No. 14-545

IN THE

Supreme Court of the United States

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

Petitioners,

v.

MAREI VON SAHER,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where there is no split in the circuit courts as to the proper treatment of Executive policy statements, should this Court grant interlocutory review of a decision of the Ninth Circuit that accepted and applied Federal policy regarding the restitution of Nazi-looted art, and held that it should not dismiss this case for the return of art looted by Reichsmarschall Hermann Göring based upon factual assumptions made by the Solicitor General and Secretary of State as set forth in an amicus brief submitted in 2011 in connection with an issue altogether different from the one now before the Court?

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INTRODUCTION

In reversing the District Court's latest decision dismissing this case for the return of artworks looted by Nazi Reichsmarschall Hermann Göring during WWII as preempted by US foreign policy, the Ninth Circuit made clear what the District Court and the Petitioners have refused to acknowledge: that while the foreign policy of the United States is set forth by the Executive branch and must be respected by the Judicial branch, it is the purview of the courts – and not the Solicitor General ("SG") or the State Department – to make findings of fact in a pending case. To the extent that the policy of the Executive branch was set forth in the Brief for the United States as Amicus Curiae submitted to the Court in 2011 in connection with a prior Petition for Certiorari on a different issue (the "SG's Brief"), the application of that policy to the facts of this case is the responsibility of the courts.

There can be no doubt that the Ninth Circuit fully accepted and accurately set forth the US policy regarding Nazi-looted art:

> In sum, U.S. policy on the restitution of Nazi-looted art includes the following tenets: (1) a commitment to respect the finality of "appropriate actions" taken by foreign nations to facilitate the internal restitution of plundered art; (2) a pledge to identify Nazi-looted art that has not been restituted and to publicize those artworks in order to facilitate the identification of prewar owners and their heirs; (3) the encouragement of prewar owners and their heirs to come forward and claim art

> that has not been restituted; (4) concerted efforts to achieve expeditious, just and fair outcomes when heirs claim ownership to looted art; (5) the encouragement of everyone, including public and private institutions, to follow the Washington Principles; and (6) a recommendation that every effort be made to remedy the consequences of forced sales.

App. 15a-16. *See also* Press Statement, Hillary Rodham Clinton, Secretary of State, *Holocaust-Era Looted Art* (Jan. 16, 2013), http://www.state.gov/secretary/20092013clinton/rm/2013/01/ 202932.htm (setting forth US policy on Holocaust-era looted art).

Petitioners' application here is based on their misstating the Ninth Circuit's holding, misstating the facts of the case, selectively citing words from the Ninth Circuit decision out of context, and accusing the Ninth Circuit of not honoring US policy or respecting the SG and State Department. As quoted above, however, the Ninth Circuit got the Federal policy exactly right.

Not only did the Ninth Circuit hold that there is no conflict between the claims in this case and the Federal policy, it found that Respondent's claims "are in concert with that policy." App. 19a. In keeping with the Ninth Circuit's finding that Respondent "is just the sort of heir that the Washington Principles and Terezin Declaration encouraged to come forward to make claims" (App. 19a) even Eric Simon, the grandson of the late Norton Simon and a trustee of an entity related to Petitioners, has publicly excoriated Petitioners for their use of "well-paid lawyers to find loopholes to evade responsibility under

this [Washington Principles] agreement and the ...Terezin Declaration." Eric Simon noted that the living relatives of Norton Simon have not participated in decisions relating to the ongoing "legal battle," and said that "[s]teps should be taken expeditiously to achieve a just and fair solution." Mike Boehm, *Norton Simon Grandson Urges Museum to be 'Just' with 'Adam' and 'Eve'*, L.A. Times, Nov. 14, 2014. Indeed, the Ninth Circuit noted that allowing this case to proceed would encourage Petitioners to follow the Washington Principles and provide the opportunity to achieve the "just and fair" solution to which Eric Simon referred.

Petitioners argue that it is the policy of the Federal Government that the artworks at issue here either were, or potentially could have been, the subject of good faith restitution proceedings by the Dutch Government. Thus, Petitioners contend that the US has a specific policy relating solely to the artworks involved in this case.

The announced Federal policy includes respect for bona fide internal restitution proceedings of foreign governments.[1] But whether a bona fide internal restitution proceeding took place or was even available is a threshold determination of fact that only a court can decide after a full record has been developed, and not on a motion to dismiss. That is precisely what the Ninth Circuit held and exactly what the SG and State Department intended. As the SG's Brief made clear when it said that this Court

1. This policy pronouncement puts the lie to the Petitioners' contention that countries were free to conduct internal restitution "in whatever way they see fit." Pet. 5. Rather, countries to which external restitution was made were expected to engage in bona fide internal restitution. App. 120a, n. 3.

need not address the constitutionality of Cal. Code Civ. Proc. §354.3, the State Department and SG intended that this case would go back to the District Court and proceed under the general statute of limitations. The SG's Brief states:

> the court of appeals' preemption holding may not be decisive even in this very case, because that court remanded to determine whether petitioner's claim is timely under another California statute of limitations for actions to recover personal property . . . . It is thus possible that on remand petitioner's action will be deemed timely. Two courts of appeals have held that application of general statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities.

App. 125a. The Government did not urge that this case should be dismissed, or expect that it would be, based upon its foreign policy pronouncement. Indeed, if the intent of the State Department and SG had been that the "determination" of facts set forth in the SG's Brief were to be binding on the courts, then the preemption holding as to §354.3 would have been dispositive and the case would have been ripe for Supreme Court review in 2012.

STATEMENT OF THE CASE

On May 10, 1940, Nazi troops invaded the Netherlands. Because they were Jewish, Jacques Goudstikker, then the foremost Dutch dealer in Old Master paintings, his wife, Dési, and their infant son, Edo, were forced to flee,

leaving behind Jacques' art gallery and most of its assets. Jacques and his family escaped on a ship traveling to South America, but Jacques died in a shipboard accident on May 16, 1940. At the time of his death, Jacques had in his possession a black notebook with entries describing artworks in the Goudstikker art collection, including an extraordinary pair of life-sized paintings entitled "Adam" and "Eve" by the sixteenth-century artist, Lucas Cranach the Elder (the "Cranachs"). The Cranachs were listed as having been purchased at the Lepke Auction House and having come from the Church of the Holy Trinity in Kiev. An essay accompanying the Lepke Auction catalogue makes clear that the Cranachs were not a part of the Stroganoff family collection that was being auctioned at the same time. C.A.E.R. 827-830.

After Jacques' death, the Nazis looted the assets of his art gallery through forced sales to Göring and his henchman, Aloïs Miedl, for a "purchase price" far below their actual value and a promise of protection from threatened "deportation" for Jacques' mother. Miedl took Jacques' business and properties. Göring took the finest artworks, including the Cranachs. C.A.E.R. 830-831.

After WWII, the Allies recovered the Cranachs, along with hundreds of other artworks stolen from the Goudstikker gallery. In accordance with Allied policy, these artworks were returned to the Netherlands with the expectation that they would be restituted to their rightful owner. C.A.E.R. 831-32. Although Jacques' widow, Dési, did recover some works after WWII, she justifiably refused to settle her claims to the works taken by Göring, and the Dutch Government retained custody of over 200 such artworks, including the Cranachs. C.A.E.R. 834-836.

In 1961, Georges Stroganoff-Scherbatoff ("Stroganoff") claimed that the Cranachs had belonged to his family. C.A.E.R. 837. This, however, was not true, as the essay accompanying the Lepke Auction catalogue explained. C.A.E.R. 827-828. Though Stroganoff filed no formal restitution claim under Dutch law, in 1966 the Dutch Government sold the Cranachs to him. In 1971, Petitioners acquired the Cranachs from Stroganoff or his agent. The Cranachs have been in Petitioners' possession since then. C.A.E.R. 837-838.

Désí complained after the War that she was not treated fairly by the Dutch bureaucracy, and the Dutch Government subsequently admitted that it had treated Goudstikker's heirs wrongfully by characterizing their losses as a voluntary sale to Nazi officials. App. 161a, 163a-165a. Such unfair treatment by the Dutch Government was widespread, as acknowledged by the Chair of the Dutch Restitutions Committee as recently as November 27, 2012:

> But as far as the Netherlands is concerned, it is important to state that in... the year 2000, the Dutch Government acknowledged that after the War the system of righting injustices was implemented in a formal, bureaucratic, and unsympathetic way in the Netherlands.

Willibrord Davids, Chair, Restitutions Committee, Address at the International Symposium "Fair and Just Solutions?" at the Peace Palace, The Hague (Nov. 27, 2012), http://vimeopro.com/ restitutiecommissie/symposium ("Davids Address").

According to the Report of the Presidential Advisory Commission on Holocaust Assets in the U.S., *Plunder and Restitution: The U.S. and Holocaust Victims' Assets* (2000) ("PACHA"), when the Allies discovered looted art in the possession of the Nazis and returned that art to its country of origin, "the United States assumed that its western allies to which it restituted looted assets would return those assets to their rightful individual owners (or the heirs of those owners)." C.A.E.R. 390. Unfortunately, the policy of returning looted artworks to their countries of origin "failed to realize the goal of returning property to the victims who suffered the loss." PACHA at 6. The actions of the Dutch Government immediately after the War were an example of that failure.

Put simply, "Jewish former owners received no support from the Dutch State. They had to fight a harsh, uncertain legal struggle for every item of property they had lost." Wouter Veraart, *Contrasting legal concepts of restitution in France and the Netherlands (1943-1952)*, *in* The Post-war Restitution of Property Rights in Europe 21, 30 (Wouter Veraart & Laurens Winkel eds., 2012).

> In the post-war period (1945-1952), the Dutch Minister of Finance, Lieftinck, got a strong hold on the nonjudicial divisions of the Council of Restoration. He used the restitution machinery mainly to pursue the financial interests of the Dutch State (in order to reconstruct the economy), even if this policy conflicted with the interests of the dispossessed Jewish community.

Id. at 26.

Contrary to Dutch law, the post-War Dutch Government's practice was to treat property that had been forcibly sold to the Nazis as enemy property that could be held by the Dutch State, rather than as property taken in a void sale and therefore still belonging to the original owner. Herman C.F. Schoordijk, *The Goudstikker Case*, *in* The Post-war Restitution of Property Rights in Europe 109, 112 (Wouter Veraart & Laurens Winkel eds., 2012). The Dutch Government recognized its prior unfair treatment and in 2006 restituted all Goudstikker artworks taken by Göring still in its custody to Jacques' daughter-in-law and sole heir, Respondent, Marei von Saher. C.A.E.R. 195-198.

Marei had begun her attempts to recover her family's looted artworks in the custody of the Dutch Government eight years earlier. C.A.E.R. 839. Her application for restitution in 1998 was rejected, and that decision was upheld on appeal in 1999. C.A.E.R. 138-143, App. 127a-144a. In 2001, the Dutch Government determined that its post-War policies regarding the restoration of Nazi-looted property had been too formal and bureaucratic, and that going forward it would review claims for such property based upon a more policy-oriented approach. Following this policy change, Marei submitted her claim to the State Secretary of the Dutch Government's Ministry for Education, Culture and Science (the "State Secretary"), which oversees the Dutch Government's restitution policy, and the State Secretary referred the claim to the Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee"). C.A.E.R. 841-842.

After an intensive review of the historical evidence, the Restitutions Committee advised the State Secretary to restitute to Marei all of the artworks in the custody of the Dutch Government that, like the Cranachs, had been taken from the Goudstikker gallery by Göring. App. 146a-147a, 172a. The Restitutions Committee found, and the State Secretary agreed, that the transactions through which Göring and his Nazi collaborators purported to purchase all of Jacques' artworks were involuntary, forced sales. App. 151a-155a, C.A.E.R. 196. The State Secretary specifically found:

> that grounds for restitution exist in this particular case in accordance with the committee's recommendation.... I am especially mindful of the facts and circumstances relating to the involuntary loss of property and the settlement of this case in the early 1950s as highlighted by the committee in its extensive investigation.... With regard to the "Göring transaction", the Restitutions Committee concludes that Goudstikker had suffered involuntary loss of possession, since the rights to these works were never waived.... Accordingly, it recommends that the application for restitution be granted. I hereby adopt this recommendation.

C.A.E.R. 196.

Based on this finding, on February 6, 2006, the State Secretary adopted the advice of the Restitutions Committee and restituted to Marei 200 artworks looted by Göring from the Goudstikker gallery. C.A.E.R. 196. If

the Cranachs had still been in the custody of the Dutch Government in 2006, they, too, would have been returned to Marei. Dési's refusal to settle her claims to the Göring works in the 1950s was vindicated by the 2006 decision, which accepted the Restitutions Committee's findings that, among other things: (a) contrary to the State Secretary's 1998 decision, Dési's claim to the Göring works had not been settled in 1952; (b) Dési had refused the Dutch Government's request that she waive the Göring claims; and (c) neither her failure to bring a restitution proceeding for the Göring works in the 1950s nor the 1999 decision of the Court of Appeals of The Hague precluded restitution of these works in 2006. C.A.E.R. 195-97.

The Restitutions Committee noted Dési's complaint about unfair treatment at the hands of the Dutch bureaucracy and found that "the authorities responsible for restorations of rights or their agents wrongfully created the impression that Goudstikker's loss of possession of the trading stock did not occur involuntarily." App. 161a, 164a. In other words, the Dutch Government's post-War restitution proceedings were not conducted in good faith. This was consistent with the Dutch Government's more general conclusion: "Based on our examination of the documents relating to a great number of post-War claims we must describe the way in which the Netherlands Art Property Foundation generally dealt with the problems of restitution as legalistic, bureaucratic, cold and often even callous." *Recommendations Regarding the Restitution of Works of Art*, Ekkart Committee 8 (Apr. 2001), http://www.herkomstgezocht.nl/ download/aanbevelingen2en.doc ("Ekkart Committee").

In 2006, the Dutch Government expressly confirmed that this dispute is of no concern to it. C.A.E.R. 28.

Marei discovered that the Cranachs were at the Norton Simon Museum of Art on or about October 25, 2000. C.A.E.R. 840. Marei demanded that Petitioners return the Cranachs to her, but they refused. C.A.E.R. 843. Marei filed her original complaint in the United States District Court for the Central District of California on May 1, 2007, setting forth causes of action for, *inter alia*, replevin and conversion. The complaint alleged that it was timely brought pursuant to California's special statute of limitations for Nazi-looted art cases, Cal. Code Civ. Proc. §354.3. App. 93a.

The District Court granted a pre-answer motion to dismiss, holding that §354.3 "intrudes on the federal government's exclusive power to make and resolve war, including the procedure for resolving war claims," and was therefore unconstitutional. App. 97a-98a. The District Court also held that, in the absence of §354.3, Marei's claims were untimely under California's general statute of limitations. App. 98a.

On appeal, the Ninth Circuit determined that §354.3 was preempted by the foreign affairs power reserved to the Federal Government because the intent of the statute was to rectify wartime wrongs. App. 79a-80a. The Ninth Circuit, however, reversed so much of the District Court decision as held that Marei's claims were barred under California's general statute of limitations for actions to recover stolen property and granted her leave to amend her complaint to allege timeliness under that statute. App. 88a-89a.

Marei sought certiorari to review the Ninth's Circuit's holding regarding §354.3. The SG's Brief, which was

submitted in connection with that petition, addressed §354.3. Certiorari was denied, Marei returned to the District Court and amended her complaint, and Petitioners again moved to dismiss, now arguing that Marei's common law claims are preempted.

In connection with the previous analysis of §354.3, the SG's Brief concluded that it is the foreign policy of the US that, when Nazi-looted artworks were returned to their countries of origin by the Allied forces (external restitution) and then subjected to bona fide restitution proceedings by the country of origin (internal restitution), the US must respect those proceedings and not permit review of such determinations by US courts. Even if the SG's Brief meant to apply this policy to common law claims – a hypothesis that the SG's Brief itself (App. 125a) and the Ninth Circuit (App. 21a) rejected – it made clear that the mere return of artworks to the country of origin through external restitution will not bar litigation in the US if the artworks were not also subject to bona fide restitution proceedings. App. 120a, n.3.

But the SG's Brief incorrectly assumed that the Cranachs were the subject of bona fide restitution proceedings in the Netherlands, a "fact" that is directly contradicted by Marei's complaint and the record. App. 22a. Relying upon that incorrect assumption of fact, the District Court found that Marei's common law claims were preempted. App. 57a-58a. A court may not simply accept the Federal Government's unsupported assumptions of fact, and there is no basis to believe that the SG or State Department intended the District Court to do so here. App. 22a-23a. Indeed, the SG's Brief explicitly stated that there was no reason to grant certiorari to review the determination regarding foreign affairs preemption

because this case would continue under California's general statute of limitations. App. 125a.

The bona fides of the Netherlands' actions towards the Goudstikker family after the War are a matter of contention between the parties, despite the Netherlands' subsequently making clear that its actions were not bona fide. Thus, if the policy set forth in the SG's Brief were applicable where there is no special statute at issue, whether or not the Cranachs were the subject of, or potentially the subject of, bona fide restitution proceedings in the Netherlands is a critical factual determination that must be made in this case. Petitioners urge that the Court ignore the allegations in Marei's complaint, as well as the Netherlands' own admissions, and accept the factual assumptions made in the SG's Brief, despite the SG and the State Department having absolutely no knowledge of any facts relevant to this case. But the Ninth Circuit declined to accept factual conclusions in the SG's Brief that were made in connection with a different issue and are contrary to the complaint and the record. Moreover, the Ninth Circuit denied Petitioners' request for rehearing and rehearing en banc. App. 101a-102a.

REASONS FOR DENYING THE PETITION

I. THE ISSUE DECIDED BY THE NINTH CIRCUIT HAS NO SIGNIFICANCE BEYOND THIS CASE AND CREATES NO DIVISION OF AUTHORITY

The Ninth Circuit's ruling does not warrant review for several reasons wholly independent of the issues Petitioners raise. The Court of Appeal's holding is narrow and of limited application. Indeed, Petitioners claim that

the policy at issue here is a policy meant to apply to this case only. Inasmuch as the "policy" that Petitioners claim is at stake is actually the incorrect factual assumption that good faith internal restitution proceedings were conducted by the Netherlands for the Cranachs, it could only apply to this case. That "policy" will never have any application again, and no disputes among the circuit courts can arise.

Petitioners attempt to make it appear that there is some conflict between how the Ninth Circuit treats Executive policy statements and how the other circuits treat such policy statements. But the Ninth Circuit properly stated the rule of law as it is recognized in all circuit courts, *i.e.*, that "at some point an exercise of state power that touches on foreign relations must yield to the National Government's policy," and that "federal courts should give serious weight to the Executive Branch's view of [a] case's impact on foreign policy." App. 12a, 21a. But the Ninth Circuit determined that it need not accept the SG's incorrect factual assumptions. Sup. Ct. R. 10 states that: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Insofar as that is all that Petitioners can complain of here, no review is warranted.

Moreover, there has been no final judgment in this case. The Ninth Circuit merely denied a motion to dismiss. The Petitioners, in more than seven years, have yet to even file an answer to Marei's complaint. There is no reason to grant certiorari at this time.

II. THERE WERE NO RESTITUTION PROCEEDINGS REGARDING THE CRANACHS IN THE NETHERLANDS

No Dutch administrative or court determination supports the SG's factual assumptions regarding bona fide internal restitution. As the Third Circuit noted in *Yusupov v. Attorney General*, 650 F.3d 968, 980 (3d Cir. 2011), the court cannot simply accept the Government's statements of fact; rather, the Government's statements "must be supported by the record it makes." *Id.* Here, the SG made no record.

1. Contrary to the SG's Brief and Petitioners' arguments, the facts show that there was no restitution proceeding in the 1950s that a court would have to examine in order to determine the merits of Marei's claims to the Cranachs. Although Dési entered into an agreement with the Dutch Government in 1952 with regard to property taken by the Nazi collaborator Aloïs Miedl, in 2006 the Dutch Government acknowledged that agreement did not waive Dési's rights to artworks looted by Göring, which included the Cranachs. C.A.E.R. 196. As the Restitutions Committee observed, the Dutch Government specifically sought such a waiver, but that clause was removed from the final settlement. App. 164a-165a. In short, after the War Dési made a "conscious and well considered decision" (App. 139a) to retain her rights to the artworks taken by Göring, and never brought any restitution proceeding with regard to those works. App. 139a, 164a-165a. Thus, no restitution proceeding would have to be examined or overturned. Nor could any bona fide proceedings have potentially taken place at that time because, as the Dutch Government admits, it incorrectly treated the looting as a

voluntary transaction and acted in a cold and bureaucratic manner. *See* Ekkart Committee, *supra*.

2. There were no restitution proceedings in connection with Stroganoff's claims to the Cranachs. Marei's complaint specifically alleges that the Cranachs were "wrongfully delivered... to Stroganoff as part of a sale transaction" (C.A.E.R. 837) and makes no reference of any kind to "restitution proceedings" in connection with Stroganoff's claim. Nonetheless, Petitioners (Pet. 9-10), the SG (App. 106a), and the Ninth Circuit (*Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 959 (9th Cir. 2010) ("*Von Saher I*")) previously stated that the Dutch Government held restitution proceedings in response to Stroganoff's claim. This is incorrect. Neither Marei's complaint nor the District Court's 2007 decision refers to such proceedings. The assertion was first incorporated into the "facts" of this case in the Ninth Circuit's prior decision (*Von Saher I* at 959), where it spontaneously appeared and led the Ninth Circuit to conclude there were restitution proceedings that would have to be reviewed. *Von Saher I* at 967. It also became part of the underpinning of the SG's argument that there were good faith restitution proceedings that the US should respect; a position that, in turn, led the District Court to dismiss the case a second time. App. 45a, 58a-59a. The Ninth Circuit corrected this mistake in its most recent decision. App. 17a-19a ("it seems dubious at best to cast Stroganoff's claim as one of internal restitution").

Petitioners have submitted for judicial notice many documents created by the Dutch Government in connection with the Goudstikker matter, but have never submitted, nor suggested they could produce, anything showing that the

Dutch Government held restitution proceedings or made a restitution decision in connection with Stroganoff's alleged claim. They cannot do so because "Decree E-100," which was enacted by the Dutch Government in 1944, covered only the restitution of legal rights in the Netherlands that had been disrupted by WWII and the Nazi occupation. C.A.E.R. 34-105. It did not provide restitution proceedings for property purportedly nationalized decades earlier in the aftermath of the Russian Revolution. App. 17a-18a. The Cranachs were sold to Stroganoff, not restituted. C.A.E.R. 837.

3. The Cranachs were not covered in the Netherland's contemporary restitution proceedings. In December 2005, the Restitutions Committee rendered its advice (the "R.C.'s Advice") on Marei's 2004 application for the restitution of artworks in the custody of the Dutch Government. It was the third time she had submitted her claim to the Dutch Government. The prior two requests – the first in 1998 made to the State Secretary and the second, an appeal of that decision to the Court of The Hague decided in 1999 – were rejected. In February 2006, however, the State Secretary adopted the R.C.'s Advice and decided to restitute all of the artworks in the Dutch Government's custody that had been looted by Göring from Goudstikker.

Concerned that the R.C.'s Advice would be adopted and fatally undermine their position, Petitioners sought assurances that they could rely on the 1998 and 1999 decisions. Therefore, on the same day the 2006 decision was announced, Petitioners' Dutch attorney sent a letter seeking "written confirmation" from the State Secretary that Petitioners "received a legally valid title to two works

and that the earlier decision of [her] predecessor, State Secretary of Culture, Aad Nuis, from 1998 as well as the judgment of the Court of the Hague regarding this point are not reversed." The State Secretary responded that the Cranachs were not covered by the 2006 decision, and refused to provide Petitioners with the assurances they sought. C.A.E.R. 23.

There are two obvious reasons why the State Secretary could not provide those assurances. First, the Dutch Government acknowledged in 2000 that "the system of righting injustices was implemented in a formal, bureaucratic, and unsympathetic way," and changed the premises on which it responded to restitution requests. *See* Davids Address, *supra*. The Restitutions Committee's recommendation to restitute 200 looted artworks to Marei noted the changed landscape in discussing the 1999 decision by the Court of The Hague and found that "generally accepted new insights" rendered its holding inapplicable. App. 165a.

Second, the prior State Secretary's 1998 decision was based on arguments that the Restitutions Committee later found were factually incorrect. For example, it cannot be true, as determined by the prior State Secretary in 1998, that the 1952 agreement settled the Göring claims (C.A.E.R. 139-141), and also be true, as found by the Restitutions Committee after a more thorough investigation in 2005 and adopted by the State Secretary in 2006, that the 1952 agreement did not waive or settle Dési's claims to the Göring works. C.A.E.R. 196. Moreover, the Dutch Government concluded that its 1998 statement that the Goudstikker claim was properly handled after the War was inaccurate (because it was treated as a voluntary

transaction) and was not to be followed. C.A.E.R. 196. It was, therefore, incorrect for the SG to rely upon the 1998 decision as a basis for concluding that the Dutch Government has "found that 'directly after the war – even under present standards – the restoration of rights was conducted carefully'" (App. 120a) because the Dutch Government rejected that position.

Even though the Dutch Government specifically declined Petitioners' request to confirm that the 1998 and 1999 decisions were not reversed, Petitioners continue to rely upon them, as did the SG. They suggest that, because the initial 1998 submission to the State Secretary included a request for compensation for artworks that had been sold, it covered the Cranachs.[2] App. 107a. But as the State Secretary noted in 1998 (C.A.E.R. 138-43) and the Court of The Hague noted in 1999 (App. 127a-144a), the 1997 policy under which Marei's 1998 claim was submitted provided only for claims to artworks still in the Dutch Government's custody. There was no provision made for damage claims, nor is there under the Restitutions Committee's current guidelines. C.A.E.R. 108-13. Therefore, the Dutch Government could not consider a request for relief beyond the return of specific artworks. As a result, whether or not damages for missing paintings were sought, there was no potential for bona fide restitution of the Cranachs

2. The SG's formulation of this point is mistaken. The SG's Brief states, "Petitioner's claim thus included the Cranachs, which had been sold to Stroganoff in 1966 in settlement of his claim" (App. 107a), and adds a citation to page 282 of the 2008 Excerpts of Record, implying that something in that record supports the assertion that the Cranachs were included in the claim. But the page cited is from Marei's original complaint, and makes no reference to either the 1998 claim or to a purported "settlement" of Stroganoff's claim.

because claims for items no longer in Dutch custody could not even be entertained. Indeed, the 1998 and 1999 decisions do not address the request for damages. Neither Petitioners nor the SG cite any instance in which the Dutch Government has compensated individuals for artworks that were sold, confirming that there is no potential for bona fide restitution in the Netherlands for items no longer in Dutch custody.

III. THE NINTH CIRCUIT ACCEPTED AND APPLIED US FOREIGN POLICY AS EXPLAINED BY THE SG'S BRIEF, BUT DID NOT ACCEPT THE SG'S MISTAKEN ASSUMPTIONS OF FACT

1. Petitioners repeatedly and egregiously misstate the Ninth Circuit's decision by lifting words out of context and inserting brackets and ellipses to make it appear that the Ninth Circuit was "not convinced" by the SG's statement of US foreign policy, and that the Ninth Circuit believed that the policy put forth in the SG's Brief was "unworthy of 'too much credence'" or "'too much weight,'" when the Ninth Circuit said no such thing. *See, e.g.,* Pet. 14.

Rather than resorting to characterizations, here is what the Ninth Circuit actually said. First, the Ninth Circuit specifically noted that when the SG's brief was filed, the only issue was whether the special California statute of limitations for Holocaust-era art (§354.3) was preempted:

> the Solicitor General's brief, which urged denying the petition for writ of certiorari in Von Saher I, focused on California Code of Civil Procedure Section 354.3. The Solicitor General argued that we had correctly invalidated

> Section 354.3 as "impermissibly intrud[ing] upon the foreign affairs authorities of the federal government." The Solicitor General noted that *Von Saher I* did not involve the application of a state statute of general applicability but "a state statute that is specifically and purposefully directed at claims arising out of transactions and events that occurred in Europe during the Nazi era, that in many cases were addressed in the post-War period by the United States and European Governments[.]" That is an altogether different issue from the one we now decide, which is whether Von Saher's specific claims against the Museum—in just this one case—conflict with foreign policy. This argument is not one the Solicitor General considered or addressed when it counseled against granting certiorari in *Von Saher I,* and we decline to read any more into the Solicitor General's brief than is there.

App. 21a. Next, the Ninth Circuit noted that the SG's Brief appears to make findings of fact that are inconsistent with the facts presented in the complaint, the record, and the parties' arguments:

> This factual discrepancy also makes us wary of giving too much credence to the Solicitor General's brief because it demonstrates that the Solicitor General goes beyond explaining federal foreign policy and appears to make factual determinations. For instance, the Solicitor General's conclusion that the Cranachs have already been subject to both internal

> and external restitution proceedings is not a statement about our nation's general approach to Nazi-looted art. Instead, the Solicitor General concludes that in this specific case involving these specific parties, external restitution took place as contemplated by the United States. This looks much like a factual finding in a matter in which we must accept the allegations in the complaint as true. While we recognize and respect the Solicitor General's role in addressing how a matter may affect foreign policy, we do not believe this extends to making factual findings in conflict with the allegations in the complaint, the record and the parties' arguments.

App. 22a. Finally, the Ninth Circuit noted that it could not accept findings of fact made in a different iteration of the case that were contrary to the facts presented to the court:

> Most worrisome, the Solicitor General admitted that "[t]he United States does not contend that the fact that the Cranachs were returned to the Dutch government pursuant to the external restitution policy would be sufficient on its own force to bar litigation if, for example, the Cranachs had not been subject (or potentially subject to) bona fide restitution proceedings in the Netherlands." And therein lies the most serious and troublesome obstacle to our relying too heavily on the Solicitor General's brief. Von Saher alleges, the Museum agrees and the record shows that the Cranachs were never subject to immediate postwar internal

> restitution proceedings in the Netherlands. Though the paintings were potentially subject to restitution proceedings[3] had Desi opted to participate in the postwar internal restitution process, she chose not to engage in what she felt was an unjust and unfair proceeding. Years later, the Dutch government itself undermined the legitimacy of that restitution process by describing it as "bureaucratic, cold and often even callous," and by eventually restituting to Von Saher all of the artworks Göring had looted that were still held by the Netherlands.
>
> It would make little sense, then, for us to conclude that Von Saher's claims against the Museum cannot go forward just because the United States returned the Cranachs to the Netherlands as part of the external restitution process, for we know and we cannot ignore, that the Cranachs were never subject to postwar internal restitution proceedings and that the 1998 and 2004 proceedings excluded the Cranachs. We therefore do not find convincing the Solicitor General's position—presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood some of the facts essential to our resolution of this appeal.

App. 22a-24a.

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3. Note that the Ninth Circuit says the Cranachs were potentially subject to restitution, but does not say that they were potentially subject to bona fide restitution proceedings.

2. The actual language in the Ninth Circuit's decision establishes that the court fully accepted the US policy concerning Nazi-looted art as articulated by the Secretary of State on January 16, 2013 and by the SG's Brief. But the Ninth Circuit found that it was not required to, and in fact could not, accept the factual assumptions made in the SG's Brief. The SG assumed that "bona fide internal restitution proceedings" had occurred in the Netherlands. But this is contradicted by Marei's complaint and by the Dutch Government, and can only be determined by a court on a full record. The SG's factual assumptions, made in an amicus brief in a case (1) where issue has never even been joined; (2) on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6); and (3) where neither the courts nor the SG has a complete record of the facts, are not a statement of US policy to be accepted and applied by the courts.

These factual assumptions have no probative value because neither the SG nor the State Department has knowledge of the facts. This is not a case where the US has knowledge due to its role as an actor in the underlying case. *See Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977-78 (9th Cir. 2007) (finding that the US Government paid Caterpillar for bulldozers sold to IDF was a fact within the Government's knowledge). Nor is this a case where the US Government is passing on or accepting as true a fact provided to it by a foreign diplomatic counterpart. *See The Janko,* 54 F. Supp. 240, 241 (E.D.N.Y. 1944). Here, the SG had no basis for concluding that the Cranachs were the subject of bona fide restitution proceedings.[4]

4. Nor can the Court take judicial notice of facts recited in Dutch judicial or administrative determinations relating to the Goudstikker collection. Indeed, "[o]n a Rule 12(b)(6) motion

a. Petitioners cite numerous cases for the proposition that courts should defer or give serious weight to the Executive branch in matters of foreign policy. *See, generally*, Pet. 16-17. Neither Marei nor the Ninth Circuit disputes this proposition. Indeed, the Ninth Circuit cited this rule of law (App. 11a-13a), repeated the policy set forth in the SG's Brief (App. 13a-16a), and applied it to this case (App. 16a-24a). Of the numerous cases cited by Petitioners, not a single one entails a court accepting assumptions of fact made by the SG or State Department on a pre-answer motion to dismiss where a full record has never been made, on issues of which the Government has no personal knowledge.

The primary case relied upon by Petitioners to support their argument that a conclusion of fact (for which the Executive has no personal knowledge) must be treated like a statement of policy is *Munaf v. Geren*, 553 U.S. 674 (2008). Petitioners, however, wholly misstate *Munaf*, which actually supports the Ninth Circuit's decision. In *Munaf*, the petitioners, who were being detained by the US division of the Multi-National Forces in Iraq (MNFI) in order to face judicial proceedings by the Iraqi government, sought habeas relief. This Court first made clear that it did not accept the SG's factual assertion that the US division of the MNFI was not under US control. Rather, despite the SG's claims, the Court found, as a

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to dismiss, when a court takes judicial notice of another court's opinion, it may do so 'not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity.'" *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) (quoting *S. Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Grp., Ltd.*, 181 F.3d 410, 426-27 (3d Cir. 1999)).

matter of fact, that the US division of the MNFI was under US control. Thus, as the Ninth Circuit did in the instant case, this Court rejected a finding of fact propounded by the SG that was counter to the evidence before the court.

Petitioners admit that whether bona fide internal restitution took place is a factual determination (Pet. 25), but claim that where factual determinations are intertwined with foreign policy judgments, the court must defer. To support this proposition, Petitioners again rely on *Munaf*. Again, *Munaf* does not support Petitioners. In that case, after refusing to accept the SG's factual assertions as to the control of the US division of the MNFI, the Court deferred to the SG's conclusion that the petitioners were not likely to be tortured when turned over to the Iraqi justice system. The question of whether or not someone will in the future be tortured is not a question of fact. As it is something that has not happened and may never happen, it is not susceptible of fact-finding. It is purely conjecture, and the SG used its specialized knowledge and expertise to conclude it was unlikely.

Here, whether or not restitution proceedings prior to 2006 were bona fide is a question of fact for the court. Analogy to *Munaf* would only be possible if (i) the petitioners in that case had been tortured, (ii) the SG advised the court that it was the policy of the US that its military allies do not commit torture, and (iii) the court held that it was bound to falsely conclude that no torture took place.

b. None of the other cases relied upon by Petitioners is any more on point because none of them entails a circumstance where the Executive is urging a court

to accept a version of facts of which it has no specific knowledge and that is contrary to the record.

This is not a case where the Executive has made a diplomatic determination, such as political recognition of a foreign government. *See Banco Nat'l de Cuba v. Sabbatino,* 376 U.S. 398, 410 (1964). Nor is this a case involving a determination of executive immunity. *See Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004). This case involves an issue of fact, that is, whether or not the Cranachs were, or potentially could have been, the subject of bona fide restitution proceedings. "Good faith" or "bona fides" is a question of fact. *United States v. McIntyre*, 582 F.2d 1221, 1225 (9th Cir. 1978) ("good faith was a question of fact"); *NLRB v. Deutsch Co.*, 265 F.2d 473, 482 (9th Cir. 1959) (whether company bargained in good faith was "manifestly a question of fact"); *In re Dumlao*, No. 09-50815, 2011 WL 4501402, at *6 (Bankr. 9th Cir. Aug. 5, 2011) ("Good faith is a question of fact"). Repeatedly saying that a statement of fact is a statement of policy does not make it so. Neither Petitioners nor the SG's Brief points to a single instance among the myriad Holocaust restitution litigations in this country where the Executive branch opined on the bona fides of post-War restitution proceedings or the lack thereof. If Petitioners were correct, then every case for the restitution of Nazi-looted art would have to be vetted by the State Department. That has never been the case. Rather, a court must be able to review prior proceedings in the country of origin to make a determination as to whether there was a bona fide restitution proceeding. Indeed, that is exactly what the court did in *United States v. Portrait of Wally*, 663 F. Supp. 2d 232 (S.D.N.Y. 2009).

Marei has alleged that there was no opportunity for a bona fide restitution proceeding in the Netherlands after WWII and that the Government of the Netherlands has acknowledged this. (C.A.E.R. 833-36, 842). Marei has also alleged that her efforts in 1998-99 to recover the artworks never returned by the Dutch Government were rejected, but that the reasons for rejecting those claims were superseded by the Dutch Government's subsequent decisions. (C.A.E.R. 839-40, 842-43). Nonetheless, the District Court and the Ninth Circuit dissenter ignored these allegations and improperly accepted the SG's assumption that the Cranachs were the subject of bona fide restitution proceedings.[5]

c. Petitioners also cite several cases for the proposition that deference to the Executive is particularly warranted where the Executive expressly advises the courts on the effect that a particular action may have on US foreign policy interests. Pet. 16-17; *see, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692, 760 n.21 (2004) (where a foreign government contends that a litigation in the US will interfere with that country's legitimate goals, the State Department may convey that sentiment and advise the court that such litigation should be dismissed due to its impact on foreign relations). The SG's Brief, however, never advised the Court that the claims in this case would adversely impact foreign policy. There is no indication of

5. The District Court could not make its own findings of fact on the issue of prior bona fide restitution on a motion to dismiss. *See Campanelli v. Bockrath*, 100 F.3d 1476, 1484 (9th Cir. 1996) (district court cannot "play factfinder" at the 12(b)(6) stage); *Browne v. McCain*, 612 F. Supp. 2d 1125, 1130 (C.D. Cal. 2009) (when considering a 12(b)(6) motion "a court does not make factual findings, nor deem material facts undisputed or admitted").

any potential deleterious effect on US foreign relations if this case proceeds. Nowhere is there even a hint that US relations with the Netherlands will suffer. Instead, the SG's Brief makes it clear that the case would continue under California's general statute of limitations.

Petitioners assert that there are "sensitive matters implicated in this case" (Pet. 1), that this is a "sensitive area" (Pet. 3), that the Ninth Circuit is overriding policy in a "sensitive context[]" (Pet. 5), and that "this case is manifestly entangled in sensitive foreign policy matters" (Pet. 20). Not once, however, does the SG's Brief say that this case involves sensitive foreign policy issues, or that there is any concern about US relations with the Netherlands. Nor does the SG report any contact by a diplomatic counterpart from the Netherlands expressing any concerns about this case. In contrast, we are certain that the Netherlands has: (i) returned all of the Goudstikker paintings looted by Göring in its custody (C.A.E.R. 195-198); (ii) expressly stated that its prior handling of the matter was cold and callous (*see* Ekkart Committee, *supra*); (iii) stated that its 2006 decision did not cover the Cranachs (C.A.E.R. 23); and (iv) made clear that it has no interest in the instant dispute (C.A.E.R. 28). Thus, Petitioners' reliance on *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) is misplaced. In *Altmann*, another case where the State Department took a position – rejected by this Court – adverse to a claimant of Nazi-looted art, the Court noted that the State Department's opinion on the "implications of exercising jurisdiction... might well be entitled to deference." *Id.* at 702. Here, however, the SG's Brief did not express an opinion that this case should not proceed in court or that a court should not make a finding of fact as to bona fide internal restitution.

The SG and the State Department have already spoken in this case. They could have explicitly said that Marei's common law claims were preempted by foreign policy concerns, but did not. Instead, they said that Marei's claims could go forward under a general state statute of limitations, noting that courts in two other circuits had already concluded that adjudicating Nazi-looted art claims under generally applicable state statutes of limitations does not conflict with foreign policy. App. 125a. *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007) is on point. There, the State Department advised the district court that the ongoing litigation "would in fact risk a potentially serious adverse impact on significant interests of the United States." *Id.* at 347. The defendants argued that this letter mandated dismissal on political question grounds. The court of appeals, however, noted that the State Department's letter not only failed to state that the case had to be dismissed, but it specifically referred to "how the case might unfold in the course of the litigation," thus indicating that the State Department had not urged the district court to dismiss. *Id.* Similarly, rather than say that this case should be dismissed, the SG argued that certiorari should be denied because the case would continue. The SG plainly concluded that ongoing litigation in this case would not pose any potential foreign affairs risk. *See also Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007) (State Department's statement of interest that lawsuit would have adverse effect on government relations entitled to serious weight, but did not request that suit be dismissed).

The SG's Brief never said that Marei's claims were preempted, but Petitioners ask this Court to find that the SG and the State Department meant them to be, even

though the SG's Brief explicitly said that Marei's claims could go forward under California's general statute of limitations. Indeed, to read the SG's Brief as Petitioners have suggested, this Court would have to conclude that the SG and the State Department deliberately misled this Court when they said the common law claims could go forward just to get the Court to deny certiorari. If that were the case, then the SG and the State Department wasted judicial resources and cost the parties enormous sums in legal fees during the ensuing years of litigation. Clearly, that could not have been their intent.

IV. THE ISSUE IN THIS CASE IS TITLE UNDER DUTCH LAW AND NOT WHETHER DUTCH PROCEEDINGS SHOULD BE OVERTURNED

Despite the numerous red-herring arguments that Petitioners have made in their effort to keep what is unquestionably Nazi-looted art, this case is not about foreign relations, US policy, or challenging decisions of the Dutch Government. This case is about one thing only: do Petitioners have title to the Cranachs or does Marei?[6] That

6. It is a fundamental principle of American law that a thief can never acquire good title to stolen property and, therefore, can never pass good title to such property, even to a good faith purchaser for value. 2 Franklin Feldman et al., *Art Law: Rights and Liabilities of Creators and Collectors* §11.2.1 (1986) ("neither the thief nor any purchasers through him receive good title"); Dan B. Dobbs, *The Law of Torts* §66 (2001) ("one who purchases converted goods is himself a converter"); 66 Am. Jur. 2d *Replevin* §26 (2006) ("a subsequent purchaser of stolen property will not acquire valid title to the property even if he was an innocent purchaser"). This fundamental principle has long been applied by California courts. *Crocker Nat'l Bank v. Byrne & McDonnell*,

is all any US court needs to address. As the SG stated, the "application of general state statutes of limitations to claims seeking recovery of Holocaust-era artwork does not impermissibly intrude upon federal foreign affairs authorities." App. 125a.

Petitioners have repeatedly argued that to decide this case a US court must overturn, or at the very least pass judgment on the good faith of, Dutch proceedings.[7] But this case will not require any court to overturn or pass judgment on the Netherlands' prior restitution decisions. It only involves the legal question of whether Goudstikker was divested of title to the Cranachs. It is only Petitioners' arguments about the meaning of the SG's Brief that compel Marei to argue, alternatively, that a court must make any factual determination relating to bona fide restitution proceedings.[8] The determination of title requires application of the Dutch law to the historical

178 Cal. 329, 332 (1918). *See also Suburban Motors, Inc. v. State Farm Mut. Auto. Ins. Co.*, 218 Cal. App. 3d 1354, 1361 (1990) ("a sale by the thief or any other person claiming under the thief does not vest any title in the purchaser as against the owner, though the sale was made in the ordinary course of trade and the purchaser acted in good faith") (quoting 3 Anderson, *Uniform Commercial Code* §2-401:61 (3d ed. 1983)).

7. Petitioners have also sought to interject the act of state doctrine into the question of the foreign affairs preemption doctrine. Marei will show that the act of state doctrine is inapplicable when that issue is properly addressed upon a full record in the District Court.

8. As shown above, even if it were necessary, analysis of internal restitution in this case would not involve overturning Dutch decisions or making any conclusion that the Dutch Government has not itself already made.

facts: the looting, Désis 1952 refusal to waive her rights, the sale to Stroganoff, the Dutch decisions in 1998 and 1999, and the final restitution in 2006. None of these acts needs to be overturned; the US court need only determine their legal effect under Dutch law.

Analyzing the meaning and effect of foreign court or administrative decisions is a familiar procedure in the US courts, and Fed. R. Civ. P. 44.1 provides a mechanism for the court to apply Dutch law to determine the legal effect of the various events related to the question of title, which is the only real issue here. The court can take evidence and hear expert testimony about the meaning and effect of Dutch cases and codes, and determine whether Goudstikker was ever divested of title to the Cranachs. No decisions of foreign governments will have to be overturned as a result of this process.

CONCLUSION

This interlocutory Petition involves a decision of the Ninth Circuit that is fully consistent with existing precedent for which there is no split among the circuit courts. The Ninth Circuit's refusal to accept incorrect factual findings while respecting the Executive's statement of foreign policy and correctly applying it is well supported. For the foregoing reasons, review by this Court is unwarranted. Accordingly, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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