

Docket No. 07-56691

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAREI VON SAHER,

Plaintiff-Appellant

vs.

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

Defendants-Appellees

On Appeal From an Order of the United States District Court
For the Central District of California, No. CV-07-02866

BRIEF OF AMICI CURIAE
BET TZEDEK LEGAL SERVICES, THE JEWISH FEDERATION COUNCIL OF
GREATER LOS ANGELES, AMERICAN JEWISH CONGRESS, AMERICAN
JEWISH COMMITTEE, SIMON WIESENTHAL CENTER AND COMMISSION FOR
ART RECOVERY IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING
REVERSAL OF ORDER DISMISSING COMPLAINT

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Bet Tzedek Legal Services (“Bet Tzedek”), the Jewish Federation Council of Greater Los Angeles (“Jewish Federation”), the American Jewish Congress, the American Jewish Committee, the Simon Wiesenthal Center and the Commission for Art Recovery submit this Brief as *amici curiae* in support of plaintiff Marei Von Saher in connection with her appeal from the district court’s grant of defendants’ motion to dismiss her complaint.

I. STATEMENT OF CONSENT

Amici respectfully submit this Brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, on grounds that all parties to this appeal have expressly consented to its filing. Fed. R. App. P. 29.

II. STATEMENT OF INTEREST OF AMICI CURIAE

Bet Tzedek, “The House of Justice,” is a non-profit legal services agency that, since 1974, has been providing free and compassionate legal representation to the thousands of low-income residents throughout Southern California. Bet Tzedek provides these services to clients of all racial, religious and ethnic backgrounds. It is also one of the only organizations in the United States regularly representing Holocaust survivors, free of charge, in their efforts to secure justice for the horrors endured by them. Over the past several years, Bet Tzedek has represented more than 800 Holocaust survivor clients, all of whom are elderly and the majority of whom are poor. Bet Tzedek has assisted these Holocaust

survivors in their efforts to assert claims under various reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments.

The Jewish Federation is the central organizing, planning and fundraising organization for the Los Angeles Jewish Community. The Jewish Federation identifies and funds social service, educational and humanitarian needs locally, in Israel and around the world. Through its network of programs and agencies, it helps address the needs of the Los Angeles community, with a focus on alleviating Jewish poverty, providing emergency relief, ensuring a Jewish future, and supporting the greater Los Angeles community. Providing for the needs of Holocaust survivors and their families has long been a core priority of the Jewish Federation. Bet Tzedek is one of its constituent agencies and the Jewish Federation works closely with Bet Tzedek on meeting the increasingly complicated needs of Holocaust survivors.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, religious, political and economic rights of American Jews. Since the early 1950's, the American Jewish Congress has participated in many lawsuits seeking restitution of property stolen from Jews by the Nazis.

The American Jewish Committee (“AJC”) is an international, not-for-profit, human relations organization, founded in 1906 to protect the civil and religious rights of Jews the world over, and to combat anti-Semitism and other forms of bigotry. It maintains thirty-one regional offices in major cities nationwide, as well as eight overseas. AJC has a long history of active involvement with restitution and indemnity claims on behalf of Jewish survivors of the Holocaust. Since before the end of World War II, it has played an integral role in advocating for rehabilitation and resettlement programs, restitution and the return of Jewish assets to Holocaust survivors and their heirs. It was a founding member of the Conference on Jewish Material Claims Against Germany and of the Committee for Jewish Material Claims on Austria, which resulted in a 1955 agreement providing for some reparations to victims of Nazism. More recently, it was an official participant in the Washington Conference on Holocaust-Era Assets in 1998 and in the Vilnius Conference on Looted Jewish Cultural Assets in 2000. Representatives have testified on the subject before various Congressional committees, as well as European governmental entities.

The Simon Wiesenthal Center, based in Los Angeles, California, is named after the world renowned Nazi hunter and is in the forefront of the struggle for human rights. It is an advocacy organization that has particular expertise in the prosecution of Nazi War criminals, such as Josef Schwammberger, and in its

dedication to the vindication of the rights of Holocaust survivors. Through counsel, it is a signatory to an agreement that resolved a major piece of Holocaust litigation in the 1990's. In addition, the Simon Wiesenthal Center sponsored a conference on property and art restitution in Geneva, Switzerland in 1998.

The Commission for Art Recovery ("Commission") was established in 1997 to stimulate restitution efforts by European governments in order to help bring a small measure of justice into the lives of families whose art was seized, confiscated, or wrongfully taken as a result of the policies of the Third Reich and the devastation of the Holocaust. The Commission encourages and assists governments, museums, and other public institutions to identify works of art in their collections that may have been stolen during the years of the Third Reich, to publicize information on the works on the Internet, and to adopt streamlined procedures that facilitate the return of these works to their rightful owners. The Commission's interest in this case is based on the principle that victims of Holocaust looting and their heirs should have a judicial forum in which to make and prosecute their claims.

Bet Tzedek, the Jewish Federation, the American Jewish Congress, the American Jewish Committee, the Simon Wiesenthal Center and the Commission for Art Recovery have an interest in this case for several reasons. Virtually all the property of Holocaust victims, including artwork, was looted,

seized, confiscated or stolen from them or otherwise lost as they were either deported to concentration camps or fled Europe. The task of identifying, locating and recovering that property is extraordinarily daunting and time-consuming at best. Because many Holocaust victims suffered mental and physical impairments from their experiences during World War II, trying to recover stolen property is exponentially more difficult for them. That difficulty is further compounded by the assertion, as in this case, of numerous purported legal barriers to the recovery of the property. Ordinary general statutes of limitation are asserted as bars to recovery, even though those statutes are ill-suited to deal with the unique circumstances surrounding the recovery of Holocaust-era property by Holocaust victims and their heirs.

California has recognized the extreme difficulties faced by Holocaust victims and their heirs in recovering artwork taken from the victims. It has done so by enacting California Code of Civil Procedure Section 354.3, a statute that affords victims and their heirs the opportunity to pursue the recovery of their artwork from museums and galleries until 2010, rather than binding them to general statutes of limitations that, in many cases and through no fault of the victims, may have expired years or decades ago.

Statutes such as Code of Civil Procedure Section 354.3 promote important state interests and should be protected from the kinds of attack made by

the defendants in this case. Plaintiff's reliance on Section 354.3 to recover her property from a California museum does not implicate any foreign policy concerns. *Amici* respectfully address the district court's erroneous application of the foreign affairs power to Section 354.3 in Sections III and IV of this Brief.

III. CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 354.3 RECOGNIZES THE DIFFICULTIES FACED BY HOLOCAUST SURVIVORS SEEKING TO RECOVER NAZI-LOOTED ARTWORK

“The Holocaust was an immeasurable human tragedy and a profound moral failure. It was also the greatest mass theft in history.” PLUNDER AND RESTITUTION: THE U.S. AND HOLOCAUST VICTIMS' ASSETS, FINDINGS AND RECOMMENDATIONS OF THE PRESIDENTIAL ADVISORY COMMISSION ON HOLOCAUST ASSETS IN THE UNITED STATES AND STAFF REPORT 15 (2000), Staff Report, Chapter 1, *available at* <http://www.pcha.gov/PlunderRestitution.html/html/StaffChapter1.html>. In adopting Civil Code of Procedure 354.3, the California legislature recognized that because the circumstances surrounding Nazi-looted art are unique and complex, Holocaust survivors and their heirs face a daunting task in locating and reclaiming their long-lost works of art. First, many owners of looted art were in concentration camps or fleeing for their lives at the time their art was confiscated, and were in no position to search for these items. Some spent years as refugees in new countries, with far more basic concerns than the hunt for their lost possessions. See Emily A. Maples, *Holocaust Art: It Isn't Always "Finders*

Keepers, Losers Weepers”: *A Look At Art Stolen During The Third Reich*, 9 TULSA J. COMP. & INT’L L. 355, 368 (2001) (“[B]ecause original owners of the stolen property were usually neither in a position to prevent the theft to begin with, nor capable of effectively searching for their property after the war, the statute of limitations should be irrelevant as it relates to Nazi stolen art.”).

Following World War II, various historical factors limited restitution of looted artwork to its rightful owners, including the chaotic situation in post-war Europe and the international legal precedent of restituting recovered property to governments rather than individuals. *See Leah J. Weiss, The Role Of Museums In Sustaining The Illicit Trade In Cultural Property*, 25 CARDOZO ARTS & ENT. L.J. 837, 866 (2007) (hereinafter Weiss). Many records and documents necessary to establish ownership rights for looted objects were locked away in government archives and did not become available to the public until recently. *See id.* at 866-67.

In addition, “the psychology of Holocaust survivors made the suggestion of the restitution of material possessions a ‘taboo’ topic, as most were grateful for having survived the war.” *Id.* at 866. Their experiences were so dreadful that many survivors never even spoke about them, let alone looked back on their lost possessions. “They wanted to move on, not revisit the agony. In many families it was impossible even to mention the word Holocaust, distasteful to

hint at the subject of restitution.” Godfrey Barker, *The Art of War*, *The Evening Standard* 24 (Dec. 8, 2006).

As the psychological mind-set of the Jewish community has evolved with time, younger generations have developed an interest in recovering the looted artwork as “an issue of belated justice.” *Id.* However, the passage of time has made it difficult to locate the art and establish claims of ownership. These difficulties stem from the “ease of transporting art across international borders, the lack of public records documenting original ownership, the difficulty of tracing art transactions through the decades, and the lack of a central authority to arbitrate claims for artwork.” Weiss, *supra*, 25 *CARDOZO ARTS & ENT. L.J.* at 868. *See also* Stephanie Cuba, *Stop The Clock: The Case To Suspend The Statute Of Limitations On Claims For Nazi-Looted Art*, 17 *CARDOZO ARTS & ENT. L.J.* 447, 450-51 (1999).

Thus, many survivors and their heirs lack the necessary documentation for establishing their ownership rights. While archives have recently become available to the public, “searching through this multitude of documents is difficult even for the skilled researcher.” Weiss, *supra*, 25 *CARDOZO ARTS & ENT. L.J.* at 867 (citation omitted). “Holocaust survivors and their heirs must engage in extensive and costly historical and factual research” to locate their art and establish ownership. *See id.*

Even if they are successful in locating their looted artwork, owners and their heirs often face one final, and sometimes insurmountable, hurdle to restitution. Although some current possessors of Nazi-looted art have willingly returned it to its rightful owners, more often claimants must resort to expensive litigation and a slow restitution process. *See id.* Those who undertake such litigation risk uncertain results, as the general property laws and doctrines such as statutes of limitations, due diligence, adverse possession and laches are ill-suited to the unique and complex issues raised by Nazi-looted art claims. *See* Julia Parker, *World War II & Heirless Art: Unleashing The Final Prisoners Of War*, 13 CARDOZO J. INT'L & COMP. L. 661, 692 (2005).

The legislative history of Section 354.3 makes clear that the California legislature recognized that “a number of pieces of artworks stolen by the Nazis are now located in museums and galleries in California.” *See* Legislative History of California Code of Civil Procedure § 354.3, Excerpts of Record (“E.R.”) at 112. The legislature also found that “[d]ue to the unique nature of claims for stolen artwork, detailed investigation is required, often involving research in several countries, translation of foreign historical documents, and the input of experts.” *See* E.R. at 97, 112. According to the legislature, the then-current three-year statute of limitations after discovery of the whereabouts of the artwork is “an insufficient amount of time to finance, investigate and commence an

action” for looted Nazi art. *See* E.R. at 97. As a result, the legislature concluded that extension of the statute of limitations to December 31, 2010 on claims for Holocaust-era artwork would provide victims of art theft an opportunity to thoroughly research, investigate and pursue such claims. *See* E.R. at 97, 112.

IV. CODE OF CIVIL PROCEDURE SECTION 354.3 DOES NOT CONTRAVENE THE FOREIGN AFFAIRS DOCTRINE

The district court, relying on *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), held that California Code of Civil Procedure Section 354.3 is facially unconstitutional because it “intrudes on the federal government’s exclusive power to make and resolve war, including the procedure for resolving war claims.” *See* Order Granting Defendants’ Motion to Dismiss, E.R. at 3 (quoting *Deutsch*, 324 F.3d at 712). The statute, however, does no such thing. Properly understood, the “foreign affairs doctrine” is a preemption doctrine that invalidates a state law primarily where a conflict exists between the state law and an express federal foreign policy (“conflict preemption”). *See American Insurance Ass’n v. Garamendi*, 539 U.S. 396, 417-25 (2003). In very rare instances, there may be preemption where a state law fosters criticism and hostility toward a foreign government (“dormant foreign affairs preemption” or “field preemption”). *See Zschernig v. Miller*, 389 U.S. 429 (1968). No such conflict or criticism of a foreign government exists here. Accordingly, the foreign affairs doctrine provides no basis for invalidating Code of Civil Procedure Section 354.3.

A. Conflict Preemption Occurs Only Where A State Law Conflicts With Express Federal Foreign Policy

Garamendi, a case not cited by the district court, is the Supreme Court's most recent articulation of the foreign affairs doctrine. The case involved a California statute, California Insurance Code Sections 13801-13807, that required insurance companies doing business in California to disclose information about insurance policies issued by those companies or their affiliates in Europe between 1920 and 1945. Failure to do so could result in the suspension of a company's certificate of authority to do business in California.

The United States Supreme Court held that the statute was preempted by the federal government's expressions of foreign policy on the subject of Holocaust-era insurance. That foreign policy was expressed in executive agreements with Germany and other countries and in repeated statements by the Executive Branch supporting a consensual resolution of insurance issues through the International Commission on Holocaust Era Insurance Claims (ICHEIC). *Garamendi*, 539 U.S. at 405-13, 421-23. According to the Court, the mandatory disclosure requirements of the California statute were in clear conflict with the federal government's express foreign policy on the subject and intruded on the privacy laws of other countries. *Id.* at 420-27. The German and Swiss governments objected to the California statute and both of the governments, along with the United States government, filed *amicus* briefs challenging the

constitutionality of the statute.

In applying a conflict preemption analysis, the Court in *Garamendi* relied on other cases invalidating state laws that conflicted with executive agreements or federal statutes. *See United States v. Pink*, 315 U.S. 203 (1942) (giving preemptive effect to agreement recognizing the government of the Soviet Union and emphasizing the President's power to recognize foreign governments under Article II, Section 3 of the Constitution); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (holding that the federal Alien Registration Act preempted Pennsylvania's Alien Registration Act through the Supremacy Clause).

Similarly, in *Deutsch v. Turner*, 324 F.3d 692, the case relied on by the district court below, the Ninth Circuit held that California Code of Civil Procedure Section 354.6, which the Court found gave World War II slave laborers and forced laborers a right of action against the companies for whom the labor was performed, was preempted by the federal government's resolution of war-related disputes. The Court held that the federal government had already exercised its authority to resolve war-related claims through treaties, international agreements and federal domestic legislation, none of which created a private right of action against the country's enemies or the companies that worked in concert with them. 324 F.3d at 712-15. As the Court stated, "[t]he federal government, acting under its foreign affairs authority, provided its own resolution to the war." *Id.* at 715.

None of these cases relied on the proposition that a state law is preempted even where the federal government has failed to act or express its position on a matter of foreign policy. Indeed, the Supreme Court in *Garamendi* expressly declined to invalidate the state statute there on field preemption grounds. *See Garamendi*, 539 U.S. at 419-20. Under these cases, then, defendants may not deprive plaintiff of her only remedy by simply asserting that the federal government's power to make and resolve war precludes her recovery of artwork in their possession. Indeed, it would be extremely ironic if a claimant could sue the Austrian government for the recovery of her artwork in federal court in the United States (*Republic of Austria v. Altmann*, 541 U.S. 677 (2004)), but could not sue an American art gallery or museum for such recovery.¹

B. Dormant Foreign Affairs Preemption May Occur Only Where A State Law Expresses, Or Fosters Expression Of, Criticism of Foreign Governments

A single Supreme Court decision, *Zschernig v. Miller*, 389 U.S. 429 (1968), has appeared to recognize a “dormant” federal foreign relations power that excludes states from certain foreign relations activity even in the absence of

¹ *Altmann* involved application of the Foreign Sovereign Immunities Act. The Supreme Court upheld the district court's denial of the Austrian government's motion to dismiss plaintiff's complaint for recovery of artwork on sovereign immunity grounds.

inconsistent federal activity. *Zschernig*, however, is limited to the distinct circumstance of a state law that fostered criticism and hostility toward foreign governments.

In *Zschernig*, the Supreme Court invalidated an Oregon inheritance law that prevented residents of foreign countries from inheriting through Oregon estates unless their government granted reciprocal rights to Oregon residents. Earlier, the Court had upheld a similar California statute, dismissing a claim based on the foreign affairs effects of the statute as “farfetched.” *Clark v. Allen*, 331 U.S. 503, 517 (1947). But in *Zschernig*, the Supreme Court became concerned that the Oregon statute and others like it, as applied, had become a vehicle for inflammatory, “cold war” criticism of foreign governments – especially Communist governments – by the states. 389 U.S. at 433-35, 439, 440 & nn. 6, 8.

It was not the existence of the reciprocal inheritance statutes that caused the problem (or else *Clark v. Allen* would have been decided differently), but rather the critical, hostile way that they were applied. Later cases confirm this reading, applying *Zschernig* by assessing whether the challenged statute, on its face or as applied, criticizes or shows hostility toward foreign governments.

Compare *Nat’l Foreign Trade Council v. Natsios*, 181 F.3d 38, 56 (1st Cir. 1999), *aff’d* on other grounds in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000) (invalidating under *Zschernig* a state law intended to pressure the Burmese

military regime into holding democratic elections), *with Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding under *Zschernig* a state commercial regulation disadvantaging foreign business but not targeting any country or group of countries). As the Court in *Deutsch* recognized, *Zschernig* “has been applied sparingly,” since state laws do not violate the foreign affairs power where they only have “some incidental or indirect effect in foreign countries.” 324 F.3d at 710. Indeed, the holding in *Zschernig* has since been interpreted as “heavily influenced by the Cold War and the real potential for judicial criticism of communist regimes to have ignited international tensions.” *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075 (N.D. Cal. 2005) (citing *Deutsch*, 324 F.3d at 711); *see also* Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1242 (1999) (observing that the *Zschernig* decision “seems both explained and justified (at least at the time) by its Cold War context”).

Particularly instructive here is *Cruz v. United States*, 387 F. Supp. 2d 1057. In *Cruz*, the district court addressed the question of whether California Code of Civil Procedure Section 354.7(c), which lifted the bar of the statute of limitations for certain claims filed by “braceros” and their heirs, was preempted under the foreign affairs doctrine. “Braceros” are defined by Section 354.7 as persons who participated in the Bracero labor importation program between 1942 and 1950 pursuant to agreements between the United States and Mexico. *See* Code

Civ. Proc. § 354.7(a)(1). Section 354.7 allowed braceros to bring claims for the funds withheld from their wages as savings to be paid to them upon their return to Mexico. *See* Code Civ. Proc. § 354.7(b). Because there was no treaty or executive agreement reflecting federal policy on how to dispose of bracero claims and because the claims were far removed from the federal government’s powers to make and resolve war, the court held that there was no conflict preemption under *Deutsch* or *Garamendi*. *See Cruz*, 387 F. Supp. 2d at 1074 (“[D]efendants have not identified any federal policy or action that is inconsistent with California’s decision to extend the statute of limitations in this case. As the federal government has not spoken with respect to the claims at issue, *Garamendi* does not support preemption.”).

The *Cruz* court rejected the argument that the statute should be preempted under the concept of field preemption of state statutes set forth in *Zschernig*. The court first recognized that *Deutsch* and *Garamendi* were specifically limited to conflict preemption, and did not support an argument for preemption under the concept of field preemption. *Id.* at 1075 (“Both *Deutsch* and *Garamendi* specifically limited their findings of preemption to the existence of an actual conflict between the state statutes at issue and clearly articulated federal

policy; those cases therefore do not provide a basis for such a finding.”)² The court then distinguished *Zschernig*, noting that its doctrine has been “applied sparingly.” *Id.* (citing *Deutsch*, 324 F.3d at 710-11). The court concluded that “field preemption here would go further than any other court” and declined to find preemption “[g]iven the uncertain contours of the *Zschernig* doctrine.” *Id.*

The *Cruz* court surveyed the cases in which *Zschernig* preemption has been applied, noting that most involved state regulations that amounted to embargoes or boycotts aimed at coercing foreign states to alter their political and social policies. *See id.* at 1076 (citing *Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down Illinois tax provision that discriminated against South African coins because “sole motivation was disapproval of [South Africa’s] policies” and “encouraging a boycott” of South

² *See also Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) (“Preemption is thus required under *Garamendi* if the plaintiffs have demonstrated a clear conflict between the state law and an express national foreign policy.”); *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 85-88 (D.D.C. 2007) (“Under *Garamendi*, Iraq must identify a ‘conflict of a clarity or substantiality that [varies] with the strength or the traditional importance of the state concern asserted.’”); *Doe v. Exxon Mobil Corp.*, 2006 WL 516744 at *7-8 (D.D.C. March 3, 2006) (holding that under the foreign affairs doctrine as articulated by *Garamendi*, “state laws are preempted when there is a conflict between the state law and the ‘exercise of the federal executive authority,’” and holding *Garamendi* “simply not applicable” because “no state government has passed any statute in conflict with U.S. foreign policy”).

African products); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (striking down state university's policy of excluding Iranian students from admission in retaliation for the Iranian hostage crisis); *New York Times Co. v. City of New York Comm'n on Human Rights*, 361 N.E. 2d 963 (N.Y. 1977) (affirming reversal of municipal agency's ruling that newspaper advertisements for employment in South Africa implicitly violated city antidiscrimination laws)). The *Cruz* court explained that "[i]n these cases, the state enactments not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct by passing the statutes." *Cruz*, 387 F. Supp. 2d at 1076.³ Because Section 354.7(c) did not raise the same concerns, the *Cruz* court held that preemption was not appropriate. Similarly, in this case, Code of Civil Procedure Section 354.3 simply extends the limitations period for recovery of Nazi-looted artwork from museums and galleries and in no way amounts to an embargo or boycott against foreign governments or businesses. As in *Cruz*, preemption here is not appropriate and would go further than any previous decision.

³ See also *In re NSA Telcoms. Records Litig.*, 2007 U.S. Dist. LEXIS 53456 at *79 (N.D. Cal. July 24, 2007) ("Only a handful of state or local laws have been struck down under *Zschernig*, and these laws have typically singled out foreign nations for regulation.").

Zschernig is not indicative of a sweeping dormant preemption of state statutes. The Supreme Court in *Garamendi*, the last word on the foreign affairs doctrine, did not read *Zschernig* that broadly. *Garamendi*, 539 U.S. at 417-20. Nor did the Court in *Garamendi* endorse such an expansive reading of that doctrine. Under this controlling Supreme Court precedent, California Code of Civil Procedure Section 354.3 does not contravene the foreign affairs doctrine.

C. Code of Civil Procedure Section 354.3 Is Constitutional Because It Neither Conflicts With Federal Foreign Policy Nor Fosters Hostility Toward Any Foreign Government

California Code of Civil Procedure Section 354.3 permits claims against museums and galleries for the recovery of Holocaust-era artwork to be brought through December 31, 2010. Defendants do not argue, and there is no evidence, that this statute conflicts with any articulated federal foreign policy. Unlike insurance and slave labor, where the federal government has actively pursued foreign policy initiatives through treaties, executive agreements, and legislation to facilitate compensation, there is simply no federal foreign policy with respect to the recovery of Holocaust-era artwork with which Section 354.3 conflicts – and no alternative remedy for plaintiff.

Indeed, the federal Executive Branch in the last year has expressly (1) encouraged museums, galleries and others to return stolen and confiscated Holocaust-era artwork to their rightful owners, (2) acknowledged that the federal

government has no specific role in the art restitution process, and (3) recognized that civil litigation by claimants to recover their artwork is appropriate. *See* Remarks by J. Christian Kennedy, Special Envoy for Holocaust Issues, Potsdam, Germany, April 23, 2007, E.R. at 12-15.⁴ To the extent that the recovery of artwork is considered a foreign policy issue, State Department statements “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” *See Altmann*, 541 U.S. at 701-02.

Moreover, the statute does not criticize or express hostility toward any foreign government. Indeed, Section 354.3, which simply extends the limitations period for recovery of Nazi-looted artwork from museums and galleries, does not take a position on any contemporary foreign government and does not require the

⁴ J. Christian Kennedy, Special Envoy for Holocaust Issues at the U.S. Department of State, explained:

Because art claims in the United States have generally had a claimant on one side and a private institution or individual collector on the other, the role of the U.S. Government has been limited on specific cases. . . . While the government can urge institutions to participate voluntarily in programs such as the one sponsored by the Museum Association, the government does not have any leverage to force compliance, for one simple reason: With the exception of a few federally owned and operated institutions, museums in the United States tend to be owned and operated privately, or by state or municipal authorities. This leaves no specific role for the federal government in the art restitution process.

Remarks by J. Christian Kennedy, Special Envoy for Holocaust Issues, Potsdam, Germany, April 23, 2007, E.R. at 12-13.

court to sit in judgment of any existing foreign regime.

California has a legitimate interest in having stolen artwork now in the hands of museums and galleries returned to their rightful owners, particularly where those museums and galleries are located in the state. California has adopted a rational means of permitting that recovery by affording claimants additional time to investigate and pursue their valid state law claims. The provision of that additional time does not conflict with any federal foreign policy. The district court erred in concluding otherwise and invalidating the California legislature's reasoned approach to providing long-overdue relief to Holocaust survivors and their families. As this Court said in permitting property claims of Holocaust survivors to go forward against the Vatican Bank and rejecting dismissal of those claims

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pursuant to the political question doctrine, “[i]n the landscape before us, this lawsuit is the only game in town....” *Alperin v. Vatican Bank*, 410 F.3d 532, 558 (9th Cir. 2005).⁵

Respectfully submitted,

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By: 

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Bet Tzedek Legal Services, The Jewish Federation Council of Greater Los Angeles, American Jewish Congress, American Jewish Committee, Simon Wiesenthal Center and Commission for Art Recovery

⁵ In *Alperin*, this Court held that the property claims before it bore similarities to those asserted in *Altmann*, noted that the claims “boil down to whether the Vatican Bank is wrongfully holding assets,” and held that even though the case had political overtones because the facts arose from World War II atrocities, the property issues were “not ‘political questions’ that are constitutionally committed to the political branches.” 410 F.3d at 551-52. Using language equally relevant to this case, the Court declared that “[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.” *Id.* at 551.

FORM 19. Certificate of Compliance With Rule 32(a)

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,
TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS**

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- The brief contains 4997 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),
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(State whether representing appellant, appellee, etc.)

February 4, 2008

(Date)

1 PROOF OF SERVICE

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10 ANGELES, AMERICAN JWISH CONGRESS, AMERICAN
11 JEWISH COMMITTEE, SIMON WIESENTHAL CENTER, AND
COMMISSION FOR ART RECOVERY IN SUPPORT OF
DISMISSING COMPLAINT**

- 12 (BY FAX) by transmitting via facsimile the document(s) listed above to the fax number(s)
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16 I declare that I am employed in the office of a member of the bar of this court at
17 whose direction the service was made and that this declaration was executed on February 4,
18 2008, at Santa Monica, California.

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