

No. 12-55733

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MAREI VON SAHER,

Plaintiff-Appellant,

v.

**NORTON SIMON MUSEUM OF ART AT PASADENA
AND NORTON SIMON ART FOUNDATION**

Defendants-Appellees.

*On Appeal from the United States District Court
for the Central District of California, Case No. CV-07-02866-JFW
The Honorable John F. Walter, United States District Judge*

**PETITION FOR REHEARING AND REHEARING *EN BANC*
OF DEFENDANTS-APPELLEES
NORTON SIMON MUSEUM OF ART AT PASADENA
AND NORTON SIMON ART FOUNDATION**

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CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee 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.

Defendant-Appellee 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.

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INTRODUCTION

The Majority Opinion usurps the Executive Branch’s exclusive power to declare the foreign policy of the United States, contravening settled Supreme Court and Circuit precedent that courts “have no authority...to decide what U.S. foreign policy is,” Op. 37 (Wardlaw, J., dissenting). As Judge Wardlaw noted in dissent, the Executive clearly “articulated the foreign policy applicable to the very artwork and transactions at issue here.” *Id.* 31. It set forth that policy in a Supreme Court *amicus* brief signed by State Department Legal Adviser Harold Koh and Acting Solicitor General Neal Katyal and filed *in this case*. Yet, rather than heeding this “clearly expressed” policy and giving it preemptive force (*id.* 37), the Panel Majority discredited it as “not convincing” and unworthy of “too much credence” (*id.* 24-25). In challenging the Executive’s statement of foreign policy, the Opinion not only conflicts with binding authority, but also raises grave separation-of-powers issues. Rehearing or rehearing *en banc* should be granted.

Plaintiff asserts state-law claims to recover artworks forcibly purchased by the Nazis in World War II (“WWII”). After the war, the U.S. returned the paintings to The Netherlands under an “external restitution” policy giving the Dutch government sole responsibility for restituting them to their owner. The Netherlands then conducted multiple restitution proceedings for Plaintiff and her predecessors. The Executive Branch has concluded that these “artworks and

transactions..., consistent with U.S. policy, have already been the subject of external and internal restitution proceedings.” (Excerpts of Record (“ER”) 527.) It has explained that because The Netherlands “conducted bona fide post-war internal restitution proceedings,” the U.S. has “a substantial interest in respecting the outcome of that nation’s proceedings.” (ER530.)

The district court and Judge Wardlaw correctly concluded that this federal policy preempted Plaintiff’s state-law action. By her lawsuit, Plaintiff seeks to attack Dutch restitution proceedings and impose her own restitution remedy, entangling U.S. courts in ownership disputes the Executive intended to avoid. But the Panel Majority rejected the controlling Executive policy, substituting in its place a Judicial policy on recovered art. The Majority deemed the Executive’s appraisal of Dutch restitution “troublesome” and undeserving of “serious weight.” Op. 23-25. Only through this second-guessing was the Majority able to decide that the U.S. policy here was not one of restitution *finality*, but the opposite: that Plaintiff was “just the sort of heir” who should be “encouraged to come forward to make claims, again.” *Id.* 21.

The Majority’s attack on Executive Branch foreign policy statements warrants *en banc* review. With the Judicial Branch announcing its own policies on recovered art and Dutch restitution, the U.S. is now speaking in two inconsistent voices on important policy matters. *See* FRAP 35(b)(1)(A). That result flouts

Supreme Court and Circuit precedent, and creates a conflict with out-of-Circuit authorities. *See Id.*(b)(1)(A),(B). This Court has repeatedly held that “[t]he conduct of foreign affairs is within the exclusive province of the Executive, and we must defer to its views.” *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc’y*, 725 F.3d 940, 947 (9th Cir. 2013); *accord Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 755 (9th Cir. 2011) *vacated on other grounds*, 133 S. Ct. 1995 (2013). “[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 (2008). Instead of “proceed[ing] with...circumspection” on sensitive foreign policy issues, *id.* at 689, however, the Majority exercised plenary review, committing demonstrable errors in the process, *see* FRAP 40(b)(2).

Left standing, the Opinion would radically change the way courts treat Executive Branch statements of foreign policy. It would authorize courts to pierce those policy statements whenever they believed the Executive “misunderstood some of the facts.” Op. 25. And it would allow plaintiffs to avoid the preemptive force of foreign policies by pleading around them. The Opinion should be vacated and the appeal reheard. *Cf. Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067, 1071 (9th Cir. 2012)(*en banc*)(reversing same panel majority on foreign affairs preemption).

STATEMENT

Plaintiff claims she is the owner of two paintings (the “Cranachs”) that were part of a collection the Nazis forcibly purchased from her predecessors in The Netherlands. After WWII, the paintings were recovered by the U.S. Army. As the Executive Branch explained in its *amicus* brief, the U.S. adopted and implemented an express foreign policy with respect to such artworks:

First, 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.” (ER513.) A key purpose of this “external restitution” policy “was to prevent the U.S. from becoming entangled in difficult ownership questions regarding confiscated property.” (ER527.)

Second, when 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.” (ER530.)

The U.S. externally restituted the Cranachs to The Netherlands after WWII. Thereafter, The Netherlands convened multiple internal restitution proceedings for Plaintiff and her predecessors. Shortly after the war, Plaintiff’s predecessor availed herself of The Netherlands’ restitution scheme. That predecessor filed and settled a claim for certain artworks and other property, but chose not to claim a

group of artworks that included the Cranachs. A decade later, an heir to a Russian noble family “claimed the Cranachs,” asserting they “belonged to his family and that the Dutch Government had no right, title or interest to, or in, them.” (ER837.) The Netherlands transferred the Cranachs to the heir in exchange for a payment, among other things; he in turn sold them to the Museum. (ER837-38.)

In 1998, Plaintiff filed her own restitution petition in The Netherlands, challenging the fairness of the 1950s restitution process. (ER138-143.) Contrary to the Majority’s erroneous assertion (Op. 20 n.1), Plaintiff sought not just the return of artworks in The Netherlands’ possession, but also monetary restitution for works The Netherlands “has in the meantime sold.” (ER157.) The Netherlands rejected her claim, and the Hague Court of Appeals affirmed. That Court held that Plaintiff’s predecessor made a “conscious and well considered decision” to forgo claiming the artworks, and that “The Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights.” (ER160-61.)

Plaintiff filed a third petition under expanded Dutch restitution laws in 2004. In 2006, the Dutch Government concluded that the Hague Court of Appeals had already given “a final decision in this case,” and that Plaintiff’s petition was “not included in the current restitution policy,” but nonetheless agreed to return 206 works in its possession. (ER187.)

The Executive Branch has carefully assessed these Dutch proceedings. It concluded that, “consistent with U.S. policies,” the Cranachs “have already been the subject of both external and internal restitution proceedings.” (ER527.) It determined that the Dutch restitution proceedings were “bona fide,” and “afforded petitioner and her predecessor adequate opportunity to press their claims, both after the War and more recently.” (ER530.) It also determined that Plaintiff’s 1998 restitution petition “included the Cranachs.” (ER515.)

Plaintiff filed this action in 2007, invoking a special California statute of limitations for Nazi-looted artworks. The district court invalidated the statute on foreign affairs field-preemption grounds. This Court affirmed that ruling in a 2-1 decision (Thompson, D.W. Nelson), with Judge Pregerson dissenting. *von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 958 (9th Cir. 2010)(“*von Saher I*”). After the U.S. filed its *amicus* brief opposing certiorari, the Supreme Court denied certiorari.

Plaintiff amended her complaint under a new statute-of-limitations provision adopted by the California Legislature in response to *von Saher I*. (ER578.) The district court dismissed the complaint, 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." (ER9.)

Plaintiff appealed. The Panel Majority reversed, holding that Plaintiff's "claims against the Museum and the remedies she seeks do not conflict with foreign policy." Op. 25. Judge Wardlaw dissented.

REASONS FOR GRANTING THE PETITION

I. The Majority Opinion Contravenes Settled Law by Overriding Executive-Branch Foreign Policy Pronouncements

The Majority Opinion openly second-guesses federal foreign policy on a matter that goes to the Executive's core "power to...resolve war claims." *Deutsch v. Turner Corp.*, 324 F.3d 692, 713-14 (9th Cir. 2003). The Executive has already established the U.S.'s policy on recovered art and Dutch restitution—including the restitution proceedings convened for this Plaintiff. By failing to follow that policy, and articulating its own Judicial restitution policy, the Opinion disregards settled Supreme Court and Circuit precedent requiring deference to Executive-Branch statements of foreign policy. The Opinion would leave the U.S. speaking in two voices on these matters, raising serious separation-of-powers concerns and inviting more judicial incursions into foreign affairs.

A. The Majority Opinion Upends Executive Branch Foreign Policy

The conflict preemption issue raised by Plaintiff's claim is straightforward. Plaintiff invokes California law to obtain the Cranachs, works the U.S. recovered

and externally restituted to The Netherlands. But “the United States has clearly stated its foreign policy position that it will not be involved in adjudicating ownership disputes over the Cranachs.” Op. 32 (Wardlaw, J., dissenting). Plaintiff’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.” *Id.* 33.

As Judge Wardlaw observed, that conflict “should be the end of the matter.” Op. 37. The Constitution commits the “vast share of responsibility for the conduct of our foreign relations” to the Executive Branch, and state claims conflicting directly with Executive policy must “give way.” *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003)(citation omitted). Because “[t]he conduct of foreign policy is not the role of the courts,” *Sarei*, 671 F.3d at 755, our constitutional structure requires the Judicial Branch to “defer to [the Executive’s] views” on such matters, *Cetacean*, 725 F.3d at 947 (citing *Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420 (1839)). Of course, it is for the Judiciary to decide whether a foreign policy preempts state laws or state-law claims. But here, there is a patent conflict between Plaintiff’s action—which challenges Dutch restitution—and U.S. foreign policy *as stated by the Executive*. Even the Panel Majority does not question that.

Instead of respecting these Executive policies, the Majority announced conflicting, erroneous policies, *see* FRAP 40(a)(2):

Recovered Art: The Executive has clearly stated: “[w]hen 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.” (ER530.) The Executive explained that it “has a continuing interest in [external restitution’s] finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted.” (ER528.) Addressing the Washington Principles and Terezin Declaration, two nonbinding multinational statements on Nazi-looted art, the Executive noted that “contemporary U.S. 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.” (ER517-18.)

The Executive’s explication of foreign policy is absent from the Panel Majority’s account of “Federal Policy on Nazi-Looted Art.” Op. 16-18. Instead, the Majority offered its *own* policy statement:

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.

Id. 18.

This policy statement reformulates the Executive’s policy in critical and erroneous respects. The Majority shifts the policy’s focus from the *process* afforded a claimant to the *outcome* of the proceedings. As Judge Wardlaw noted, the “relevant issue” under U.S. policy (Op. 33), is whether the Cranachs were “subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands” (ER528). The Executive has explained that Dutch internal restitution is entitled to respect because “the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims.” (ER530.)

In recasting the Executive’s concern with process and the “opportunity” for restitution, the Majority ignores a central objective of external restitution:

“prevent[ing] the United States from becoming entangled in difficult ownership questions” posed by individual restitution. (ER527.) As *von Saher I* recognized, external restitution left it to “the individual countries to handle restitution in whatever way they see fit,” with the U.S. “play[ing] no further role” once “the art was returned to the country of origin.” 592 F.3d at 962. This finality concern is

carried forward by the Washington Principles and Terezin Declaration. These non-binding principles, the Executive has explained, address Nazi-looted artworks “not subsequently restituted or available to be restituted through bona fide proceedings,” and “do[] not support relitigation of all art claims in the U.S. Courts.” (ER529.)

Dutch Internal Restitution: The Panel Majority challenged the Executive’s specific “policy judgment” on the scope and adequacy of Dutch restitution. Op. 35 (Wardlaw, J. dissenting). The Executive’s assessment is 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.” (ER527.) The Dutch internal restitution proceedings are “bona fide” for purposes of federal policy because The Netherlands gave Plaintiff and her predecessors an “adequate opportunity to press their claims, both after the War and more recently.” (ER530.)

Again, however, the Majority disagreed with the Executive. It rejected the Executive’s assessment that the U.S. had “a substantial interest in respecting the outcome of [Dutch] proceedings” because The Netherlands had “conducted bona fide restitution proceedings.” (ER530.) Instead, it found the opposite—that Plaintiff “is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims.” Op. 21. The Majority based this conclusion on the view that “the Cranachs were never subject to postwar

internal restitution proceedings and that the 1998 and 2004 proceedings excluded the Cranachs.” *Id.* 25.

These determinations contradict two express foreign policy judgments by the Executive. First, federal recovered art policy requires only that externally-restituted artwork be “*potentially* subject” to bona fide restitution proceedings. (ER528 n.3 (emphasis added).) Because even the Majority recognizes that “the paintings were potentially subject to restitution” under The Netherlands’ “postwar internal restitution process” (Op. 25), that should be the end of the preemption analysis. Second, even if one reaches the question whether the paintings were *actually* subject to internal restitution, the Majority’s supposition that the Dutch proceedings “excluded the Cranachs” contradicts the Executive’s determination that Plaintiff’s 1998 petition “included the Cranachs.” (ER515.) That determination is supported by Plaintiff’s request that the Hague Court of Appeals “order the State to pay the[] sales prices” for artworks it had sold (ER157), and Plaintiff’s allegation that The Netherlands sold the Cranachs to the Russian heir in 1966 (ER837).

B. The Majority Opinion Conflicts with Supreme Court and Circuit Precedent on Deference to Executive Branch Foreign Policy

By overriding the Executive Branch on an important foreign policy matter, the Majority Opinion sets this Circuit at odds with Supreme Court precedent, its own case law, and the law of other Circuits. The Supreme Court has stressed that

“[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*, 553 U.S. at 700-01. This flows from foundational separation-of-powers principles, which teach that “[t]he conduct of foreign affairs is within the exclusive province of the Executive.” *Cetacean*, 725 F.3d at 947. When it comes to stating U.S. foreign policy, the Executive’s judgment “is not open to judicial inquiry.” *United States v. Pink*, 315 U.S. 203, 222-23 (1942). In Judge Wardlaw’s words, the courts “have no authority...to decide what U.S. foreign policy is.” Op. 37.

The Panel Majority disregarded those admonitions. Its Opinion not only recasts the controlling foreign policy, but deems the Executive’s policy statements unworthy of “too much credence” or “serious weight.” Op. 24-25, 23. Even though the selfsame policy statements were before the Supreme Court when it denied certiorari, the Opinion characterizes them as “worrisome,” “troublesome,” and “not...convincing,” and criticizes the Executive for “misunderst[anding] some of the facts,” *id.* 24-25. This is just the sort of “second-guess[ing]” of Executive foreign policy pronouncements that the Supreme Court, *see Munaf*, 553 U.S. at 702, this Court, *e.g.*, *Al-Haramain Islamic Found. v. Bush*, 507 F.3d 1190, 1203 (9th Cir. 2007), and other Circuits, *e.g.*, *Legal Assistance v. Dep’t of State*, 104 F.3d 1349, 1353 (D.C. Cir. 1997), have rejected. And the risks of such aggressive review are on full display in the Majority’s numerous errors (*supra* at 9-12), as

well as its acknowledgment of having “misunderstood federal policy” in *von Saher I*, Op. 16.

That the Executive’s policy was “presented in a brief in a different iteration of this case that raised different arguments” (Op. 25) is “immaterial” (*id.* 36 (Wardlaw, J.)). Because the *amicus* brief was a “collaborative effort of the State Department and the Department of Justice,” its policy statements are “more than simply the advocacy position of the government”; they constitute “the official position of the Executive Branch.” *Ye v. Zemin*, 383 F.3d 620, 623 n.6 (7th Cir. 2004). The Majority’s suggestion that official foreign policy requires more than a brief signed by “high-level executive officials” who “faithfully represent[] the President’s chosen policy” is refuted by *Garamendi*, 539 U.S. at 423 n.13, and the many cases deferring to such statements, *e.g.*, *Munaf*, 553 U.S. at 702.

C. The Majority Opinion Frustrates the Executive’s Conduct of Foreign Relations and Raises Separation of Powers Concerns

Left uncorrected, the Majority’s foray into diplomatic waters would invite courts to substitute their own foreign policy statements for the Executive’s. Courts would feel free to disagree with the President’s diplomatic judgment on matters such as Iraq’s treatment of prisoners, *cf. Munaf*, 553 U.S. at 702, or the sale of tractors to Israel, *cf. Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 978 (9th Cir. 2007). That could draw the judiciary into conflict with the Executive not just in war reparations cases, but in a wide range of matters implicating foreign relations,

including Alien Tort cases, *e.g.*, *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005), and cases involving foreign trade, *e.g.*, *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, 632 F.3d 938 (5th Cir. 2011).

The Majority Opinion thus portends a serious separation-of-powers problem, one warranting immediate intervention. It pits a divided federal court panel against the Executive on foreign policy matters within the Executive's province. The President "is exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950), and it is not the business of courts "to judge the wisdom of the National Government's policy," *Garamendi*, 539 U.S. at 427. Here, however, the Majority has vocally criticized the Executive's assessment of an ally's war-remedies process. The existence of conflicting Executive and Judicial-Branch policies on recovered art and Dutch restitution cannot but "compromise[] the very capacity of the President to speak for the Nation with one voice in dealing with other governments.'" *Id.* 424.

That the policy at issue concerns actions by a foreign sovereign only exacerbates this inter-branch tension. The Executive's foreign policy power is at its apex, and judicial authority at its low-point, when it comes to assessing and addressing a foreign state's conduct. *See Munaf*, 553 U.S. at 700. That is why the act of state doctrine bars courts from "sit[ting] in judgment" on the validity of actions by foreign sovereigns, *see 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 v. Banco Nacional de Cuba*, 406 U.S. 759, 765 (1972).

The Majority Opinion flips these principles, selectively quoting a foreign government’s statements about its conduct and using them to challenge the U.S. Executive’s appraisal of that conduct. The Majority poses “serious questions” about whether The Netherlands took “appropriate action” in the 1950s restitution proceedings. Op. 19. While purporting to reserve judgment, it credits Plaintiff’s allegations that Dutch post-war restitution “made it difficult for Jews like [Plaintiff] to recover their property.” *Id.* It endorses a Dutch committee report characterizing the restitution process as “legalistic, bureaucratic, cold and often even callous” (*id.*), but fails to acknowledge the Hague Court of Appeals’ holding that the proceedings were “adequately guaranteed” or the Dutch Government’s reaffirmance of that ruling (ER161). And the Majority “strongly suggests” that the district court “should determine the bona fides of the Netherlands’ 1951 internal restitution process” on remand. Op. 36 (Wardlaw, J., dissenting).

Both precedent and separation-of-powers principles foreclose this searching review of Dutch restitution, and make clear that the Court “may not displace the Executive’s assessment that the Netherlands’ postwar proceedings were adequate.” *Id.* 35. In challenging that assessment and criticizing Dutch restitution, the

Majority injects this Court into a “highly politicized inquiry into the conduct of a foreign nation,” *Movsesian*, 670 F.3d at 1076, realizing the Supreme Court’s concern with the Judicial Branch ““disparag[ing] certain foreign regimes,”” *Garamendi*, 539 U.S. at 417.

II. The Majority Opinion Announces Unprecedented and Unworkable Rules for Analyzing Foreign Policy “Facts”

The Panel Majority took the position that it could override the Executive’s assessment of Dutch restitution because “the [Solicitor General] goes beyond explaining federal foreign policy and appears to make factual determinations.” Op. 24. Even though the Executive supported its policy judgments with citations to official Dutch records of undisputed authenticity (ER126-28), the Majority showed them no deference, and indeed credited Plaintiff’s allegations *over* the Executive’s assessment (Op. 24). This novel pleading rule, and the Majority’s artificial distinction between policy and fact, is contrary to precedent. If upheld, it would leave courts uncertain about how to treat Executive foreign policy statements.

As Judge Wardlaw explained, U.S. foreign policy “often relies on factual assumptions inseparable from the policy itself.” Op. 39 n.4. For example, courts treat the Executive’s assessment of facts grounding its recognition of foreign sovereigns as “conclusive on the judicial department,” *Williams*, 38 U.S. at 420, and consistently decline to examine whether the Executive’s foreign policies rest on “misinformation or faulty reasoning,” *cf. Sarei v. Rio Tinto PLC*, 221 F. Supp.

2d 1116, 1181-82 (C.D. Cal. 2002), *rev'd on other grounds*, 671 F.3d 736. This is illustrated by *Munaf*, where the Court accepted not just the Executive's statement "that it is the policy of the United States *not* to transfer an individual in circumstances where torture is likely to result," but also the Executive's application of that policy to the facts. 553 U.S. at 702. The Court refused "to second-guess" the State Department's "'determin[ation] that the [Iraqi] Justice Ministry...ha[s] generally met internationally accepted standards for basic prisoner needs.'" *Id.*

The Majority's "distinction between 'explaining federal foreign policy' and 'mak[ing] factual determinations'" contradicts *Munaf*, and is "unworkable." Op. 39 n.4 (Wardlaw, J.). To take Judge Wardlaw's example, "the federal foreign policy that 'Iran's pursuit of nuclear weapons is unacceptable' entails a factual assumption that Iran is pursuing nuclear weapons." *Id.* Similarly, the Executive's head-of-state immunity determinations entail the factual assumption that a foreign officer "functioned as an official diplomatic envoy." *E.g., Weixum v. Xilai*, 568 F. Supp. 2d 35, 38 (D.D.C. 2008). Distinguishing policy from fact in such situations is something courts are "not suited" to do. *Munaf*, 553 U.S. at 702.

By crediting Plaintiff's "factual allegations" over the Executive's assessment of Dutch restitution (Op. 13), the Majority departs yet further from *Munaf*, adopting a pleading rule that threatens to work mischief in preemption cases. The

Munaf Court credited “the Executive’s assessment of the foreign country’s legal system” over the petitioner’s “allegation” that his “transfer to Iraqi custody [was] likely to result in torture.” 553 U.S. at 702, 700. If district courts were instead bound to credit allegations contradicting Executive foreign policy, they would be hamstrung in their ability to dismiss preempted claims. District courts could not resolve a foreign affairs preemption defense before summary judgment or trial, requiring them to assess competing *evidence* of U.S. foreign policy. Such protracted litigation would defeat the purpose of the foreign affairs doctrine, which is to prevent state law from “plac[ing] the Government at a disadvantage” in diplomatic relations. *See Garamendi*, 539 U.S. at 424.

CONCLUSION

Panel rehearing and/or rehearing *en banc* should be granted.

DATED: July 17, 2014

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CERTIFICATE OF COMPLIANCE

I certify pursuant to Federal Rules of Appellate Procedure 35(a) and 40(b) and Ninth Circuit Rules 35-4(a) and 40-1(a) that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 4,199 words.

Dated: July 17, 2014

/s Fred A. Rowley, Jr.

Fred A. Rowley, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2014, I caused to be electronically filed the foregoing **PETITION FOR REHEARING AND REHEARING EN BANC OF DEFENDANTS-APPELLEES NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION** with the Clerk of the Court for the United States Court of Appeals by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I caused to be mailed the foregoing document by Federal Express (overnight delivery) to the following non-CM/ECF participants:

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Dated: July 17, 2014

/s/ Fred A. Rowley, Jr.
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FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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

OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
August 22, 2013—Pasadena, California

Filed June 6, 2014

Before: Harry Pregerson, Dorothy W. Nelson,
and Kim McLane Wardlaw, Circuit Judges.

Opinion by Judge D.W. Nelson;
Dissent by Judge Wardlaw

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SUMMARY*

Federal Policy Conflict

The panel reversed the district court's Fed. R. Civ. P. 12(b)(6) dismissal of Marei Von Saher's action claiming that she was the rightful owner of two panels painted by Lucas Cranach, *Adam* and *Eve*, which hang in Pasadena's Norton Simon Museum of Art.

Relying on California state law, Von Saher alleged that the Nazis forcibly purchased the panels from her deceased husband's family in the Netherlands during World War II. The district court held that Von Saher's specific claims and the remedies she sought conflicted with the United States' express federal policy on recovered art, and the claims were barred by conflict preemption.

The panel held that Von Saher's claims did not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands. The panel held that Von Saher's claims against the museum and the remedies she sought did not conflict with foreign policy, and the dispute was one between private parties. The panel remanded for further development on the issue of whether the case implicated the act of state doctrine.

Dissenting, Judge Wardlaw would affirm the judgment of the district court because Von Saher's state law claims would

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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conflict with federal policy, which respects the finality of the Netherlands' restitution proceedings.

COUNSEL

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Fred A. Rowley, Jr. (argued), Munger, Tolles & Olson LLP, Los Angeles, California, for Defendant-Appellee.

Catherine Z. Ysrael, Deputy Attorney General, for Amicus Curiae State of California.

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 Goudstikkens, 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

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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.

In the second illegal contract, the "Miedl transaction," Nazi Alois Miedl took over the Goudstikker business and

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properties. Miedl began operating an art dealership out of Jacques's gallery with the artwork that Göring left behind. Miedl employed Jacques's 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.” *Von 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 R 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

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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

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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 Goudstikkens 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,

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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

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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 thirty 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-

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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).

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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 (“SG”) 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 SG 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 (2003) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964)). “The exercise of the federal executive authority means that state law must give way where

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. . . there is evidence of a clear conflict between the policies adopted by the two.” *Id.* at 421. “[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. 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 (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 (“SG”), reaffirmed our nation’s continuing and ongoing commitment to external restitution. The SG 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”),

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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.” (emphasis added). “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,

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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 post-War 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

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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 Desi 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 twenty-seven 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 retribute Nazi-confiscated art, the Dutch government itself has acknowledged the “legalistic, bureaucratic, cold and often even callous” nature

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 37; *see also* Dissent at 39 (“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.

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of the initial postwar restitution system. And the Dutch State Secretary eventually ordered the return of all the Göring-looted artworks possessed by the Netherlands—the very artwork Desi chose not to seek in the postwar restitution process immediately 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

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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. California’s insurance commissioner then issued administrative subpoenas against several subsidiaries of European insurance companies. *Id.* at 411. Those insurance companies filed suit seeking injunctive relief against the insurance commissioner of California and challenging California’s Holocaust-era insurance legislation as unconstitutional. *Id.* at 412. 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. 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 overriding, and which the National Government has addressed.” *Id.* at 421.

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 Goudstikkens. 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

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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 (2004). But there are many reasons why we find that weight unwarranted here.

First, the SG’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 SG argued that we had correctly invalidated Section 354.3 as “impermissibly intrud[ing] upon the foreign affairs authorities of the federal government.” The SG 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 SG considered or addressed when it counseled against granting certiorari in *Von Saher I*, and we decline to read any more into the SG’s brief than is there.

It also concerns us that the SG characterizes the facts in a way that conflicts with the complaint, the record before us and the parties’ positions. The SG argued that *Von Saher I*

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“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 SG’s brief because it demonstrates that the SG goes beyond explaining federal foreign policy and appears to make factual determinations. For instance, the SG’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 SG 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 SG’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 SG 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 SG’s

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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 SG’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 (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 (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. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). This doctrine is not “inflexible and all-encompassing,” *Banco Nacional de Cuba*, 376 U.S. at 428, 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 (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).

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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 (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 (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 (“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

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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 (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 id.* at 406–07 (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.

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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 Stroganoff 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.

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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

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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 Goudstikkens’ 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 (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 (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 Goudstikkens 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

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.

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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 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 (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, 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

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dealing with other governments.”² *Garamendi*, 539 U.S. at 424 (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 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*, 132 S. Ct. 1421, 1427 (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

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. Evtl. Tectonics Corp., Int’l*, 493 U.S. 400, 406 (1990).

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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 (“[V]alid executive agreements are fit to preempt state law”); *id.* at 421 (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 (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. 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

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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

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 Goudstikkens. 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.

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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 See *Munaf*, 553 U.S. at 702. 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 (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

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 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.

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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 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*, 132 S. Ct. 1309, 1316 (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

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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.