THE NINTH CIRCUIT'S DECISION IN *VON SAHER V. NORTON SIMON MUSEUM OF ART AT PASADENA*: THE INVOCATION OF THE ACT OF STATE DOCTRINE AND ITS IMPLICATIONS FOR FUTURE NAZI-STOLEN ART CLAIMS♦

INTRODUCTION

On June 6, 2014, the Ninth Circuit Court of Appeals reversed the district court's 2012 decision in *Von Saher v. Norton Simon Museum of Art at Pasadena*[1] by reinstating the plaintiff Marei von Saher's[2] previously dismissed claims against the defendant Norton Simon Museum to certain Nazi-stolen art.[3] The works in question are two life-size panels, entitled *Adam* and *Eve*, collectively referred to as "the Cranachs" or "the panels," painted by Lucas Cranach the Elder in the sixteenth century.[4] The Norton Simon Museum purchased the Cranachs in 1971 and has held them on display for over thirty years. As of 2006, the Cranachs were valued at twenty-four million dollars.[5] The plaintiff, Marei von Saher, is a Connecticut resident and the sole heir of Jacques Goudstikker, a Jewish Dutch art gallery owner and one of Europe's leading art dealers in the years leading up to World War II.[6] Goudstikker's extensive collection, containing more than 1,200 works of art,[7] including the Cranachs, was forcibly sold after he and his family fled the Netherlands during the Nazi invasion in May of 1940.[8]

In May 2007, von Saher filed suit against the Norton Simon Museum in California, relying on then-enacted California Code of Civil Procedure Section 354.3, entitled "Recovery of Holocaust-era artwork from enumerated entities."[9] The statute permitted the rightful owners of confiscated Holocaust-era art to bring actions on or before December 31, 2010 to recover such looted works from museums and galleries.[10] In

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1 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

2 The plaintiff is Marei von Saher, and the case is *Von Saher v. Norton Simon Museum at Pasadena*. For clarification purposes, when referencing the plaintiff, the author of this Note will use the term "von Saher." When referencing the case, the author will use the term "*Von Saher*."

3 Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712 (9th Cir. 2014).

4 *Id.* at 714.

5 Mike Boehm, *Woman Seeking Return of Looted Art from Norton Simon Museum Loses Appeal*, L.A. TIMES (Jan. 16, 2010), http://articles.latimes.com/2010/jan/16/entertainment/la-et-cranach16-2010jan16.

6 Kenneth Ofgang, *Court Revives Suit Against Museum Over Artwork Stolen by Nazis*, METRO. NEWS-ENTER. (June 9, 2014), http://www.metnews.com/articles/2014/vonn060914.htm.

7 *Von Saher*, 754 F.3d at 715.

8 Nicholas Datlowe, *Fight Over Paintings Looted by Nazis May Finally Get Trial Thanks to Ninth Cir.*, 82 U.S. LAW WEEK 1944 (2014); *see also* Ofgang, *supra* note 6.

9 *See* CAL. CIV. PROC. CODE § 354.3 (West 2014).

10 *Id.* CAL. CIV. PROC. CODE § 354.3 (West 2014). In its opinion filed on March 22, 2012, the District Court held Section 354.3 facially unconstitutional on the basis of field preemption. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044 (C.D. Cal. 2012) ("Defendants argue in relevant part that Plaintiff's claims are preempted under the foreign affairs doctrine. 'The Supreme Court has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power.' Indeed, 'the Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes.'" (internal

her complaint, von Saher asserted that she was the rightful owner of the Cranachs and that the Nazis had forcibly purchased the works from her deceased husband's family during World War II, and she demanded that the Norton Simon Museum honor her claim for restitution.[11]

In the eight-plus years since the commencement of von Saher's action, the lawsuit has proven "emblematic of so many World War II restitution cases."[12] As of today, *Von Saher* has gone up to the Ninth Circuit on two separate occasions and, like the majority of Nazi-looted art litigations, the courts' decisions in *Von Saher* have been made not on the substantive merits but rather primarily on the basis of technical and procedural legal defenses,[13] a strategy that the majority of American museums and galleries have been employing in opposing such restitution claims.[14]

However, in what has been described as a very significant opinion in a "'pendulum swing' since the start of 2013 in favor of claimants seeking restitution of art taken by the Nazis,"[15] the Ninth Circuit reversed the district court's 2012 dismissal in *Von Saher*[16] and

citations omitted)).

[11] *See* Complaint, Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044 (C.D. Cal. 2012) (No. 07-2866). Marei von Saher's deceased husband was Eduard ("Edo") von Saher, the son of Jacques Goudstikker. After Goudstikker died, Edo's mother Desiree ("Desi") remarried. Desi's second husband was August Edward Dimitri von Saher. *Id.* at 7.

[12] Nicholas O'Donnell, *Restitution Claims for Cranach Paintings in the Norton Simon Museum Revived by Ninth Circuit, Case Now Hinges on Act of State Doctrine*, ART LAW REPORT (June 9, 2014), http://www.artlawreport.com/2014/06/09/Von-saher-claims-to-adam-and-eve-in-the-norton-simon-museum-revived-by-ninth-circuit-case-now-hinges-on-act-of-state-doctrine/; *see also* Stephanie Cuba, Note, *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) ("The circumstances surrounding litigation over Nazi-looted art are unique and complex: most of the thefts occurred more than fifty years ago; the thefts occurred in Europe during World War II and the art has since crossed many borders; the unavailability of records has prevented the victims from locating their art; negligence by purchasers or donees in researching title propels these works of art through the marketplace. This myriad of complex factors contributes to the obstacles plaintiffs face in promptly bringing their claims.").

[13] Ronald S. Lauder, *Time to Evict Nazi-Looted Art From Museums*, WALL ST. J., http://online.wsj.com/articles/ronald-lauder-time-to-evict-nazi-looted-art-from-museums-1404076759 (last updated June 30, 2014, 8:30 PM).

[14] *See* Grosz v. Museum of Modern Art, 403 F. App'x 575 (2d Cir. 2010) (upholding the district court's dismissal of plaintiffs' claims as time-barred and denial of plaintiff's equitable tolling claim); The Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *4 (E.D. Mich. Mar. 31, 2007) (Following Toledo Museum of Art v. Ullin, court found that the Plaintiff/Counter-Defendant had not waived its right to assert a statute of limitations defense and that Defendants/Counter-Plaintiffs' Counterclaims were barred by Michigan's statute of limitations, and must be dismissed); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006) (Motion to dismiss heirs' claim of ownership granted as claims were not brought within the applicable statute of limitations and Museum did not waive its right to assert a statute of limitations defense); In re Peters, 34 A.D.3d 29, 821 N.Y.S.2d 61, (2006) (Petitioner's claim barred by the statute of limitations and the doctrine of laches).

[15] Datlowe, *supra* note 8.

[16] Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044 (C.D. Cal. 2012).

reinstated the plaintiff's claims, holding that the claims did not conflict with any United States federal policy and therefore were not barred by federal conflict preemption.[17]

Although the Ninth Circuit reinstated von Saher's claims, the Court instructed the district court, on remand, to assess whether the claims implicate the Act of State Doctrine, a legal principle requiring federal and state courts in the United States to respect the acts of a foreign sovereign power within its own territory.[18] Specifically, the Ninth Circuit ruled that the district court is best able to determine whether the Act of State Doctrine was implicated in the conveyance of the Cranachs in the years following World War II.[19] If the doctrine is found to be implicated, von Saher's claims may be defeated; however, the impact of the Ninth's Circuit's June 2014 analysis in *Von Saher* will not only have significant effects upon the application of statutes of limitations in future restitution claims but, also, more broadly, upon the interplay between state judicial power and the act of state doctrine.[20] Plaintiff's counsel asserts that after all this time, *Von Saher* is finally beginning and, going forward, "[c]ourts may now allow these claims to go to the merits, rather than applying prudential defenses, in order to apply U.S. foreign policy."[21]

This Note will set forth a stronger argument: by remanding the Act of State Doctrine issue to the district court, the Ninth Circuit has instructed the lower court to determine the nature of the conveyance at issue in *Von Saher* and whether such transfer was of the kind that would properly invoke the Act of State Doctrine or whether it constituted a purely commercial transaction between a foreign government and a private individual, thereby fitting within what at least some courts have recognized as a commercial exception to the doctrine.

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[17] Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 721 (9th Cir. 2014) ("Von Saher's claims do not conflict with any federal policy because the Cranachs were never subject to postwar internal restitution proceedings in the Netherlands . . . ."). Preemption, a doctrine under the Supremacy Clause of the United States Constitution, holds that certain kinds of state laws must yield to federal statutes; *see* O'Donnell, *supra* note 12 ("Preemption is generally divided into two categories: (1) 'Field Preemption,' where an entire subject is sufficiently entrusted to federal law that any state law regulating it will impermissibly intrude and be unconstitutional (like immigration or copyright law), and (2) 'Conflict Preemption,' where a particular state law is in direct conflict with a federal law, and the state law must yield. As has been described by the Supreme Court, conflict preemption is the concept 'that state laws that conflict with federal law are 'without effect.''"); *see also* U.S. CONST. art. VI, cl. 2.

[18] *Von Saher*, 754 F.3d at 725; *see also* Underhill v. Hernandez, 168 U.S. 250, 252 (1897) ("Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."); Ricaud v. Am. Metal Co., Ltd., 246 U.S. 304, 310 (1918) ("[T]he act within its own boundaries of one sovereign state cannot become the subject of re-examination and modification in the courts of another.").

[19] *Von Saher*, 754 F.3d at 726.

[20] Datlowe, *supra* note 8.

[21] *Id.*

This Note will explore the effect of the Ninth Circuit's June 2014 ruling in *Von Saher* and its implications for future Nazi-art restitution claims. Part I provides background on the Nazi art confiscation program during World War II and the various post-war initiatives that were undertaken to effectuate the restitution of Nazi-looted art.[22] Part II details the story of Jacques Goudstikker and the Goudstikker Collection, as well as his acquisition of the Cranachs and the origins of *Von Saher v. Norton Simon Museum of Art at Pasadena*. Part III describes the case's procedural history and addresses the various technical legal defenses and other obstacles that the litigation has encountered. Part IV discusses the impact of the Ninth's Circuit decision in *Von Saher* and its effect on future restitution claims, as well as the way in which its holding differs from prior Nazi-looted art cases decided by the Ninth Circuit. Part V explores whether the act of state doctrine is implicated in *Von Saher*.

I. THE NAZI ART CONFISCATION PROGRAM AND THE POST-WAR RESTITUTION INITIATIVES

The Nazi art confiscations and forced sales that occurred during World War II have been described as "the greatest displacement of art in human history."[23] In a 2006 law journal article, Lawrence Kaye, plaintiff's present counsel in *Von Saher*, stated that between 1933 and 1945, German forces and other Nazi agents seized or forced the sale of approximately one-fifth of all Western art that was in existence at the time, a total of nearly 650,000 works.[24] It has been estimated that the total value of stolen art was approximately $2.5 billion at the time that the looting occurred, exceeding the total value of all artwork in existence in the United States in 1945.[25] Today, the looted art is valued at $20.5 billion, with more than 100,000 works of art still unaccounted for.[26]

After World War II, there were various voluntary post-war agreements committed to the fair and just restitution of Nazi-looted art. On January 5, 1943, the United States, the United Kingdom, and the French National Committee, along with fifteen other governments of the United Nations, entered into the Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy

[22] Lawrence M. Kaye, *Avoidance and Resolution of Cultural Heritage Disputes: Recovery of Art Looted During the Holocaus*t, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 243 (2006).
[23] *Id.* (citation omitted).
[24] *Online Database of Stolen Artworks Launched*, THE TASK FORCE FOR INTERNATIONAL COOPERATION ON HOLOCAUST EDUCATION, REMEMBRANCE, AND RESEARCH (Oct. 21, 2010), http://www.holocausttaskforce.org/news/234-online-database-of-stolen-artworks-launched.html.
[25] Kaye, *supra* note 22, at 244..
[26] *Id.*

Occupation and Control (known as "The London Declaration").[27] Committed to the belief that all governments should work to restore Nazi-stolen property to its rightful owners, the London Declaration sought to invalidate all property transfers resulting from such theft so that such recovered property could be returned to the governments of their respective places of origin and restored to their original owners.[28]

In December 1998, the United States Department of State sponsored The Washington Conference on Holocaust Era Assets for the purpose of developing a consensus to assist in the resolution of complex issues regarding the repatriation of Nazi-stolen art.[29] There, the United States and forty-three other countries[30] adopted the eleven protocols introduced at the Conference, known as the "Washington Principles,"[31] and committed to searching for Nazi-stolen art in their public art collections and to resolve Holocaust restitution claims justly and fairly.[32] The Washington Principles are based on two fundamental propositions: that "[a]rt museums and their collections should not be built with stolen property [and] that passion for art should not displace

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[27] *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation and Control*, COMM'N FOR LOOTED ART IN EUROPE, http://www.lootedartcommission.com/inter-allied-declaration (last visited April 10, 2016).

[28] *Id.*

[29] *Washington Conference Principles on Nazi-Confiscated Art*, U.S. DEP'T OF STATE (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm.

[30] *See* Lauder, *supra* note 13.

[31] The Washington Principles are as follows:

> (1) Art that had been confiscated by the Nazis and not subsequently restituted should be identified; (2) Relevant records and archives should be open and accessible to researchers, in accordance with the guidelines of the International Council on Archives; (3) Resources and personnel should be made available to facilitate the identification of all art that had been confiscated by the Nazis and not subsequently restituted. (4) In establishing that a work of art had been confiscated by the Nazis and not subsequently restituted, consideration should be given to unavoidable gaps or ambiguities in the provenance in light of the passage of time and the circumstances of the Holocaust era; (5) Every effort should be made to publicize art that is found to have been confiscated by the Nazis and not subsequently restituted in order to locate its pre-War owners or their heirs. (6) Efforts should be made to establish a central registry of such information; (7) Pre-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted. (8) If the pre-War owners of art that is found to have been confiscated by the Nazis and not subsequently restituted, or their heirs, can be identified, steps should be taken expeditiously to achieve a just and fair solution, recognizing this may vary according to the facts and circumstances surrounding a specific case; (9) If the pre-War owners of art that is found to have been confiscated by the Nazis, or their heirs, cannot be identified, steps should be taken expeditiously to achieve a just and fair solution; (10) Commissions or other bodies established to identify art that was confiscated by the Nazis and to assist in addressing ownership issues should have a balanced membership; and (11) Nations are encouraged to develop national processes to implement these principles, particularly as they relate to alternative dispute resolution mechanisms for resolving ownership issues.

Washington Conference Principles on Nazi-Confiscated Art, *supra* note 29.

[32] Lauder, *supra* note 13.

respect for justice."[33]

In June 2009, the Government of the Czech Republic hosted the Holocaust Era Assets Conference in Prague.[34] There, the United States, along with forty-five other nations, entered into the Terezin Declaration,[35] in which the participating states reaffirmed their support of the Washington Principles while also acknowledging "an urgent need to strengthen and sustain these efforts in order to ensure just and fair solutions" of Nazi-looted cultural property.[36]

As recently as January 2013, in commemorating the seventieth anniversary of the London Declaration, Secretary of State Hilary Rodham Clinton acknowledged the various voluntary post-war initiatives entered into following World War II.[37] Beginning with the London Declaration, followed by the Washington Principles and the Terezin Declaration (all aimed at the restitution of Nazi-confiscated works of art to their lawful owners), Secretary Clinton, in her press statement, expressed that it was United States policy to continue to "support the fair and just resolution of claims involving Nazi-confiscated art, in light of the provenance and rightful ownership of each particular work."[38]

However, in spite of these post-World War II initiatives committed to the fair and just restitution of Nazi-looted art, adherence to the spirit of the agreements has proven quite ineffective. As voluntary agreements, these post-war initiatives have no binding effect. A 2014 study indicated that two-thirds of the nations that endorsed the principles set forth in the London Declaration, the Washington Principles, and the Terezin Declaration have made scarce or no progress in establishing fair claims processes aimed at the restitution of Nazi-

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[33] *Id.*

[34] HOLOCAUST ERA ASSETS CONFERENCE (Feb. 9, 2009), http://www.holocausteraassets.eu. Some of the objectives of the conference were: (1) "[t]o assess the progress made since the 1998 Washington Conference on Holocaust Era Assets in the areas of the recovery of looted art and objects of cultural, historical and religious value . . . and in the areas of property restitution and financial compensation schemes"; (2) "[t]o review current practices regarding provenance research and restitution and, where needed, define new effective instruments to improve these efforts"; and (3) "[t]o discuss new, innovative approaches in education, social programs and cultural initiatives related to the Holocaust and other National Socialist wrongs and to advance religious and ethnic tolerance in our societies and the world." *Id.*

[35] *Prague Holocaust Era Assets Conference: Terezin Declaration*, U.S. DEP'T OF STATE (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm.

[36] *Id.* ("[Urging] all stakeholders to ensure that their legal system or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims and all the relevant documents submitted by all parties.").

[37] Press Statement, Hillary Rodham Clinton, U.S. Sec'y of State, Holocaust-Era Looted Art (Jan. 16 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/202932.htm.

[38] *Id.*

looted art.[39] In fact, the Ninth Circuit's June 2014 ruling in *Von Saher* marked the first invocation of the Washington Principles in an American judicial decision.[40] In citing to the Principles, the Ninth Circuit effectively determined that they constitute the foreign policy of the United States on the issue, and that private claims for restitution of Nazi-looted art, such as those in *Von Saher*, are consistent with that policy.[41] The Ninth Circuit's recent ruling in *Von Saher* "could have significant implications for the efforts of plaintiffs to recover artworks allegedly stolen by Nazis during World War II, and signifies the increasing reluctance of the [Ninth] Circuit to consider claims barred or preempted by considerations of U.S. diplomatic interests abroad."[42]

II. THE STORY OF JACQUES GOUDSTIKKER AND THE GOUDSTIKKER COLLECTION, THE ACQUISITION OF THE CRANACHS, AND THE ORIGINS OF *VON SAHER V. NORTON SIMON MUSEUM OF ART AT PASADENA*

A. *Jacques Goudstikker Acquires the Cranachs*

Jacques Goudstikker acquired the Cranachs, possibly the most valuable works of art looted from the Goudstikker Collection, in May of 1931 at a Berlin auction of the famous Stroganoff collection.[43] They

[39] Graham Bowley, *Report Criticizes Lax Efforts on the Restitution of Wartime Looted Art*, N.Y. TIMES, Sept. 11, 2014, at C1; *see also* E.B., *How Is Nazi-Looted Art Returned?*, ECONOMIST (Jan. 12, 2014, 11:50 PM), http://www.economist.com/blogs/economist-explains/2014/01/economist-explains ("The process of claiming looted artwork is often opaque, ad-hoc, expensive and uncertain. Different countries follow different rules and there is no international arbitrator to resolve disputes. Ownership records are patchy, so these tussles are trickier than those over bank assets frozen during the war. Only five countries—Austria, Britain, France, Germany and the Netherlands—have set up independent national commissions for handling claims, and practices vary . . . . [I]n America most museums are private, so the government cannot mandate restitution.").

[40] Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 723 (9th Cir. 2014) ("[V]on Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims. . . . Moreover, allowing her lawsuit to proceed would encourage the Museum, a private entity, to follow the Washington Principles, as the Terezin Declaration urged. Perhaps most importantly, this litigation may provide Von Saher an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction.").

[41] Datlowe, *supra* note 8.

[42] Joshua Keesan, *9th Circuit Warms Up to Claims of Art Looted by Nazis*, DAILY JOURNAL (June 18, 2014) (on file with CARDOZO ARTS & ENT. L.J.)

[43] Contemporary Jewish Museum, *Opening Talk | Reclaimed: Paintings from the Collection of Jacques Goudstikker*, YOUTUBE (Nov. 7, 2010), https://www.youtube.com/watch?v=bPQD4v-J_dc; *see also* Answering Brief of Defendants-Appellees, Von Saher v. Norton Simon Museum of Art at Pasadena & Norton Simon Art Foundation, No. CV 07-2866-JFW (JTLx), 2007 WL 4302726 (C.D. Cal. Oct. 18, 2007) (No. 07-56691), 2008 WL 2196421, at *9; First Amended Complaint, *Von Saher*, 2007 WL 4302726 (No. 07-2866), 2011 WL 12544171, at ¶¶ 10–12; Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 20 (S.D.N.Y. 1976) (In the early 1920s, the Soviet Union seized the Cranachs from the Church of the Holy Trinity in Kiev, Ukraine and transferred them to the repositories of a state-owned Kiev museum at Kievo Pecherskaia Lawra Monastery. Around 1927, the Cranachs were transferred, for a second time, to the repositories of the Art Museum of the Ukrainian Academy of Science, which was also located in Kiev. Soon

were then incorporated into Goudstikker's extensive art collection. The Goudstikker Gallery was maintained in a seventeenth-century canal building located in Amsterdam and was comprised of approximately 1,200 works of art, including those of Rembrandt, Steen, Ruisdael, and van Gogh.[44]

On May 10, 1940, the Nazis invaded the Netherlands.[45] Three days later, Goudstikker, along with his wife Desiree ("Desi") and infant son Eduard ("Edo"), fled to Amsterdam and boarded a ship to South America, leaving behind his entire art collection with his mother Emilie.[46] The only object of value Jacques took was a black notebook (known as "The Blackbook"), detailing the inventory of his collection.[47] On May 16, 1940, two days into their journey, Jacques died in an accident aboard the ship and was buried in England.[48] Desi and Edo escaped to the United States and remained in New York for the duration of the war.[49]

B. *The Forced Sale to the Nazis*

In 1940, after the Goudstikkers fled the Netherlands, the Nazis, led by Hermann Göring, Second in Command of the Third Reich, looted the Goudstikker gallery through a forced sale of its assets.[50] The coercive sale of Goudstikker's entire art collection was a common practice of the Nazi regime to induce owners of property to "sell" their assets to the Nazis under duress.[51] Under explicit warnings from Göring that her and

after, the Soviet authorities began selling seized works of art abroad, including those that had been housed in various state-owned museums. In 1931, the Soviet authorities held an auction at the Lepke Auction House in Berlin titled "The Stroganoff Collection." The auction included works from the Stroganoff family, one of Russia's foremost noble houses, although not all of the auctioned works of art had been part of the famed Stroganoff Collection. The Cranachs were among the auctioned works and in May 1931 Jacques Goudstikker purchased them.)

44 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 959 (9th Cir. 2010).

45 Contemporary Jewish Museum, *supra* note 43.

46 *Id.*

47 *Id.* The Blackbook was a portable inventory cataloging the works of art that made up Goudstikker's collection. It included where each work was bought or exhibited but contained no visuals. The Blackbook has served as the key instrument in establishing claims in restitution of works of art that belonged to the Goudstikker collection. *See* Brief of Appellant, *Von Saher*, 2007 WL 4302726 (No. 07-56691), 2008 WL 644327, at *6 ("[T]he Blackbook . . . is currently located in the Goudstikker archives, maintained by the Municipal Archives of Amsterdam. The Blackbook lists the Cranachs and indicates that they were purchased at the Lepke Auction House and were from the Church of Holy Trinity in Kiev.").

48 Contemporary Jewish Museum, *supra* note 43.

49 *Id.*

50 Brief of Appellant, *supra* note 47, at *6.

51 Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 721 (9th Cir. 2014); *see also* Katharine N. Skinner, Note, *Restituting Nazi-Looted Art: Domestic, Legislative, and Binding Intervention to Balance the Interests of Victims and Museums*, 15 VAND. J. ENT. & TECH. L. 673, 674–75 (2013) ("[I]n many cases the theft was much more subtle—accomplished through a signed transfer under duress, for example, or a low price in exchange for safe passage out of the country. This was not simply a method of financial gain for the Nazis but rather a part of their systematic promotion of Aryanization—to destroy minority races and steal their dignified

her son Jacques' property would be confiscated and that she would be deported, Emilie was forced to vote her minority shares in the Gallery for a "sale" to the Nazis at a fraction of their true value.[52] Desi, who together with Edo inherited the majority of the outstanding shares in the Gallery after Goudstikker's death, refused to consent to the proposed sale when Jacques' former employees contacted her.[53] Regardless, the forced sale of the Gallery went forward and the entirety of Goudstikker's assets was sold in two separate transactions.[54] Alois Miedl, a German banker residing in the Netherlands, obtained "Goudstikker's art dealership and certain real and personal property."[55] Göring obtained the majority of the collection, consisting of over 1,000 works of art, including the Cranachs, all of which were sent to Göring's estate near Berlin where they remained for approximately five years.[56]

C. *The Post-War Fate of the Cranachs*

In May 1945, during the liberation of Germany, Allied Forces recovered the Cranachs along with approximately 200 additional Goudstikker collection works of art.[57] The Allied Forces sent the recovered artwork to the Munich Central Collecting Point[58] pursuant to the newly established policies of external and internal restitution.[59]

possessions." (citations omitted)); Government of the Netherlands, *World War II and Its Aftermath in the Netherlands*, at 21 (Oct. 12, 2010) http://www.government.nl/documents-and-publications/leaflets/2010/12/10/world-war-ii-and-its-aftermath-in-the-netherlands.html ("In principle, all sales of works of art by private Jewish individuals . . . in the Netherlands from 10 May 1940 onward are considered to have been forced sales . . . .").

[52] Kaye, *supra* note 22, at 247.

[53] *Id.*

[54] Brief for United States et al. as Amici Curiae Supporting Respondents, Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) (No. 09-1254), 2011 WL 2134984, at *2.

[55] *Id.*

[56] *Von Saher*, 578 F.3d at 1021.

[57] *Id.*; *see also* Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 716 (9th Cir. 2014) ("When American forces arrived on German soil in the winters of 1944 and 1945, they discovered large caches of Nazi-looted and stolen art hidden in castles, banks, salt mines and caves. The United States established collection points for gathering, cataloging, and caring for the recovered pieces. At a collection point in Munich, Allied forces identified the Cranachs and other items from the Goudstikker collection." (footnotes omitted)).

[58] *Munich Central Collecting Point Archive*, NAT'L GALLERY OF ART, http://www.nga.gov/content/ngaweb/research/library/imagecollections/core-collection/munich-central.html (last visited April 10, 2016) ("The Munich Central Collecting Point was established to accommodate repositories of Nazi-confiscated works of art and other cultural objects, hidden throughout Germany and Austria, which were discovered by the Allies at the close of World War II. At the central collecting points of Marburg, Wiesbaden, Munich, and the Offenbach Archival Depot, objects were identified, photographed, and restituted to their countries of origin.").

[59] Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54, at *2. ("The policy of external restitution was an outgrowth of the London Declaration of January 5, 1943, in which the Allied nations—including the United States and the Netherlands—reserved the right to invalidate wartime transfers of property. In November 1943, the State Department established an Interdivisional Committee on Reparations, Restitution, and Property Rights, which

Under the policy of external restitution, nations formerly occupied by Germans during the war would provide American authorities with lists of property that had been seized from those nations' citizens, setting forth details regarding the location and circumstances of each theft.[60] Based on the information provided, American authorities would identify the listed works of art and return them to their countries of origin.[61] Under the policy of internal restitution, each nation was responsible "for restoring the externally restituted artworks to their rightful owners."[62] In 1944, the Dutch government issued the Restitution of Legal Rights Decree, establishing formal internal restitution procedures in the Netherlands.[63] In 1946, the Allied Forces returned the recovered Goudstikker artwork to the Netherlands "to be held in trust by the Dutch Government for their lawful owners."[64]

In 1946, Desi Goudstikker began restitution proceedings in the Netherlands to recover her family's property that had been forcibly sold during the war.[65] Under Dutch law, claimants had until July 1, 1951 to file restitution petitions for property that had been acquired by the Nazi regime through coercive sales.[66] In order to recover their property under Dutch restitution law, all claimants, like Desi, who had received

determined that property taken by the Nazis should be turned over to its country of origin, with the expectation that the country of origin would return the property to its lawful owners"); *see also* Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1046 (C.D. Cal. 2012) ("On July 29, 1945, at the Potsdam Conference, President Truman formally adopted a policy of 'external restitution,' which governed looted artwork found within the United States' zone of occupation. Under this policy, the United States determined that looted art should be returned to the countries of origin, not to individual owners, allowing the newly liberated governments to restitute the art to individual owners."); Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report, Chapter V: Restitution of Victims' Assets (Dec. 2000), http://govinfo.library.unt.edu/pcha/PlunderRestitution.html/html/StaffChapter5.html. The U.S. authorities stopped accepting claims for external restitution on September 15, 1948. *Id.*

60 *Von Saher*, 754 F.3d at 716.

61 *Id.*

62 *Id.* "[T]he Restitution of Legal Rights Decree . . . was established to create special rules regarding restitution of legal rights and restoration of rights in connection with the liberalization of the [Netherlands] following World War II. The Decree included provisions addressing the restitution of wrongful acts committed in enemy territory during the war." *Id.* at 722.

63 *Id.*; *see also Reparations Information: The Netherlands, Overview*, U.S. HOLOCAUST MEM'L MUSEUM, http://www.ushmm.org/information/exhibitions/online-features/special-focus/holocaust-era-assets/reparations-information-netherlands-overview (last visited Oct. 31, 2014) ("The aim of the [Restitution of Legal Rights Decree] was to restore the legal rights of the dispossessed wherever possible and to return to them the property of which they had been robbed.").

64 Kaye, *supra* note 22, at 247.

65 *Von Saher*, 754 F.3d at 716 ("Upon [Desi's] return but before she made an official claim, the Dutch government characterized the Göring and Miedl transactions as voluntary sales undertaken without coercion. Thus, the government determined that it had no obligation to restore the looted property to the Goudstikker family. The government also took the position that if Desi wanted her property returned, she would have to pay for it . . . .").

66 Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1047 (C.D. Cal. 2012).

monetary compensation from the Nazis, were required to return those funds in exchange for their assets.[67] In 1951, Desi filed a timely restitution petition and subsequently entered into a settlement agreement on August 1, 1952 with respect to the property taken by Alois Miedl.[68] However, neither the claim nor the settlement included any of the Goudstikker property taken by Hermann Göring, including the Cranachs.[69] The deadline for filing Dutch restitution petitions lapsed without Desi having filed a petition for the property acquired by Göring.[70]

D. *The Stroganoff Restitution Claim with the Dutch Government*

In May 1961, George Stroganoff-Scherbatoff ("Stroganoff"), an heir of the Russian aristocratic family, filed a restitution claim with the Dutch government for the return of the Cranachs and other paintings.[71] Stroganoff claimed that the artwork had belonged to his family and that it had been seized by the Soviet Union and unlawfully auctioned to Goudstikker.[72] In July 1966, the Dutch government settled the claim by giving the Cranachs and an additional painting to Stroganoff in return for monetary compensation.[73] The Norton Simon Museum purchased the Cranachs from the Stroganoff family in 1971, and they have remained in the museum's possession since then.[74] In November 2000, Marei von Saher discovered that the Cranachs were on display at the Norton Simon Museum.[75] Despite von Saher's repeated demands for the return of the Cranachs, the museum refused to oblige.[76] In 2007, after six years of unsuccessful settlement negotiations and two failed mediations with the Norton Simon Museum, von Saher brought an

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67 *Id.*

68 Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54, at *3; *see also Von Saher*, 754 F.3d at 716–17 ("The [settlement] agreement stated that Desi acquiesced to the settlement in order to avoid years of expensive litigation and due to her dissatisfaction with the Dutch government's refusal to compensate her for the extraordinary losses the Goudstikker family suffered at the hands of the Nazis during the war.").

69 *Von Saher*, 862 F. Supp. 2d at 1047 ("The settlement did not include any of her claims related to the works taken as a result of the Göring transaction . . . [f]or a variety of reasons but primarily because [Desi] believed the restitution proceedings were unfair . . . ."); *see also Von Saher*, 754 F.3d at 717 ("Given the government's position that the Nazi-era sales were voluntary and because of its refusal to compensate the Goudstikkers for their losses, Desi believed that she would not be successful in a restitution proceeding to recover the artworks Göring had looted.").

70 *Von Saher*, 754 F.3d at 722.

71 *Von Saher*, 862 F. Supp. 2d at 1047.

72 Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54, at *3–4; *see also* Mike Boehm, *Norton Simon Museum Seeks Rehearing After 'Adam and Eve' Setback*, L.A. TIMES (July 22, 2014, 9:36 AM), http://www.latimes.com/entertainment/arts/culture/la-et-cm-nazi-looted-art-norton-simon-museum-adam-eve-20140721-story.html.

73 *Id.*

74 *Id.*

75 Brief of Appellant, *supra* note 47, at *7.

76 Boehm, *supra* note 72; *see also* Kaye, *supra* note 22, at 252.

action in federal court.

III. THE COMMENCEMENT OF *VON SAHER V. NORTON SIMON MUSEUM OF ART AT PASADENA* AND ITS COMPLICATED PROCEDURAL HISTORY

A. *The District Court Proceeding*

On May 1, 2007, von Saher filed a complaint in the United States District Court for the Central District of California setting forth causes of action for "replevin, conversion, [and] damages under Cal[ifornia] Penal Code § 496, [for] a judgment declaring Marei to be the lawful owner of the Cranachs, and to quiet title."[77] The complaint alleged that it was timely filed pursuant to Section 354.3 of the California Code of Civil Procedure, a state law that extended until December 31, 2010 the statute of limitations for claims involving the return of Nazi-looted art brought in California against museums or galleries.[78]

On October 18, 2007, the District Court issued an order granting the Norton Simon Museum's motion to dismiss the Complaint in its entirety with prejudice.[79] The District Court, relying heavily on the Ninth Circuit's 2003 decision in *Deutsch v. Turner Corporation*,[80] held Section 354.3 unconstitutional, stating, "'California seeks to redress wrongs committed in the course of the Second World War' [with] a legislative act which 'intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving

[77] Brief of Appellant, *supra* note 47, at *3; *see also* CAL. PENAL CODE § 496 (West 2014).

[78] CAL. CIV. PROC. CODE § 354.3 (West 2014). In 2002, the California legislature enacted Section 354.3 of its Code of Civil Procedure entitled "Recovery of Holocaust-era artwork from enumerated entities." Section 354.3(a)(1) defines an "[e]ntity" as "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Section 354.3(a)(2) defines "Holocaust-era artwork" as "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive." Section 354.3(b) of the statute provides "[n]otwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity . . . ." Lastly, Section 354.3(c) of the statute provides that "any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010."

[79] Order Granting Defendants' Motion to Dismiss, Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx) (C.D. Cal. 2007), 2007 WL 4302726.

[80] Deutsch v. Turner Corp., 324 F.3d 692, 713–15 (9th Cir. 2003). In *Deutsch*, the Ninth Circuit addressed the constitutionality of California Civil Procedure Code Section 354.6, a statute substantially similar to California Civil Procedure Code Section 354.3. Section 354.6 was passed by the California legislature in 1999 to create a cause of action for claims brought in regard to slave and forced labor during World War II. Like Section 354.3, Section 354.6 provided that certain claims were not time-barred if an action was commenced on or before December 31, 2010. In *Deutsch*, the Ninth Circuit held Section 354.6 to be unconstitutional on the grounds that it violated the foreign affairs doctrine. "[T]he Constitution allocates the power over foreign affairs to the federal government exclusively, and the power to make and resolve war, including the authority to resolve war claims, is central to the foreign affairs power in the constitutional design. In the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from exercising foreign affairs powers, including modifying the federal government's resolution of war-related disputes." *Deutsch*, 324 F.3d at 713–14.

war claims.'"[81] Accordingly, the District Court held that Section 354.3 was preempted by the federal government's exclusive power to conduct foreign affairs.[82]

In its opinion, the District Court reiterated the Supreme Court's characterization of foreign affairs powers as being "primarily, if not exclusively, [a] federal power,"[83] and that when a "state law conflicts with a federal action such as a treaty, federal statute, or express executive branch policy," that state law is unconstitutional under the foreign affairs doctrine.[84] The District Court explained that courts rely on two distinct theories when declaring state laws unconstitutional or preempted under the foreign affairs doctrine: conflict preemption and field preemption.[85] Conflict preemption occurs when "state law conflicts with a federal foreign policy, and the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of that federal policy."[86] Field preemption applies "[i]f a state were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility. . . ."[87] Additionally, the court held von Saher's claims to be untimely pursuant to the then-enacted California Code of Civil Procedure Section 338, California's general three-year statute of limitations governing "actions for the specific recovery of personal property."[88]

[81] Order Granting Defendants' Motion to Dismiss, *supra* note 79, at *3 (quoting *Deutsch*, 324 F.3d at 712).

[82] O'Donnell, *supra* note 12.

[83] Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010); *see also* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003); Zschernig v. Miller, 389 U.S. 429 (1968); Hines v. Davidowitz, 312 U.S. 52 (1941).

[84] *Von Saher*, 578 F.3d at 1022; *see also Garamendi*, 539 U.S. at 421–22 (invalidating a California statute conflicting with Presidential foreign policy); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373–74 (2000) (invalidating a Massachusetts statute which stood as an obstacle to a Congressional act imposing sanctions on Burma); U.S. v. Belmont, 301 U.S. 324, 327 (1937) (holding that the Litvinov Assignment, an executive agreement, preempted New York public policy).

[85] Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1049–50 (C.D. Cal. 2012).

[86] *Id.* at 1050 (quoting Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 961 (9th Cir. 2010)).

[87] *Id.* at 1049 (quoting *Garamendi*, 539 U.S. at 420 n.11).

[88] CAL. CIV. PROC. CODE § 338(c)(1) (West 2014); *see also* Order Granting Defendants' Motion to Dismiss, *supra* note 79, at *3 ("Under the version of California Code of Civil Procedure § 338 in effect at the time Defendants acquired the Cranachs, Plaintiff's predecessor-in-interest had three years to bring '[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.' According to her Complaint, Plaintiff did not inherit her alleged claim to the Cranachs until July 21, 1996—long after the applicable statute of limitations on that claim would have expired. As a result, in the absence of Section 354.3, it is apparent from the allegations of Plaintiff's Complaint that each of Plaintiff's underlying claims for relief is time-barred." (citations omitted)).

B. *The First Appeal to the Ninth Circuit*

On January 31, 2008, von Saher appealed the District Court's decision to the Ninth Circuit.[89] On August 19, 2009, the Ninth Circuit affirmed in part, reversed in part, and remanded to the district court for further proceedings.[90] The Ninth Circuit held that Section 354.3 was not preempted by the federal government's policy of external restitution, as that policy ceased to exist in 1948.[91] However, the Ninth Circuit upheld the district court's holding that Section 354.3 was preempted under the foreign affairs doctrine, specifically under field preemption, since "the power to legislate restitution and reparation claims, is one that has been exclusively reserved to the national government by the Constitution."[92]

Although von Saher could not bring her claim under Section 354.3, the Ninth Circuit held that she might be able to state a cause of action within the three-year statute of limitations under Section 338 of the California Code of Civil Procedure for actions seeking recovery of personal property, if the statute of limitations "began to accrue when she discovered or reasonably could have discovered her claim to the Cranachs, and their whereabouts."[93] Ruling that it was unclear from the

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[89] Brief of Appellant, *supra* note 47, at *10–12 ("The District Court erroneously held that Cal. Civ. Proc. Code § 354.3 . . . is facially unconstitutional under the 'foreign affairs doctrine' as interpreted by the Ninth Circuit in *Deutsch* . . . [T]he order is also erroneous and must be reversed because the District Court erred in holding that, in the absence of Section 354.3, Marei's claims would be time barred under the version of Section 338(c) in effect at the time the Museum acquired the Cranachs, irrespective of when she discovered their whereabouts."). The Plaintiff's appeal was supported by the Attorney General of California along with several other organizations, including Bet Tzedak Legal Services, the Jewish Federation Council of Greater Los Angeles, the American Jewish Congress, the American Jewish Committee, the Simon Wiesenthal Center and the Commission for Art Recovery. *See* Brief of Bet Tzedek Legal Services et. al. as Amici Curiae Supporting Plaintiff-Appellant, Marei von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx), 2007 WL 4302726 (C.D. Cal. 2007) (No. 07-56691), 2007 WL 4984834.

[90] *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016 (9th Cir. 2009), *superseded by* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010).

[91] *Von Saher*, 592 F.3d at 963 ("The United States's policy of external restitution, however, ended in 1948. After September 15, 1948, the U.S. authorities refused to accept any more claims for external restitution.").

[92] *Id.* at 967 ("Section 354.3, at its core, concerns restitution for injuries inflicted by the Nazi regime during World War II. Claims brought under this statute, including the instant claim, would require California courts to review acts of restitution made by foreign governments . . . . In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. This example illustrates that § 354.3 claims cannot be separated from the Nazi transgressions from which they arise.").

[93] *Id.* at 969. "Decisions from California's intermediate appellate court have reached differing conclusions as to when the statute of limitations under § 338 begins to run for property stolen prior to 1983." *Id.* at 968. "At the time the museum acquired the Cranachs, around 1971, § 338 provided a strict three-year statute of limitations. In 1982, the section was amended to incorporate a discovery rule: '[T]he cause of action in the case of theft, as defined in § 484 of the Penal Code, of any art or artifact is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally

face of the Complaint whether the statute of limitations had expired, the Ninth Circuit remanded the issue to the district court for further proceedings.[94] Additionally, the Ninth Circuit held that von Saher's Complaint should not have been dismissed with prejudice and without leave to amend.[95]

C. *The California Legislature Amends Section 338(c)*

On April 12, 2010, von Saher filed a petition for a writ of certiorari with the Supreme Court of the United States,[96] arguing that the district court's invalidation of the state's statute as unconstitutional should be reviewed "by the nation's highest court."[97] The Court denied the petition on June 27, 2011.[98] In February 2010, six weeks after the Ninth Circuit had issued its opinion upholding the District Court's ruling, the California legislature amended Section 338(c) to extend the statute of limitations for "the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer, in the case of an unlawful taking or theft" from three years to six years.[99] Additionally, under the amended code, the statute of limitations for such claims would not begin to "accrue until 'actual discovery[100] rather than 'constructive discovery'[101] of both the identity and whereabouts of" a particular work of art.[102] The amended statute applied retroactively.[103]

investigated the theft.' Saher does not claim that the 1982 amendments should be applied to her case. Rather, she contends that the statute of limitations on her claim did not begin to run until she discovered that the Cranachs were in the possession of the museum." *Id.* at 968 (citations omitted).

94 *Id.* at 969.

95 *Id.*

96 Petition for Writ of Certiorari, Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954 (9th Cir. 2010) (No. 09-1254), 2010 WL 1557533. The petition for a writ of certiorari was supported by several amicus briefs, which were submitted by Bet Tzedak Legal Services, The Simon Wiesenthal Center, The American Jewish Committee, The American Jewish Congress, The Jewish Federation, The Commission for Art Recovery, and Edmund G. Brown Jr., the Attorney General of California, on behalf of the State of California. *Id.*

97 *Marei Von Saher vs. Norton Simon Museum of Art at Pasadena, et al.*, COMM'N FOR ART RECOVERY, http://www.commartrecovery.org/cases/marei-von-saher-vs-norton-simon-museum-art-pasadena-et-al (last visited April 10, 2016).

98 *Von Saher*, 592 F.3d 954, *cert. denied* 131 S. Ct. 3055 (2011).

99 CAL. CIV. PROC. CODE § 338 (West 2015).

100 *Id.* ("'Actual discovery' . . . does not include any constructive knowledge imputed by law."); *see also* Cassirer v. Thyssen-Bornemisza Collection Found., 737 F.3d 613, 617 (9th Cir. 2013) ("The amended statute specifies that the six-year period is triggered on 'the actual discovery' by plaintiff of (1) '[t]he identity and the whereabouts of the work of fine art' and (2) '[i]nformation or facts that are sufficient to indicate that the claimant has a claim for a possessory interest in the work of fine art that was unlawfully taken or stolen.'" (citing CAL. CIV. PROC. CODE § 338(c)(3)(A)(i)–(ii))).

101 Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. KAN. L. REV. 75, 103 (2012) ("[T]he constructive discovery rule provides that in certain cases the statute of limitations will not begin to run until the claimant has or should have knowledge of the claim and of the correct entity to sue.").

102 CAL. CIV. PROC. CODE § 338; *see also* Keesan, *supra* note 42.

Relying on amended statute Section 338(c), von Saher filed an amended complaint in district court on November 8, 2011, alleging that she had not actually discovered the identity and whereabouts of the Cranachs until October 25, 2000.[104] On March 22, 2012, the district court, supported by an amicus curiae brief submitted by the Acting Solicitor General,[105] dismissed the case for a second time, holding that the plaintiff's claims were again preempted under the foreign affairs doctrine.[106] In its opinion, the district court held:

> In order to determine whether the Museum has good title to the Cranachs, a California court would necessarily have to review the restitution decisions made by the Dutch government and courts. Such a determination by the Court would seriously undermine the federal government's policy of respecting the finality and outcome of the Dutch government's restitution proceedings . . . .[107]

On October 1, 2012, von Saher appealed the district court's March 2012 decision to the Ninth Circuit.[108] The appeal was granted and

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[103] Keesan, *supra* note 42.

[104] First Amended Complaint, *supra* note 43, at ¶¶ 58–60 ("On or about October 25, 2000, Marei was contacted by a Ukrainian art historian who had been researching the deaccession of works from the Museum of the Academy of Sciences in Kiev, Russia, including the Cranachs that are now at issue in this case. He told Marei that he had happened upon the two works when he visited the Norton Simon Museum in Pasadena, California, and recognized them as the works from Kiev. He explained that he then began to research the history of the Cranachs after their deaccession and in the course of that research learned that they had been acquired by Jacques Goudstikker and later looted from him by the Nazis, and felt compelled to contact Marei. . . . Upon receiving the information from the Ukrainian art historian, as set forth above, Marei immediately began investigating her claim to the Cranachs and promptly contacted the Museum. This led to six years of discussions, two fruitless mediations and an agreement entered into between Marei and the Museum that tolled any statute of limitations as of September 26, 2003.").

[105] Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54. This brief, known as the Brief of the Solicitor General, was filed with the Supreme Court in connection with Marei's petition for a writ of certiorari from the Ninth Circuit's 2010 ruling. On October 4, 2010, the Court had issued an order inviting Neal Kumar Katyal, the Acting Solicitor General, to file briefs expressing the views of the United States in *Von Saher*. The Brief of the Solicitor General was filed on May 27, 2011. The Supreme Court denied Marei's petition for writ of certiorari one month later. *Id.*

[106] Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1052–53 (C.D. Cal. 2012) ("[T]he United States made a decision and chose its favored remedy for the restitution of Nazi-looted art, i.e. a country of origin's bona fide restitution proceedings. This external restitution policy has not changed since it was first adopted by the United States after World War II. However, Plaintiff's action seeks to trump and interfere with United States foreign policy, by relying on an entirely different remedy for the restitution of Nazi-looted art, i.e. the laws of the State of California."); *see also* Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54, at *19 ("When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings.").

[107] *Von Saher*, 862 F. Supp. 2d at 1053.

[108] Brief of Appellant, *Von Saher*, 862 F. Supp. 2d 1044 (No. 12-55733), 2012 WL 4793678; *see*

argued before the appellate court on August 22, 2013.[109]

D. *The Ninth Circuit's Second Decision*

On June 6, 2014, in a 2–1 decision, the Ninth Circuit reversed the district court's March 2012 decision, restoring the plaintiff's claims in *Von Saher* and remanding to the district court for further proceedings.[110] In addressing the issue of whether the plaintiff's specific claims for replevin and conversion against the Norton Simon Museum conflicted with the foreign policy of the United States with respect to claims of restitution, the Court answered in the negative.[111] In answering this question, the Ninth Circuit:

> [S]hifted its analysis from its earlier decisions . . . about whether the revised statute of limitations was itself a restitution mechanism . . . [to] whether claims either revived by the California law generally, or von Saher's case specifically, conflict with the actual current foreign policy of the United States.[112]

In reaching its decision, the Ninth Circuit relied heavily on the fact that the Cranachs were never subject to immediate post-war internal restitution proceedings in the Netherlands.[113] While the Court recognized the United States' continuing interest in respecting "the finality of 'appropriate actions' taken in a foreign nation to restitute Nazi-confiscated art," it also relied significantly on the plaintiff's

Von Saher, 754 F.3d 712.

109 *Von Saher*, 754 F.3d 712.

110 *Id.* Senior Circuit Judge Nelson and Circuit Judge Pregerson wrote for the majority. Circuit Judge Wardlaw filed a dissenting opinion ("In my view, Von Saher's attempt to recover the Cranachs in U.S. courts directly thwarts the central objective of U.S. foreign policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin. The majority concludes that Von Saher's claims do not conflict with federal policy because the Cranachs were never subject to any restitution proceedings in the Netherlands. . . . [H]owever, the relevant issue is whether the Cranachs were subject *or potentially subject* to bona fide internal proceedings. The majority fails to acknowledge the Executive's clear determination that the Goudstikkers had an adequate opportunity to assert their claim after the war.") *Id.* at 729 (emphasis in original). In its decision, the Ninth Circuit did not reach the issue of whether Plaintiff's claims were time-barred under the revised California Code of Civil Procedure Section 338(c)(3)(A). *Id.* (majority opinion).

111 *Id.* at 720.

112 O'Donnell, *supra* note 12.

113 *Von Saher*, 754 F.3d at 721–22 ("'[T]he post-war Dutch Government was concerned that the immediate and automatic return of Jewish property to its original owners would have created chaos in the legal system and damaged the economic recovery of [t]he Netherlands' . . . Desi was 'met with hostility by the postwar Dutch Government' and 'confronted a restitution regime that made it difficult for Jews like [her] to recover their property.' In fact, the Dutch government went so far as to take the [position] that the transaction between Göring and the Goudstikker Gallery was voluntary and taken without coercion. Not surprisingly, Desi decided that she could not achieve a successful result in a sham restitution proceeding to recover the artworks Göring had looted.").

allegations in the case.[114]

First, as alleged by plaintiff, after returning to the Netherlands in 1946 in hopes of recovering her family's seized property, Desi was met with a "legalistic, bureaucratic, cold and often even callous" initial post-war restitution system, the deficient nature of which even the Dutch government has now acknowledged.[115] As such, Desi opted not to file, prior to the July 1, 1951 deadline, an internal restitution claim with respect to her family's property that had been seized by Göring.[116]

Second, the Dutch government conveyed the Cranachs to Stroganoff in 1966, before Desi or her heirs could make another claim to the artwork.[117] In response, the Norton Simon Museum contended that the conveyance of the Cranachs by the Dutch government to Stroganoff, as the rightful heir to the Cranachs, constituted a proper restitution claim.[118] However, the Ninth Circuit found that the record in the case did not support such a characterization.[119] To the extent Stroganoff filed a restitution claim against the Dutch government in the 1960s for the return of the Cranachs, that claim was based on the "allegedly wrongful seizure" of the Cranachs and other works of art by the Soviet Union prior to Jacques Goudstikker's acquisition of the Cranachs in 1931.[120] As the claim was seemingly based on "events which predated the war and any wartime seizure of property," it was unlikely that Stroganoff's claim was one of internal restitution.[121]

Thus, the Ninth Circuit concluded that the Cranachs had never been subject to any post-war internal restitution proceedings in the Netherlands and therefore this matter was not preempted by the foreign affairs doctrine.[122] As such, von Saher's claim to proceed would not "disturb the finality of any internal restitution proceedings—appropriate or not—in the Netherlands."[123] Not only did the Ninth Circuit find an absence of conflict between the plaintiff's claims and U.S. federal

114 *Id.* at 722; *see also* Keesan, *supra* note 42.

115 *Von Saher*, 754 F.3d at 717; *see also* Government of the Netherlands, *supra* note 51.

116 *Von Saher*, 754 F.3d at 721–23.

117 *Id.* at 716.

118 *Id.* at 722.

119 *Id.* ("[T]he deadline for filing an internal restitution claim in the Netherlands expired July 1, 1951, and Stroganoff did not assert his claim to the Cranachs until a decade later. In addition, the Restitution of Legal Rights Decree . . . was established to create 'special rules regarding restitution of legal rights and restoration of rights in connection with the liberalization of the [Netherlands]' following World War II.").

120 *Id.*

121 *Id.* ("To the extent that Stroganoff made a claim of restitution, however, it was based on the allegedly wrongful seizure of the paintings by the Soviet Union *before* the Soviets sold the Cranachs to Jacques Goudstikker in 1931—events which predated the war and any wartime seizure of property. Thus, it seems dubious at best to cast Stroganoff's claim as one of internal restitution.").

122 Keesan, *supra* note 42.

123 Ofgang, *supra* note 6; *see also Von Saher*, 754 F.3d at 723.

policy, but the Court also held that the claims in *Von Saher* were actually in concert with U.S. federal policy, as "Von Saher is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims, again, because the Cranachs were never subject to internal restitution proceedings."[124] Allowing the plaintiff's lawsuit to proceed would encourage the Norton Simon Museum, a private entity, to adhere to the Washington Principles, as advocated by the Terezin Declaration. Furthermore, the Ninth Circuit noted that the litigation might provide the plaintiff "an opportunity to achieve a just and fair outcome to rectify the consequences of the forced transaction with Göring during the war, even if such a result is no longer capable of being expeditiously obtained."[125]

E. *The Ninth Circuit Invokes the Act of State Doctrine*

In addition to reversing the district court's ruling on the issue of preemption, the Ninth Circuit remanded to the lower court for further proceedings to consider whether the Act of State Doctrine might bar the plaintiff's claims in the case.[126] In the six years of litigation that *Von Saher* had endured up to that point, the issue as to whether the Act of State Doctrine might be implicated had never been presented.[127] The Act of State Doctrine holds that "one nation's acts within its own borders cannot be challenged or modified in the courts of another."[128] Historically, the justification for invoking the Act of State Doctrine has depended on the significance of the issue's implications for United States foreign policy.[129] Thus, "act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign."[130]

The Ninth Circuit held that, on remand, the district court would

124 *Von Saher*, 754 F.3d at 723.

125 *Id.*

126 O'Donnell, *supra* note 12; *see also Von Saher*, 754 F.3d at 724–27.

127 *Von Saher*, 754 F.3d at 726.

128 Keesan, *supra* note 42; *see also* W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400, 405 (1990) ("In every case in which . . . the act of state doctrine appli[es], the relief sought . . . would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[T]he (Judicial Branch) will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."); Stroganoff-Scherbatoff v. Weldon, 420 F. Supp. 18, 20 (S.D.N.Y. 1976) ("The Act of State Doctrine requires courts of this country to refrain from independent examination of the validity of a taking of property by a sovereign state where 1) the foreign government is recognized by the United States at the time of the lawsuit, and 2) the taking of the property by the foreign sovereign occurred within its own territorial boundaries.").

129 Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1047 (9th Cir. 1983).

130 *W.S. Kirkpatrick*, 493 U.S. at 406.

need to determine whether the conveyance of the Cranachs by the Dutch government to Stroganoff in 1966 constituted an official act of a foreign sovereign.[131] If so, the Act of State Doctrine would be implicated, and the conveyance by the Dutch government would likely be entitled to deference by U.S. courts.[132] However, due to insufficient information regarding the post-war conveyance of the Cranachs to Stroganoff—in particular whether the conveyance to Stroganoff was "attendant to 'restitution proceedings'" by a sovereign power or was merely a commercial transaction on behalf of the Dutch government—the Ninth Circuit remanded to the district court for further information to determine whether the Act of State Doctrine would apply.[133]

IV. THE SUPREME COURT'S DENIAL OF THE NORTON SIMON MUSEUM'S PETITION FOR A WRIT OF CERTIORARI AND THE IMPLICATION OF THE NINTH CIRCUIT'S RULING ON FUTURE RESTITUTION CLAIMS

On July 17, 2014, the Norton Simon Museum petitioned the Ninth Circuit for rehearing and rehearing en banc, which was denied on August 14, 2014.[134] Less than a week later, on August 20, 2014, the Norton Simon Museum filed an unopposed motion requesting that the Ninth Circuit stay its mandate of remand in *Von Saher* pending the disposition of the Museum's intended petition for a writ of certiorari to the United States Supreme Court.[135]

The Norton Simon Museum argued that the Ninth Circuit had decided significant threshold questions in its June opinion.[136] One of these threshold questions involved the consideration to be given to executive statements on foreign policy, such as the Solicitor General's brief filed in 2011.[137] According to the motion, the statements at issue in *Von Saher* involved World War II remedies adopted and implemented by the United States, thereby implicating the Executive Branch's "core power to resolve war."[138] Relying heavily on Judge Wardlaw's dissent in the Ninth Circuit's opinion, the Norton Simon Museum asserted that Supreme Court precedent "establishes that an *amicus* brief signed by high-level executive officials . . . is sufficient to set forth the official

131 *Von Saher*, 754 F.3d at 725–26.

132 *Id.*; *see also* O'Donnell, *supra* note 12 ("[T]he argument would go, even if returning the Cranachs to Stroganoff-Scherbatoff deprived Goudstikker's widow of what was otherwise her property, that deprivation was an act by the Dutch government to the detriment of a Dutch citizen, and thus beyond review.").

133 *Von Saher*, 754 F.3d at 726.

134 Order, *Von Saher*, 754 F.3d 712 (No. 12-55733), ECF No. 57.

135 Unopposed Motion for Stay of Mandate Pending Disposition of a Petition for a Writ of Certiorari of Defendants-Appellees, *Von Saher*, 754 F.3d 712 (No. 12-55733), ECF No. 58.

136 *Id.* at 1.

137 *Id.* at 1–2.

138 *Id.* at 4.

position of the Executive on foreign policy."[139] The Museum's motion cited past cases in which the Supreme Court agreed that the Solicitor General's views should be accepted as an authoritative interpretation of United States foreign policy by the courts, including the Ninth Circuit, which previously recognized executive statements on foreign policy as binding.[140] Based on this precedent, the Norton Simon Museum argued that "the courts are bound to accept the Executive's statement of foreign policy and its related assessment of foreign restitution practices" and must defer to its views in the conduct of foreign affairs.[141]

On August 22, 2014, the Ninth Circuit granted the Norton Simon Museum's motion for stay.[142] On November 10, 2014, the Norton Simon Museum filed its petition for a writ of certiorari seeking Supreme Court review of the Ninth Circuit's allegedly "profoundly misguided decision," which conflicts with significant legal principles previously upheld by the Court that could "open the door for other cases that would improperly try to second-guess U.S. foreign policy outcomes."[143] In its petition, the Norton Simon Museum requested that the Court grant review and dismiss *Von Saher* on the ground that the Act of State Doctrine bars the plaintiff's claims.[144]

On January 20, 2015, after the submission of both von Saher's brief in opposition[145] and the Norton Simon Museum's reply brief,[146] the Supreme Court denied the Norton Simon Museum's certiorari

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139 *Id.* at 5 (citing Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 411, 421–23 & n.13 (2003)).

140 Mike Boehm, *Norton Simon Asks Supreme Court to Let It Keep 'Adam' and 'Eve'*, L.A. TIMES (Nov. 13, 2014, 5:16 PM), http://www.latimes.com/entertainment/arts/culture/la-et-cm-norton-simon-adam-eve-nazi-art-looting-supreme-court-20141113-story.html; *see also* Munaf v. Geren, 553 U.S. 674, 700–01 (2008) ("[I]t is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments."); *Garamendi*, 539 U.S. at 421–423; Al-Haramain Islamic Found., Inc. v. Bush, 507 F.3d 1190, 1203 (9th Cir. 2007) ("[W]e acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.").

141 Unopposed Motion for Stay of Mandate Pending Disposition of a Petition for a Writ of Certiorari, *supra* note 135, at 6.

142 Order, Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712 (9th Cir. 2014) (No. 12-55733), ECF No. 59.

143 Boehm, *supra* note 140.

144 Petition for Writ of Certiorari, Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712 (9th Cir. 2014) (No. 14-545), 2014 WL 5907562, at *32.

145 Brief in Opposition, Norton Simon Museum of Art at Pasadena v. Von Saher, No. 14-545, 2014 WL 7273626, at *34 ("This interlocutory Petition involves a decision of the Ninth Circuit that is fully consistent with existing precedent for which there is no split among the circuit courts. The Ninth Circuit's refusal to accept incorrect factual findings while respecting the Executive's statement of foreign policy and correctly applying it is well supported. For the foregoing reasons, review by this Court is unwarranted. Accordingly, Respondent respectfully requests that the Petition be denied.").

146 Reply Brief for Petitioners, *Norton Simon Museum*, (No. 14-545) 2014 WL 7387212, at *1–2 ("If the Ninth Circuit's remarkable decision in this case is allowed to stand, it will become a blueprint for future panels of the Ninth Circuit to follow when they disagree with the Executive's foreign policy views. The Ninth Circuit's decision warrants further review by this Court.").

petition.[147] No reason for the denial was provided.[148] The Supreme Court remanded *Von Saher* to the district court, which has been directed by the Ninth Circuit to consider the implications of the Act of State Doctrine arising from the 1966 sale of the Cranachs by the Dutch government to Stroganoff.[149] At the time of writing this Note, a jury trial is set for September 2016.[150]

V. THE CRITICAL ISSUE: IS THE ACT OF STATE DOCTRINE IMPLICATED IN *VON SAHER*?

The Act of State Doctrine precludes U.S. courts from inquiring into the validity of acts that a recognized foreign sovereign power undertakes within its own territory.[151] The purpose of the doctrine is to prevent courts from "'sit[ting] in judgment' on the validity of actions by foreign sovereigns . . . thereby 'embarrass[ing] the conduct of foreign relations by the political branches of the [American] government.'"[152] Since the establishment of the London Declaration in 1943, the "just and final resolution of claims" to Nazi-stolen art remains of significant importance to the United States.[153] The post-war policies of external and internal restitution, recognized and agreed to by way of the London

147 *Von Saher*, 754 F.3d 712, *cert. denied*, 135 S. Ct. 1158 (2015); *see also* Mike Boehm, *Norton Simon Dealt Setback in Nazi-Looted Art Case*, L.A. TIMES (Jan. 21, 2015, 4:00 AM), http://www.latimes.com/entertainment/arts/la-et-cm-norton-simon-scotus-nazi-looted-art-20150121-story.html; Sarah Cascone, *Supreme Court Declines to Hear Norton Simon's Nazi-Loot Appeal*, ARTNET NEWS (Jan. 21, 2015), http://news.artnet.com/art-world/supreme-court-declines-to-hear-norton-simons-nazi-loot-appeal-227465; Nicholas O'Donnell, *Supreme Court Declines to Hear Norton Simon Intermediate Appeal, Von Saher Claim Returns to Trial Court*, ART LAW REPORT (Jan. 21, 2015), http://www.artlawreport.com/2015/01/21/supreme-court-declines-to-hear-norton-simon-intermediate-appeal-von-saher-claim-returns-to-trial-court/; John Rogers, *Supreme Court Won't Take Up Looted Art at Norton Simon*, PARKRECORD.COM (Jan. 21, 2015, 2:13 PM), http://www.parkrecord.com/ci_27365004/fight-over-ownership-looted-art-at-norton-simon.

148 *Von Saher*, 754 F.3d 712, *cert. denied*, 135 S. Ct. 1158 (2015). The docket simply states that the petition has been denied.

149 Boehm, *supra* note 140; *see also* Boehm, *supra* note 147 ("The 9th Circuit opinion overturning [the] 2012 dismissal of [*Von Saher*] instructs [John Walter, the U.S. District Court judge in Los Angeles who has handled the case] to turn his attention to the Dutch government's handling of 'Adam' and 'Eve.' . . . [O]ne question Walter will consider is whether the Netherlands' 1966 sale of 'Adam' and 'Eve' to the Stroganoff heir qualifies as a policy action by the Dutch government."). On March 2, 2015, the Norton Simon Museum made a motion to dismiss the case. The motion was denied on April 2, 2015. *See* Order Denying Defendants' Motion to Dismiss, Von Saher v. Norton Simon Museum of Art at Pasadena, (No. CV 07-2866-JFW (JTLx)) (C.D. Cal. Apr. 2, 2015), ECF No. 119.

150 Order Continuing Dates Set Forth in the Feb. 19, 2015 Am. Scheduling and Case Management Order, *Von Saher*, (No. CV 07-2866-JFW) (C.D. Cal. Oct.14, 2015), ECF No. 142.

151 Donald T. Kramer, *Modern Status of the Act of State Doctrine*, 12 A.L.R. FED. 707 (1972).

152 Petition for Writ of Certiorari, *supra* note 144, at *30 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897) and First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765 (1972) (alterations in original)); *see also* Munaf v. Geren, 553 U.S. 674, 700–01 (2008) ("[I]t is for the political branches, not the Judiciary, to *assess practices in foreign countries* and to determine national policy *in light of those assessments*." (emphasis added)).

153 Petition for Writ of Certiorari, *supra* note 144, at *2.

Declaration, the Washington Principles, and the Terezin Declaration, were created for the sole purpose of returning Nazi-stolen works of art to their rightful owners, thereby invalidating wartime transfers of such property.[154]

In general, where "appropriate actions have been taken by a foreign government concerning the internal restitution of [Nazi-looted] art," and "'bona fide post-war internal restitution proceedings' [that are] consistent with U.S. foreign policy" have been conducted, the United States has a substantial interest to respect the outcome of the foreign nation's post-war restitution process.[155] The Solicitor General's 2011 brief in *Von Saher* set forth the Executive's statements of American foreign policy regarding the deference owed to internal restitution proceedings conducted by foreign nations.[156] In the case of Nazi-looted art claims, a plaintiff or predecessor need only be afforded an "adequate opportunity" to press claims through a "bona fide" foreign restitution process.[157] So long as the plaintiff or the plaintiff's predecessor "*potentially* had such an opportunity (even if the [plaintiff] failed to avail herself of the process or defaulted on her claim)," the internal restitution proceedings conducted are considered sovereign acts carried out by a foreign power that are not subject to second-guessing by another nation.[158] In such an instance, the Act of State Doctrine is implicated and a lawsuit in the United States asserting a claim for Nazi-stolen art will be dismissed. The Act of State Doctrine upholds the fundamental notion of the separation of powers. In the instance of Nazi-looted art litigation, where questions of American foreign policy arise, the Act of State Doctrine should be implicated to prevent courts from "pass[ing] judgment on foreign justice systems, [thereby] undermin[ing] the [U.S.] Government's ability to speak with one voice in this area."[159]

If the question posed in *Von Saher* were whether the transfer of the Cranachs had been effectuated pursuant to Dutch internal restitution proceedings conducted with respect to a claim to Nazi-looted art filed prior to the 1951 Dutch deadline, plaintiff's claim to the Cranachs would be barred under the act of state doctrine and her case would be dismissed. As stated in the record, Desi, after returning to the Netherlands in the late 1940s, was given an opportunity to file a restitution claim with the Dutch government as to the Cranachs but ultimately chose not to, allowing the 1951 deadline to lapse.[160]

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154 Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 715–16, 721 (9th Cir. 2014).

155 Petition for Writ of Certiorari, *supra* note 144, at *3.

156 Brief for United States et al. as Amici Curiae Supporting Respondents, *supra* note 54.

157 Petition for Writ of Certiorari, *supra* note 144, at *23.

158 *Id.* at *24 (citation omitted).

159 *Id.* at *15–16 (quoting Munaf v. Geren, 553 U.S. 702, 702 (2008)).

160 Von Saher v. Norton Simon Museum of Art at Pasadena, 862 F. Supp. 2d 1044, 1047 (C.D.

The facts presented in *Von Saher* are unique in that the Cranach works in question, in effect, were stolen twice.[161] The Cranachs were initially seized by the Soviets in the 1920s and sold to Jacques Goudstikker in a 1931 Soviet-sponsored art auction of the famed Stroganoff Collection.[162] In 1940, the Cranachs were seized for a second time when Hermann Göring and the Nazis looted the Goudstikker gallery.[163] Thus, the remaining question in *Von Saher* does not pertain to a pre-1951 claim regarding the transfer of Nazi-stolen artwork pursuant to Dutch post-World War II internal restitution proceedings, but rather to the transfer of the Cranachs by the Dutch government to Stroganoff in 1966 pursuant to a claim first asserted by Stroganoff in 1961.[164] What remains at issue in *Von Saher* is the characterization of *that* conveyance and whether or not *that* transfer implicates the Act of State Doctrine.

If the 1966 transfer were deemed a sovereign act on behalf of the Dutch government, then pursuant to the Act of State Doctrine, dismissal of the plaintiff's claims in *Von Saher* clearly would be warranted. However, there have been exceptional circumstances where the Act of State Doctrine has been found inapplicable. Exceptions to the Act of State Doctrine include state department intervention,[165] violations under international law,[166] human rights violations,[167] statutory exceptions,[168]

Cal. 2012)

161 Mike Boehm, *Norton Simon Grandson Urges Museum to Be 'Just' with 'Adam' and 'Eve'*, L.A. TIMES (Nov. 14, 2010), http://www.latimes.com/entertainment/arts/la-et-cm-norton-simon-grandson-20141113-story.html.

162 Contemporary Jewish Museum, *supra* note 43.

163 Brief of Appellant, *supra* note 47, at *6.

164 Petition for Writ of Certiorari, *supra* note 144, at *9–*10.

165 Kramer, *supra* note 151. "The Bernstein Exception," whose name originates from the two cases in which it was first promulgated, *Bernstein v. Van Heyghen Freres Societe Anonyme*, 163 F.2d 246 (2d Cir. 1947) and *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 173 F.2d 71 (2d Cir. 1949), provides that the Act of State Doctrine is not applicable in a given situation if the Executive Branch has clearly indicated that it has no objection to the examination by a court in the United States of the validity of the act of a foreign state; *see also* LORI FISLER DAMROSCH & SEAN D. MURPHY, INTERNATIONAL LAW CASES & MATERIALS 712 (6th ed. 2014) ("In *Bernstein*, the U.S. Department of State informed the Court by letter that U.S. foreign relations did not require judicial abstention in cases involving Nazi confiscations, and therefore the Second Circuit did not apply the act of state doctrine."). To date, the United States Supreme Court has specifically refused to pass judgment on the validity of the Bernstein Exception.

166 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964); *see also* Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia, 729 F.2d 422 (6th Cir. 1984); DAMROSCH & MURPHY, *supra* note 165, at 709 ("*Sabbatino* suggests that even if the validity of a foreign government's act in its own territory is at issue, the U.S. court might set aside the act if it violates settled international law. One way that international law might be regarded as 'settled' is if there is a treaty directly on point to which the foreign government is a party.").

167 Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (holding that the act of state doctrine did not bar an action for torture under the Alien Tort Statute); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 cmt. c (1987) ("A claim arising out of an alleged violation of fundamental human rights—for instance, a claim on behalf of a victim of torture or genocide—would (if otherwise sustainable) probably not be defeated by the act of state doctrine,

and—potentially significant to *Von Saher*—commercial acts.[169]

A plurality of the Supreme Court has noted that an exception to the Act of State Doctrine may exist for commercial acts in situations "'where foreign governments do not exercise powers peculiar to sovereigns' and instead 'exercise only those powers that can be exercised by private citizens.'"[170] It is important to note that the Ninth Circuit has not yet decided whether to adopt a commercial exception to the Act of State Doctrine in its jurisdiction.[171] The *Von Saher* litigation now centers upon the issue of whether the 1966 transfer of the Cranachs by the Dutch government to Stroganoff constituted a sovereign act of the Dutch government that would therefore preclude the plaintiff's claim under the Act of State Doctrine, or whether that transfer represented a commercial act, bringing it within an exception to the Doctrine's applicability.

Unfortunately, the present factual record in *Von Saher* has been deemed insufficient to determine the nature of the conveyance.[172] The

since the accepted international law of human rights is well established and contemplates external scrutiny of such acts.").

168 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 444 (1987). In response to the Supreme Court's ruling in *Sabbatino*, Congress enacted the Hickenlooper Amendment. *See* 22 U.S.C. § 2370(e)(2) ("Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided*, That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court."); *see also* Kramer, *supra* note 151 ("[The Amendment] operates to bar American courts from applying the Act of State Doctrine in certain cases relating to a claim of title or some other right to specific property which has been expropriated or nationalized abroad . . . .").

169 Von Saher v. Norton Simon Museum of Art at Pasadena, 754 F.3d 712, 726–27 (9th Cir. 2014).

170 *Id.*; *see also* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 695–96 (1976); Bank of U.S. v. Planters' Bank of Ga., 22 U.S. 904, 907 (1824) ("[W]hen a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.").

171 Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 408 (9th Cir. 1983) ("The Ninth Circuit has not definitively ruled on the commercial exception . . . we need not reach the question whether to adopt an exception to the act of state doctrine for purely commercial activity." (citations omitted)).

172 *Von Saher*, 754 F.3d at 727 ("[W]e cannot determine from the record whether [the Dutch government's transfer of the Cranachs to Stroganoff in 1966] was a commercial sale or whether

Ninth Circuit stated that it could not determine the nature of the conveyance because the record is devoid of any detailed information pertaining to the transfer.[173] The plaintiff contends that the Netherlands "wrongfully delivered the Cranachs to Stroganoff as part of a sale transaction," disputing that the Stroganoff family ever owned the Cranachs, as they were seized from a church in Kiev in the 1920s.[174] Additionally, the plaintiff alleges that until the Ninth Circuit described the facts as it did in *Von Saher I*, no one had ever even referred to the transfer of the Cranachs from the Dutch government to Stroganoff as attendant to "restitution proceedings."[175] Only after the Ninth Circuit made that characterization in *Von Saher I* did the Norton Simon Museum adopt that characterization of the facts as its own.[176] The Ninth Circuit conceded that, for the purpose of plaintiff's appeal, it was legally compelled to accept the allegations in plaintiff's complaint as true.[177] For those reasons, the Ninth Circuit determined that the District Court would be best suited to assess which characterization of the conveyance was proper.[178] On remand, the parties, through evidence to be obtained from pretrial discovery, will need to provide the District Court with a more comprehensive account of the facts concerning the nature of the 1966 transaction of the Cranachs by the Dutch government to Stroganoff. The outcome of *Von Saher* hinges on whether the Court determines the conveyance to be a commercial transaction or one attendant to restitution proceedings.

However, United States courts should not interpret the Ninth Circuit's remand as an opportunity to cast doubt on the firmness of the Act of State Doctrine by questioning whether the adjudicatory process of a foreign nation with regard to Nazi-looted art litigation sufficiently meets American legal standards. The Act of State Doctrine "concerns

the government transferred the Cranachs to Stroganoff to restore his rights in some way.").

173 *Id.* at 726.

174 *Id.*

175 Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 959 (9th Cir. 2010) ("The Cranachs were never restituted to the Goudstikker family. Instead, after restitution proceedings in the Netherlands, the Dutch government delivered the two paintings to George Stroganoff, one of the claimants, and he sold them, through an art dealer, to the Museum.").

176 *Von Saher*, 754 F.3d at 726.

177 First Amended Complaint, *supra* note 43, at ¶¶ 39–43 ("[I]n or about May 1961, [Stroganoff] falsely claimed the Cranachs from the Dutch authorities, asserting that they belonged to his family and that the Dutch Government had no right, title or interest to, or in, them. . . . [E]ven though the Cranachs belonged to the Goudstikker heirs and were never part of the Stroganoff Collection, the Dutch authorities wrongfully delivered the Cranachs to Stroganoff as part of a sale transaction. . . . The art taken by Goering, including the Cranachs, had been handed over to the Dutch Government by the Allies so that they could be returned to their rightful owners—in this case, Goudstikker. The Dutch Government, therefore, held the Cranachs only as a custodian. Because the 1952 Agreement did not settle or waive Goudstikker's claims to the Goering property, the status of the property remained unchanged, and the Dutch Government did not have title to the Cranachs in 1966 when it purported to convey the works to Stroganoff.").

178 *Von Saher*, 754 F.3d at 726.

the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations"[179] and seeks to maintain "the amicable relations between governments and [the] peace of nations."[180] Such second-guessing of the legality of certain acts within a foreign nation's own territory by another nation would create grave contention and distrust among nations, the majority of which initially committed to work together in the restitution of Nazi-looted art through the various voluntary post-war initiatives, and would result in judicial upheaval.

In the 1943 London Declaration, participating nations agreed to work collectively to restitute Nazi-looted property to its rightful owners but also asserted that "[t]he expression of solidarity between the parties also means that they are agreed . . . to follow in this matter similar lines of policy, without derogation to their national sovereignty and having regard to the differences prevailing in the various countries."[181] Accordingly, in developing the Washington Principles, the Washington Conference on Holocaust Era Assets recognized that "among participating nations there are differing legal systems and that countries act within the context of their own laws."[182] Based on these statements, it is clear that the various post-war initiatives regarding the restitution of Nazi-looted art expressly recognized the deference and respect owed by other nations to the adjudicatory process within a particular foreign nation's own territory.

By invoking the Washington Principles in *Von Saher*, the Ninth Circuit properly deemed the protocols therein to constitute United States foreign policy regarding private claims for restitution of Nazi-looted art.[183] United States foreign policy clearly recognizes the Act of State Doctrine with respect to the restitution of Nazi-looted art, and thus United States courts should refrain from inquiring into the validity of a foreign nation's legal processes utilized in the adjudication of Nazi-looted art claims. For American courts to do otherwise would directly contravene the foundation of the post-war initiatives.

Thus, however the District Court in *Von Saher* ultimately characterizes the 1966 transaction involving the Cranachs, it is imperative that the District Court take this opportunity to recognize the

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179 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.").

180 Oetjen v. Central Leather Co., 246 U.S. 297, 304 (1918).

181 *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation and Control*, *supra* note 27.

182 *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 29.

183 Datlowe, *supra* note 8.

proper application and implications of the Act of State Doctrine with respect to such claims of restitution as in *Von Saher*, lest there be a flood of such claims in American courts which would effectively undermine the foundations of the Doctrine.[184]

CONCLUSION

Throughout its years of litigation, *Von Saher v. Norton Simon Museum of Art at Pasadena* has illustrated the way in which litigation involving claims of Nazi-looted art is "manifestly entangled in sensitive foreign policy matters," raising crucial questions involving the separation of powers and judicial discretion.[185] For these reasons, on remand, the District Court should take this opportunity to decide the applicability of both the Act of State Doctrine and any exceptions to the Doctrine, not only in regards to the claims in *Von Saher* but also to help set a precedent for the future litigation of Nazi-looted art claims. The Act of State Doctrine should be invoked where plaintiffs or their predecessors have been afforded adequate opportunities to recover their property through "bona-fide" internal restitution proceedings of a foreign state. However, where there is compelling evidence that such a transfer has been effectuated pursuant to a truly commercial transaction, even if a governmental entity is a party to such, the non-adjudicatory nature of that transaction should preclude invocation of the Act of State Doctrine.

Thus, on remand, the District Court should take the opportunity to reiterate the Ninth Circuit's ruling in *Von Saher* with respect to the legal force of the Washington Principles both as binding on American courts and as a statement of American foreign policy.[186] *Von Saher* illustrates the fact-intensive nature of litigation involving Nazi-stolen art claims. In remanding to the District Court for further proceedings, the Ninth Circuit has provided the lower court with the opportunity to clarify the applicability of the Act of State Doctrine in such cases and the concomitant need for the lower court to conclusively determine whether the transfer of the Cranachs at issue in *Von Saher* was within the context of the Dutch government's internal restitution proceedings or was instead merely a commercial transaction. If the District Court finds that the transfer of the Cranachs constituted a commercial transaction and, in the likely event that *Von Saher* is then appealed for a third time, the Ninth Circuit should take the opportunity to hold valid a commercial exception to the Act of State Doctrine. In doing so, the District Court,

184 Boehm, *supra* note 147 ("Experts on art law foresee a possible nationwide ripple effect for at least some claims to art looted by the Nazis.").

185 O'Donnell, *supra* note 12; *see also* Petition for Writ of Certiorari, *supra* note 144, at *20.

186 *Washington Conference Principles on Nazi-Confiscated Art*, *supra* note 29; *see also* Boehm, *supra* note 147.

and in the event of further appeal, the Ninth Circuit, can clarify the scope of the Doctrine's invocation in the handling of future Nazi-looted art litigation; such action would be consistent with what the Act of State Doctrine seeks to protect, namely the applicability of the Doctrine to instances where the disposition of art has been made pursuant to a foreign government's internal restitution proceedings, as opposed to a disposition by a commercial arms-length agreement.

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