

No. 07-56691

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

MAREI VON SAHER,
Plaintiff-Appellant,

v.

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

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

PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND STATEMENT OF COUNSEL

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

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

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

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

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

STATEMENT OF THE CASE

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

354.3 unquestionably seeks merely to further enforce already existing rights and duties. This is self-evident by the majority's own conclusion that Petitioner may continue to pursue her causes of action under § 338, the preexisting general statute of limitations for the recovery of converted property, despite holding § 354.3 to be unconstitutional. This is in sharp contrast to both *Deutsch* and *Garamendi*, which involved substantive statutes that, when found unconstitutional, left the plaintiff with no claim to pursue.

Just as the regulation of property is a traditional function of the states (Op. at *21), the establishment of a statute of limitations for conversion of stolen property is quintessentially a traditional state function. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Thus, § 354.3, which gives plaintiff no cause of action that she did not previously have, addresses a traditional state responsibility.

II. The Majority Wrongly Concluded That § 354.3 Intrudes On The Federal Government's Exclusive Power To Make And Resolve War

While it is undoubtedly true that the power to make and resolve war is exclusively reserved to the Federal Government, § 354.3 does neither, and does not intrude upon the Federal Government's power to do so.

A. There Is A Fundamental Difference Between Claims Against Former Wartime Enemies For Slave Labor And Claims For Recovery Of Nazi-Looted Art From Museums And Galleries

As Judge Pregerson correctly concluded, the majority decision departs from the Ninth Circuit precedent established in *Deutsch*. Most importantly, unlike

§ 354.6 (the statute found unconstitutional in *Deutsch*), § 354.3 does not target former enemies of the United States. The Federal Government does not make or resolve war with museums and galleries. The majority concluded that the *Deutsch* Court's emphasis on the defendants' status as former wartime enemies was irrelevant, but rather the relevant consideration was that § 354.3 and § 354.6 had the same "verboten intent," that is, "the aim of rectifying wartime wrongs." Op. at *28. As Judge Pregerson noted, this conclusion cannot be correct, as the recovery of looted art from its possessor does not equate to war reparations. Op. at *41, n.1.

Not every statute that furnishes relief to Holocaust victims equates to extracting reparations from wartime enemies. Section 354.3 addresses the former; *Deutsch* addressed the latter. In fact, there are numerous state statutes that provide relief to Holocaust victims without implicating war reparations. For example, at least eleven states (including California) provide certain tax relief for Holocaust victims,² nineteen states (including California) have mandatory Holocaust education statutes,³ and various states have other miscellaneous Holocaust-related

² See, e.g., Cal. Rev. & Tax Code §§ 17131.1 & 17155 (2007); Conn. Gen. Stat. §§ 1-11 & 12-701 (2008); Ind. Code Ann. § 6-3-1-30 (2008); Va. Code Ann. § 58.1-322 (2008).

³ See, e.g., Cal. Ed. Code §§ 44776.2 & 51220 (2007); Conn. Gen. Stat. § 10-16b (2008); Fla. Stat. § 10003.42 (2008); O.C.G.A. § 50-12-130 (2008); 105 ILCS 5/27-20.3 (2008); Ind. Code Ann. § 20-30-5-7 (2008); Nev. Rev. Stat. Ann. § 233G.010 (2008).

legislation.⁴ Plainly, the majority again interpreted § 354.3 far too broadly, finding that a statute that provides relief to Holocaust victims in the form of a revised statute of limitations equates to war reparations.

The majority departed from Ninth Circuit precedent by its summary rejection of the Court's determination in *Alperin* merely because it involved the application of the political question doctrine rather than foreign affairs field preemption. But the relevant inquiry in political question cases and foreign affairs preemption cases are closely related and decisions based on one of those doctrines are often relied upon in decisions based upon the other. *Alperin* is an obvious example. 410 F.3d at 561. *See also Cruz v. U.S.*, 387 F. Supp. 2d 1057, 1074, n.12 (N.D. Cal. 2005) ("At bottom, the property claims contemplated by the bracero statute, although contextually related to war, do not intrude upon any of the federal government's war powers") (citing *Alperin* at 551); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005); *In re Nazi Era Cases Against German Defendants Litigation*, 196 Fed. Appx. 93, 99 (3d Cir. 2006).

In *Alperin*, this Court made it clear that there is a fundamental difference between claims for compensation and damages for slave labor, on the one hand, and claims for the recovery of Nazi loot, on the other. The former interfere with the federal power to wage and resolve war, 410 F.3d at 559; the

⁴ *See, e.g.*, Estates and Trusts -- Share of Other Heirs, Fla. Stat. § 732.103 (2008); Malicious Harassment, Wash. Rev. Code (ARCW) § 9A.36.078 (2008).

latter do not. *Id.* at 555. That is because “[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.” *Id.* at 551. Indeed, the *Alperin* Court’s conclusion “that the judiciary has the power to adjudicate Holocaust-era property claims” could not have been arrived at if such claims were in fact textually committed to the Constitution, as the majority here states. *Id.* The decision here simply cannot be reconciled with *Alperin*.

B. The Majority’s Opinion Expands The Scope Of The Field Preemption Doctrine Beyond The Supreme Court’s Ruling In *Garamendi*

The panel has taken foreign affairs field preemption farther than any other decision, including *Zschernig v. Miller*, 389 U.S. 429, 434-35 (1968), and certainly farther than the Supreme Court’s determination in *Garamendi*, in which the High Court found an actual conflict with expressed U.S. policy.⁵ *Central Valley Chrysler-Jeep, Inc. v. Goldstone*, 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) (“[o]ther courts addressing the application of field preemption under *Zschernig* to situations where the conflict between state law and federal foreign policy is less clear than in *Garamendi* have shown reluctance to extend *Zschernig*’s reach further”). Indeed, it appears that the instant case is the only one to apply the foreign affairs field preemption doctrine set forth in *Zschernig* to

⁵ *Cf. Medellin v. Texas*, 128 S. Ct. 1346 (2008).

invalidate a statute that is not “aimed directly at a foreign country.” *Central Valley*, 529 F. Supp. 2d at 1158.

Without any evidence of a federal agreement, treaty or policy addressing Nazi-looted art, there is no justification for finding that California’s statute of limitations in § 354.3 conflict with federal foreign relations policy. Thus, the majority opinion contravened the holding in *Garamendi*, which was premised on a direct conflict between federal policy and a California statute.

Garamendi suggested a sliding scale such that when a state acts within its traditional competence, there must be a conflict of a substantiality that varies with the strength or traditional importance of the state action in order to find a statute preempted under the foreign affairs power. The question is whether “state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government” (539 U.S. at 420) and not whether the legislation has “more than an incidental effect on foreign affairs . . . even absent any affirmative federal activity in the subject area . . .” *Id.* at 418.

In an effort to come within the *Garamendi* holding, the majority states that “[i]n 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.” *Op.* at *30. The fact remains, however, that in accordance with the instant decision, Petitioner can continue her lawsuit under

the statute of limitations provided by § 338, and a California court will still have to review the Dutch government's actions with respect to the Cranachs. This proves that it is not § 354.3 that would require California courts to review acts of restitution by foreign governments, but rather the particular facts in a given case.⁶ Section 354.3's effect on foreign affairs is purely incidental, based upon unusual facts in a particular case and not upon the statute itself. A statute must have more than an incidental effect on foreign affairs to conflict with the field of foreign affairs. *Zschernig*, 389 U.S. at 434-35.

Contrary to the majority's conclusion, § 354.3 does not "require California courts to review acts of restitution made by foreign governments." *Op.* at *30. Indeed, numerous Nazi-looted art cases brought in this country, and specifically in California, were never the subject of a prior restitution by a foreign government. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Cassirer v. Kingdom of Spain*, Nos. 06-56326, 06-56406 (9th Cir. Sept. 8, 2009); *Vineberg v. Bissonnette*, 548 F.3d 50, 57-58 (1st Cir. 2008); *United States v. Meador*, 138 F.3d 986 (5th Cir. 1998); *DeWeerth v. Baldinger*, 38 F.3d 1266 (2d Cir. 1994); *Kunstsammlungen zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir.

⁶ The question of whether this case will require the court to consider the validity of the Dutch government's actions with respect to the Cranachs will be determined under Defendants' Act of State defense. It is not an issue that relates to preemption, however, where, as here, the statute at issue is entirely neutral as to foreign governments.

1982); *United States v. One Oil Painting Entitled "Femme en Blanc" by Pablo Picasso*, 362 F. Supp. 2d 1175 (C.D. Cal. 2005); *Menzel v. List*, 246 N.E.2d 742 (N.Y. 1969).

C. There Is No History of Comprehensive And Pervasive Federal Action -- And The Federal Government Does Not Have Exclusive Power -- Regarding The Recovery Of Nazi-Looted Art

The majority also erroneously concludes that in this case there has been and continues to be a "history of federal action... so comprehensive and pervasive as to leave no room for state legislation." Op. at *31. But the majority's conclusion is completely belied by recent federal pronouncements, including the two referred to by the majority itself,⁷ which recognize both that the federal government plays only a limited role in the area of the recovery of Nazi-looted art and has failed to take action to regulate the field.

The State Department's Special Envoy for Holocaust Issues, Ambassador J. Christian Kennedy has explained precisely what the role of the United States Government is -- and is not -- in this area. His explanation leaves no room for the majority's conclusion that the federal government has pre-empted this

⁷ First, the Presidential Advisory Commission on Holocaust Era Assets was created only to study the area and make recommendations for possible federal action. Congress, however, failed to adopt any one of the Commission's recommendations. Second, the Washington Principles, as Special Envoy for Holocaust Issues, Ambassador Kennedy noted, are not binding, provide no remedy, and the U.S. leaves it up to claimants to resolve their claims in the courts. E.R. 13-14.

field. In a speech given in Potsdam, Germany on April 23, 2007, Ambassador Kennedy clarified the federal government's limited role in claims for the restitution of Nazi-looted art:

[A]rt restitution in [the United States] has generally involved a private citizen who discovers that an artwork once held by his or her family is now hanging in a museum or private collection. Usually working through their respective attorneys, the two parties attempt to establish and agree on the facts of the case, and then work out a settlement *If the talks break down, or if they fail to get started at all, the claimant has the option of turning to the courts. . . .*

While the government can urge institutions to participate voluntarily in programs . . . 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. . . .*

The point that I want to leave with you today is the following. The role of the United States Government in art restitution matters is significantly different from the role of many European governments. Our government has not been involved in cases such as those adjudicated by the Dutch Art Restitution Commission, *nor has it been involved in direct negotiations with other states as have some European countries.*

E.R. 12-13 (emphasis added). Thus, far from pre-empting the field of Nazi-looted art recovery, the federal government has acknowledged its limited role. Only the states are left to regulate garden-variety actions to recover art looted during the Holocaust, an area of legislation well within their traditional competence.

Section 354.3 is entirely consistent with federal foreign affairs policy,

which has always been that victims of Nazi forced transfers may bring private lawsuits in U.S. courts to recover their property. *See Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954). Section 354.3 does nothing more than extend the time in which to bring such lawsuits. Indeed, cases to recover Nazi-looted art have been heard in the courts for years. *See generally* Michael J. Bazylar, *Holocaust Justice: The Battle for Restitution in America's Courts* (2003) at 202-68 (chapter on court cases in the U.S. for the restitution of Holocaust-looted artworks). As this Court aptly stated in *Alperin*, a private lawsuit “is the only game in town” for a Holocaust victim to seek the return of looted artworks. 410 F.3d at 558.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that so much of the panel majority’s decision affirming the judgment of the District Court 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: September 25, 2009

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULE 40-1**

Case No. 07-56691

I certify that, pursuant to Circuit Rule 40-1 that the text of this Petition uses proportionately spaced 14-point Times New Roman font type. The brief contains 4,200 words or less (including footnotes) as calculated by Microsoft Word, the word processor used to create the Petition.

DATED: September 25, 2009

Respectfully Submitted,

s/ Donald S. Burris

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