JS – 6

LINKS: 122, 154

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendant.

Case No. CV 05-3459-GAF (CTx)

MEMORANDUM AND ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

I.

INTRODUCTION

Plaintiffs David Cassirer, Ava Cassirer, and United Jewish Foundation of San Diego County are the heirs and successors in interest to Lilly Cassirer Neubauer, who fled Germany during the Holocaust era to escape Nazi persecution. As a condition to being allowed to leave, Ms. Neubauer was forced to relinquish ownership in a valuable painting, the <u>Rue Saint-Honoré, après-midi, effet de pluie</u> by the French impressionist painter Camille Pissarro ("<u>Rue Saint-Honoré</u>," or the "Painting"), which is now owned by Defendant Thyssen-Bornemisza Collection Foundation (the "Foundation"), and on display in the Thyssen-Bornemisza Museum in Madrid, Spain. Claiming that the

Painting was obtained by theft through extortionate means, Plaintiffs filed this lawsuit, in which they contend that the Foundation was incapable of obtaining good title to the painting and must return it to its rightful owners. They argue that their lawsuit was timely filed under Cal. Civ. Proc. Code section 338(c)(3)(A), enacted in 2011 and made retroactive, which extends the statute of limitations and permits claims to be brought within six years of actual discovery 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 . . . . of a work of fine art, including a taking or theft by means of fraud or duress." Cal. Civ. Proc. Code § 338(c)(3) (2011). Section 338(c)(4), enacted at the same time, bars the application of California's borrowing statute, Cal. Civ. Proc. Code section 361, to such claims. See Cal. Civ. Proc. Code § 338(c)(4) (2011).

The Court now confronts the Foundation's motion to dismiss in which it asserts that the State of California's retroactive amendment of the applicable statute of limitations to permit Plaintiffs to pursue their claim deprives it of various constitutional rights. In support of this broad assertion, the Foundation argues that the statute of limitations had run on Plaintiffs' claims by 2003, and that all rights of the Plaintiffs had been extinguished when this case was filed in 2005. According to the Foundation, when California later amended the statute of limitations to revive Plaintiff's claim, it deprived the Foundation of its rights to due process and equal protection, and interfered with rights it had under the First Amendment. The Foundation also contends that the amendment to the applicable statute of limitations is preempted under the foreign affairs doctrine described in Von Saher v. Norton Simon Museum of Art, 592 F.3d 954 (9th Cir. 2010), in which the Ninth Circuit invalidated a California statute that created a cause of action for the recovery of Holocaust-era artwork, established a new, longer statute of limitations, and revived any time-barred claims.

The First and Fourteenth Amendment arguments are not meritorious. With respect to the First Amendment, the statute in question, which permits the presentation of claims over ownership of stolen artworks, imposes no burden on museums in connection with protected expressive conduct—the display of artwork. The burden, if any, involves the acquisition of artworks which does not implicate First Amendment values. Likewise, the equal protection argument, which focuses on the differential treatment of institutional purchasers of artworks, does not present a close question. Under rational basis scrutiny, which is the equal protection standard applicable to the legislation in question, the statute serves a legitimate governmental interest in facilitating the return of stolen artwork from large sophisticated, institutional purchasers who buy in volume, have insurance and have superior means of tracing the provenance of purchased works. With respect to the due process argument, the Court agrees that retroactive legislation violates due process when it deprives a party of vested property rights. But the contention that Amended Section 338(c) "strip(s) the Foundation of the vested property interest it acquired when the long-standing three-year statute of limitations expired" misses the mark. The legislation does not in fact say anything about the merits of the Foundation's claim to the Painting. Rather, by reviving Plaintiffs' ability to contest that claim in a court of law, it affects only the potential remedy but no substantive right, and provides the Foundation with ample due process to protect its alleged vested rights in the Painting. See Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311–12 (1945). Whether, as a matter of fact, Defendants can prove up their right to the painting under applicable Spanish or California law is a matter for decision at trial. Accordingly, to the extent that the motion to dismiss is based on the foregoing theories, it is **DENIED.**

However, the Court concludes that the preemption analysis of Von Saher applies in this case, and that the suit must therefore be dismissed. Although the statute on its face does not mention Holocaust-era art thefts, the amendments were enacted shortly after the Ninth Circuit overturned a functionally equivalent statute expressly enacted to allow recovery of Holocaust-era artwork. The language of the amended statute bears numerous similarities to the overturned statute, including the elimination of the application of California's borrowing statute. Even the legislative history of the amended statute references Von Saher and indicates that a purpose of the legislation was "to provide protection for victims that the Legislature has already intended to protect" and would "provide the necessary remedy for these victims." (Docket No. 122-3 [Stauber Decl.] ¶ 4, Ex. C [Amended Section 338(c) Bill Analysis] at 6/22/10 Hearing, pg. 7.) As the Ninth Circuit stated in Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1074 (9th Cir. 2012) (en banc), even where legislation purportedly addresses a traditional state responsibility, where confronted with a preemption challenge to the legislation, the Court must inquire into the "real purpose" of the statute. Quoting from Von Saher, the Movsesian court wrote, "Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs." Id. Thus, as discussed in greater detail below, the Court concludes that the California Legislature cannot do an end run around Von Saher by enacting legislation which, though worded differently in an attempt to appear of general applicability, has the identical purpose as the invalidated Section 354.3 of the California Code of Civil Procedure. The Court therefore concludes that amended Section 338(c) is preempted under the reasoning of Von Saher and that the motion to dismiss is **GRANTED**. The motion to continue trial date and pre-trial proceedings (Docket No. 154) is **DENIED as moot**.

II.

BACKGROUND

A. THE NAZIS' TAKING OF THE PISSARRO PAINTING FROM THE CASSIRER FAMILY, SPAIN'S REFUSAL TO RETURN IT, AND THE INSTITUTION OF THIS LAWSUIT

On this motion to dismiss, the Court takes the allegations made in Plaintiffs' Complaint as true and construes them in the light most favorable to Plaintiffs. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337–38 (9th Cir. 1996); Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120–21 (9th Cir. 2007).

Plaintiffs David Cassirer and Ava Cassirer, the heirs of Lilly Cassirer Neubauer, together with the United Jewish Federation of San Diego County, seek to recover from the Thyssen-Bornemisza Collection Foundation (the "Foundation") a painting by the French impressionist painter Camille Pissaro, the Rue Saint-Honoré, après-midi, effet de pluie, which the Nazis extorted from David's and Ava's great-grandmother in 1939 as a condition to issuing her an exit visa.[1] (Docket No. 1 [Compl.] at 1, ¶¶ 5, 21–23, Ex. A.) Julius Cassirer, Plaintiffs' great-great grandfather, purchased the Painting from Pissarro's representative in 1898, and the Painting remained in the Cassirer family and on display in the family's homes until Lilly Cassirer Neubauer was forced to relinquish it to the Nazi regime's official art appraiser in exchange for 900 Reichsmarks, approximately US$360 in 1939, before fleeing to England. (Id. ¶¶ 14–23, Ex. B.)

During and after World War II, the Painting changed hands several times. (Id. ¶¶ 25, 27.) In the 1950s, Lilly Cassirer Neubauer sought compensation for the Painting via the German courts and before the United States Court of Restitution Appeals of the Allied High Commission for Germany, and, in 1958, she received 106,000 Deutsche Marks from the German government in settlement of her claim. (See Stauber Decl. ¶¶ 2–3, Ex. A [Neubauer v. Sulzbacher, Case No. 703, Opinion No. 414 (U.S. Court of Restitution Appeals of the Allied High Commissioner for Germany, June 1, 1954), Ex. B [Signed Final Transcript of German Settlement Agreement, February 28, 1958].) Ms. Neubauer died in the United States in 1962, having made substantial efforts to locate and recover the painting, but without having become aware of its whereabouts. (Compl. ¶ 26.) In 1976, the Painting came into the possession of Baron Hans-Heinrich Thyssen-Bornemisza, a resident of Switzerland and one of the world's foremost art collectors. In 1988, when the Baron loaned his collection, including the Painting, to Spain, the Kingdom spent millions of dollars to refurbish a state-owned palace in Madrid, the Villahermosa, and provided it at no charge as the home for the Thyssen-Bornemisza Museum (the "Museum"), where the collection was displayed. (Id. ¶¶ 27–30.) Spain

[1] This action was originally filed by Claude Cassirer, Lilly Cassirer-Neubauer's grandson and David's and Ava's father. Following Claude Cassirer's death on September 25, 2011, the present Plaintiffs were substituted in as successors to his interest in and claim for recovery of the Painting. (Docket Nos. 126, 127.)

paid the Baron $50 million for a ten-year lease of the collection, and in 1993 paid an additional $327 million to enable the Foundation, which operates the Museum, to purchase the entire collection. (Id. ¶¶ 3, 9, 29–30)

Plaintiffs allege that Claude Cassirer, Lilly Cassirer Neubauer's grandson and the original Plaintiff in this action, first learned in 2000 that the Foundation was in possession of the Painting, and that this was the first information that he had regarding the Painting's whereabouts since it was taken in 1939. (Id. ¶ 31.) In 2001, Claude Cassirer petitioned Spain's then Minister of Education, Culture and Sports and a Chair of the Foundation's Board, Pilar del Castillo Vera, for the Painting's return. The request was refused, despite Spain's participation in various international fora calling for the restitution of Holocaust-era looted cultural property. (Id. ¶¶ 32, 34.)

In July 2003, five members of Congress wrote to Minister del Castillo requesting that Spain and the Foundation return the Painting to Claude Cassirer. (Id. ¶ 33.) In May 2005, when del Castillo again refused, Claude Cassirer filed suit in this Court against the Kingdom of Spain and the Foundation, asserting claims for declaratory relief, imposition of a constructive trust, possession of personal property, and conversion. (Id. ¶¶ 36–47.) The Complaint seeks a declaration affirming that Plaintiffs own the Painting and have a right to its immediate return; return of the Painting or conversion damages, and actual and unjust enrichment damages for deprivation of possession of the Painting from the time of Claude Cassirers' demand until the time that Plaintiffs recover possession. (Id. ¶¶ 38, 41, 45, 47.). Spain was dismissed without prejudice from these proceedings pursuant to the Parties' stipulation on August 12, 2011. (Docket No. 119.) No Plaintiff has ever attempted to obtain the Painting through judicial proceedings initiated in Spain.

B. HISTORY OF APPLICABLE CALIFORNIA LEGISLATION

1. THE 2002 LEGISLATION – THE ENACTMENT OF SECTION 354.3

Prior to 2002, the applicable statute of limitations set forth in Section 338 of the California Code of Civil Procedure provided that "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property" was required to be brought within three years of accrual of the claim. "The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance 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 investigated the theft." Cal. Civ. Proc. Code § 338 (2010). The accrual-on-discovery rule was added to the statute in 1983.

In 2002, the California Legislature passed Assembly Bill No. 1758, adding Section 354.3 to the California Code of Civil Procedure. Section 354.3 extended the statute of limitations for actions for the recovery for works of fine art alleged to have been stolen during the "Holocaust era"—defined as 1929 to 1945—to December 31, 2010, allowing such suits against "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance." Cal. Civ. Proc. Code § 354.3. Section 354.3 also barred application of California's "borrowing statute," section 361 of the California Code of Civil Procedure, which provides that:

> When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state, and who has held the cause of action from the time it accrued.

Cal. Civ. Proc. Code § 361. In May 2005, after the enactment of Section 354.3, Claude Cassirer filed the present lawsuit. (Docket No. 1.)

2. <u>VON SAHER</u> INVALIDATES SECTION 354.3 ON PREEMPTION GROUNDS

In 2009, while this case was on interlocutory appeal seeking review of the Court's ruling on various jurisdictional issues,[2] the Ninth Circuit in another stolen art

[2] The circuit ultimately affirmed the decision of this Court denying Defendants' motion to dismiss for lack of jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 et seq. See Cassirer v. Kingdom of Spain, 616 F.3d 1019 (9th Cir. 2010) (en banc), cert. denied, 131 S. Ct. 3057 (2011).

case struck down Section 354.3 as unconstitutional, holding that the statute infringed on the federal government's exclusive power to conduct foreign affairs. Von Saher v. Norton Simon Museum of Art at Pasadena, 578 F.3d 1016, 1026–30 (9th Cir. 2009), opinion amended and superseded on denial of rehearing en banc 592 F.3d 954 (9th Cir. 2010).

Von Saher involved a pair of paintings, Adam and Eve, by Lucas Cranach the Elder (the "Cranachs"), which had been auctioned in 1931 by the Soviet government to Jacques Goudstikker, a Dutch art dealer, and then taken from Goudstikker in 1940 by the Nazis during their occupation of The Netherlands. In 1946, the Allied Forces formally returned Goudstikker's artworks, including the Cranachs, to the Dutch government which undertook responsibility for addressing claims of restitution. See Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07–2866–JFW (JTLx), 2012 WL 994299, at *1 (C.D. Cal. Mar. 22, 2012). Goudstikker's wife, Desi Goudstikker, returned to The Netherlands in 1946 and settled claims for real estate and other property taken by the Nazis with the Dutch government under the Dutch restitution law, but did not file a claim to the Cranachs or other artwork before the deadline lapsed, primarily because she believed that the restitution proceedings were unfair. Id. at *2. In 1961, the Dutch government accepted payment in exchange for the Cranachs from an heir to the family that had owned the painting prior to their auction by the Soviet government, George Stroganoff-Scherbatoff.

In 1998, the sole Goudstikker heir, Marei von Saher, filed a new restitution claim for the artworks taken from Goudstikker, including the Cranachs, with the Dutch State Secretary of Education, Culture, and Science; this claim was rejected as time-barred, and the decision was upheld on appeal by the Court of Appeals of The Hague. Id. In 2001 and 2002, however, the Dutch government established a new Restitution Committee to hear certain Holocaust-era art claims. This Committee determined Von Saher's claim to be admissible as a matter of policy, and decided to return to her the works still in the country's possession, but did not compensate her for works previously sold, including the Cranachs. Id. In reliance on the extended statute of limitations established under Section 354.3, Von Saher then brought suit in the U.S. District Court for the Central District of California to recover the Cranachs. Although the Ninth Circuit affirmed the district court's decision finding that Section 354.3 was unconstitutional, it remanded for consideration of whether Von Saher's claim was timely under Section 338's then three-year limitations period. The Ninth Circuit noted differing conclusions reached by California appellate courts on the question of when the limitations period begins to run for property stolen before 1983, when the discovery rule provision was added to the statute. See Von Saher, 592 F.3d at 968–69 (citing Naftzger v. Am. Numismatic Soc'y, 49 Cal. Rptr. 2d 784, 786 (Ct. App. 1996) (in case against museum, holding that rule of actual discovery applies to claims for property stolen before 1983); Soc'y of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865, 869–70 & n.10 (Ct. App. 1996) (in suit against collector, holding that prior to the 1983 amendment, "the statute of limitations began to run anew against a subsequent purchaser," and noting disagreement with Naftzger). Von Saher petitioned to the U.S. Supreme Court for a writ of certiorari as to the preemption question. See Von Saher v. Norton Simon Museum of Art of Pasadena, 131 S. Ct. 3055 (2011).

3. THE CALIFORNIA LEGISLATURE RESPONDS TO VON SAHER WITH NEW LEGISLATION

In July 2010, while the Supreme Court was considering the Von Saher petition, and while the present case was being heard en banc, the California Legislature passed Assembly Bill No. 2765, amending Section 338(c) of the California Code of Civil Procedure. Those portions of Section 338, including the accrual-on-discovery rule, that pre-dated the enactment of Section 354.4 remained intact. However, three subsections were added to extend the statute of limitations on claims for "the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer," where the claim involves "an unlawful taking or theft . . . including a taking or theft by means of fraud or duress." Cal. Civ. Proc. Code § 338(c)(3)(A) (2011). The limitations period for such claims was extended to "six years [following] the actual discovery by the claimant or his or her agent, of both of the following: (i) [t]he identity of the whereabouts of the work of fine art . . . [and] (ii) [i]nformation or facts that are sufficient to indicate that the claimant has a claim for possessory interest in the work or fine art." Cal. Civ. Proc. Code § 338(c)(3)(A)(i)–(ii) (2011).

Moreover, the bill made Section 338(c) expressly retroactive, applying it to "all pending and future actions commenced on or before December 31, 2017, including the actions dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute . . . provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute." Cal. Civ. Proc. Code § 338(c)(3)(B) (2011). Amended Section 338 also provides that a defendant in such an action may raise "all equitable and legal affirmative defense and doctrines, including, without limitation, laches." Cal. Civ. Proc. Code § 338(c)(5) (2011). Finally, like Section 354.3, Amended Section 338 bars application of California's borrowing statute. Cal Civ. Proc. Code § 338(c)(4) (2011).[3]

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[3]Thus, as amended, Section 338(c) now provides, in relevant part, that

> (c)(1) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property [must be brought within three years].
>
> (2) The cause of action in the case of theft, as described in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance 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 investigated the theft.
>
> (3)(A) Notwithstanding paragraphs (1) and (2), an action 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, as described in Section 484 of the Penal Code, of a work of fine art, including a taking or theft by means of fraud or duress, shall be commenced within six years of the actual discovery by the claimant or his or her agent, of both of the following:
>
>> (i) The identity and the whereabouts of the work of fine art. In the case where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen.
>>
>> (ii) Information or facts that are sufficient to indicate that the claimant has a claim for a possessory

The legislative history for A.B. 2765 states, in part, that

> The bill seeks to address a problem faced by persons who are attempting to recover art and other valuable objects that may have been stolen several years ago, passed through the hands of one or more bona fide purchasers, and are then subsequently displayed in a museum or gallery. It is in the very nature of stolen art that it circulates underground for several years before it appears in museums or galleries, and by that time the [statute of limitations] has long since expired. Even when applying the discovery rule, the imputation of 'constructive' discovery . . . does not lead to equitable results when works may be displayed anywhere in the world and traffickers engage in purposeful concealment. This bill would amend the [statute of limitations] for recovery of stolen art so as to clarify competing case law and ensure more equitable results when the [statute of limitations] is applied to the theft of works of artistic, historic, and cultural significance. The issue was brought to the attention of the Committee as a result of a recent 9th Circuit Court opinion noting the inconsistencies in the California appellate courts.
>
> [. . .]
>
> This bill amends the statute of limitations . . . in CCP Section 338 (c) relating to the discovery of stolen works of art or other objects of historical, artistic or cultural significance. Specifically, it will primarily do three things: (1) it will clarify that the 'discovery' rule adopted in 1983 applies to works stolen before that date, thereby clarifying disparate opinions of the California Courts of Appeal on this point; (2) it will clarify that the discovery rule adopted by the legislature was one of 'actual' not 'constructive' discovery; (3) it will extend to six years the [statute of limitations] for actions for specific recovery brought against a museum, gallery, auctioneer, or dealer.

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interest in the work of fine art that was unlawfully taken or stolen.

(B) The provisions of this paragraph shall apply to all pending and future actions commenced on or before December 31, 2017, including any actions dismissed based on the expiration of statutes of limitation in effect prior to the date of enactment of this statute if the judgment in that action is not yet final or if the time for filing an appeal from a decision on that action has not expired, provided that the action concerns a work of fine art that was taken within 100 years prior to the date of enactment of this statute.

(C) For purposes of this paragraph:
[. . .]
(iv) 'Duress' means a threat of force, violence, danger, or retribution against an owner of the work of fine art in question, or his or her family member, sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act that otherwise would not have been performed or to acquiesce to an act to which he or she would otherwise not have acquiesced.
[. . .]

(4) Section 361 shall not apply to an action brought pursuant to paragraph (3).

(5) A party in an action to which paragraph (3) applies may raise all equitable and legal affirmative defenses and doctrines, including, without limitation, laches and unclean hands.

> At one level, this bill seeks to clarify competing interpretations of California's statute of limitations for the specific recovery of personal property. As importantly, it seeks to address a vexing problem faced by theft victims who are attempting to recover art and other valuable works that may have been stolen several years ago, but where the victim only learns the whereabouts of the work many years later. It is in the very nature of stolen art that it circulates underground for several years before it appears in museums and galleries, and by that time the [statute of limitations] has long run its course. . . .
>
> [. . .]
>
> [A] recent opinion by the Ninth Circuit Court of Appeal highlighted the conflicting views in California. (Marie von Saher v. Norton Simon Museum (2009) 578 F.3d 1016.) The von Saher decision did not deal directly with the discovery provision in the statute that would be amended by this bill. Instead, von Saher was brought under Civil Code of Procedure 354.3, a 2002 statute that purported to extend the [statute of limitations] for art stolen by Nazis during World War II. The Ninth Circuit struck down Section 354.3 on the grounds that, by singling out art stolen by a foreign regime, the statute was preempted under the 'foreign policy field preemption' doctrine. Although this proposed bill does not raise this issue, since it would apply to any stolen works, the Court noted in dictum that von Saher's action could have been brought under general recovery statute that is the subject of this bill. . . .
>
> [. . .]
>
> [I]n addition to reconciling differing court opinions on the application and meaning of California's discovery rule, this bill would also extend the [statute of limitations] for the limited purpose of bringing a cause of action for stolen works that are in the possession of a museum, gallery, dealer, or auctioneer. The existing three year [statute of limitations] was adopted for the recovery of personal property that had been wrongfully taken or converted more generally. But . . . stolen art and other objects of historical and cultural significance entail more complex legal problems that justify a longer period of time. According to attorneys who litigate stolen art cases . . ., the three-year period is often too short to 'take into account the difficulties that claimants continue to experience in discovering the underlying facts and finding counsel to litigate their cases.' . . .
>
> [. . .]
>
> E. Randol Schoenberg, an attorney and leading expert in cases concerning stolen art works, writes that 'AB 2765 is a much-needed resolution of several long-standing splits and disagreements in the law concerning stolen art works.' According to Schoenberg, 'one of the principal difficulties with stolen art cases is the great lack of clarity in the procedural law. Often this leads to years of difficult preliminary litigation, as the parties and courts attempt to determine what the law should be. Ambiguities in the procedural law frequently lead the parties to abandon or settle their otherwise valid claims for recovery of stolen artwork.' . . .

(Amended Section 338(c) Bill Analysis at 5/4/10 Hearing, pgs. 1–3, 7–8.) Another portion of the legislative history indicates that

> [T]his bill would help to provide protection for victims that the Legislature has already intended to protect. [Section 354.3] removed the statute of limitations requirements for these actions and allowed plaintiffs to file their actions by December 31, 2010. . . . However, a subsequent Ninth Circuit appellate ruling Von Saher v. Norton Simon Museum of Art at Pasadena[,] . . .592 F.3d 954 held that this statute was preempted by federal powers over foreign affairs under the Supremacy Clause. Victims who relied upon the provisions of [Section 354.3] and failed to file their claim based on a different statute of limitations are not prejudiced in bringing their actions. This bill would provide the necessary remedy for these victims and other victims of historical art theft by allowing them to file their actions based upon the statute of limitations created by this bill.

(Id. at 6/22/10 Hearing, pg. 7.) The amendments to Section 338(c) became effective on January 1, 2011. The bill was sponsored by the Committee on Judiciary, but the "idea" for the bill came from Schoenberg, whose law firm represented the Von Saher plaintiff. See Von Saher, 2012 WL 994299 at *3 n.4. Schoenberg also represented Claude Cassirer in an earlier litigation in state court, Claude Cassirer v. Stephen Hahn, No. 01158698 (Santa Barbara Super. Ct., filed July 19, 2004), seeking disgorgement of an art dealer's profits received from the sale of the Rue St. Honoré to the Baron Thyssen-Bornemisza. See Blair Clarkson, News: Judge Oks Pursuit of Stolen Art, lootedart.com, The Central Registry of Information on Looted Cultural Property 1933–1945, http://www.lootedart.com/news.php?r=MLI7UA822701 (reprinted from The Daily Journal, Jan. 21, 2005).

C. UNITED STATES' POLICY WITH RESPECT TO HOLOCAUST-ERA LOOTED ART

As the Ninth Circuit observed in Von Saher, "[d]uring World War II, the Nazis stole hundreds of thousands of artworks from museums and private collections throughout Europe, in what has been termed the 'greatest displacement of art in human history.'" 592 F.3d at 957 (quoting Michael J. Bazyler, Holocaust Justice: The Battle for Restitution in America's Courts, 202 (N.Y.U. Press 2003)). Following the conclusion of the War, the United States pursued a policy of "'external restitution,' under which the looted art was returned to the countries of origin—not to the individual owners." Id. at 958; see also Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: The U.S. and Holocaust Victims' Assets SR-142, 153 (Washington, D.C.: December 2000). The Cranachs, at issue in Von Saher, were returned to The Netherlands under this policy. U.S. authorities ceased accepting claims for restitution of looted artwork as of September 15, 1948. Von Saher, 592 F.3d at 963; Plunder and Restitution at SR-143. Although international efforts continued after this date, many artworks were never returned to their original owners, and, in recent years, some have been discovered in the collections of prominent museums around the world. Von Saher, 592 F.3d at 958.

In recent decades, the United States and numerous other nations have participated in international conferences aimed to address the significant unresolved issues relating to Holocaust-era looted assets and cultural property. Among these were the 1998 Washington Conference on Nazi-Confiscated Art and the 2009 Prague Holocaust Era Assets Conference. These conferences produced sets of "non-binding principles," enshrined in the Washington Conference Principles on Nazi-Confiscated Art and affirmed in the Terezin Declaration, under which participating nations are urged to develop national processes to identify and publicize the existence of looted artwork and to facilitate its just and fair restitution. See Washington Conference Principles on Nazi-Confiscated Art, December 3, 1998, available at http://www.state.gov/p/eur/rt/hlcst/122038.htm; Prague Holocaust Era Assets Conference: Terezin Declaration, June 30, 2009, available at http://www.state.gov/p/eur/rls/or/126162.htm. These two sets of norms call for the return of confiscated art and cultural property to Holocaust victims and their heirs, while recognizing that "among participating nations there are differing legal systems and that countries act within the context of their own laws." Washington Conference Principles; see also Terezin Declaration.

In the years since these principles were adopted, litigation over Holocaust-era art has proceeded in U.S. courts under generally applicable laws. See, e.g., Republic of Austria v. Altmann, 541 U.S. 677 (2004) (permitting claims to Nazi-looted art to proceed under the Foreign Sovereign Immunities Act ("FSIA"), notwithstanding that acts of alleged expropriation had occurred before the enactment of the FSIA in 1976); Dunbar v. Seger-Thomschitz, 615 F.3d 574 (5th Cir. 2010) (suit to quiet title to Nazi-confiscated painting); Museum of Fine Arts, Boston v. Seger-Thomschitz, 623 F.3d 1 (1st Cir. 2010) (suit for declaratory relief in connection with painting allegedly sold under duress in 1938). However, in 2011, the U.S. Solicitor General filed an amicus brief supporting denial of the Von Saher petition for certiorari. Brief for the United States as Amicus Curiae, Von Saher Certiorari Petition, May 2011 ("Solicitor General's Amicus Brief in Von Saher"), available at http://www.justice.gov/osg/briefs/2010/2pet/6invit/2009-1254.pet.ami.inv.pdf. The brief was additionally signed by, among others, Harold Hongju Koh, Legal Advisor to the U.S. State Department. In the brief, the United States took the position that application of Section 354.3 to permit the Von Saher claims intruded on the Executive Branch's exercise of the foreign affairs power, in part because it "raise[d] particular inconsistencies with implementation of restitution policies to which the United States has adhered." Id. at 13. This was because the Von Saher litigation

> 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 had 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. 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.

Id. at 16. The United States explained that, although "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 . . . that policy does not support relitigation of all art claims in U.S. courts." Id. at 18. The Washington Conference Principles and Terezin Declaration, to which the United States subscribes, took no "explicit position in favor of or against the litigation of claims to Nazi-confiscated art," but encouraged resort to alternative dispute resolution. Id. at 18. Moreover, "[w]hen 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." Id. at 19. The Supreme Court denied the certiorari petition. See Von Saher, 131 S. Ct. 3055.

III.

DISCUSSION

The Foundation argues that Amended Section 338 is unconstitutional on four grounds, namely that it (1) infringes on the federal government's exclusive power to conduct foreign affairs; (2) violates the Fourteenth Amendment's Due Process Clause by retroactively "strip[ping] the Foundation of the vested property interest it acquired when the long-standing three-year statute of limitations expired"; (3) burdens freedom of expression and thus violates the First Amendment by "expressly target[ing] for unfavorable treatment select entities engaged in protected First Amendment activities"; and (4) runs afoul of the Fourteenth Amendment's Equal Protection Clause in "target[ing] museums, galleries, auctioneers, and dealers for disparate and discriminatory treatment regarding their fundamental right to hold vested property." (Docket No. 122-1 [Mem.] at 6, 15, 19; Docket No. 137 [Defendant's Suppl. Mem.].) The Court addresses each argument in turn.

A. FOREIGN AFFAIRS PREEMPTION

Broadly, "[t]he foreign affairs doctrine provides that state laws may not intrude 'into the field of foreign affairs which the Constitution entrusts to the President and the Congress.'" Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1171 (C.D. Cal. 2005) (quoting Zschernig v. Miller, 389 U.S. 429, 432 (1968)). "The Constitution does not create an express, general power over foreign affairs but rather allocates particular powers related to foreign affairs to particular federal actors." Deutsch v. Turner Corp., 324 F.3d 692, 708 (9th Cir. 2003). It also expressly prohibits the states from exercising certain foreign relations powers, including some not expressly allocated to the federal government. Id. at 709. "[T]he Supreme Court has long viewed the foreign affairs powers specified in the text of the Constitution as reflections of a generally applicable constitutional principle that power over foreign affairs is reserved to the federal government," id., and "has characterized the power to deal with foreign affairs as a primarily, if not exclusively, federal power," Von Saher, 592 F.3d at 960.

The principle behind this doctrine is that an individual state "cannot have a 'distinct juristic personality' from that of the United States when it comes to matters of foreign affairs." Von Saher, 592 F.3d at 965 (quoting United States v. Pink, 315 U.S. 203, 232 (1942)). That is, "[w]hen it comes to dealings with foreign nations, 'state lines disappear.'" Id. (quoting United States v. Belmont, 301 U.S. 324, 331(1937)). The Supreme Court has frequently described the foreign affairs power in broad terms, stating, for example, that "[t]he Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties." Hines v. Davidowitz, 312 U.S. 52, 63 (1941). Indeed, "[o]ur system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Id.

There are two species of foreign affairs preemption, known as conflict preemption and field preemption. As the Ninth Circuit explained in Von Saher, conflict preemption occurs when state law conflicts with a specific federal action, such as a treaty, federal statute, or express executive branch policy. 592 F.3d 954, 960–61. "Occasionally, however, in the absence of any conflict, the Court has declared state laws to be incompatible with the federal government's foreign affairs power." Id. at 961. The latter type of preemption is known as field preemption. Although the Supreme Court has stated that these categories are not "rigidly distinct," Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 n.6 (2000), in practical terms, the foreign affairs preemption cases generally fall into one of these two categories.

1. Conflict Preemption

a. Legal Standard

Under the conflict preemption analysis, courts will "find preemption where it is impossible for a private party to comply with both state and federal law, and where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives'" of the federal statute, treaty, or express policy. Id. at 372–73 (citations omitted).

In American Insurance Association v. Garamendi, the Supreme Court held that a California statute, the Holocaust Victims Insurance Recovery Act ("HVIRA"), which threatened regulatory sanctions against any insurer doing business in California that did not file information in a public registry regarding any insurance policies sold in Europe between 1920 and 1945, was preempted by a consistent federal policy to encourage European governments and companies to work with the International Commission on Holocaust Era Insurance Claims ("ICHEIC") and to volunteer settlement funds for the resolution of claims. This policy was expressed in executive agreements with Germany, Austria, and France, under which those governments had stipulated to resolving insurance claims arising out of World War II through the ICHEIC, to set aside settlement funds, and to publish a comprehensive list of holders of insurance policies who may have been Holocaust victims, within the framework of their national privacy laws. The United States had agreed to file a statement in any relevant litigation in an American court supporting dismissal in favor of resolution of the claim through the ICHEIC. Id. at 401, 406–07, 420–21. By requiring complete disclosure and threatening different sanctions, the California law "undercut[] the President's diplomatic discretion" and "threaten[ed] to frustrate the operation of the particular mechanism the President ha[d] chosen." 539 U.S. 396, 423–24 (2003).

b. Application

The Foundation argues that the federal government has a "clear policy" in favor of national, not individual, resolution of Holocaust-era art claims, and in favor of negotiation rather than litigation, preempting Amended Section 338(c) under a conflict preemption analysis. (Defendant's Suppl. Mem. at 2–3.) In support of this argument, it relies on the United States' post-war program of external restitution. (Id. at 2–3.) This program was founded on the position of the U.S. State Department's Interdivisional Committee on Reparation, Restitution, and Property Rights that

> [t]he question of restoration to individual owners is a matter for these governments to handle in whatever way they see fit. The original owners may have received part payment for property taken from them under duress and the governments in question may wish to make adjustments for this circumstance in returning the property. In some cases it may be impossible to locate the original owners or their heirs and the governments involved will have to decide what should be done with the property or proceeds therefrom.

See Plunder and Restitution at SR-140. The Foundation also relies on the United States' recent participation in the Washington Conference Principles and Terezin Declaration, which advocate alternative dispute resolution mechanisms. See Washington Conference Principles; Terezin Declaration. Finally, the Foundation draws attention to the Solicitor General's amicus brief, supporting denial of the Von Saher petition for certiorari, which stated, in part, that U.S. "policy does not support relitigation of all art claims in U.S. courts." Solicitor General's Amicus Brief in Von Saher at 18.

Plaintiffs argue that the federal government has no clear or express policy against the litigation of claims to Holocaust-era assets. (Docket No. 136 [Plaintiffs' Suppl. Mem.] at 8 n.8.) Indeed, the Ninth Circuit in Von Saher considered the United States' post-war policy of external restitution and its participation in the Washington Conference Principles and determined that the plaintiff's claims were not preempted under a conflict preemption analysis. Specifically, the Ninth Circuit found that the U.S. Government's express policy of external restitution had ended in 1948, when it ceased accepting such claims, and that Section 354.3 did not conflict with any current foreign policy espoused by the Executive Branch. Von Saher, 592 F.3d at 963; see also Plunder and Restitution at SR-143. In reaching this conclusion, the court recognized that, although the United States had participated in international discussions, including at the

Washington Conference, unlike in Garamendi, "[n]o organization comparable to the [ICHEIC] has been established yet to resolve Holocaust-era art claims." Von Saher, 592 F.3d at 967–68.

Plaintiffs also draw the Court's attention to additional evidence that the federal government takes no express position against the litigation of Holocaust-era claims. Announcing an end to the official program of external restitution, in 1949, the State Department issued a press release stating that the Executive Branch's policy is "to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property," and "with respect to claims asserted in the United States for restitution of such property, to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." Jurisdiction of U.S. Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers, 20 Dep't of St. Bull. 592 (1949). In 1954, the Second Circuit found that this statement permitted a plaintiff pursuing a conversion claim in connection with the forced transfer of his controlling shares in a German shipping company to allege duress by Nazi officials, because such allegations no longer ran afoul of the act of state doctrine, under which courts will decline to pass upon the validity of public acts by foreign countries. See Bernstein v. N.V. Nederlandsche-Amerikaansche, 210 F.2d 375, 375–76 (2d Cir. 1954); Bernstein v. N.V. Nederlandsche-Amerikaansche, 173 F.2d 71, 72 (2d Cir. 1949). Plaintiffs argue that the 1949 State Department press release and the Bernstein decisions "confirm that it has long been the policy of the United States to allow suits to recover Nazi-looted assets." (Docket No. 141 [Plaintiffs' Second Suppl. Mem.] at 2.)

According to Plaintiffs, this policy continues to the present. (Plaintiffs' Suppl. Mem. at 8 n.8.) In 2007, the U.S. Special Envoy for Holocaust Issues, J. Christian Kennedy, described the process of art restitution in the United States. Kennedy observed that, in the not-atypical circumstance in which a private citizen discovers that an artwork once held by his or her family is now hanging in a museum or private gallery in the United States, "[a]greements between parties without resort to judicial channels have been frequent"; however, "[i]f the talks break down, or if they fail to get started at all, the claimant has the option of turning to the courts." J. Christian Kennedy, Special Envoy for Holocaust Issues, The Role of the United States Government in Art Restitution, Remarks at the Conference in Potsdam, Germany (Apr. 23, 2007), http://germany.usembassy.gov/kennedy_speech.html. Indeed, the U.S. Government filed an amicus brief in this case opposing Supreme Court review of the Ninth Circuit's decision to permit this case to proceed under the FSIA. See Kingdom of Spain v. Estate of Claude Cassirer, Brief for the United States as Amicus Curiae, 2011 WL 2135028.

Had the Ninth Circuit Von Saher panel had the last word, the Court would not hesitate to hold that neither Plaintiffs' specific claims nor Amended Section 338(c) are preempted under a conflict preemption analysis. Indeed, the United States ceased externally restituting artworks in 1948, the Washington Conference Principles and Terezin Declaration express non-binding norms only, and no institution similar to the ICHEIC has been created for the resolution of Holocaust-era art claims. Examining similar sources, the First Circuit has also concluded that the United States has taken no express position with regard to the litigation of Holocaust-era art claims. Museum of Fine Arts, Boston, 623 F.3d at 12–13 (no express federal policy that these claims should be decided on the facts and merits, without regard to statutes of limitations). As noted, such claims have heretofore proceeded in U.S. courts. See, e.g., Altmann, 541 U.S. 677; Dunbar, 615 F.3d 574; Museum of Fine Arts, Boston, 623 F.3d 1.

However, subsequent to the Ninth Circuit's decision in Von Saher, the Solicitor General argued to the Supreme Court that it need not review the Ninth Circuit's determination that Section 354.3 was preempted. Then, after the hearing on the Foundation's motion to dismiss in this action, the Von Saher district court, on remand from the Ninth Circuit, closely reviewed the Solicitor General's amicus argument, and determined that it required a finding of conflict preemption as to Von Saher's claims, now asserted pursuant to Amended Section 338(c). Although the Ninth Circuit had rejected the application of conflict preemption, the district court found that the evidence on remand was significantly different than it had been on appeal, justifying a departure from this determination. Von Saher, 2012 WL 994299 at *6. In particular, the district court found that "[t]he Ninth Circuit and this Court did not have the benefit of the United States' view of its foreign policy, as expressed in the Solicitor General's brief filed in the Supreme Court in connection with Plaintiff's petition for writ of certiorari," which was "signed by Harold Koh, the Legal Advisor to the Department of State, on the agency's behalf." Id. In view of the clear statement and interpretation by the Executive Branch of its own foreign policy, the court concluded that the "United States' policy of external restitution and respect for the outcome and finality of The Netherlands' bona fide restitution proceedings . . . directly conflicts with the relief sought in Plaintiffs' action." Id. at *7. The court reasoned that

> 'Conflict is imminent when two separate remedies are brought to bear on the same activity.' In this case, the 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. Although the United States and California both share a goal of returning Nazi-looted art to its rightful owners, '[t]he fact of a common end hardly neutralizes conflicting means.' Moreover, if the Court were to allow Plaintiff's claims to proceed, the Court undoubtedly would be forced to review the restitution decisions made by the Dutch government and courts, including for example whether Plaintiff's claims had in fact been 'settled.' . . . 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 and would potentially implicate the act of state doctrine.

Id. (quoting Crosby, 530 U.S. at 380; citing Von Saher, 592 F.3d at 967). Although the defendants had conceded that California acted within its traditional competence in enacting Amended Section 338, the court recognized that "'[i]t is a black-letter principle of preemption law that generally applicable state laws may conflict with and frustrate the purposes of a federal scheme just as much as a targeted state law.'" Id. at *5 n.5, 8 (quoting Saleh v. Titan Corp., 580 F.3d 1, 13 n.8 (D.C. Cir. 2009)). The court thus did not strike down Amended Section 338(c) as unconstitutional, but did not permit the plaintiff's claims to proceed. Id. at *8; see also Saleh, 580 F.3d at 6–7, 13 (application of state tort laws to government defense contractors in Iraq providing interrogation and translation services at the Abu Ghraib prison preempted by Federal Tort Claims Act ("FTCA"), which provides exception to the general waiver of sovereign immunity as to tort claims brought against the government for "any claim arising out of the combatant activities of the military or armed forces"); Mujica, 381 F. Supp. 2d at 1187–88 (plaintiffs' claims under California law for wrongful death and intentional and negligent infliction of emotional distress in connection with the bombing of village in Colombia by the Colombian military preempted by U.S. policy, expressed in a statement of interest filed by the government, to "encourage other countries to establish responsible legal mechanisms for addressing and resolving human rights," and to partner with Colombia in regional security and investment).

Although considerations similar to those in Von Saher are present in this case, the Court cannot conclude that the adjudication of Plaintiffs' claims would conflict with the United States' external restitution policy, as recently expressed by the Executive Branch. A review of the Solicitor General's Von Saher amicus brief reveals that the concern was with the conflict between the Von Saher plaintiff's pursuit of her claims to recover the Cranachs and the United States' interest in the finality of actions taken by the U.S. Government pursuant to its external restitution policy. However, unlike the Cranachs, the Rue Saint-Honoré was not externally restituted by the United States. Thus, the United States' external restitution program is not implicated in this action, and there is no conflict between the remedies sought here and the remedy offered by the federal government. Moreover, although the restitution actions of other governments could potentially be implicated in this case, these will play a lesser role here than in the Von Saher litigation. The plaintiffs' claims in Von Saher implicated the restitution procedures available in The Netherlands between 1946 and 1951 and the renewed procedures available after 2001, including Desi Goudstikker's choice not to file a claim during the first period based on her perception that the proceedings were unfair, and the

Dutch Government's later decision not to compensate Von Saher for artworks no longer in its possession. See Von Saher, 2012 WL 994299 at *2. By contrast, here, following World War II, the Rue Saint-Honoré was in private hands until 1993, when Baron Thyssen-Bornemisza sold his collection of paintings to the Spanish government. (Compl. ¶¶ 25, 27–30.) Although Lilly Cassirer Neubauer filed a claim in relation to the Painting in the 1950s through the official German channels, because the Painting could not be located, the only questions at issue in those proceedings were the quality and amount of compensation. (See Neubauer v. Sulzbacher, Case No. 703, Opinion No. 414 (U.S. Court of Restitution Appeals of the Allied High Commissioner for Germany, June 1, 1954); Signed Final Transcript of German Settlement Agreement, February 28, 1958.) It does not appear from the record that Claude Cassirer's request for the return of the Painting was made pursuant to any Spanish program of restitution. (See Compl. ¶¶ 30–33.)

In sum, the United States has not held a general policy against litigation in U.S. courts of Holocaust-era art claims since 1948, and the Solicitor General's brief in Von Saher did not express a new policy against all such litigation. Rather, it clarified the existence of a policy against the litigation of claims to artwork that had been externally restituted by the United States and subject to bona fide restitution proceedings in the country of origin. This is not the circumstance that the Court confronts here. Thus, because the adjudication of Plaintiffs' claims do not conflict with a clear federal policy, these claims are not preempted under a conflict preemption analysis.

2. FIELD PREEMPTION

"The existence of th[e] general foreign affairs power implies that, even when the federal government has taken no action on a particular foreign policy issue, the state generally is not free to make its own foreign policy on that subject." Movsesian v. Victoria Versicherung AG, 670 F.3d 1067, 1072 (9th Cir. 2012) (en banc). Thus, the field preemption analysis asks whether, in its action, a state has "addressed a traditional state responsibility," or has instead "infringed on a foreign affairs power reserved by the

Constitution exclusively to the national government." Von Saher, 592 F.3d at 964; see also Movsesian, 670 F.3d at 1074 (". . . Garamendi suggests that, under a field preemption analysis, when a state law (1) has no serious claim to be addressing a traditional state responsibility and (2) intrudes on the federal government's foreign affairs power, the Supremacy Clause prevents the state statute from taking effect.").[4]

The Ninth Circuit in Deutsch, Von Saher, and Movsesian struck down three sections of the California Code of Civil Procedure on field preemption grounds. Deutsch concerned a statute, Section 354.6, which created a cause of action for Second World War slave labor or forced labor victims of the Nazi regime, its allies and sympathizers, and for the victims' heirs, to recover compensation for labor performed, from the entity for whom it was performed or a successor entity, and extended the statute of limitations for such claims until December 31, 2010. See 324 F.3d at 706–07. Von Saher concerned a statute, Section 354.3, which vested California courts with jurisdiction over claims to recover Holocaust-era artwork from "any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance," and extended the statute of limitations for such claims until December 31, 2010. Von Saher, 592 F.3d at 958–59. Movsesian concerned a statute, Section 354.4, which vested California courts with jurisdiction over certain insurance claims brought by "Armenian Genocide victim[s]" arising out of policies issued or in effect between 1875 and 1923 and extended the statute of limitations for these claims to December 31,

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[4] In Garamendi, the Supreme Court stated that

> 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, field preemption might be the appropriate doctrine, whether the National Government had acted and, if it had, without reference to the degree of any conflict, the principle having been established that the Constitution entrusts foreign policy exclusively to the National Government. Where, however, a State has acted within what Justice Harlan called its 'traditional competence,' 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.

539 U.S. at 420 n.11. As discussed supra, Garamendi was decided on conflict preemption grounds.

2016. See Movsesian, 670 F.3d at 1070 & n.2. The Ninth Circuit's reasoning in these cases is explained in greater detail below.

a. Area of Traditional State Responsibility

"Courts have consistently struck down state laws which purport to regulate an area of traditional state competence, but in fact, affect foreign affairs." Von Saher, 592 F.3d at 964 (rejecting purported in interest in regulating property, "an area traditionally left to the states") (citing Garamendi, 539 U.S. at 425–26, which rejected a "purported state interest in regulating insurance business and blue sky laws"; Crosby, 530 U.S. at 367, 373 n.7, which rejected a "purported state interest in taxing and spending"; Zschernig, 389 U.S. at 437–38, which rejected a "purported state interest in regulating descent of property"; and Deutsch, 324 F.3d at 707, which rejected a "purported state interest in procedural rules"). In so doing, courts have looked to the "real purpose" of the state law, by examining the language and scope of the statute and the statute's legislative history. Id. at 964–65; Garamendi, 539 U.S. at 426 (finding that the real purpose of California's Holocaust Victims' Recovery Act was "concern for the several thousand Holocaust survivors said to be living in the state").

In Von Saher, the Ninth Circuit rejected the plaintiff's argument that Section 354.3, "concern[ed] a quintessential state function: the establishment of a statute of limitations for actions seeking the return of property." Von Saher, 592 F.3d at 964. The court looked to the scope of the statute, which "address[ed] only the claims of Holocaust victims and their heirs, and allowed suits against any museum or gallery, whether located in California or not." Id. at 964–65. The court also looked to the statute's legislative history; indeed, a memorandum submitted by the California Governor's office in support of the bill explained that "California has been a leader in exposing those entities who benefitted financially from the plunder or exploited the unusual circumstances of the Holocaust, who have been less than forthcoming in their business dealings." Id. at 965. The court thus concluded that the "real purpose" behind California's enactment of Section 354.3 was not to protect the property interests of

California residents and to regulate the state's art trade, but to "provide relief to Holocaust victims and their heirs" and to "create a friendly forum for litigating Holocaust restitution claims." Id. at 964–965. Thus, "[b]y opening its doors as a forum to all Holocaust victims and their heirs to bring Holocaust claims in California against 'any museum or gallery' whether located in the state or not," California had "expressed its dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of Word War II," and could make "no serious claim to be addressing a traditional state responsibility." Id.

Confronting parallel questions in Deutsch and Movsesian, the Ninth Circuit reached similar conclusions. In Deutsch, the Ninth Circuit struck down Section 354.6, which created a cause of action for Second World War slaves and forced labor victims of the Nazi regime to recover compensation. The court found that, rather than legislating within its traditional competence, California sought to "create its own resolution to a major issue arising out of the war—a remedy for wartime acts that California's legislature believed had never been fairly resolved." See Deutsch, 324 F.3d at 706–07, 712. In Movsesian, which was decided after Von Saher and after the hearing in this case, the Ninth Circuit struck down Section 354.4, the Armenian Genocide insurance statute. The court explained that the statute could not "'be fairly categorized as a garden variety' insurance regulation," because it applied only to policies in effect in Europe and Asia between 1875 and 1923 and specified a certain class of people as its intended beneficiaries, and because the legislative findings expressly stated the intent "to ensure that Armenian Genocide victims and their heirs be permitted to have an expeditious, inexpensive, and fair forum in which to resolve their claims." Movsesian, 670 F.3d at 1075–76 (quoting Von Saher, 592 F.3d at 964). The court thus found it clear that the statute's "real purpose" was "to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events." Id. at 1076.

Here, similar to the Von Saher plaintiff, Plaintiffs argue that Amended Section 338(c) is "simply a statute of limitations requiring claims for the return of stolen art brought against museums and galleries to be brought within six years from actual discovery of the location of the art." (Plaintiffs' Suppl. Mem. at 10). As such, it "addresses the traditional state responsibility for establishing statutes of limitations for property claims," and "serves the undoubtedly important state interest in facilitating the return of stolen artworks." (Id. at 10–11.) Plaintiffs argue that "there is no reason to conclude that [the statute's] 'real purpose is to provide relief to Holocaust victims and their heirs.'" (Id. at 12 (quoting Von Saher, 592 F.3d at 964).) They cite to the legislative history indicating several neutral purposes behind the statute: to facilitate otherwise difficult claims to stolen art, and to resolve conflicting California cases as to when the limitations period begins to run for claims to art stolen before 1983. (Id. at 11–12.)

Plaintiffs argue that, in contrast to the unconstitutional statutes at issue in Garamendi, Deutsch, and Von Saher, "Section 338(c)(3) on its face references neither foreign states or persons, nor actions occurring abroad." (Id. at 12.) Unlike those statutes, Amended Section 338(c) does not define the plaintiffs who may invoke it; identify defendants who were wartime enemies of the United States; or restrict its application to claims arising during wartime. (Id. at 12–13.) Plaintiffs argue that the limitation of the statute to claims filed before December 31, 2017, for art taken after 1910 "reflects not an intent to interfere with foreign affairs, but rather an effort to impose a reasonable limit on the liability that museums and other entities may face." (Id. at 13.) Neither does Subsection (c)(4), which directs courts not to apply California's borrowing statute, indicate a "true intent to meddle in foreign affairs." (Id.) On its face, the borrowing statute "has nothing to do with war remedies." (Id.) Moreover, Subsection (c)(4) does not preclude courts from applying a foreign statute of limitations; instead, courts will engage in a traditional choice of law analysis to determine which limitations period should apply. Indeed, numerous U.S. states have no borrowing statute; thus, to preclude application of California's borrowing statute cannot be unconstitutional. (Id. at 14 n.16.) Finally, California's borrowing statute would not apply in this case in any event, because Claude Cassirer was a California resident when his claims accrued. (Id. at 13 n.15.)

The Court is not persuaded. Plaintiffs make these arguments while ignoring a number of critical facts: the legislation was drafted in response to the Von Saher decision; the "idea" for the legislation came from Von Saher's counsel who had previously represented Cassirer in state litigation; and the legislative history of the amendment to Section 338(c) expressly notes that the legislation would assist a class of plaintiffs "that the Legislature has already intended to protect." Thus, while Amended Section 338(c) was drafted to create the appearance that it was intended solely to address an area of "traditional state responsibility," the scope and content of the legislation and the context in which it was enacted suggest otherwise. As the Foundation notes, Amended Section 338(c) is "functionally equivalent" to Section 354.3, in that both revive claims alleging art theft that are otherwise time-barred, contain a sunset provision for such claims, target museums and galleries that may possess stolen art, and bar the application of California's borrowing statute, creating a presumption in favor of California's extended limitations period. (Defendant's Suppl. Mem. at 7.) Although, unlike Section 354.3, Amended Section 338(c) does not, by its terms, limit its application to Holocaust-era artwork, the statute does limit its application to claims to art taken after 1910—a time frame that includes both the first and second World Wars—and specifies that it applies to "a taking or theft by means of fraud or duress." Cal. Civ. Proc. Code § 338(c)(3)(A), (3)(B) (2011). The forced transfer of property to the Nazis has long been characterized as having been accomplished under "duress." See, e.g., Plunder and Restitution, Staff Report, Ch. V (cataloguing international discussions regarding inclusion of "presumption of duress" in post-war restitution laws). The statute's reference to this term thus clearly indicates that the extended limitations period encompasses Holocaust-era claims. Like Section 354.3, Amended Section 338(c) is not limited to claims against California entities, and, with the striking down of Section 354.3, Section 338(c) is the only California statute currently in effect that blocks application of the state's borrowing statute.

Second, as noted, the legislative history indicates that the amendments to Section 338(c) were intended, in significant part, to provide relief to the same class of plaintiffs targeted by Section 354.3, including Von Saher and the Cassirers. This history states, in numerous places, that the amendments respond to the Ninth Circuit's Von Saher decision, including its (1) observation that California courts have reached conflicting determinations as to the application of the "discovery rule" to claims to art stolen before 1983; and (2) determination that Section 354.3 was unconstitutional because it singled out claims to Nazi-looted art. (See Amended Section 338(c) Bill Analysis at 5/4/10 Hearing, pgs. 6–7 (citing Naftzger, 49 Cal. Rptr. 2d 784; Soc'y of Cal. Pioneers v. Baker, 50 Cal. Rptr. 2d 865).) Although the California Legislature may, in good faith, enact legislation that responds to the decisions of federal and California courts, it has not done so here. Indeed, the extended statute of limitations and the clarification that the limitations period runs from actual discovery applies only to "action[s] for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer." Cal. Civ. Proc. Code § 338(c)(3)(A) (2011). The 2011 amendment thus resolves the dispute engendered by the 1983 amendment only in a specific class of cases. Moreover, the bill analysis specifically states that the amendments to Section 338(c) "would help to provide protection for victims that the Legislature has already intended to protect" by the enactment of Section 354.3; thus, "[v]ictims who relied upon the provisions of [Section 354.3] and failed to file their claim based on a different statute of limitations are not prejudiced in bringing their actions." (Amended Section 338(c) Bill Analysis at 6/22/10 Hearing, pg. 7.)

The legislative history contains no discussion that would explain the sudden recognition of art theft as a widespread problem requiring legislative action, particularly given the 1983 amendment to Section 338 which created delayed accrual of the statute of limitations until the discovery of the location of stolen items of "artistic significance."[5] In fact, the operation of the statute of limitations in the field of art theft has arisen largely in a single class of cases—artwork stolen from its rightful owners by Nazi thugs. Thus, in light of the parallel scope and purpose between Amended Section 338(c) and the former Section 354.3, the Court concludes that the "real purpose" behind the amendments to Section 338(c) is 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 state." Von Saher, 592 F.2d at 965. In short, no suggestion is made in the text of the statute, in its legislative history, or in the Parties' arguments that other specific classes of plaintiffs will in fact benefit from the amendments. Accordingly, the Court concludes that, in amending Section 338(c), California has legislated beyond its traditional competence.

b. Intrusion on Foreign Affairs Power

The Ninth Circuit has recognized that the Constitution reserves exclusively to the federal government the power to make and resolve war, "including the power to legislate restitution and reparation claims." Von Saher, 592 F.3d at 965–66; see also Deutsch, 324 F.3d at 711–12 ("Matters related to war are for the federal government alone to address."); Saleh, 580 F.3d 1 at 11 ("The states . . . constitutionally and traditionally have no involvement in federal wartime policy-making."). Thus, "[i]n the absence of some specific action that constitutes authorization on the part of the federal government, states are prohibited from . . . modifying the federal government's resolution of war-related disputes." Deutsch, 324 F.3d at 714. A state may also intrude impermissibly on foreign affairs by "express[ing] a distinct point of view on a specific

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[5] The open debate, as noted in Von Saher, was the application of the amendment to artwork stolen prior to 1983 and whether "discovery" in the amended statute included constructive discovery. See Von Saher, 592 F.3d at 968–69. But those problems could have been resolved without the sweeping expansion of Section 338(c) through a simple legislative fix narrowly addressing those issues. But for Von Saher's counsel, who appears to have been the bill's architect, that simple fix would not have cured his client's statute of limitations problem because the Goudstikkers were aware of the location of the paintings and had been in contact with the Dutch authorities on and off since the late 1940s. Thus, it was essential that the statute contain language that would revive their claim and extend the statutory period within which the claim could be brought.

matter of foreign policy" and "send[ing] a political message on an issue of foreign affairs by providing relief and a friendly forum to a perceived class of foreign victims." Movsesian, 670 F.3d at 1076–77 (Armenian Genocide insurance statute impermissibly intruded on foreign affairs by "impos[ing] the politically charged label of 'genocide' on the actions of the Ottoman Empire (and, consequently, present-day Turkey)," thus "establish[ing] a particular foreign policy for California," and by requiring courts to make a "highly politicized inquiry" into whether a policyholder "escaped" the Ottoman Empire "to avoid persecution").

In Von Saher, the Ninth Circuit held that Section 354.3 impermissibly "establish[ed] a remedy for wartime injuries." Von Saher, 592 F.3d at 966. The court looked to the legislative findings, which included many references to the "Nazi regime," "Nazi persecution," and the "many atrocities" committed by Nazis, and the fact that Section 354.3 was closely modeled on Section 354.6, in Deutsch, which had impermissibly created an alternative procedure for the resolution of claims for compensation for slave and forced labor arising from World War II. Indeed, both statutes created new causes of action "with the aim of rectifying wartime wrongs committed by our enemies or by parties operating under our enemies' protection." Id. Under both statutes, the actionable injury occurred in the context of war. Id. Moreover, in order to adjudicate claims under Section 354.3, California courts would be required, impermissibly, to review acts of restitution made by foreign governments. Id. at 967. The court found Section 354.3 to be particularly problematic by reason of the "documented history of federal action addressing the subject of Nazi-looted art," leading to the conclusion that the "history of federal action is so comprehensive and pervasive as to leave no room for state legislation." Id. The court cited the program of external restitution adopted immediately following the war; the establishment, in 1998, of the Presidential Advisory Commission on Holocaust Assets in the United States, which produced the Plunder and Restitution report; and the United States' participation in the Washington Conference Principles. Id. Finally, the court observed that the recovery of Holocaust-era art is a matter of international concern, with many calls being made for the creation of an international registration system and the establishment of a commission to settle ownership disputes. However, only the federal government possesses the power to negotiate and establish these remedies. Id. at 967–968. Thus, the field of Holocaust-era art claims has been "occupied exclusively" by the federal government, and California lacks power to act in this arena. Id. at 968.

It follows from the Ninth Circuit's decision in Von Saher that the amendments to Section 338(c) impermissibly intrude on foreign affairs. The Ninth Circuit's contemporaneous determination that the federal government has occupied the field with regard to the resolution of Holocaust-era art claims, leaving no room for states to legislate in this area, is binding on this Court. See Von Saher, 592 F.3d at 967–68. The resolution of this case then turns on the question whether, by amending Section 338(c), California has sought to legislate in this area. The Court concludes that it has. As noted supra, the amendments to Section 338(c) make this statute functionally equivalent to Section 354.3, in that it revives and extends the statute of limitations for claims to art transferred during the Holocaust era, permits these claims to be brought in California against museums and galleries (and now also auctioneers and dealers) located anywhere in the world, and blocks application of California's borrowing statute, creating a presumption in favor of application of California's extended limitations period. Like Section 354.3, Amended Section 338(c) impermissibly intrudes on foreign affairs because its aim is to provide a remedy for wartime wrongs through California courts that would otherwise not exist. Moreover, the actual claims for relief asserted pursuant to Section 354.3 in Von Saher were common law claims similar to those asserted by Plaintiffs here, pursuant to Amended Section 338(c). Cf. Von Saher v. Norton Simon Museum of Art at Pasadena, No. CV 07-2866-JFW (JTLx), 2007 WL 4302726, at *1 (C.D. Cal. Oct. 18, 2007) (complaint asserted claims for replevin, conversion, damages under Cal. Penal Code section 496, quiet title, and declaratory relief).

Plaintiffs are correct that the text of Amended Section 338(c) is set forth in terms more neutral than those of Section 354.3 by eliminating references to the Holocaust and nominally sweeping within its scope a broader temporal and substantive range of claims. (See Plaintiffs' Suppl. Mem. at 15.) However, the statute's legislative history, and the textual reference to "taking[s] or theft by means of . . . duress," suggests that the amendments were primarily intended to provide relief to the same class of plaintiffs as those targeted by Section 354.3: persons with claims to Holocaust-era art, such as Von Saher and the Cassirers. Moreover, the Court cannot agree with Plaintiffs that adjudication of their claims, made timely by Amended Section 338(c), would not require the Court to review the legitimacy of the compensation provided to Lilly Cassirer Neubauer by the German government in 1958. The question of whether she was adequately compensated for the Painting will necessarily bear on the question whether Plaintiffs retain title to it today. The necessity of such review weighed in favor of a finding of field preemption in Von Saher, and it also does so here. See Von Saher, 592 F.3d at 967. In addition, the Court observes that, like the California statute at issue in Movsesian, Section 354.4, the adjudication of claims under Amended Section 338(c) would at times impermissibly require courts to make politically sensitive determinations, including whether the circumstances surrounding the transfer of a particular work of art constituted "duress." See Cal. Civ. Proc. Code § 338(c)(3)(A), (c)(3)(C)(iv) (2011).

To avoid the Court's intended result, Plaintiffs rely on Alperin v. Vatican Bank, 410 F.3d 532 (9th Cir. 2005), which found justiciable, under the political question doctrine, claims to profits reaped during the Second World War by the Croatian Ustasha from lost and looted property, which passed through the Vatican Bank. Id. at 538, 548. Plaintiffs argue that, similarly, their claims to recover the Rue Saint-Honoré are "garden-variety legal and equitable claims." (Plaintiffs' Suppl. Mem. at 16.) This argument was rejected in Von Saher. As the Ninth Circuit explained, the "holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims." Von Saher, 592 F.3d at 967. That is, the problem in this case is not the Plaintiffs' claims, which are justiciable in U.S. courts. Rather, the problem is Amended Section 338(c), which "cannot be fairly categorized as a garden variety property regulation," Von Saher, 592 F.3d at 964, and exceeds California's power to legislate. Plaintiffs also cite the Bernstein case, decided in 1949, for the proposition that "a state legislature may constitutionally amend a statute of limitations to make timely a claim to redress Nazi looting that otherwise would have been time barred." (Plaintiffs' Second Suppl. Mem. at 2–3.) In that case, the Second Circuit held that a 1948 New York statute tolling the limitations period for claims arising in a foreign country with which the United States was at war permitted the plaintiff's claim—for conversion in connection with the transfer under duress of his controlling shares in a German shipping company—to proceed. See Bernstein, 173 F.2d at 72–73, 74–75. The Second Circuit's decision did not address foreign affairs preemption, was decided before many of the federal government's actions were taken with respect to Holocaust-looted art, and is, in any event, not controlling on this Court. Under Von Saher, it is plain that California may not provide a legislative remedy for Holocaust-era art claims. Because the state has impermissibly attempted to do so by amending Section 338(c), that statute, as amended, is preempted under the foreign affairs doctrine. The Foundation's motion to dismiss on foreign affairs preemption grounds is therefore **GRANTED**.

In the interest of creating a complete record, the Court will address the remaining claims raised in the pending motions.

B. DUE PROCESS

The Foundation contends that application of Amended Section 338 violates the Fourteenth Amendment's Due Process Clause by retroactively stripping it of the vested property interest it acquired in the Painting when the long-standing three-year statute of limitations expired. (Mem. at 6.) In making that argument, the Foundation relies on the long-standing proposition that retroactive revival of time-barred claims contravenes foundational notions of due process when the effect of such revival is to interfere with vested title to real or personal property. (Id. (citing Campbell v. Holt, 115 U.S. 620, 627–628 (1885)). The Foundation then contends that, under both Spanish and California law, it has acquired a vested property right in the Painting.

For the reasons set forth herein, the Court concludes that the Foundation cannot establish such a claim on the basis of the current record. Under Campbell and its progeny, the Foundation has not been deprived of its property without due process of law merely by being subjected to suit. In Campbell, the Court held not that the modification of the statute of limitations itself violated due process, but that "to give the act the effect of transferring . . . title" would constitute such a deprivation. 115 U.S. at 623 (emphasis added). The Foundation, by bringing the motion at this early stage of the proceedings, with almost no factual record before the Court, has improperly sought to sidestep a determination of the merits.

1. RETROACTIVE APPLICATION OF STATUTES OF LIMITATIONS

The Supreme Court formally adopted the doctrine of the English courts in Campbell v. Holt, finding that it "ha[d] been repeatedly asserted in th[e] [Supreme] Court" and "in the highest courts of the states of the Union":

> [I]n an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, that . . . act deprives the party of his property without due process of law.

115 U.S. at 623. "The reason" for that deprivation, the Court held:

> [I]s that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff would be to deprive him of his property without due process of law.

Id.

But a lapse of time does not automatically vest a defendant with legal title to property, a principle which has operated to blunt the potential impact of Campbell. For example, the Supreme Court in Chase Sec. Corp. v. Donaldson, recited what was by that time considered a long-standing principle of the Court's due process jurisprudence:

> [W]here lapse of time has not invested a party with title to real or personal property, a state legislature, consistently with the Fourteenth Amendment, may

> repeal or extend a statute of limitations, even after right of action is barred thereby, restore to the plaintiff his remedy, and divest the defendant of the statutory bar. This has long stood as a statement of the law of the Fourteenth Amendment . . . .

325 U.S. 304, 309 (1945) (emphasis added) (citing Campbell, 115 U.S. at 623). See also Stewart v. Keyes, 295 U.S. 403, 417 (1935). The Ninth Circuit has re-stated the principle in much the same language. See Starks v. S.E. Rykoff Co., 673 F.2d 1106, 1109 (9th Cir. 1982) ("Where a lapse of time has not invested a party with title to real or personal property, a state legislature may extend a lapsed statute of limitations without violating the fourteenth amendment, regardless of whether the effect is seen as creating or reviving a barred claim.") (citing Chase Sec. Corp., 325 U.S. at 311–313.) Accordingly, in order to establish a due process violation, the Foundation must show that its purchase or adverse possession of the Painting, or the lapse of the relevant statute of limitations, vested it with title to the Painting. Although the broad principle under which the Foundation seeks relief appears straightforward, the actual vesting of title to personal property, and the effect of a statute of limitations' expiration on that title are the difficult and unresolved issues on which the Foundation's claim depends, and to which the Court now turns.

2. VESTED TITLE

The Parties engage in wide-ranging argument concerning the proper way to analyze the Foundation's claim of title.[6] The Foundation contends that "title to the Subject Painting vested in the Foundation because the Foundation purchased the Subject Painting in 1993" from the Baron Thyssen-Bornemisza's collection. (Mem at 7.) In the

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[6]The Parties also disagree as to which law, Spain's or California's, is applicable to these claims. The Foundation argues that "because the Subject Painting was in Spain at the time the Foundation purchased it, and the Subject Painting has remained in Spain since that time, Spanish law determines whether the Foundation acquired title through its 1993 purchase, by prescription, or adverse possession during that time." (Mem. at 8.) The Cassirers contend that the Foundation must have acquired a vested right under California law, and that Spanish law has "no bearing on . . . whether the California legislature may amend a California statute of limitations without violating the Due Process Clause." (Docket No. 128 [Opp.] at 10.) Each cite varying choice of law sources in support of these contentions. Because of the fact issues raised by each of the Foundation's claims of title, the Court finds that this issue does not require resolution at the present time.

alternative, the Foundation argues that it has acquired title to, and thus a "vested property right" in the Painting under both Spanish and California law's adverse possession and prescription doctrines. (Id.)

The Court finds that each of the Foundation's three theories rely on facts not pleaded in the complaint, and which are subject to discovery. In particular, the Foundation's contention that it acquired title to the Painting by virtue of the 1993 purchase raises a number of fact issues not resolved by the allegations contained in the complaint. Under California law, that claim requires, at the very least, an inquiry into the history of the painting's transfer. See, e.g., Cassirer v. Kingdom of Spain, 616 F.3d 1019, 1030 n. 14 (9th Cir. 2010) (discussing the "familiar notion that a purchaser cannot get good title if property has been stolen at any place along the line, which is the general rule at common law") (citing Marilyn E. Phelan, Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork, 23 Seattle U. L. Rev. 631, 633–34 (2000) ("[O]ne who purchases, no matter how innocently, from a thief, or all subsequent purchasers from the thief, acquires no title in the property. Title always remains with the true owner."); U.C.C. § 2-403 (seller can only transfer the title that it possesses)). Under Spanish law, Article 464 of Spain's Civil Code states that "possession of personal property, acquired in good faith is equivalent to title thereto," but it also provides that "the person who lost personal property or has been illegally deprived thereof may recover it from whoever possesses it." (Docket No. 129 [Dunwoody Decl.], Ex. A.)

An evaluation of the Foundation's adverse possession theory also requires fact-intensive inquiries into such issues as whether the Foundation's possession was uninterrupted, whether and how long that possession can be characterized as "open," and whether it has held the painting "as an owner."[7] (Mem. at 9.) The Foundation

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[7] Similarly, although Section 1955 of the Spanish Civil Code provides that "ownership of personal property is acquired by means of uninterrupted possession for a period of six years, with no other condition," that same provision clarifies that "in terms of the owner's right to reclaim the lost personal property or property of which he has been illegally deprived, as well as those properties acquired at public

merely asserts in its memorandum that it has "satisfied the requirements for acquiring title by adverse possession," but does not substantiate these allegations. (Id.) The Complaint states only that Spain paid the Baron $300 million in 1993 so that the Foundation could take on the entire collection, but does not speak to the date of conveyance, the manner in which the Painting was exhibited, or the history of the Painting's possession and transfer. (Compl. ¶ 30.) Nevertheless, the Foundation asks the Court to rule on issues of first impression under California law—namely, whether the doctrine of adverse possession is properly applied to personal property—with almost no factual record to apply it to. See Soc'y of Cal. Pioneers, 50 Cal. Rptr. 2d at 872 n. 13 ("The [California Supreme Court] in San Francisco Credit C. House v. Wells, 239 P. 319 (Cal. 1925) suggested that the doctrine of adverse possession would not apply to personal property, and no California case has been cited in support of such an application. We note that this issue does not appear to be settled. Even if we held that the doctrine of adverse possession applies to personal property, which we do not, it would not help respondent . . . .") (internal citations omitted); but see 13 B.E. Witkin, Summary of California Law, Personal Property § 123, at 139 (10th ed. 2005); 3 Am. Jur. 2d Adverse Possession § 12 (2007).

The Foundation's prescription claim, even if colorable, is still precluded by an undeveloped record because that doctrine ultimately relies on similar facts as those required to make out an adverse possession claim. The Foundation contends that under California law, the lapse of Section 338's previous three-year statute of limitations itself caused title to be vested in the Foundation in 2003, three years after the Cassirers discovered that the Painting was on display. (Mem. at 15.) By contrast, the Cassirers

auction, stock exchange, fair or market, or from a legally licensed merchant who regularly deals with analogous objects, the provisions of section 464 of this Code shall apply." (Docket No. 122-2 [Baviere Decl.], Ex. E.) As noted above, Article 464 states that "the person who lost personal property or has been illegally deprived thereof may recover it from whoever possesses it." The Foundation contends that "Article 464 . . . does not prevent acquisition of title after three years (with good faith) or six years (in the absence of good faith) by a third party possessor," implying that the operation of Article 464 is conditional on the operation of Section 1955. However, it does not account for the fact that it is Section 1955 that references, and thus appears to contemplate application of Article 464, and not visa versa.

contend that the prior version of Section 338 "did not give rise to any vested rights merely by the passage of time," as "on its face, [that] statute . . . merely specifies when a claimant has lost his or her ability to pursue a remedy due to the passage of time." (Opp. at 8.)

California law is largely silent on the issue, but that which does exist supports Plaintiffs' position. The California Supreme Court has held that similar statutes of limitations in California's Code of Civil Procedure:

> affect only the remedy, i.e., the action, or means given by the law for the recovery of a right, but not the right itself. On the other hand, section 1007 of the Civil Code, pertaining to the acquisition of title by prescription, which is correlated with, and must be construed with, the sections of the Code of Civil Procedure relating to adverse possession confers a substantive right.

Akley v. Bassett, 209 P. 576, 584 (Cal. 1922) (internal citations omitted). Accordingly, as the Cassirers argue, California lawmakers know how to draft a statute which vests title in an adverse possessor, as evidenced by section 1007 of the State's Civil Code, and Section 338 gives no indication that it was designed to do so. Section 1007 refers to both "title by prescription" and by "adverse possession," providing that:

> Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar any action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all . . . .

Cal. Civ. Code § 1007.

Indeed, the Court is aware of no California case holding that, under California law, a possessor obtains title to personal property merely through expiration of a statute of limitations. See Nelson v. Flintkote Co., 218 Cal. Rptr. 562, 565 (Ct. App. 1985) (discussing, in the context of a similar due process claim, the procedural character of statutes of limitations, but noting (without citation) that "prescriptive property rights . . . have sometimes been deemed substantive."); Steketee v. Lintz, Williams & Rothberg, 694 P.2d 1153 (Cal. 1985) ("The principle is . . . well established that [s]tatutorily imposed limitations on actions are technical defenses which should be strictly construed to avoid the forfeiture of a plaintiff's rights.") (internal citation and quotation marks omitted). The Foundation cites only to cases holding that the expiration of a statute of limitations precludes recovery of personal property lost through conversion, which does not address the transfer of title. See First Nat'l Bank v. Thompson, 140 P.2d 75, 76 (Ct. App. 1948); Bell v. Bank of California, 94 P. 889, 892 (Cal. 1908).[8]

The Court therefore finds that none of the Foundation's title theories can be established on the basis of the current record. Accordingly, the Foundation cannot demonstrate that it has a vested property interest in the Painting, such that retroactive revival of the Cassirers' claim would deprive it of property without due process of law. For these reasons, the Court **DENIES** the motion to the extent that it urges dismissal based on violations of the Fourteenth Amendment's Due Process Clause.

C. FREE EXPRESSION

The Foundation next contends that Amended Section 338 burdens freedom of expression and thus violates the First Amendment by "expressly target[ing] for unfavorable treatment select entities," namely museums and art galleries, "engaged in protected First Amendment activities." (Mem. at 14.)

The Foundation rests its First Amendment argument on two premises. First, the Foundation contends that it is beyond dispute that artwork, as well as the public display or sale of works of art in a museum or art gallery, are forms of protected speech. (Mem. at 16 (citing Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 756 n.5, 768 (1988)). Second, the Foundation contends that it is "well-recognized that a state may not impose special burdens targeted at individuals or entities who engage in constitutionally protected activities." (Id. (citing Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue, 460 U.S. 575 (1983) (holding that a special use tax on paper and ink singled out the press for special treatment and thereby burdened interests protected by the First Amendment)). Accordingly, the Foundation reasons, the "statute marginalizes

[8] As the Cassirers note, even if the Court were to apply the Spanish law of prescription, the Foundation's argument still relies on a number of facts not alleged in the complaint, such as the duration of its possession, and whether that possession has been open and uninterrupted. Moreover, as with the Foundation's adverse possession theory, Article 1955 of the Spanish Civil Code is explicitly made subject to Article 464.

those who regularly engage in the public display and distribution of fine art—a form of protected expression—. . . subject[ing] them to civil liability and possible forfeiture of their artwork for claims that are otherwise stale," whereas "entities or individuals who keep their artwork in a private collection and thus do not engage in expressive conduct are not subject to this penalty." (Id.)

From the outset, the Foundations' argument suffers from definitional problems. Although it relies on the proposition that "artwork is a form of speech," it cites differential treatment not between those who produce or do not produce artwork, or between those who produce certain kinds of artwork, but rather between those who exhibit and those who do not exhibit artwork. Moreover, that differential treatment consists not in any form of restriction on speech, but rather merely an extension of a statute of limitations allowing otherwise stale claims for conversion to go forward, affecting the Foundation's acquisition and ownership, rather than its exhibition of artwork. In sum, the statute does not "burden" expression in any manner cognizable under the Supreme Court's First Amendment jurisprudence. That the Foundation's First Amendment claim does not fit neatly within any particular body of the Supreme Court's First Amendment jurisprudence highlights the extent to which the statute neither (1) regulates speech in a way that the Supreme Court has deemed "dangerous"; or (2) burdens that speech in a way recognized as problematic by the Court's First Amendment case law. An examination of the cases relied upon by the Foundation reveals the deficiencies in its First Amendment arguments.

The Foundation relies primarily on the Supreme Court's decision in Minneapolis Star, where the Court held that a special use tax on paper and ink singled out the press for special treatment and thereby burdened interests protected by the First Amendment. Subsequent Supreme Court cases have oscillated between reading that case as limited to the selective taxation of newspapers, and articulating the principle more broadly. See Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 228 (1987) (citing Minneapolis Star and reiterating the view that the Supreme Court's "cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment."); but see Arcara v. Cloud Books, Inc., 478 U.S. 697, 704 (1986) (citing Minneapolis Star and stating that "we have also applied First Amendment scrutiny to some statutes which, although directed at activity with no expressive component, impose a disproportionate burden upon those engaged in protected First Amendment activities"). These cases have also clarified that the concern animating the Minneapolis Star court was that "a power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." Arkansas Writers', 481 U.S. at 228.

More recently, in United States v. National Treasury Employees Union, the Supreme Court, citing Minneapolis Star and Arkansas Writers', held that "although [a statute prohibiting receipt of honoraria by government employees] neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity." 513 U.S. 454, 468 (1995). The Court found that "the widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision," and that, "unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens." Id.

In principle, then, the Supreme Court has recognized that statutes which are not directed at regulating the speech of its content can nevertheless violate the First Amendment. However, neither the facts of these cases nor the manner in which they have subsequently been interpreted in the Ninth Circuit lend support to that theory's application in circumstances such as these.

In Spokane Arcade, Inc. v. City of Spokane, the Ninth Circuit cited Treasury Employees in rejecting an adult entertainment business' challenge to a city ordinance requiring that the interior of adult video arcade booths be visible to employees in adjacent public rooms. 75 F.3d 663 (9th Cir. 1996). The business argued that the regulation constituted an invalid restriction on the manner in which protected speech could be expressed. The Court of Appeals upheld the ordinance, finding that:

> The ordinances promulgated by the city in this case do not deny World Video the opportunity to operate its establishments, but merely (or rather, allegedly) increase the costs of its doing so. Even if the costs of compliance were so great that World Video would be forced out of business, the ordinances do not pose any intrinsic limitation on the operation of the arcades, but merely increase World Video's vulnerability to such market forces as the increased costs of labor and the decreased or stagnant demand for pornography.

Id. at 667.

Critically, the Ninth Circuit read Treasury Employees in a manner that confirms its inapplicability to the present facts:

> Treasury Employees, however, is entirely consistent with the test articulated by this court in Topanga and can be distinguished easily from the instant matter. The prohibition at issue in Treasury Employees had the effect of not merely reducing the value of the employees' speech, but rather of barring them from the market in which that speech might be expressed. That they could have engaged in such acts of expression without compensation was irrelevant; Treasury Employees suggests that they must not be denied the opportunity to enter into a market where they might be compensated for such expression.

Id.

As in Spokane Arcade, the statute here does not "deny [the Foundation] the opportunity to operate its establishments, but merely (or rather, allegedly) increase[s] the costs of its doing so." Id. Further, as the Court of Appeals noted there, "[e]ven if the costs of compliance were so great that [the Foundation] would be forced out of business," the amendment to the statute of limitations "do[es] not pose any intrinsic limitation on the operation of the [gallery], but merely increase[s] [the Foundation's] vulnerability" to suits for stolen property. Id. The statute does not, as the Foundation contends, directly burden their expressive activity, nor does it "bar[] them from the market in which th[eir] speech might be expressed," as the Ninth Circuit read Treasury Employees in Spokane Arcade. Id.

The Foundation's broad reading of the principle articulated in Minneapolis Star is thus precluded by the case law interpreting that decision, which has either construed its holding narrowly or rejected challenges to statutes "burdening" expression in the incidental fashion in which Section 338 touches on the Foundation's expressive activity.[9] Accordingly, the Court **DENIES** the motion to the extent that it is predicated on violations of the First Amendment.

D. EQUAL PROTECTION

Finally, the Foundation contends that Amended Section 338 should be invalidated because it runs afoul of the Fourteenth Amendment's Equal Protection Clause in "target[ing] museums, galleries, auctioneers, and dealers for disparate and discriminatory treatment regarding their fundamental right to hold vested property." (Mem. at 19.)

The Foundation concedes that Section 338' s "discriminatory application is subject to rational basis scrutiny"; that "a law will survive rational basis review 'so long as it bears a rational relation to some legitimate end,'" Romer v. Evans, 517 U.S. 620, 631 (1996); and that "it can be difficult to show that a law violates the equal protection clause under rational basis review." (Id.) Nevertheless, the Foundation contends that the task is "not impossible," and that, for various reasons, Section 338 fails to meet even the rational basis test.

The Foundation contends that the amendment's purpose, which, according to its legislative history, was to address certain difficulties faced by claimants such as the Cassirers, is belied by a number of Amended Section 338' s new features, including (1) "running the statute of limitations from the moment that the claimant has actual knowledge of both the location of the object and the possessory interest," and thus undercutting "a foundational concept of American law, [namely that] property owners must take reasonable steps to act like owners and protect their property"; (2) extending

[9] The Cassirers also cite to Cammarano v. United States, a 1952 case in which the Supreme Court upheld a Treasury regulation denying deductions for expenditures by individual or corporate income taxpayers to the defeat legislation. The Court reasoned there that the "petitioners [we]re not being denied a tax deduction because they engage[d] in constitutionally protected activities, but [we]re simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under the provisions of the Internal Revenue Code." 358 U.S. 498, 512–513. The Court held that "nondiscriminatory denial of deduction from gross income to sums expended to promote or defeat legislation is plainly not 'aimed at the suppression of dangerous ideas.'" Id. (citing Speiser v. Randall, 357 U.S. 513, 519 (1958)).

the statute of limitations from three to six years notwithstanding the "actual notice" discovery standard; (3) targeting only museums, galleries, auctioneers and dealers for claims involving works of fine art; (4) precluding application of foreign law through its barring of the borrowing statute's operation. (Mem. at 20–22.) The Foundation contends that these features of the statute both evidence the legislature's true motive of supporting claims such as the Cassirers (or even the Cassirers' claim itself), and in any event do not serve "legitimate governmental (or public) interest[s]." (Id.)

The Cassirers contend that Amended Section 338 serves "several important objectives, such as facilitating the return of stolen artworks." (Opp. at 16.) Citing the bill's legislative history, the Cassirers note that adoption of an "actual discovery" rule and extension of the limitations period to six years can both avoid "years of difficult preliminary litigation, which frequently leads the parties to abandon or settle their otherwise valid claims for recovery of stolen artwork," and allow a plaintiff to address the "more complex legal problems" entailed in such lawsuits. (Id. at 17.) The Cassirers contend that Section 338 targets museums, galleries, auctioneers and dealers because these "are sophisticated purchasers who deal in a large volume of works and are typically insured," and who "have access to methods of tracing artifact provenance" which would allow them to "discover[] a break in title." (Id. at 17–18.) Moreover, Amended Section 338 gives museums and other entities subject to it the ability to raise a laches defense, "balanc[ing] the interests of theft victims with those of museums." (Id. at 16.) Finally, the Cassirers contend that even if their case "informed the legislature about the problems that victims of art theft face in litigation, this is not unconstitutional." (Id. at 18.)

The Cassirers are correct. Despite the obvious effort of the legislature to provide a California remedy for victims of Nazi art thefts, the California Legislature's debatable justifications for the statute in no way preclude rational basis review. The Foundation offers no cases suggesting that the statute's rationale should bear on the rational basis review, and offers no case authority arising in a similar context where a statute was found to violate equal protection under a rational basis standard. Rather, the Foundation cites a number of well known Supreme Court decisions that involve legislation addressing issues that have nothing at all to do with the pending lawsuit. See, e.g., Romer, 517 U.S. at 620 (striking down amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination); City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 448-49 (1985) (finding that requirement of special use permit for proposed group home for the mentally retarded failed rational basis review in that the requirement, in absence of any rational basis in record for believing that group home would pose any special threat to city's legitimate interests, appeared to rest on an irrational prejudice against mentally retarded).

Moreover, the Ninth Circuit has rejected a strikingly similar equal protection challenge. In Lyon v. Agusta S.P.A., the Court of Appeals held that the shortening of a statute of repose, which barred an action by survivors of airplane crash victims, and which was passed after the accident occurred, with the intent to preclude liability for the manufacturer, easily survived equal protection and due process challenges. 252 F.3d 1079 (9th Cir. 2001). The court found that:

> The holder of an existing cause of action was no more, or less, worthy than a person who would come later, and had no less of an opportunity to seek a recovery. In neither case are the jeremiads of the injured party less appealing. The legislative decision was not made on the basis of the injured party's alacrity or merit; it was made on the basis that in the course of human affairs too much time had elapsed since the date of a defendant's acts.
>
> Of course, the legislature must act in a rational manner; that almost goes without saying. But barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. Indeed, the Supreme Court has not blanched when settled economic expectations were upset, as long as the legislature was pursuing a rational policy. Here the choice was assuredly rational.

Id. at 1086 (internal citations omitted).

Like Amended Section 338, the statute of repose in that case applied only to a particular sector of an industry, namely aircraft manufacturers. Lyon thus stands as a particularly applicable restatement of the ease with which the rational basis test is met.

In short, the Court has no basis on which to disturb the California Legislature's judgment that the statute facilitates the return of stolen artwork from large sophisticated, institutional purchasers who buy in volume, have insurance and have superior means of tracing the provenance of purchased works.

Accordingly, the Foundation's equal protection challenge is **DENIED**.

IV.

CONCLUSION

Based on the foregoing, the Foundation's motion to dismiss is **GRANTED** on the basis of foreign affairs preemption. The dismissal is ordered **WITH PREJUDICE** and **WITHOUT LEAVE TO AMEND.** The motion to continue trial date and pre-trial proceedings is **DENIED as moot**, and the hearing on that motion presently scheduled for June 18, 2012, is hereby **VACATED**.

IT IS SO ORDERED.

DATED: May 24, 2012

Gary Feess

Judge Gary Allen Feess
United States District Court