

App. No. ____

In the Supreme Court of the United States

Marei von Saher,

Petitioner,

v.

Norton Simon Museum of Art at Pasadena; Norton Simon Art Foundation,

Respondents.

**PETITIONER’S APPLICATION TO EXTEND TIME TO
FILE PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Justice Elena Kagan, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22 and 30.3, Petitioner, Marei von Saher, respectfully requests that the time to file a Petition for a Writ of Certiorari in this case be extended for sixty days to and including February 8, 2019. The court of appeals issued its opinion on July 30, 2018. *Von Saher v. Norton Simon Museum of Art at Pasadena* (“*Von Saher III*”), 897 F.3d 1141 (9th Cir. 2018) (attached hereto at App. A). The court denied a timely petition for rehearing and rehearing *en banc* on September 11, 2018 (attached hereto at App. B). Absent an extension of time the Petition would be due on December 10, 2018. Petitioner is filing this application at least ten days before that date. *See* Sup. Ct. R. 13.5. This Court has jurisdiction to review this case under 28 U.S.C. § 1254(1).

Background

Petitioner brought this action ten years ago to recover two extraordinary life-size paintings entitled “Adam” and “Eve” by the 16th Century artist, Lucas Cranach the Elder (the “Cranachs”). The Cranachs, indisputably looted by the notorious Nazi, Hermann Göring, from the Kunsthandel J. Goudstikker N.V. (the “Goudstikker Gallery”), Petitioner’s predecessor-in-interest, are now in the possession of Respondents (the “Museum”). The court of appeals held that the relief sought by Petitioner would necessitate the court’s “‘declar[ing] invalid’ at least three ‘official act[s] of the Dutch government ‘performed within its own territory,’” and thus was barred by the act of state doctrine. App. A at 17.

1. Petitioner is the daughter-in-law of Jacques and Dési Goudstikker. App. A at 10. Before World War II, Jacques was the principal shareholder of the Goudstikker Gallery and purchased the Cranachs at a 1931 auction of artworks consigned by the Soviet Union at Lepke Auction House in Berlin. When Nazi troops invaded the Netherlands, Jacques and Dési, who were Jewish, fled for their lives. They left behind the Goudstikker Gallery and all of its assets, which included the Cranachs, among some 1,200 other valuable artworks and other property. Jacques died in a shipboard accident on May 16, 1940 while fleeing the Netherlands. Dési continued on, eventually arriving in the U.S. where she became a naturalized citizen on June 9, 1947. At the time of his death, Jacques had in his possession a black notebook containing entries describing artworks in the Goudstikker art collection. The list includes the Cranachs, which are described as having been purchased by Jacques at the Lepke Auction House and as having been from the Church of Holy Trinity in Kiev. D.C. Dkt. 331 at 2.

After Jacques’s death, the assets of the Goudstikker Gallery, including the Cranachs, were forcibly and involuntarily transferred to Göring and his accomplice, Alois Miedl. When World

War II ended, the Allies in Germany recovered the Cranachs, along with hundreds of other artworks taken by Göring from the Goudstikker Gallery. In accordance with Allied policy, these artworks were sent to the Dutch Government to be returned to the pre-War owners. *Id.* at 2-3. Beginning in 1946, Dési made several trips to the Netherlands in order to arrange for the restitution of the Goudstikker property forcibly transferred to Göring and Miedl. *Id.* at 4. From virtually the moment the Allies returned Goudstikker's artworks to the Netherlands and up until at least March 1952, the Dutch Government took the position that the forced sale to Göring was voluntary, that Goudstikker benefitted from the sale and that Goudstikker should be grateful because, as a trade-off for the looting, the Nazis refrained from deporting Jacques Goudstikker's mother to a concentration camp. App. A. at 7. The position that the transaction with Göring was voluntary, among other things, demonstrated to Dési that she would not recover her property in any proceeding conducted by the Dutch Government. Although Dési eventually entered into a settlement agreement with the Dutch Government in 1952 and recovered some property that had been taken by Miedl, she refused to settle her claims to the artworks taken by Göring. The Dutch Government therefore retained custody of over 200 such artworks, including the Cranachs.

In 1961, George Stroganoff Scherbatoff ("Stroganoff") asserted that the Cranachs had belonged to his family and asked the Dutch Government to transfer them to him. D.C. Dkt. 331 at 6. At no time, however, had the Cranachs ever belonged to the Stroganoff family. The Dutch Government took the position that Stroganoff had no right to the Cranachs, so he offered to purchase them. The sale was effectuated in 1966. App. A. at 11. In or about 1971, the Norton Simon Art Foundation and the Norton Simon Foundation acquired the Cranachs from Stroganoff through his agent, despite knowing that the Cranachs had been taken from the Goudstikker Gallery by Göring. App. A at 12. The Cranachs have been in the custody of the Museum since that time.

2. Petitioner first learned the facts concerning the artworks looted from the Goudstikker Gallery in 1997, and she began her attempts to recover her family's looted artworks in the custody of the Dutch Government through both administrative and judicial proceedings in 1998. After denying restitution on several occasions, in 2006, the State Secretary of the Dutch Government's Ministry of Education, Culture and Science, which oversees the Dutch Government's restitution policy, determined that all of the artworks in the custody of the Dutch Government that, like the Cranachs, had been taken from the Goudstikker Gallery by Göring, should be restituted to Petitioner. D.C. Dkt. 331 at 7-8. Had the Cranachs still been in the custody of the Dutch Government in 2006, they, too, would have been returned. On or about October 25, 2000, Petitioner discovered that the Cranachs were at the Museum and promptly contacted the Museum to ask for their return.

After several years of attempting to regain possession of the Cranachs through negotiation and mediation, Petitioner filed her complaint in this action in the United States District Court for the Central District of California on May 1, 2007 (the "Complaint"). D.C. Dkt. 1. The Complaint, which sets forth causes of action for replevin, conversion, damages under Cal. Penal Code § 496, a judgment declaring Petitioner to be the lawful owner of the Cranachs, and to quiet title, alleged timeliness pursuant to Cal. Code Civ. P. § 354.3. On October 18, 2007, the district court granted a motion to dismiss on the ground that § 354.3 was unconstitutional as it contravened the foreign affairs doctrine and was therefore preempted. Dkt. 47. The district court also held that, in the absence of § 354.3, Petitioner's predecessor-in-interest had only three years to bring a claim from the time the Museum acquired the Cranachs in 1971. On August 19, 2009, the court of appeals affirmed the decision with respect to the constitutionality of § 354.3, but reversed with respect to the accrual of the generally applicable statute of limitations and remanded with leave to amend to

allege timeliness thereunder. A petition for rehearing and rehearing *en banc* was denied, but an amended decision and order was issued. *Von Saher v. Norton Simon Museum of Art at Pasadena* (“*Von Saher I*”), 592 F.3d 954 (9th Cir. 2010). The mandate was then stayed pending a petition for certiorari to the Supreme Court. Certiorari was denied and the mandate issued. D.C. Dkt. 53-54, 57-59.

Petitioner filed her first amended complaint (the “FAC”) on November 8, 2011, setting forth the same causes of action. She alleged timeliness pursuant to § 338. D.C. Dkt. 62. Again, the district court granted a motion to dismiss, this time on the grounds that all of Petitioner’s claims are preempted by express federal policy. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 862 F. Supp. 2d 1044 (C.D. Cal. 2012). In its June 6, 2014 decision, the court of appeals reversed and held that Petitioner’s claims “do not conflict with any federal policy.” *Von Saher v. Norton Simon Museum of Art at Pasadena* (“*Von Saher II*”), 754 F.3d 712, 725 (9th Cir. 2014). A petition for rehearing and rehearing *en banc* was denied. D.C. Dkt. 98. The mandate was stayed pending a petition for certiorari to the Supreme Court. Certiorari was denied and the mandate issued. D.C. Dkt. 99-100. After remand, in its April 2, 2015 order, the district court held Petitioner’s case to be timely under California Code of Civil Procedure § 338, as amended. D.C. Dkt. 119.

3. After the close of discovery the district court granted summary judgment dismissing the FAC. The district court determined that under Dutch law in effect after WWII, artworks forcibly and involuntarily sold by the Goudstikker Gallery to Göring became Göring’s property, and that, because Göring was an enemy of the Dutch State, all such property – including the Cranachs – reverted to the Dutch Government. As a result, it concluded that the Dutch Government owned the artworks, and the Museum acquired “good title” to the Cranachs through the sale by the Dutch Government to Stroganoff. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 2016 WL

7626153 (C.D. Cal. 2016). On appeal from that decision, exercising its *de novo* power of review, the court of appeals based its decision in *Von Saher III* not on the district court's determination that under Dutch law, the Netherlands became the owner of the Cranachs after the theft by Göring, but rather on an act of state analysis. The court of appeals concluded that it could not enforce the U.S. policy that Nazi-looted art should be restituted to its rightful owner because to do so would necessitate the court's "'declar[ing] invalid' at least three 'official act[s] of' the Dutch government 'performed within its own territory,'" and thus was barred by the act of state doctrine. *See App. A at 17.* A petition for rehearing and rehearing *en banc* was filed and denied. *See App. B.*

Reasons for Granting an Extension of Time

The time to file a Petition for a Writ of Certiorari should be extended for sixty days, to February 8, 2019, for several reasons:

1. The forthcoming Petition is likely to be granted. The court of appeals' decision allows artwork looted from a Jewish family by Hermann Göring to continue to hang on the wall of a California museum, rather than be returned to the sole heir of that family, contradicting the express policy of the United States. The federal policy on Nazi-looted art is reflected in the Washington Conference Principles on Nazi-Confiscated Art, which provide that "[p]re-War owners and their heirs should be encouraged to come forward and make known their claims to art that was confiscated by the Nazis and not subsequently restituted," and that governments faced with such claims for art in their control should take steps "expeditiously to achieve a just and fair solution." *See* www.state.gov/p/eur/rt/hlcst/270431.htm. Forty-four nations, including the United States, adopted these Principles. The U.S., along with thirty-seven other nations, also participated in the Council of Europe in Vilnius, which issued the Vilnius Forum Declaration on October 5, 2000, asking "all governments to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust era to the original owners or their heirs." *See*

www.lootedart.com/MFV7EE39608. In 2009, the U.S. also participated in the Prague Holocaust Era Assets Conference, where the Terezin Declaration on Holocaust Era Assets and Related Issues was adopted by forty-six nations. In this Declaration, the participating nations “urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations....” See www.holocausteraassets.eu/program/conference-proceedings/declarations. The recent enactment of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 stat. 1524 (the “HEAR Act”) underscores U.S. policy on, and the exceptional importance of, Holocaust restitution. The HEAR Act, which provides for a federal statute of limitations to permit claimants a greater opportunity to bring claims to recover Nazi-looted art without fear of having them dismissed as untimely, states that one of its purposes is “[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration.” HEAR Act, Sec. 3. The HEAR Act, which enacts a claimant-favorable federal statute of limitations, shows how important it is to U.S. policy that Nazi-looted art be returned to the victim. Yet, the court of appeals improperly ignored this policy and instead applied the act of state doctrine to shield the post-War acts of the Netherlands, despite the fact that the Netherlands itself had reversed its prior decisions and restituted all of the Goudstikker artworks still in its custody to Petitioner in 2006.

2. The attorneys with principal responsibility for the preparation of the brief are heavily engaged in other matters. For example, Petitioner’s lead counsel, Lawrence Kaye, and his colleagues are actively engaged in summary judgment and other substantive briefing; and preparation for trial, including of a pretrial order in *Republic of Turkey v. Christie’s Inc., et al.*, 17-civ-3086 (S.D.N.Y.), a major litigation in which more than 74,600 pages have been produced

during discovery and more than twenty depositions have taken place. Petitioner's lead counsel and his colleagues are also engaged in *Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann v. Metropolitan Museum of Art*, 18-634-cv (2d Cir.), a major Second Circuit appeal with oral argument forthcoming. These commitments will limit counsel's availability to work on the Certiorari Petition between today and December 10, 2018.

3. Petitioner is seeking counsel with extensive Supreme Court experience to work with her attorneys on the Certiorari Petition. She has contacted several attorneys in this regard and is awaiting their response. As soon as she is able to choose such counsel, she will enter into an appropriate retention agreement. An extension of time is necessary for Petitioner to complete this process.

4. Counsel for Petitioner has been approached by several amici who are considering filing briefs in support of Petitioner's Certiorari Petition. Potential amici require additional time to decide whether to file their respective amicus briefs, and to prepare any such briefs.

5. Thanksgiving and the religious holiday of Chanukah fall within the proscribed period, during which time Petitioner's lead counsel and several of his colleagues will have material restrictions on their work schedules.

6. No prejudice would arise from the extension. This case was filed eleven years ago, and negotiations started before then. During all of that time, Respondents have had, and still have, possession of the Cranachs. An extra sixty days to ensure the highest quality Petition is reasonable in light of the long history of this case. Respondents have no objection to an application to extend Petitioner's time by thirty days. Respondents have objected to an application for sixty days, citing the fact that Petitioner previously filed a petition for rehearing *en banc*. See generally App. B. But, the grounds for filing a Petition for a Writ of Certiorari are quite different than those required

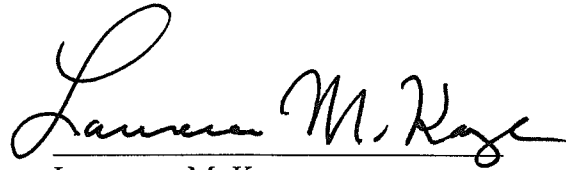
for a petition for rehearing and rehearing *en banc*. Respectfully, Petitioner, in this Application, has asserted sufficient grounds to warrant the extension she seeks.

Conclusion

For the foregoing reasons, the time to file a Petition for a Writ of Certiorari in this matter should be extended for sixty days to and including February 8, 2019.

Dated: November 20, 2018

Respectfully submitted,

A handwritten signature in black ink, reading "Lawrence M. Kaye". The signature is fluid and cursive, with the first name "Lawrence" written in a larger, more prominent script than the middle initial "M." and the last name "Kaye".

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