardlaw emphasized, the Ninth Circuit's decision in this case sharply departs from this Court's precedents and usurps the Executive's responsibility to determine and implement U.S. foreign policy.

---

[2] *See, e.g.*, *Weiss v. Assicurazioni Generali, S.p.A. (In re Assicurazioni Generali, S.p.A.)*, 592 F.3d 113, 119-20 (2d Cir.) (after "solicit[ing] the advice of the Secretary of State (in two administrations) on the foreign policy of the United States," deferring to the United States' view that the plaintiffs' claims "are preempted by the foreign policy of the United States"), *cert. denied*, 131 S. Ct. 287 (2010); *De Los Santos Mora v. New York*, 524 F.3d 183, 188 (2d Cir.) (deferring "to the settled view of the Executive under successive national administrations" on scope of Vienna Convention), *cert. denied*, 555 U.S. 943 (2008); *see also Ye v. Zemin*, 383 F.3d 620, 627 (7th Cir. 2004) (deferring to Executive's recognition of immunity of foreign leader as "conclusive"), *cert. denied*, 544 U.S. 975 (2005).

1. This case is manifestly entangled in sensitive foreign policy matters. The Solicitor General's brief—joined by the State Department Legal Advisor—explains U.S. foreign policy concerning the resolution of claims of ownership to Nazi-confiscated art and their application to the "artworks and transactions" at issue. App. 119a. But instead of deferring to the Executive's statements on U.S. foreign policy, as required by this Court's precedents, the Ninth Circuit turned the tables and asked whether the Solicitor General's brief had *convinced* the court on the U.S. foreign policy implications of this case and was *worthy* of credence. App. 23a (finding the Solicitor General's articulation of foreign policy "not … convincing"); *see also id.* at 22a (the Solicitor General's position "concerns us"; court is "wary of giving too much credence to the Solicitor General's brief"; court finds the Solicitor General's analysis "worrisome"); *see id.* at 33-35a (dissent).

While the Ninth Circuit quoted the Court's admonition that "'federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy,'" App. 21a (alteration in original) (quoting *Sosa*, 542 U.S. at 733 n.21), its disparaging treatment of the Solicitor General's brief is the very antithesis of that rule. This Court has never scrutinized and second-guessed the Solicitor General's statement of U.S. foreign policy like the Ninth Circuit did below. To the contrary, the Court has held that "the Judiciary is not suited to second-guess such determinations." *Munaf*, 553 U.S. at 702. In *First National City Bank*, for example, the Court reversed the Second Circuit's decision precisely because it neglected to defer to the "views of the Department of State … transmitted to this Court by the Solicitor General." 400 U.S. at 1019; *see* 406 U.S. at 765; *see*

also, e.g., *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 696 (1976) (referring to "the position of the United States, stated in an Amicus brief filed by the Solicitor General"). The Ninth Circuit's derogatory treatment of the Solicitor General's brief is sharply at odds with this Court's precedents on the respect owed to the Executive's foreign policy views.

The Executive does not carry the burden of "convincing" the Judiciary that its foreign policy judgments are correct or merit "credence." This Court has made clear that it is not the business of courts "to judge the wisdom of the National Government's policy." *Garamendi*, 539 U.S. at 427. Such "decisions as to foreign policy" are by their "very nature, … political, not judicial," and "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). The Ninth Circuit identified no valid basis for refusing to defer to the Solicitor General's foreign policy statements. As Judge Wardlaw explained, the courts "have no authority … to decide what U.S. foreign policy is," and "are not at liberty to find that the State Department's articulation of U.S. policy is not 'convincing.'" App. 35a (dissenting).

2. In addition to determining that the Executive's foreign policy determinations were not worthy of "credence" (*id.* at 22a), the Ninth Circuit substituted its own views for the Executive's on "what U.S. foreign policy is," *id.* at 35a (Wardlaw, J., dissenting).

For example, the Solicitor General explained in his brief that, under U.S. foreign policy grounded in the external restitution policy, "the particular nation

concerned (here, the Netherlands) … [has] the immediate responsibility for determining issues of ownership and restitution of, or restoration in, works like the Cranachs." *Id.* at 120a. This policy "prevent[s] the United States from becoming entangled in difficult ownership questions regarding confiscated property," and reflects the United States' "continuing interest" in respecting the "finality" of the "wartime restitution process." *Id.* at 119-20a. Under this policy, where a foreign government affords the claimant an "adequate opportunity to press [her] claims, … the United States has a substantial interest in respecting the outcome of that nation's proceedings." *Id.* at 122-23a.

As Judge Wardlaw observed, the "sufficiency of the Netherlands' 1951 internal restitution process is a quintessential policy judgment committed to the discretion of the Executive." App. 33-34a (citing *Munaf*, 553 U.S. at 700-01). The Solicitor General specifically conveyed the Executive's determination that the Dutch "post-war internal restitution proceedings" are "bona fide." *Id.* at 123a. But the Ninth Circuit majority refused to accept that policy determination. Instead, the Ninth Circuit questioned the adequacy of the Netherlands' post-war proceedings and actions—and even its motives. *See id.* at 19a (second-guessing whether the Netherlands' actions were "appropriate"), *id.* at 23a (echoing plaintiff's arguments that the post-war restitution proceeding was "unjust and unfair"). The Ninth Circuit had neither "the aptitude, facilities nor responsibility," *Chicago & S. Air Lines*, 333 U.S. at 111, to make that foreign policy judgment for itself, nor the capacity to second-guess the Executive's determination that "the Netherlands … has conducted bona fide post-war internal restitution proceedings," App. 123a.

In discussing the foreign policy implications of this case, the Solicitor General also explained that plaintiff and her predecessor had a sufficient opportunity to raise their claims within these "bona fide post-war internal restitution proceedings" to warrant the United States' respect for the finality of those proceedings. *Id.*; *see id.* at 120-22a (discussing proceedings). The Solicitor General explained that, "[a]s both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims, both after the War and more recently." *Id.* at 122-23a. Even though the sufficiency of foreign proceedings is a quintessential foreign policy judgment, the Ninth Circuit specifically questioned whether the Dutch restitution proceedings were "appropriate," and concluded that this litigation should be allowed to proceed to provide plaintiff "an opportunity to achieve a just and fair outcome." *Id.* at 19a.

The conflict between the Ninth Circuit and the Executive on the foreign policy implications of this litigation is clear and direct. As explained, the Solicitor General concluded that the United States has a "'substantial interest in respecting the outcome'" of the Dutch restitution proceedings in which plaintiff and her predecessor actually—or potentially—had the opportunity to participate. *Id.* at 37a (Wardlaw, J., dissenting). In contrast, the Ninth Circuit concluded that plaintiff is "just the sort of heir" who should be "encourage[d] to come forward to make claims, again," *Id.* at 24a. As Judge Wardlaw explained, the upshot is that allowing this action to proceed "directly thwarts the central objective of U.S. foreign policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an

adequate opportunity to recover it in the country of origin." *Id.* at 32a (dissent); *see id.* at 119a-20a.

3. The Ninth Circuit's primary justification for disregarding the Solicitor General's statement of U.S. foreign policy was its view that the Solicitor General had improperly made "factual determinations" about the intersection of this case and U.S. foreign policy. *Id.* at 22a. The Ninth Circuit found the Solicitor General's statements about this case "worrisome," "troublesome," and not worthy of "credence." *Id.* at 22-23a. That reasoning, too, is fundamentally flawed.

For starters, as noted, the Ninth Circuit improperly overrode the Executive's statements of U.S. foreign policy that did not depend on the facts of this case at all, including U.S. policy that it is sufficient that a victim have an "adequate opportunity" to press claims through a "bona fide" foreign restitution process, *id.* at 122-23a; that it is sufficient that the victim *potentially* had such an opportunity (even if the victim failed to avail herself of the process or defaulted on her claim), *id.* at 121-23a; and that the Netherlands *has* conducted bona fide internal restitution proceedings following World War II, *id.* at 123a. The Ninth Circuit's failure to defer to the Executive on such core foreign policy judgments alone warrants plenary review and reversal.

But the Ninth Circuit also erred in rejecting the Solicitor General's statements about U.S. foreign policy on the Dutch proceedings specifically conducted for the "artworks and transactions" at issue in this case. The articulation of U.S. foreign policy in the context of litigation is inevitably interwoven with the facts or circumstances of the underlying case. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), is instructive. There, the Court explained that although it need not defer to the United States' recommendation with

respect to a question of statutory construction, "should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." *Id.* at 701-02. A State Department determination that considers a "particular petitioner['s] … alleged conduct," *id.*, will necessarily involve the sort of "factual determinations" that the Ninth Circuit disparaged below.

Indeed, this Court itself has previously deferred to such factual determinations by the Executive where, as here, they are entwined with foreign policy judgments. In *Munaf*, for example, the petitioner alleged that his "transfer to Iraqi custody [was] likely to result in torture." 553 U.S. at 700. The Court nevertheless credited the Executive's determination as set forth in the Solicitor General's brief for the Executive respondents there, that "the [Iraqi] Justice Ministry … ha[s] generally met internationally accepted standards for basic prisoner needs." *Id.* at 702 (citation and internal quotation marks omitted). This Court drew no distinction between so-called factual "determinations" and broader policy statements; instead, the Court made clear that it would be inappropriate for the courts to "second-guess" either sort of determination. *Id.* at 702; *see also id.* at 700-01 ("[I]t is for the political branches, not the Judiciary, to *assess practices in foreign countries* and to determine national policy *in light of those assessments*." (emphasis added)).

As Judge Wardlaw explained, the Ninth Circuit's attempt to "draw[] [a] … distinction between 'explaining federal foreign policy' and 'mak[ing] factual determinations'" is "unworkable." App. 37a n.4

(dissent). "Our foreign policy often relies on factual assumptions inseparable from the policy itself," *id.*, as the *Munaf* case illustrates. Neither this Court nor any other of which we are aware has criticized the Solicitor General for discussing the facts of a case in the course of articulating the U.S. foreign policy impact of a dispute. The Ninth Circuit's extraordinary attack on the Solicitor General's "factual" statements in this case itself warrants review to nip such analysis in the bud.

The Ninth Circuit's criticism of the Solicitor General's factual statements about the Cranachs was misplaced in another important respect. The Ninth Circuit criticized the Solicitor General for making a "factual determination[]" "that the Cranachs have already been subject to both internal and external restitution proceedings." *Id.* at 22a. The fact that the Cranachs were subject to the Dutch restitution process is amply supported by the record—and the citations that the Solicitor General provided. *See id.* at 107a, 119a; *infra* at 27-28. But perhaps the more salient point is that, as the Solicitor General explained in his brief, what matters under U.S. foreign policy is that the Cranachs were "subject (*or potentially subject) to*" restitution proceedings. App. 120a n.3 (emphasis added); *see id.* at 30a (dissent). The Ninth Circuit itself recognized that "the paintings were *potentially* subject to restitution proceedings." *Id.* at 23a (emphasis added). That is "beyond dispute." *Id.* at 32a (dissent).

The Ninth Circuit seemed to base its conclusion that the Cranachs were never subject to Dutch restitution proceedings on the ground that the paintings had left the Netherlands by the time of plaintiff's 1998 petition. *See id.* at 18a. But the physical whereabouts of the paintings does not decide whether they were subject to the proceedings. As

noted, plaintiff's 1998 restitution petition not only sought return of any Goudstikker paintings still held by the Netherlands, but also the proceeds from the Dutch government's sale of any such paintings. *Id.* at 130-33a; *supra* at 10-11. That request undeniably covered the Cranachs because plaintiff herself has alleged that the Dutch government "sold" the Cranachs, and its settlement with Stroganoff involved a monetary payment. App. 107a; C.A.E.R. 515. The Dutch Court of Appeals specifically recognized that plaintiff sought damages for such transferred works. App. 130-31a.

Furthermore, as the Dutch Court of Appeals specifically found, plaintiff's predecessor "made a conscious and well considered decision" not to seek return of the Cranachs in the 1951 petition. *Id.* at 139a. Plaintiff challenged the 1950s restitution proceedings in her 1998 petition, arguing that they were unfair and violated international law, and that the court should therefore excuse her predecessor's failure to seek return of the Cranachs in 1951. *Id.* at 138-39a. But the Dutch Court of Appeals rejected those arguments, finding that "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights" in the 1950s; that plaintiff's predecessor "had at its disposal expert legal advisors who could have argued the involuntary nature of the transaction"; and that plaintiff's predecessor nevertheless made a "well-founded" decision not to include the Göring transaction in her 1951 claim. *Id.* at 141a, 140a. In light of those findings, the Dutch Court of Appeals found no basis to allow plaintiff to reopen the matter "nearly 50 years after" the period for filing post-war restitution claims had passed. *Id.* at 139a.

As Judge Wardlaw explained, "[t]hat [v]on Saher did not succeed in obtaining her requested *relief* with respect to the Cranachs does not imply that there were no *proceedings* pertaining to the Cranachs." *Id.* at 38a (dissent) (emphases in original). "Put differently, Dutch authorities finally adjudicated [v]on Saher's legal claim to the Cranachs on the grounds that it was procedurally defaulted as a matter of Dutch law." *Id.* at 38-39a. And, Judge Wardlaw continued, "[a]s is routinely recognized in other contexts, allowing von Saher to relitigate these claims in U.S. courts would necessarily undermine the finality of the Netherlands' prior proceedings"—"precisely what our nation's foreign policy requires us to avoid." *Id.* at 39a (citing *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012)).

III. THE QUESTION PRESENTED IS IMPORTANT AND WARRANTS REVIEW

1. The respect owed by the Judiciary to the Executive's foreign policy statements is a matter of utmost importance implicating core separation of powers principles in our constitutional system. This Court has repeatedly emphasized the importance of the Executive's ability to speak "'with one voice in dealing with other governments,'" *Garamendi*, 539 U.S. at 424 (citation omitted); *see Munaf*, 553 U.S. at 702, and the need for the courts to exercise circumspection in this sphere. *Supra* at 16-19. The Ninth Circuit's decision directly conflicts with this Court's precedents and, in effect, places the United States in the position of speaking in two inconsistent voices on a sensitive foreign policy matter. *See* App. 34a (dissent).

In this case, the question arises in considering a conflict-preemption claim, but the deference owed to the Executive's statements on U.S. foreign policy cuts

across numerous different areas. Under the Ninth Circuit's decision in this case, a court could second-guess the Executive's diplomatic judgment on matters such as Iraq's treatment of prisoners, *cf. Munaf*, 553 U.S. at 702; the sale of tractors to Israel, *cf. Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 (9th Cir. 2007); or any number of sensitive foreign policy issues arising under the act-of-state doctrine. This issue is also recurring in the Ninth Circuit alone—where cases implicating foreign policy regularly arise.

2. Here, the Ninth Circuit's refusal to give effect to the Solicitor General's statements on U.S. foreign policy was the decisive factor in its holding that "[v]on Saher's claims do not conflict with any federal policy." App. 16a. As both Judge Wardlaw and the district court concluded, giving effect to the Executive's foreign policy views "should end" this case under conflict preemption principles. *Id.* at 40a; *see id.* at 57a. Indeed, the Cranachs were indisputably subject to the United States' external restitution policy—a policy approved by the President. *Supra* at 5-6. As the Solicitor General has explained, the United States has a "continuing interest" in respecting the finality of that wartime restitution process where, as here, the Executive has determined that the countries have conducted "bona fide" internal restitution proceedings concerning externally restituted art like the Cranachs. Yet plaintiff seeks to invoke "an entirely different remedy for the restitution of Nazi-looted art, i.e. the laws of the State of California." *Id.* at 57a; *see Crosby*, 530 U.S. at 380 ("'Conflict is imminent when two separate remedies are brought to bear on the same activity.'" (internal quotations omitted)).

The Ninth Circuit's refusal to heed the Executive's foreign policy determinations could also impact the act-

of-state issue that the court remanded. App. 24-29a; *see id.* at 34a n.2 (observing that "adjudicating whether the Netherlands' 1951 proceedings were bona fide may implicate the act of state doctrine") (dissent); *id.* at 58a (same) (district court). In seeking dismissal, Norton Simon argued that plaintiff's attempt to invoke the U.S. courts to secure return of the Cranachs is barred by the act-of-state doctrine as well. That doctrine prevents courts from "sit[ting] in judgment" on the validity of actions by foreign sovereigns, *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), and thereby "embarrass[ing] the conduct of foreign relations by the political branches of the [American] government," *First Nat'l City Bank*, 406 U.S. at 765.

As Norton Simon explained below, granting plaintiff the relief she seeks would require the courts to invalidate three separate actions of the Dutch government: the Dutch government's purportedly "wrongful[] deliver[y] [of] the Cranachs to Stroganoff," C.A.E.R. 837; the Dutch government's refusal to return the paintings to Ms. Goudstikker in the 1950s, *id.*; and the Dutch Court of Appeals' ruling upholding the 1950s proceedings. *See* Norton Simon C.A. Br. 46-47. Any of these foreign government actions would be sufficient to invoke the act-of-state doctrine. But by openly disagreeing with the Executive's express view on the adequacy and scope of the Dutch proceedings, the Ninth Circuit's decision risks just the sort of "embarrassment" the act-of-state doctrine is intended to avoid. *See First Nat'l City Bank*, 406 U.S. at 765; App. 16a; *supra* at 22-29.

In his 2011 brief, the Solicitor General observed that "[t]he act-of-state doctrine and considerations of international comity … also weigh in favor of giving effect to the Dutch government's actions in this case."

App. 123a. But while the act-of-state doctrine should itself dispose of plaintiff's claim, the proper application of that doctrine depends on giving the Executive's foreign policy views the deference that they are due. *See, e.g.*, *First Nat'l City Bank*, 406 U.S. at 768 ("[W]here the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts."). By permitting the courts to second-guess the Executive's foreign policy determinations, the decision below fundamentally distorts the act-of-state doctrine as well.

3. The Ninth Circuit's profoundly misguided decision warrants this Court's review. Because the Ninth Circuit's refusal to respect the Executive's foreign policy determinations was a threshold error that infected its entire analysis, this Court should at least grant review to decide the question presented and remand the case with instructions for the Ninth Circuit to reconsider its decision while according the Executive's foreign policy views the respect that they are owed under this Court's precedents. *See, e.g.*, *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2131 (2014) ("follow[ing] our ordinary practice of remanding so that the Court of Appeals can reconsider" its decision "under the proper standard"); *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471, 2473 (2014) (same); *United States v. Clarke*, 134 S. Ct. 2361, 2369 (2014) (same). Indeed, the Ninth Circuit's astonishingly harsh treatment of the Executive's foreign policy views is so out of step with this Court's precedents that summary reversal and an order remanding the case for reconsideration of the

issues applying the proper deference would be appropriate. Alternatively, the Court should grant review and hold that this action may not proceed.[3]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RONALD L. OLSON
LUIS LI
FRED A. ROWLEY, JR.
ERIC P. TUTTLE
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
35th Floor
Los Angeles, CA 90071
(213) 683-9100
fred.rowley@mto.com

GREGORY G. GARRE
Counsel of Record
MAUREEN E. MAHONEY
NICOLE RIES FOX
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

NOVEMBER 10, 2014

---

[3] Because the question presented is an "important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." *See* Stephen M. Shapiro *et al.*, *Supreme Court Practice* 283 (10th ed. 2013).

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS—Continued

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Marei VON SAHER, Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA; Norton Simon Art Foundation, Defendants-Appellees.

No. 12–55733

Argued and Submitted Aug. 22, 2013.

Filed June 6, 2014.

754 F.3d 712

BEFORE: HARRY PREGERSON, DOROTHY W. NELSON, and KIM McLANE WARDLAW, Circuit Judges.

OPINION

D.W. NELSON, Senior Circuit Judge:

This case concerns the fate of two life-size panels painted by Lucas Cranach the Elder in the sixteenth century. *Adam* and *Eve* (collectively, "the Cranachs" or "the panels") hang today in Pasadena's Norton Simon Museum of Art ("the Museum"). Marei Von Saher claims she is the rightful owner of the panels, which the Nazis forcibly purchased from her deceased husband's family during World War II. The district court dismissed Von Saher's complaint as insufficient to state a claim upon which relief can be granted, and that dismissal is before us on appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we reverse and remand.

I. Background

In reviewing the district court's decision, we must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to" Von Saher. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir.2008). We therefore hew closely to the allegations in the complaint in describing the facts.

A. Jacques Goudstikker Acquires the Cranachs

For the 400 years following their creation in 1530, the panels hung in the Church of the Holy Trinity in Kiev, Ukraine. In 1927, Soviet authorities sent the panels to a state-owned museum at a monastery and in 1927 transferred them to the Art Museum at the Ukrainian Academy of Science in Kiev. Soviet authorities then began to arrange to sell state-owned artworks abroad and held an auction in Berlin in 1931 as part of that effort. This auction, titled "The Stroganoff Collection," included artworks previously owned by the Stroganoff family. The collection also included the Cranachs, though Von Saher disputes that the Stroganoffs ever owned the panels. Jacques Goudstikker, who lived in the Netherlands with his wife, Desi, and their only child, Edo, purchased the Cranachs at the 1931 auction.

B. The Nazis Confiscate the Cranachs

Nearly a decade hence in May 1940, the Nazis invaded the Netherlands. The Goudstikkers, a Jewish family, fled. They left behind their gallery, which contained more than 1,200 artworks—the Cranachs among them. The family boarded the SS Bodegraven, a ship bound for South America. Days into their journey, Jacques accidentally fell to his death through an uncovered hatch in the ship's deck. When he died,

Jacques had with him a black notebook, which contained entries describing the artworks in the Goudstikker Collection and which is known by art historians and experts as "the Blackbook." Desi retrieved the Blackbook when Jacques died. It lists the Cranachs as part of the Goudstikker Collection.

Meanwhile, back in the Netherlands, high-level Nazi Reichsmarschall Herman Göring divested the Goudstikker Collection of its assets, including the Cranachs. Jacques' mother, Emilie, had remained in the Netherlands when her son fled to South America with his wife and child. Göring's agent warned Emilie that he intended to confiscate the Goudstikker assets, but if she cooperated in that process, the Nazis would protect her from harm. Thus, Emilie was persuaded to vote her minority block of shares in the Goudstikker Gallery to effectuate a "sale" of the gallery's assets for a fraction of their value.

Employees of the Goudstikker Gallery contacted Desi to obtain her consent to a sale of the majority of the outstanding shares in the gallery, which she had inherited upon Jacques' death. She refused. Nevertheless, the sale went through when two gallery employees, unauthorized to sell its assets, subsequently entered into two illegal contracts. In the first, the "Göring transaction," Göring "purchased" 800 of the most valuable artworks in the Goudstikker collection. Göring then took those pieces, including the Cranachs, from the Netherlands to Germany. He displayed *Adam* and *Eve* in Carinhall, his country estate near Berlin. properties. Miedl began operating an art dealership out of Jacques' gallery with the artwork that Göring left behind. Miedl employed

Jacques' former employees as his own and traded on the goodwill of the Goudstikker name in the art world.

C. The Allies Recover Nazi–Looted Art, Including the Cranachs

In the summer of 1943, the United States, the Netherlands and other nations signed the London Declaration, which "served as a formal warning to all concerned, and in particular persons in neutral countries, that the Allies intended to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war." *Yon Saher v. Norton Simon Museum of Art at Pasadena* ("*Von Saher I*"), 592 F.3d 954, 962 (9th Cir.2010) (internal quotation marks and citation omitted). The Allies "reserved the right to invalidate wartime transfers of property, regardless of whether" those transfers took the form of open looting, plunder or forced sales. *Id.*

When American forces arrived on German soil in the winter of 1944 and 1945, they discovered large caches of Nazi-looted and stolen art hidden in castles, banks, salt mines and caves. *Von Saher I*, 592 F.3d at 962. The United States established collection points for gathering, cataloging and caring for the recovered pieces. *Id.* At a collection point in Munich, Allied forces identified the Cranachs and other items from the Goudstikker Collection.

In order to reunite stolen works of art with their rightful owners, President Truman approved a policy statement setting forth the procedures governing looted artwork found in areas under U.S. control. *Von Saher I*, 592 F.3d at 962. These procedures had two components—external restitution and internal restitution. Under external restitution, nations

formerly occupied by the Germans would present to U.S. authorities "consolidated lists of items taken [from their citizens] by the Germans." *Id.* These lists would include "information about the location and circumstances of the theft." *Id.* American authorities would identify the listed artworks and return them to their country of origin. *Id.* The United States stopped accepting claims for external restitution on September 15, 1948. *Id.* at 963. Under internal restitution, each nation had the responsibility for restoring the externally restituted artworks to their rightful owners. *Id.*

In 1946, the Allied Forces returned the pieces from the Goudstikker Collection to the Dutch government so that the artworks could be held in trust for their lawful owners: Desi, Edo and Emilie.

D. Desi's Postwar Attempt to Recover the Cranachs

In 1944, the Dutch government issued the Restitution of Legal Rights Decree, which established internal restitution procedures for the Netherlands. As a condition of restitution, people whose artworks were returned to them had to pay back any compensation received in a forced sale.

In 1946, Desi returned to the Netherlands intending to seek internal restitution of her property. Upon her return but before she made an official claim, the Dutch government characterized the Göring and Miedl transactions as voluntary sales undertaken without coercion. Thus, the government determined that it had no obligation to restore the looted property to the Goudstikker family. The government also took the position that if Desi wanted her property returned, she would have to pay for it, and she would not receive

compensation for missing property, the loss of goodwill associated with the Goudstikker gallery's name or the profits Miedl made off the gallery during the war.

Desi decided to file a restitution claim for the property sold in the Miedl transaction, so that she could recover her home and some of her personal possessions. In 1952, she entered into a settlement agreement with the Dutch government, under protest, regarding only the Miedl transaction. As part of that settlement, Desi repurchased the property Miedl took from her for an amount she could afford. The agreement stated that Desi acquiesced to the settlement in order to avoid years of expensive litigation and due to her dissatisfaction with the Dutch government's refusal to compensate her for the extraordinary losses the Goudstikker family suffered at the hands of the Nazis during the war.

Given the government's position that the Nazi-era sales were voluntary and because of its refusal to compensate the Goudstikkers for their losses, Desi believed that she would not be successful in a restitution proceeding to recover the artworks Göring had looted. She therefore opted not to file a restitution claim related to the Göring transaction. The Netherlands kept the Göring-looted artworks in the Dutch National Collection. Von Saher alleges that title in these pieces did not pass to the Dutch Government.

In the 1950s, the Dutch government auctioned off at least 63 of the Goudstikker paintings recovered from Göring. These pieces did not include the Cranachs.

E. Von Saher Recovers Artwork from the Dutch Government

In the meantime, Desi and her son Edo became American citizens, and Desi married August Edward

Dimitri Von Saher. When Emilie died in 1954, she left all of her assets, including her share in the Goudstikker Gallery, to her daughter-in-law, Desi, and her grandson, Edo. Desi then died in February 1996, leaving all of her assets to Edo. Just months later, in July 1996, Edo died and left his entire estate to his wife, Marei Von Saher, the plaintiff-appellant. Thus, Marei is the sole living heir to Jacques Goudstikker.

In 1997, the State Secretary of the Dutch Government's Ministry of Education, Culture and Science (the "State Secretary") announced that the Dutch government had undertaken an investigation into the provenance of artworks recovered in Germany and returned to the Netherlands following World War II. Related to that investigation, the government began accepting claims for recovered artworks in its custody that had not been restituted after the war.

Around the same time, a Dutch journalist contacted Von Saher and explained to her the circumstances regarding Göring's looting of the Goudstikker gallery, Desi's efforts to obtain restitution and the Dutch government's continued possession of some Goudstikker pieces in its national collection. This conversation was the first time Von Saher learned about these events.

In 1998, Von Saher wrote to the Dutch State Secretary requesting the surrender of all of the property from the Goudstikker collection in the custody of the Dutch government. The State Secretary rejected this request, concluding that the postwar restitution proceedings were conducted carefully and declining to waive the statute of limitations so that Von Saher could submit a claim. Von Saher made various attempts to appeal this decision without success.

While Von Saher pursued various legal challenges, the Dutch government created the Ekkart Committee to investigate the provenance of art in the custody of the Netherlands. The committee described the handling of restitution in the immediate postwar period as "legalistic, bureaucratic, cold and often even callous." It also criticized many aspects of the internal restitution process, among them employing a narrow definition of "involuntary loss" and requiring owners to return proceeds from forced sales as a condition of restitution.

Upon the recommendation of the Ekkart Committee, the Dutch government created the Origins Unknown project to trace the original owners of the artwork in its custody. The Dutch government also set up the Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War ("the Restitutions Committee") to evaluate restitution claims and to provide guidance to the Ministry for Education, Culture and Science on those claims. Between 2002 and 2007, the Restitution Committee received 90 claims.

In 2004, Von Saher made a restitution claim for all of the Goudstikker artwork in the possession of the Netherlands. The Committee recommended that the government grant the application with respect to all of the artworks plundered in the Göring transaction, which the Committee deemed involuntary. The State Secretary adopted the Committee's recommendation.

Unfortunately, the Dutch government no longer had custody of the Cranachs. In 1961, George Stroganoff Scherbatoff ("Stroganoff") claimed that the Soviet Union had wrongly seized the Cranachs from his

family and unlawfully sold the paintings to Jacques Goudstikker 30 years earlier at the "Stroganoff Collection" auction in Berlin. Thus, Stroganoff claimed that the Dutch government had no right, title or interest in the panels. In 1966, the Dutch government transferred the Cranachs and a third painting to Stroganoff in exchange for a monetary payment. The terms of this transaction, including the amount Stroganoff paid for the artworks, are not in the record before us. The Dutch government did not notify Desi or Edo that Stroganoff made a claim to the panels or that the panels were being transferred to him. In 1971, New York art dealer Spencer Samuels acquired the Cranachs from Stroganoff, either as an agent or as a purchaser. Later that year, the Museum acquired the Cranachs and has possessed them ever since.

F. Von Saher Seeks Recovery From The Museum

In 2000, a Ukrainian art historian researching the deaccession of artworks from state-owned museums in Kiev contacted Von Saher. He explained to Von Saher that he happened upon *Adam* and *Eve* when he visited the Museum, and once he researched the origin of the panels, he felt compelled to contact her. Because Cranach the Elder painted 30 similar depictions of *Adam* and *Eve*, Von Saher could not be certain whether the diptychs in the Museum were the ones missing from the Goudstikker collection. She contacted the Museum about the panels, and the parties engaged in a six-year effort to resolve this matter informally, which proved unsuccessful.

In May 2007, Von Saher sued the Museum, relying on California Code of Civil Procedure Section 354.3. That statute allowed the rightful owners of confiscated Holocaust-era artwork to recover their items from

museums or galleries and set a filing deadline of December 31, 2010. Cal.Civ.Proc.Code § 354.3(b), (c).

The district court dismissed the action, finding Section 354.3 facially unconstitutional on the basis of field preemption. The court also found Von Saher's claims untimely.

We affirmed, over Judge Pregerson's dissent, holding Section 354.3 unconstitutional on the basis of field preemption. *Von Saher I*, 592 F.3d at 957. Because it was unclear whether Von Saher could amend her complaint to show lack of reasonable notice to establish compliance with California Code of Civil Procedure Section 338(c), we unanimously remanded. *Id.* at 968–70.

Six weeks after this court issued *Von Saher I*, the California legislature amended Section 338(c) to extend the statute of limitations from three to six years for claims concerning the recovery of fine art from a museum, gallery, auctioneer or dealer. Cal.Civ.Proc.Code § 338(c)(3)(A). In addition, the amendments provided that a claim for the recovery of fine art does not accrue until the actual discovery of both the identity and the whereabouts of the artwork. *Id.* The legislature made these changes explicitly retroactive. *Id.* § 338(c)(3)(B).

Von Saher filed a First Amended Complaint. The Museum moved to dismiss, arguing that Von Saher's specific claims and the remedies she sought—not the amended Section 338 itself—conflicted with the United States' express federal policy on recovered art. The district court agreed. It held that the Solicitor General's brief filed in the Supreme Court in connection with Von Saher's petition for writ of certiorari from *Von Saher I*, "clarified the United

States' foreign policy as it specifically relates to Plaintiff's claims in this litigation." The district court held "that the United States' policy of external restitution and respect for the outcome and finality of the Netherlands' bona fide restitution proceedings, as clearly expressed and explained by the Solicitor General in his amicus curiae brief, directly conflicts with the relief sought in Plaintiff's action." The court dismissed the complaint with prejudice. Von Saher timely appeals.

II. Standard of Review

We review de novo the district court's dismissal of Von Saher's complaint. *Manzarek*, 519 F.3d at 1030. As discussed, we must accept the factual allegations in the complaint as true, and we construe the complaint in the light most favorable to Von Saher. *Id.* at 1031.

III. Discussion

We first must decide whether the district court erred in finding Von Saher's claims barred by conflict preemption. It did.

A. Applicable Law

"[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design." *Deutsch v. Turner Corp.*, 324 F.3d 692, 713–14 (9th Cir.2003). "In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Id.* at 714.

"Foreign affairs preemption encompasses two related, but distinct, doctrines: conflict preemption and field preemption." *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir.2012) (en banc). In *Von Saher I*, we found Section 354.3 unconstitutional on the basis of field preemption. 592 F.3d at 965, 968. Here, however, the Museum's argument focuses exclusively on conflict preemption. Specifically, the Museum contends that Von Saher's claims, and the remedies she seeks, are in conflict with federal policy on the restitution of Nazi-stolen art.

"There is, of course, no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy, given the 'concern for uniformity in this country's dealings with foreign nations' that animated the Constitution's allocation of the foreign relations power to the National Government in the first place." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964)). "The exercise of the federal executive authority means that state law must give way where ... there is evidence of a clear conflict between the policies adopted by the two." *Id.* at 421, 123 S.Ct. 2374. "[T]he likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." *Id.* at 420, 123 S.Ct. 2374. Similarly, a state law is preempted "where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" federal policy. *Crosby*

v. Nat'l Foreign Trade Council, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (internal quotations marks and citations omitted).

Courts have found individual claims, or even entire lawsuits, preempted where a plaintiff relies on a statute of general applicability, as Von Saher does here. *See*, *e.g.*, *In re: Assicurazioni Generali S.P.A. Holocaust Ins. Litig.*, 340 F.Supp.2d 494, 501 (S.D.N.Y.2004) (holding *Garamendi* "requires dismissal ... of the benefits claims arising under generally applicable state statutes and common law" because "[l]itigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of claims through [the International Commission on Holocaust Era Insurance Claims]"), *aff'd*, 592 F.3d 113 (2d Cir.2010); *see also Mujica v. Occidental Petrol. Corp.*, 381 F.Supp.2d 1164, 1187–88 (C.D.Cal.2005) (finding plaintiffs' state law tort claims preempted by the foreign policy interest in the United States' "bilateral relationship with the Columbian government").

The question we must answer is whether Von Saher's claims for replevin and conversion, as well as the remedies she seeks, conflict with federal policy. We conclude that they do not.

B. Federal Policy on Nazi–Looted Art

We start by looking to federal policy on the restitution of Nazi-looted art. As discussed, the United States signed the London Declaration and subsequently adopted a policy of external restitution based on the principles in that declaration. In *Von Saher I*, we noted that the United States stopped accepting claims for external restitution on September

15, 1948, and accordingly concluded that the United States' policy of external restitution ended that year. 592 F.3d at 963. Thus, we held that California Civil Procedure Code Section 354.3 could not "conflict with or stand as an obstacle to a policy that is no longer in effect." *Id.*

It seems that we misunderstood federal policy. In a 2011 brief filed in the Supreme Court recommending the denial of a petition for writ of certiorari in *Von Saher I*, the United States, via the Solicitor General, reaffirmed our nation's continuing and ongoing commitment to external restitution. The Solicitor General explained that external restitution did not end in 1948 with the deadline for submitting restitution claims, as we had concluded in *Von Saher I*. Instead, "[t]he United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process," and the United States has a "continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art."

Federal policy also includes the Washington Conference Principles on Nazi Confiscated Art ("the Principles"), produced at the Washington Conference on Holocaust–Era Art Assets in 1998. Though non-binding, the Principles reflect a consensus reached by the representatives of 13 nongovernmental organizations and 44 governments, including both the United States and the Netherlands, to resolve issues related to Nazi-looted art. The Principles provided first that "Art that has been confiscated by the Nazis and not subsequently restituted should be identified" and that "[e]very effort should be made to publicize" this art "in order to locate pre-War owners and their

heirs." The signatories agreed that "[p]re-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." The Principles also provided that when such heirs are located, "steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to facts and circumstances surrounding a specific case." Finally, the Principles encouraged nations "to develop national processes to implement these principles," including alternative dispute resolution.

Additionally, in 2009, the United States participated in the Prague Holocaust Era Assets Conference, which produced the "legally non-binding" Terezin Declaration on Holocaust Era Assets and Related Issues, to which the United States and the Netherlands agreed. The signatories reaffirmed their support for the Washington Conference Principles and "encourage[d] all parties [,] *including public and private institutions* and individuals to apply them as well." "The Participating States urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress[.]" In addition, the signatories "urge[d] 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 the parties."

In sum, U.S. policy on the restitution of Nazi-looted art includes the following tenets: (1) a commitment to

respect the finality of "appropriate actions" taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

C. Von Saher's Claims Do Not Conflict with Federal Policy

Von Saher's claims do not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands, as noted in the complaint, the district court's order and the opinion of the Court of Appeals of The Hague.

Desi could have brought a claim for restitution as to all of the artworks Göring looted in the immediate postwar period, but she understandably chose not to do so prior to the July 1, 1951 deadline. Per Von Saher, the "[h]istorical literature makes clear that the post-War Dutch Government was concerned that the immediate and automatic return of Jewish property to its original owners would have created chaos in the legal system and damaged the economic recovery of [t]he Netherlands," and "[t]his attitude was reflected in the restitution process." Desi was "met with hostility by the postwar Dutch Government" and "confronted a

'restitution' regime that made it difficult for Jews like [her] to recover their property." In fact, the Dutch government went so far as to take the "astonishing position" that the transaction between Göring and the Goudstikker Gallery was voluntary and taken without coercion. Not surprisingly, Desi decided that she could not achieve a successful result in a sham restitution proceeding to recover the artworks Göring had looted. The Dutch government later admitted as much when the Ekkart Committee described the immediate postwar restitution process as "legalistic, bureaucratic, cold and often even callous."

Moreover, the Dutch government transferred the Cranachs to Stroganoff fourteen years after Desi settled her claim against Miedl. The Museum contends that this conveyance satisfied a restitution claim Stroganoff made as the rightful heir to the Cranachs, but the record casts doubt on that characterization. As noted, the deadline for filing an internal restitution claim in the Netherlands expired July 1, 1951, and Stroganoff did not assert his claim to the Cranachs until a decade later. In addition, the Restitution of Legal Rights Decree, which governed the Dutch internal restitution process, was established to create "special rules regarding restitution of legal rights and restoration of rights in connection with the liberalization of the [Netherlands]" following World War II. The Decree included provisions addressing the restitution of wrongful acts committed in enemy territory during the war. To the extent that Stroganoff made a claim of restitution, however, it was based on the allegedly wrongful seizure of the paintings by the Soviet Union *before* the Soviets sold the Cranachs to Jacques Goudstikker in 1931—events

which predated the war and any wartime seizure of property. Thus, it seems dubious at best to cast Stroganoff's claim as one of internal restitution.

By the time Von Saher requested in 1998 that the Dutch government surrender all of the Goudstikker artworks within state control, the Cranachs had been in the Museum's possession for 27 years. Even if Desi's 1998 request for surrender could be construed as a claim for restitution—made nearly 50 years after the deadline for filing such a claim lapsed—the Cranachs were no longer in possession of the Dutch government and necessarily fell outside that claim.[1]

Though we recognize that the United States has a continuing interest in respecting the finality of "appropriate actions" taken in a foreign nation to restitute Nazi-confiscated art, the Dutch government itself has acknowledged the "legalistic, bureaucratic, cold and often even callous" nature of the initial postwar restitution system. And the Dutch State Secretary eventually ordered the return of all the Göring-looted art-works possessed by the Netherlands—the very artwork Desi chose not to seek in the postwar restitution process immediately

---

[1] The dissent concludes that "the Cranachs were in fact subject to bona fide internal restitution proceedings in the Netherlands in 1998–99 and 2004–06." Dissent at 731; *see also* Dissent at 732 ("Von Saher did seek 'restitution' of the Cranachs, and her filing of the claims and the official disposition of those claims do constitute proceedings."). We cannot agree. In both 1998 and 2004, Von Saher sought the return of all the Goudstikker artworks the Dutch government had in its possession. This necessarily excludes the Cranachs because the Netherlands had divested itself of the panels many decades earlier. We therefore cannot conclude that Von Saher's 1998 and 2004 claims included the Cranachs.

following the war—to Von Saher. These events raise serious questions about whether the initial postwar internal restitution process constitutes an appropriate action taken by the Netherlands.

Nevertheless, we do not even need to go so far as answering that query, nor should we on a motion to dismiss. Based on Von Saher's allegations that (1) Desi chose not to participate in the initial postwar restitution process, (2) the Dutch government transferred the Cranachs to Stroganoff before Desi or her heirs could make another claim and (3) Stroganoff's claim likely was not one of internal restitution, the diptych was never subject to a postwar internal restitution proceeding in the Netherlands. Thus, allowing Von Saher's claim to go forward would not disturb the finality of any internal restitution proceedings—appropriate or not—in the Netherlands.

Not only do we find an absence of conflict between Von Saher's claims and federal policy, but we believe her claims are in concert with that policy. Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims, again, because the Cranachs were never subject to internal restitution proceedings. Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war, even if such a result is no longer capable of being expeditiously obtained.

Nor is this dispute of the sort found to involve the international problems evident in *American Insurance*

Association v. Garamendi. In that case, California passed legislation that deemed the confiscation or frustration of World War II insurance policies for Jewish policy holders an unfair business practice. 539 U.S. at 408–11, 123 S.Ct. 2374. California's insurance commissioner then issued administrative subpoenas against several subsidiaries of European insurance companies. *Id.* at 411, 123 S.Ct. 2374. Those insurance companies filed suit seeing injunctive relief against the insurance commissioner of California and challenging California's Holocaust-era insurance legislation as unconstitutional. *Id.* at 412, 123 S.Ct. 2374. The Supreme Court held the law preempted due to the "clear conflict" between the policies adopted by the federal government and the state of California. *Id.* at 419–21, 123 S.Ct. 2374. As part of that holding, the Court noted that "[v]indicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are over-riding, and which the National Government has addressed." *Id.* at 421, 123 S.Ct. 2374.

Here, however, there is no Holocaust-specific legislation at issue. Instead, Von Saher brings claims pursuant to a state statute of general applicability. Also unlike *Garamendi*, Von Saher seeks relief from an American museum that had no connection to the wartime injustices committed against the Goudstikkers. Nor does Von Saher seek relief from the Dutch government itself. In fact, the record contains a 2006 letter from the Dutch Minister for Education, Culture and Science, who confirmed that "the State of the Netherlands is not involved in this dispute" between Von Saher and the Museum. The Minister

also opined that this case "concerns a dispute between two private parties."

We are not at all persuaded, as is the dissent, that the Solicitor General's brief requires a different outcome. Certainly, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 733 n. 21, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). But there are many reasons why we find that weight unwarranted here.

First, the Solicitor General's brief, which urged denying the petition for writ of certiorari in *Von Saher I*, focused on California Code of Civil Procedure Section 354.3. The Solicitor General argued that we had correctly invalidated Section 354.3 as "impermissibly intrud[ing] upon the foreign affairs authorities of the federal government." The Solicitor General noted that *Von Saher I* did not involve the application of a state statute of general applicability but "a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments[.]" That is an altogether different issue from the one we now decide, which is whether Von Saher's specific claims against the Museum—in just this one case—conflict with foreign policy. This argument is not one the Solicitor General considered or addressed when it counseled against granting certiorari in *Von Saher I*, and we decline to read any more into the Solicitor General's brief than is there.

It also concerns us that the Solicitor General characterizes the facts in a way that conflicts with the complaint, the record before us and the parties' positions. The Solicitor General argued that *Von Saher I* "concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles." As we have discussed, however, the Cranachs were not subject to immediate postwar internal restitution proceedings in the Netherlands, and Von Saher's 1998 and 2004 claims did not include the Cranachs.

This factual discrepancy also makes us wary of giving too much credence to the Solicitor General's brief because it demonstrates that the Solicitor General goes beyond explaining federal foreign policy and appears to make factual determinations. For instance, the Solicitor General's conclusion that the Cranachs have already been subject to both internal and external restitution proceedings is not a statement about our nation's general approach to Nazi-looted art. Instead, the Solicitor General concludes that in this specific case involving these specific parties, external restitution took place as contemplated by the United States. This looks much like a factual finding in a matter in which we must accept the allegations in the complaint as true. While we recognize and respect the Solicitor General's role in addressing how a matter may affect foreign policy, we do not believe this extends to making factual findings in conflict with the allegations in the complaint, the record and the parties' arguments.

Most worrisome, the Solicitor General admitted that "[t]he United States does not contend that the fact

that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient on its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject to) bona fide restitution proceedings in the Netherlands." And therein lies the most serious and troublesome obstacle to our relying too heavily on the Solicitor General's brief. Von Saher alleges, the Museum agrees and the record shows that the Cranachs were never subject to immediate postwar internal restitution proceedings in the Netherlands. Though the paintings were potentially subject to restitution proceedings had Desi opted to participate in the postwar internal restitution process, she chose not to engage in what she felt was an unjust and unfair proceeding. Years later, the Dutch government itself undermined the legitimacy of that restitution process by describing it as "bureaucratic, cold and often even callous," and by eventually restituting to Von Saher all of the artworks Göring had looted that were still held by the Netherlands.

It would make little sense, then, for us to conclude that Von Saher's claims against the Museum cannot go forward just because the United States returned the Cranachs to the Netherlands as part of the external restitution process, for we know and we cannot ignore, that the Cranachs were never subject to postwar internal restitution proceedings and that the 1998 and 2004 proceedings excluded the Cranachs. We therefore do not find convincing the Solicitor General's position—presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood

some of the facts essential to our resolution of this appeal.

Von Saher's claims against the Museum and the remedies she seeks do not conflict with foreign policy. This matter is, instead, a dispute between private parties. The district court erred in concluding otherwise.

D. Act of State

We are mindful that the litigation of this case may implicate the act of state doctrine, though we cannot decide that issue definitively on the record before us. We remand for further development of this issue.

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252, 18 S.Ct. 83, 42 L.Ed. 456 (1897). "[T]he act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another. Such action when shown to have been taken, becomes, ... a rule of decision for the courts of this country." *Ricaud v. Am. Metal Co.*, 246 U.S. 304, 310, 38 S.Ct. 312, 62 L.Ed. 733 (1918).

"In every case in which ... the act of state doctrine appli[es], the relief sought ... would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 405, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990). This doctrine is not "inflexible and all-encompassing," *Banco Nacional de Cuba*, 376 U.S. at 428, 84 S.Ct. 923, nor is it "some vague doctrine of abstention but a *principle of decision* binding on

federal and state courts alike," *W.S. Kirkpatrick*, 493 U.S. at 406, 110 S.Ct. 701 (internal quotation marks and citation omitted). The justification for invoking the act of state doctrine "depends greatly on the importance of the issue's implications for our foreign policy." *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir.1983).

Von Saher seeks as remedies a declaration that she is the rightful owner of the panels and an order both quieting title in them and directing their immediate delivery to her. According this kind of relief may implicate the act of state doctrine. *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–04, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (holding act of state doctrine barred American courts from considering the sale of animal hides by the Mexican government); *Ricaud*, 246 U.S. at 310, 38 S.Ct. 312 (holding act of state doctrine prohibited American courts from considering the seizure of an American citizen's property by the Mexican government for military purposes).

Thus, it becomes important to determine whether the conveyance to Stroganoff constituted an official act of a sovereign, which might trigger the act of state doctrine. *W.S. Kirkpatrick*, 493 U.S. at 406, 110 S.Ct. 701 ("Act of state issues only arise when a court must decide—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."). We cannot answer this question because the record is devoid of any information about that transfer. For her part, Von Saher alleges that the Netherlands "wrongfully delivered the Cranachs to Stroganoff as part of a sale transaction," and for the purpose of this appeal, we must accept the allegations in her complaint as true, *Manzarek*, 519 F.3d at 1031.

She also contends that no one ever referred to the transfer of the Cranachs to Stroganoff as attendant to "restitution proceedings" until we described the facts that way in *Von Saher I*, 592 F.3d at 959. In her view, the Museum has since adopted that characterization of the facts. The district court is best-equipped to determine which of these competing characterizations is correct.

If on remand, the Museum can show that the Netherlands returned the Cranachs to Stroganoff to satisfy some sort of restitution claim, that act could "constitute a considered policy decision by a government to give effect to its political and public interests ... and so [would be] ... the type of sovereign activity that would be of substantial concern to the executive branch in its conduct of international affairs." *Clayco Petrol. Corp. v. Occidental Petrol. Corp.*, 712 F.2d 404, 406–07 (9th Cir.1983) (per curiam) (internal quotations and citations omitted); *see also Alfred Dunhill of London, Inc. v. Rep. of Cuba*, 425 U.S. 682, 695, 96 S.Ct. 1854, 48 L.Ed.2d 301 (1976) (noting foreign government had not offered a government "statute, decree, order, or resolution" showing that the government action was undertaken as a "sovereign matter"); *but see Clayco*, 712 F.2d at 406–07, 96 S.Ct. 1854 (noting the Third Circuit held that the granting of patents by a foreign sovereign would not implicate the act of state doctrine); *Timberlane Lumber Co. v. Bank of Am., N.T. and S.A.*, 549 F.2d 597, 607–08 (9th Cir.1976) (holding judicial proceedings in another country initiated by a private party were not the sort of sovereign acts that would require deference under the act of state doctrine). On remand, the district court also should consider whether the conveyance of the

Cranachs to Stroganoff met public or private interests. *Clayco*, 712 F.2d at 406 (holding that "without sovereign activity effectuating public rather than private interests, the act of state doctrine does not apply") (internal quotation marks and citation omitted).

Even if the district court finds that the transfer of the Cranachs is a sovereign act, it also must determine whether any exception to the act of state doctrine applies. A plurality of the Supreme Court has noted that an exception may exist for "purely commercial acts" in situations where "foreign governments do not exercise powers peculiar to sovereigns" and instead "exercise only those powers that can be exercised by private citizens." *Alfred Dunhill*, 425 U.S. at 704, 96 S.Ct. 1854.

We have not yet decided whether to adopt a commercial exception in our Circuit. *Clayco*, 712 F.2d at 408. When presented with this issue previously, we held that even if a commercial exception to the act of state doctrine existed, it did not apply because a private citizen could not have granted a concession to exploit natural resources—the government action at issue in *Clayco*. *Id.*

On the present record, we are unable to determine whether a commercial exception would apply in this case. Thus, it is unnecessary for us to determine whether our court recognizes a commercial exception to the act of state doctrine.

Other exceptions to the act of state doctrine may apply. For example, the Hickenlooper Amendment provides that the act of state doctrine does not apply to a taking or confiscation (1) after January 1, 1959, (2) by an act of state (3) in violation of international law. 22 U.S.C. § 2370(e)(2). The Dutch government kept

possession of the Cranachs in 1951 when Desi opted not to seek restitution for the artworks Göring had confiscated during the war. Though the government took possession of the pieces before the effective date of the Hickenlooper Amendment, the Dutch government transferred the Cranachs to Stroganoff in 1966. That conveyance may constitute a taking or confiscation from Desi. Again, we cannot determine from the record whether that transaction was a commercial sale or whether the government transferred the Cranachs to Strogranoff to restore his rights in some way. That distinction may bear on whether the Dutch government confiscated the artworks from Desi, via the transfer to Stroganoff, in violation of international law. The district court should consider this issue on remand.

We recognize that this remand puts the district court in a delicate position. The court must use care to "limit[ ] inquiry which would impugn or question the nobility of a foreign nation's motivation." *Clayco*, 712 F.2d at 407 (internal quotation marks and citation omitted). The court also cannot "resolve issues requiring inquiries ... into the authenticity and motivation of the acts of foreign sovereigns." *Id.* at 408 (internal quotation marks and citations omitted). Nevertheless, this case comes to us as an appeal from a dismissal for failure to state a valid claim. The Museum has not yet developed its act of state defense, and Von Saher has not had the opportunity to establish the existence of an exception to that doctrine should it apply. Though this remand necessitates caution and prudence, we believe that the required record development and analysis can be accomplished with faithfulness to the limitations imposed by the act of state doctrine.

REVERSED and REMANDED.

WARDLAW, Circuit Judge, dissenting:

The United States has determined that the Netherlands afforded the Goudstikker family an adequate opportunity to recover the artwork that is the subject of this litigation. Our nation's foreign policy is to respect the finality of the Netherlands' restitution proceedings and to avoid involvement in any ownership dispute over the Cranachs. Because entertaining Marei Von Saher's state law claims would conflict with this federal policy, I respectfully dissent.

I.

The United States has articulated the foreign policy applicable to the very artwork and transactions at issue here. When Von Saher petitioned for certiorari from our court's decision rejecting her claims under Cal.Civ.Proc.Code § 354.3 on preemption grounds, the Supreme Court invited the Solicitor General to express the position of the United States on the question there presented. The United States set forth its policy in an amicus curiae brief signed by Harold Hongju Koh, then the Legal Adviser to the Department of State, and Neal Kumar Katyal, then the Acting Solicitor General.

The United States explained that its post-World War II policy of "external restitution" did not end on September 15, 1948, as our court had determined, but remains extant. After World War II, the United States determined that it would return private property expropriated by the Nazis to its country of origin—that is, "externally"—rather than to its private owners. In turn, the country of origin was responsible for returning the property to its lawful owners through "internal" restitution proceedings. A central purpose of this policy was to avoid entangling the United States

in difficult, long-lasting disputes over private ownership. For this reason, the United States expressed its "continuing interest" in the finality of external restitution, "when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II."

The United States and the international community have also recognized, however, that some countries' internal restitution processes were deficient. Accordingly, pursuant to such non-binding international agreements as the Washington Principles and the Terezin Declaration, the United States supports ongoing efforts to restore expropriated art to Holocaust victims and their heirs. Furthermore, the United States does not categorically insist upon the finality of its postwar external restitution efforts. Our nation maintains a continuing interest in the finality of external restitution only when the country of origin has taken "appropriate" internal restitution measures. The United States has a "substantial interest in respecting the outcome" of "bona fide" proceedings conducted by other countries. Thus, the policy of the United States, as expressed in its Supreme Court brief, is that World War II property claims may not be litigated in U.S. courts if the property was "subject" *or "potentially subject* " to an adequate internal restitution process in its country of origin.

The United States not only set forth these general policy principles in its brief before the Supreme Court, but also explained their application to the very artwork and historical facts presented by this case. According to the United States, the Cranachs "have already been

the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles." In the federal government's considered judgment, these proceedings were "bona fide," so their finality must be respected. Because the Cranachs were "subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands," our nation's ongoing interest in the finality of external restitution "bar[s] litigation" of the Goudstikkers' claims in U.S. courts. Simply put, the United States has clearly stated its foreign policy position that it will not be involved in adjudicating ownership disputes over the Cranachs.

II.

The Constitution allocates power over foreign affairs exclusively to the federal government, and the power to resolve private parties' war claims is "central to the foreign affairs power in the constitutional design." *Deutsch v. Turner Corp.*, 324 F.3d 692, 714 (9th Cir.2003). Federal foreign policy preempts Von Saher's common law claims if "there is evidence of clear conflict" between state law and the policies adopted by the federal Executive. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). We must determine whether, "under the circumstances," Von Saher's state law action "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of our national foreign policy concerning the resolution of World War II claims. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (internal quotation marks omitted).

A.

In my view, Von Saher's attempt to recover the Cranachs in U.S. courts directly thwarts the central objective of U.S. foreign policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin. The majority concludes that Von Saher's claims do not conflict with federal policy because the Cranachs were never subject to any restitution proceedings in the Netherlands. As the United States explained in its amicus brief, however, the relevant issue is whether the Cranachs were subject *or potentially subject* to bona fide internal proceedings. The majority fails to acknowledge the Executive's clear determination that the Goudstikkers had an adequate opportunity to assert their claim after the war.

It is beyond dispute that the Cranachs were "potentially subject" to internal restitution proceedings in the Netherlands in the years following World War II. Desi Goudstikker could have filed a claim for the Cranachs with the Dutch government before the 1951 deadline lapsed. She chose not to do so because she believed she would not be treated fairly. As the amicus brief explained:

> In this case, Ms. Goudstikker settled with the Dutch government in 1952, and that settlement did not provide for the return of artworks like the Cranachs that had been acquired by [Hermann] Göring. When petitioner brought a Dutch restitution proceeding in 1998, the State Secretary found that "directly after the war—even under present standards—the restoration of rights was conducted carefully." Petitioner sought review of that decision in the

> Court of Appeals for the Hague, which found that at the time of the 1952 settlement Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction."

Thus, the only question is whether the internal restitution proceedings Desi forewent were bona fide.[1] If they were, the United States has an ongoing interest in their finality and in the finality of the Cranachs' external restitution to the Netherlands, and U.S. foreign policy expressly bars Desi's granddaughter-in-law from reviving Desi's unasserted claim six decades later in federal district court.

The United States has determined as a matter of foreign policy that the postwar process in which Desi declined to participate was bona fide. As the United States explained in its brief, "As both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded [Von Saher] and her predecessor adequate opportunity to press their claims, both *after the War* and more recently." The majority concludes that this question has not been decisively determined only by finding ways to disavow the State Department's prior representations to the Supreme Court in this case.

But we lack the authority to resurrect Von Saher's claims given the expressed views of the United States. The sufficiency of the Netherlands' 1951 internal restitution process is a quintessential policy judgment

---

[1] The majority correctly explains the U.S. government's position that external restitution alone is not "sufficient of its own force" to bar civil litigation in U.S. courts.

committed to the discretion of the Executive. "[I]t is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments." *Munaf v. Geren*, 553 U.S. 674, 700–01, 128 S.Ct. 2207, 171 L.Ed.2d 1 (2008). Just as we may not "second-guess" the Executive's assessment that a prisoner is unlikely to be tortured if transferred to an Iraqi prison, *id.* at 702, 128 S.Ct. 2207, we may not displace the Executive's assessment that the Netherlands' postwar proceedings were adequate. For the federal courts to contradict the State Department on this issue, as is necessary to decide this appeal in Von Saher's favor, would "compromise[ ] the very capacity of the President to speak for the Nation with one voice in dealing with other governments."[2] *Garamendi*, 539 U.S. at 424, 123 S.Ct. 2374 (internal quotation marks omitted).

The majority strongly suggests that the federal courts should determine the bona fides of the Netherlands' 1951 internal restitution process. It acknowledges that the Cranachs were "potentially subject to restitution proceedings" that Desi Goudstikker found unfair. It notes, however, that the Dutch government later "undermined the legitimacy of

---

[2] I would not reach the question of whether Von Saher's claims are barred by the act of state doctrine because I would affirm the district court's dismissal of the complaint on the basis that her claims are preempted. I note, however, that adjudicating whether the Netherlands' 1951 proceedings were bona fide may implicate the act of state doctrine because "the outcome" of this inquiry "turns upon[ ] the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406, 110 S.Ct. 701, 107 L.Ed.2d 816 (1990).

that restitution process by describing it as 'bureaucratic, cold and often even callous.' " The majority then asserts that it does not "find convincing" the United States' statement of its foreign policy because it was "presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood some of the facts essential to our resolution of this appeal."

But we are not at liberty to find that the State Department's articulation of U.S. foreign policy is not "convincing." *Cf. Zivotofsky ex rel. Zivotofsky v. Clinton*, —— U.S. ——, 132 S.Ct. 1421, 1427, 182 L.Ed.2d 423 (2012) (finding a question justiciable because "[t]he federal courts are not being asked to supplant a foreign policy decision of the political branches"). And it is immaterial whether the Executive expressed our nation's policy in a Supreme Court amicus brief concerning field preemption, a district court merits brief concerning conflict preemption, an executive agreement unconnected to any litigation, or an official's testimony before Congress. *See Garamendi*, 539 U.S. at 416, 123 S.Ct. 2374 ("[V]alid executive agreements are fit to preempt state law...."); *id.* at 421, 123 S.Ct. 2374 (quoting Ambassador Randolph M. Bell's statement of U.S. foreign policy in congressional testimony). The majority is correct that we have the discretion to defer, or not, to "the Executive Branch's view of [a] case's impact on foreign policy." *Sosa v. Alvarez–Machain*, 542 U.S. 692, 733 n. 21, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004). We have no authority, however, to decide what U.S. foreign policy is. That is the exclusive responsibility of the political branches. *See Munaf*, 553

U.S. at 700–02, 128 S.Ct. 2207. Here, the Executive has clearly expressed its policy judgment that the process in which Desi declined to participate was adequate. That should be the end of the matter.

B.

The majority further errs by overlooking that the Cranachs were in fact subject to bona fide internal restitution proceedings in the Netherlands in 1998–99 and 2004–06.

In 1998, unaware that the Netherlands no longer possessed the Cranachs, Von Saher filed a claim to recover all of the Goudstikker artworks still in the Dutch government's possession. The State Secretary found that Von Saher's claim was untimely and declined to waive the statute of limitations because "directly after the war—even under present standards—the restoration of rights was conducted carefully." A Dutch appellate court determined it had no jurisdiction to entertain an appeal from this decision and declined to exercise its *ex officio* authority to grant relief because Desi had "made a conscious and well considered decision" not to pursue restitution after the war.

In 2004, after the Netherlands revised its restitution policy to adopt a more equitable approach in response to the Washington Principles, Von Saher filed another claim. A governmental advisory committee recommended that the claim be granted, reasoning that the claim was "still admissible" despite the prior decisions by the State Secretary and the appellate court. The State Secretary rejected this reasoning, finding that Von Saher's "restoration of rights" had been "settled" as a legal matter and that her claim fell outside the scope of the Dutch restitution policy. The

State Secretary nonetheless decided, as a matter of discretion, to return to Von Saher all of the Goudstikker artworks still in the government's possession. The Netherlands transferred to Von Saher more than two hundred of the 267 artworks she sought—but not the Cranachs, which had long ago been moved to California.[3]

The majority implausibly concludes that these were not restitution proceedings at all because Von Saher's restitution claims were time-barred and because the Cranachs were outside their scope. As an initial matter, the United States has expressly determined that the Cranachs were subject to a "1998 restitution proceeding" and a "2004 restitution proceeding" in the Netherlands, and that our nation "has a substantial interest in respecting the outcome of that nation's proceedings." This policy assessment is probably sufficient to foreclose the majority's contrary view.[4]

---

[3] In 1961, George Stroganoff–Scherbatoff, heir to the Russian Stroganoff dynasty, filed a restitution claim for the Cranachs in the Netherlands. He asserted that the Cranachs had been wrongfully seized from his family by Soviet authorities and then unlawfully auctioned off to the Goudstikkers. The Dutch government transferred the Cranachs to Stroganoff in 1966. Von Saher alleges that these were not restitution proceedings, but simply a sale, and that the Stroganoffs never owned the Cranachs. In 1971, Stroganoff sold the Cranachs to the Norton Simon Art Foundation.

[4] The majority attempts to draw an unworkable distinction between "explaining federal foreign policy" and "mak[ing] factual determinations." Our foreign policy often relies on factual assumptions inseparable from the policy itself. For instance, the federal foreign policy that "Iran's pursuit of nuclear weapons is unacceptable" entails a factual assumption that Iran is pursuing

See Munaf, 553 U.S. at 702, 128 S.Ct. 2207. Even if it is not, Von Saher did seek "restitution" of the Cranachs, and her filing of claims and the official disposition of those claims do constitute "proceedings." *See* BLACK'S LAW DICTIONARY 1428 (9th ed.2009) (defining "restitution" as "[r]eturn or restoration of some specific thing to its rightful owner or status"); *id.* at 1324, 128 S.Ct. 2207 (defining "proceeding" as "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment," or "[a]ny procedural means for seeking redress from a tribunal or agency"). That Von Saher did not succeed in obtaining her requested *relief* with respect to the Cranachs does not imply that there were no *proceedings* pertaining to the Cranachs.

Von Saher's state law claims conflict with our nation's "substantial" policy interest in respecting the finality of these two more recent rounds of Dutch proceedings. As the district court explained, these proceedings collectively determined that Von Saher was not entitled to the Cranachs' restitution as of right, but that the Cranachs should nonetheless be returned to her as a matter of discretion if the Netherlands possessed them. Put differently, Dutch authorities finally adjudicated Von Saher's legal claim to the

---

nuclear weapons. *U.S. Strategic Objectives Towards Iran: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. 7 (2011) (statement of Wendy R. Sherman, Under Secretary of State for Political Affairs). Here, the federal foreign policy that the finality of the Netherlands' prior restitution proceedings in this case should be respected entails a factual assumption that those proceedings occurred. Von Saher's attempt to plead to the contrary simply highlights why entertaining her claims would conflict with federal policy.

Cranachs on the grounds that it was procedurally defaulted as a matter of Dutch law. As is routinely recognized in other contexts, allowing Von Saher to relitigate these claims in U.S. courts would necessarily undermine the finality of the Netherlands' prior proceedings. *Cf.*, *e.g.*, *Martinez v. Ryan*, —— U.S. ——, 132 S.Ct. 1309, 1316, 182 L.Ed.2d 272 (2012) (noting that federal litigation concerning claims defaulted in state court undermines the finality of state adjudication). This is precisely what our nation's foreign policy requires us to avoid.

Because the Cranachs were potentially subject to restitution proceedings initiated by Desi in 1951 and actually subject to restitution proceedings initiated by Von Saher in 1998 and 2004, and because we lack the authority to invalidate the United States' policy judgment that all of these proceedings were bona fide, I would conclude that federal foreign policy preempts Von Saher's state law claims.

III.

During their campaign of atrocities in Europe, the Nazis stole precious cultural heritage as they systematically destroyed millions of innocent human lives. Shortly after the Nazi invasion of the Netherlands in 1940, Hermann Göring expropriated a historically significant artwork from the Goudstikker family. Perhaps as restitution for earlier wrongs by another totalitarian regime, George Stroganoff–Scherbatoff later obtained the artwork from the Dutch government in 1966. An acclaimed Southern California museum then acquired the Cranachs in 1971, presumably at a substantial price. Today, they hang in the gallery of the Norton Simon without the consent of the Goudstikkers' sole heir.

Marei Von Saher and the Museum are both standing on their rights to the Cranachs. Their dispute spans decades and continents, and it cannot be resolved in an action under the laws of California or any other U.S. state. The United States has determined, as a matter of its foreign policy, that its involvement with the Cranachs ended when it returned them to the Netherlands in 1945 and the Dutch government afforded the Goudstikkers an adequate opportunity to reclaim them. This foreign policy decision also binds the federal courts, and it should end our many years of involvement with the Cranachs as well. I would affirm the judgment of the district court.

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA.

Marei VON SAHER

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, et al.

No. CV 07-2866-JFW (JTLx).

March 22, 2012.

862 F. Supp. 2d 1044

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED [filed 12/27/2011; Docket No. 76]

JOHN F. WALTER, District Judge.

On December 27, 2011, Defendants Norton Simon Museum of Art at Pasadena and The Norton Simon Art Foundation (collectively "Defendants" or "Norton Simon") filed a Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted. On February 10, 2012, Plaintiff Marei von Saher ("Plaintiff") filed her Opposition. On March 7, 2012, Defendants filed a Reply.[1] Pursuant to Rule 78 of the Federal Rules of

---

1. On March 19, 2012, Plaintiff filed Objections to Certain Portions of Defendants' Reply Brief. On March 20, 2012, Defendants filed their Response to and Motion to Strike Plaintiff's Improper Sur–Reply. On March 20, 2012, Plaintiff filed an Opposition to Defendants' Motion to Strike Plaintiff's Objections

Civil Procedure and Local Rule 7–15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for March 26, 2012 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Plaintiff seeks to recover the diptych entitled "Adam and Eve," a pair of sixteenth century oil paintings on wood panels by Lucas Cranach the Elder (the "Cranachs"), which were taken by the Nazis during World War II from Plaintiff's father-in-law, Jacques Goudstikker, in a forced sale. The Cranachs were acquired by Norton Simon from George

---

to Certain Portions of Defendants' Reply Brief. The Court agrees with Defendants that Plaintiff's "Objections to Certain Portions of Defendants' Reply Brief" is plainly a sur-reply, which is flatly prohibited by the Local Rules. *See* Local Rule 7–10 ("Absent prior written order of the Court, the opposing party shall not file a response to the reply."). Accordingly, Defendants' Motion to Strike Plaintiff's Improper Sur–Reply is **GRANTED**.

2. The Court accepts the factual allegations in Plaintiff's First Amended Complaint as true, and construes them in the light most favorable to Plaintiff. Although the factual and procedural history of this action is very interesting, the Court has elected to provide a succinct statement of the relevant facts necessary to its ruling on this motion. The factual and procedural history has been exhaustively set forth in Plaintiff's First Amended Complaint, in the Ninth Circuit's opinion in *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (2010), the parties' briefs filed in the Ninth Circuit and the Supreme Court, and the Solicitor General's brief filed at the invitation of the Supreme Court.

Stroganoff–Scherbatoff in 1970–71 and have been continuously on display at the Norton Simon Museum of Art at Pasadena since 1979.

A. The Paintings and Their History

In 1931, the Soviet government held an art auction in Berlin titled the "Stroganoff Collection," which featured artworks formerly in the collection of the Stroganoff family as well as other artworks. The Cranachs were among the auctioned works. According to Plaintiff, the Cranachs were not part of the Stroganoff family's collection, but instead came from the Church of the Holy Trinity in Kiev, Ukraine. Jacques Goudstikker ("Goudstikker"), a prominent Dutch art dealer and Plaintiff's predecessor-in-interest, purchased the Cranachs at the 1931 art auction.

Nazi Germany invaded The Netherlands in May 1940, and Goudstikker fled with his wife and son, Desi and Edo, to South America by ship. Although Goudstikker was forced to leave his art gallery and collection behind, Goudstikker brought with him a black notebook (the "Blackbook") which listed over 1,000 artworks he had left in The Netherlands, including the Cranachs. Goudstikker unfortunately died in a ship-board accident.

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Göring, Reischsmarschall of the Third Reich, and his cohort, Aloïs Miedl, forcibly purchased the Goudstikker assets in two transactions at a fraction of their value. Miedl took Goudstikker's real property, the art dealership itself, and personal property, whereas Göring took most of the dealership's inventory of art, including the Cranachs.

In May 1945, the Allied Forces discovered and took possession of Göring's collection of artworks, and sent them to the Munich Central Collection Point, where the works from the Goudstikker collection were identified, including the Cranachs. On July 29, 1945, at the Potsdam Conference, President Truman formally adopted a policy of "external restitution," which governed looted artwork found within the United States' zone of occupation. Under this policy, the United States determined that looted art should be returned to the countries of origin, not to individual owners, allowing the newly liberated governments to restitute the art to individual owners. Pursuant to this policy of external restitution, in or about 1946, the Allied Forces formally returned the Goudstikker artworks, including the Cranachs, to The Netherlands.

B. The Dutch Restitution Proceedings

In 1946, Desi Goudstikker returned to The Netherlands and commenced restitution proceedings in order to recover her family's property. Dutch restitution law required claimants who had received money from the Nazis in forced sales to return that money as a condition of recovering their property. Claimants were given until July 1951 to file restitution petitions.

Ms. Goudstikker filed a timely restitution petition seeking return of the real estate and other property taken by Miedl. Ms. Goudstikker ultimately settled her claims and entered into a written settlement agreement with the Dutch authorities in 1952. The settlement did not include any of her claims related to the works taken as a result of the Göring transaction, such as the Cranachs. For a variety of reasons but primarily because she believed the restitution

proceedings were unfair, Ms. Goudstikker decided not to file a claim for the works taken in the Göring transaction, and allowed the Dutch restitution filing deadline to lapse.

In May 1961, one of the Stroganoff heirs, former Prince and U.S. Naval Commander George Stroganoff–Scherbatoff, filed a claim with the Dutch government for the return of the Cranachs and other paintings, claiming that they belonged to his family. In 1966, the Dutch government settled his claim by exchanging the Cranachs and a third painting for a monetary payment. Norton Simon purchased the Cranachs from Stroganoff in 1970–1971.

In 1996, Ms. Goudstikker and her son Edo both died, leaving Plaintiff as the sole Goudstikker heir. On January 9, 1998, Plaintiff filed a new restitution claim with the Dutch State Secretary of Education, Culture, and Science ("Dutch State Secretary") demanding return of "the Goudstikker Collection" and all proceeds received by the Dutch government from the sale of any of the works taken by Göring.[3] According to Plaintiff, at that time, she was not aware that the Dutch government no longer had possession of the Cranachs. The Dutch State Secretary rejected Plaintiff's claim, concluding it was time-barred. Plaintiff appealed the Dutch State Secretary's decision to the Court of Appeals of The Hague and asserted original claims seeking restitution and challenging the Goudstikker restitution proceedings under international law. The Hague Court rejected her claims, emphasizing that

---

3. Sometime in the 1950s, the Dutch government auctioned at least 63 of the Goudstikker paintings taken by Göring.

"nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted, and that Ms. Goudstikker had made a 'conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction' ".

In 2001–2002, the Dutch government made a policy decision to "depart from a purely legal approach of the restitution of 'war art' " in favor of a "more moral" approach, and established a new Restitution Committee to hear certain Holocaust art claims. In April 2004, Plaintiff filed a renewed claim seeking "the goods that the State of the Netherlands has in its custodianship and that were part of the Goudstikker Collection." "[B]ased more on policy than strict legality," the Restitution Committee decided that Plaintiff's claim for the works taken by Göring was "still admissible" and recommended the return of those works that were still in the Dutch government's possession. On February 6, 2006, the Dutch State Secretary adopted the Restitution Committee's recommendations regarding the return of the art works, but rejected the majority of the Restitution Committee's reasons for its recommendations. In particular, the Dutch State Secretary found that "this case is not included in the current restitution policy" and that it has already been "settled." Nevertheless, based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties," the Dutch State Secretary agreed to return the works still in The Netherlands' possession that had been taken by Göring, without requiring Plaintiff to relinquish any of the money paid by Göring in the forced sale. However,

the Dutch State Secretary decided not to compensate Plaintiff for works that had been previously auctioned by the Dutch government.

C. History of this Litigation

On May 1, 2007, Plaintiff filed a Complaint against Defendants to recover the Cranachs, relying on the provisions of California Code of Civil Procedure § 354.3, which extended the statute of limitations for the recovery of Holocaust-era art until 2010. In a written decision, this Court held that California Code of Civil Procedure § 354.3 was "facially unconstitutional" under the foreign affairs doctrine, and that Plaintiff's claims were otherwise time-barred. In a published opinion, *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir.2010), the Ninth Circuit affirmed the Court's decision that § 354.3 was preempted by the foreign affairs doctrine. However, the Ninth Circuit remanded the action to allow Plaintiff an opportunity to amend her Complaint "to allege the lack of reasonable notice to establish diligence" under California Code of Civil Procedure § 338, California's general three-year statute of limitations for the recovery of stolen property.

The California legislature responded to the *Von Saher* opinion, and on February 25, 2010, six weeks after the Ninth Circuit issued its opinion, the Committee on Judiciary introduced Assembly Bill 2765 ("AB 2765"),[4] which amended California Code of Civil

---

4. Although the bill was sponsored by the Committee on Judiciary, the "idea" for the bill came from Randol Schoenberg,

Procedure § 338 with respect to art claims against museums. As enacted, the bill retroactively amended § 338 and (1) extended the statute of limitations for specific recovery of a work of fine art from three to six years if the action is brought against a museum, gallery, auctioneer or dealer; and (2) clarified that such claims do not accrue until "actual discovery" rather than "constructive discovery" of both the identity and whereabouts of the work and information supporting a claim of ownership.

On November 8, 2011, Plaintiff filed a First Amended Complaint seeking to recover the Cranachs from Defendants and alleging the following state-law claims for relief: (1) Replevin; (2) Conversion; (3) Damages under California Penal Code § 496; (4) Quiet title; and (5) Declaratory relief. Plaintiff relies on the amended statute of limitations provisions in California Code of Civil Procedure § 338 and alleges that she did not actually discover that the Cranachs were on display at the Norton Simon Museum of Art at Pasadena until October 25, 2000.

II. LEGAL STANDARD

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. "A Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.' " *Summit Technology, Inc. v. High–Line Medical Instruments Co., Inc.*, 922 F.Supp. 299, 304

---

whose law firm represents Plaintiff in this action. *See* Appendix at Exhibit 38 at 549.

(C.D.Cal.1996) (quoting *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988)). However, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (internal citations and alterations omitted). "[F]actual allegations must be enough to raise a right to relief above the speculative level." *Id.*

In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir.1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F.Supp. at 304 (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981) cert. denied, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). However, a court may consider material which is properly submitted as part of the complaint and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting the motion to dismiss into a motion for

summary judgment. *See*, *e.g.*, *id.*; *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir.1996).

III. DISCUSSION

Defendants argue in relevant part that Plaintiff's claims are preempted under the foreign affairs doctrine. "The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir.2010). Indeed, "the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch v. Turner Corp.*, 324 F.3d 692, 714–15 (9th Cir.2003).

There are two different theories which courts rely upon to declare state laws unconstitutional or preempted under this "foreign affairs doctrine": (1) conflict preemption; or (2) field preemption. As the Supreme Court has explained:

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted and, if

> it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. Where, however, a State has acted within ... its "traditional competence," but in a way that affects foreign relations, it might make good sense to require a conflict, of a clarity or substantiality that would vary with the strength or the traditional importance of the state concern asserted.

American Ins. Ass'n v. Garamendi, 539 U.S. 396, 420 n. 11, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) (internal citations omitted).

Here, Defendants argue that Plaintiff's state-law claims are preempted under the foreign affairs doctrine because the remedies sought by Plaintiff conflict directly with express federal policy.[5] Conflict preemption occurs where state law conflicts with a federal foreign policy, and the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of that federal policy. *Von Saher*, 592 F.3d at 961 (quotations and citations omitted). In this case, as the Ninth Circuit acknowledged, after World War II, the United States adopted a policy of external restitution. Under that policy, "the U.S. restituted looted art to countries, not individuals. The newly liberated governments were responsible for restituting the art to the individual owners. Once the art was returned to the country of

---

5. Defendants apparently concede that California has acted within its traditional competence in amending California Code of Civil Procedure 338.

origin, the U.S. played no further role." *Von Saher*, 592 F.3d at 962. The Ninth Circuit also recognized the State Department's reasons for choosing this policy of external restitution:

> First, in view of the complexities of the sham transactions through which the Nazis seized many of the artworks, the State Department felt it best to allow the individual countries to handle restitution in whatever way they see fit. Second, the State Department observed, in some cases, it might "be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom." Finally, the State Department recognized that the liberated countries themselves had a stake in the restitution of art owned by their citizens....

Id. (internal citations omitted).

The Ninth Circuit concluded however that the United States' external restitution policy ended in 1948 because "[a]fter September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution." *Id.* at 963. The Ninth Circuit noted: "[H]ad [California Code of Civil Procedure § 354.3] been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external restitution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch." *Id.* Accordingly, the Ninth Circuit concluded that conflict preemption was inapplicable and instead concluded that § 354.3 was preempted under a theory of field preemption.

Although the Ninth Circuit rejected the application of conflict preemption to § 354.3, Defendants argue that this Court is not bound by the Ninth Circuit's determination and that this Court can and should conclude that conflict preemption bars Plaintiff's state-law claims. The Court agrees. Under the law of the case doctrine, this Court may only depart from a decision of the Ninth Circuit in very limited circumstances, which include: "(1) the first decision was clearly erroneous; (2) an intervening change in law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997).

The Court, recognizing its obligation to follow the law of the case except in very limited circumstances, concludes that the evidence on remand is significantly different than on appeal and that it is permissible and appropriate to depart from the Ninth Circuit's determination that conflict preemption is inapplicable. The Ninth Circuit and this Court did not have the benefit of the United States' view of its foreign policy, as expressed in the Solicitor General's brief filed in the Supreme Court in connection with Plaintiff's petition for writ of certiorari. Importantly, the Solicitor General's brief was signed by Harold Koh, the Legal Advisor to the Department of State, on the agency's behalf. In his brief, the Solicitor General succinctly stated and clarified the United States' foreign policy as it specifically relates to Plaintiff's claims in this litigation:

> The court of appeals erred in dismissing the external restitution policy as irrelevant to this case

> because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims. The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality when appropriate actions have taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II.

See Appendix at Exhibit 37 at 500 (internal citations omitted). Moreover, the Solicitor General focused on and emphasized the importance of the United States' policy of respecting the finality and outcome of The Netherlands' restitution proceedings:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings.

Id. at 502.

Plaintiff disputes that the Solicitor General has accurately expressed United States foreign policy, and asks the Court to supplant the Solicitor General's statement of current United States foreign policy with her own. Specifically, she argues that the Solicitor General has grossly misstated and misinterpreted The Washington Conference Principles on Nazi–Confiscated Art ("Washington Principles") and the Terezin Declaration on Holocaust Era Assets and Related Issues ("Terezin Declaration"), and contends

that the Solicitor General is wrong to imply that litigation to retrieve Nazi-looted art is precluded.

The Washington Principles are an important, non-binding set of norms signed by participating nations including the United States and The Netherlands, which resulted from the Washington Conference on Holocaust Era Art Assets hosted by the United States in 1998. Appendix at Exhibit 34. The Washington Principles were based on the moral principle that art and cultural property confiscated by the Nazis and not subsequently restituted should be returned to Holocaust victims or their heirs, while also recognizing that "among participating nations there are differing legal systems and that countries act within the context of their own laws." *Id.* at Exhibit 34, 35. The principles encouraged participating nations to take steps "expeditiously to achieve a just and fair resolution, recognizing this may vary according to the facts and circumstances surrounding a specific case," *id.* at Exhibit 34.

In June 2009, many signatories to the Washington Principles participated in the Prague Holocaust Era Assets Conference which produced the Terezin Declaration. *See* Appendix at Exhibit 35. The Terezin Declaration promulgated a substantially similar set of non-binding principles, and "urge[d] 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 the parties." *Id.*

After carefully considering the norms and principles established by the Washington Principles and Terezin Declaration, the Solicitor General concluded that contemporary United States policy "does not support relitigation of all art claims in U.S. courts," but rather "supports the fair and just resolution of claims involving Nazi-confiscated art, while also respecting the bona fide internal restitution proceedings of foreign governments."[6] Appendix at Exhibit 37 at 489, 501. After a thorough review of the Washington Principles, Terezin Declaration, and other relevant statements of United States foreign policy, the Court concludes that the Solicitor General's statement of United States policy is entirely complementary and does not in any manner whatsoever contradict the Washington Principles or the Terezin Declaration. Even if it were appropriate to do so, the Court finds no compelling reason to second-guess the Executive Branch's statement and interpretation of its own foreign policy. *See e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F.Supp.2d 1164, 1188 n. 18 (C.D.Cal.2005) ("The Court notes that it must take these statements [of the State Department] at face value."); *Sosa v. Alvarez–*

---

6. Plaintiff claims that "[a]fter arguing that the post-War external restitution policy rendered § 354.3, a statute that specifically targeted Holocaust claims, unconstitutional," the Solicitor General "made clear that [Plaintiff's] common law claims may now proceed to be determined on the merits" under the generally applicable statute of limitations for stolen property claims. Opposition at p. 1. The Solicitor General took no such position. He merely stated that Supreme Court review would be premature because the Ninth Circuit's preemption holding may not be dispositive.

Machain, 542 U.S. 692, 733 n. 21, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) ("[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.").

The Court concludes that the United States' policy of external restitution and respect for the outcome and finality of The Netherlands' bona fide restitution proceedings, as clearly expressed and explained by the Solicitor General in his amicus curiae brief, directly conflicts with the relief sought in Plaintiff's action. "Conflict is imminent when two separate remedies are brought to bear on the same activity." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 380, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (quotations and citations omitted). In this case, the United States made a decision and chose its favored remedy for the restitution of Nazi-looted art, i.e. a country of origin's bona fide restitution proceedings. This external restitution policy has not changed since it was first adopted by the United States after World War II. However, Plaintiff's action seeks to trump and interfere with United States foreign policy, by relying on an entirely different remedy for the restitution of Nazi-looted art, i.e. the laws of the State of California. Although the United States and California both share a goal of returning Nazi-looted art to its rightful owners, "[t]he fact of a common end hardly neutralizes conflicting means." *Crosby*, 530 U.S. at 379, 120 S.Ct. 2288. Moreover, if the Court were to allow Plaintiff's claims to proceed, the Court undoubtedly would be forced to review the restitution decisions made by the Dutch government and courts, including for example whether Plaintiff's claims had in fact been "settled."

See Von Saher, 592 F.3d at 967 ("In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts."). Such a determination by the Court would seriously undermine the federal government's policy of respecting the finality and outcome of the Dutch government's restitution proceedings and would potentially implicate the act of state doctrine. Allowing Plaintiff's action to proceed would have "more than incidental effect in conflict with express foreign policy of the National Government." *See Garamendi*, 539 U.S. at 420, 123 S.Ct. 2374. Accordingly, the Court concludes that Plaintiff's state-law claims are preempted.

To the extent Plaintiff argues that the foreign affairs doctrine cannot preempt claims which arise under a state's generally applicable law, the Court disagrees. *See*, *e.g.*, *In re Assicurazioni Generali S.p.A. Holocaust Ins. Litig.*, 340 F.Supp.2d 494, 501 (S.D.N.Y.2004) (concluding that the Supreme Court's decision in *Garamendi* "requires dismissal ... of the benefits claims arising under generally applicable state statutes and common law" because "[l]itigation of Holocaust-era insurance claims, no matter the particular source of law under which the claims arise, necessarily conflicts with the executive policy favoring voluntary resolution of such claims...."). "It is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law." *Saleh v. Titan Corp.*, 580 F.3d 1, 13 n. 8 (D.C.Cir.2009). In this case, California's

generally applicable laws must yield to the United States' conflicting foreign policy.

It is again with great reluctance that the Court concludes that Plaintiff's claims are preempted by the foreign affairs doctrine, realizing the effect that this decision may have on victims of the holocaust and their descendants. As the Court stated in its previous order, there are no words which can adequately describe the atrocities suffered by the victims of the Holocaust, which continue to have an effect on those victims and their descendants today.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted is **GRANTED**. Plaintiff's First Amended Complaint is **DISMISSED with prejudice**.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

Marei VON SAHER, Plaintiff–Appellant,
v.
NORTON SIMON MUSEUM OF ART AT PASADENA, Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation, Defendants–Appellees.

No. 07–56691.

Argued and Submitted Dec. 8, 2008.
Filed Aug. 19, 2009.
Amended Jan. 14, 2010.

592 F.3d 954

Before: HARRY PREGERSON, D.W. NELSON and DAVID R. THOMPSON, Circuit Judges.

Opinion by Judge THOMPSON; Dissent by Judge PREGERSON.

ORDER AMENDING OPINION AND DENYING THE PETITIONS FOR REHEARING AND FOR REHEARING EN BANC AND AMENDED OPINION

ORDER

The panel, with the following amendments, has granted the petition for panel rehearing filed by the appellee, Norton Simon Museum of Art at Pasadena, and has denied the petitions for rehearing and for rehearing en banc filed by the appellant Marei Von Saher, and by amici the State of California and Earthrights International.

The opinion filed August 19, 2009, slip op. 11333, and published at 578 F.3d 1016 (9th Cir.2009) is amended as follows:

At page 578 F.3d at 1031 the last two paragraphs of the majority opinion are deleted. The first of these two paragraphs begins "The museum contends that the articles" and the last paragraph of the two paragraphs ends "dismissed without leave to amend." The following new paragraph is inserted in place of the two deleted paragraphs:

> Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). We, therefore, grant Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under California Code of Civil Procedure § 338, and remand this case to the district court for that purpose.

The full court was advised of the petitions for rehearing and for rehearing en banc, and of the proposed amendments set forth above. No judge requested rehearing en banc.

The opinion as amended above is filed simultaneously with this order.

With the exception of the relief granted above pursuant to the appellee's petition for panel rehearing, the petitions for rehearing and for rehearing en banc are DENIED. Judge Pregerson voted to grant the petitions for rehearing and for rehearing en banc.

No further petitions for rehearing or rehearing en banc may be filed.

OPINION

THOMPSON, Senior Circuit Judge:

Marei von Saher ("Saher") seeks the return of two paintings alleged to have been looted by the Nazis during World War II. The paintings were purchased in or around 1971 by the Norton Simon Museum of Art in Pasadena, California ("the Museum"), and are now on display there. Saher brought this claim against the Museum under § 354.3 of the California Code of Civil Procedure, which extends the statute of limitations until 2010 for actions for the recovery of Holocaust-era art. The primary issue on appeal is whether § 354.3 infringes on the national government's exclusive foreign affairs powers. The district court held that it does. We agree, and affirm the district court's holding that § 354.3 is preempted.

California also has a three-year statute of limitations for actions to recover stolen property. California Code of Civil Procedure § 338. The district court granted the Museum's Rule 12(b)(6) motion to dismiss Saher's complaint under that statute without leave to amend. Because it is possible Saher might be able to amend her complaint to bring her action within § 338, we reverse the district court's dismissal without leave to amend, and remand for further proceedings.

I. Background

A. Nazi Art Looting in WWII

During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the "greatest displacement of art in human history." Michael J. Bazyler, Holocaust Justice: The

Battle for Restitution in America's Courts 202 (N.Y.U Press 2003).

Following the end of World War II, the Allied Forces embarked on the task of returning the looted art to its country of origin. In July 1945, President Truman authorized the return of "readily identifiable" works of art from U.S. collecting points. *See, e.g.*, Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR–142 (Dec.2000) (hereinafter Plunder and Restitution). At the Potsdam Conference, President Truman formally adopted a policy of "external restitution," under which the looted art was returned to the countries of origin—not to the individual owners. American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946) (hereinafter Roberts Commission Report).

Despite these restitution efforts, many paintings stolen by the Nazis were never returned to their rightful owners. *See, e.g.*, Bazyler at 204. Tracking the provenance of Nazi-looted art is nearly impossible, since many changes of ownership went undocumented, and most of the transactions took place on the black market. *Id.* In recent years, a number of the world's most prominent museums have discovered their collections include art stolen during World War II. *Id.* at 205–06.

The federal government has continued to take action to address the recovery of Holocaust-era art. In 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub.L. No. 105–186, 112 Stat. 611 (codified as amended at 22 U.S.C. § 1621). This Act established the Presidential Advisory Commission on

Holocaust Assets, which conducted research on the fate of Holocaust-era assets, and advised the President on future policies concerning the recovery of these assets. *Id.* That same year, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets. U.S. Dep't of State, Proceedings of the Washington Conference on Nazi–Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Conference Proceedings). In the meantime, numerous Holocaust victims and their heirs have turned to the courts to recover their looted art. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004).

B. Section 354.3

Many obstacles face those who attempt to recover Holocaust-era art through lawsuits. The challenges range from procedural hurdles such as statutes of limitations, to prudential standing doctrines. *See, e.g.*, Benjamin E. Pollock, *Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution to Nazi–Looted Art Claims*, 43 Houston L.Rev. 193, 213–28 (2006); Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaust*, 14 Williamette J. Int'l L. & Disp. Resol. 243, 252–58 (2006). In 2002, California responded to these difficulties by enacting California Code of Civil Procedure § 354.3.[1] Section 354.3 provides:

---

[1] All subsequent references are to the California Code of Civil Procedure, unless otherwise stated.

> 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.
>
> Section 354.3(b). The California statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354(a)(1). The statute also extends the statute of limitations for § 354.3 claims until December 31, 2010.

Section 354.3(c). California has enacted several other laws extending the statute of limitations for claims relating to the Holocaust. *See, e.g.*, Section 354.5 (extending statute of limitations for insurance policy claims by Holocaust victims or their heirs); Section 354.6 (creating a cause of action and extending the statute of limitations for slave labor claims arising out of WWII). Both of these sister statutes have been found unconstitutional under the foreign affairs doctrine. *Steinberg v. Int'l Comm'n on Holocaust Era Ins. Claims*, 133 Cal.App.4th 689, 34 Cal.Rptr.3d 944, 953 (2005) (finding § 354.5 unconstitutional); *Deutsch v. Turner Corp.*, 324 F.3d 692, 716 (9th Cir.2003) (finding § 354.6 unconstitutional).

C. The Cranachs

Saher, the only surviving heir of Jacques Goudstikker, a deceased art dealer, filed this suit in 2007 against the Museum under § 354.3 and California

Penal Code § 496, seeking the return of a diptych entitled "Adam and Eve." The diptych, a pair of oil paintings by sixteenth-century artist Lucas Cranach the Elder (hereinafter the "Cranachs"), is currently on public display at the Museum.

Goudstikker bought the Cranachs at an art auction in Berlin in or about May 1931.[2] Goudstikker was a prominent art dealer in the Netherlands; he specialized in Old Master paintings. Goudstikker's collection contained more than 1,200 artworks, including Rembrandts, Steens, Ruisdaels, and van Goghs.

When the Nazis invaded the Netherlands in May 1940, Goudstikker and his family fled the country. The family left their assets behind, including the Gallery. Goudstikker brought with him a black notebook containing a list of over 1,000 of the artworks he had left behind in his collection (the "Blackbook"). The Blackbook lists the Cranachs as Numbers 2721 and 2722, and states that they were purchased at the Lepke Auction House and were previously owned by the Church of the Holy Trinity in Kiev.

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Göring, Reischsmarschall of the Third Reich, seized the Cranachs and hundreds of other pieces from the gallery. Göring sent the artwork to Carinhall, his country estate near Berlin, where the collection remained until approximately May 1945 when the

---

[2] The facts in this section are alleged in Saher's complaint; some are disputed by the Museum. Given the procedural posture of the case, we accept these factual allegations as true, and construe them in the light most favorable to Saher.

Allied Forces discovered it. The recovered artwork was then sent to the Munich Central Collection Point, where the works from the Goudstikker collection were identified. In or about 1946, the Allied Forces returned the Goudstikker artworks to the Netherlands.

The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the Museum.

The Museum filed a Rule 12(b)(6) motion to dismiss Saher's complaint filed in this case for the return of the paintings. The district court granted the motion and dismissed Saher's claim with prejudice. The district court held that § 354.3's extension of the statute of limitations was unconstitutional on its face, because it violated the foreign affairs doctrine, as interpreted and applied by the Ninth Circuit in *Deutsch*, 324 F.3d 692. The district court concluded that by seeking to redress wrongs committed in the course of World War II, the California statute intruded on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. The court then dismissed Saher's complaint because it had not been filed within the three-year period of California's statute of limitations, California Code of Civil Procedure § 338. This appeal followed.

II. Standard of Review

We review de novo the district court's decision dismissing Saher's complaint under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir.2004). We accept all well-pleaded factual allegations as true, and construe them in the light most

favorable to Saher. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007); *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir.2008).

III. Motion for Judicial Notice

The Museum moves for judicial notice of two Presidential Commission reports, a military order approved by President Truman and enacted under the command of General Eisenhower, and a memorandum prepared by a State Department committee. Judicial notice of legislative facts such as these is unnecessary. Fed.R.Evid. 201(a), advisory comm. note to 1972 amendments. *See, e.g., Toth v. Grand Trunk R.R.*, 306 F.3d 335, 349 (6th Cir.2002) ("[J]udicial notice is generally not the appropriate means to establish the legal principles governing the case.").

The Museum also moves for judicial notice of the fact that various newspapers, magazines, and books have published information about the Cranachs. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n. 15 (3d Cir.2006); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir.1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."). These publications meet the standards for admissibility set forth in Federal Rule of Evidence 201(b). Accordingly, we take judicial notice of them solely as an indication of what information was in the public realm at the time.

IV. Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power. *See, e.g., Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413–14, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003); *Zschernig v. Miller*, 389 U.S. 429, 432, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941). The Supreme Court has declared state laws unconstitutional under the foreign affairs doctrine when the state law conflicts with a federal action such as a treaty, federal statute, or express executive branch policy. *See, e.g., Garamendi*, 539 U.S. at 421–22, 123 S.Ct. 2374 (invalidating a California statute which conflicted with Presidential foreign policy); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373–74, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (invalidating a Massachusetts statute which stood as an obstacle to a Congressional act imposing sanctions on Burma); *U.S. v. Belmont*, 301 U.S. 324, 327, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy).

Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power. *See, e.g., Zschernig*, 389 U.S. at 432, 88 S.Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines*, 312 U.S. at 63, 61 S.Ct. 399 (invalidating a Pennsylvania immigration law because

the field of immigration regulation was occupied exclusively by federal statutes and regulations); *see also Deutsch*, 324 F.3d at 712 (concluding that § 354.6 infringed on the federal government's exclusive power to wage and resolve war).

The Museum argues that § 354.3 is preempted under either theory. First, the Museum contends, § 354.3 conflicts with the Executive Branch's policy of external restitution following World War II. Alternatively, the Museum argues, § 354.3 is preempted because it infringes on the federal government's exclusive power to conduct foreign affairs, and specifically, the power to redress injuries arising from war. We address each argument in turn.

A. Does § 354.3 Conflict With the Executive Branch's Policy of External Restitution?

Federal law's "power" to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States" and "all Treaties ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (citing *Hines*, 312 U.S. at 67, 61 S.Ct. 399) (internal quotation marks omitted).

Executive agreements settling claims with foreign nations and nationals have long been accorded the same preemptive effect. *Garamendi*, 539 U.S. at 416, 123 S.Ct. 2374 ("[V]alid executive agreements are fit to

preempt state law, just as treaties are[.]"); *Dames & Moore v. Regan*, 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Belmont*, 301 U.S. at 324, 57 S.Ct. 758. In *Garamendi*, the Supreme Court invalidated a California statutory scheme which facilitated litigation of Holocaust-era insurance claims. *Garamendi*, 539 U.S. at 401, 123 S.Ct. 2374. The Court concluded that the California scheme posed an obstacle to the German Foundation Agreement and other expressions of Executive Branch policy preferring nonjudicial resolution of such claims. *Id.* at 405–07, 123 S.Ct. 2374.

Here, the Museum contends that § 354.3 is preempted by the Executive Branch's policy of external restitution. This policy, the Museum argues, was expressed in two main sources: first, the London Declaration, and second, "Art Objects in U.S. Zone," a U.S. policy statement approved by President Truman during the Potsdam Conference in August of 1945.

London Declaration

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. Forced Transfers of Property in Enemy–Controlled Territory, 1943, in 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776–1949, p. 754 (C. Bevans comp.1969) (hereinafter Bevans). The Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war [.]" *Id.*

In the Declaration, the Allies explicitly reserved the right to invalidate wartime transfers of property, regardless of "whether such transfers or dealings [had] taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport[ed] to be voluntarily effected." *Id.* The Declaration does not explicitly address restitution or reparations, but has been credited by some with laying the foundation for the United States's postwar restitution policy. *See, e.g.*, Plunder and Restitution at SR–139.

Art Objects in U.S. Zones

When the American forces entered Germany in the winter of 1944–45, they discovered large stashes of Nazi-looted art, hidden in castles, banks, salt mines, and even caves. Plunder and Restitution at SR–13, SR–85. U.S. authorities established several central collection points within the U.S. Zone to assemble the recovered artwork "for proper care and study." Report, Art Objects in U.S. Zone, July 29, 1945, NACP, RG 338, USGCC HQ, ROUS Army Command, Box 37, File: Fine Art [313574–575] (hereinafter "Art Objects in U.S. Zone").

On July 29, 1945, at the Potsdam Conference, President Truman approved a policy statement setting forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation. Art Objects in U.S. Zone; Roberts Commission Report at 148. The governments of the formerly occupied countries submitted consolidated lists of items taken by the Germans, with information about the location and circumstances of the theft. Plunder and Restitution at SR–142. The U.S. authorities examined the lists, and when artwork was

identified, it was returned to the country of origin. *Id.* Under this policy of "external restitution," the U.S. restituted the looted artwork to countries, not individuals. Art Objects in U.S. Zone; Plunder and Restitution at SR–139–SR–142. The newly liberated governments were responsible for restituting the art to the individual owners. Once the art was returned to the country of origin, the U.S. played no further role.

A contemporaneous memorandum from the State Department illuminates several of the reasons the federal government preferred the policy of external restitution over individual restitution. U.S. Dep't of State, Memorandum from Interdivisional Comm. on Rep., Rest., & Prop. Rights, Subcomm. 6, Recommendations on Restitution, Apr. 10, 1944, 1, NACP, RG 59, Lot 62D–4, Box 49, State/Notter, [320633–644] (hereinafter Recommendations on Restitution). First, in view of the complexities of the sham transactions through which the Nazis seized many of the artworks, the State Department felt it best to allow the individual countries to handle restitution in "whatever way they see fit." *Id.* at 2. Second, the State Department observed, in some cases, it might "be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom." *Id.* Finally, the State Department recognized that the liberated countries themselves had a stake in the restitution of art owned by their citizens:

> [I]n many, if not most, cases the local funds[with which the Nazis "purchased" the art from the persecuted] were supplied originally by the local government or central bank as occupation costs or

> through forced credits. The Germans in effect forced the local government to pay for their purchases. The individual owner received recompense in local currency but the country as a whole received no recompense for the transfer of property to foreign owners. These cases constitute looting just as much as the cases of outright seizure without recompense.

Id. at 2–3.

The U.S. authorities stopped accepting claims for external restitution of looted artwork as of September 15, 1948. Plunder and Restitution at SR–143. By the beginning of 1949, close to three million pieces of Jewish cultural property had been restituted to twelve different countries by the U.S. authorities. *Id.*

Had California enacted § 354.3 in 1945, it would have directly conflicted with the federal government's policy of external restitution. If the statute had been enacted in the immediate aftermath of the war, it would have presented a competing method of resolving restitution claims, and a forum for individuals to seek the return of their looted art—in clear contravention of the Executive Branch policy. The California statute also would have presented a direct threat to several of the goals underlying the Executive Branch's policy, including the rehabilitation of Germany.

The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution. Plunder and Restitution at SR–143. In fact, as Saher states in her complaint, the Cranachs were returned to the Netherlands through the U.S. external restitution program. Section 354.3

cannot conflict with or stand as an obstacle to a policy that is no longer in effect.

The Museum also argues, however, that many of the federal government's concerns leading to the external restitution policy remain relevant today. For example, the Museum argues that claims under § 354.3 are problematic, because they ask California courts to review the restitution decisions of foreign governments.[3] Even if true, there would still be no conflict because, as stated above, the external restitution policy is no longer in effect.

In sum, had the California statute been enacted immediately following WWII, it undoubtedly would have conflicted with the Executive Branch's policy of external resolution. The statute does not, however, conflict with any current foreign policy espoused by the Executive Branch.

B. In the Absence of Any Conflict With Federal Law or Foreign Policy, is § 354.3 Nonetheless Preempted Under the Foreign Affairs Doctrine?

At times, albeit seldomly, the Supreme Court has found a state law to be preempted because it infringes upon the federal government's exclusive power to conduct foreign affairs, even though the law does not conflict with a federal law or policy. *Zschernig*, 389 U.S. at 432, 88 S.Ct. 664; *Hines*, 312 U.S. at 63, 61 S.Ct. 399. In *Garamendi*, the Court suggested that a traditional statutory "field" preemption analysis should be employed in such cases:

---

[3] These and other related concerns are addressed more fully in the section below dealing with field preemption.

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted, and if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

Garamendi, 539 U.S. at 420 n. 11, 123 S.Ct. 2374.

Unlike its traditional statutory counterpart, foreign affairs field preemption may occur "even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy." *Deutsch*, 324 F.3d at 709 (internal citation and quotations omitted). The central question, then, is this: in enacting § 354.3, has California addressed a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the Constitution exclusively to the national government?

1. Does § 354.3 Concern a Traditional State Responsibility?

Saher contends § 354.3 concerns a quintessential state function: the establishment of a statute of limitations for actions seeking the return of stolen property. Property, of course, is traditionally regulated by the state. But § 354.3 cannot be fairly categorized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs. Section 354.3(b).

Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs. *See, e.g.*, *Garamendi*, 539 U.S. at 425–26, 123 S.Ct. 2374 (rejecting purported state interest in regulating insurance business and blue sky laws); *Crosby*, 530 U.S. at 367, 373 n. 7, 120 S.Ct. 2288 (rejecting purported state interest in taxing and spending); *Zschernig v. Miller*, 389 U.S. 429, 437–38, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968) (rejecting purported state interest in regulating descent of property); *Deutsch*, 324 F.3d at 707 (rejecting purported state interest in procedural rules).

The *Garamendi* Court in dicta rejected the "traditional state interests" advanced by California in support of HVIRA, finding instead that the real purpose of the state law was the "concern for the several thousand Holocaust survivors said to be living in the state." *Garamendi*, 539 U.S. at 426, 123 S.Ct. 2374. Though § 354.3 purports to regulate property, an area traditionally left to the states, like HVIRA, § 354.3's real purpose is to provide relief to Holocaust victims and their heirs.

California's desire to help its resident Holocaust victims and their heirs is a noble legislative goal, with which we are entirely sympathetic. In *Garamendi*, however, the Supreme Court held that "California's concern for the several thousand Holocaust survivors said to be living in the state ... does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one." *Garamendi*, 539 U.S. at 426–27, 123 S.Ct. 2374. The State's interest alone was not sufficient in *Garamendi*

to save the statute: "[T]here being about 100,000 survivors in the country, only a small fraction of them live in California. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.*

California arguably has a stronger interest in enacting § 354.3 than it did in enacting the related statutes struck down in *Deutsch* and *Garamendi.* Section 354.3 addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries. Assem. Jud. Com., Background Information Worksheet for Assem. Bill No. 1758 (2001–2002 Reg. Sess.) Jan. 30, 2002.

California certainly has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art. Indeed, it appears the original goal of § 354.3 may have been to regulate California museums and galleries in such a manner. Prior to its enactment, however, the bill was amended. The restriction limiting the scope of the statute to suits against "museums and galleries in California" was stricken. Assem. Amend. to Assem. Bill No. 1758 (2001–2002 Reg. Sess.); Sen. Jud. Com., Analysis of Assem. Bill No. 1758 (2001–2002 Reg. Sess.) Jun. 25, 2002, pp. 5–6. As enacted, the statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance," whether located in the state or not. Section 354.3(a)(1).

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended

version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state. A memorandum from the Governor's office provides further illustration of California's intent. In it, California is characterized as a pioneering leader in the quest for justice for Holocaust victims:

> In the past decade, it has come to the public's attention that spoils gained by the Nazi Holocaust were enjoyed not just by the Nazis. *California has been a leader in exposing those entities* who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings.

Governor's Office of Planning & Research, Enrolled Bill Report on Assem. Bill No. 1758 (2001–2002) Reg. Sess. Aug. 1, 2002 (emphasis added).

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II. In so doing, California can make "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374; *see also Deutsch*, 324 F.3d at 712 (rejecting California's interest in "redress[ing] wrongs committed in the course of the Second World War"). California cannot have a "distinct juristic personality" from that of the United States when it comes to matters of

foreign affairs. *Pink*, 315 U.S. at 232, 62 S.Ct. 552. When it comes to dealings with foreign nations, "state lines disappear." *Belmont*, 301 U.S. at 331, 57 S.Ct. 758.

In sum, the scope of § 354.3 belies any purported state interest in regulating stolen property or museums or galleries within the State. By enacting § 354.3, California has created a world-wide forum for the resolution of Holocaust restitution claims. While this may be a laudable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374.

2. Does the California Statute Intrude on a Power Expressly or Impliedly Reserved to the Federal Government by the Constitution?

The District Court held that § 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution. We agree.

The Constitution divides the war power between the Executive, who is the Commander–in–Chief of the Armed Forces, and the Congress, who has the power to declare war. U.S. Const. art. II, § 2; *Id.* at art. I, § 8. *Deutsch* clearly provides that "[m]atters related to war are for the federal government alone to address," and state statutes which infringe on this power will be preempted. *Deutsch*, 324 F.3d at 712.

Section 354.3 establishes a remedy for wartime injuries. The legislative findings accompanying the statute repeatedly reference the "Nazi regime," "Nazi persecution," and "the many atrocities" the Nazis committed. 2002 Cal. Legis. Serv. 332 (West 2002). By enacting § 354.3, California "seeks to redress wrongs

committed in the course of the Second World War"—a motive that was fatal to § 354.6. *Deutsch*, 324 F.3d at 712.

Section 354.3 was closely modeled on § 354.6, which was found to infringe on the federal government's exclusive power to make and resolve war. Sen. Rules Com., Off. of Sen. Floor Analyses, 3d. reading analysis of Assem. Bill No. 1758 (2001–2002 Reg. Sess.) Aug. 8, 2002. Like its sister statute struck down in *Deutsch*, § 354.3 "creates a special rule that applies only to a newly defined class" of plaintiffs. *Id.* Like § 354.6, § 354.3 creates a new cause of action "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." 324 F.3d at 708. This is significant because, as the *Deutsch* Court noted, "[a] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties." 324 F.3d at 708.

Saher, however, argues that § 354.3 is distinguishable from the statute at issue in *Deutsch*, because it does not target former wartime enemies. Section 354.3 authorizes suits only against museums and galleries, but the actionable injury at the heart of the statute is the Nazi theft of art. The California legislature enacted § 354.6 "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." *Deutsch*, 324 F.3d at 708. California enacted § 354.3 with the same verboten intent. Distinctions between the class of eligible defendants are irrelevant in light of this fatal similarity.

Saher also contends that under *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir.2005), claims for restitution of "garden variety property" can be distinguished from claims for reparation arising from wartime injury. In *Alperin* we considered whether the claims for restitution presented by a class of Holocaust survivors presented a nonjusticiable political question. Saher places particular reliance on the following quote: "Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. This quote references the first *Baker* test, which requires courts to consider whether the case in question concerns an issue that has been textually committed by the Constitution to another branch of government. *Id.* at 544, 549–52 (citing *Baker v. Carr*, 369 U.S. 186, 210–11, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). Ultimately, in *Alperin* we concluded that despite the political overtones inherent in cases brought by Holocaust survivors, the underlying property issues presented in such cases were not political questions constitutionally committed to the political branches. *Id.* at 551.

Saher's reliance on *Alperin* is misplaced. 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.

Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during Word War

II. Claims brought under this statute, including the instant claim, would require California courts to review acts of restitution made by foreign governments. For example, in this case, the parties contest the provenance of the Cranachs. In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. This example illustrates that § 354.3 claims cannot be separated from the Nazi transgressions from which they arise.

Our conclusion today is buttressed by the documented history of federal action addressing the subject of Nazi-looted art. The Art Looting and Investigation Unit of the Office of Strategic Services gathered a great deal of intelligence about looted art through covert operations during and after the war. Plunder and Restitution at SR–92. Immediately following the war, the federal government implemented the program of external restitution, as discussed in more detail above. It is beyond dispute that there was no role for individual states to play in the restitution of Nazi-looted assets during and immediately following the war.

Recent Administrations and Congresses continue to address problems facing Holocaust survivors and their heirs. *See, e.g.*, Pub.L. No. 105–186, June 23, 1998, 112 Stat. 611, codified at 22 U.S.C. § 1621 (establishing the Presidential Advisory Commission on Holocaust Assets in the United States); Plunder & Restitution, supra (the final report of the Presidential Advisory Commission on Holocaust Assets in the United States); U.S. Dep't of State, Washington Conference Principles on Nazi–Confiscated Art (Dec. 3, 1998), http:// www.

state. gov/ p/ eur/ rt/ hlcst/ 23231. htm (hereinafter Washington Principles). (adopted by the forty-four governments participating in the Washington Conference on Holocaust–Era Assets, hosted by the State Department on December 3, 1998). This history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Cf. English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (discussing traditional statutory field preemption).

Finally, the federal government, "representing as it does the collective interests of the ... states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines*, 312 U.S. at 63, 61 S.Ct. 399. The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle Nazi-looted art disputes. *See, e.g.*, Pollock, 43 Houston L.Rev. at 231. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community. As discussed above, the federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. *See, e.g.*, Washington Conference Report. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been established yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field occupied exclusively by the federal government.

In sum, it is California's *lack* of power to act which is ultimately fatal. In *Deutsch*, we held that "[i]n the

absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch,* 324 F.3d at 714. California may not improve upon or add to the resolution of the war. *Id.* The factual circumstances surrounding this case—the many years which have passed since Göring stole the Cranachs from Goudstikker, restitution of the paintings to the Netherlands by the Allies, or the changes in ownership since then—cannot save § 354.3 from this fatal flaw.

V. Did the District Court Err in Concluding that Saher's claim was Time–Barred Under California Code of Civil Procedure § 338?

Though Saher cannot bring her claim under § 354.3, she may be able to state a cause of action within the three-year statute of limitations of § 338. The district court held that Saher's § 338 claim was time-barred, because she did not inherit her interest in the Cranachs until after the statute of limitations on the claim had expired. The claim, however, might survive a Rule 12(b)(6) motion to dismiss depending upon how Saher might be able to allege the notice element.

A. Constructive Notice

At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. Cal.Civ.Proc.Code § 338(3).[4] In 1982, the section was amended to incorporate a discovery

---

[4] In 1988, § 383(3) was renumbered § 383(c); all subsequent references refer to subsection (c) for simplicity's sake. 1988 Cal. Legis. Serv. 1186 (West).

rule: "[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft."[5] Cal.Civ.Proc.Code § 338(c); 1982 Cal. Legis. Serv. 3401 (West). Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum.

Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983. In *Naftzger v. American Numismatic Society*, the court held that a cause of action for the return of property stolen before the 1982 amendment "accrue[s] when the owner discovered the identity of the person in possession of the stolen property, and not when the theft occurred." 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784, 786 (1996). The *Naftzger* court concluded that "there was a discovery rule of accrual implicit in the prior version of section 338." 49 Cal.Rptr.2d at 786. In *Society of California Pioneers v. Baker*, however, the court held that prior to the 1982 amendments, "the statute of limitations began to run anew against a subsequent purchaser." 43 Cal.App.4th 774, 50 Cal.Rptr.2d 865, 869–70 (1996).

---

[5] In 1989, the phrase "art or artifact" was replaced with "article of historical, interpretive, scientific, or artistic significance." Cal.Civ.Proc.Code § 338(c) (West 1989).

The *Pioneers* court specifically noted its disagreement with *Naftzger*. 50 Cal.Rptr.2d at 870 n. 10.

The California Supreme Court has not addressed the issue, but "has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice." *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir.2007) (citing *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988)). Thus, in *Orkin*, we concluded that "under the discovery rule, a [pre–1983] cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property." *Id.* at 741.

Saher argues, however, that the *Naftzger* court adopted a discovery rule based on actual, not constructive, notice. As we pointed out in *Orkin*, such a rule would be clearly inconsistent with California Supreme Court precedent. *Id.* (citing *Jolly*, 44 Cal.3d at 1109, 245 Cal.Rptr. 658, 751 P.2d 923).

Saher urges that we certify the issue to the Supreme Court of California for resolution. Though Saher contends that the Orkin court's interpretation of California state law is incorrect, "it is well established that we may reconsider earlier Ninth Circuit precedent only by en banc review or after an intervening Supreme Court decision." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1285 (9th Cir.1992) (declining to revisit the court's interpretation of New York state law under similar circumstances). Under *Orkin*, we are bound to apply a constructive notice standard.

In conclusion, Saher's cause of action began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts. *Orkin*, 487 F.3d at 741.

B. Reasonable Diligence

The Museum asserts that Saher is precluded as a matter of law from making the required showing of reasonable diligence, because the facts underlying her claim were publicly available. We disagree.

A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir.2006). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir.1995).

In *Orkin*, we concluded that the plaintiffs' claims were time-barred because the face of the complaint established facts that foreclosed any showing of reasonable diligence. *Orkin*, 487 F.3d at 742. The Orkins' complaint admitted that the defendant had purchased the painting in question at a publicized auction, and that she was listed as the owner in a publicly available catalogue raisonné. *Id.* at 741–42. By contrast, there are no facts on the face of Saher's complaint which foreclose a showing of lack of reasonable notice as a matter of law.

Because it is not clear that Saher's complaint could not be amended to show a lack of reasonable notice, dismissal without leave to amend was not appropriate. *See Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir.2003). We, therefore, grant Saher leave to amend her complaint to allege the lack of reasonable notice to establish diligence under

California Code of Civil Procedure § 338, and remand this case to the district court for that purpose.

VI. Conclusion

The judgment of the district court is **AFFIRMED** in part and **REVERSED** in part. The case is **REMANDED** for further proceedings consistent with this opinion.

PREGERSON, Circuit Judge, dissenting in part:

I dissent from the majority's conclusion that California is acting outside the realm of traditional state responsibility, and that field preemption applies. Where a State acts within its "traditional competence," the Supreme Court has suggested that conflict preemption, not field preemption, is the appropriate doctrine. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n. 11, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). *Garamendi* counsels that field preemption would apply "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility...." *Id.* That is not the case here.

It is undisputed that property is traditionally regulated by the State. The majority acknowledges that California has a legitimate interest in regulating museums and galleries, and that California Code of Civil Procedure § 354.3 "addresses the problem of Nazi-looted art currently hanging on the walls of the state's museums and galleries." Maj. Op. at 964–65. However, the majority goes on to hold that because Section 354.3 applies to any museum or gallery, "California has created a world-wide forum for the resolution of Holocaust restitution claims," and that the State is therefore acting outside the scope of its traditional interests. Maj. Op. at 965.

The majority reads the statute far too broadly. A reasonable reading of "any museum or gallery" would limit Section 354.3 to entities subject to the jurisdiction of the State of California. Because California has a "serious claim to be addressing a traditional state responsibility," it is clear that *Garamendi* requires us to apply conflict preemption, not field preemption.

The majority's reliance on *Deutsch v. Turner Corp.*, 324 F.3d 692, (9th Cir.2005) is misplaced. The statute in *Deutsch*, California Code of Civil Procedure § 354.6, allowed recovery for slave labor performed "between 1929 and 1945,[for] the Nazi regime, its allies and sympathizers, or enterprises transacting business in any of the areas occupied by or under control of the Nazi regime or its allies and sympathizers." This court held that California impermissibly intruded upon the power of the federal government to resolve war by enacting the *Deutsch* statute "with the aim of rectifying wartime wrongs *committed by our enemies* ...." *Id.* at 708, 711(emphasis added).

The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.3 applies to looted artwork. Maj. Op. at 966. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does Section 354.3 provide for war

reparations.[1] Maj. Op. at 966–67. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

I would reverse the district court. As the majority correctly holds, Section 354.3 does not conflict with federal policy. However, California has acted within its traditional competence, and field preemption should not apply. Accordingly, I dissent in part.

---

[1] Black's Law Dictionary defines reparation as "[c]ompensation for an injury or wrong, esp. for wartime damages or breach of an international obligation." *Black's Law Dictionary* 1325 (8th ed.2004). Section 354.3 allows only for the recovery of stolen art.

UNITED STATES DISTRICT COURT,
C.D. CALIFORNIA.

MAREI VON SAHER
v.
NORTON SIMON MUSEUM OF ART AT PASADENA, et al.

No. CV 07-2866-JFW (JTLx).
Oct. 18, 2007.
2007 WL 4302726

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED [filed 7/9/07; Docket No. 20]

ORDER VACATING SCHEDULING CONFERENCE

JOHN F. WALTER, District Judge.

On July 9, 2007, Defendants Norton Simon Museum of Art at Pasadena, Norton Simon Art Foundation, and Norton Simon Foundation (collectively "Defendants") filed a Motion to Dismiss Pursuant to Fed.R.Civ.P. 12(b)(6) for Failure to State a Claim Upon Which Relief Can Be Granted. On August 20, 2007, Plaintiff Marel von Saher ("Plaintiff") filed her Opposition. On August 20, 2007, the Court granted the Application of Bet Tzedek Legal Services, the Jewish Federation Council of Greater Los Angeles, and the American Jewish Congress for Leave to File Memorandum as Amici Curiae. On September 17, 2007, Defendants filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds

that this matter is appropriate for decision without oral argument. The hearing calendared for October 22, 2007 is hereby vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

Adam and *Eve*, two sixteenth century oil paintings on wood panels by Lucas Cranach the Elder, (the "Cranachs") are currently on display at Defendant Norton Simon Museum of Art at Pasadena. The Cranachs were acquired by Defendants Norton Simon Foundation and Norton Simon Art Foundation from George Stroganoff-Scherbatoff in 1971 and have been continuously on display at the Museum since 1979.

On May 1, 2007, Plaintiff filed a Complaint against Defendants in which she alleges that "[t]he Cranachs were looted by the Nazis from a noted Jewish [art] collector and dealer[, Jacques Goudstikker,] during their occupation of the Netherlands in 1940." Complaint at ¶ 1. Plaintiff claims that as the "sole living heir" of Mr. Goudstikker, she is "the rightful owner, and is thus entitled to recover sole possession, of the Cranachs." *Id.* at ¶¶ 2, 41, 46. Plaintiff brings this action under California Code of Civil Procedure § 354.3 and alleges the following claims for relief: (1) Replevin; (2) Conversion; (3) Damages under California Penal Code § 496; (4) Quiet title; and (5) Declaratory relief.

Defendants move to dismiss each of Plaintiff's claims on the grounds that: (1) they are barred by California's three years statute of limitations in California Code of Civil Procedure § 338 and cannot be revived by Section 354.3 because Section 354.3 is unconstitutional on its face and as applied; (2) Plaintiff

cannot establish "plausible grounds" for challenging Defendant Norton Simon Art Foundation's ownership of the Cranachs; and (3) Plaintiff has not and cannot plead sufficient facts to establish a violation of California Penal Code § 496.

A motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Accordingly, "[a] Rule 12(b)(6) dismissal is proper only where there is either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Summit Technology, Inc. v. High-Line Medical Instruments Co., Inc.*, 922 F.Supp. 299, 304 (C.D.Cal.1996) (*quoting Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir.1988)). In deciding a motion to dismiss, a court must accept as true the allegations of the complaint and must construe those allegations in the light most favorable to the nonmoving party. *See, e.g., Wyler Summit Partnership v. Turner Broadcasting System, Inc.*, 135 F.3d 658, 661 (9th Cir.1998). "However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations." *Summit Technology*, 922 F.Supp. at 304 (*citing Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981) *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981)).

"Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citations omitted). However, a court may consider material which is properly submitted as part of the

complaint and matters which may be judicially noticed pursuant to FRE 201 without converting the motion to dismiss into a motion for summary judgment. *See id.; Branch v. Tunnel*, 14 F.3d 449, 454 (9th Cir.1994). Where a motion to dismiss is granted, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *See Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir.1996).

In their motion, Defendants argue that Section 354.3 is unconstitutional on its face on the grounds that it "has the purpose and effect of inserting California into the business of remedying war injuries, a matter of exclusive federal competence." Motion at 12. Section 354.3, which became effective on January 1, 2003, provides:

> (a) The following definitions govern the construction of this section:
>
> (1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.
>
> (2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.
>
> (b) 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. Section 361 does not apply to this section.
>
> (c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.
>
> Ca[l].Code Civ. P. § 354.3.

Shortly after Section 354.3 became effective, the Ninth Circuit addressed the constitutionality of a substantially similar or "sister" statute. Section 354.6, in *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir.2003). Section 354.6 was "[a] California statute passed in 1999 [which] create[d] a cause of action ... for claims involving Second World War slave labor." *Deutsch*, 324 F.3d at 703. Like Section 354.3, under Section 354.6, certain claims were not time-barred if an action was commenced on or before December 31, 2010. *See* Cal.Code Civ. P. § 354.6. In *Deutsch*, the Ninth Circuit found Section 354.6 unconstitutional on its face on the grounds that it violated the foreign affairs doctrine. Specifically, the Ninth Circuit explained that "the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, [i]s central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes[.]" *Deutsch*, 324 F.3d at 714-15. The Ninth Circuit found that by enacting Section 354.6, "California has sought to create its own resolution to a major issue arising out of the war-a

remedy for wartime acts that California's legislature believed had never fairly been resolved." *Id.* at 712. As a result, the Ninth Circuit held that "Section 354.6 runs afoul of the restriction on the exercise of foreign affairs powers by the states. Because California lacks the power to create a right of action-or, alternatively, to resurrect time-barred claims-in order to provide its own remedy for war-related [i]njuries inflicted by our former enemies and those who operated in their territories, we hold that section 354.6 is unconstitutional." *Id.* at 716.

As with Section 354.6, by enacting Section 354.3, "California seeks to redress wrongs committed in the course of the Second World War"-a legislative act which "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims." *Id.* at 712. There can be no doubt that, as Judge Reinhardt stated in *Deutsch*, the Holocaust was "the most atrocious act ever perpetrated by a civilized (or uncivilized) people" and "represents the worst historic manifestation of the perpetual human condition known as antisemitism." There are no words which can adequately describe the atrocities suffered by the victims of the Holocaust, and the harms suffered continue to have an effect on the victims and their descendants. For that reason, the Court shares the Ninth Circuit's reluctance in finding unconstitutional a statute which attempts to provide at least some measure of redress to those victims and their families. However, the Court is not only compelled to apply the foreign affairs doctrine, it is bound by the interpretation of that doctrine as set forth by the Ninth Circuit in *Deutsch*. *See, e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir.2001).

Accordingly, in light of and based upon the Ninth Circuit's decision in *Deutsch*, the Court finds Section 354.3 facially unconstitutional.[1]

In her Complaint, Plaintiff admits that "one or more of the Defendants acquired the Cranachs" in 1971 and claims that "Defendants have wrongfully continued to retain possession of the Cranachs since that time." Complaint at ¶ 32. Under the version of California Code of Civil Procedure § 338 in effect at the time Defendants acquired the Cranachs, Plaintiff's predecessor-in-interest had three years to bring "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property." *See* Cal.Code Civ. P. § 338. According to her Complaint, Plaintiff did not inherit her alleged claim to the Cranachs until July 21, 1996 – long after the applicable statute of limitations on that claim would have expired. *See* Complaint at ¶ 35. As a result, in the absence of Section 354.3, it is apparent from the allegations of Plaintiff's Complaint that each of Plaintiff's underlying claims for relief is time-barred.[2] *See* Cal.Code Civ. P. § 338.

---

1 In light of the Court's finding that dismissal of Plaintiff's Complaint is appropriate because the statute under which Plaintiff's action is brought is unconstitutional, the Court need not address Defendants' remaining arguments in support of their Motion to Dismiss.

2 Plaintiff alleges that she did not "discover" that the Cranachs were in Defendants' possession until November of 2000. See Complaint at ¶ 36. However, her alleged "discovery" of the whereabouts of the Cranachs would not revive the statute of limitation governing her claims which had expired many years prior.

For all of the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED.** Plaintiff's Complaint is **DISMISSED with prejudice .**

The Scheduling Conference, currently on calendar for October 22, 2007, is **VACATED.**

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 22 2014
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MAREI VON SAHER, Plaintiff - Appellant, v. NORTON SIMON MUSEUM OF ART AT PASADENA; NORTON SIMON ART FOUNDATION, Defendants - Appellees.	No. 12-55733 D.C. No. 2:07-CV-02866-JFW-JTL Central District of California, Los Angeles ORDER

Before: PREGERSON, D.W. NELSON, and WARDLAW, Circuit Judges.

Appellees' motion for stay of the issuance of the mandate pending application for writ of certiorari is GRANTED.

Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 14 2014
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MAREI VON SAHER, Plaintiff - Appellant, v. NORTON SIMON MUSEUM OF ART AT PASADENA; NORTON SIMON ART FOUNDATION, Defendants - Appellees.	No. 12-55733 D.C. No. 2:07-CV-02866-JFW-JTL Central District of California, Los Angeles ORDER

Before: PREGERSON, D.W. NELSON, and WARDLAW, Circuit Judges.

Judges Pregerson and D. W. Nelson have voted to deny Appellees' petition for rehearing. Judge Pregerson voted to deny the petition for rehearing en banc. Judge D. W. Nelson recommended denial of the petition for rehearing en banc. Judge Wardlaw voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.

SUPREME COURT OF THE UNITED STATES

MAREI VON SAHER, PETITIONER,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, ET AL.

No. 09-1254

May 27, 2011.

2011 WL 2134984

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HAROLD HONGJU KOH
Legal Adviser
Department of State
Washington, D.C. 20520-6310

[i] QUESTION PRESENTED

Whether the court of appeals correctly held that federal law preempts a California state statute that creates a cause of action for the recovery of Nazi-confiscated artwork, with an extended statute of limitations for any such action to December 31, 2010.

* * *

[1] This brief is submitted in response to this Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner brought this action to recover two paintings by Lucas Cranach the Elder (the Cranachs). Those paintings were purchased around 1971 by the Norton Simon Art Foundation, and they are currently on display in the Norton Simon Museum of Art at Pasadena (Norton Simon). Because the Cranachs' post-war history and the previous efforts by petitioner and her predecessor to recover them matter to this case, the government recounts that background in some detail.

[2] a. *The United States' external restitution.* Petitioner is the sole heir of Jacques Goudstikker, a Dutch art dealer who purchased the paintings from the Soviet Union in 1931. Goudstikker and his family fled the Netherlands in 1940, following the Nazi invasion. Subsequently, all of Goudstikker's assets were forcibly sold in two transactions: Alois Miedl, a German banker living in the Netherlands, acquired Goudstikker's art dealership and certain real and personal property for 550,000 guilders (or about $4.5 million today); and

Hermann Göring, Reichsmarschall of the Third Reich, acquired the bulk of Goudstikker's art collection, which contained over 1,000 artworks and included the Cranachs, for 2 million guilders (or about $16.5 million today). In May 1945, the Cranachs and Goudstikker's other paintings were recovered by the United States Army. In 1946, the United States returned all of the paintings to the Dutch government, pursuant to a policy of "external restitution." Under that policy, the United States returned property taken by the Nazis and recovered by Allied forces, including artworks like the Cranachs, to their countries of origin rather than directly to particular claimed owners. Pet. App. 5a, 8a-10a; see C.A. E.R. 45.

The policy of external restitution was an outgrowth of the London Declaration of January 5, 1943, in which the Allied nations—including the United States and the Netherlands—reserved the right to invalidate wartime transfers of property. In November 1943, the State Department established an Interdivisional Committee on Reparations, Restitution, and Property Rights, which determined that property taken by the Nazis should be turned over to its country of origin, with the expectation that the country of origin would return the property to its lawful owners. The Committee foresaw that once the **[3]** external restitution had been made, the United States would play no further role in disposition of the property. On July 29, 1945, President Truman approved that policy at the Potsdam Conference, and thereafter American occupying forces implemented the policy under the order of General Eisenhower. The United States set a three-year deadline for filing claims, and it declined to accept any

claims for external restitution after September 15,1948. Pet. App. 15a-18a.

b. *The Netherlands' internal restitution.* In 1946, Goudstikker's widow returned to the Netherlands and began attempting to recover her family's property. Under Dutch law, claimants were given until July 1, 1951, to file a restitution petition, and claimants who had received money in forced sales generally were required to turn over those proceeds to the Dutch government as a condition of receiving their property. C.A. E.R. 23, 48. After negotiating with the Dutch government for several years, Ms. Goudstikker filed a timely petition in 1951 and subsequently entered into a settlement agreement on August 1,1952. *Id.* at 47-48. Under that agreement, Ms. Goudstikker received most of the real and personal property acquired by Miedl in exchange for returning a portion of the money paid by Miedl and relinquishing claims to the remaining property transferred in the Miedl transaction. *Id.* at 48, 52-53. The agreement did not, however, encompass the artworks acquired by Göring, and the Dutch-imposed deadline for filing restitution claims lapsed. *Id.* at 48-49; see C.A. Supp. E.R. 151-152.

In 1961, George Stroganoff-Scherbatoff (Stroganoff), heir to the Stroganoff family, instituted a restitution proceeding in the Netherlands for the Cranachs and other paintings. C.A. E.R. 282. Stroganoff asserted **[4]** that the paintings had been seized from his family by the Soviet Union and unlawfully auctioned to Goudstikker. *Id.* at 279, 282. In July 1966, the Dutch government transferred the Cranachs and another painting to Stroganoff in settlement of his claim and in exchange for a monetary payment. *Id.* at 282. Around 1971, Stroganoff sold the

Cranachs to the Norton Simon Art Foundation. *Id.* at 283.

c. *Petitioner's 1998 restitution proceeding.* In 1996, after Ms. Goudstikker and her son had died, petitioner (her daughter-in-law) was left as the sole heir. C.A. E.R. 283. In 1998, petitioner filed a claim with the Dutch State Secretary for Education, Culture, and Science, in which petitioner requested two things: "all properties that Hermann Göring obtained from [Goudstikker] and over which the State has gained control," and the "sales prices" for any such property sold by the State. C.A. Supp. E.R. 147-148. Petitioner's claim thus included the Cranachs, which had been sold to Stroganoff in 1966 in settlement of his claim. C.A. E.R. 282. The State Secretary rejected petitioner's claim as barred by the Dutch statute of limitations on restitution claims, which he declined to waive, finding that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147.

Petitioner sought review of that decision in the Court of Appeals for the Hague, which likewise declined to grant relief. See C.A. Supp. E.R. 145-153.[1]

---

[1] Petitioner contends that the Court of Appeals decided the case only on procedural and jurisdictional grounds. That does not appear to be correct. The court did hold that it could not decide petitioner's claim as an appeal from the State Secretary's decision (because the State Secretary was not a judicial division), see C.A. Supp. E.R. 148-150, or as a **[5]** direct restitution proceeding (because the claim was filed after July 1, 1951, and was thus time-barred), see *id.* at 151. The court then further held, however, that it would not exercise its power "to grant ex officio restoration of rights." *Id.* at 152. In that portion of its opinion, the court made clear that it could grant petitioner relief, *id.* at 151, although it

The court **[5]** "[took] into consideration that nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted." *Id.* at 150. In addition, the court concluded, Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151. The court rejected petitioner's argument that Ms. Goudstikker's failure to seek restoration of rights should be excused because she had been misled by Dutch authorities about the nature of the Göring transaction and the value of the paintings. The court pointed out that Ms. Goudstikker had "expert legal advisors" who could have argued that the transaction was involuntary and that she could have requested her own expert appraisal. *Id.* at 152. Finally, the court found that the original restitution proceedings did not violate international law, because "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights." *Ibid.*

d. *The United States' modern policy.* A number of problems emerged with post-war restitution policy,[2] and as a result, impetus developed for a more equitable approach to recovery of Nazi-looted art. In response, the **[6]** United States convened a Conference on Holocaust-Era Assets in Washington in 1998. At that

---

declined to do so on the ground that Ms. Goudstikker had voluntarily forgone the claim in the early 1950s. See *id.* at 151-152; see also C.A. E.R.61.

2 See Presidential Advisory Comm'n on Holocaust Assets in the U.S., *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* at SR-140 (2000) (*PCHA Report*).

Conference, representatives of 13 nongovernmental organizations and 44 governments, including the United States and the Netherlands, reached consensus on the Washington Conference Principles on Nazi-Confiscated Art (Washington Principles). That set of 11 "non-binding principles" is designed "to assist in resolving issues relating to Nazi-confiscated art," "recogniz[ing] that among participating nations there are differing legal systems and that countries act within the context of their own laws." *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm. In general, the Washington Principles encourage national efforts to identify art taken by the Nazis and not subsequently restituted, to publicize the existence of such art, and to restitute it to its pre-war owners.

In June 2009, representatives of 46 governments, including the United States and the Netherlands, reaffirmed the Washington Principles in the Terezin Declaration. That "legally non-binding" Declaration "urge[d] 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." *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm. Thus, as more fully elaborated below, see p. 18, *infra*, contemporary U.S. policy supports the fair and just resolution of claims involving Nazi-confiscated art, while also respecting the **[7]** bona fide internal restitution proceedings of foreign governments.

e. *Petitioner's 2004 restitution proceeding.* From 2000 to 2001, in part in response to the Washington Principles, the Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach," and on that basis it adopted an extended restitution policy. C.A. E.R. 60. In 2004, petitioner filed an application for the return of all artworks formerly owned by Goudstikker that were then in the Dutch government's possession. See *id.* at 41. After referring the matter to the Restitutions Committee, the State Secretary determined that petitioner's application involved "a matter of restoration of rights which has been settled," because "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in this case." *Id.* at 62. For that reason, the State Secretary explained, "this case is not included in the [Dutch government's] current restitution policy." *Ibid.*

The State Secretary nevertheless decided "that in this special case there are grounds that justify a restitution" of artworks still in the Dutch government's possession, based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." C.A. E.R. 62. The State Secretary therefore ordered the transfer to petitioner of more than 200 artworks. The State Secretary did not require petitioner to repay any portion of the two million guilders received from Göring. *Id.* at 62-63. And the State Secretary did not address paintings, like the Cranachs, that were no longer in the government's possession.

[8] 2. In 2002, California enacted Section 354.3 of its Code of Civil Procedure, which provides:

> 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.

Cal. Civ. Proc. Code § 354.3(b) (West 2006). The statute defines an "[e]ntity" as "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." *Id.* § 354.3(a)(1). It defines "Holocaust-era artwork" as "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945." *Id.* § 354.3(a)(2). Finally, the statute provides that "[a]ny action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010." *Id.* § 354.3(c).

3. In 2007, petitioner, a resident of Connecticut, brought this action in federal district court in California, seeking recovery of the Cranachs from Norton Simon. See C.A. E.R. 276-288.

a. The district court granted Norton Simon's motion to dismiss. Pet. App. 75a-83a. The court held that "by enacting Section 354.3, 'California seeks to redress wrongs committed in the course of the Second World War'—a legislative act which 'intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.' " *Id.* at 81a (quoting *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712 (9th Cir.), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003)). The court further held that in the absence of Section 354.3's extended statute of limitations, peti- **[9]** tioner's claim was untimely under California's general three-year statute of limitations governing "actions for the specific recovery of personal

property." *Id.* at 82a (quoting Cal. Civ. Proc. Code § 338(c) (West 2006)).

b. The court of appeals affirmed in part and reversed in part. Pet. App. la-38a. The court concluded that Section 354.3 does not conflict with "the federal government's policy of external restitution," because that policy "ended in 1948" and "Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect." *Id.* at 18a-19a. The court held, however, that Section 354.3 is preempted because "the power to legislate restitution and reparation claims[] is one that has been exclusively reserved to the national government by the Constitution." *Id.* at 28a. The court further held that petitioner's claim might be timely under the statute of limitations for actions seeking recovery of personal property, and it remanded to determine when petitioner "discovered or reasonably could have discovered her claim to the Cranachs." *Id.* at 33a.

Judge Pregerson dissented in part, concluding that Section 354.3 is not preempted by the federal government's foreign affairs powers. Pet. App. 36a-38a.

DISCUSSION

The court of appeals correctly held that the invocation in this case of California Code of Civil Procedure § 354.3, which creates a cause of action with an extended statute of limitations for recovery of Nazi-confiscated art wherever it is located, impermissibly intrudes upon the foreign affairs authorities of the federal government. Review of that decision is not warranted, especially at this interlocutory stage of the case. No other court of appeals has addressed whether a State may create a **[10]** cause of action with an

extended statute of limitations specifically for the recovery of Nazi-confiscated art. Section 354.3's limitations period expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3. And the decision below may not matter even in this case, because the case was remanded to determine whether petitioner's claim is timely under another statute of limitations. If petitioner does not prevail on remand, she may seek this Court's review after a final judgment.

A. Application Of Section 354.3 In This Case Intrudes Upon Substantial Foreign Policy Authorities Of The United States

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. Rather, this case involves a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments, and that in this case have been further addressed by the Netherlands in restitution proceedings in recent years. In these circumstances, petitioner cannot now rely on Section 354.3 in an effort to recover the Cranachs.

1. a. The court of appeals rejected petitioner's argument that Section 354.3 concerns a "traditional state responsibility," Pet. App. 20a (quoting *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 n.11 (2003)) —namely, "the establishment of a statute of limitations for actions seeking the return of stolen property," *id.* at

[11] 21a. As the court explained, "[Section] 354.3 cannot be fairly characterized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs." *Ibid.* Thus, the court observed, although Section 354.3 "purports to regulate property, an area traditionally left to the [S]tates," its "real purpose is to provide relief to Holocaust victims and their heirs." *Id.* at 21a-22a.

The court of appeals emphasized in this regard that Section 354.3 is not limited to regulating museums and galleries in California. Pet. App. 23a. As petitioner acknowledges (Pet. 17-19), that geographic limitation was eliminated from the provision prior to enactment for the specific purpose of extending its reach to any museum over which California courts could obtain jurisdiction, regardless of whether the artwork at issue had entered California. Pet. App. 23a. Indeed, in what is apparently the only other pending case under Section 354.3, the museum and artwork are both located in Spain. See p. 21, *infra*. Nor is Section 354.3 limited to suits brought by California residents. In fact, petitioner is a resident of Connecticut. See C.A. E.R. 277.

The court of appeals therefore reasonably determined that Section 354.3's broad scope "belies California's purported interest in protecting its residents and regulating its art trade," and instead "suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. That, the court explained, "is not an area of

'traditional state responsibility.'" *Id.* at 25a. The court of appeals then concluded **[12]** that, in thus moving beyond its traditional responsibilities and enacting a measure specifically directed at claims arising out of transactions and events in Europe during the Nazi era—by providing its own means of "restitution for injuries inflicted by the Nazi regime," *id.* at 28a—California had impermissibly intruded on the United States' foreign affairs prerogatives. *Id.* at 25a-30a.

b. As this Court has emphasized, "[i]n international relations * * * the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979) (citation omitted). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *Garamendi*, 539 U.S. at 413; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

The federal government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("'[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712-714 (9th Cir.) ("[T]he Constitution allocates the power over foreign affairs to the federal government exclusively,

and the power to make and resolve war, including the authority to resolve war claims, **[13]** is central to the foreign affairs power in the constitutional design."), cert, denied, 540 U.S. 820, and 540 U.S. 821 (2003).

There accordingly 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. The President and Congress have the sole authority to resolve (or to establish mechanisms to resolve) the claims of U.S. nationals when their claims are singled out precisely because they arise out of such international incidents. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. The same would seem to be true of singling out for resolution the claims of foreign nationals (or the heirs of foreign nationals) because they arise out of international incidents.

2. There is no occasion in this case, however, to consider the preemptive force of the foregoing general principles standing alone, because petitioner's present suit under Section 354.3 raises particular inconsistencies with implementation of restitution policies to which the United States has adhered.

a. In *Garamendi*, this Court considered California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (West 2005), which required any insurer doing business in the State to disclose certain information about Holocaust-era insurance policies. See 539 U.S. at 401. The Court regarded as beyond dispute that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's

policy," in light of the Constitution's allocation of the foreign relations power to the **[14]** United States rather than the several States. *Id.* at 413. The Court further observed that, "[h]istorically, wartime claims against even nominally private entities have become issues in international diplomacy," because "diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." *Id.* at 416.

In recognition of the various contexts in which issues concerning preemption of state laws affecting foreign affairs may arise, the Court questioned whether it is necessary to make "a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi,* 539 U.S. at 419. Rather, the Court suggested that those theories "can be seen as complementary," depending on whether a State has acted within an area of traditional responsibility. *Id.* at 419 n.11. "If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," the Court indicated, "field preemption might be the appropriate doctrine." *Ibid.* But if a State has acted in an area of traditional responsibility in a way that affects foreign relations, "it might make good sense to require a conflict, of a clarity or substantiality that would vary" with the strength and nature of the asserted state interest and possibly also the federal interest. *Ibid.*

The Court did not, however, decide any question of field preemption, because it found "a sufficiently clear conflict" between HVIRA and "express foreign policy of the National Government." *Garamendi,* 539 U.S. at 420. The Court recognized that "[t]he issue of

restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and execu- **[15]** tive agreements over the last half century, and * * * securing private interests is an express object of diplomacy today." *Id.* at 420-421. After surveying how that federal foreign policy has treated disclosure by insurers, the Court determined that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id.* at 423. The Court concluded that even "[i]f any doubt about the clarity of the conflict remained, * * * it would have to be resolved in the National Government's favor, given the weakness of the State's interest * * * in regulating disclosure of European Holocaust-era insurance policies." *Id.* at 425.

b. Somewhat similar considerations are present here. Unlike in *Garamendi*, the United States has not entered into Executive Agreements with foreign governments to resolve contemporary claims for Holocaust art, and it has supported the just and equitable resolution of claims from that era. But as the court of appeals noted, like HVIRA in *Garamendi*, Section 354.3 is not a statute of general applicability directed to matters of traditional state interest. Pet. App. 21a-25a. Although petitioner asserts (Pet. 19) that Section 354.3 is directed to a state interest in regulating entities that currently avail themselves of the privilege of transacting business in California, the provision in fact is expressly targeted at claims to artworks that were seized prior to and during World War II (including, as here, artworks that later were the subject of restitution proceedings by European

governments). In *Garamendi*, the Court rejected California's similar effort to justify HVIRA as a regulation of the current business activities of insurers in the State, explaining that "quite unlike a generally applicable 'blue **[16]** sky' law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." 539 U.S. at 425-426. Accordingly, Section 354.3 is reasonably viewed as an effort by California to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. And by providing "a new cause of action," *Garamendi*, 539 U.S. at 423, with an extended statute of limitations for claimants of Holocaust-era artwork, California has, as in *Garamendi*, "expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." Pet. App. 24a.

Notably, moreover, this case concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles. This case does not involve artwork whose existence or provenance has only recently been discovered and has never been the subject of restitution proceedings. The Cranachs were transferred by the United States to the Netherlands in 1946 pursuant to the policy of external restitution. Pet. App. 5a, 9a-10a; see C.A. E.R. 45. One of the purposes of that policy at the time was to prevent the United States from becoming entangled in difficult ownership questions regarding confiscated property. See *PCHA*

Report at SR-140. That policy judgment demonstrates that, from the perspective of the United States, it was the particular nation concerned (here, the Netherlands) that was to have the immediate responsibility for determining issues of ownership and **[17]** restitution of, or restoration of rights in, works like the Cranachs.

The court of appeals erred in dismissing the external restitution policy as irrelevant to this case because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims. Pet. App. 18a. The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II.[3]

In this case, Ms. Goudstikker settled with the Dutch government in 1952, and that settlement did not provide for the return of artworks like the Cranachs that had been acquired by Göring. C.A. E.R. 47-49. When petitioner brought a Dutch restitution proceeding in 1998, the State Secretary found that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147. Petitioner sought

---

[3] The United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient of its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands.

review of that decision in the Court of Appeals for the Hague, which found that at the time of the 1952 settlement Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151.

[18] Petitioner correctly observes (Pet. 24-25) that there are other relevant aspects of federal policy regarding Nazi-confiscated art that the court of appeals did not discuss. In 1998 and 2009, respectively, the United States endorsed the Washington Principles and the Terezin Declaration. See p. 6, *supra*; Pet. App. 29a. The Washington Principles generally encourage the return to its pre-war owner of art that was confiscated by the Nazis and not subsequently restituted or available to be restituted through bona fide proceedings. And the Terezin Declaration encourages those restitution proceedings to be conducted expeditiously, based on the facts and merits of the Holocaust victims' claims.

Petitioner is thus correct that it is United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner. But that policy does not support relitigation of all art claims in U.S. courts. Neither the Washington Principles nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art. Rather, they encourage resort to alternative dispute resolution, so that such claims may be resolved as justly, fairly, and expeditiously as possible.

The recent expanded restitution policy in the Netherlands is an example of a non-adversarial mechanism developed by a foreign nation in light of the

Washington Principles. The Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach." C.A. E.R. 60. But even under that approach, the Dutch government has not provided for damages claims for artwork that it previously sold or transferred to third parties. See Advisory Comm. on the Assessment of Restitu- **[19]** tion Applications for Items of Cultural Value and the Second World War, *Report 2009*, at 71 (May 2010), http://www.restitutiecommissie.nl/images/stories/files/report2009-met%20wijz.b6.pdf (providing for restitution only of items in the Dutch government's possession). Nor does the Dutch government otherwise review claims for artwork that is in private possession, unless both the claimant and the current possessor submit a joint request to the State Secretary. See *ibid.*

In 2004, petitioner brought another restitution proceeding in the Netherlands, and the State Secretary determined that the case was "not included in the [Dutch government's] current restitution policy" because it involved a "matter of restoration of rights which has been settled" and "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in the case." C.A. E.R. 62. The State Secretary nonetheless decided "that in this special case there [were] grounds that justif[ied] a restitution," based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." *Ibid.* The State Secretary therefore ordered the return to petitioner of more than 200 artworks in the Dutch government's possession.

As both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded petitioner

and her predecessor adequate opportunity to press their claims, both after the War and more recently. When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings.

[20] c. The act of state doctrine and considerations of international comity, although not directly applicable at this stage of the proceedings, also weigh in favor of giving effect to the Dutch government's actions in this case. See, *e.g.*, *Diorinou* v. *Mezitis*, 237 F.3d 133, 140-141 (2d Cir. 2001); 1 Restatement (Third) of Foreign Relations Law of the United States, §§ 481-482 (1987) (providing for recognition in certain circumstances of foreign judgments denying recovery of monetary sums). Recognition of the actions of the Dutch government is a defense distinct from preemption, cf. *id.* § 481, comment b, but the existence of a defense based on such actions shows that petitioner's suit under Section 354.3 implicates substantial foreign affairs interests of the United States.

B. Review By This Court Is Not Warranted At This Time

The court of appeals' decision does not warrant review at this time for four reasons. *First*, no other court of appeals has addressed whether a State may create a cause of action (with its own extended statute of limitations) for the recovery of Nazi-confiscated art, including art that has been the subject of bona fide internal restitution proceedings. Petitioner does not contend otherwise. Petitioner does argue (Pet. 9-16) that the court of appeals' decision conflicts with

Garamendi's analysis of field preemption. But as explained above, this case does not present a suitable occasion for addressing that broad question in light of the inconsistencies between this suit under Section 354.3 and the implementation of restitution policies to which the United States has adhered.[4]

[21] *Second*, the question whether Section 354.3 is preempted is not of any continuing importance. Section 354.3's extended statute of limitations expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3, *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), petition for cert, pending, No. 10-786 (filed Dec. 10, 2010). In *Cassirer*, neither the Kingdom

---

[4] Petitioner argues in a supplemental brief that the court of appeals' decision in *Movsesian* v. *Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010), supports review by this Court. *Movsesian* concerned Cal. Civ. Proc. Code § 354.4 (West 2006), which creates a cause of action **[21]** and extends the statute of limitations for California residents with insurance claims arising out of the "Armenian Genocide." *Ibid.* The court of appeals initially found Section 354.4 invalid as a matter of conflict preemption, see *Movsesian* v. *Victoria Versicherung AG*, 578 F.3d 1052, 1059 (9th Cir. 2009), but on rehearing the panel reversed course and held that there is no clear federal policy with respect to recognition of that event in Armenian history, see 629 F.3d at 907. Regardless of whether there is a federal policy in that context, here the artworks that are the subject of petitioner's claim have already been subject to both external and internal restitution proceedings, consistent with United States policy. But to the extent there is any intracircuit disagreement between the decision below and *Movsesian*, that issue does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Both the decision below and *Movsesian* are interlocutory, and the en banc court of appeals can resolve any tension between those decisions.

of Spain nor the Thyssen-Bornemisza Collection Foundation thus far has raised a preemption defense. See *id.* at 1022.[5]

Third, the court of appeals' preemption holding may not be decisive even in this very case, because that court **[22]** remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property. Pet. App. 34a-35a. It is thus 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 Cir. 2010), cert. denied, 131 S. Ct. 1612 (2011); *Dunbar* v. *Seger-Thomschitz*, 615 F.3d 574, 578-579 (5th Cir. 2010), cert. denied, 131 S.Ct. 1511 (2011).

Fourth and finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Even if issues concerning the preemption of

---

[5] The petitioners in *Cassirer* have asserted sovereign immunity, but the Ninth Circuit allowed the action to proceed under the "expropriation" exception in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(3). 616 F.3d at 1022. Thus, if this Court were to grant certiorari in *Cassirer*, it would not affect the decision below. On March 21, 2011, the Court invited the Acting Solicitor General to file a brief as amicus curiae expressing the views of the United States in *Cassirer*.

Section 354.3 might otherwise warrant review at some point, the Court, in the interest of judicial economy, should postpone any review until after the conclusion of the proceedings on remand, thereby permitting the Court to consider all of petitioner's contentions, including any that might arise on remand, in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Review by this Court would be premature at this juncture.

[23] CONCLUSION

The petition for a writ of certiorari should be denied.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

HAROLD HONGJU KOH
Legal Adviser
Department of State

MARK B. STERN
SHARON SWINGLE
Attorneys

MAY 2011

* * *

IN THE NAME OF THE QUEEN

Decision: December 16, 1999

Case No., Appeals Court: 98/928

The Court of Appeals of The Hague, first civil division, has issued the following decision in the case of:

1. The public corporation with limited liability
AMSTERDAMS NEGOTIATIE COMAPAGNIE N.V.
in liquidation,
(hereafter, The Corporation),
domiciled in Amsterdam,

2. Marei VON SAHER-LANGENBEIN,
(hereafter, Von Saher),
resident of Greenwich, Connecticut, United States of America,
appellants (hereafter, Goudstikker),
local attorney: W. Taekema, esq.

versus

THE STATE OF THE NETHERLANDS
(Ministry of Education, Culture, and Science),
having its headquarters in The Hague,
respondent (hereafter, The State),
local attorney, H.C. Grootveld, esq.

The dispute

In a notice of appeal (with exhibits) received by the Clerk of the Court of Appeals on August 19, 1998, Goudstikker brought 21 grounds for appeal against the decision described under 1.8 below by the State Secretary for Education, Culture, and Science

(hereafter, The State Secretary) and so doing filed an appeal against The State.

The State submitted its statement of defense (with exhibits), which was received on September 30, 1998.

The oral arguments concerning the notice of appeal were conducted in a session of the Court of Appeals held on October 18, 1999. The parties had their positions further elaborated at that time, Goudstikker by Prof. H.M.N. Schonis, esq., and R.O.N. van Holthe tot Echtent, esq., both attorneys of Amsterdam, and the State by M. van Rijn, esq., attorney of The Hague, and by its local attorney, all – with the exception of the local attorney for The Hague – based on briefs submitted.

Goudstikker then revised the claim for relief in its appeal as stated under 2, and submitted additional exhibits. The State also entered some exhibits into the case.

Assessment of the facts in the dispute

Case no. appeals: 98/298

1. The background of the notice of appeal is as follows.

1.1 Until May 1940, the Corporation maintained in Amsterdam an internationally known art dealership known as "Kunsthandel J. Goudstikker N.V." At the end of the 1930s, the shares in the Corporation were largely held by Jacques Goudstikker, who was also Director of the Corporation. When fleeing The Netherlands for the United States in May 1940, Jacques Goudstikker died as the result of an accident. His spouse, Desirée Goudstikker-Halban, and his son, Edo, were his only heirs.

1.2 On July 1, 1940, the attorney-in-fact of the Corporation, Ten Broek, who had assumed control of the Corporation along with another employee, and the German Third Reich citizen Aloïs Miedl, concluded an agreement by which the latter acquired the entire assets of the Corporation. This agreement was amended by further agreements on July 5, 1940 and July 13, 1940, and partially dissolved, after which the majority share of the Corporation's assets were acquired by Third Reich Field Marshal Hermann Göring under an agreement of July 13, 1940. Aloïs Miedl paid Hfl 550,000 for the portion of the Corporation's assets that he acquired, which comprised largely a number of moveable properties (the so-called "Miedl transaction"), while Hermann Göring paid the sum of Hfl 2,000,000 for the assets of the Corporation that he acquired, comprising primarily paintings (the so-called "Göring transaction").

1.3 On July 31, 1945, E.J. Korthals Altes, esq. and W.C. Roest van Limburg, esq. were appointed administrators of the Corporation in the context of the restoration of rights in property seized during the German occupation. In October 1946, administration of the Corporation was transferred to the aforesaid Desirée Goudstikker-Halban, Jacques Goudstikker's widow and mother-in-law to Von Saher, who had since returned to The Netherlands, and to attorney M. Meyer, esq. and the accountant E. Lemberger. Discussions and negotiations among the parties then followed, which led ultimately to a settlement agreement on

August 1, 1952 with respect to, in any case, the Miedl transaction.

1.4 The name of the Corporation was changed in the 1950s to "Amsterdamse Negotiatie Compagnie N.V.", and the corporation was dissolved as of December 14, 1955 and its liquidation concluded on February 28, 1960.

1.5 By decision of the District Court of Amsterdam of March 31, 1998, the liquidation of the Corporation was re-opened, with Andre Bursky and Von Saher as liquidators, in order to make possible the distribution of the Goudstikker collection.

1.6 In 1997 the State Secretary produced the brochure entitled "The NK collection of works of art administered by The State", and took the position in that brochure that it was still possible to submit a claim in writing to the Cultural Heritage Inspectorate of the Ministry of Education, Culture, and Science for works of art that had come into the possession of The State as a consequence of the Second World War. The brochure stated that these would be claims that had not previously been submitted. Claims to objects about which a decision had already been taken – as this brochure stated – would only be reviewed if new information had become available. The statute of limitations would be waived with respect those who were within their rights. The decision to award or not any artwork claimed would be made with supporting grounds by the State Secretary.

1.7 Von Saber, sole heir of Edo and Desirée Goudstikker-Halban, approached the State

Secretary through a letter of January 9, 1998 and in it, briefly stated, requested that the State surrender all property from the so-called "Goudstikker collection" over which the State has gained control.

1.8 In a letter of March 25, 1998, the State Secretary replied to this request, in part, as follows:

> "In my opinion, directly after the war – even under present standards – the restoration of rights was conducted carefully, Therefore, I do not waive the statute of limitations. It may be clear from the above that I cannot give a positive response to your expressed desire to obtain clarity about the issue "whether the liquidation can be completed through good consultation", and more in particular to your request for the "surrender of all property from the "Goudstikker collection" over which the State has gained control". I would be pleased to provide the list of all former Goudstikker paintings that are now in the possession of The State. I provide this under separate cover."

2 The claim amended during the session of the Court of Appeals effectively asked that the Court of Appeals rule, as far possible with immediate enforcement and annulment of the disputed decision of the State Secretary of March 25, 1998:

1. to intervene into the legal relationships created out of the sales agreement of July 13, 1940 in such a manner that the State is charged to hand over to the Corporation all properties that Hermann Göring obtained

from the Corporation and over which the State has gained control, as well as charging the State to cooperate in the division and reporting of the property that Hermann Göring obtained from the Corporation in 1940 and which the Corporation co-owned with third parties, and which property are already jointly owned by the State and the Corporation, all of this to the extent that the aforesaid property is still held by or for the State on the date of the submission of this appeal, as well as to see to it that all property that Hermann Göring obtained from the Corporation and which the State can see to it is returned to the Corporation is actually made available to the Corporation within four weeks after this judgment is pronounced, all this to the extent that the Court of Appeals shall determine corresponds to the proper delivery of justice and moreover order all measures that the Court of Appeals shall deem useful and/or necessary for the restoration of rights to the Göring transaction as defined in this appeal;

2. Will charge the State to provide the Corporation within four weeks after this judgment is pronounced with a complete list of property known to the State to have been conveyed in 1940 from the Corpbration's assets to Hermann Göring, over which up to the time of this judgment the State has gained control, whether or not in co-ownership, and, if it has in the meantime sold any of this property, to report what the sales

prices was at the time and to order the State to pay these sales prices to the Corporation, all this to the extent and to the degree that the Court of Appeals shall determine corresponds to the proper delivery of justice;

3. to order the State to pay the costs of the legal proceedings."

3 The State issued a number of defenses and argued principally that Court of Appeals rule itself incompetent, and alternatively that Goudstikker's appeal be found inadmissible, and more alternatively that Goudstikker's appeal be denied, all ordering Goudstikker to pay the costs of the proceedings, increased by the legal rate of interest from two weeks after the date on which the court would issue its ruling.

Competence of the Court

4. With respect to its competence to accept the appeal, the Court of Appeals ruled as follows. The criterion for determining such competence is the arguments of the appeal and what (after amending the claim for relief) is claimed or requested The Court's competence, as the appeal correctly indicates, rests on the Kingdom Act described below.

5 Under the Kingdom Act of March 9, 1967, Stb. 163 (hereafter, The Kingdom Act), concerning the regulations for the winding-down of the Council for the Restoration of Rights (in property seized during the German occupation) (hereafter, The Council), the Council as well as the Council's Divisions, with the exception of the division for

share registration, were dissolved. Under Article III paragraphs 1, 2, and 3 of the Kingdom Act, the task and the authority of the Council with respect to all matters, except those handled in first instance by the division for share registration, were transferred to the Court of Appeals in The Hague.

6 Pursuant to paragraph 4 of Article III, the procedures of the Court of Appeals of The Hague's, as legal successor to the Council, are also subject to the provisions of the Decree of September 17, 1944 implementing the Restitution of Legal Rights Decree No. E 100 (hereafter, Decree E 100).

7 This Court of Appeals therefore is court for restoration of rights, and is subject to the provisions of Decree E 100 on the legal procedure to be followed.

8 The issue therefore is whether this Court of Appeals is authorized under the provisions of Decree E 100 to issue a ruling on an appeal of the State Secretary's disputed decision of March 25, 1998.

9 Article 18 paragraph 5 of Decree E 100 holds that decisions of the Council's Divisions, with the exception of the Judiciary Division, are open to appeal by the Judiciary Division except for those cases in which this is expressly excluded. The question of whether the decision of the State Secretary is open to appeal therefore also depends on the question (A) whether the State Secretary is to be considered legal successor to the Netherlands Art Property Foundation (SNK)

created after the war, which foundation was occupied with tracing works of art removed to Germany and with the administration of recovered property, as well as (B) the question of whether the SNK is a Division of the Council.

Ad A

10 The Court of Appeal s shares the position of the parties that the State Secretary (the Minister of Education, Culture, and Science) is to be considered the SNK's legal successor. This is apparent also from the exhibits submitted by the parties. Finally, the Decree of April 20, 1988, concerning the redistribution of the ministerial task with respect to the recovery of works of art removed from The Netherlands during the Second World War, the Minister of Welfare, Public Health and Culture (now the Minister of Education, Culture, and Science) was charged as of May 1, 1988 with such recovery to the extent that such recovery had at that moment been transferred to the Minister of Finance. Question A is answered in the affirmative.

Ad B

11 Article 4 paragraph 3 of Decree E 100, which provides among other things that the Council should consist of, in any case divisions on the Judiciary, registration of shares, administration, provisions for the missing and provisions for legal persons, does not name the SNK as a division.

12 The SNK therefore is not to be equated with a division. Among the documents (submitted by the State as additional exhibit 9) is the "draft

guideline for the general policy of the Netherlands Art Property Foundation". While this draft guideline is unsigned and undated and although the Court of Appeals has not been able to review the final text of the guideline, the Court of Appeals has used this draft guideline in reaching its opinion, since Goudstikker has admitted that the guideline ultimately was made final at the end of 1946 and it has neither been argued nor has it appeared that the version now submitted to the Court of Appeals differs in any important respect to the final version of the text of the guideline.

Article 3 of the draft guideline provides that:

> "The activities of the homeland department are conducted in accordance with the instructions given to the Foundation by the Netherlands Property Administration Institute and with additional directions, without prejudice to the Foundation's authority to request instructions on issues of a fundamental nature from the Ministers of Education, Arts, and Sciences and of Finance."

Article 11 of the draft guidelines provides that:

> "The Foundation will return works of art to their original owners or their legal successors upon their requests to do so, but only in those cases when the legitimacy of their claims is clear to the Foundation and when the other conditions stated in these guidelines have been met.
>
> Return will be considered only if the following conditions are met simultaneously:

a. the original owner or owners must be death established;

b. it is established beyond doubt that the loss of possession was involuntary;

c. no mutually contradictory claims may be submitted and there may be no reason to assume that such claims will be exercised.

(...)

The Foundation will notify the Netherlands Property Administration Institute of its decision for restitution. Such a decision will not be executed when the Netherlands Property Administration Institute states within 30 days that it is withholding its permission to do so.

The Court of Appeals determines from these provisions that the SNK was not authorized to return property without the approval of the Netherlands Property Administration Institute (hereinafter: NBI).

The SNK' s subordinate role with respect to the NBI is also apparent from the letter from the NBI dated June 26, 1951, referred to in oral arguments on behalf of Goudstikker before the Court of Appeals. It is the NBI that refuses in that letter to lend its support to an agreement of restoration of rights with respect to the Miedl transaction,

Therefore it is the NBI and not the SNK. that must be regarded as the body that received the ultimate decision-making power and power of disposition.

The Court of Appeals finally notes in this respect that pursuant to Article V paragraph 3 of the Kingdom Act, the task and authority of the NBI, as far as The Netherlands is concerned, were transferred to the Minister of Justice.

13 Question B must be answered in the negative.

14 Since the SNK is not, and not to be regarded as, a department of the Council with the power of disposal, the Court of Appeals reaches the conclusion that the decision of the State Secretary as legal successor to the SNK is not to be regarded as a decision of a department within the meaning of Article 18 paragraph 5 of Decree E 100, so that it is not open to appeal before this Court of Appeals and this Court of Appeals will rule itself incompetent to hear an appeal as the court for restoration of rights of the decision of the State Secretary.

Direct application

Case no appeals: 98/298

15 With respect to whether the notice of appeal must be construed as a direct appeal of an interested party to the Court of Appeals within the meaning of Article 21 paragraph 1 of Decree E 100, the Court of Appeals finds as follows.

16 After the period of time for the submission of this category of claims had been extended a number of times, by decision of the executive board of the Council for the Restoration of Rights, published in the Government Gazette of December 27, 1950 (Stcrt. no. 251, page 5), this period was extended

explicitly for the last time and it was determined that such claims must have been submitted prior to July 1, 1951.

17 The claim submitted to the Court of Appeals on August 19, 1998, therefore, was not submitted on time, so that in principle a ruling of inadmissibility must follow on this ground.

Ex-officio granting of restoration of rights

18 The remaining question is whether there is reason to rule that there is serious cause that must result in an ex-officio granting of restoration of rights:

Article 21 paragraph 3 of Decree E 100 indeed provides that the Council can exercise its authority ex-officio after the expiration of period of time set and published in the Government Gazette. The essence of this provision is that restoration of rights can be applied even if one of the parties involved has not made an application.

19 The Court of Appeals first takes into consideration that nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted.

20 Additionally, the following is of importance. From the documents submitted it appears that the Corporation at the time made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction. The Court of Appeals refers here to the Memorandum of M. Meyer, esq [Notation in margin: [*sp?*] *exh. 19 p. 5*.] of November 10, 1949 (submitted as additional exhibit 19 by the State), as well as the report by A.E.D. von Saber, esq. of

April 1952 (submitted as additional exhibit 25 by the State).

Goudstikker now argues that the Corporation refrained from asking for restoration of rights with respect to the Göring transaction under the position of (agencies of) the State, that held that the Göring transaction was entered into voluntarily and because Desirée Goudstikker-Halban was misled by the statements of the then-Director of the SNK, Dr. A.B. de Vries, regarding the value of the paintings that were part of this transaction.

In the opinion of the Court of Appeals, the Corporation was free – no matter what position was taken by the SNK, the NBI, or any other agency of the State involved in this matter at any time after the war – to have submitted an application for restoration of rights with the Council. The Corporation had at its disposal expert legal advisors who could have argued the involuntary nature of the Göring transaction during any legal proceedings before the Council, and yet the Corporation neglected to do so for well-founded reasons.

Goudstikker's argument that De Vries had misled Desirée Goudstikker-Halban with respect to the value of the paintings adds insufficient weight to the scales. Should that have been the case – which the State disputes – then in the opinion of the Court of Appeals, and since the SNK was in a certain sense the counterparty, the way was certainly open for the Corporation and/or its advisors Meyer and Lemberger to have one or

more independent experts conduct counter appraisals of the paintings.

21 Based on the foregoing, the Court of Appeals finds no serious cause to grant ex officio restoration of rights.

22 Goudstikker additionally makes, and in the opinion of the Court of Appeals, a vain claim based on international law. The Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights. The fact that international law does not provide for a rigid statute of limitations does not mean that the regulation for the restoration of rights, that included a hardly rigid final term for the submission of such application, is on this ground, in conflict with international law.

23 With reference to the opinion of Prof. A.K. Koekoek, esq. submitted, to the extent that Goudstikker appeals to Article 5 of the Constitution such an appeal also cannot provide it any benefit. That provision's right to petition authority – that can include judicial authority and therefore this Court of Appeals – does not affect the opinion of this Court of Appeals that there are no grounds in this case for ex officio application of the restoration of rights with respect to the Göring transaction.

24 The above considerations lead to the conclusion that the Court of Appeals rules itself incompetent to receive the notice of appeal to the extent that this is to be understood as an appeal under Article 18 paragraph 5 of Decree E 100 against the decision of the State Secretary of March 25, 1998.

To the extent that the notice of appeal is to be regarded as a direct request by interested parties within the meaning of Article 21 paragraph 1 of Decree E 100, the Court of Appeals rules Goudstikker inadmissible in this request. There is no place for ex officio granting of restoration of rights pursuant to Article 21 paragraph 3 of Decree E 100

As the unsuccessful party, Goudstikker will be ordered to pay the costs of the case, including the requested legal interest

Decision

The Court of Appeals:

- rules itself incompetent to hear the appeal to the extent that it is an appeal on the ground of Article 18 paragraph 5 of Decree E 100 against the dispute decision of the State Secretary;
- rules the notice of appeal inadmissible to the extent that it is to be regarded as a direct claim for restoration of rights on ground of Article 21 paragraph 1 of Decree E 100;
- orders Goudstikker to pay the costs of the case, estimated up to the moment of this judgment for the State to be Hfl 3,400 as the local counsel's fixed fee and at Hfl 440 in court fees, increased by the legal interest on these costs starting 2 weeks after this judgment.

This judgment is rendered by
Vrij, In 't Velt-Meijer, and Dupain, assisted by Mr. Van Gessel, esq., as Clerk, and pronounced in the public session of December 16, 1999.

[signature]

[signature]
Certified Bailiff's Copy
issued to: Mr. Grootveld, esq.
Local attorney for: respondent
The Clerk of the Court of Appeals of The Hague

[Logo and letterhead omitted]

City of New York, State of New York, County of New York

I, Pamela Doyle, hereby certify that "Opinion, Court of Appeal of The Hague dated December 16, 1999" is, to the best of my knowledge and belief, a true and accurate translation from Dutch into English.

/s/ Pamela Boyle

Pamela Boyle

Sworn to before me this
28th day of March 2007

/s/ Heather Bosley

Signature, Notary Public

[Notary Public Stamp omitted.]

Stamp, Notary Public

Recommendation Regarding the Application by Amsterdamse Negotiatie Compagnie NV in Liquidation for the Restitution of 267 Works of Art from the Dutch National Art Collection

(Case number RC 1.15)

In letters dated 10 June 2004 and 20 September 2005, the State Secretary for Culture, Education and Science asked the Restitutions Committee to issue a recommendation regarding the decision to be taken concerning an initial application and additional application by Amsterdamse Negotiatie Compagnie NV in liquidation for the restitution of the works of art which are currently in the possession of the State of the Netherlands and that were part of the trading stock of the gallery Kunsthandel J. Goudstikker NV, as it existed on 10 May 1940.

The Proceedings

On 26 April 2004, Amsterdamse Negotiatie Compagnie NV in liquidation (referred to below as 'the Applicant') filed a substantiated application with the State Secretary for Culture, Education and Science (referred to below as 'the State Secretary') for the restitution of 241 itemised art objects described in the application as '*the goods that the State of the Netherlands has in its custodianship and that were part of the Goudstikker Collection*'. The State Secretary submitted this application to the Restitutions Committee (referred to below as 'the Committee') for its advice in a letter dated 10 June 2004. In a letter of 31 July to the State Secretary and letters of 8 January 2005 and 31 July 2005 to the Committee, the Applicant revised the list of

241 art objects enclosed with the letter of 26 April 2004, expanding it to a list of 267 art objects.

According to a statement in the first application, the application is 'supported' by Marei von Saher-Langenbein (referred to below as 'von Saher-Langenbein'), the widow of Eduard von Saher, Jacques Goudstikker's only son. At the request of the Committee, the authorised representatives explained the meaning of this support in a letter of 8 January 2005. This was provided '*in case goods were included among the reclaimed art objects that belonged to the private assets of Mr Jacques Goudstikker and/or Mrs Desi Goudstikker-von Halban.*' Because this was ·not the case, the Committee regards Amsterdamse Negotiatie Compagnie NV in liquidation as the sole applicant. Amsterdamse Negotiatie Compagnie NV has been the new name of Kunsthandel J. Goudstikker NV (referred to below as 'Goudstikker') since a 1952 resolution. The liquidation of assets of the company wound up as from 14 December 1955, 'which was concluded on 28 February 1960, was reopened on 31 March 1998 by order of the Amsterdam District Court.

R.O.N. van Holthe tot Echten, Master of Laws, and Prof. H.M.N. Schonis, Master of Laws, are acting in the proceedings before the Committee as the authorised representatives of the Applicant and of von Saher-Langenbein.

The Committee has reviewed all the written documents submitted in this case, specifically including the applications and explanatory notes filed with the State Secretary on behalf of the Applicant on 26 April 2004 and 31 July 2005, the reply dated 8 January 2005 from the Applicant's authorised representatives to the

Committee's questions and the response of 31 July 2005, the draft investigatory report compiled by the Committee. For the State Secretary's part, the Committee has read a letter with appendices of 30 September 2004 from deputy State Advocate H.C. Grootveld, Master of Laws, to the director of the Cultural Heritage Department of the Ministry of Culture, Education and Science with respect to the status of judicial cases pending before the court in which the State of the Netherlands and the Applicant are involved.

During a hearing on 12 September 2005 organised by the Committee, the Applicant provided a verbal explanation of its application. Besides the authorised representatives Van Holthe tot Echten and Schonis, the following persons attended on behalf of the Applicant: Von Saher-Langenbein (the Applicant's liquidator as well as the 'supporter' of the application), Charlene von Saher (Jacques Goudstikker's granddaughter), A. Bursky (the Applicant's liquidator), L.M. Kaye, Esq. (Von Saher-Langenbein's counsel), Prof. I. Lipschits (the Applicant's advisor), Mr C. Toussaint (the Applicant's art history advisor), R. Smakman (colleague of authorised representative Van Holthe tot Echten), as well as the interpreters Van den Berg and Cillekens. A transcript was drafted of the hearing, which the Committee sent to the authorised representatives in a letter dated 13 October 2005.

In response to the requests for advice it has received, the Committee instituted a fact-finding investigation, the results of which are documented in a draft report dated 25 April 2005 that was sent to the Applicant on 4 May 2905. In a letter of 31 July 2005, the Applicant sent its response to the Committee's draft report.

Subsequently, points of the draft report were revised. This response has been appended to the documentary report (referred to below as 'the Report') adopted by the Committee on 19 December 2005. The Report is deemed to comprise part of this recommendation.

General Considerations (regarding art dealers)

a) The Committee has drawn up its opinion with due regard for the relevant (lines of) policy issued by the Ekkart Committee and the government.

b) The Committee asked itself whether it is acceptable that an opinion to be issued is influenced by its potential consequences for decisions in subsequent cases. The Committee resolved that such influence cannot be accepted, save in cases where special circumstances apply, since allowing such influence would be impossible to justify to the Applicant concerned.

c) The Committee then asked itself how to deal with the circumstance that certain facts can no longer be ascertained, that certain information has been lost or has not been recovered, or that evidence can no longer be otherwise compiled. On this issue the Committee believes that, if the problems that have arisen can be attributed at least in part to the lapse of time, the associated risk should be borne by the government, save in cases where exceptional circumstances apply.

d) Finally, the Committee believes that insights and circumstances which, according to generally accepted views have evidently changed since the Second World War should be granted the status of new facts.

e) Involuntary loss of possession is also understood to mean sale without the art dealer's consent by 'Verwalters' [Nazi-appointed caretakers who took over management of firms owned by Jews] or other custodians not appointed by the owner of items from the old trading stock under their custodianship, in so far as the original owner or his heirs did not receive all the profits' of the transaction, or in so far as the owner did not expressly waive his rights after the war.

Special Considerations

A few basic assumptions are first explained below under Section I. Section II addresses the loss of possession during the first months of the war in 1940, the period during which Jacques Goudstikker, sole managing director and principal shareholder of Goudstikker, had already fled the Netherlands, and some of his employees had sold the immovable and movable property of his gallery, mainly to Alois Miedl and Hermann Göring. Section III discusses previous applications for the 'restoration of Goudstikker's rights, namely:

- the negotiations with the Dutch rights restoration authorities conducted after the war that ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the art objects, and
- a restitution application filed with the State Secretary by Jacques Goudstikker's heirs in 1998, which, following its rejection, was brought before the Court of Appeals of The Hague.

In Section IV, the Committee provides its judgement of the works of art delivered in 1940 to Miedl and Göring, respectively. In Section V, the Committee

then sets out its position on the other art objects included in this restitution application. Finally, in Section VI, the Committee discusses the consequences of possible restitution.

I. Basic Assumptions

The Facts

1. For the facts serving as the basis of this recommendation, the Committee refers the reader to the Committee's Report, deemed to comprise an integral part of this recommendation:

The Committee's Decision-Making Framework

2. Under Article 2 of the Decree of 16 November 2001 establishing its task and responsibilities, the Committee has the task of advising the State Secretary on decisions to be taken concerning applications for the restitution of items of cultural value of which the original owners involuntary lost possession due to circumstances directly related to the Nazi regime. The committee must observe relevant government policy.

Items of Cultural Value Concerned

3. The Applicant seeks the restitution of 267 works of art, mainly paintings, from the Dutch National Art Collection that are claimed to have been part of Goudstikker's trading stock, as stated in List I appended to this recommendation. After the war, the Sate of the Netherlands recovered these works of art primarily from Germany and they were subsequently incorporated into the National Art Collection. As 2005, a large portion of the works of art is on loan to various Dutch museums and government agencies under Netherlands Art Property (NK) inventory numbers.

The Committee has determined that the majority of the art objects whose restitution is requested (227 in number) were the property of Goudstikker when in May 1940, Jacques Goudstikker was forced to leave the gallery behind, although some of the paintings were co-owned by Goudstikker and others. In Jacques Goudstikker's papers and below, these, paintings (21 in number) are called the 'meta-paintings'. The Committee's recommendation regarding the meta-paintings can be found under 14.

4. It is certain or likely that a total of 40 of the 267 works of art whose restitution is requested were not part of Goudstikker's property on 10 May 1940. It is true that the provenance of some of the works of art from tins category may not be entirely conclusive, but it is not likely that they be1onged to Goudstikker's old trading stock. Three of the paintings were present in the gallery on 10 May 1940 owing to consignment or commission. As for the other works of art from this category, some may have been part of Goudstikker's trading stock at one time or another, but not during the period that is relevant to this application.

   As these 40 art objects cannot be regarded as Goudstikker's former property, the Committee concludes that there are no grounds whatsoever for granting the restitution·application in respect of these paintings. The considerations provided below do not pertain to these works of art, which are specified in List II appended to this recommendation.

II. Involuntary Loss of Possession during the War

5. The foremost question the Committee feels it must address is whether Goudstikker's loss of possession should be regarded as involuntary. The Committee deems the following events relevant to answering this question.

   When the war broke out on 14 May 1940, Jacques Goudstikker, principal shareholder and sole managing director of Goudstikker, managed to flee the Netherlands by boat with his wife Désirée Goudstikker-von Halban and son Eduard. During the journey, Jacques Goudstikker lost his life in an accident; Désirée and Eduard ultimately reached the United States. The gallery, with a trading stock of 1,113 (inventoried) works of art, was left behind without management, as Jacques Goudstikker's authorised agent also died suddenly in early May 1940. Two of Goudstikker's employees, A.A. ten Broek and J. Dik, Sr., took on the management of the gallery, and Ten Broek was subsequently named company director during an extraordinary general meeting of shareholders held on 4 June 1940. Almost immediately after the capitulation of the Netherlands, Alois Miedl, a German banker and businessman living in the Netherlands, joined the art business and took over the actual management.

   In a contract dated 1 July 1940, Miedl purchased all of Goudstikker's assets, including the trading name of the gallery. This contract was then amended shortly thereafter in connection with the concurrent interest of General Field Marshal Hermann Göring in the gallery. On 3 July 1940, two purchase agreements were subsequently concluded between Goudstikker, represented.by Ten Broek, and Miedl and Göring, respectively:

- Under the agreement with Miedl, Miedl acquired from Goudstikker, for an amount of NLG 550,000, the co-ownership of the meta-paintings, the right to the trade name 'J. Goudstikker' and the immovable property, i.e. Nijenrode castle in Breukelen, the building in which the gallery was located on the Herengracht in Amsterdam, and 'Oostemneer', the country house in Ouderkerk aan de Amstel;
- Under the agreement with Göring, Göring acquired, for an amount of NLG 2,000,000, the rights to all art objects that belonged to Goudstikker on 26 June 1940 and that were located in the Netherlands. Göring acquired a right of first refusal to the meta-paintings, which right was exercised, resulting in Göring's acquisition of several meta-paintings.

Although both agreements stipulated that '*as accurate a list as possible would be drawn up as soon as possible*', no such list was ever compiled. For their part in arranging the sale, the gallery's personnel received from Miedl a combined sum of NLG 400,000. In addition, at the time the agreement was concluded, Mrs Goudstikker-Sellisberger, Jacques Goudstikker's mother who had stayed behind in Amsterdam, was said to have been granted the protection of Miedl or Göring.

Désirée Goudstikker – heir of Jacques Goudstikker and representing 334 of the 600 shares partly on behalf of her underage son – refused to 'grant permission for the sale as requested of her by Ten Broek.

On 14 September 1940, Alois Miedl founded 'Kunsthandel voorheen J. Goudstikker NV' [Gallery

formerly known as J. Goudstikker NV] (referred to below as: 'Miedl NV'). The decision to wind up Goudstikker was made on 2 October 1940, and the company was thus wound up. This winding-up was reversed with retroactive effect on 26 February 1947. Of the purchase price of NLG 2,550,000 involved in the sale to Miedl and Göring, an amount of NLG 1,363,752.33 (also see Part VII) was left for Goudstikker after the war.

6. The Committee feels that the loss of possession as described above can be considered involuntary under the current restitution policy.

   This conclusion is legitimised by the mere circumstance that Jacques Goudstikker's widow refused permission for the transactions and that there is doubt about the authority of those who sold the works of art on behalf of Goudstikker. The Committee also takes into consideration that the possible legal validity of the transactions resulting in loss of possession could only have occurred because of the appointment as director of the gallery of an employee who was sympathetic towards the German buyers (Ten Broek), and that this appointment occurred during an extraordinary general meeting of shareholders on 4 June 1940 that was convened in a manner that rendered decision-making invalid.

   Contributing to this opinion is also the fact that both buyers purchased works of art on a large scale immediately after the capitulation of the Netherlands, a situation in which Göring could –and undoubtedly did – use the influence of his high rank in the Nazi hierarchy. In respect of Miedl, it cannot

be ruled out and so it must be assumed (see the general consideration under *c)* that sales to him, as a friend of Göring's, were involuntary. It is true that Miedl helped, Jewish families during World War II and he himself was married to Jewish woman, but he also had clear Nazi sympathies. He profited from the war by deriving sizable profits from trade with Germans, working particularly to amass the art collections of Göring and Hitler. It is known that even in an early phase of the occupation, Miedl pressured Jewish art owners in an attempt to sway them to sell to Göring via him.

In the years shortly after the war, the Council for the Restoration of Rights also established that the transaction in which Miedl purchased the Goudstikker gallery should be labelled as involuntary, as evident from the considerations dedicated to the matter by the Council for the Restoration of Rights, judicial division, Chamber of Amsterdam on 21 April 1949, in which involuntariness was determined even '*if the sale were to have occurred at a normal purchase price*'.

The Committee would also like to mention, perhaps superfluously, the recommendations of the Ekkart Committee made in January 2003 in respect of the gallery, to the effect that: '*in any case, threats of reprisal and 'promises of the provision of passports or safe-conducts as a component of the transaction should be considered among the indications of involuntary sale*'.

The Committees judgement in respect of art objects obtained during the war by others besides Göring or Miedl will be addressed in section 15 below.

III. Previous Applications for Restitution

7. The next question the Committee feels it must answer is whether the application return the works of art should be regarded as a matter that has been conclusively settled based on a previous settlement. The result of this would be that the current application would no longer qualify as admissible. In its memorandum of 14 July 2000, the government formulated its position regarding restitution and recovery, of items of cultural value, stating that an application can only be taken into consideration if:

   - *it is a new application, i.e., not an application that was already settled by a decision of a competent judicial body for the restoration of rights or by amicable restoration of rights*
   - *it is an application already settled as part of a restoration of rights in respect of which new, relevant facts have subsequently become available.*

   The Ekkart Committee proposed the following additions to this in its recommendations to the government in 2001:

   - *The Committee advises restricting the concept of 'settled cases' to those cases in which the Council for the Restoration of Rights or another competent court has handed dawn a verdict or in which a formal settlement between entitled parties and the agencies that 'supersede the SNK [Netherlands Art Property Foundation] has been reached;*
   - *The Committee advises interpreting the concept of new facts more broadly than has been customary in policy thus far and to also include*

deviations in respect of the rulings handed down by the Council for the Restoration of Rights as well as the results of changed (historical) insight in respect of the justice and consequence of the policy pursued at the time.

On 29 June 2001, the government also refined the concept of a 'settled case' as follows:

- *The government is consequently willing to follow the Committee in its recommendation but feels that the concept of an 'official settlement' can lead to uncertainty. In the government's opinion a case will be considered settled if the claim for restitution has intentionally and deliberately resulted in a settlement or the claimant has explicitly withdrawn the claim for restitution.*

Pursuant to the recommendations of the Ekkart Committee of 28 January 2003 regarding the art trade and a written clarification thereof by its chairman Prof. R.E.O. Ekkart, the cited recommendations apply integrally to this application.

8. In respect to f the art objects delivered to Miedl in 1940, it is important to note here that a settlement agreement was signed by Goudstikker on 1 August 1952, and in respect of the works of art delivered to Göring in 1940, a ruling was handed down by the Court of Appeals of The Hague on 16 December 1999.

Settlement Agreement of 1 August 1952

After World War II, Goudstikker sought restoration of rights in respect of the so-called 'Miedl transaction'. For years starting in 1947, Désirée Goudstikker negotiated the matter with the administrators who were appointed on behalf of the Netherlands Property Administration Institute (NBI) for Miedl's assets and the gallery Miedl NV he had founded. The NBI represented the Dutch state in these negotiations. The negotiations on the restoration of rights ultimately, on 1 August 1952, resulted in a settlement agreement in respect of the works of art. This firstly arranged for the (re-) purchase by Goudstikker of more than three hundred art objects from the assets of Miedl that had been put under administration, as well as the termination of the pending lawsuit Goudstikker had brought before the Judicial Division of the Council of the Restoration of Rights. In this agreement, Goudstikker also waived the ownership rights to the either art objects delivered to Miedl NV during the war:

> *(Art. 1.4) In respect of the Party of the one part [in summary: the State], the Party of the other part [i.e. Goudstikker] waives all rights it could invoke towards anyone whomsoever in respect of paintings and art objects and shares "in paintings and art objects that were delivered by GOUDSTIKKER NV to MIEDL NV between May of nineteen hundred and forty and May of nineteen hundred and forty-five, regardless of whether these have since been recovered from foreign countries or are located in foreign*

countries, as well as proceeds that in the event of sale have been or will be in lieu thereof.

Unlike in a previous draft of the settlement agreement, in the final agreement, Goudstikker did not waive rights to the items that were delivered to Göring during the war.

Application for Restitution to the State Secretary and Ruling by the Court of The Hague of 16 December 1999·

On 9 January 1998, Von Saher-Langenbein requested that the State Secretary return the 'Goudstikker collection'. The State Secretary rejected this application, ruling that in his view; even according to current standards, the restoration of rights had been carefully settled after the war, and that he saw no reason to reconsider the matter. The Applicant and Von Saher-Langenbein subsequently appealed this decision before the Court of Appeals of The Hague, at which time they also submitted an application for the restoration of rights for the 'Göring transaction' on the basis of post-war legislation on the restoration of rights (Decree on Restoration of Legal Transactions, E 100 from 1944). The court found this application inadmissible, given that the period from the post-war arrangement had expired on 1 July 1951 and the application was thus submitted too late. In addition, the court also examined whether there was a 'compelling reason' to officially grant restoration of rights,' giving consideration to the following:

The court first of all takes into consideration that nearly 50 years have passed since the time when the

last applications for restoration of rights could he submitted.

Also of significance is the following.

It is evident from the documents that the Company intentionally and deliberately decided against seeking restoration of rights in respect of the Göring transaction at the time. The court cites the Memorandum from M. Meyer, Master of Laws, of 10 November 1949, as well as the report by A.E.D. van Saher, Master of Laws, of April 1952 (...)

Goudstikker now avers that the Company decided against requesting restoration of rights in respect of the Göring transaction under the sway of the position of the State (or its bodies), purporting that the Göring transaction occurred voluntarily, and because Desirée Goudstikker-Halban was misled by then director of the SNK, Dr A.B. de Vries, with respect to the value of the paintings that comprised part of this transaction.

In the court's opinion, regardless of any position the SNK, the NBI or other State bodies may have taken in the matter at any time after the war, the Company was free to submit an application for restoration of rights to the Council. The Company had expert legal advisors who could have argued the involuntariness of the Göring transaction during proceedings before the Council, yet this was not done for the Company's own reasons.

Goudstikker's assertion that De Vries misled Desirée Goudstikker-Halban with respect to the value of the paintings does not carry sufficient weight. If this were the case – which the State refutes – then, the court feels, it should have been up to the Company or its advisors Meyer and

Lemberger, since the SNK was (in a certain sense) its counterparty, to have one or more independent experts make (counter) assessments of the value of the paintings.

IV. Judgement of the Committee regarding the Works of Art delivered-to Miedl and Göring, respectively

Works of Art delivered to Miedl

9. As for the validity of the settlement, the Committee's first consideration is that it has not been convinced by legal arguments that the agreement should not be deemed valid. The Applicant's authorised representatives have claimed that the settlement is null and void because it came about under coercion and deception. It is certain, as documented in the settlement itself; that Jacques Goudstikker's widow was very disappointed with the content of the agreement that was reached after many years. The circumstance that she signed the settlement despite this disappointment indicates that she opted for the lesser of (what she considered to be) two evils. In legal terms, this cannot be termed coercion, and no compelling arguments to support the accusation of deception have been submitted nor found by the Committee. The Committee will not address the issue that the legal nullity or voidableness of the settlement was not invoked on time. In the Committee's opinion, the settlement is thus legally valid.

10. The Committee also answers the question of whether, as a result of the validity of the settlement, this category of works of art can be

regarded as a conclusively settled case in the affirmative.

In the Committee's view, a valid settlement is distinct from a valid legal ruling in that the former contains an individual statement by the parties who had previously been in disagreement but who have now met in the middle by reaching a settlement, whereas the legal ruling creates a situation imposed from above with which the losing party will generally disagree and remain in disagreement.

In this case, in the settlement, Goudstikker waived ownership rights to the benefit of the Dutch State and opted to put an end to the lawsuit brought before the Council for the Restoration of Rights. The Committee, citing the. general considerations under *e*, is of the opinion that *waiving ownership rights*, as Goudstikker has done, unlike *deciding against submitting an application for the restoration of rights*, is of such a definitive nature, that, despite the broad concept of new facts, it cannot be applied here.

In conclusion, the Committee has arrived at the judgement that, even by present-day standards, by signing the settlement agreement in 1952, Goudstikker unconditionally waived the ownership rights to the art objects delivered to Miedl, on the basis of which the Committee cannot advise the State Secretary to return these art objects.

11. The Committee has considered what is known as the Elte Report as definitive when it comes to categorising the individual art objects covered by the settlement. This is an accountant's report written by J. Elte for Miedl NV in 1942, shedding

light on the performance of the July 1940 agreements between Goudstikker and Miedl and Göring, respectively. In the Committee's view and according to the Elte list, among the category of works of art covered by the settlement are also some paintings that Göring purchased under contract but that were actually delivered to Miedl.

The Committee is consequently of the opinion that the works of art stated in LIST III under A are covered by the settlement, whereas the works of art that were delivered to Göring stated on LIST III under B, are *not* covered by the settlement.

Works of art delivered to Göring

12. It has been established that Goudstikker involuntarily lost the other art objects in List III, under B and that they were not covered by the settlement. Given the circumstances, these works of art should be returned to the Applicant, unless the case should be deemed to have already been conclusively settled. The government policy which the Committee is bound to observe stipulates that the restoration of rights must not be reiterated.

In its first recommendation to the government, the Ekkart Committee advises restricting the concept of a 'settled case' to those cases in which the Council for the Restoration of Rights or another competent court has handed down a ruling or in which a formal settlement between entitled parties and agencies that supersede the Netherlands Art Property Foundation [SNK] has been reached. The government evidently agreed with this recommendation, according to a government statement of 29 June 2001, on the understanding

that they refined the concept as follows: '*A case will be considered settled if the claim for restitution has resulted intentionally and deliberately in a settlement or the claimant has explicitly withdrawn the claim for restitution*.' With this addition, the government has apparently sought continuity with the wording of the court's ruling (as the legal successor of the Council for the Restoration of Rights) of 16 December 1999, in which the court decided that there were no substantial reasons to officially grant restoration of rights to applicants, because at the time, applicants had intentionally and deliberately decided against requesting the restoration of rights in respect of the Göring transaction.

Although the Committee cannot ignore this determination by the court, that does not automatically mean that by deciding against asking for the restoration of rights, the Applicant's actual *rights* to the Göring collection have been surrendered. Goudstikker could have had various reasons at the time for deciding against seeking restoration of rights that in no way suggest the surrender of ownership rights to the Göring collection. One example that can be cited is that the authorities responsible for restoration of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily. As another indication that Goudstikker did not want to surrender the rights to the Göring collection in 1952, the Committee would like to point out the deliberate omission of this category of works of art from the

final revision of Article 1.4 of the aforementioned settlement.

Added to that is the fact that in 1999, the court could not take into consideration the expanded restitution policy the government formulated after that, which renders the Committee able and imposes an obligation on the Committee to issue a recommendation is based more on policy than strict legality. This expanded policy and the resulting expanded framework for assessment, representing generally accepted new insights, causes the Committee to decide that the Applicant's current application is still admissible, despite the court's previous handling of the application.

13. Based on the above and given the involuntary nature of the loss of possession, the Committee concludes that the application for restitution of the works of art delivered to Göring in 1940 as specified in appendix III-B, which are not covered by the waiver of rights in the settlement agreement of 1 August 1952, should be granted.

The Committee's opinion in respect of the meta-paintings that were delivered to Göring follows below under 14.

<u>The meta-paintings</u>

14. Of the 21 meta-paintings – the paintings Goudstikker co-owned with others – specified in List IV appended to the recommendation, the thirteen paintings listed under B on that list belong to the 'Göring collection'. The remaining eight meta-paintings, under A of this list belong to the works of art delivered to Miedl.

Goudstikker involuntarily lost possession of these thirteen meta-paintings, as was the case with the other works of art that Göring obtained, and the rights to these paintings were not waived either. The only reason that might stand in the way of restitution is thus the co-ownership of those paintings by third parties, largely art dealers Evidently, those third parties did not have any objection whatsoever at the time to leaving these paintings – which were, after all, intended for sale – in Goudstikker's physical possession. The Committee sees no reason why it should now rule any differently. The object of such an arrangement is to obtain the highest possible sale price, and apparently the co-owners had great confidence in that respect in the skills and renown of Goudstikker, who, incidentally, was not allowed to sell these paintings below the purchase price without the co-owners' consent and who would not be allowed to do so after their restitution either.

As it is the Committee's job to provide advice in such a way that, if the State Secretary accepts the advice, a situation is achieved that as closely as possible approximates the former situation of 10 May 1940, it recommends returning the paintings listed in LIST IV under B as meta-paintings to the Applicant, who should, if possible, notify the co-owners after the restitution is effected.

V. Other Art Objects

<u>The 'Ostermann Paintings'</u>

15. The twelve paintings designated in the first application and the Committee's Report as the 'Ostermann paintings' (numbers 1 to 12 on LIST V appended to this recommendation) comprised part

of Goudstikker's trading stock at the time that Jacques Goudstikker was forced to leave his gallery behind in May 1940. In all likelihood, they were sold with the assistance of Goudstikker's staff to the German W. Lüpps in May 1940, before Miedl took over the gallery. E.J. Ostermann, a German who became a naturalised Dutch citizen in 1919, acted as the agent, receiving a sum of NLG 20,000 from Miedl. It is very likely that Goudstikker never received the purchase price of NLG 400,000. The circumstances of the loss of possession are otherwise the same as outlined above under 5 and 6.

Given these circumstances, it can be assumed that Goudstikker's loss of possession of these paintings was involuntary as a result of circumstances directly related to the Nazi regime. As the paintings do not fall under the ambit of the settlement of 1 August 1952 nor were the subject of any other application for the restoration of rights, the Committee's recommendation shall consequently be that these paintings should be returned to the Applicant. This is only partially possible, however, as will become evident below under consideration 17.

VI. Consequences of Restitution

Consideration in exchange for restitution

16. Another question that must be addressed is whether, in exchange for the restitution of a portion of the art objects to the Applicant, as considered above, there should be a repayment of the consideration received at the time for the sale.

At the recommendation of the Ekkart Committee, government policy states in this respect that

restitution of the proceeds of sale should only be raised in the case if and in so far as the former seller or his heirs did actually receive the free disposal of those proceeds. In cases of doubt, the Applicant shall be given the benefit of the doubt.

As far as possible, the Committee has attempted to gain an impression of the amounts involved in the loss of possession of the works of art by Goudstikker. Stating the caveat that the Committee had information to go on that was collected during and after the war, information that does not always match up, an overview is provided below.

After the war, an amount NLG 1,363,752.33 remained for Goudstikker from the amount of NLG 2,500,000 that was paid by Miedl and Göring for the sale of the gallery, as a result primarily of costs involved in sales transactions and disbursements of amounts connected with Goudstikker's winding up. In exchange for repossession of the immovable property and more than three hundred art objects as part of the amicable restoration of rights after the war, Goudstikker then had to pay the authorities responsible for restoration of rights a sum of NLG 483,389.47. Accordingly, the amount of sales proceeds that was at the free disposal of Goudstikker can be set at NLG 880,362.86.

On the other hand, besides losing the trading stock of 1,113 inventoried works of art, Goudstikker was confronted with other sizeable losses. The loss of the gallery's goodwill and the loss of a large number of non-inventoried works of art and other goods can be designated as the largest, unsettled loss items. The second spouse of the widow

Goudstikker, A.E.D. von Saher, Master of Laws, has estimated the value of just the non-inventoried works of art alone at between NLG 610,000 and NLG 810,000.

The Committee has determined that, after so many years; it is not possible to gain an accurate idea of Goudstikker's financial consequences of losing the gallery. In view of the following facts:

(a) that Goudstikker suffered heavy losses during and because of the war and occupation of such a nature that a significant, if not the most significant, gallery of the Netherlands ceased to exist after the war;

(b) that at least 63 paintings from Goudstikker's trading stock were sold by the Dutch State in the fifties and that the proceeds from that sale were channelled into state coffers and, in any case, were not allocated to Goudstikker;

(c) that the Dutch State has enjoyed a right of usufruct to the paintings for a period of nearly six decades without paying any consideration in exchange;

(d) and that, as proposed below under 17 of this recommendation, no compensation will be paid for the four paintings that have gone missing;

the Committee recommends that restitution should not involve any financial obligation on the part of the Appellant.

Missing and Stolen Works of Art

17. Two of the paintings belonging to the Göring transaction (NK 1437 and NK 1545) have been reported missing, while two paintings that are part of the Ostermann category (NK 1887 and NK 1889,

numbers 9 and 10 on LIST V) are registered as stolen.

It must be established in respect of these four paintings that they cannot be returned (at this time), although they do qualify for restitution according to the Committee's opinion as set out above. Consequently, the Committee does not consider it unreasonable for the Applicant to be indemnified for them. However, now that it has been established that Goudstikker did receive the amounts from the transaction with Göring, whereas the recommendation under 16 is not to require the obligation for any (re)payment in exchange for the restitution of numerous art objects, the Committee feels that that compensation need not occur. If one or more of these paintings should return to the custodianship of the State of the Netherlands, this must result, the Committee feels, in the restitution thereof to the Applicant.

Public Interest

18. In conclusion of this recommendation, the Committee has asked itself whether there are weighty considerations, besides those mentioned above, that could impact the recommendation to return the art. In this framework, the question has been raised of whether there could be a public interest that could be weighed as part of this recommendation. After all, the restitution concerns a large number of works, including some that are very significant in terms of art history, some of which have already been on display in the permanent exhibitions of Dutch museums for years.

Pursuant to the criteria of the Cultural Heritage Protection Act (referred to below as 'the WBC'), if a work of art has such significance in terms of cultural history or science that it should be kept for the Netherlands, there can be a case of a public interest to keep a collection or individual objects permanently for the cultural assets of the Netherlands. Article 2 of the WBC states that this concerns works of art that are irreplaceable and indispensable: irreplaceable, if no equivalent or similar objects in good condition are present in the Netherlands and 'indispensable, if they have symbolic value for Dutch history, play a linking role in the exercise of research in a broad sense and/or represent comparative value in that they make a substantial contribution to the research or knowledge of other important objects of art and science.

The Committee considers that, in establishing a public interest, it matters whether this determination was applicable to the situation immediately prior to the loss of possession, or whether the understanding of the irreplaceability and indispensability arose in, the period after recovery, while the works were under the custodianship of the Dutch state. In that respect, it can be observed that in 1940 there was as yet no protection of Dutch cultural assets, as the WBC aims to do. The Committee also feels that any post-war shift in the appreciation of the works of art cannot and should not have any influence on the recommendation to restore the art to the Applicant.

Regardless of the application of the WBC after·effectuation of the restitution of the art, the

Committee concludes that, in this case, no public interest is deemed present that could impede restitution to the Applicant.

Conclusion

The Committee advises the State Secretary:

1. to reject the application to return the works of art specified under consideration 4, in respect of which it has been established that Goudstikker cannot be designated as the original owner (List II);
2. to reject the application to return the paintings that were delivered to Miedl during the war and that are subject to the provisions of Article 1.4 of the settlement agreement of 1 August 1952 (List III-A);
3. to grant the application in respect of the works of art that are part of the Göring transaction (List III-B), with the exception of NK 1437 and NK 1545 that have gone missing, while the meta-paintings included there are to be returned in their capacity as meta-paintings (and in List IV-B);
4. to grant the application in respect of the works of art belonging to the 'Ostermann paintings', with the exception of NK 1886 and NK 1887 which have been stolen (List V).

Adopted in the meeting of 19 December 2005,

B.J. Asscher (chair)

J.Th.M. Bank

J.C.M. Leijten

P.J.N. van Os

E.J. van Straaten

H.M. Verrijn Stuart
I.C. van der Vlies