No. 09-1254

In The Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The State of California will address the following question presented:

In enacting a state statute extending the statute of limitations applicable to claims for the recovery of property stolen during the Holocaust against museums and galleries, was the State of California addressing an area of "traditional state responsibility" without intruding on the federal foreign affairs power?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTEREST OF THE STATE OF CALIFORNIA

Pursuant to Rule 37.4, Edmund G. Brown Jr., the Attorney General of California, submits this brief on behalf of the State of California in support of the petition for a writ of certiorari filed by petitioner, Marei Von Saher.[1] Petitioner seeks review of a Ninth Circuit decision invalidating a California statute that extends the limitations period in which plaintiffs may seek the recovery of artworks looted during the Nazi-era. California Code of Civil Procedure, Section 354.3, extends the limitations period for such claims against art museums or galleries until December 31, 2010.[2]

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[1] Counsel of record for the parties received timely notice of the State of California's intent to file this amicus curiae brief ten days before the due date in compliance with Supreme Court Rule 37.2(a).

[2] Section 354.3 states:

> (a) The following definitions govern the construction of this section:
>
> (1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.
>
> (2) "Holocaust era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.
>
> (b) 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 described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over

(Continued on following page)

California has a compelling interest in preserving its ability to regulate in areas of traditional state responsibility and in defending its lawfully enacted statutes where they do not conflict with federal law or foreign policy. Here, the Ninth Circuit invalidated a statute that regulates in an area of traditional state competence, conceding that the statute does not conflict with any federal foreign policy or law. In doing so, the Ninth Circuit broadened the application of field preemption in the context of the foreign affairs doctrine to such an extent that it threatens to upset the proper balance of power our federal system demands. This Court has explained that "even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy." *United States v. Pink,* 315 U.S. 203 (1942).

STATEMENT

Petitioner filed this action in 2007, seeking the return of two paintings allegedly looted from her

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that action until its completion or resolution. Section 361 does not apply to this section.

(c) 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.

Cal. Civ. Proc. § 354.3 (West 2006).

relative by the Nazis during World War II. Petition Appendix (Pet. App.) at 4a, 8a. The paintings were subsequently purchased in or around 1971 by respondent Norton Simon Museum of Art in Pasadena, California, and are currently on display there. *Id.* at 4a.

Respondent filed a motion to dismiss plaintiff's complaint, which the district court granted on the ground that Section 354.3 is unconstitutional because it violates the foreign affairs doctrine, relying on *Deutsch v. Turner Corp*., 324 F.3d 692 (9th Cir. 2003). Pet. App. at 10a.[3] The Ninth Circuit in the present case affirmed, concluding that "§ 354.3 intrudes on the power to make and resolve war, a power reserved exclusively to the federal government by the Constitution." *Id.* at 25a.

Significantly, the Ninth Circuit specifically determined that Section 354.3 "does not . . . conflict with any current foreign policy espoused by the Executive Branch." Pet. App. at 19a. Nonetheless, the court reasoned that "[u]nlike its traditional statutory counterpart, foreign affairs field preemption may occur 'even in [the] absence of a treaty or federal statute, [because] a state may violate the Constitution by establishing its own foreign policy.'" *Id*. at 20a, citing *Deutsch*, 324 F.3d at 709. The circuit court then concluded that

[3] In *Deutsch*, the Ninth Circuit invalidated a provision of the California Code of Civil Procedure that extended the statute of limitations for claims by victims of World War II-era forced or slave labor, or their heirs. *Deutsch,* 324 F.3d at 708.

"[b]y enacting § 354.3, California 'seeks to redress wrongs committed in the course of the Second World War,'" a motive that the court said had been found to be fatal in *Deutsch*. *Id*. at 25a-26a.

The Ninth Circuit correctly recognized that the regulation of property claims is traditionally a state function. Pet. App. at 21a-22a. That court also correctly determined that Section 354.3 does not directly conflict with any federal foreign policy and that this Court has "seldomly" invalidated a state law under the foreign affairs doctrine where it does not "conflict with a federal law or policy." *Id.* at 19a-20a. In addition, the court seemed to accept this Court's guidance that field preemption in the context of the foreign affairs doctrine should be limited to those circumstances where a State seeks to regulate outside of the areas of its traditional responsibility. *Id.* at 23a-25a.

However, from there the Ninth Circuit veered into dangerous new territory, concluding that Section 354.3 did not address a matter of traditional state responsibility because the statute did not limit its application to defendants within California. From that fact, the Ninth Circuit boldly declared that the statute's real goal was not to regulate the recovery of stolen property at all, but rather to create a world-wide forum for the resolution of Holocaust restitution claims. The Ninth Circuit concluded that, because the law, in the court's unsupported view, did not regulate in an area of "'traditional state responsibility,'" it was "subject to a field preemption analysis." Pet. App. at 25a.

The circuit court's reasoning threatens the legitimate power of California and other Ninth Circuit states to regulate matters within the scope of their traditional responsibilities.

ARGUMENT

I. THE NINTH CIRCUIT EFFECTIVELY EXPANDED THE DOCTRINE OF FIELD PREEMPTION AS IT RELATES TO THE FOREIGN AFFAIRS DOCTRINE BEYOND WHAT THIS COURT HAS LAID OUT IN *ZSCHERNIG* AND *GARAMENDI*

This Court has not yet answered the question whether or when it is appropriate to apply field-preemption analysis in the context of the foreign affairs doctrine. In *American Ins. Assn. v. Garamendi*, 539 U.S. 396 (2003), this Court noted that it was still "a fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption." *Garamendi*, 539 U.S. at 420. While not deciding the issue, this Court did offer some guidance, stating that field preemption might be appropriate "[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." *Id.* at 419, n. 11. However, the Court observed that where "a State has acted within . . . its 'traditional competence,' [citation] but 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 or the traditional importance of the state concern asserted." *Id*. This Court added that "the strength of the federal foreign policy interest" might also need to be weighed. *Id*.

Garamendi involved a challenge to California's Holocaust Victim Insurance Relief Act of 1999, Cal. Ins. Code §§ 13800-13807 (West 2005). The statute required any insurer doing business in the state to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or anyone "related" to the company. This Court pointed out that the statute "single[d] out only policies issued by European companies, in Europe, to European residents, at least 55 years ago." *Garamendi*, 539 U.S. at 426. Despite the clear extra-territorial aspect of the statute, this Court did not apply field preemption. Rather, the Court concluded that the "question relevant to preemption in [the] case [was] conflict." *Id*. at 427. The California statute was in "clear conflict" with federal policy. *Id.* at 420. The Court observed that the United States and Germany had specifically agreed to work with the International Commission on Holocaust Era Insurance Claims, a voluntary organization formed by several European insurance companies; the State of Israel; Jewish and Holocaust survivor associations; and associations of insurance commissioners to resolve insurance claims. The Court reasoned that, by adopting its own method of addressing Holocaust-era insurance claims, California sought "to use an iron fist where the President

has consistently chosen kid gloves." *Id*. The Court instructed that "state law must give way where, as here, *there is evidence of clear conflict* between the policies adopted by the two." *Id*. at 421 (emphasis added).[4]

Garamendi's relevance to the application of field preemption is its instruction that if the analysis is appropriate at all in the context of the foreign affairs doctrine, it is appropriate when a State has "no serious claim to be addressing a traditional State responsibility." *Garamendi*, 539 U.S. at 419, n. 11. In *Garamendi* this Court expressly did not resolve the question whether California's insurance statute addressed a traditional state responsibility because the state law at issue directly conflicted with federal policy. *Id*. at 419-420.

On the other hand, in *Zschernig v. Miller*, 389 U.S. 429 (1968), the Court invalidated an Oregon probate law without finding a specific conflict with any federal treaty, agreement, or foreign policy. The law at issue there prohibited nonresident aliens from claiming real or personal property unless the countries of their citizenship or residence provided certain reciprocal rights to United States citizens, and the

[4] Four members of this Court, Justices Ginsberg, Stevens, Scalia and Thomas, would have upheld the law at issue in *Garamendi,* citing the absence of "a clear statement aimed at disclosure requirements by the 'one voice' to which courts properly defer in matters of foreign affairs." *Garamendi*, 539 U.S. at 430 (Ginsberg, J., dissenting).

foreign heirs could prove that their inheritance would not be confiscated by the governments of their countries. *Zschernig,* 389 U.S. at 430-431. This Court observed that, although the law on its face may have been a valid probate law, in applying it courts had engaged in "minute inquiries concerning the actual administration of foreign law, into the credibility of foreign diplomatic statements, and into speculation whether the fact that some received delivery of funds should 'not preclude wonderment'" about whether others had been denied that right. *Zschernig,* 389 U.S. at 435. Such foreign affairs- and international relations-matters, this Court said, are entrusted by the Constitution solely to the federal government. *Id.* at 436.

Thus, this Court has strongly suggested that field preemption is appropriate, if at all, where a State has attempted, either expressly or in actual practice, to regulate in an area of foreign affairs outside of the State's traditional area of responsibility. Where a State regulates *within* such areas, the Court has suggested that an actual conflict with federal foreign policy should be shown to exist for the law to be preempted. The Ninth Circuit's erroneous determination that Section 354.3 addresses matters outside of California's traditional areas of responsibility led the court to apply field-preemption analysis to a statute that properly should be subjected to conflict-preemption analysis. The court acknowledged that the regulation of property is a traditional state function. Pet. App. at 21a-22a. Nonetheless, it found

that Section 354.3 addresses "restitution for injuries inflicted by the Nazi regime during Word [sic] War II" (*id.* at 28a), based solely on the significance the court attached to the Legislature's decision not to limit the law to museums and galleries located within California. As a result, the court erased the line between legitimate state authority and exclusive federal foreign affairs power, invalidating a state law that facially addresses property claims and that manifestly does not conflict with federal foreign policy.

II. THE NINTH CIRCUIT WRONGLY DETERMINED THAT SECTION 354.3 INTERFERES WITH THE FEDERAL GOVERNMENT'S ABILITY TO MAKE AND RESOLVE WAR

The foreign affairs doctrine preempts States' efforts to make their own foreign policy or to alter foreign policy set by the federal government. California attempted neither by enacting Section 354.3. By extending the limitations period for claims to recover artworks looted during the Holocaust, California has not injected itself into relations with foreign countries or with former wartime enemies. Neither has it sought to modify any prior federal resolution of these claims or alter any federally-established process for such resolution. Indeed, the Ninth Circuit expressly found no conflict with any existing federal foreign policy. California simply did not intrude into the realm of foreign affairs reserved

to the federal government when it enacted Section 354.3.

This Court has recognized a "foreign affairs doctrine" culled from several provisions of the Constitution, which reserves foreign affairs powers exclusively to the federal government. *See United States v. Pink,* 315 U.S. at 230-234. In accord with this doctrine, where state laws impair the effective exercise of the Nation's foreign policy, they must yield. *Garamendi,* 539 U.S. at 419, quoting *Zschernig,* 389 U.S. 429, and *Pink,* 315 U.S. at 230-231. Section 354.3 does not intrude upon these powers.

Section 354.3 only extends the statute of limitations on claims brought against *museums and galleries*; it does not target foreign governments or officials. Such claims are not necessarily brought by victims of the war against wartime enemies or their collaborators. The claims do not seek to redress the wartime wrongs of foreign governments. The claim presented in this case illustrates as much. It is brought against a museum that has no alleged connection to the Holocaust, the Nazi regime, or the conduct of World War II, and that did not acquire the artwork in question until 1971.

The Ninth Circuit erred in determining that Section 354.3 seeks to regulate in an area reserved exclusively to the federal government and, therefore, in invalidating Section 354.3 on field preemption grounds. Further, as was discussed above, field-preemption analysis was not applicable in the first

instance, as Section 354.3 regulates in an area of traditional state responsibility – property – and does not conflict with federal foreign policy.

CONCLUSION

For all the reasons set forth above, the State of California respectfully urges this Court to grant the petition for a writ of certiorari.

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Respectfully submitted,

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