No. 09-1254

In The
Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICI CURIAE* BET TZEDEK LEGAL SERVICES, SIMON WIESENTHAL CENTER, AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS AND THE JEWISH FEDERATION COUNCIL OF GREATER LOS ANGELES IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FRANK KAPLAN*
HEATHER L. RISTAU
KRISTEN GRACE HILTON
SARA EPSTEIN
BINGHAM MCCUTCHEN LLP
The Water Gardens
1620 26th Street
Fourth Floor, North Tower
Santa Monica, CA 90404
(310) 907-1000
Frank.Kaplan@bingham.com

Attorneys for Amici Bet Tzedek Legal Services, Simon Wiesenthal Center, American Jewish Committee, American Jewish Congress and The Jewish Federation Council of Greater Los Angeles

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Blank Page

Bet Tzedek Legal Services ("Bet Tzedek"), the Simon Wiesenthal Center, the American Jewish Committee, the American Jewish Congress, and the Jewish Federation Council of Greater Los Angeles ("Jewish Federation") (collectively "*Amici*") submit this Brief as *amici curiae* in support of Petitioner Marei Von Saher's Petition for Writ of Certiorari.[1]

INTEREST OF *AMICI CURIAE*

Bet Tzedek, "The House of Justice," is a non-profit legal services agency that, since 1974, has been providing free legal representation to thousands of low-income residents throughout Southern California. It is one of the only organizations in the United States regularly representing Holocaust survivors, having represented more than 800 such clients in their efforts to assert claims under various reparations programs, United States-based litigation, and other humanitarian relief programs administered by various international funds or governments.

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the amici's intention to file this brief; all counsel have consented to the filing of this brief and the consent letters have been filed with the Clerk of the Court with this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae, their members, or counsel, made a monetary contribution to the preparation or submission of this brief.

The Simon Wiesenthal Center is an advocacy organization that has particular expertise in the prosecution of Nazi War criminals and is dedicated to the vindication of the rights of Holocaust survivors. Through counsel, it is a signatory to an agreement that resolved a major piece of Holocaust litigation in the 1990's. In addition, the Simon Wiesenthal Center has sponsored a conference on property and art restitution.

The American Jewish Committee ("AJC") is an international human relations organization, founded in 1906 to protect the civil and religious rights of Jews, and to combat anti-Semitism and other bigotry. It maintains regional offices in major cities nationwide, as well as eight overseas. AJC has a long history of active involvement with restitution and indemnity claims on behalf of Holocaust survivors. It has played an integral role in advocating for restitution and the return of assets to Holocaust survivors and their heirs.

The American Jewish Congress is an organization founded in 1918 to protect the civil, religious, political and economic rights of American Jews. Since the early 1950's, the American Jewish Congress has participated in many lawsuits seeking restitution of property stolen from Jews by the Nazis.

The Jewish Federation is the central organizing, planning and fundraising organization for the Los Angeles Jewish Community. The Jewish Federation

identifies and funds social service, educational and humanitarian needs locally, in Israel and around the world. Providing for the needs of Holocaust survivors and their families has long been a core priority of the Jewish Federation.

Amici bring a unique point of view to this case and are qualified to assist this Court in its decision. Through their work with Holocaust victims and their heirs, *Amici* have witnessed the tremendous difficulties involved in identifying, locating and recovering property that was seized, stolen or confiscated during World War II. The problems are further compounded by the assertion of numerous purported legal barriers to the recovery of the property.

California has specifically recognized the state interest in alleviating the hardship faced by Holocaust victims and their heirs in recovering artwork taken from the victims. It has done so in part by enacting California Code of Civil Procedure section 354.3, a statute that simply affords victims and their heirs the opportunity to pursue the recovery of their artwork from museums and galleries until 2010, rather than binding them to general statutes of limitations that, in many cases and through no fault of the victims, may have expired years or decades ago. *Amici* strongly believe that statutes such as section 354.3 promote important state interests and are not preempted by the federal government's foreign affairs power.

ARGUMENT

I. INTRODUCTION

This Court recognized in *Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396 (2003) ("*Garamendi*") that, properly understood, preemption of state laws based on the federal government's foreign affairs power occurs only in two limited circumstances: (1) where the state law conflicts with a treaty, federal statute, executive agreement, or express federal policy, or (2) in those rare instances where even though the federal government has not acted, a state statute criticizes, or fosters criticism of, a foreign government. Cases decided both before and after *Garamendi* have also carefully confined foreign affairs preemption to one of these two circumstances. And for good reason, since the scope of the federal government's foreign affairs power is not clearly defined in the Constitution and, unless properly tethered, could usurp many laws and regulations traditionally within the states' competence.

The Ninth Circuit's decision in *Von Saher v. Norton Simon Museum of Art at Pasadena,* 592 F.3d 954 (9th Cir. 2010) ("*Von Saher*") invalidated a state statute of limitations for certain property claims despite the absence of any conflict with federal law or policy and notwithstanding the lack of any state criticism of a foreign government. Instead, the panel majority crafted a new and expanded dormant foreign affairs preemption power that has never been recognized by this or any other Court.

This unwarranted extension of foreign affairs preemption far beyond the carefully delineated boundaries established by this Court reflects a fundamental misunderstanding of this Court's foreign affairs jurisprudence. Unless reversed, *Von Saher* threatens to upset the previously existing balance between federal and state law and to legitimize broadside dormant "foreign affairs" attacks on state law never before permitted. Given the increased globalization of modern society and ordinary business affairs, there is a significant risk that *Von Saher*-styled foreign affairs preemption could be used as a pretext to challenge a variety of otherwise unobjectionable state laws.

To preserve the narrow framework for foreign affairs preemption adopted by this Court and followed by all other courts except the Ninth Circuit panel in *Von Saher*, this Court should grant certiorari. Since the Ninth Circuit found no conflict between the state statute and federal law or policy, this Court should then reverse the Ninth Circuit decision and order the case remanded to the District Court for further proceedings on the merits of Petitioner's claims.

II. THE FOREIGN AFFAIRS POWER HAS BEEN CONSISTENTLY APPLIED AND USED SPARINGLY TO PREEMPT STATE LAW

This Court and others have described the federal government's foreign affairs power in broad terms. Nevertheless, a review of the leading cases decided by

this Court reflects a constrained and consistent view of when that federal power ought to preempt state law or other state conduct. More specifically, in virtually all the decisions of this Court implicating foreign affairs, the federal government has affirmatively acted, and the courts have employed a conflict preemption analysis to resolve the issue. In only one case, *Zschernig v. Miller*, 389 U.S. 429 (1968) ("*Zschernig*"), has this Court gone outside that conflict analysis and instead relied on a dormant foreign affairs preemption, not requiring any conflict or, indeed, any activity by the federal government whatsoever, to invalidate state action.

The *Zschernig* case, however, was based on very unique facts and, until *Von Saher*, had been confined to those facts. *Von Saher* has now extended *Zschernig* and this Court's much more recent *Garamendi* decision and has dangerously opened the door to an expansive dormant foreign affairs preemption of state law that could have wide-ranging negative implications.

A. Pre-*Garamendi* Cases Other Than *Zschernig* Have Relied On Conflict Preemption

Pre-*Garamendi* cases other than *Zschernig* were consistent in their use of conflict preemption to invalidate state laws or conduct that interfered with the federal government's foreign affairs power. In *United States v. Belmont*, 301 U.S. 324 (1937) and

United States v. Pink, 315 U.S. 203 (1942), this Court gave preemptive effect to an executive agreement recognizing the government of the Soviet Union, thereby barring conflicting state policies regarding the legality of Soviet expropriation of foreign property. Around this same period, this Court engaged in a traditional Article VI Supremacy Clause analysis to hold that the federal Alien Registration Act, 54 Stat. 670, ch. 439 (1940), preempted Pennsylvania's conflicting Alien Registration Act. *Hines v. Davidowitz*, 312 U.S. 52 (1941). Later, in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000), this Court concluded that a federal statute prescribing limited economic sanctions against Burma (now Myanmar) preempted a similar but more restrictive regulation by Massachusetts.[2]

These decisions each involved federal government action and each reflected a determination that the federal government's action when dealing with foreign affairs had supremacy over state law or conduct that conflicted or interfered with the federal government's exercise of power. By contrast, only a

---

[2] In *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936), the Court upheld a criminal charge of conspiracy to sell arms of war to a foreign government in violation of a joint resolution of Congress. Later, in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), this Court addressed the effect of emergency executive orders made pursuant to an executive agreement, impliedly consented to by Congress, that ended the Iran hostage crisis of 1980. Based on those orders, this Court nullified a prejudgment attachment of assets of certain Iranian banks and suspended the common law claims of American nationals against Iran.

single decision of this Court, *Zschernig,* has appeared to recognize a dormant federal foreign relations preemption that excludes states from certain foreign relations activity even in the absence of conflicting federal activity. *Zschernig*, however, is limited to the distinct circumstance of a state law that, when applied, fostered criticism and hostility toward foreign governments.

In *Zschernig*, this Court invalidated an Oregon inheritance statute that prevented residents of foreign countries from inheriting through Oregon estates unless their government granted reciprocal rights to Oregon residents. Earlier, this Court had upheld a similar California statute, dismissing a claim based on the foreign affairs effects of the statute as "farfetched." *Clark v. Allen*, 331 U.S. 503, 517 (1947) ("*Clark*"). But in *Zschernig*, this Court became concerned that the Oregon statute and others like it, as applied, had become a vehicle for inflammatory, "Cold War" criticism of foreign governments – especially Communist governments – by the states. 389 U.S. at 433-35, 439, 440 & nn.6,8.

It was not the existence of reciprocal inheritance statutes that caused the problem in *Zschernig* (or else *Clark* would have been decided differently), but rather the critical, hostile way that they were applied. Later cases confirm this reading, applying *Zschernig* by assessing whether the challenged statute, on its face or as applied, criticizes or shows hostility toward foreign governments. *See, e.g., Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 56 (1st

Cir. 1999), *aff'd sub nom. Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000); *Trojan Techs. v. Pennsylvania*, 916 F.2d 903, 913-14 (3d Cir. 1990) (upholding under *Zschernig* a state commercial regulation disadvantaging foreign business but not targeting any country or group of countries); *Cruz v. United States*, 387 F. Supp. 2d 1057, 1075 (N.D. Cal. 2005) (holding that a California law, which lifted the bar of the statute of limitations for certain claims filed by "braceros" and their heirs, was not preempted under the foreign affairs doctrine, and noting that *Zschernig* has been "applied sparingly"); *see also* Peter J. Spiro, *Foreign Relations Federalism,* 70 U. COLO. L. REV. 1223, 1242 (1999) (observing that the *Zschernig* decision "seems both explained and justified [at least at the time] by its Cold War context").

Zschernig has largely been applied to invalidate state regulations that amounted to embargoes or boycotts aimed at coercing foreign states to alter their political and social policies. *See, e.g. Springfield Rare Coin Galleries, Inc. v. Johnson*, 503 N.E.2d 300 (Ill. 1986) (striking down Illinois tax provision that discriminated against South African coins, because "sole motivation was disapproval of [South Africa's] policies" and "encouraging a boycott" of South African products); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1378 (D.N.M. 1980) (invalidating state university's policy of excluding Iranian students from admission in retaliation for the Iranian hostage crisis); *New York Times Co. v. City of New York*

Comm'n on Human Rights, 361 N.E.2d 963 (N.Y. 1977) (affirming reversal of municipal agency's ruling that newspaper advertisements for employment in South Africa implicitly violated city antidiscrimination laws). Describing the limited reach of these cases, another district court explained that "[i]n these cases, the state enactments not only used state commercial power as a tool of foreign policy, their mere existence articulated state condemnation of a foreign nation's conduct by passing the statutes." *Cruz*, 387 F. Supp. 2d at 1076.

B. The *Garamendi* Decision Confirmed The Narrow Scope Of Dormant Or Field Preemption In The Area Of Foreign Affairs And Adopted And Applied A Conflict Preemption Analysis In Invalidating A State Statute Intended To Benefit Holocaust Survivors

In *Garamendi,* this Court invalidated on foreign affairs preemption grounds a California statute that compelled insurers and their affiliates to disclose information regarding insurance policies issued in Europe during the period between 1920 and 1945. In so holding, the Court adopted and applied a conflict preemption analysis, balancing the state's regulatory interest against the federal government's expressed foreign policy interest.

Significantly, the Court pursued a conflict preemption analysis notwithstanding its belief that the statute was enacted to assist Holocaust survivors in

vindicating Holocaust-era European insurance claims, rather than serve a traditional consumer protection interest. *Garamendi,* 539 U.S. at 425-26. In the Court's view, this perceived purpose did not doom the statute on dormant or field preemption grounds; if the statute had failed on those grounds, the Court would have said so and would not have engaged in a lengthy conflict preemption analysis. Instead, the apparent weakness of the state's regulatory interest, when viewed "against the backdrop of traditional state legislative subject matter", was simply a factor to be evaluated in determining the extent of conflict with federal foreign policy. *Id.* at 425-27.

Before embarking on its conflict analysis, the *Garamendi* Court discussed *Zschernig*. Although not rejecting *Zschernig's* dormant foreign affairs preemption (which the Court described as "field preemption"), the Court expressly confined the potential outer boundaries of that preemption to a narrow circumstance – namely, "[i]f a State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility," then field preemption "*might* be the appropriate doctrine." *Garamendi,* 539 U.S. at 420, n.11 (emphasis added).

Indeed, to emphasize that it was not expanding *Zschernig*, the Court discussed in some detail and implicitly endorsed Justice Harlan's concurring opinion in *Zschernig*. *See Garamendi,* 539 U.S. at 418-20 & n.10. In his concurring opinion in *Zschernig*, Justice Harlan had asserted that the majority's view

of dormant foreign affairs preemption went too far. *Zschernig,* 389 U.S. at 459. Instead, he said that he would find preemption only where there was a "conflicting federal policy," and all of the cases he cited as examples of "federal policy" preempting state law involved statutes or treaties. *Id.* at 458-59 & n.25.

Later cases have all recognized that after *Garamendi*, the linchpin of foreign affairs preemption is "the existence of an actual conflict between the state [statute] at issue and clearly articulated federal policy." *Cruz*, 387 F. Supp. 2d at 1075. *See also Central Valley Chrysler-Jeep, Inc. v. Goldstene,* 529 F. Supp. 2d 1151, 1184 (E.D. Cal. 2007) ("The court concludes that *Zschernig*, together with cases that follow it, including *Garamendi*, hold that a party asserting preemption on the ground of foreign policy preemption must show 'clear conflict' between a state law or program and the functioning of some agreement, treaty, or program that is the product of negotiations between the administrative branch and a foreign government."); *Green Mt. Chrysler Plymouth Dodge Jeep v. Crombie*, 508 F. Supp. 2d 295, 396 (D. Vt. 2007) ("Preemption is thus required under *Garamendi* if the plaintiffs have demonstrated a clear conflict between the state law and an express national foreign policy."); *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 85-88 (D.D.C. 2007) ("Under *Garamendi*, Iraq must identify a 'conflict of a clarity or substantiality that [varies] with the strength or the traditional importance of the state concern

asserted.'"); *Doe v. Exxon Mobil Corp.*, 2006 WL 516744 at *7-8 (D.D.C. March 3, 2006) (holding that under the foreign affairs doctrine as articulated by *Garamendi*, "state laws are preempted when there is a conflict between the state law and the 'exercise of the federal executive authority,'" and holding *Garamendi* "simply not applicable" because "no state government has passed any statute in conflict with U.S. foreign policy").[3]

This settled law has now been abandoned by the *Von Saher* decision. That decision has expanded foreign affairs preemption far beyond its recognized boundaries and, unless corrected by this Court, threatens to undermine the careful balance between state regulation and the federal government's foreign affairs power that has been followed by this Court.

III. *VON SAHER* MISAPPREHENDED AND MISAPPLIED *GARAMENDI* AND ITS PROGENY, RESULTING IN AN EXPANSIVE, AND LEGALLY INCORRECT, INTERPRETATION OF FOREIGN AFFAIRS PREEMPTION

California Code of Civil Procedure section 354.3 extends the statute of limitations on claims for the

---

[3] This view is consistent with the fact that, as a general matter, field preemption has been "frequently rejected" by this Court "in the absence of statutory language expressly requiring it." *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564, 617 (1997) (Thomas, J., dissenting).

recovery of Holocaust-era artwork from museums or galleries subject to jurisdiction in the state until December 31, 2010. That extension, which implicitly recognizes the difficulty inherent in identifying, locating, and making claims on such artwork, is consistent with the federal government's policy that such artwork should be returned to their rightful owners, through litigation if necessary. *See* J. Christian Kennedy, Special Envoy for Holocaust Issues, *The Role of the United States in Art Restitution*, Remarks at the Conference in Potsdam, Germany (April 23, 2007), http://germany.usembassy.gov/kennedy_speech.html.

The statute is not directed at or critical of any foreign country, does not create any right or claim against any foreign government, and is instead limited to actions for the recovery of artwork from museums or galleries.

Respondent, a museum located in California, successfully challenged the statute on foreign affairs preemption grounds in the district court, and Petitioner appealed to the Ninth Circuit. A majority of a panel of that court, while expressly finding that "[t]he statute does not . . . conflict with any current foreign policy espoused by the Executive Branch" (592 F.3d at 963), nevertheless affirmed that the statute was preempted under the foreign affairs doctrine.

This unprecedented result followed from the majority's holding that even in the absence of a conflict with federal policy or criticism of a foreign

government, the statute nonetheless "infringed on a foreign affairs power reserved by the Constitution exclusively to the national government" – *i.e.* it was preempted by the federal government's "dormant" foreign affairs power. 592 F.3d at 964-68. The court reached that remarkable conclusion by finding that the statute's subject matter was not in an area of "traditional state responsibility" and was "therefore subject to a field preemption analysis." *Id.* at 965.

The court acknowledged that California "has a legitimate interest in regulating the museums and galleries operating within its borders, and preventing them from trading in and displaying Nazi-looted art." 592 F.3d at 965. But, since the statute applied to any museum or gallery subject to personal jurisdiction in the state, including those located outside its borders, the court divined that "California's 'real purpose' was to create a friendly forum for litigating Holocaust restitution claims, open to anyone in the world to sue a museum or gallery located within or without the state." *Id.*

The court then concluded that the federal government's "power to wage and resolve war" included "the power to legislate restitution and reparation claims" and that such power "has been reserved exclusively to the national government by the Constitution." 592 F.3d at 967. Since, according to the court, the statute's "real purpose" intruded into this exclusive federal domain, California lacked the power to act. *Id.* at 967-68.

The Ninth Circuit's analysis is fundamentally flawed and not reconcilable with *Garamendi*. Unless corrected, *Von Saher* will likely lead to unwarranted preemptions of state law.

The majority in *Von Saher* began veering off the road by attempting to determine whether the California statute concerned a "traditional state responsibility." 592 F.3d at 964-65. Finding the statute too broad (since it covered museums and galleries outside the state), the court concluded that the statute was not addressing a "traditional state responsibility" and must therefore reflect an expression of California's "dissatisfaction with the federal government's resolution (or lack thereof) of restitution claims arising out of World War II." *Id.* at 965. It followed, then, according to the Ninth Circuit majority, that the statute was invalid even in the absence of any conflict with federal policy. *Id.*

The Ninth Circuit's perception that section 354.3 did not concern a "traditional state responsibility" is unsupported. Such responsibilities surely include legislation that allows and facilitates the recovery of stolen property, and legislation that recognizes disabling circumstances that might prevent the timely filing of claims under more general statutes of limitation. Other California statutes, for example, expressly toll or extend the limitations period for bringing lawsuits in situations where there might be some impediment to the claim being brought within the time period allowed by more general limitations statutes. *See, e.g.*, California Code of Civil Procedure

§337.15 (establishing 10-year limitations period for claims involving latent defects in real property); California Code of Civil Procedure §340.7 (tolling limitations period for Dalkon Shield claimants); California Code of Civil Procedure §352.1 (tolling limitations period for claimants who are imprisoned).

Nor does it follow that the breadth of the statute disqualifies it as one concerning "traditional state responsibilities" or converts it into a foray into foreign affairs. Similarly, contrary to the Ninth Circuit's apparent speculation, there is nothing to suggest that the statute's breadth reflects some dissatisfaction with federal government restitution efforts. And finally, even if some dissatisfaction with the federal government was apparent from the statute, that fact is not evidence of an interference with foreign affairs that this Court has recognized as requiring pre-emption.

But the real problem with *Von Saher* is this: even if the scope, purpose or tradition of the state statute are legitimate subjects of inquiry, the Ninth Circuit considered and applied those factors to the wrong preemption doctrine. Those factors, if relevant at all, should only be evaluated in assessing whether there is conflict preemption – whether there is a conflict between the state statute and a treaty, federal statute, executive agreement or express federal policy. "[I]t would be reasonable to consider the strength of the state interest, judged by standards of traditional practice, when deciding how serious a conflict must be shown before declaring a state law preempted."

Garamendi, 539 U.S. at 420. *See also Garamendi*, 539 U.S. at 425-27. The Ninth Circuit expressly found no conflict in *Von Saher*.

Those factors should not be employed, where there is no conflict and no criticism of a foreign government, to invalidate a state statute on dormant (field) foreign affairs preemption grounds. Neither *Garamendi* nor *Zschernig* go that far. To the contrary, *Garamendi* teaches that dormant foreign affairs preemption should be invoked only where the state law or conduct criticizes a foreign government or perhaps (and just perhaps) where a state "take[s] a position on a matter of foreign policy, with no serious claim to be addressing a traditional state responsibility." 539 U.S. at 417-20 & n.11.

If the *Von Saher* majority were correct, then the lengthy conflict analysis in *Garamendi* was superfluous and unnecessary. If the *Von Saher* majority were correct, then presumably this Court would have relied on the perceived overbreadth of the disclosure statute and apparent weakness of the state's traditional regulatory interest in *Garamendi* and simply voided the statute there on field preemption grounds – an intrusion into an area of exclusive federal power.

But this Court did not do that. This Court did not employ a dormant or field preemption analysis, because the statute in *Garamendi* (like the one here) neither criticized a foreign government nor took a position on a matter of foreign policy. This Court instead evaluated the breadth of the disclosure

statute and the strength of the state's regulatory interest as part of its conflict analysis, balancing the state's interest against the federal government's expressed foreign policy interest.

In light of *Von Saher*, this Court should reconfirm the limits of the federal government's foreign affairs preemption power.

IV. UNLESS REVERSED BY THIS COURT, *VON SAHER* THREATENS TO OPEN STATE LAWS TO FOREIGN AFFAIRS ATTACKS ON MATTERS THAT ARE NOT IN CONFLICT WITH FEDERAL LAW OR EXPRESSED POLICY AND DO NOT CRITICIZE FOREIGN GOVERNMENTS

Unless checked, *Von Saher* threatens to preempt virtually any state regulation dealing with a matter that might be thought to have foreign implications, even where the federal government has not spoken (or, as here, where the federal government has expressed support for the state action). This Court, in *Garamendi* and earlier cases, did not sanction that result.

A. The Ninth Circuit's Test Is Vague And Subjective And Makes The Courts Rather Than The Executive Or Congress The Primary Arbiters Of When States Have Improperly Intruded Into Foreign Affairs

The Ninth Circuit's broad test to preempt state laws in the absence of any conflicting federal law or policy raises numerous concerns. First, "[p]olitical protections for state interests are absent when the unelected federal judiciary preempts state law under a foreign relations rationale without any apparent political branch authorization." Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1678 (1997). The legislature and the executive are more familiar with the nation's foreign policy and are better suited to determine when state laws pose a genuine threat to foreign relations. *See* Nick Robinson, *Citizens Not Subjects: U.S. Foreign Relations Law and the Decentralization of Foreign Policy*, 40 AKRON L. REV. 647, 686 (2007); Goldsmith, *supra*, 83 VA. L. REV. at 1684. Moreover, "giving broad preemption power to the judiciary may result in diverse decisions by lower courts in the same area of foreign relations, creating further confusion." Robinson, *supra*, 40 AKRON L. REV. at 686. Where the actual impact on national policy is unclear (*i.e.*, "dormant"), judges should not "broaden their own authority to decide when national interests require preemption of state and local legislation." *See* Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light*

of Translocal Internationalism, 57 EMORY L.J. 31, 84 (2007).

In addition, the Ninth Circuit's "traditional state responsibility" test is fraught with ambiguity and subjectivity. State laws can be "framed in ways that make them seem either traditional or nontraditional, depending on how one views their purposes and at what level of abstraction one characterizes them." *Note: Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1896 (2006). As this Court noted in the context of the state immunity doctrine, "[a]ny rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985).

In *Garcia*, this Court rejected as "unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional,'" explaining that "[a]ny such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles." *Id.* at 546-47; *see also United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 368-69 (2007) (Alito, J., dissenting) ("[T]his

Court has previously recognized that any standard that turns on a judicial appraisal of whether a particular governmental function is integral or traditional is unsound in principle and unworkable in practice. . . . Thus, to the extent today's holding rests on a distinction between traditional governmental functions and their nontraditional counterparts, it cannot be reconciled with prior precedent.") (internal citations and quotation marks omitted).

Limiting the dormant field preemption test to the facts of *Zschernig* – that is, to circumstances where the state law fosters criticism of a foreign government – would rein in the courts' broad discretion, alleviate the problem of subjectivity, and bring the doctrine back in line with this Court's past decisions. Such a limitation would not give the states free rein. Where a state law is beyond the scope of *Zschernig* – and, thus, beyond the reach of the courts – the executive or legislative branches of the federal government could step in if they believe the state law affects the federal government's ability to conduct foreign affairs. *See* Robinson, *supra*, 40 AKRON L. REV. at 676 ("If localities' actions damage U.S. foreign policy interests, the federal government can easily preempt the state or local policies in question."); Goldsmith, *supra*, 83 VA. L. REV. at 1678-79 ("[O]ur constitutional democracy normally depends on the elected federal political branches to correct this sort of problem."). While various types of state laws might have implications that extend beyond U.S. borders, it is really for the

political branches of the government, not the judiciary, to decide whether those laws intrude on the foreign relations. Absent a "clear conflict" with federal law or presidential foreign policy as found in *Garamendi*, or criticism directed at a foreign government as found in *Zschernig*, the courts should not strike down state laws on grounds of foreign affairs preemption.

B. The Ninth Circuit's Expanded Dormant Foreign Affairs Preemption Test Will Subject A Broad Range Of Socially-Motivated State Laws To Preemption Scrutiny

As several commentators in law and political science have recognized, "globalization makes state participation in foreign affairs inevitable." *See* Ernest A. Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1676 & n.191 (2008); *see also* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1672 (1997) ("[A]s the world becomes more interconnected, domestic law and activity increasingly have foreign consequences, and vice versa.").

Foreign affairs was traditionally understood as relations between national governments, where the main concerns were military and diplomatic issues and the primary participants were the executive branches of the national governments. *See* Goldsmith, *supra*, 83 VA. L. REV. at 1670. Today, that has

changed. Issues as diverse as trade, investment, technology and energy transfers, environmental and social issues, cultural exchanges, migratory labor, drug traffic and epidemics have entered the foreign policy arena. *See* Goldsmith, *supra*, 83 VA. L. REV. at 1671; *see also* Young, *supra*, 83 NOTRE DAME L. REV. at 1676 ("'[G]lobalization makes everything international,' so that many if not most things states do – whether it is regulating highway safety, or adjudicating contract or tort suits, or executing their own citizens that commit capital crimes, may well implicate foreign affairs in one way or another."). Thus, foreign relations have come to encompass numerous issues traditionally regulated by the states, and there is no clear line dividing "foreign affairs" from traditional areas of state regulation.

State law-making in these diverse areas is vital to our political system. It allows the states to express the core values and local interests of their citizens. And it allows citizens to "more fully shape their lives, create a nation-wide system of policy experimentation, and provide a check on federal and international power." Robinson, *supra*, 40 AKRON L. REV. at 697. "[A] single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Robinson, *supra*, 40 AKRON L. REV. at 679-80.

The role of the states as laboratories for innovation has been instrumental in shaping our country's

history and values. "[H]istory has shown localities were often on the forefront of causes of justice." Robinson, *supra*, 40 AKRON L. REV. at 684 (noting the northern states' ban on slavery when it was condoned by the federal government, and the western states' leadership in pushing for women's suffrage). Here, California recognized the unique legal and logistical obstacles faced by Holocaust survivors as they try to locate and recover artwork looted during World War II. In response, the state extended the statute of limitations on such claims to provide Holocaust survivors and their heirs sufficient time to finance, investigate and commence an action to recover their artwork.

As noted in Von Saher's Petition, the Ninth Circuit's decision could have negative implications for numerous Holocaust-related state statutes. *See* Petition at 22-25 and nn.5-8. But the implications of the Ninth Circuit's decision are not limited to statutes involving Holocaust survivors. The decision could affect countless other socially-motivated state laws that have been or may be enacted, including laws aimed at promoting human rights or environmental interests. "[T]he changing nature of international regulation and concern means that even domestic law that applies to domestic persons for domestic acts can implicate foreign relations." Goldsmith, *supra*, 83 VA. L. REV. at 1672.

Environmental policy, which was formerly an area of local or national concern, has become internationalized. *See* Robinson, *supra*, 40 AKRON L. REV.

at 680. State regulation in this area has great potential benefits: "localities can experiment with creative new environmental policies, defraying risk for the country and creating support for successful policies." Robinson, *supra*, 40 AKRON L. REV. at 680. But, while states have long regulated air pollution, vehicle emissions and electricity generation, the overarching issues of climate change and greenhouse gas emissions are "unavoidably global in scope." *See* 119 HARV. L. REV. 1877, 1896. Under the Ninth Circuit's expanded dormant preemption test, a state environmental statute enacted with the goal of effecting change outside state borders might be subject to challenge. *See, e.g.*, Resnik, *supra*, 57 EMORY L.J. at 77 (noting that state laws relating to Kyoto might be preempted under the increasingly broad doctrine of foreign affairs preemption).

In addition, state laws differ on issues such as the death penalty, public benefits for illegal immigrants, gay marriage, and stem-cell research. *See* Robinson, *supra*, 40 AKRON L. REV. at 695-97. These differences reflect the local interests and values of the states, and each of these areas has the potential to implicate foreign relations. For example, certain states' continued use of the death penalty has sometimes put a strain on diplomatic relations with countries that oppose the death penalty. *See id.* at 695. States take different positions on illegal immigrants' eligibility for certain public benefits, and

those positions have obvious potential to impact foreign relations. *See id.* at 696-97. Likewise, states' decisions whether or not to recognize same-sex marriages and civil unions consummated abroad could give rise to conflicts with countries allowing such unions. *See id.* at 696. And, because of differing views about what constitutes human life, "[t]he issues surrounding cloning and stem-cell research all have the potential to insult the moral sensibilities of the citizens and governments of foreign countries and become diplomatic issues in the future." *See id.*

In sum, modern foreign affairs covers a wide range of issues, and "it would be extraordinary if the states were preempted from all of these areas merely because of their potential entanglement with foreign affairs." *See* Daniel A. Farber, *Climate Change, Federalism, and the Constitution,* 50 ARIZ. L. REV. 879, 904-09 (2008). The Ninth Circuit's ruling in *Von Saher* failed to follow this Court's narrowly-defined doctrine of dormant foreign affairs preemption and threatens to set a dangerous precedent for the future.

V. CONCLUSION

This Court should grant Petitioner's Petition for a writ of certiorari in order to allow the Court to address the impermissibly broad reading that the

Ninth Circuit has given to the foreign affairs preemption doctrine.

Respectfully submitted,

FRANK KAPLAN*
HEATHER L. RISTAU
KRISTEN GRACE HILTON
SARA EPSTEIN
BINGHAM MCCUTCHEN LLP
The Water Gardens
1620 26th Street
Fourth Floor, North Tower
Santa Monica, CA 90404
(310) 907-1000
Frank.Kaplan@bingham.com

Attorneys for Amici Bet Tzedek Legal Services, Simon Wiesenthal Center, American Jewish Committee, American Jewish Congress and The Jewish Federation Council of Greater Los Angeles

**Counsel of Record*