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8  
9 **IN THE UNITED STATES DISTRICT COURT**  
10 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

11 DAVID CASSIRER, AVA CASSIRER and  
12 UNITED JEWISH FEDERATION OF  
13 SAN DIEGO COUNTY, a California non-  
profit corporation,

14 Plaintiffs,

15 vs.

17 THYSSEN-BORNEMISZA COLLECTION  
18 FOUNDATION, an agency or  
instrumentality of the Kingdom of Spain;

19 Defendant.  
20

Case No. 05-cv-03459-GAF (CTx)

**THYSSEN-BORNEMISZA  
COLLECTION FOUNDATION'S  
RESPONSE TO ORDER RE:  
REQUEST FOR FURTHER  
BRIEFING**

**Date: January 9, 2012  
Time: 9:30 a.m.  
Courtroom: 740**

**The Honorable Gary Allen Fees**

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1 **I. INTRODUCTION**

2 Pursuant to this Court’s November 15, 2011, Order, Defendant Thyssen-  
3 Bornemisza Collection Foundation (the “Foundation”) respectfully submits the  
4 following memorandum of points and authorities addressing what the Court correctly  
5 characterized as “potentially dispositive” issues, namely:

- 6 (1) In light of relevant Supreme Court and Ninth Circuit holdings (e.g.,  
7 *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003); *Zschernig v.*  
8 *Miller*, 389 U.S. 429 (1968); *Crosby v. Nat’l Foreign Trade Council*, 530  
9 U.S. 363 (2000), *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *Von*  
10 *Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010);  
11 *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003), *Movsesian v. Victoria*  
12 *Versicherung AG*, 629 F.3d 901 (9th Cir. 2010); *Alperin v. Vatican Bank*,  
13 410 F.3d 532 (9th Cir. 2005)), is Amended Section 338(c) of the  
14 California Code of Civil Procedure, and/or Amended Subsection  
15 338(c)(4) preempted by the federal government’s foreign affairs power?
- 16 (2) Is Amended Section 338(c) of the California Code of Civil Procedure,  
17 and/or Amended Subsection 338(c)(4) preempted *as applied* to Plaintiffs’  
18 claim?

19 The short answer is yes. As set forth below and in the briefs filed in Support of  
20 the Foundation’s Motion to Dismiss, (1) Amended Section 338(c) is preempted by the  
21 federal government’s foreign affairs power, (2) Amended Subsection 338(c)(4) is  
22 preempted by the federal government’s foreign affairs power, and (3) Amended  
23 Section 338(c) is preempted *as applied* to Plaintiffs’ claim.

24 **II. HISTORICAL BACKGROUND**

25 **A. Foreign Affairs Is the Exclusive Realm of the Federal Government**

26 The Supreme Court has long characterized the power to deal with foreign affairs  
27 as an exclusive federal power. *See, e.g., American Ins. Ass’n v. Garamendi*, 539 U.S.  
28 396, 413-14 (2003); *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373-74  
(2000); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968); *Hines v. Davidowitz*, 312 U.S.  
52, 63 (1941); *United States v. Belmont*, 301 U.S. 324, 327 (1937). The Supreme  
Court has noted that occasionally, “in the absence of any [express] conflict, the Court

1 has declared state laws to be incompatible with the federal government’s foreign  
2 affairs power.” *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 961 (9th  
3 Cir. 2010) (citing *Zschernig*, 389 U.S. at 432 (striking down an Oregon probate law, in  
4 the absence of any federal action, because it was an “intrusion by the State into the  
5 field of foreign affairs which the Constitution entrusts to the President and Congress”)  
6 and *Hines*, 312 U.S. at 63 (invalidating a Pennsylvania immigration law because the  
7 field of immigration regulation was occupied exclusively by federal statutes and  
8 regulations)). In such cases, the Court suggested that a traditional statutory field  
9 preemption analysis should be employed.

10 If a State were simply to take a position on a matter of foreign policy with  
11 no serious claim to be addressing a traditional state responsibility, field  
12 preemption might be the appropriate doctrine, whether the National  
13 Government had acted and, if it had, without reference to the degree of any  
14 conflict, the principle having been established that the Constitution entrusts  
15 foreign policy exclusively to the National Government.

16 *Garamendi*, 539 U.S. 420 n.11. Foreign affairs field preemption may occur “even in  
17 [the] absence of a treaty or federal statute, [because] a state may violate the  
18 Constitution by establishing its own foreign policy.” *Deutsch v. Turner*, 324 F.3d 692,  
19 709 (9th Cir. 2003).

20 As noted in earlier briefs, the U.S. government has a clear policy regarding the  
21 resolution of Holocaust-era claims. U.S. policy mandated restitution of looted assets to  
22 governments, not to individuals.

23 *The question of restoration to individual owners is a matter for these*  
24 *governments to handle in whatever way they see fit.* The original owners  
25 may have received part payment for property taken from them under  
26 duress and the governments in question may wish to make adjustments  
27 for this circumstance in returning the property. In some cases it may be  
28 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.

1 *Plunder and Restitution: The U.S. And Holocaust Victims' Assets; Findings and*  
 2 *Recommendations of the Presidential Advisory Commission on Holocaust Assets in the*  
 3 *United States and Staff Report*, SR-140 (December 2000, Washington, D.C.)  
 4 (emphasis added). Shortly after World War II, U.S. policy supported the use of  
 5 restitution agencies and courts, located in Germany, to help resolve claims. *See*  
 6 *Plunder and Restitution: The U.S. and Holocaust Victims' Assets*, SR-153 (referencing  
 7 policy of resolving restitution issues by utilizing the Restitution Chambers of German  
 8 District Courts and the Court of Restitution Appeals).<sup>1</sup>

9 U.S. policy promotes the negotiation, rather than litigation, of claims. Recently  
 10 stated by the Solicitor General of the United States,

11 United States policy to support both the just and fair resolution of claims  
 12 to Nazi-confiscated art on the merits and the return of such art to its  
 13 rightful owner. *But that policy does not support relitigation of all art*  
 14 *claims in U.S. courts.* Neither the Washington Principles nor the Terezin  
 15 Declaration takes an explicit position in favor of or against the litigation  
 16 of claims to Nazi-confiscated art. Rather, they encourage resort to  
 alternative dispute resolution, so that such claims may be resolved as  
 justly, fairly, and expeditiously as possible.<sup>2</sup>

17 Reply at 14 (quoting Brief of United States as Amicus Curiae Supporting

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18  
 19 <sup>1</sup> Plaintiffs' claims, originally brought by Lilly Cassirer Neubauer, were heard by both  
 20 of these institutions. *See* Mot. to Dismiss, Stauber Decl., Exh. A (*Neubauer v.*  
 21 *Sulzbacher, et al.*, Case No. 703, Opinion No. 414, dated June 1, 1954, U.S. Court of  
 22 Restitution Appeals of the Allied High Commission for Germany) and Exh. B (Signed,  
 Final Transcript of German Settlement Agreement, stamped "Legally Binding" by  
 Munich District Court, dated February 28, 1958)).

23 <sup>2</sup> The United States participated in international conferences that have produced "non-  
 24 binding principles" (e.g., the Washington Principles and the Terezin Declaration)  
 25 designed "to assist in resolving issues relating to Nazi-confiscated art." Washington  
 26 Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), available at  
 27 <http://www.state.gov/p/eur/rt/hlcst/122038.htm>, *see also* Prague Holocaust Era Assets  
 28 Conference: Terezin Declaration (June 30, 2009) available at  
<http://www.state.gov/p/eur/rls/or/126162.htm>. The United States' participation in  
 these conferences is evidence of current U.S. policy. *See Von Saher*, 592 F.3d. at 958.

1 Respondents in *Von Saher v. Norton Simon Museum of Art*, (09-1254) at  
2 <http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-1254.pet.ami.inv.pdf> (noting  
3 that participation in the Washington Principles is part of the United States’ “post-war  
4 restitution policy”) (emphasis added)). Thus, it is clear that U.S. policy promotes  
5 negotiation, rather than litigation, of Holocaust-era claims.

### 6 **B. Enactment of Section 354.3**

7 In 2002, the California Legislature passed Assembly Bill No. 1758, adding  
8 Section 354.3 to the California Code of Civil Procedure. Section 354.3 extended the  
9 statute of limitations for actions for the recovery of works of fine art alleged to have  
10 been stolen during the Second World War. This statute allowed suits against “any  
11 museum or gallery that displays, exhibits, or sells any article of historical, interpretive,  
12 scientific, or artistic significance.” Cal. Civ. Proc. Code § 354.3(a)(1). The statute  
13 extended the statute of limitations for such claims until December 31, 2010. *See* Cal.  
14 Civ. Proc. Code § 354.3(c). Finally, Section 354.3 stated that California Code of Civil  
15 Procedure § 361 did not apply to actions brought under Section 354.3. Section 361,  
16 California’s “borrowing statute,” provides that except where a California citizen has  
17 possessed a cause of action since its inception, a cause of action that occurred in  
18 another state or country and is barred by the laws of that state or country, is barred in  
19 California. By stating that Section 361 does not apply, the California Legislature  
20 attempted to evade the application of non-California law that would otherwise govern  
21 the claims.

22 On August 19, 2009, a three-judge panel of the U.S. Court of Appeals for the  
23 Ninth Circuit struck down Section 354.3 as unconstitutional. *See Von Saher*, 592 F.3d  
24 at 964-68. The claimant had argued that Section 354.3 concerned “a quintessential  
25 state function: the establishment of a statute of limitations for actions seeking the  
26 return of stolen property.” *Id.* at 964. Invoking *Garamendi* and its field preemption  
27 test, the Ninth Circuit recognized that the statute “cannot be fairly categorized as a  
28 garden variety property regulation.” *Id.*

1 Despite the legislature’s “purported interest in protecting its residents and  
2 regulating its art trade,” the Ninth Circuit noted, “California’s real purpose [in enacting  
3 Section 354.3] was to create a friendly forum for litigating Holocaust restitution  
4 claims, open to anyone in the World to sue a museum or gallery located within or  
5 without the state.” *Von Saher*, 592 F.3d at 965. For California to create such a forum  
6 was to express “dissatisfaction with the federal government’s resolution (or lack  
7 thereof) of restitution claims arising out of World War II.” *Id.* “In doing so,” the court  
8 recognized, “California can make ‘no serious claim to be addressing a traditional state  
9 responsibility.’” *Id.* (quoting *Garamendi*, 539 U.S. at 419, n.11. Because California  
10 cannot legislate in the area of foreign affairs – the federal government’s exclusive  
11 realm – the Ninth Circuit found Section 354.3 to be preempted, leaving in place  
12 Section 338’s three year statute of limitations.<sup>3</sup>

13 **C. Enactment of Amended Section 338(c)**

14 In late August 2010, shortly after an *en banc* panel of the Ninth Circuit affirmed  
15 this Court’s finding that it had jurisdiction, under the Foreign Sovereign Immunities  
16 Act, 28 U.S.C. § 1330, *et seq.* (“FSIA”), to hear this case and while the Supreme Court  
17 was considering the petition for a writ of certiorari filed by the claimant in *Von Saher*,  
18 the California Legislature voted to enact Assembly Bill 2765. This bill amended

19 \_\_\_\_\_  
20 <sup>3</sup> In their Opposition brief, Plaintiffs assert that *Von Saher* has been “superseded by  
21 the Ninth Circuit’s decision in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901  
22 (9th Cir. 2010).” Opp. at 19. Plaintiffs are mistaken. *Movsesian* does not overrule or  
23 supersede *Von Saher*. In fact, *Von Saher* is not mentioned once in the Majority’s  
24 decision. The dissent’s repeated reference to *Von Saher* underscores that *Movsesian* is  
25 limited to the specific facts of the case. Moreover, *Movsesian*’s holding – that a court  
26 cannot act in an area where the Executive has expressed a clear policy – supports the  
27 Foundation’s argument that Amended Section 338(c) cannot withstand judicial  
28 scrutiny as it would require the Court to resolve otherwise time-barred claims that: (1)  
are not the state’s traditional responsibility and (2) interfere with the Executive’s  
power to wage and resolve war. Finally, to the extent that *Movsesian* has any  
relevance to this case, it was called *en banc* on November 7, 2011, and is no longer  
citable as good law. The *en banc* hearing in *Movsesian* was held on December 14,  
2011. See <http://www.ca9.uscourts.gov/enbanc/>.

1 Section 338, extending the statute of limitations for claims seeking “the specific  
2 recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer”  
3 where the claims involve “an unlawful taking or theft . . . including a taking or theft by  
4 means of fraud or duress.” Cal. Civ. Proc. Code § 338(c)(3)(A) (2011). Under the  
5 new limitations period, a claim must be brought within “*six* years of the *actual*  
6 discovery by the claimant or his or her agent, of both of the following: (i) [t]he identity  
7 of the whereabouts of the work of fine art . . . [and] (ii) [i]nformation or facts that are  
8 sufficient to indicate that the claimant has a claim for possessory interest in the work or  
9 fine art . . . .” Cal. Civ. Proc. Code § 338(c)(3)(A)(i)-(ii) (2011) (emphasis added).

10 Section 338(c), like Section 354.3, targets certain entities and institutions:  
11 museums and galleries possessing works of fine art. *See* Cal. Civ. Proc. Code  
12 § 338(c)(3)(A). Importantly, like the unconstitutional Section 354.3, amended Section  
13 338 bars application of Section 361’s borrowing statute. *See* Cal. Civ. Proc. Code  
14 § 338(c)(4) (2011). Amended Section 338(c) differs from the predecessor statute in  
15 that it was made expressly retroactive: it applies to “all pending and future actions  
16 commenced on or before December 31, 2017, including the actions dismissed based on  
17 the expiration of statutes of limitation in effect prior to the date of enactment of this  
18 statute . . . .” Cal. Civ. Proc. Code § 338(c)(3)(B) (2011). Amended Section 338  
19 became effective January 1, 2011.

### 20 **III. ARGUMENT**

#### 21 **A. Amended Section 338(c) Is Preempted by the Federal Government’s** 22 **Foreign Affairs Power**

23 As this Court recognized in its November 15, 2011, Order, “[i]n determining  
24 whether a law intrudes on the federal government’s foreign affairs power, courts have  
25 consistently probed into a legislature’s “real purpose” in enacting or amending that  
26 law.” November 15, 2011, Order (Docket No. 736) (citing *Von Saher*, 592 F.3d at  
27 964; *Garamendi*, 539 U.S. at 425-26; *Zschernig*, 389 U.S. at 437-41; *Deutsch*, 324  
28 F.3d at 707-09).

1 As an initial matter, it is evident from a comparison of Section 354.3 and  
2 Amended Section 338(c) that the two statutes are functionally equivalent. Both  
3 statutes alter the statutes of limitation for claims alleging art theft that are otherwise  
4 barred. Both statutes provide a sunset provision for such claims. Both statutes target  
5 museums and galleries. Both statutes bar the application of Section 361, California's  
6 borrowing statute that applies (and respects) the laws of foreign States.

7 Further, it can be discerned from the legislative history of California Assembly  
8 Bill ("AB") No. 2765 that Amended Section 338(c) was specifically intended to  
9 provide a remedy for plaintiffs with Holocaust-era claims. Referencing the importance  
10 of protecting certain rights in the face of otherwise stale claims and speaking  
11 specifically to Holocaust-era art claims, the legislative history states

12 Similarly, this bill would help to provide protection for victims that the  
13 Legislature has already intended to protect. AB 1758 removed the statute  
14 of limitations requirements for these actions and allowed plaintiffs to file  
15 their actions by December 31, 2010. (Code Civ. Proc. Sec. 354.3.)  
16 However, a subsequent Ninth Circuit appellate ruling in *Von Saher v.*  
17 *Norton Simon Museum of Art at Pasadena*, supra, 592 F.3d 954 held that  
18 this statute was preempted by federal powers of foreign affairs under the  
19 Supremacy Clause. Victims who relied upon the provisions of Code of  
20 Civil Procedure Section 354.3 and failed are not prejudiced in bringing  
21 their actions. *This bill would provide the necessary remedy for these  
22 victims . . . .*

23 Motion to Dismiss, Declaration of Thaddeus J. Stauber, (Legislative History of  
24 California Assembly Bill No. 2765) Exh. C, p. 32 (emphasis added).<sup>4</sup> Moreover, by

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25 <sup>4</sup> The California Legislature sought to de-emphasize AB No. 2765's unconstitutional  
26 underpinnings by citing to other bills where the California Legislature had previously  
27 approved retroactive statutes of limitations. *See* Mot. to Dismiss, Stauber Decl. Exh.  
28 C, p. 32. Many of these bills, when codified, were found unconstitutional. *See* AB  
No. 600 (Knox) (extending statute of limitations for insurance claims of Holocaust  
victims; codified at California Civil Procedure Code § 354.5 and unconstitutional as  
noted in *Garamendi*); California Senate Bill ("SB") No. 1245 (Hayden) (extending  
addressing World War II slave labor claims; codified at California Civil Procedure  
Code § 354.6 and unconstitutional as noted in *In re World War II Era Japanese  
Forced Labor Litig.*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001), affirmed 317 F.3d 1005,

1 highlighting that the six year statute of limitations applies to situations where the  
2 taking of fine art was accomplished by “duress” – a term not found in the prior version  
3 of Section 338 – the California Legislature again reveals that the true purpose of  
4 Amended 338(c) is to address Holocaust-era art claims.<sup>5</sup>

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5  
6 amended and superseded on denial of rehearing, 324 F.3d 692, certiorari denied, 540  
7 U.S. 820, and *Steinberg v. Int’l Comm’n on Holocaust Era Ins. Claims* (App. 2 Dist.  
8 2005) 34 Cal. Rptr. 3d 944, 133 Cal. App. 4th 689; AB 1758 (Nakano) Holocaust-era  
9 artwork (extending statute of limitations for filing claims for Holocaust-era artwork;  
10 codified at California Civil Procedure Code § 354.3 and recognized as unconstitutional  
11 in *Von Saher*; SB No. 1779 (Burton) (extending statute of limitations for civil actions  
12 to recover damages suffered as a result of childhood sexual abuse; codified at  
13 California Civil Procedure Code § 340.1 and recognized as unconstitutional in *Perez v.*  
14 *Richard Roe 1*, 52 Cal. Rptr. 3d 762, 764 (Cal. App. 2 Dist. 2006).

15 Of the bills that have not yet been found unconstitutional, none relate to claims  
16 seeking to divest an owner of personal property. *See* AB No. 1899 (Burton)  
17 (extending statute of limitations for insurance claims relating to Northridge earthquake  
18 because of perceived problems with insurer malfeasance; codified at California Civil  
19 Procedure Code § 340.9 ); SB No. 1915 (Poochigian) (extending statute of limitations  
20 for insurance claims of Armenian Genocide victims; codified at California Civil  
21 Procedure Code § 354.4) (the Ninth Circuit’s recent decision to call *Movsesian en*  
22 *banc* raises questions regarding this statute’s continued viability); AB No. 2913  
23 (Firebaugh) (extending statute of limitations for claims brought by Braceros (Mexicans  
24 who worked in U.S. between 1942 and 1950 pursuant to U.S.-Mexico agreements) to  
25 get money withheld from their wages; codified at California Civil Procedure Code  
26 § 354.7(c); SB No. 688 (Burton) 9/11 victims (extending statute of limitations (from  
27 one to two years) for actions for assault, battery, injury, or death caused by wrongful  
28 act or neglect; codified at California Civil Procedure Code § 340.10 and § 335.1; SB  
No. 1278 (Dunn) (extending statute of limitations for civil actions to recovered  
damages suffered as a result of childhood sexual abuse; codified at Cal. Civ. Proc.  
Code § 340.35).

<sup>5</sup> The Complaint asserts that Lilly Cassirer Neubauer was forced to surrender the *Rue Saint-Honoré, après-midi, effet de pluie* by Camille Pissarro (the “Subject Painting”) to the Nazis when she fled Germany. Compl. ¶ 5. The concept of transfer under duress has been long recognized by the United States as the proper characterization of forced property transfers to the Nazis. *See Plunder and Restitution: The U.S. And Holocaust Victims’ Assets*, SR-140 (noting the official post-war U.S. policy understanding that “all property moved to Germany during the occupation ‘should be presumed to have been transferred under duress’”). Prior to Amended Section 338(c), the relevant

1 By making Amended Section 338(c) facially neutral, the California Legislature  
2 is attempting to avoid the Ninth Circuit’s admonition that it may not create a forum for  
3 litigating Holocaust restitution claims.<sup>6</sup> Although Amended Section 338(c) may not  
4 only target Holocaust-era art by its terms, it targets certain entities that may possess it.<sup>7</sup>  
5 In amending Section 338, California is (again) expressing “dissatisfaction with the  
6 federal government’s resolution (or lack thereof) of restitution claims arising out of  
7 World War II.” *Von Saher*, 592 F.3d at 965. In doing so, California can (again) make  
8 “no serious claim to be addressing a traditional state responsibility.” *Id.* (quoting  
9 *Garamendi*, 539 U.S. at 419 n.11). Like Section 354.3, the goal (and actual effect) of  
10 Amended Section 338 is to provide a forum “open to anyone in the World to sue a  
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12

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13 portion of the statute addressed only property taken by fraud. *See* Cal. Civ. Proc. Code  
14 § 338(c) (2010). To make Amended Section 338(c) specifically applicable to  
15 Holocaust-era claims, the California legislature added the term “duress” to address  
16 claims where property, like the Subject Painting, was alleged to have been taken by the  
Nazis by means of duress, rather than fraud.

17 <sup>6</sup> Attempting to legitimize the discriminatory nature of Amended Section 338(c),  
18 Plaintiffs cite the legislative history which asserts that “museums, galleries, and dealers  
19 are sophisticated purchasers who deal in large volumes of works and are typically  
20 insured.” *Opp.* at 17, Dunwoody Decl., Exh. D. As noted in the Foundation’s Initial  
21 Disclosures, it is not insured against an adverse ownership claim. While museums and  
galleries are typically insured against artwork theft or damage, they are not generally  
insured against adverse ownership claims like the one at issue in this action.

22 <sup>7</sup> The legislative history of Amended Section 338(c) references *Von Saher* and states  
23 that the Ninth Circuit “struck down Section 354.3 on the grounds that, by singling out  
24 art stolen by a foreign regime, the statute was preempted under the ‘foreign policy  
25 preemption doctrine.’” *Mot. to Dismiss*, Stauber Decl., Exh. C, p. 5. The history  
26 continues, stating that Assembly Bill No. 2765 “does not raise this issue, since it would  
27 apply to any stolen works.” *Mot. to Dismiss*, Stauber Decl., Exh. C, p. 5. This is a  
28 dramatic misstatement – Amended Section 338(c) does not apply to “any stolen  
works,” it applies *only* to works of fine art possessed by museums, galleries,  
auctioneers, or dealers where the transfer involved fraud or duress. Cal. Civ. Proc.  
Code § 338(c) (2011).

1 museum or gallery [or auctioneer or dealer] located within or without the state.” *Von*  
2 *Saher*, 592 F.3d at 965, and then preclude the application of relevant foreign laws.<sup>8</sup>

3 Amended Section 338(c) was enacted to address Holocaust-era art claims and  
4 suffers from the same unconstitutional deficiencies as Section 354.3, its predecessor;  
5 because California cannot legislate in the area of foreign affairs – the federal  
6 government’s exclusive realm – this Court should strike down Amended Section  
7 338(c) as preempted.

8 **B. Amended Subsection 338(c)(4) Is Preempted by the Federal**  
9 **Government’s Foreign Affairs Power**

10 As noted in the briefs filed in connection with the Foundation’s Motion to  
11 Dismiss, Amended Subsection 338(c)(4)’s prohibition on the application of Section  
12 361, raises numerous constitutional and due process concerns as: (1) it ignores long-  
13 standing California and national laws and precedent that recognize that if a cause of  
14 action arose outside the forum state, the law of the state where the injury arose may be  
15 the appropriate law to apply; (2) it may act to strip a party of vested property interests;  
16 (3) it targets certain parties and claims (only museums, galleries, art dealers and  
17 auctioneers, for claims involving art); and (4) it encourages forum shopping. *See, e.g.*,  
18 *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Campbell v. Holt*, 115 U.S.  
19 620, 627-28 (1885); *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1189-90 (9th Cir. 2009)  
20 (highlighting the important role Section 361 plays in preventing forum shopping and  
21 allowing courts to apply the proper law).<sup>9</sup> Aside from these red flags, the California

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22 <sup>8</sup> E. Randol Schoenberg, the attorney who provided commentary in the legislative  
23 history of AB2765 and represented Mr. Cassirer in *Claude Cassirer v. Stephen Hahn*,  
24 01158698 (Santa Barbara Super. Ct., filed July 19, 2004), represents the claimant in  
*Von Saher*.

25 <sup>9</sup> Although the general rule is “that a federal court sitting in diversity applies the  
26 conflict-of-law rules of the state in which it sits,” *Harris v. Polskie Linie Lotnicze*, 820  
27 F.2d 1000, 1002 (9th Cir. 1987) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S.  
28 487, 496 (1941)), jurisdiction in this case is based on FSIA, not diversity. Therefore,  
federal common law applies to the choice of law rule determination. *See id.* at 1003;  
*Liu v. Republic of China*, 892 F.2d 1419, 1425-26 (9th Cir. 1989). Federal common

1 Legislature’s attempt to preclude courts in California from applying applicable, foreign  
2 law conflicts with specific elements of U.S. foreign policy.

3 In their Opposition, Plaintiffs cite several international conferences addressing  
4 issues relating to the Holocaust in which the United States has participated. Compl. at  
5 11-12. Such conferences promote “non-binding principles” designed “to assist in  
6 resolving issues relating to Nazi-confiscated art.” Washington Conference Principles  
7 on Nazi-Confiscated Art (Dec. 3, 1998).<sup>10</sup> The principles, however, “recognize[] that  
8 among participating nations there are differing legal systems and that countries act  
9 within the context of their own laws.” Washington Conference Principles on Nazi-  
10 Confiscated Art (Dec. 3, 1998). They also admonish participating countries that in  
11 addressing Holocaust-era claims, they must take “into account the different legal  
12 traditions” involved. Prague Holocaust Era Assets Conference: Terezin Declaration  
13 (June 30, 2009).<sup>11</sup> To be able to take relevant foreign laws and traditions into account,  
14 courts must be free to utilize California Code of Civil Procedure section 361,  
15 California’s borrowing statute. By prohibiting courts from using Section 361 (and

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16  
17 law follows the approach of the Restatement (Second) of Conflict of Laws (1969). *See*  
18 *Harris*, 820 F.2d at 1003-04.

19 Following the Second Restatement approach, there is “a presumption that the  
20 law of the place where the injury occurred applies,” *Harris*, 820 F.2d at 1003-04, and  
21 Spanish law will apply unless California has “a more significant relationship . . . to the  
22 occurrence and the parties,” *id.* Examining the facts set forth in the Restatement,  
23 which include: (a) the needs of the interstate and international systems; (b) the relevant  
24 policies of the forum; (c) the relevant policies of other interested states and the relative  
25 interests of those states in the determination of the particular issue; (d) the protection  
26 of justified expectations; (e) the basic policies underlying the particular field of law; (f)  
27 certainty, predictability and uniformity of result; and (g) ease in the determination and  
28 application of the law to be applied, *see Harris*, 820 F.2d at 1004 n.4, it is likely that  
the Court would find that California does not have a more significant relationship to  
this suit than Spain, the location of the Subject Painting when the Foundation  
purchased it.

<sup>10</sup> Available at <http://www.state.gov/p/eur/rt/hlcst/122038.htm>.

<sup>11</sup> Available at <http://www.state.gov/p/eur/rls/or/126162.htm>.

1 applicable foreign laws as directed by U.S. foreign policy) the California Legislature is  
2 invading the Executive’s realm.

3 Here, it is likely that the Court, in the absence of Amended Subsection 338(c)(4)  
4 would be asked to apply foreign law as no relevant event in the history of Plaintiffs’  
5 claims occurred in the United States. *See Harris*, 820 F.2d at 1004; *Auto Auction, Inc.*  
6 *v. Riding Motors*, 10 Cal. Rptr. 110, 112 (Cal. App. 2d Dist. 1960). No other (valid)  
7 statute prohibits courts in California from applying the law that should govern the  
8 claim. Allowing Subsection 338(c)(4) to bar application of foreign law in favor of the  
9 laws of California, a jurisdiction with no ties to the events relating to Plaintiffs’ claims,  
10 violates the Foundation’s rights and highlights, yet again, that like Section 354.3,  
11 California’s “real purpose” in enacting Amended Subsection 338(c)(4) was “to create a  
12 friendly forum for litigating Holocaust restitution claims, open to anyone in the World  
13 to sue a museum or gallery located within or without the state.” *Von Saher*, 592 F.3d  
14 at 965. Moreover, by forcing courts to apply California law, the California Legislature  
15 is not merely providing the forum, but also steering the outcome, of lawsuits involving  
16 Holocaust-era artwork.

17 **C. Amended Section 338(c) Is Preempted as Applied to Plaintiffs’ claims**

18 Even if this Court ignores the evidence of the “real purpose” of Amended  
19 Section 338(c) and Amended Subsection 338(c)(4) and their connection to Holocaust-  
20 era claims, it is evident from the record that Amended Section 338(c) is preempted *as*  
21 *applied* to this action.

22 It is beyond dispute that Plaintiffs’ claims relate to “injuries inflicted by the Nazi  
23 regime during World War II,” *Von Saher*, 592 F.3d at 967, an area that is “not an area  
24 of ‘traditional state responsibility,’” *id.* at 964 (quoting *Garamendi*, 539 at 419 n.11).  
25 The Complaint is replete with references to the Holocaust and Lilly Cassirer  
26 Neubauer’s “surrender” of the Subject Painting to the Nazis in 1939. Compl. at 1-3, 6-  
27 9. In fact, Plaintiffs concede that their claims relate to Holocaust-era art – the very  
28

1 type of claims precluded by *Von Saher*.<sup>12</sup> Plaintiffs assert that when Mr. Cassirer  
2 brought his claim in 2005, he “relied on Section 354.3 and assumed that it, and not the  
3 pre-2010 version of Section 338(c), provided the relevant statute of limitations for his  
4 claims.” Opp. at 3 n.4. Section 354.3, on which Mr. Cassirer relied, relates *only* to  
5 Holocaust-era art claims.<sup>13</sup>

6  
7 <sup>12</sup> Should Plaintiffs attempt to re-characterize their claims as not relating to the  
8 Holocaust and not challenging the Executive’s role of waging and resolving war, such  
9 an attempt would not make the claims viable. *See Zivkovich v. Vatican Bank*, 242 F.  
10 Supp. 2d 659, 666 (N.D. Cal. 2002) (dismissing wartime claims as nonjusticiable  
11 political questions despite plaintiffs attempts to re-characterize claims); *In re*  
12 *Holocaust Victims’ Assets Litig.*, 105 F. Supp. 2d 139, 148-49 (E.D.N.Y. 2000) (noting  
13 that the issue of justiciability was a “reality check” for those who “believe that strong  
14 moral claims are easily converted into successful legal causes of action”).

15 <sup>13</sup> As noted in earlier briefs, Amended Section 338(c) was enacted specifically to  
16 address the Holocaust-era claim in *this case*. As the California Association of  
17 Museums (“CAM”) noted in its letter to California Assemblyman Michael Feuer,  
18 Chairman of the Judiciary Committee that sponsored AB 2765,

19 The only interests clearly served by [Assembly Bill No. 2765’s] unusual  
20 constellation of provisions appear to be those of a private individual and  
21 his lawyers in the case of Cassirer v. Kingdom of Spain, which might  
22 otherwise be time barred. (Cassirer is a California citizen who sued in  
23 federal court a Madrid museum operated by the Spanish government,  
24 seeking recovery of a painting allegedly taken from a member of his  
25 family about seventy years ago. Mr. Cassirer’s 2000 demand for return  
26 of the painting was refused, and he initiated [a] lawsuit five years later, in  
27 2005. CAM takes no position on the merits of Cassirer v. Spain.) The  
28 policy of the California legislature should not be to overturn longstanding  
state law for the convenience of a small number of private individual  
litigants.

29 Mot. to Dismiss, Stauber Decl., Exh. D (Letter, dated August 19, 2010, from California  
30 Association of Museums (“CAM”) to Assemblyman Michael Feuer). There is no other  
31 reasonable explanation available for why, after 135 years, a three-year statute of  
32 limitation (that bars Plaintiffs’ claims) should be extended to six years and made  
33 retroactive – and only with respect to claims for fine art taken under duress against  
34 certain entities and individuals – thereby allowing Plaintiffs’ claims to go forward.  
35 *See, e.g.*, Stauber Decl., Exh. 1 (e-mail correspondence, dated August 13, 2010, one

1 In pursuing their claim, Plaintiffs are clearly “seeking to redress wrongs  
2 committed in the course of the Second World War.” *Von Saher*, 592 F.3d at 960.  
3 Employing Amended Section 338(c), Plaintiffs are challenging the Executive’s power  
4 to wage and resolve war – a role not allotted to the states but to the federal government  
5 through procedures (and policies) that were specifically established to address art  
6 restitution claims arising from World War II. *See id.* at 967 (noting that the “history of  
7 federal action [in the arena of Holocaust-era restitution] is so comprehensive and  
8 pervasive as to leave no room for state legislation”) (citing *English v. Gen. Elec. Co.*,  
9 496 U.S. 72, 79 (1990)); *Deutsch*, 324 F.3d at 714 (“In the absence of some specific  
10 action that constitutes authorization on the part of the federal government, states are  
11 prohibited from exercising foreign affairs powers, including modifying the federal  
12 government’s resolution of war-related disputes.”). The federal government has not  
13 authorized California, or any other state, to wade into this area.<sup>14</sup>

#### 14 **IV. CONCLUSION**

15 If Amended Section 338(c) is deemed to allow this case goes forward – a case  
16 that is otherwise clearly time-barred – this Court will be required to apply a statute that  
17 interferes with the federal government’s foreign affairs power. Such an action is  
18 explicitly preempted and prohibited by *Garamendi* and *Von Saher*. For the reasons set

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19 day after an *en banc* panel of the Ninth Circuit held that it had jurisdiction under the  
20 FSIA to consider Plaintiffs’ claims, regarding communications with Assemblyman  
21 Feuer concerning increase of statute of limitations from three to six years).

22 <sup>14</sup> As noted in an earlier brief (Reply at 15), resolution of Plaintiffs’ claims “would  
23 require California courts to review acts of restitution made by foreign governments,”  
24 *Von Saher*, 592 F.3d at 967, an action it cannot take, *see id.* This Court has recognized  
25 that the Foundation is an agency or instrumentality of Spain, a foreign government.  
26 *See Cassirer v. Kingdom of Spain*, 461 F. Supp. 1157, 1165 (C.D. Cal. 2006). This  
27 Court may not scrutinize Spain or the Foundation’s acts or responses, whatever they  
28 may be, to restitution claims arising from World War II. Nor can it review the  
restitution acts of Germany, *see* Mot. to Dismiss, Stauber Decl., Exh. B (Signed, Final  
Transcript of German Settlement Agreement, stamped “Legally Binding” by Munich  
District Court, dated February 28, 1958), memorialized decades ago.

1 forth above and in the Foundation's Motion to Dismiss and the Reply, the Court should  
2 grant the Foundation's Motion to Dismiss with prejudice.

3  
4 Dated: December 16, 2011

Respectfully submitted,

5  
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