No. 09-1254

In the Supreme Court of the United States

MAREI VON SAHER, PETITIONER

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEFFREY B. WALL
Assistant to the Solicitor General
MARK B. STERN
SHARON SWINGLE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HAROLD HONGJU KOH
Legal Adviser
Department of State
Washington, D.C. 20520-6310

QUESTION PRESENTED

Whether the court of appeals correctly held that federal law preempts a California state statute that creates a cause of action for the recovery of Nazi-confiscated artwork, with an extended statute of limitations for any such action to December 31, 2010.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

Statute—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 09-1254

MAREI VON SAHER, PETITIONER

v.

NORTON SIMON MUSEUM OF ART AT PASADENA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner brought this action to recover two paintings by Lucas Cranach the Elder (the Cranachs). Those paintings were purchased around 1971 by the Norton Simon Art Foundation, and they are currently on display in the Norton Simon Museum of Art at Pasadena (Norton Simon). Because the Cranachs' post-war history and the previous efforts by petitioner and her predecessor to recover them matter to this case, the government recounts that background in some detail.

a. *The United States' external restitution.* Petitioner is the sole heir of Jacques Goudstikker, a Dutch art dealer who purchased the paintings from the Soviet Union in 1931. Goudstikker and his family fled the Netherlands in 1940, following the Nazi invasion. Subsequently, all of Goudstikker's assets were forcibly sold in two transactions: Alois Miedl, a German banker living in the Netherlands, acquired Goudstikker's art dealership and certain real and personal property for 550,000 guilders (or about $4.5 million today); and Hermann Göring, Reichsmarschall of the Third Reich, acquired the bulk of Goudstikker's art collection, which contained over 1,000 artworks and included the Cranachs, for 2 million guilders (or about $16.5 million today). In May 1945, the Cranachs and Goudstikker's other paintings were recovered by the United States Army. In 1946, the United States returned all of the paintings to the Dutch government, pursuant to a policy of "external restitution." Under that policy, the United States returned property taken by the Nazis and recovered by Allied forces, including artworks like the Cranachs, to their countries of origin rather than directly to particular claimed owners. Pet. App. 5a, 8a-10a; see C.A. E.R. 45.

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 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. The Committee foresaw that once the

external restitution had been made, the United States would play no further role in disposition of the property. On July 29, 1945, President Truman approved that policy at the Potsdam Conference, and thereafter American occupying forces implemented the policy under the order of General Eisenhower. The United States set a three-year deadline for filing claims, and it declined to accept any claims for external restitution after September 15, 1948. Pet. App. 15a-18a.

b. *The Netherlands' internal restitution.* In 1946, Goudstikker's widow returned to the Netherlands and began attempting to recover her family's property. Under Dutch law, claimants were given until July 1, 1951, to file a restitution petition, and claimants who had received money in forced sales generally were required to turn over those proceeds to the Dutch government as a condition of receiving their property. C.A. E.R. 23, 48. After negotiating with the Dutch government for several years, Ms. Goudstikker filed a timely petition in 1951 and subsequently entered into a settlement agreement on August 1, 1952. *Id.* at 47-48. Under that agreement, Ms. Goudstikker received most of the real and personal property acquired by Miedl in exchange for returning a portion of the money paid by Miedl and relinquishing claims to the remaining property transferred in the Miedl transaction. *Id.* at 48, 52-53. The agreement did not, however, encompass the artworks acquired by Göring, and the Dutch-imposed deadline for filing restitution claims lapsed. *Id.* at 48-49; see C.A. Supp. E.R. 151-152.

In 1961, George Stroganoff-Scherbatoff (Stroganoff), heir to the Stroganoff family, instituted a restitution proceeding in the Netherlands for the Cranachs and other paintings. C.A. E.R. 282. Stroganoff asserted

that the paintings had been seized from his family by the Soviet Union and unlawfully auctioned to Goudstikker. *Id.* at 279, 282. In July 1966, the Dutch government transferred the Cranachs and another painting to Stroganoff in settlement of his claim and in exchange for a monetary payment. *Id.* at 282. Around 1971, Stroganoff sold the Cranachs to the Norton Simon Art Foundation. *Id.* at 283.

c. *Petitioner's 1998 restitution proceeding.* In 1996, after Ms. Goudstikker and her son had died, petitioner (her daughter-in-law) was left as the sole heir. C.A. E.R. 283. In 1998, petitioner filed a claim with the Dutch State Secretary for Education, Culture, and Science, in which petitioner requested two things: "all properties that Hermann Göring obtained from [Goudstikker] and over which the State has gained control," and the "sales prices" for any such property sold by the State. C.A. Supp. E.R. 147-148. Petitioner's claim thus included the Cranachs, which had been sold to Stroganoff in 1966 in settlement of his claim. C.A. E.R. 282. The State Secretary rejected petitioner's claim as barred by the Dutch statute of limitations on restitution claims, which he declined to waive, finding that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147.

Petitioner sought review of that decision in the Court of Appeals for the Hague, which likewise declined to grant relief. See C.A. Supp. E.R. 145-153.[1] The court

[1] Petitioner contends that the Court of Appeals decided the case only on procedural and jurisdictional grounds. That does not appear to be correct. The court did hold that it could not decide petitioner's claim as an appeal from the State Secretary's decision (because the State Secretary was not a judicial division), see C.A. Supp. E.R. 148-150, or as a

"[took] into consideration that nearly 50 years have now elapsed since the last moment that an application for the restoration of rights could be submitted." *Id.* at 150. In addition, the court concluded, Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151. The court rejected petitioner's argument that Ms. Goudstikker's failure to seek restoration of rights should be excused because she had been misled by Dutch authorities about the nature of the Göring transaction and the value of the paintings. The court pointed out that Ms. Goudstikker had "expert legal advisors" who could have argued that the transaction was involuntary and that she could have requested her own expert appraisal. *Id.* at 152. Finally, the court found that the original restitution proceedings did not violate international law, because "[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights." *Ibid.*

d. *The United States' modern policy.* A number of problems emerged with post-war restitution policy,[2] and as a result, impetus developed for a more equitable approach to recovery of Nazi-looted art. In response, the

---

direct restitution proceeding (because the claim was filed after July 1, 1951, and was thus time-barred), see *id.* at 151. The court then further held, however, that it would not exercise its power "to grant ex officio restoration of rights." *Id.* at 152. In that portion of its opinion, the court made clear that it could grant petitioner relief, *id.* at 151, although it declined to do so on the ground that Ms. Goudstikker had voluntarily forgone the claim in the early 1950s. See *id.* at 151-152; see also C.A. E.R. 61.

[2] See Presidential Advisory Comm'n on Holocaust Assets in the U.S., *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* at SR-140 (2000) (*PCHA Report*).

United States convened a Conference on Holocaust-Era Assets in Washington in 1998. At that Conference, representatives of 13 nongovernmental organizations and 44 governments, including the United States and the Netherlands, reached consensus on the Washington Conference Principles on Nazi-Confiscated Art (Washington Principles). That set of 11 "non-binding principles" is designed "to assist in resolving issues relating to Nazi-confiscated art," "recogniz[ing] that among participating nations there are differing legal systems and that countries act within the context of their own laws." *Washington Conference Principles on Nazi-Confiscated Art* (Dec. 3, 1998), http://www.state.gov/p/eur/rt/hlcst/122038.htm. In general, the Washington Principles encourage national efforts to identify art taken by the Nazis and not subsequently restituted, to publicize the existence of such art, and to restitute it to its pre-war owners.

In June 2009, representatives of 46 governments, including the United States and the Netherlands, reaffirmed the Washington Principles in the Terezin Declaration. That "legally non-binding" Declaration "urge[d] all stakeholders to ensure that their legal systems or alternative processes * * * 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." *Prague Holocaust Era Assets Conference: Terezin Declaration* (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm. Thus, as more fully elaborated below, see p. 18, *infra*, contemporary U.S. policy supports the fair and just resolution of claims involving Nazi-confiscated art, while also respecting the

bona fide internal restitution proceedings of foreign governments.

e. *Petitioner's 2004 restitution proceeding*. From 2000 to 2001, in part in response to the Washington Principles, the Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach," and on that basis it adopted an extended restitution policy. C.A. E.R. 60. In 2004, petitioner filed an application for the return of all artworks formerly owned by Goudstikker that were then in the Dutch government's possession. See *id.* at 41. After referring the matter to the Restitutions Committee, the State Secretary determined that petitioner's application involved "a matter of restoration of rights which has been settled," because "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in this case." *Id.* at 62. For that reason, the State Secretary explained, "this case is not included in the [Dutch government's] current restitution policy." *Ibid.*

The State Secretary nevertheless decided "that in this special case there are grounds that justify a restitution" of artworks still in the Dutch government's possession, based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." C.A. E.R. 62. The State Secretary therefore ordered the transfer to petitioner of more than 200 artworks. The State Secretary did not require petitioner to repay any portion of the two million guilders received from Göring. *Id.* at 62-63. And the State Secretary did not address paintings, like the Cranachs, that were no longer in the government's possession.

2. In 2002, California enacted Section 354.3 of its Code of Civil Procedure, which provides:

> Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any entity.

Cal. Civ. Proc. Code § 354.3(b) (West 2006). The statute defines an "[e]ntity" as "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." *Id.* § 354.3(a)(1). It defines "Holocaust-era artwork" as "any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945." *Id.* § 354.3(a)(2). Finally, the statute provides that "[a]ny 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." *Id.* § 354.3(c).

3. In 2007, petitioner, a resident of Connecticut, brought this action in federal district court in California, seeking recovery of the Cranachs from Norton Simon. See C.A. E.R. 276-288.

a. The district court granted Norton Simon's motion to dismiss. Pet. App. 75a-83a. The court held that "by enacting Section 354.3, 'California seeks to redress wrongs committed in the course of the Second World War'—a legislative act which 'intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims.'" *Id.* at 81a (quoting *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712 (9th Cir.), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003)). The court further held that in the absence of Section 354.3's extended statute of limitations, peti-

tioner's claim was untimely under California's general three-year statute of limitations governing "actions for the specific recovery of personal property." *Id.* at 82a (quoting Cal. Civ. Proc. Code § 338(c) (West 2006)).

b. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-38a. The court concluded that Section 354.3 does not conflict with "the federal government's policy of external restitution," because that policy "ended in 1948" and "Section 354.3 cannot conflict with or stand as an obstacle to a policy that is no longer in effect." *Id.* at 18a-19a. The court held, however, that Section 354.3 is preempted because "the power to legislate restitution and reparation claims[] is one that has been exclusively reserved to the national government by the Constitution." *Id.* at 28a. The court further held that petitioner's claim might be timely under the statute of limitations for actions seeking recovery of personal property, and it remanded to determine when petitioner "discovered or reasonably could have discovered her claim to the Cranachs." *Id.* at 33a.

Judge Pregerson dissented in part, concluding that Section 354.3 is not preempted by the federal government's foreign affairs powers. Pet. App. 36a-38a.

DISCUSSION

The court of appeals correctly held that the invocation in this case of California Code of Civil Procedure § 354.3, which creates a cause of action with an extended statute of limitations for recovery of Nazi-confiscated art wherever it is located, impermissibly intrudes upon the foreign affairs authorities of the federal government. Review of that decision is not warranted, especially at this interlocutory stage of the case. No other court of appeals has addressed whether a State may create a

cause of action with an extended statute of limitations specifically for the recovery of Nazi-confiscated art. Section 354.3's limitations period expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3. And the decision below may not matter even in this case, because the case was remanded to determine whether petitioner's claim is timely under another statute of limitations. If petitioner does not prevail on remand, she may seek this Court's review after a final judgment.

A. Application Of Section 354.3 In This Case Intrudes Upon Substantial Foreign Policy Authorities Of The United States

This case does not involve the application of a state statute or common law of general applicability that addresses matters of traditional state interest and only incidentally touches on foreign affairs prerogatives of the United States Government. Rather, this case involves a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments, and that in this case have been further addressed by the Netherlands in restitution proceedings in recent years. In these circumstances, petitioner cannot now rely on Section 354.3 in an effort to recover the Cranachs.

1. a. The court of appeals rejected petitioner's argument that Section 354.3 concerns a "traditional state responsibility," Pet. App. 20a (quoting *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 419 n.11 (2003)) —namely, "the establishment of a statute of limitations for actions seeking the return of stolen property," *id.* at

21a. As the court explained, "[Section] 354.3 cannot be fairly characterized as a garden variety property regulation. Section 354.3 does not apply to all claims of stolen art, or even all claims of art looted in war. The statute addresses only the claims of Holocaust victims and their heirs." *Ibid.* Thus, the court observed, although Section 354.3 "purports to regulate property, an area traditionally left to the [S]tates," its "real purpose is to provide relief to Holocaust victims and their heirs." *Id.* at 21a-22a.

The court of appeals emphasized in this regard that Section 354.3 is not limited to regulating museums and galleries in California. Pet. App. 23a. As petitioner acknowledges (Pet. 17-19), that geographic limitation was eliminated from the provision prior to enactment for the specific purpose of extending its reach to any museum over which California courts could obtain jurisdiction, regardless of whether the artwork at issue had entered California. Pet. App. 23a. Indeed, in what is apparently the only other pending case under Section 354.3, the museum and artwork are both located in Spain. See p. 21, *infra.* Nor is Section 354.3 limited to suits brought by California residents. In fact, petitioner is a resident of Connecticut. See C.A. E.R. 277.

The court of appeals therefore reasonably determined that Section 354.3's broad scope "belies California's purported interest in protecting its residents and regulating its art trade," and instead "suggests that California's real purpose was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. That, the court explained, "is not an area of 'traditional state responsibility.'" *Id.* at 25a. The court of appeals then concluded

that, in thus moving beyond its traditional responsibilities and enacting a measure specifically directed at claims arising out of transactions and events in Europe during the Nazi era—by providing its own means of "restitution for injuries inflicted by the Nazi regime," *id.* at 28a—California had impermissibly intruded on the United States' foreign affairs prerogatives. *Id.* at 25a-30a.

b. As this Court has emphasized, "[i]n international relations * * * the people of the United States act through a single government with unified and adequate national power." *Japan Line, Ltd.* v. *County of L.A.*, 441 U.S. 434, 448 (1979) (citation omitted). It necessarily follows that "[p]ower over external affairs is not shared by the States," but instead "is vested in the national government exclusively." *United States* v. *Pink*, 315 U.S. 203, 233 (1942); see *Garamendi*, 539 U.S. at 413; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 427 n.25 (1964).

The federal government has traditionally exercised its foreign relations and war powers with respect to the resolution of private parties' claims arising out of international disputes. See, *e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654, 679 (1981) ("[T]he United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries."); *Pink*, 315 U.S. at 240 (Frankfurter, J., concurring) ("That the President's control of foreign relations includes the settlement of claims is indisputable."); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199, 230 (1796); *Deutsch* v. *Turner Corp.*, 324 F.3d 692, 712-714 (9th Cir.) ("[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."), cert. denied, 540 U.S. 820, and 540 U.S. 821 (2003).

There accordingly is considerable force to the court of appeals' view that, by targeting the claims of Holocaust survivors and their heirs to Nazi-confiscated art, rather than merely applying to such claims a law of general applicability, California has impermissibly intruded upon foreign affairs prerogatives of the federal government. The President and Congress have the sole authority to resolve (or to establish mechanisms to resolve) the claims of U.S. nationals when their claims are singled out precisely because they arise out of such international incidents. See, *e.g.*, *Dames & Moore*, 453 U.S. at 679. The same would seem to be true of singling out for resolution the claims of foreign nationals (or the heirs of foreign nationals) because they arise out of international incidents.

2. There is no occasion in this case, however, to consider the preemptive force of the foregoing general principles standing alone, because petitioner's present suit under Section 354.3 raises particular inconsistencies with implementation of restitution policies to which the United States has adhered.

a. In *Garamendi*, this Court considered California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA), Cal. Ins. Code §§ 13800-13807 (West 2005), which required any insurer doing business in the State to disclose certain information about Holocaust-era insurance policies. See 539 U.S. at 401. The Court regarded as beyond dispute that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," in light of the Constitution's allocation of the foreign relations power to the

United States rather than the several States. *Id.* at 413. The Court further observed that, "[h]istorically, wartime claims against even nominally private entities have become issues in international diplomacy," because "diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments." *Id.* at 416.

In recognition of the various contexts in which issues concerning preemption of state laws affecting foreign affairs may arise, the Court questioned whether it is necessary to make "a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi*, 539 U.S. at 419. Rather, the Court suggested that those theories "can be seen as complementary," depending on whether a State has acted within an area of traditional responsibility. *Id.* at 419 n.11. "If a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," the Court indicated, "field preemption might be the appropriate doctrine." *Ibid.* But if a State has acted in an area of traditional responsibility in a way that affects foreign relations, "it might make good sense to require a conflict, of a clarity or substantiality that would vary" with the strength and nature of the asserted state interest and possibly also the federal interest. *Ibid.*

The Court did not, however, decide any question of field preemption, because it found "a sufficiently clear conflict" between HVIRA and "express foreign policy of the National Government." *Garamendi*, 539 U.S. at 420. The Court recognized that "[t]he issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and execu-

tive agreements over the last half century, and * * * securing private interests is an express object of diplomacy today." *Id.* at 420-421. After surveying how that federal foreign policy has treated disclosure by insurers, the Court determined that "California has taken a different tack of providing regulatory sanctions to compel disclosure and payment, supplemented by a new cause of action for Holocaust survivors if the other sanctions should fail." *Id.* at 423. The Court concluded that even "[i]f any doubt about the clarity of the conflict remained, * * * it would have to be resolved in the National Government's favor, given the weakness of the State's interest * * * in regulating disclosure of European Holocaust-era insurance policies." *Id.* at 425.

b. Somewhat similar considerations are present here. Unlike in *Garamendi*, the United States has not entered into Executive Agreements with foreign governments to resolve contemporary claims for Holocaust art, and it has supported the just and equitable resolution of claims from that era. But as the court of appeals noted, like HVIRA in *Garamendi*, Section 354.3 is not a statute of general applicability directed to matters of traditional state interest. Pet. App. 21a-25a. Although petitioner asserts (Pet. 19) that Section 354.3 is directed to a state interest in regulating entities that currently avail themselves of the privilege of transacting business in California, the provision in fact is expressly targeted at claims to artworks that were seized prior to and during World War II (including, as here, artworks that later were the subject of restitution proceedings by European governments). In *Garamendi*, the Court rejected California's similar effort to justify HVIRA as a regulation of the current business activities of insurers in the State, explaining that "quite unlike a generally applicable 'blue

sky' law, HVIRA effectively singles out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." 539 U.S. at 425-426. Accordingly, Section 354.3 is reasonably viewed as an effort by California to "create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the [S]tate." Pet. App. 23a. And by providing "a new cause of action," *Garamendi*, 539 U.S. at 423, with an extended statute of limitations for claimants of Holocaust-era artwork, California has, as in *Garamendi*, "expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." Pet. App. 24a.

Notably, moreover, this case concerns artworks and transactions that, consistent with U.S. policies, have already been the subject of both external and internal restitution proceedings, including recent proceedings by the Netherlands in response to the Washington Principles. This case does not involve artwork whose existence or provenance has only recently been discovered and has never been the subject of restitution proceedings. The Cranachs were transferred by the United States to the Netherlands in 1946 pursuant to the policy of external restitution. Pet. App. 5a, 9a-10a; see C.A. E.R. 45. One of the purposes of that policy at the time was to prevent the United States from becoming entangled in difficult ownership questions regarding confiscated property. See *PCHA Report* at SR-140. That policy judgment demonstrates that, from the perspective of the United States, it was the particular nation concerned (here, the Netherlands) that was to have the immediate responsibility for determining issues of ownership and

restitution of, or restoration of rights in, works like the Cranachs.

The court of appeals erred in dismissing the external restitution policy as irrelevant to this case because it "ended" on September 15, 1948—the deadline set by the United States for filing restitution claims. Pet. App. 18a. The United States established a deadline to ensure prompt submission of claims and achieve finality in the wartime restitution process. The United States has a continuing interest in that finality when appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States following World War II.[3]

In this case, Ms. Goudstikker settled with the Dutch government in 1952, and that settlement did not provide for the return of artworks like the Cranachs that had been acquired by Göring. C.A. E.R. 47-49. When petitioner brought a Dutch restitution proceeding in 1998, the State Secretary found that "directly after the war—even under present standards—the restoration of rights was conducted carefully." C.A. Supp. E.R. 147. Petitioner sought review of that decision in the Court of Appeals for the Hague, which found that at the time of the 1952 settlement Ms. Goudstikker "made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction." *Id.* at 151.

---

[3] The United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient of its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject) to bona fide internal restitution proceedings in the Netherlands.

Petitioner correctly observes (Pet. 24-25) that there are other relevant aspects of federal policy regarding Nazi-confiscated art that the court of appeals did not discuss. In 1998 and 2009, respectively, the United States endorsed the Washington Principles and the Terezin Declaration. See p. 6, *supra*; Pet. App. 29a. The Washington Principles generally encourage the return to its pre-war owner of art that was confiscated by the Nazis and not subsequently restituted or available to be restituted through bona fide proceedings. And the Terezin Declaration encourages those restitution proceedings to be conducted expeditiously, based on the facts and merits of the Holocaust victims' claims.

Petitioner is thus correct that it is United States policy to support both the just and fair resolution of claims to Nazi-confiscated art on the merits and the return of such art to its rightful owner. But that policy does not support relitigation of all art claims in U.S. courts. Neither the Washington Principles nor the Terezin Declaration takes an explicit position in favor of or against the litigation of claims to Nazi-confiscated art. Rather, they encourage resort to alternative dispute resolution, so that such claims may be resolved as justly, fairly, and expeditiously as possible.

The recent expanded restitution policy in the Netherlands is an example of a non-adversarial mechanism developed by a foreign nation in light of the Washington Principles. The Dutch government "decided to depart from a purely legal approach [to] the restitution of 'war art' and to choose a more moral policy approach." C.A. E.R. 60. But even under that approach, the Dutch government has not provided for damages claims for artwork that it previously sold or transferred to third parties. See Advisory Comm. on the Assessment of Restitu-

tion Applications for Items of Cultural Value and the Second World War, *Report 2009*, at 71 (May 2010), http://www.restitutiecommissie.nl/images/stories/files/report2009-met%20wijz.b6.pdf (providing for restitution only of items in the Dutch government's possession). Nor does the Dutch government otherwise review claims for artwork that is in private possession, unless both the claimant and the current possessor submit a joint request to the State Secretary. See *ibid.*

In 2004, petitioner brought another restitution proceeding in the Netherlands, and the State Secretary determined that the case was "not included in the [Dutch government's] current restitution policy" because it involved a "matter of restoration of rights which has been settled" and "[i]n 1999 the Hague Court of Appeal * * * gave a final decision in the case." C.A. E.R. 62. The State Secretary nonetheless decided "that in this special case there [were] grounds that justif[ied] a restitution," based on "the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." *Ibid.* The State Secretary therefore ordered the return to petitioner of more than 200 artworks in the Dutch government's possession.

As both the 1998 and 2004 restitution proceedings reflect, the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims, both after the War and more recently. 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.

c. The act of state doctrine and considerations of international comity, although not directly applicable at this stage of the proceedings, also weigh in favor of giving effect to the Dutch government's actions in this case. See, *e.g.*, *Diorinou* v. *Mezitis*, 237 F.3d 133, 140-141 (2d Cir. 2001); 1 Restatement (Third) of Foreign Relations Law of the United States, §§ 481-482 (1987) (providing for recognition in certain circumstances of foreign judgments denying recovery of monetary sums). Recognition of the actions of the Dutch government is a defense distinct from preemption, cf. *id.* § 481, comment b, but the existence of a defense based on such actions shows that petitioner's suit under Section 354.3 implicates substantial foreign affairs interests of the United States.

B. Review By This Court Is Not Warranted At This Time

The court of appeals' decision does not warrant review at this time for four reasons. *First*, no other court of appeals has addressed whether a State may create a cause of action (with its own extended statute of limitations) for the recovery of Nazi-confiscated art, including art that has been the subject of bona fide internal restitution proceedings. Petitioner does not contend otherwise. Petitioner does argue (Pet. 9-16) that the court of appeals' decision conflicts with *Garamendi*'s analysis of field preemption. But as explained above, this case does not present a suitable occasion for addressing that broad question in light of the inconsistencies between this suit under Section 354.3 and the implementation of restitution policies to which the United States has adhered.[4]

---

[4] Petitioner argues in a supplemental brief that the court of appeals' decision in *Movsesian* v. *Victoria Versicherung AG*, 629 F.3d 901 (9th Cir. 2010), supports review by this Court. *Movsesian* concerned Cal. Civ. Proc. Code § 354.4 (West 2006), which creates a cause of action

Second, the question whether Section 354.3 is preempted is not of any continuing importance. Section 354.3's extended statute of limitations expired on December 31, 2010, and the parties identify only one other pending case brought under Section 354.3, *Cassirer* v. *Kingdom of Spain*, 616 F.3d 1019 (9th Cir. 2010) (en banc), petition for cert. pending, No. 10-786 (filed Dec. 10, 2010). In *Cassirer*, neither the Kingdom of Spain nor the Thyssen-Bornemisza Collection Foundation thus far has raised a preemption defense. See *id.* at 1022.[5]

Third, the court of appeals' preemption holding may not be decisive even in this very case, because that court

---

and extends the statute of limitations for California residents with insurance claims arising out of the "Armenian Genocide." *Ibid.* The court of appeals initially found Section 354.4 invalid as a matter of conflict preemption, see *Movsesian* v. *Victoria Versicherung AG*, 578 F.3d 1052, 1059 (9th Cir. 2009), but on rehearing the panel reversed course and held that there is no clear federal policy with respect to recognition of that event in Armenian history, see 629 F.3d at 907. Regardless of whether there is a federal policy in that context, here the artworks that are the subject of petitioner's claim have already been subject to both external and internal restitution proceedings, consistent with United States policy. But to the extent there is any intracircuit disagreement between the decision below and *Movsesian*, that issue does not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Both the decision below and *Movsesian* are interlocutory, and the en banc court of appeals can resolve any tension between those decisions.

[5] The petitioners in *Cassirer* have asserted sovereign immunity, but the Ninth Circuit allowed the action to proceed under the "expropriation" exception in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605(a)(3). 616 F.3d at 1022. Thus, if this Court were to grant certiorari in *Cassirer*, it would not affect the decision below. On March 21, 2011, the Court invited the Acting Solicitor General to file a brief as amicus curiae expressing the views of the United States in *Cassirer*.

remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property. Pet. App. 34a-35a. It is thus possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities. See *Museum of Fine Arts* v. *Seger-Thomschitz*, 623 F.3d 1, 12-13 (1st Cir. 2010), cert. denied, 131 S. Ct. 1612 (2011); *Dunbar* v. *Seger-Thomschitz*, 615 F.3d 574, 578-579 (5th Cir. 2010), cert. denied, 131 S. Ct. 1511 (2011).

Fourth and finally, the interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Even if issues concerning the preemption of Section 354.3 might otherwise warrant review at some point, the Court, in the interest of judicial economy, should postpone any review until after the conclusion of the proceedings on remand, thereby permitting the Court to consider all of petitioner's contentions, including any that might arise on remand, in a single petition. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Review by this Court would be premature at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

TONY WEST
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

JEFFREY B. WALL
Assistant to the Solicitor General

HAROLD HONGJU KOH
Legal Adviser
Department of State

MARK B. STERN
SHARON SWINGLE
Attorneys

MAY 2011