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,
Defendant-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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# MOTION TO STAY ISSUANCE OF MANDATE AND FOR LEAVE TO FILE A PETITION FOR REHEARING AND REHEARING EN BANC

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## INTRODUCTION

Plaintiff-Appellant Marei von Saher ("Von Saher") respectfully submits this motion (1) pursuant to Fed. R. App. P. 41(d) to stay the issuance of the Court's mandate; and (2) pursuant to Fed. R. App. P. 27 and Fed. R. App. P. 40 for leave to file a new petition for rehearing and rehearing en banc of the decision in *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) (copy attached hereto as Ex. A) in light of the Ninth Circuit's intervening decision in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010) (copy attached hereto as Ex. B). A copy of the proposed Petition for Rehearing and Rehearing En Banc is attached as Ex. C. Without a stay, the Court's mandate will issue immediately after the filing of the Supreme Court's order in the Ninth Circuit.[1] *See* Fed. R. App. P. 41(d)(2)(D); *Alphin v. Henson*, 552 F.2d 1033, 1035 (4th Cir. 1977). As demonstrated below and as more fully explained in Ex. C, exceptional circumstances exist that warrant a stay of issuance of the mandate and permit further review of this case by the Court.

## STATEMENT OF THE CASE

Von Saher, the sole living heir of the noted Jewish art dealer, Jacques Goudstikker, brought this action to recover an extraordinary pair of life-size

[1] In light of the extreme time urgency caused by the immediacy of the filing of the Supreme Court's order, counsel for Von Saher notified counsel for Defendants-Appellees of this motion simultaneously with its filing and enquired as to their position. We will advise the Court as soon as we have received a response.

paintings of Adam and Eve (the "Cranachs"), that were looted from Goudstikker's gallery -- along with hundreds of other artworks -- by Reichsmarschall 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 Von Saher 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 Cal. Code Civ. Proc. § 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 Von Saher's complaint, arguing that § 354.3 is unconstitutional and that, but for this provision, Von Saher's complaint would be untimely.[2] The District Court granted Defendants' motion on the ground that § 354.3 is facially unconstitutional under the foreign affairs doctrine as interpreted in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2005). Von Saher 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

[2] This Court held that Von Saher'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. *Von Saher* at 969. This will inevitably lead to another motion to dismiss.

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 Court previously found that § 354.3 does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable. It 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 Court 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 responsibility." Having found that California was not exercising a traditional state responsibility, the Court determined that § 354.3 conflicts with the field of foreign affairs, because the intent of the statute was to rectify wartime wrongs. *Von Saher*, 592 F.3d at 965.

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. *Von Saher*, 592 F.3d at 970.

Von Saher timely filed a petition for rehearing and rehearing en banc on September 25, 2009. Respondent timely filed a petition for panel rehearing on September 1, 2009, requesting that the panel make revisions to its opinion. On January 14, 2010, this Court granted Respondent's petition for panel rehearing and issued an amended opinion. Simultaneously, this Court denied Von Saher's request for rehearing. Judge Pregerson voted to grant Von Saher's request for rehearing and rehearing en banc.

Von Saher timely filed an unopposed motion to stay the issuance of the Mandate on January 20, 2010 pending the filing of a petition for a writ of certiorari, which was granted on January 21, 2010. Von Saher then filed a petition for a writ of certiorari with the Supreme Court of the United States on April 14, 2010, and pursuant to the Court's Order of January 21, 2010, the stay remained in effect until the Supreme Court acted upon the petition. The Attorney General of the State of California and non-profit organizations dedicated to Holocaust and Jewish issues submitted amicus briefs in the Supreme Court supporting the constitutionality of § 354.3. On June 27, 2011, the Supreme Court denied Von Saher's petition for a writ of certiorari.

On December 10, 2010, while Von Saher's petition for a writ of certiorari was still pending, this Court granted rehearing in *Movsesian* and reversed its prior ruling. At issue in *Movsesian* was the constitutionality of Cal. Code Civ. Proc. § 354.4, a similar statute to the one at issue in *Von Saher* that extended the statute of limitations for insurance claims relating to the Armenian Genocide. At the Court's direction, the two cases were treated as related and argued the same day before the same panel. The Court issued opinions in both cases concluding that the statues were unconstitutional. In its decision on rehearing in *Movsesian*, however, the Court found that, notwithstanding foreign affairs concerns identical to those found in *Von Saher*, the statute at issue in *Movsesian* affected only "garden variety property claims" and was constitutional. *Movsesian*, 629 F.3d at 908. This created a direct conflict with the Court's prior holding in *Von Saher*.

## THE MOTION TO STAY THE ISSUANCE OF THE MANDATE SHOULD BE GRANTED

### I. Applicable Standard

This Court has "the inherent power to stay its mandate following the Supreme Court's denial of certiorari." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) citing *Alphin*, 552 F.2d 1033. *See also Beardslee v. Brown*, 393 F.3d 899 (9th Cir. 2004) (motion for stay granted following denial of certiorari). To warrant such a stay, a "threshold standard of exceptional

circumstances" is required. *Id.* at 901.[3] Exceptional circumstances will be found when the Court needs "to protect the integrity of its own processes, to prevent injustice, or for other good cause." *Bryant*, 886 F.2d at 1529, citing *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). The circumstances of this case easily meet that standard.

## II. The Circumstances of This Case Are Exceptional

A stay of the issuance of the mandate is required in the instant case to protect the integrity of the Court's processes and "to prevent injustice." *Bryant*, 886 F.2d at 1529. While the petition for a writ of certiorari in *Von Saher* was pending, this Court reversed its prior decision in *Movsesian*, finding that § 354.4, a statute that extended the statute of limitations for claims related to the Armenian Genocide, was constitutional. As explained more fully in the proposed Petition for Rehearing and Rehearing En Banc (Ex. C), in the second *Movsesian* decision the Court applied the same analysis to § 354.4 that it had applied to § 354.3 in *Von Saher*, but reached the *opposite conclusion.* This discrepancy was underscored by Judge Thomson in his dissent in the second *Movsesian* decision. *Movsesian*, 629

[3] Counsel believe this motion for a stay was filed following the Supreme Court's denial of Von Saher's petition for a writ of certiorari but prior to the issuance of the Ninth Circuit's mandate. If, however, the mandate has issued, Von Saher requests that the Court consider recall of the mandate as alternative relief. The applicable legal standard for the recall of the mandate is the same as that for a stay of the issuance of the mandate following the denial of a petition for certiorari. *Bryant*, 886 F.2d at 1529.

F.3d at 911-12. Even so, the *Movsesian* majority did not attempt to reconcile the second *Movsesian* decision with its decision in *Von Saher*.

The Ninth Circuit has previously granted a motion to stay the issuance of the mandate in a case with the same procedural posture. In *Beardslee*, the Court issued a stay of the issuance of the mandate following the denial of a petition for a writ of certiorari and prior to the issuance of the mandate where an inconsistent decision was issued in the Ninth Circuit while the petition for a writ of certiorari was still pending. 393 F.3d at 901. The *Beardslee* court concluded that there was "an intervening change in the law" that constituted "an exceptional circumstance that may warrant the amendment of an opinion on remand after denial of a writ of certiorari." *Id.* (citing *Alphin* 552 F.2d at 1035). In *Von Saher*, the Court is presented with the same problem and should provide the same relief.

## THE MOTION FOR LEAVE TO FILE A FURTHER PETITION FOR REHEARING AND REHEARING EN BANC SHOULD BE GRANTED

As shown above this case meets the "exceptional circumstances" standard required to stay the issuance of the Court's mandate following a denial of a writ of certiorari. That standard was met because of a change in the Ninth Circuit's view of the legal principles set forth in *Movsesian*, 629 F.3d at 905-908 that are equally applicable to the examination of the statute at issue in this case. Von Saher should, therefore, be allowed to petition the Court for rehearing and rehearing en banc in light of the new decision in *Movsesian*. But Von Saher needs permission of the

Court to do so because the Court's Order Amending Opinion and Denying the Petitions for Rehearing and Rehearing En Banc, filed on January 14, 2010 stated, "No further petitions for rehearing or rehearing en banc may be filed."

Given the change in relevant precedent since the Court's Order was filed in this case, Von Saher respectfully requests that the Court grant her motion for leave to file a further petition for rehearing and rehearing en banc notwithstanding the prior Order. The proposed petition will properly place before the Court the information it needs to consider the inconsistencies between the *Von Saher* opinion and the second *Movsesian* opinion, and will assist the Court in determining whether rehearing is required. Granting rehearing or rehearing en banc would provide the Court with an opportunity to maintain uniformity in its decisions. *See* Fed. R. App. P. 35(a)(1) ("en banc consideration is necessary to secure or maintain uniformity of the court's decisions"). Failure to grant Von Saher an opportunity to be heard on this issue through her proposed petition would not only unfairly deny her, and other victims of the Nazis, the protections that the State of California wanted to provide, but also undermine the expectation that litigants will be provided with consistent rulings by the courts.

## CONCLUSION

For all of the foregoing reasons, the Court should stay the issuance of its mandate and grant Von Saher's request for leave to file the proposed petition for rehearing and rehearing en banc for the Court's consideration and determination.

Dated: June 27, 2011

Respectfully submitted,

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priate public education, and reverse the district court.

## VII

For the reasons discussed, we conclude that the district court erred in holding that the definition of a free appropriate public education set forth by the Supreme Court in *Rowley* has been superseded, and accordingly, vacate its orders.[11] In addition, we reverse the district court's conclusions that the District committed procedural violations of the Individuals with Disabilities Education Act that resulted in the denial of a free appropriate public education.

Because it is not clear whether our rulings dispose of all of K.L.'s claims, we remand this case to allow K.L. to pursue any such claims she may have asserted that are not determined by our opinion. On remand, the district court must review the ALJ's determination that the District provided K.L. with a free appropriate public education pursuant to the "educational benefit" standard set forth in *Rowley* and reiterated in this opinion. We deny the District's request for a different judge on remand.

**REVERSED in part, VACATED in part and REMANDED.**


11. Because the district court's awards of reimbursement, related expenses and attorneys' fees were premised on its determination that the District failed to provide K.L. with a free appropriate public education, vacation of that determination also vacates those awards.

**Marei VON SAHER, Plaintiff–Appellant,**

**v.**

**NORTON SIMON MUSEUM OF ART AT PASADENA, Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation, Defendants–Appellees.**

**No. 07–56691.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 8, 2008.

Filed Aug. 19, 2009.

Amended Jan. 14, 2010.

**Background:** Heir of Dutch art dealer brought action against art museum under California statute allowing art owners or their heirs to bring actions against museums to recover art looted by Nazis, seeking return of two paintings alleged to have been looted by Nazis during World War II. The United States District Court for the Central District of California, John F. Walter, J., 2007 WL 4302726, dismissed action with prejudice.

**Holdings:** The Court of Appeals, Thompson, Senior Circuit Judge, held that:

(1) California statute was not preempted by Executive Branch's policy of external restitution;

(2) statute was preempted under foreign affairs doctrine;

(3) three-year limitations period applicable to actions to recover stolen property began to run when heir discovered or reasonably could have discovered her claim to paintings, and their whereabouts; but

(4) dismissal should have been without prejudice.

Affirmed in part, reversed in part, and remanded.

Pregerson, Circuit Judge, dissented in part and filed opinion.

Opinion, 578 F.3d 1016, superseded.

**1. Evidence ⇐46, 48**

Court of Appeals would not take judicial notice of presidential commission reports, military order approved by President Truman, or memorandum prepared by State Department committee, in action seeking return of paintings allegedly looted by Nazis during World War II, inasmuch as judicial notice of such legislative facts was unnecessary. Fed.Rules Evid. Rule 201(a), 28 U.S.C.A.

**2. Evidence ⇐11**

Court would take judicial notice of fact that various newspapers, magazines, and books had published information about two paintings, in action seeking return of paintings allegedly looted by Nazis during World War II, solely as indication of what information was in public realm at relevant time. Fed.Rules Evid.Rule 201(b), 28 U.S.C.A.

**3. Evidence ⇐11**

Courts may take judicial notice of publications introduced to indicate what was in the public realm at the time, not whether the contents of those articles were in fact true.

**4. States ⇐18.3**

Federal law's power to preempt state law arises from the Supremacy Clause. U.S.C.A. Const. Art. 6, cl. 2.

**5. States ⇐18.5**

Under a traditional statutory preemption analysis, conflict or obstacle preemption by federal law occurs where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

**6. States ⇐18.43**

California statute, allowing art owners or their heirs to bring actions against museums to recover art looted by Nazis without regard to statute of limitations, was not preempted by Executive Branch's policy of external restitution, under which looted artworks were returned to countries, not individuals, where such policy had ended in 1948, as indicated by fact that United States authorities refused to accept any more claims for external restitution after that date. West's Ann.Cal. C.C.P. § 354.3.

**7. States ⇐18.43**

Unlike traditional statutory preemption, foreign affairs field preemption may occur even in the absence of a treaty or federal statute, because a state may violate the Constitution by establishing its own foreign policy.

**8. States ⇐18.43**

California statute, allowing art owners or their heirs to bring actions against museums to recover art looted by Nazis without regard to statute of limitations, was preempted under foreign affairs doctrine; by allowing suits against museums not located in California, statute indicated California's dissatisfaction with federal government's resolution of restitution claims, and thus did not concern traditional state responsibility, and, furthermore, statute intruded on federal government's power to make and resolve war, in that at its core it concerned restitution for injuries inflicted by Nazi regime during World War II. U.S.C.A. Const. Art. 1, § 8, cl. 1; U.S.C.A. Const. Art. 2, § 2, cl. 2; West's Ann.Cal. C.C.P. § 354.3.

**9. Limitation of Actions ⇐95(7)**

California's three-year limitations period, applicable to actions to recover stolen property, began to run, with respect to action against museum seeking return of paintings allegedly looted by Nazis during World War II, when art dealer's heir discovered or reasonably could have discovered her claim to paintings, and their whereabouts. West's Ann.Cal.C.C.P. § 338(3).

**10. Federal Civil Procedure ⇐1838**

Dismissal, for failure to state claim, of complaint seeking return of paintings allegedly looted by Nazis should have been without prejudice and with leave to amend, since it was not clear from face of complaint that California's three-year limitations period, applicable to actions to recover stolen property, had expired. West's Ann.Cal.C.C.P. § 338(3); Fed.Rules Civ. Proc.Rule 12(b)(6), 28 U.S.C.A.

**11. Federal Civil Procedure ⇐1754**

A complaint may be dismissed for failure to state a claim on the ground that it is barred by the applicable statute of limitations only when the running of the statute is apparent on the face of the complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

**12. Federal Civil Procedure ⇐1754**

A complaint cannot be dismissed for failure to state a claim on the ground that it is barred by the applicable statute of limitations unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

West Codenotes

**Preempted**

West's Ann.Cal.C.C.P. § 354.3

**Recognized as Preempted**

West's Ann.Cal.C.C.P. § 354.5; West's Ann.Cal.C.C.P. § 354.6

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Appeal from the United States District Court for the Central District of California, John F. Walter, District Judge, Presiding. D.C. No. CV–07–02866–JFW.

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

Opinion by Judge THOMPSON; Dissent by Judge PREGERSON.

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

**ORDER**

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

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

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

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

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

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

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

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

## OPINION

THOMPSON, Senior Circuit Judge:

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

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

### I. Background

#### *A. Nazi Art Looting in WWII*

During World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the "greatest displacement of art in human history." Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts 202 (N.Y.U Press 2003).

Following the end of World War II, the Allied Forces embarked on the task of returning the looted art to its country of origin. In July 1945, President Truman authorized the return of "readily identifiable" works of art from U.S. collecting points. *See, e.g.,* Presidential Advisory Commission on Holocaust Assets in the

United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR–142 (Dec.2000) (hereinafter Plunder and Restitution). At the Potsdam Conference, President Truman formally adopted a policy of "external restitution," under which the looted art was returned to the countries of origin—not to the individual owners. American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, Report, 148 (1946) (hereinafter Roberts Commission Report).

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

The federal government has continued to take action to address the recovery of Holocaust-era art. In 1998, Congress enacted the U.S. Holocaust Assets Commission Act of 1998, Pub.L. No. 105–186, 112 Stat. 611 (codified as amended at 22 U.S.C. § 1621). This Act established the Presidential Advisory Commission on Holocaust Assets, which conducted research on the fate of Holocaust-era assets, and advised the President on future policies concerning the recovery of these assets. *Id.* That same year, the State Department convened a conference with forty-four other nations to address the recovery of Holocaust-era assets. U.S. Dep't of State, Proceedings of the Washington Conference on Nazi–Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Conference Proceedings). In the meantime, numerous Holocaust victims and their heirs have turned to the courts to recover their looted art. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004).

### *B. Section 354.3*

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

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution.

Section 354.3(b). The California statute allows suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354(a)(1).

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

The statute also extends the statute of limitations for § 354.3 claims until December 31, 2010. Section 354.3(c).

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

### C. *The Cranachs*

Saher, the only surviving heir of Jacques Goudstikker, a deceased art dealer, filed this suit in 2007 against the Museum under § 354.3 and California Penal Code § 496, seeking the return of a diptych entitled "Adam and Eve." The diptych, a pair of oil paintings by sixteenth-century artist Lucas Cranach the Elder (hereinafter the "Cranachs"), is currently on public display at the Museum.

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

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

After the Goudstikkers escaped, the Nazis looted Goudstikker's gallery. Herman Göring, Reischsmarschall of the Third Reich, seized the Cranachs and hundreds of other pieces from the gallery. Göring sent the artwork to Carinhall, his country estate near Berlin, where the collection remained until approximately May 1945 when the Allied Forces discovered it. The recovered artwork was then sent to the Munich Central Collection Point, where the works from the Goudstikker collection were identified. In or about 1946, the Allied Forces returned the Goudstikker artworks to the Netherlands.

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

The Museum filed a Rule 12(b)(6) motion to dismiss Saher's complaint filed in this case for the return of the paintings. The district court granted the motion and dismissed Saher's claim with prejudice. The district court held that § 354.3's extension of the statute of limitations was unconstitutional on its face, because it violated the foreign affairs doctrine, as interpreted and applied by the Ninth Circuit in *Deutsch,* 324 F.3d 692. The district court

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

concluded that by seeking to redress wrongs committed in the course of World War II, the California statute intruded on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims. The court then dismissed Saher's complaint because it had not been filed within the three-year period of California's statute of limitations, California Code of Civil Procedure § 338. This appeal followed.

## II. Standard of Review

We review de novo the district court's decision dismissing Saher's complaint under Rule 12(b)(6). *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir. 2004). We accept all well-pleaded factual allegations as true, and construe them in the light most favorable to Saher. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007); *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1122 (9th Cir.2008).

## III. Motion for Judicial Notice

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

[2, 3] The Museum also moves for judicial notice of the fact that various newspapers, magazines, and books have published information about the Cranachs. Courts may take judicial notice of publications introduced to "indicate what was in the public realm at the time, not whether the contents of those articles were in fact true." *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n. 15 (3d Cir.2006); *accord Heliotrope Gen. Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n. 118 (9th Cir.1999) (taking judicial notice "that the market was aware of the information contained in news articles submitted by the defendants."). These publications meet the standards for admissibility set forth in Federal Rule of Evidence 201(b). Accordingly, we take judicial notice of them solely as an indication of what information was in the public realm at the time.

## IV. Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

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

Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power. *See, e.g., Zschernig,* 389 U.S. at 432, 88 S.Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines,* 312 U.S. at 63, 61 S.Ct. 399 (invalidating a Pennsylvania immigration law because the field of immigration regulation was occupied exclusively by federal statutes and regulations); *see also Deutsch,* 324 F.3d at 712 (concluding that § 354.6 infringed on the federal government's exclusive power to wage and resolve war).

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

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

[4, 5] Federal law's "power" to preempt state law arises from the Supremacy Clause, which provides that "the Laws of the United States" and "all Treaties ... shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. Under a traditional statutory preemption analysis, conflict or obstacle preemption occurs where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 373, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000) (citing *Hines,* 312 U.S. at 67, 61 S.Ct. 399) (internal quotation marks omitted).

Executive agreements settling claims with foreign nations and nationals have long been accorded the same preemptive effect. *Garamendi,* 539 U.S. at 416, 123 S.Ct. 2374 ("[V]alid executive agreements are fit to preempt state law, just as treaties are[.]"); *Dames & Moore v. Regan,* 453 U.S. 654, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *United States v. Pink,* 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Belmont,* 301 U.S. at 324, 57 S.Ct. 758. In *Garamendi,* the Supreme Court invalidated a California statutory scheme which facilitated litigation of Holocaust-era insurance claims. *Garamendi,* 539 U.S. at 401, 123 S.Ct. 2374. The Court concluded that the California scheme posed an obstacle to the German Foundation Agreement and other expressions of Executive Branch policy preferring nonjudicial resolution of such claims. *Id.* at 405–07, 123 S.Ct. 2374.

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

#### London Declaration

The United States and the Netherlands, along with sixteen other nations, were signatories to the London Declaration of January 5, 1943. Forced Transfers of Property in Enemy–Controlled Territory, 1943, in 3 Dep't of State, Treaties and Other International Agreements of the United States of America 1776–1949, p. 754 (C. Bevans comp.1969) (hereinafter Bevans). The

Declaration served as a "formal warning to all concerned, and in particular persons in neutral countries," that the Allies intended "to do their utmost to defeat the methods of dispossession practiced by the governments with which they [were] at war[.]" *Id.*

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

**Art Objects in U.S. Zones**

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

On July 29, 1945, at the Potsdam Conference, President Truman approved a policy statement setting forth the standard operating procedures governing the looted artwork found within the U.S. zone of occupation. Art Objects in U.S. Zone; Roberts Commission Report at 148. The governments of the formerly occupied countries submitted consolidated lists of items taken by the Germans, with information about the location and circumstances of the theft. Plunder and Restitution at SR–142. The U.S. authorities examined the lists, and when artwork was identified, it was returned to the country of origin. *Id.* Under this policy of "external restitution," the U.S. restituted the looted artwork to countries, not individuals. Art Objects in U.S. Zone; Plunder and Restitution at SR–139–SR–142. The newly liberated governments were responsible for restituting the art to the individual owners. Once the art was returned to the country of origin, the U.S. played no further role.

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

> [I]n many, if not most, cases the local funds[with which the Nazis "purchased" the art from the persecuted] were supplied originally by the local government or central bank as occupation costs or through forced credits. The Germans in effect forced the local government to

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

*Id.* at 2–3.

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

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

The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution. Plunder and Restitution at SR–143. In fact, as Saher states in her complaint, the Cranachs were returned to the Netherlands through the U.S. external restitution program. Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect.

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

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

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

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

> If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility, field preemption might be the appropriate doctrine, whether the National Government had acted, and if it had, without reference to the degree of any conflict, the principle

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

having been established that the Constitution entrusts foreign policy exclusively to the National Government. See, e.g., *Hines v. Davidowitz*, 312 U.S. 52, 63, 61 S.Ct. 399, 85 L.Ed. 581 (1941).

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

[7, 8] Unlike its traditional statutory counterpart, foreign affairs field preemption may occur "even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy." *Deutsch*, 324 F.3d at 709 (internal citation and quotations omitted). The central question, then, is this: in enacting § 354.3, has California addressed a traditional state responsibility, or has it infringed on a foreign affairs power reserved by the Constitution exclusively to the national government?

### 1. Does § 354.3 Concern a Traditional State Responsibility?

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

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

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

California's desire to help its resident Holocaust victims and their heirs is a noble legislative goal, with which we are entirely sympathetic. In *Garamendi*, however, the Supreme Court held that "California's concern for the several thousand Holocaust survivors said to be living in the state ... does not displace general standards for evaluating a State's claim to apply its forum law to a particular controversy or transaction, under which the State's claim is not a strong one." *Garamendi*, 539 U.S. at 426–27, 123 S.Ct. 2374. The State's interest alone was not sufficient in *Garamendi* to save the statute: "[T]here being about 100,000 survivors in the country, only a small fraction of them live in California. As against the responsibility of the United States of America, the humanity underlying the state statute could not give the State the benefit of any doubt in resolving the conflict with national policy." *Id.*

California arguably has a stronger interest in enacting § 354.3 than it did in enacting the related statutes struck down in *Deutsch* and *Garamendi*. Section 354.3 addresses the problem of Nazi-looted art currently hanging on the walls of the

state's museums and galleries. Assem. Jud. Com., Background Information Worksheet for Assem. Bill No. 1758 (2001–2002 Reg. Sess.) Jan. 30, 2002.

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

The scope of the statute as enacted belies California's purported interest in protecting its residents and regulating its art trade. The amended version of § 354.3 suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state. A memorandum from the Governor's office provides further illustration of California's intent. In it, California is characterized as a pioneering leader in the quest for justice for Holocaust victims:

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

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

By opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against "any museum or gallery" whether located in the state or not, California has expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II. In so doing, California can make "no serious claim to be addressing a traditional state responsibility." *Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374; *see also Deutsch*, 324 F.3d at 712 (rejecting California's interest in "redress[ing] wrongs committed in the course of the Second World War"). California cannot have a "distinct juristic personality" from that of the United States when it comes to matters of foreign affairs. *Pink*, 315 U.S. at 232, 62 S.Ct. 552. When it comes to dealings with foreign nations, "state lines disappear." *Belmont*, 301 U.S. at 331, 57 S.Ct. 758.

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

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

The District Court held that § 354.3 intrudes on the power to make and resolve

war, a power reserved exclusively to the federal government by the Constitution. We agree.

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

Section 354.3 establishes a remedy for wartime injuries. The legislative findings accompanying the statute repeatedly reference the "Nazi regime," "Nazi persecution," and "the many atrocities" the Nazis committed. 2002 Cal. Legis. Serv. 332 (West 2002). By enacting § 354.3, California "seeks to redress wrongs committed in the course of the Second World War"—a motive that was fatal to § 354.6. *Deutsch,* 324 F.3d at 712.

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

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

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

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

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

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

Recent Administrations and Congresses continue to address problems facing Holocaust survivors and their heirs. *See, e.g.*, Pub.L. No. 105–186, June 23, 1998, 112 Stat. 611, codified at 22 U.S.C. § 1621 (establishing the Presidential Advisory Commission on Holocaust Assets in the United States); Plunder & Restitution, supra (the final report of the Presidential Advisory Commission on Holocaust Assets in the United States); U.S. Dep't of State, Washington Conference Principles on Nazi–Confiscated Art (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/23231.htm (hereinafter Washington Principles). (adopted by the forty-four governments participating in the Washington Conference on Holocaust–Era Assets, hosted by the State Department on December 3, 1998). This history of federal action is so comprehensive and pervasive as to leave no room for state legislation. *Cf. English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990) (discussing traditional statutory field preemption).

Finally, the federal government, "representing as it does the collective interests of the ... states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." *Hines*, 312 U.S. at 63, 61 S.Ct. 399. The recovery of Holocaust-era art affects the international art market, as well as foreign affairs. Many have called for the creation of an international registration system, and a commission to settle Nazi-looted art disputes. *See, e.g.*, Pollock, 43 Houston L.Rev. at 231. Only the federal government possesses the power to negotiate and establish these or other remedies with the international community. As discussed above, the federal government has initiated discussions with other countries, which will hopefully yield a comprehensive remedy for all Holocaust victims and their heirs. *See, e.g.*, Washington Conference Report. No organization comparable to the International Commission on Holocaust Era Insurance Claims has been es-

tablished yet to resolve Holocaust-era art claims. This does not, however, justify California's intrusion into a field occupied exclusively by the federal government.

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

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

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

### *A. Constructive Notice*

[9] At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. Cal.Civ.Proc.Code § 338(3).[4] In 1982, the section was amended to incorporate a discovery rule: "[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft." [5] Cal.Civ.Proc.Code § 338(c); 1982 Cal. Legis. Serv. 3401 (West). Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum.

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

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

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

disagreement with *Naftzger*. 50 Cal. Rptr.2d at 870 n. 10.

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

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

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

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

### *B. Reasonable Diligence*

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

[11, 12] A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations only when "the running of the statute is apparent on the face of the complaint." *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir.2006). "[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204, 1206 (9th Cir.1995).

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

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

## VI. Conclusion

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

PREGERSON, Circuit Judge, dissenting in part:

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

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

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

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

The majority concludes that Section 354.3 suffers from a "fatal similarity" to the *Deutsch* statute because Section 354.3 applies to looted artwork. Maj. Op. at 966. I do not agree. The majority overlooks significant differences between the *Deutsch* statute and Section 354.3. First, as discussed above, here California has acted within the scope of its traditional competence to regulate property over which it has jurisdiction. Furthermore, unlike the statute in *Deutsch*, Section 354.3 does not target enemies of the United States for wartime actions. Nor, contrary to the majority's characterization, does Section 354.3 provide for war reparations.[1] Maj. Op. at 966–67. Here, Appellee, a museum located in California, acquired stolen property in 1971. Appellant now seeks to recover that property. I fail to

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

see how a California statute allowing such recovery intrudes on the federal government's power to make and resolve war.

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


**Kristin M. PERRY; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs–Appellees,**

**and**

**City and County of San Francisco, Plaintiff-intervenor,**

**v.**

**Arnold SCHWARZENEGGER, in his official capacity as Governor of California; Edmund G. Brown, Jr., in his official capacity as Attorney General of California; Mark B. Horton in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; Linette Scott, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; Patrick O'Connell, in his official capacity as Clerk–Recorder for the County of Alameda; Dean C. Logan, in his official capacity as Registrar–Recorder/County Clerk for the County of Los Angeles, Defendants,**

**and**

**Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak–Shing William Tam; Mark A. Jansson; Protectmarriage. Com–Yes on 8, a Project OFVRW California Renewal, Defendant–Intervenors–Appellants.**

**Kristin M. Perry; Sandra B. Stier; Paul T. Katami; Jeffrey J. Zarrillo, Plaintiffs–Appellees,**

**and**

**Our Family Coalition; Lavender Seniors of the East Bay; Parents, Families, and Friends of Lesbians and Gays, City and County of San Francisco, Plaintiff–intervenors–Appellees,**

**v.**

**Arnold Schwarzenegger; Edmund G. Brown, Jr.; Mark B. Horton; Linette Scott; Patrick O'Connell; Dean C. Logan, Defendants,**

**and**

**Dennis Hollingsworth; Gail J. Knight; Martin F. Gutierrez; Hak–Shing William Tam; Mark A. Jansson; Protectmarriage Com–Yes on 8, a Project OFVRW California Renewal, Defendant–intervenors–Appellants.**

**Nos. 09–17241, 09–17551.**

United States Court of Appeals,
Ninth Circuit.

Dec. 30, 2009.

David Boies, Thoedore H. Uno, Boies, Schiller & Flexner, Armonk, NY, Theodore J. Boutrous, Jr., Esquire, Christopher D. Dusseault, Theane Evangelis Kapur, Gibson Dunn & Crutcher, LLP, Los Angeles, CA, Ethan Douglas Dettmer, Esquire, Rebecca Justice Lazarus, Enrique Antonio Monagas, Gibson, Dunn & Crutcher LLP, San Francisco, CA, Matthew

light of the facts known by the IJ at the 1994 hearing, the IJ did not have a duty to inform Lopez–Velasquez of relief for which he was ineligible.

## IV. Conclusion

The IJ's duty is to inform the alien of "a reasonable possibility that the petitioner may be eligible for relief." *Moran–Enriquez*, 884 F.2d at 423. This duty did not require the IJ to inform Lopez–Velasquez of relief for which he was not then eligible and for which he would become eligible only with a change in law *and* the passage of eight months. Rather, an IJ's duty is limited to informing an alien of a reasonable possibility that the alien is eligible for relief at the time of the hearing. Because Lopez–Velasquez has not established that his deportation order was invalid, his motion to dismiss his § 1326 indictment was improperly granted. For the foregoing reasons, we reverse the district court's order granting the motion to dismiss the indictment.

**REVERSED AND REMANDED.**


**Vazken MOVSESIAN; Harry Arzoumanian; Garo Ayaltin; Miran Khagerian; Ara Khajerian, individually and on behalf of all others similarly situated including thousands of senior citizens, disabled persons, and orphans as well as on behalf of the general public and acting in the public interest, Plaintiffs–Appellees,**

v.

**VICTORIA VERSICHERUNG AG, a German corporation; Ergo Versicherungsgruppe AG, a German corporation, Defendants,**

**and**

**Munchener Ruckversicherungs–Gesellschaft Aktiengesellschaft AG, a German corporation, Defendant–Appellant.**

**No. 07–56722.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 8, 2008.

Filed Dec. 10, 2010.

**Background:** Persons of Armenian descent brought class action against insurer and its subsidiaries for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and other related claims arising from policies allegedly issued to Armenian Genocide victims. The United States District Court for the Central District of California, Christina A. Snyder, J., granted insurer's motion to dismiss in part, and insurer appealed.

**Holdings:** The Court of Appeals, Pregerson, Circuit Judge, held that:

(1) California statute which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims did not conflict with an express federal policy against use of the term "Armenian Genocide," and thus was not preempted under the foreign affairs doctrine;

(2) neither the Claims Agreement of 1922 nor the War Claims Act of 1928, which resolved World War I-related claims between the United States and Germany, applied to life insurance policies issued to citizens of the Ottoman Em-

ence since 1982, a period approaching five years."). Accordingly, we are unpersuaded.

pire between 1915 and 1923, and thus could not preempt the California statute; and

(3) defendant was an "insurer" under the statute.

Affirmed.

Thompson, Senior Circuit Judge, filed dissenting opinion.

Opinion, 578 F.3d 1052, withdrawn on grant of rehearing.

**1. Evidence ⇐48**

On appeal from denial of insurer's motion to dismiss insureds' suit on grounds that California statute, which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims, was preempted under the foreign affairs doctrine, Court of Appeals would not take judicial notice of letter from Turkish Republic's Ambassador to the United States expressing Turkey's opposition to the statute and urging the Court to overturn the statute, where letter was submitted after, and apparently in response to, district court's decision denying motion to dismiss. West's Ann.Cal. C.C.P. § 354.4.

**2. States ⇐18.43**

At some point an exercise of state power that touches on foreign relations must yield to the National Government's policy.

**3. States ⇐18.43**

Not every executive action or pronouncement constitutes a proper invocation of executive's potentially preemptive policy-making power regarding foreign relations.

**4. Limitation of Actions ⇐4(1)**
**States ⇐18.15**

California statute which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims did not conflict with an express federal policy against use of the term "Armenian Genocide," and thus was not preempted under the foreign affairs doctrine; executive branch communications arguing against recognition of the Armenian Genocide were counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches in favor of such recognition. West's Ann.Cal.C.C.P. § 354.4.

**5. Limitation of Actions ⇐4(1)**
**States ⇐18.15**

Field preemption did not apply to preempt California statute which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims; California's attempt to regulate insurance fell within realm of traditional state interests, and the statute's regulation of the insurance industry had, at most, an incidental effect on foreign affairs. West's Ann.Cal.C.C.P. § 354.4.

**6. Limitation of Actions ⇐4(1)**
**States ⇐18.15**

Neither the Claims Agreement of 1922 nor the War Claims Act of 1928, which resolved World War I-related claims between the United States and Germany, applied to life insurance policies issued to citizens of the Ottoman Empire between 1915 and 1923, and thus could not preempt California statute which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims; policies covered by the statute were the private property of insured Armenian citizens of the Ottoman Empire, not German debts owing to American citizens. Act Aug. 10, 1922, Art. 1 et seq., 42 Stat. 2200; West's Ann.Cal.C.C.P. § 354.4.

**7. Limitation of Actions ⇐113**

German parent company of two life insurers that issued policies to Armenian

citizens of the Ottoman Empire was an "insurer" under California statute which extended the statute of limitations for claims arising out of life insurance policies issued to Armenian Genocide victims. West's Ann.Cal.C.C.P. § 354.4(a)(2).

**8. Limitation of Actions ⇐113**

California statute which extended the statute of limitations for claims arising out of life insurance policies action brought by persons of Armenian descent seeking benefits under life insurance policies issued to Armenian Genocide victims applied to class issued to citizens of the Ottoman Empire. West's Ann.Cal.C.C.P. § 354.4(c).

West Codenotes

**Negative Treatment Reconsidered**

West's Ann.Cal.C.C.P. § 354.4

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Neil Michael Soltman, Los Angeles, CA, for the defendant/appellant.

Brian S. Kabateck, Los Angeles, CA, for the plaintiffs/appellees.

Appeal from the United States District Court for the Central District of California, Christina A. Snyder, District Judge, Presiding. D.C. No. CV-03-09407-CAS-JWJ.

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

Opinion by Judge PREGERSON; Dissent by Judge THOMPSON.

## ORDER

Judge Pregerson and Judge Nelson vote to grant the petition for rehearing and Judge Thompson votes to deny the petition for rehearing. The petition for rehearing is GRANTED.

The opinion and dissent filed on August 20, 2009, are hereby withdrawn. The opinion and dissent attached to this order are hereby filed.

New petitions for rehearing and rehearing en banc may be filed.

PREGERSON, Circuit Judge:

## OPINION

Section 354.4 of the California Code of Civil Procedure extends the statute of limitations until 2010 for claims arising out of life insurance policies issued to "Armenian Genocide victim[s]." Cal.Civ.Proc.Code § 354.4(c) (West 2006). The primary issue in this appeal is whether § 354.4 conflicts with a clear, express federal executive policy. We conclude that there is no express federal policy forbidding states to use the term "Armenian Genocide," and we affirm the district court.

### I. Background

In 2000, the California Legislature enacted Senate Bill 1915, which amended California's Code of Civil Procedure [1] to provide California courts with jurisdiction over certain classes of claims arising out of insurance policies held by "Armenian Genocide victim[s]." Sen. Bill No. 1915 (1999–2000 Reg. Sess.), 2000 Cal. Legis. Serv. 543 (West 2000), codified at Cal.Civ. Proc.Code § 354.4. The Bill also amended the Code to extend the statute of limitations for such claims until December 31,

1. Hereinafter, all statutory references are to the California Code of Civil Procedure, unless otherwise indicated.

2010. *Id.* Section 354.4, in its entirety, provides:

> (a) The following definitions govern the construction of this section:
>
> (1) "Armenian Genocide victim" means any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during that period.
>
> (2) "Insurer" means an insurance provider doing business in the state, or whose contacts in the state satisfy the constitutional requirements for jurisdiction, that sold life, property, liability, health, annuities, dowry, educational, casualty, or any other insurance covering persons or property to persons in Europe or Asia at any time between 1875 and 1923.
>
> (b) Notwithstanding any other provision of law, any Armenian Genocide victim, or heir or beneficiary of an Armenian Genocide victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe or Asia between 1875 and 1923 from an insurer described in paragraph (2) of subdivision (a), may bring a legal action or may continue a pending legal action to recover on that claim in any court of competent jurisdiction in this state, which court shall be deemed the proper forum for that action until its completion or resolution.
>
> (c) Any action, including any pending action brought by an Armenian Genocide victim or the heir or beneficiary of an Armenian Genocide victim, whether a resident or nonresident of this state, seeking benefits under the insurance policies issued or in effect between 1875 and 1923 shall not be dismissed for failure to comply with the applicable statute of limitation, provided the action is filed on or before December 31, 2010.
>
> (d) The provisions of this section are severable. If any provision of this section or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

In the legislative findings accompanying the statute, the Legislature recognized that:

> [D]uring the period from 1915 to 1923, many persons of Armenian ancestry residing in the historic Armenian homeland then situated in the Ottoman Empire were victims of massacre, torture, starvation, death marches, and exile. This period is known as the Armenian Genocide.

Sen. Bill No. 1915 at § 1.

In December 2003, Vazken Movsesian ("Movsesian") filed this class action against Victoria Versicherung AG ("Victoria"), Ergo Versicherungsgruppe AG ("Ergo"), and Munchener Ruckversicherungs–Gesellschaft Aktiengesellschaft AG ("Munich Re"). Movsesian and his fellow class members are persons of Armenian descent who claim benefits from insurance policies issued by Victoria and Ergo. Munich Re is the parent company of Victoria and Ergo. Movsesian seeks damages from all three companies for breach of written contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and other related claims. Munich Re filed a Rule 12(b)(6) motion to dismiss the claims, arguing that the class members lacked standing to bring claims under § 354.4, and contending that it was not a proper defendant under § 354.4. Munich Re also challenged the constitutionality of § 354.4, on the grounds that it violated the due process clause of the United States Constitution and was preempted under the foreign affairs doctrine.

The district court granted Munich Re's motion to dismiss the claims for unjust enrichment and constructive trust, and denied Munich Re's motion to dismiss the claims for breach of contract and breach of the covenant of fair dealing. The court held that the class members had standing to bring their claims, and that Munich Re was a proper defendant under § 354.4. The court rejected Munich Re's due process challenge, and held that § 354.4 was not preempted under the foreign affairs doctrine.

[1] Munich Re filed a motion to certify the district court's order for interlocutory appeal, and to stay the action pending appeal. The district court granted the motion, and stayed the case. Within the ten-day window provided by 28 U.S.C. § 1292(b), Munich Re petitioned this court for permission to pursue an interlocutory appeal, which we granted.[2]

On appeal, the parties address three issues: first, whether § 354.4 is preempted under the foreign affairs doctrine; second, whether Munich Re is a proper defendant; and third, whether the Plaintiff–Appellees have standing to bring these claims.[3] We address each issue in turn.

## II. Standard of Review

We review de novo a district court's grant of a Rule 12(b)(6) motion to dismiss. *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1061 (9th Cir.2004). "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.2005).

## III. The Constitutionality of § 354.4 Under the Foreign Affairs Doctrine

This case presents the issue of whether § 354.4 of the California Code of Civil Procedure is preempted under the foreign affairs doctrine. Munich Re contends that § 354.4 is preempted in two ways: first, that it conflicts with the Executive Branch's policy prohibiting legislative recognition of an "Armenian Genocide"; and second, that it is preempted by the Claims Agreement of 1922 (the "Claims Agreement") and the War Claims Act of 1928 (the "War Claims Act"). We conclude that there is no clear federal policy with respect to references to the Armenian Genocide, and, therefore, that there can be no conflict. We also conclude that neither the Claims Agreement nor the War Claims Act, which resolved World War I-related claims between the United States and Germany, has any application to life insurance policies issued to citizens of the Ottoman Empire between 1915 and 1923.

### A. Conflict Preemption

[2, 3] It is well settled that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy." *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 413, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003). "Nor is there any question generally that there is executive authority to

2. At oral argument, Munich Re asked us to take judicial notice of a December 4, 2008 letter from Nabi Sensoy, the Turkish Republic's Ambassador to the United States, to Molly Dwyer, Clerk of the United States Court of Appeals for the Ninth Circuit (December 4, 2008). We decline to take judicial notice of the letter because the letter was submitted after—and apparently in response to—the district court's decision. *See, e.g., Ctr. for Bio–Ethical Reform, Inc. v. City and County of Honolulu*, 455 F.3d 910, 918 n. 3 (9th Cir. 2006) (declining to take judicial notice of documents issued after the district court's decision).

3. Neither party addresses the due process issue on appeal.

decide what that policy should be." *Id.* at 414, 123 S.Ct. 2374. However, not every executive action or pronouncement constitutes a proper invocation of that potentially preemptive policy-making power. *See Medellin v. Texas,* 552 U.S. 491, 531–32, 128 S.Ct. 1346, 170 L.Ed.2d 190 (2008) (limiting preemptive effect of informal presidential communications where Congress has not implicitly approved such authority). *Garamendi* established that executive agreements do carry policy-making force, at least where Congress has historically acquiesced to such executive practices. *See Garamendi,* 539 U.S. at 415, 123 S.Ct. 2374; *Medellin,* 552 U.S. 491 at 531–32, 128 S.Ct. 1346. In *Garamendi,* the Court found that several executive agreements, coupled with statements from executive branch officials, constituted an express federal policy. *Garamendi,* 539 U.S. at 415, 123 S.Ct. 2374. Here, in contrast, there is no executive agreement regarding use of the term "Armenian Genocide."

[4] Instead, Munich Re points to informal presidential communications as the sole source of a clear, express federal policy against use of the term "Armenian Genocide." For example, in 2000, House Resolution 596 proposed to recognize the Ottoman Empire's atrocities against the Armenians between 1915 and 1923. H.R. Res. 596, 106th Cong. (2000). President Clinton and senior administration officials sent letters to the House, suggesting that Resolution 596 would negatively impact United States interests in the Balkans and Middle East. Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 Pub. Papers 2225–26 (Oct. 19, 2000); H.R.Rep. No. 106–933, at 16–19 (2000). Resolution 596 was never brought to a floor vote.

In 2003, a proposed general resolution "reaffirm[ed] support of the Convention on the Prevention and Punishment of the Crime of Genocide" and used the term "Armenian Genocide." H.R. Res. 193, 108th Cong. (2003). A State Department official opposed the resolution, arguing that it would hamper peace efforts in the Caucasus. H.R.Rep. No. 108–130, at 5–6 (2003). The resolution never reached the House floor.

In 2007, the House entertained another resolution that would provide official recognition to an "Armenian Genocide." House Resolution 106 was nearly indistinguishable from House Resolution 596, discussed above. President Bush opposed Resolution 106, to which he referred as the "Armenian genocide resolution," on the ground that it would negatively affect the war on terror. Remarks on Intelligence Reform Legislation, 43 Weekly Comp. Pres. Doc. 1320 (Oct. 10, 2007). The House never brought Resolution 106 to the floor for a vote.

Munich Re argues that these communications are sufficient to constitute an express federal policy. They are not. The three cited executive branch communications arguing against recognition of the Armenian Genocide are counterbalanced, if not outweighed, by various statements from the federal executive and legislative branches *in favor* of such recognition.

Despite its occasional reluctance to officially recognize the Armenian Genocide, the House of Representatives has done so in the past. In 1975, the House observed a day of remembrance for "all victims of genocide, especially those of Armenian ancestry." H.J. Res. 148, 94th Congress (1975). In 1984, the House similarly recognized "victims of genocide, especially the one and one-half million people of Armenian ancestry." H.J. Res. 247, 98th Congress (1984).

The Executive Branch has repeatedly used terms virtually indistinguishable from "Armenian Genocide." In 1998, President Clinton publicly commemorated

"the deportations and massacres of a million and a half Armenians in the Ottoman Empire in the years 1915–1923." 1 Pub. Papers 617 (Apr. 24, 1998). In 1981, President Reagan explicitly stated that "like the *genocide of the Armenians* before it, and the genocide of the Cambodians, which followed it—and like too many other persecutions of too many other people—the lessons of the Holocaust must never be forgotten." Proclamation 4838 (Apr. 22, 1981) *available at* http://www.reagan.utexas.edu/archives/speeches/1981/42281c.htm (emphasis added).

The current administration has also at times favored recognition of the Armenian Genocide. In the midst of his campaign for the presidency, then-Senator Obama asserted in a Senate floor statement that "[i]t is imperative that we recognize the horrific acts carried out against the Armenian people as genocide." *See, e.g.*, 110th Cong. Rec. S3438–01 (Apr. 28, 2008). Since taking office, President Obama has issued additional statements that seem to support recognition of the Armenian Genocide. In 2009, for example, President Obama publicly remembered "the 1.5 million Armenians who were [ ] massacred or marched to their death in the final days of the Ottoman Empire. The Meds Yeghern must live on in our memories, just as it lives on in the hearts of the Armenian people." *See* Statement of President Barack Obama on Armenian Remembrance Day, http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Armenian-Remembrance-Day/ (last accessed August 13, 2010). "Meds Yeghern" is the term for "Armenian Genocide" in the Armenian language.

We also note that while some forty states recognize the Armenian Genocide, the federal government has never expressed any opposition to any such recognition. *See, e.g.*, Mich. Comp. Laws § 435.281 ("Michigan Days of Remembrance of Armenian Genocide"); 1990 Okla. Sess. Law Serv. Sen. Conc. Res. 68 (West) ("Armenian Remembrance Day"); Proclamation of Governor Jim Gibbons Declaring April 24, 2010 as "Armenian Genocide Remembrance Day", http://gov.state.nv.us/PROCs/2010/2010-04-24_Armenian_genocide_remembrance.pdf (last visited August 13, 2010); Proclamation of Governor John Hoeven Declaring April 24, 2007 "Armenian Genocide Remembrance Day", http://governor.nd.gov/proc/docs/2007/04/20070424a.pdf (last visited August 20, 2010).

Considering the number of expressions of federal executive and legislative support for recognition of the Armenian Genocide, and federal inaction in the face of explicit state support for such recognition, we cannot conclude that a clear, express federal policy forbids the state of California from using the term "Armenian Genocide."

[5] The Supreme Court has suggested that field and conflict preemption are "complementary," *Garamendi*, 539 U.S. at 420 n. 11, 123 S.Ct. 2374, and that it "would be reasonable" to consider the strength of a state's interest to determine "how serious a conflict must be shown before declaring the state law preempted." *Id.* at 420, 123 S.Ct. 2374. Having determined that there is no clear federal policy with which § 354.4 could conflict, we briefly discuss the possibility of field preemption. Under the Court's suggested approach, field preemption would only apply if a "State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." *Id.* at 420 n. 11, 123 S.Ct. 2374. That is not the case here.

California's attempt to regulate insurance clearly falls within the realm of traditional state interests. The legislative findings accompanying California Code of Civil Procedure § 354.4 recognize that thou-

sands of California residents and citizens have often been deprived of their entitlement to benefits under certain insurance policies. S. 1915, 1999–2000 Reg. Sess. (Cal. 2000) at § 1(b). The Supreme Court has recognized that California has "broad authority to regulate the insurance industry." *Garamendi*, 539 U.S. at 434 n. 1, 123 S.Ct. 2374 (Ginsburg, J. dissenting) (citing *Western & Southern Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 653–655, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981)). California has not exceeded that authority merely by "assigning special significance to an insurer's treatment arising out of a[ ] [particular] era...." *Id.* California's interest in ensuring that its citizens are fairly treated by insurance companies over which the State exercises jurisdiction is hardly a superficial one. Furthermore, Section 354.4's regulation of the insurance industry has, at most, an incidental effect on foreign affairs, particularly considering that thirty-nine other states already officially recognize the Armenian Genocide. *See Garamendi*, 539 U.S. at 418–42, 123 S.Ct. 2374.

### B. Preemption By the Claims Agreement and the War Claims Act

[6] In 1922, the United States and Germany entered into an executive agreement establishing a commission to resolve all claims concerning "debts owing to American citizens by the German government or by German nationals." 42 Stat. 2200 (1922) (the "Claims Agreement"). In 1928, the Settlement of War Claims Act (the "War Claims Act") provided for payment of Claims Agreement awards. *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 466 (App.D.C.Cir.1940), *aff'd*, 311 U.S. 470, 61 S.Ct. 351, 85 L.Ed. 288 (1941). The Claims Agreement and War Claims Act, if applicable, have preemptive effect. *See Garamendi*, 539 U.S. at 416, 123 S.Ct. 2374; *Medellin*, 552 U.S. at 532, 128 S.Ct. 1346.

Munich Re argues that the Claims Agreement and War Claims Act apply to claims against German insurance companies by Armenian Genocide victims. We disagree. The insurance policies were the private property of insured Armenian citizens of the Ottoman Empire, not German debts owing to American citizens.

Munich Re's reliance on *Deutsch v. Turner*, 324 F.3d 692 (9th Cir.2003), is misplaced. In *Deutsch*, we invalidated a California statute that allowed World War II slave laborers to bring war-related claims against wartime enemies of the United States. *Deutsch*, 324 F.3d at 712. We held that California's attempt to create a private right of action for war-related injuries intruded upon the federal government's exclusive power over matters related to war. *Id.* at 712–716.

Here, in contrast, § 354.4 does not implicate the government's exclusive power over war. Section 354.4 covers private insurance claims, not wartime injuries. *See Alperin v. Vatican Bank*, 410 F.3d 532, 548 (9th Cir.2005) (distinguishing "garden-variety" private property interests from war injuries). Furthermore, as the district court noted, the Claims Agreement was signed *before* the end of the Armenian Genocide. According to the California legislature, the Armenian Genocide ended in 1923, a year after the Claim Act was signed at Berlin. We reject Munich Re's assertion that the Claims Agreement, which resolved claims from the concluded fighting in World War I, has any bearing on life insurance policies issued to citizens of the Ottoman Empire. The Claims Agreement and War Claims act therefore do not preempt § 354.4.

## IV. Whether Munich Re Is a Proper Defendant

[7] Munich Re also argues that is it not an "insurer," as defined in

§ 354.4(a)(2), and therefore is not a proper defendant. Specifically, Munich Re contends that it did not issue insurance policies in Europe or Asia at any time between 1875 and 1923. However, Munich Re's subsidiaries, Victoria and Ergo, *did* issue such policies. Contrary to Munich Re's interpretation, § 354.4 does not define "insurer" for purposes of limiting the class of potential *defendants*, but rather to limit the types of *claims* that may be brought. Cal.Civ.Proc.Code § 354.4(b). Accordingly, Munich Re is a proper defendant.

## V. Whether Movsesian Has Standing

[8] Lastly, we agree with the district court that § 354.4(c) confers standing on Movsesian. We reject Munich Re's assertion that § 354.4(c)'s reference to Armenian genocide victims, their heirs, and beneficiaries is "all-encompassing." The broad language of § 354.4(c) clearly applies to "any action" seeking benefits under the insurance policies, so long as the action is filed before December 31, 2010.

## VI. Conclusion

California Code of Civil Procedure § 354.4 is not preempted by federal law. There is no clearly established, express federal policy forbidding state references to the Armenian Genocide. California's effort to regulate the insurance industry is well within the realm of its traditional interests. Nothing in § 354.4(a)(2) or § 354.4(b) operates to limit the class of proper defendants, nor does § 354.4(c) limit standing to any particular group. Accordingly, the district court's order denying the Rule 12(b)(6) motion to dismiss is AFFIRMED.

THOMPSON, Senior Circuit Judge, dissenting:

Contrary to the majority's view, I would hold that a clear Presidential foreign policy exists in this case against officially recognizing the "Armenian Genocide." Over the past decade, three separate House Resolutions have attempted to formally recognize the "Armenian Genocide." *See* H.R. Res. 596, 106th Cong. (2000); H.R. Res. 193, 108th Cong. (2003); H.R. Res. 106, 110th Cong. (2007). Each time, however, the Administrations of President Clinton and President Bush took specific actions, both publicly and privately, to oppose those Resolutions [1] and to urge that legislative action was not the preferred solution.[2] And each time, as a result, the Resolutions concerned were never brought to a vote on the floor.

Based on this undisputed evidence, which in my view is not undermined by the federal government's occasional efforts to

1. *See, e.g.*, Letter to the Speaker of the House of Representatives on a Resolution on Armenian Genocide, 3 Pub. Papers 2225–26 (Oct. 19, 2000) (noting that H.R. Res. 596 could have "far-reaching negative consequences for the United States" and might "undermine efforts to encourage improved relations between Armenia and Turkey"); H.R.Rep. No. 108–130, at 5–6 (2003) (noting that H.R. Res. 193 "could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish–Armenian reconciliation"); Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007) (noting that H.R. Res. 106 "would do great harm to our relations with a key ally in NATO and in the global war on terror").

2. *See, e.g.*, Press Release, White House Office of the Press Secretary, President Bush Discusses Foreign Intelligence Surveillance Act Legislation (Oct. 10, 2007) (urging opposition to H.R. Res. 106 because it was "not the right response to these historic mass killings"); Press Release, White House Office of the Press Secretary, Press Briefing by Dana Perino (Oct. 11, 2007) ("The President believes that the proper way to address this issue and express our feelings about it is through the presidential message and not through legislation.").

commemorate these tragic and horrific events, I would conclude that there is an express foreign policy prohibiting legislative recognition of the "Armenian Genocide," as pronounced by the Executive Branch and as acquiesced in by Congress. Accordingly, I dissent. I would find that California Code of Civil Procedure § 354.4 is preempted because it clearly conflicts with this express federal policy. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420–25, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003).

More importantly, the same result is mandated under a theory of field preemption. The Supreme Court has characterized the power to deal with foreign affairs as primarily, if not exclusively, vested in the federal government. *See, e.g., id.* at 413–14, 123 S.Ct. 2374; *Zschernig v. Miller*, 389 U.S. 429, 435–36, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968); *United States v. Pink*, 315 U.S. 203, 233, 62 S.Ct. 552, 86 L.Ed. 796 (1942). As a result, the Court has declared state laws to be preempted when they were incompatible with the federal government's foreign affairs power, even in the absence of any conflict. *See, e.g., Zschernig*, 389 U.S. at 432, 440–41, 88 S.Ct. 664 (striking down an Oregon probate law, in the absence of any federal action, because it was an "intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress"); *Hines v. Davidowitz*, 312 U.S. 52, 62–65, 61 S.Ct. 399, 85 L.Ed. 581 (1941) (invalidating a Pennsylvania statute governing aliens because the field of immigration regulation is occupied exclusively by federal law). This court has done the same on occasion, also in the absence of any apparent conflict. *See, e.g., Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965–68 (9th Cir.2010) (finding preempted California's statute dealing with recovery of art stolen by the Nazis because the statute intruded on the federal government's power to make and resolve war); *Deutsch v. Turner Corp.*, 324 F.3d 692, 715–16 (9th Cir.2003) (finding unconstitutional California's statute providing recovery to World War II slave laborers because the statute intruded on the federal government's power to resolve war claims).

The central question under a field preemption analysis is whether, in enacting § 354.4, California has addressed a "traditional state responsibility," *Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374, or whether it has "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government." *Von Saher*, 592 F.3d at 964. Courts have consistently looked past "superficial" interests to ascertain true legislative intent. *See, e.g., Garamendi*, 539 U.S. at 425–26, 123 S.Ct. 2374 (rejecting purported state interest in regulating insurance business and blue sky laws); *Zschernig*, 389 U.S. at 437–41, 88 S.Ct. 664 *(rejecting purported state interest in regulating descent of property); Von Saher*, 592 F.3d at 964–65 (rejecting purported state interest in establishing a statute of limitations for actions seeking the return of stolen property); *Deutsch*, 324 F.3d at 707–08 (rejecting purported state interest in procedural rules).

In this case, even though § 354.4 purports to regulate the insurance industry, its real purpose is to provide relief to the victims of "Armenian Genocide." *See* Sen. Jud. Comm., Analysis of S.B. 1915, 1999–2000 Reg. Sess. 5–6 (May 9, 2000). By its terms, only "Armenian Genocide" victims or their heirs and beneficiaries can bring a claim under the statute. CAL. CIV. PROC. CODE § 354.4(b). "Armenian Genocide victim," in turn, is defined as "any person of Armenian or other ancestry living in the Ottoman Empire during the period of 1915 to 1923, inclusive, who died, was deported, or escaped to avoid persecution during

that period." *Id.* § 354.4(a). In short, § 354.4 is California's attempt to provide relief to a specific category of claimants who were aggrieved by a foreign nation, not a general attempt to regulate the insurance industry. While this may be a commendable goal, it is not an area of "traditional state responsibility," and the statute is therefore subject to a field preemption analysis. *See Garamendi,* 539 U.S. at 419 n. 11, 425–27, 123 S.Ct. 2374; *Von Saher,* 592 F.3d at 964–65.

The majority errs in relying on Justice Ginsburg's dissent in *Garamendi* to reach a contrary conclusion. *See ante* at 907–08. The *Garamendi* majority specifically *rejected* Justice Ginsburg's position that California in that case had broad authority to regulate the insurance industry, noting instead that the challenged statute "effectively single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." 539 U.S. at 425–26, 123 S.Ct. 2374. Similarly, in this case, California's interest is weak because instead of regulating the insurance industry generally, § 354.4 effectively singles out only policies issued in Europe or Asia, to any person of Armenian ancestry, in the Ottoman Empire, at least 87 years ago.

As applied to this case, there can be no doubt that § 354.4 is preempted. The Constitution vests with the President the power to make policy determinations regarding national security, wars in progress, and diplomatic relations with foreign nations. *See* U.S. Const. art. II, § 2, cl. 1; *id.* § 2, cl. 2; *id.* § 3; *see also Garamendi,* 539 U.S. at 414–15, 123 S.Ct. 2374; *Deutsch,* 324 F.3d at 708–09. The Constitution also delegates to the President the prerogative "to speak for the Nation with one voice in dealing with other governments." *Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 381, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000). When it comes to interactions with foreign nations, "state lines disappear." *United States v. Belmont,* 301 U.S. 324, 331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937). By declaring that the "Armenian Genocide" has occurred and by providing a right of action for its victims, California is intruding into the field of foreign relations by passing judgment on another nation when the President has expressly decided to pursue an alternate way of addressing the issue.[3] California's approach, thus, "undercuts the President's diplomatic discretion and the choice he has made exercising it." *See Garamendi,* 539 U.S. at 423–24, 123 S.Ct. 2374.

Finally, the majority's opinion appears to be in conflict with our recent case law on the issue. The majority highlights the fact that in this case there is no executive agreement regarding the use of the term "Armenian Genocide." See *ante* at 905–06. However, our recent decisions in *Deutsch* and *Von Saher* indicate that the preemptive power of federal policy is not derived from the form of the policy statement, but rather from the source of the Executive Branch's authority to act. Thus, we have recently stated that "foreign affairs field preemption may occur 'even in the absence of a treaty or federal statute, because a state may violate the Constitution by establishing its own foreign policy.' " *Von Saher,* 592 F.3d at 964 (quoting *Deutsch,* 324 F.3d at 709). Ap-

3. The President's concern that a formal recognition of the "Armenian Genocide" might have negative consequences on our relations with Turkey is very real. For example, when the French National Assembly voted in favor of a bill that would criminalize denial of the events of 1915, the Turkish military cut all contacts with the French military and terminated defense contracts under negotiation. *See* Letter from Robert M. Gates, Sec'y of Defense, and Condoleeza Rice, Sec'y of State, to Nancy M. Pelosi, Speaker of the House of Representatives (Mar. 7, 2001).

plying this principle, the court can hold a state law preempted regardless of "whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government." *See Garamendi*, 539 U.S. at 419 n. 11, 123 S.Ct. 2374; *accord Von Saher*, 592 F.3d at 963–64.

Accordingly, I would conclude there is an express Presidential foreign policy, as acquiesced in by Congress, prohibiting legislative recognition of the "Armenian Genocide." By formally recognizing the "Armenian Genocide," § 354.4 directly conflicts with this foreign policy. Moreover, far from concerning an area of traditional state interest, § 354.4 instead infringes upon the federal government's prerogative to conduct foreign affairs. Therefore, I respectfully dissent and would reverse the district court's order denying the Rule 12(b)(6) motion to dismiss.


**UNITED STATES of America, Plaintiff–Appellee,**

v.

**Prabhat GOYAL, Defendant–Appellant.**

**No. 08–10436.**

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 12, 2010.

Filed Dec. 10, 2010.

**Background:** Defendant was convicted in the United States District Court for the Northern District of California, Martin J. Jenkins and Susan Illston, JJ., 2008 WL 755010, of securities fraud and making materially false statements, and he appealed.

**Holdings:** The Court of Appeals, Clifton, Circuit Judge, held that:

(1) evidence was insufficient to sustain conviction for securities fraud, and

(2) evidence was insufficient to sustain conviction for making materially false statements to auditors.

Reversed and remanded.

Kozinski, Chief Judge, filed concurring opinion.

**1. Criminal Law ⇐1134.70, 1144.13(3)**

In reviewing a motion for acquittal, the Court of Appeals must decide whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt.

**2. Securities Regulation ⇐193**

Evidence was insufficient to sustain convictions for securities fraud and making materially false statements to Securities and Exchange Commission (SEC); there was no evidence that defendant, in his role as computer software vendor's chief financial officer, materially misstated vendor's revenue by using sell-in, rather than sell-through, accounting on several transactions. Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff.

**3. Securities Regulation ⇐193**

Evidence was insufficient to sustain conviction for making materially false statements to auditors; there was no evidence that defendant violated generally accepted accounting principles (GAAP) in his role as computer software vendor's chief financial officer by using sell-in, rather than sell-through, accounting on several transactions, and there was no evidence that defendant engaged in willful and knowing deception. Securities Exchange

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" or "Von Saher") respectfully submits this second Petition for Rehearing and Rehearing En Banc of the decision in *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010), which found unconstitutional Cal. Code Civ. Proc. § 354.3, a statute extending the limitations period for Holocaust victims and their heirs to bring certain claims to Nazi-looted art. The decision in *Von Saher* is in conflict with Court's subsequent decision in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010) and rehearing is necessary to secure and maintain uniformity of the Court's decisions. *See* Fed. R. App. P. 35(a)(1) ("en banc consideration is necessary to secure or maintain uniformity of the court's decisions").

*Von Saher* and *Movsesian* involve similar California state statutes. While *Von Saher* involves § 354.3, *Movsesian* concerns Cal. Code Civ. Proc. § 354.4, a statute extending the limitations period for victims and their heirs to commence actions to recover insurance claims related to the Armenian Genocide. This Court originally concluded that both statutes were unconstitutional intrusions on federal power. A petition for rehearing and rehearing en banc in *Von Saher* was denied, but the Court later granted the petition for rehearing in *Movsesian* and issued a new opinion finding § 354.4 was constitutional. To reach that conclusion, the Court

adopted the precise reasoning proposed by the Petitioner in *Von Saher*, but rejected in that case.

If allowed to stand, the decision in *Von Saher* will not only deprive Petitioner, and those similarly situated, with protections that the California legislature intended for them to have, but also undermine the public's faith that courts will render consistent decisions.

## STATEMENT OF THE CASE

Von Saher, 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 Reichsmarschall 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 Von Saher 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 Von Saher's complaint, arguing that § 354.3 is unconstitutional and that, but for this provision, Von Saher's complaint would be untimely.[1] The District Court granted Defendants' motion on the ground that § 354.3 is facially unconstitutional under the foreign affairs doctrine as interpreted in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2005). Von Saher 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 Court previously found that § 354.3 does not conflict with any specific federal statute, treaty or policy, and thus conflict preemption is inapplicable. It 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 Court 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

[1] This Court held that Von Saher'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. *Von Saher*, 592 F.3d at 969. This will inevitably lead to another motion to dismiss.

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 responsibility." *Von Saher*, 592 F.3d at 965. Having found that California was not exercising a traditional state responsibility, the Court determined that § 354.3 conflicts with the field of foreign affairs, because the intent of the statute was to rectify wartime wrongs. *Id.*

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. *Von Saher*, 592 F.3d at 970.

Von Saher timely filed a petition for rehearing and rehearing en banc on September 25, 2009. Respondent timely filed a petition for panel rehearing on September 1, 2009, requesting that the panel make revisions to its opinion. On January 14, 2010, this Court granted Respondent's petition for panel rehearing and issued an amended opinion. Simultaneously, this Court denied Von Saher's request for rehearing. Judge Pregerson voted to grant Von Saher's request for rehearing and rehearing en banc.

Von Saher timely filed an unopposed motion to stay the issuance of the Mandate on January 20, 2010 pending the filing of a petition for a writ of certiorari, which was granted on January 21, 2010. Von Saher then filed a petition for a writ of certiorari with the Supreme Court of the United States on April 14, 2010, and pursuant to the Court's Order of January 21, 2010, the stay remained in effect until the Supreme Court acted upon the petition. The Attorney General of the State of California and non-profit organizations dedicated to Holocaust and Jewish issues submitted amicus briefs in the Supreme Court supporting the constitutionality of § 354.3. On June 27, 2011, the Supreme Court denied Von Saher's petition for a writ of certiorari.

## REASONS FOR GRANTING THE PETITION

### I. The Court Can Entertain Successive Petitions for Rehearing

"A court of appeals has the power to entertain successive petitions for rehearing and those that are filed after the expiration of the specified period and any extension thereof[.]" Wright, Miller, Cooper & Steinman, 16AA *Fed. Prac. & Proc.* § 3986 (West 4th ed. 2008). Although unusual, reconsideration has been allowed on successive petitions, particularly where there has been an intervening change of law after the first petition. *See, e.g.*, *Huddleston v. Dwyer*, 322 U.S. 232 (1944); *United States v. Des Jardins*, 772 F.2d 578 (9th Cir. 1985); *United States v. Middlebrooks*, 624 F.2d 36 (5th Cir. 1980); and *Braniff Airways, Inc. v. Curtiss-*

*Wright Corp.*, 424 F.2d 427 (2d Cir. 1970). This case presents the rare set of circumstances under which a second petition for rehearing and rehearing en banc should be granted.

## II. An Intervening Ninth Circuit Decision Reversed the Court's Position in *Von Saher*

On December 10, 2010, while the petition for a writ of certiorari in *Von Saher v. Norton Simon Museum* was pending, the Ninth Circuit Court of Appeals granted rehearing and reversed its prior decision in *Movsesian*, a case in which the Court considered the constitutionality of Cal. Code Civ. Proc. § 354.4 -- a statute that extended the time for victims and their heirs to commence legal actions to recover on insurance claims connected with the Armenian Genocide. At the Court's direction, *Movsesian* and *Von Saher* were treated as related cases and argued before the same three-judge panel on the same day.

Decisions in the two cases were handed down nearly simultaneously. The original *Movsesian* decision found the statute at issue to be unconstitutional because "§ 354.4 conflict[ed] with the Executive Branch's clearly expressed foreign policy," to which the Ninth Circuit gave "preemptive weight." *Movsesian v. Victoria Versicherung AG*, 578 F.3d 1052, 1062 (9th Cir. 2009). The court concluded that the purpose of the statute was "to provide a forum for the victims of the 'Armenian Genocide' and their heirs to seek justice," which it held was "not a permissible state interest" because it "expresse[d] [California's] dissatisfaction

with the federal government's chosen foreign policy path." *Id.* at 1062-63. The statute in *Von Saher* was held to be unconstitutional because, although "[t]he statute does not . . . conflict with any current federal policy espoused by the Executive Branch" (592 F.3d at 963), it "created a world-wide forum for the resolution of Holocaust restitution claims," which was "not an area of 'traditional state responsibility.'" *Id.* at 965. The Court thus agreed with the District Court's assessment that "§ 354.3 infringes on the national government's exclusive foreign affairs powers." *Id.* at 957.

Both 2009 decisions relied heavily on the Supreme Court's opinion in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), but in crucially different ways: in the original *Movsesian* decision, the Court found that an actual conflict with Executive Branch policy preempted § 354.4, but having found no such conflict with § 354.3 in *Von Saher*, the Court focused on the issue of field preemption taken up in Garamendi (539 U.S. at 419 n.11). The second *Movsesian* opinion, however, eliminated that distinction.

With the switch of a single vote, this Court produced a new decision in *Movsesian* that cannot be reconciled with the holding in *Von Saher.* Having decided in *Movsesian*, as it had in *Von Saher*, that there was no actual conflict with federal policy to preempt the California statute, the Court applied the same test for field preemption from *Garamendi* that it did in *Von Saher. Movsesian*, 629 F.3d at

907-08. Relying on *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), the *Movsesian* Court reversed its first decision and found that § 354.4 falls within a traditional area of state interest and would have only an incidental effect on foreign affairs because insurance claims are "garden variety property claims," not war injuries. *Movsesian*, 629 F.3d at 908. Although § 354.4 permits lawsuits to be brought against insurance companies if they wrote insurance policies in Europe or Asia from 1875 to 1923, so long as traditional standards for jurisdiction are met, this Court concluded that the statute is constitutional. *Id.* By contrast, in *Von Saher*, this Court rejected Petitioner's reliance on *Alperin* because there was a state statute at issue in *Von Saher*, something that was not present in *Alperin*. *Von Saher*, 592 F.3d at 967. The Court obviously reversed itself on that point in *Movsesian*.

In sum, the *Movsesian and Von Saher* decisions applied the same legal precedent from footnote 11 in *Garamendi* to virtually identical situations but reached opposite conclusions. If there is no constitutional infirmity in extending the statute of limitations with respect to property claims by victims of the Armenian Genocide and their heirs, then it necessarily follows that extending the statute of limitations for property claims by Holocaust victims and their heirs must be constitutional. More importantly, although the inconsistency is readily apparent and was underscored by the new dissenting opinion in *Movsesian*, the new

*Movsesian* majority opinion did not even mention *Von Saher* much less attempt to explain why the two cases should be treated radically differently. This Court's handling of the two cases can only be described as contradictory, and the resulting inconsistency demonstrates that there was a manifest injustice in *Von Saher*.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that so much of the prior decision affirming the judgment of the District Court's holding § 354.3 unconstitutional be reheard, and upon rehearing, vacated and that the decision below, to the extent that it held § 354.3 to be unconstitutional be reversed.

Dated: June 27, 2011

Respectfully submitted,

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