

No. 07-56691

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

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MAREI VON SAHER,  
Plaintiff-Appellant,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON  
SIMON ART FOUNDATION,  
Defendants-Appellees.

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Appeal from the United States District Court  
for the Central District of California  
Case No. CV 07-02866-JFW  
Hon. John F. Walter

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**PETITION FOR PANEL REHEARING AND REHEARING EN BANC**

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**INTRODUCTION AND STATEMENT OF COUNSEL**

Petitioner Marei von Saher (“Petitioner”) respectfully submits this Petition for Rehearing and Rehearing En Banc of the panel’s 2-1 decision in *Von Saher v. Norton Simon*, 2009 U.S. App. LEXIS 18604 (2009) (“Op.”), which undermined California’s right to extend the statute of limitations governing property disputes properly before its courts. This Petition presents issues of exceptional importance in that the panel majority has declared unconstitutional a statute well within California’s traditional area of competence by divining a legislative intent belied by the legislative record and finding a conflict with the federal war power that does not exist.

The majority wrongly concluded that by enacting legislation (California Code of Civil Procedure § 354.3) extending the statute of limitations in an action for the recovery of Nazi-looted art without limiting its scope solely to museums and galleries physically located in California, the State Legislature did not address a traditional state interest and instead impinged upon the federal power to regulate foreign affairs. As Judge Pregerson’s dissent explained, however, any reasonable reading of § 354.3 would limit it to museums and galleries otherwise subject to California’s jurisdiction. Unquestionably, it is a traditional state power to enact statutes of limitations and regulate property claims where the defendant is constitutionally subject to the state’s jurisdiction.

Moreover, the majority's decision conflicts with this Court's decisions in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2005) and *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005). As Judge Pregerson noted, unlike the statute at issue in *Deutsch*, § 354.3 does not target enemies of the United States for their wartime actions or provide for war reparations and instead only extends the statute of limitations for actions seeking the recovery of looted art from the entity that possesses it. The majority dismissed out of hand the *Alperin* Court's conclusion that such garden-variety property claims are not constitutionally committed to the federal government pursuant to its exclusive power to make and resolve war (*id.* at 548, 552), noting only that *Alperin* was a political question case, rather than a foreign affairs preemption case.

And, despite its recognition that the Supreme Court has seldom applied the doctrine of foreign affairs field preemption and has relied solely on conflict preemption in its most recent cases, the majority expanded the breadth of the doctrine beyond the Court's ruling in *American Ins. Ass'n. v. Garamendi*, 539 U.S. 396 (2003).

If allowed to stand, the majority opinion will render unconstitutional a statute enacted unanimously by the California Legislature and leave Ninth Circuit jurisprudence hopelessly confused. Its misplaced analysis could have a far-reaching effect on other legislation and is inconsistent with the law of this Circuit.

**STATEMENT OF THE CASE**

Petitioner, the sole living heir of the noted Jewish art dealer, Jacques Goudstikker, brought this action to recover an extraordinary pair of life-size paintings of Adam and Eve (the “Cranachs”), that were looted from Goudstikker’s gallery -- along with hundreds of other artworks -- by Reichsmarshal Hermann Göring when the Nazis invaded the Netherlands. The Norton Simon Museum of Art and/or the Norton Simon Art Foundation came into possession of the paintings in or about 1971, where Petitioner discovered them in November 2000.

Recognizing the unique nature of claims for the return of Nazi-looted artwork, in particular the victims’ difficulties in finding their artwork after the War and filing their claims, in 2002 the California Legislature enacted § 354.3 to extend the statute of limitations for claims for the return of Nazi-looted artwork brought in California against museums and galleries.

Defendants moved to dismiss Petitioner’s complaint, arguing that § 354.3 is unconstitutional and that, but for this provision, Petitioner’s complaint would be untimely.<sup>1</sup> The District Court granted Defendants’ motion on the ground that § 354.3 is facially unconstitutional under the foreign affairs doctrine as

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<sup>1</sup> The panel held that Petitioner’s claims may not be time barred under Cal. Code Civ. Proc. § 338, the general statute of limitations for claims for the recovery of personal property, and that she should be given leave to replead to attempt to come within the provisions of that statute, which will inevitably lead to another motion to dismiss.

interpreted in *Deutsch*. Petitioner appealed, contending that the District Court's reliance on *Deutsch* was misplaced and that § 354.3 was not preempted by the foreign affairs doctrine. The Attorney General of the State of California and six non-profit organizations dedicated to Holocaust and Jewish issues submitted amicus briefs in support of the constitutionality of § 354.3.

The majority found that § 354.3 does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable. The majority also concluded that, had § 354.3 been limited to museums physically located in California, California would have been acting within its traditional state competence, and foreign affairs field preemption would not be applicable. The majority found, however, that because § 354.3 could apply to museums and galleries outside of the state, the Legislature's interest in enacting § 354.3 was not to protect its residents and regulate its art trade, but rather to create "a world-wide forum for the resolution of Holocaust restitution claims," which it held was not a "traditional state function." Op. at \*26. Having found that California was not exercising a traditional state function, the majority determined that § 354.3 conflicts with the field of foreign affairs because the intent of the statute was to rectify wartime wrongs.

Judge Pregerson dissented, noting that § 354.3 was necessarily limited to entities over which California may exercise jurisdiction, and is, therefore, a

proper exercise of the state's traditional role. He also concluded that § 354.3 does not target former enemies of the United States for wartime actions, or provide war reparations, but merely extends the time for a claimant to bring an action to recover stolen art in the possession of a museum or gallery located in California. Op. at \*41.

**REASONS FOR GRANTING THE PETITION**

**I. The Panel Majority Wrongly Concluded That § 354.3 Does Not Concern A Traditional State Responsibility**

“[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (cited in *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep’t*, 533 F.3d 780, 790 (9th Cir. 2008)).

In this case, the majority took a statute extending the statute of limitations for the recovery of stolen art and construed it as an effort by the Legislature to “create a world-wide forum for the resolution of Holocaust restitution claims.” *Op.* at \*26. Upon this construction, the majority concluded that California acted outside the scope of its traditional state interest in enacting § 354.3 and then proceeded to find the statute unconstitutional under the doctrine of field preemption. The majority made clear that, had § 354.3 been limited to museums and galleries physically located in California, there would be no question that the Legislature had been acting within its legitimate state interest, and § 354.3 would have been constitutional.

Any reasonable reading of § 354.3, however, recognizes that it can apply only to museums and galleries subject to California’s jurisdiction. *Op.* at \*39-\*41. If, as the majority concluded, California “has a legitimate interest in

regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art” (*id.* at \*23), it has an equally legitimate interest in regulating museums and galleries that come into California to transact business, thereby subjecting themselves to California’s jurisdiction.

The majority surmised that by amending § 354.3 to cover museums and galleries outside of California, the Legislature’s intent was not to “regulat[e] the museums and galleries operating within its borders” -- an admittedly legitimate state interest -- but rather to create a “world-wide forum” for Holocaust restitution claims. There was no need, however, for the majority to guess the Legislature’s intent. The actual legislative history is clear. Notes prepared for the April 9, 2002 hearing of the Assembly Committee on Judiciary state:

As currently drafted, AB 1758 would apply only to a suit by a Holocaust victim to recover artwork from a museum or gallery located in California. Attorney E. Randol Schoenberg, who represents a client in an action to recover artwork taken in the Holocaust, has written to suggest the removal of the limitation of the bill to apply only in those cases involving museums and galleries in the state. Mr. Schoenberg states:

For some reason, the proposed legislation is limited in application to museums or galleries “located in the State of California.” This territorial limitation in section 354.7(a) should be eliminated. Jurisdiction over defendants in California courts is already restricted by the Constitution of California and of the United States, as set forth in Code of Civil Procedure Section 410.10 . . . . None of the other statute of limitation sections have jurisdictional limits on the location of defendants to whom the limitations rule applies.

E.R. 103-104. Further, notes prepared for the June 25, 2002 hearing of the Senate Judiciary Committee state:

With regard to out-of-state defendants, the limits of a California court's jurisdiction would be determined by the "minimum contacts" test set forth by the U.S. Supreme Court in *International Shoe Co. v. Washington* (1945) 326 U.S. 310. . . . "Minimum contacts" means the relationship is such that the exercise of jurisdiction over the nonresident does not offend "traditional notions of fair play and substantial justice." Indeed, the doing of business within a state creates such a relationship as to make it reasonable for the state to require that the corporation defend suits brought against it there."

In California, Witkin writes: "To justify the court's assumption of jurisdiction, the defendant's activity must consist of some act or transaction in the forum state 'by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.'" [2 Witkin, California Procedure, Jurisdiction (4th Ed. 1996), p. 158] . . . .

Museums for which the test was satisfied would find their collections subject to recovery regardless of whether the piece of artwork itself had ever entered California. This result, however, would not be that different from corporations that find their out-of-state assets subject to a state judgment.

E.R. 114-115. Thus, the legislative history of § 354.3 leaves no doubt that the Legislature's actual intent was to exercise the legitimate state interest of regulating entities that avail themselves of the privilege of transacting business in California.

As the majority noted, the *Deutsch* Court stated: "[a] state is generally more likely to exceed the limits of its power when it seeks to alter or create rights and obligations than when it seeks merely to further enforcement of already existing rights and duties." Op. at \*27 (quoting *Deutsch*, at 708). Section

