No. 18-1057

In the Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

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

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to disturb the Dutch government's transfer of artworks to a third party, who in turn sold them to respondent the Norton Simon Museum of Art at Pasadena, where the court of appeals determined, on a fully developed summary judgment record, that respecting the Dutch government's actions and bona fide restitution proceedings advances the sovereign interests of the Netherlands and the foreign policy interests of the United States, and where both lower courts concluded the record established that the Dutch government offered Petitioner's family the opportunity to invoke that government's post-World War II, bona fide sovereign restitution process concerning Nazi-confiscated art; that Petitioner's family made a conscious decision not to seek return of the artworks in question, while seeking the return of other property; and that the Dutch government has rejected Petitioner's renewed restitution claims as "settled" and refused to repudiate its prior actions.

RULE 29.6 STATEMENT

Respondent Norton Simon Museum of Art at Pasadena, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Museum of Art at Pasadena.

Respondent Norton Simon Art Foundation, a California nonprofit public benefit corporation, has no parent corporation. No other person or publicly held corporation owns 10% or more of the stock of the Norton Simon Art Foundation.

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TREATISES

INTRODUCTION

Because the Petition asks this Court to review a ruling that bears little resemblance to the one actually issued by the Ninth Circuit, we begin by summarizing the dispute now before this Court and the Opinion below.

Petitioner brought this lawsuit to challenge the title Respondent the Norton Simon Museum of Art at Pasadena et al. ("the Museum") has held to two Cranach paintings for nearly 50 years. Her claims collaterally attack numerous sovereign actions by the Dutch government that gave the Museum's predecessor-in-interest, George Stroganoff, title to the paintings and repeatedly "settled" Petitioner's claims of entitlement to the paintings against her. After carefully considering the extensive factual record, the Ninth Circuit held that there was no basis for U.S. courts to upset the determinations made by the Dutch government in that bona fide, postwar restitution process.

While Petitioner focuses on the Nazis' forced purchase of the paintings in WWII—an act all agree was abhorrent—the salient events occurred after WWII, once the Allies returned the paintings to the Netherlands. The Netherlands gave Petitioner's family the opportunity to seek restitution of the Cranachs and other property forcibly purchased by the Nazis. Those Dutch proceedings have been deemed bona fide by the United States government, the Netherlands, the two courts below, and Petitioner's own expert. Petitioner's predecessor made a conscious decision, on advice of counsel, not to seek return of the Cranachs and other Nazi-confiscated artworks, and to instead keep the money

the Nazis had paid for the artwork. Two decades later, the Netherlands transferred the Cranachs to Stroganoff to settle his claim that these and other paintings were looted from his family following the Russian Revolution.

In the 1990s, Petitioner filed renewed restitution claims for Nazi-confiscated artworks in the Netherlands, her family's second turn through the Dutch restitution process. The Dutch Court of Appeals—sitting as the Dutch postwar restitution agency—refused to grant Petitioner relief based upon her family's "well considered" decision decades earlier not to seek postwar restitution of the works. Pet.App. 22a. And when Petitioner filed a *third* restitution claim under the current Dutch restitution policy, the Dutch government reconfirmed that her claim had been "settled" by the Dutch Court of Appeals' "final decision," and that her claim was "not included in the current restitution policy." *Id.* at 26a.

The Ninth Circuit applied the act of state doctrine because Petitioner's claim would require the courts to invalidate "the Dutch government's conveyance of the paintings to Stroganoff" (Pet.App. 17a) and restitution proceedings that "thrice 'settled'" ownership of these artworks (*id.* at 33a). The court elected to respect "the validity of the Dutch government's sensitive political judgments and avoid embroiling our domestic courts in re-litigating long-resolved matters entangled with foreign affairs." *Id.* at 32a-33a. That result, the court held, accords with the 2011 amicus brief filed by the Solicitor General and State Department in this case. *Id.* at 31a. There, the U.S. explained that "the Netherlands here[] had conducted bona fide post-war internal

restitution proceedings following the return of Nazi-confiscated art," and that the U.S. therefore "had a substantial interest in respecting the outcome of the nation's proceedings." Brief of United States as Amicus Curiae, *von Saher v. Norton Simon Museum of Art*, No. 09-1254, at 19 (2011) ("U.S. Br.").

The Ninth Circuit's careful decision was correct, and provides no basis for this Court's review. For that reason, the Petition conjures a decision wholly different from the one actually rendered below. In its lead paragraph, the Petition asserts that "[t]he Ninth Circuit found the fact that there had been earlier proceedings in the Netherlands to be a jurisdictional-style bar to suit, without any assessment of the degree of interest of the Netherlands in this proceeding, or the ultimate policy positions of the United States." Pet. 2. In reality, the Circuit expressly "assess[ed]" whether "substantial foreign sovereign interests and the formal policies of the United States foreclose suit." *Ibid.* And the Circuit applied the act of state doctrine not merely because of some "earlier proceedings in the Netherlands" (*ibid.*), but because of the uniquely sovereign context of a bona fide postwar restitution system. As the Circuit explained, Petitioner's claims necessarily challenged "a decades-long 'considered policy decision'" reflected in the Netherlands' postwar "rights-restoration proceedings under [Dutch] royal decrees." Pet.App. 20a. Finally, far from treating the doctrine as some sort of "jurisdictional-style bar to suit" (Pet. 2), the Circuit correctly applied the doctrine as supplying "a rule of decision" requiring that sovereign foreign actions be "deemed valid" (Pet.App. 16a (quoting

W.S. Kirkpatrick Co. v. Environ. Tectonics Corp., Int'l, 493 U.S. 400, 405, 409 (1990))).

The upshot is that the Petition raises none of the doctrinal Questions (Pet. i), "irreconcilable difference[s] in law" (Pet. 30), or "fundamental issues of injustice" (*ibid.*) that Petitioner touts. Because the Circuit expressly *did* consider the Netherlands' "sovereign interest" and "the express foreign policy of the United States," the Questions Presented are hypothetical. Pet. i. Because the Dutch government conveyed the Cranachs to Stroganoff and repeatedly resolved Petitioner's restoration-of-rights claims *against* her in its bona fide restitution process, the Opinion in no way conflicts with *Bigio v. Coca Cola Co.*, 239 F.3d 440 (2d Cir. 2000), where the Egyptian government had "repudiated the acts in question" and "sought to have the property or its proceeds returned" to the plaintiff. *Id.* at 453. And because the Opinion simply applies settled principles to a unique "case concern[ing] artworks and transactions that, consistent with U.S. policy, have already been the subject of both external and internal restitution proceedings" (U.S. Br. 16), this case furnishes no occasion to consider general questions about "whether the act of state doctrine bars American courts from adjudicating ownership of artworks looted during the Holocaust" (Pet. 1).

There is, in short, no basis to grant certiorari. And the lengths Petitioner goes to mischaracterize and distort the Ninth Circuit's Opinion just underscores that the court's actual decision does not warrant review. Certiorari should be denied.

STATEMENT OF THE CASE

I. The *Cranachs*

Petitioner's lawsuit centers on *Adam* and *Eve* by Lucas Cranach the Elder. Pet.App. 5a. In 1931, Jacques Goudstikker, a prominent Dutch art dealer, purchased the Cranachs on behalf of his eponymous art dealership (the "Firm") at a Berlin auction. *Ibid.* The auction, titled "The Stroganoff Collection," featured works expropriated by the Soviet Union from the aristocratic Stroganoff family, whom the Bolsheviks had driven into exile. *Ibid.* Goudstikker contemporaneously described these "financial and political catastrophies" as "giv[ing] opportunity" to acquire "previously unattainable" artwork. SER 2042, ECF No. 39-9.

In May 1940, Nazi forces invaded the Netherlands, and Goudstikker, who was Jewish, was forced to flee with his wife Desi and son Edo. Pet.App. 6a. Goudstikker left behind his dealership, which had an inventory of 1200 works and extensive property holdings. *Ibid.*

In July 1940, Nazi Reichsmarschall Herman Göring and Alöis Miedl forcibly purchased the Goudstikker Firm and its assets. Pet.App. 6a. Miedl acquired the Firm, some of its paintings, and its real estate for 550,000 guilders. *Ibid.* Göring acquired most of the Firm's inventory, including the Cranachs, for 2 million guilders—the equivalent of more than $20 million today. *Ibid.*

After Allied forces defeated Germany, they recovered much of the Goudstikker collection, including the Cranachs. Pet.App. 6a. In 1946, the Cranachs were returned to the Netherlands in

accordance with the U.S. policy of "external restitution." *Id.* at 15a, 31a, 79a. Under that policy, the U.S. determined that recovered artworks should be returned to their countries of origin, not directly to individual owners, because those governments were better placed to handle individual restitution. *Ibid.*; *see also* U.S. Br. 2.

II. The Dutch Government's Comprehensive Scheme for Restitution and Reparations

Through three royal decrees, the Dutch government established a detailed postwar framework for restitution, which returned property to claimants, and reparations, which compensated the Dutch State for wartime damage. Pet.App. 7a, 80a.

A. Royal Decree A6 and the CORVO Decision

Following the Nazi invasion, the exiled Dutch government enacted Royal Decree A6 in an effort to thwart Nazi plunder. Pet.App. 7a. Decree A6 prohibited certain transactions with Germans and other enemies, automatically invalidating them unless they were approved beforehand by a committee known as "CORVO." *Ibid.* CORVO also had the power to "revoke the invalidity" of such transactions retroactively. *Ibid.*

In February 1947, after the war, CORVO revoked the invalidity of all transactions involving property found in enemy territory and returned by the Allies to the Netherlands. Pet.App. 7a. By reversing the automatic invalidity, CORVO presumptively treated returned property as "enemy property" (allowing it to be expropriated, as explained below), and presumptively treated any money paid by the Nazis

to the original Dutch owner as that owner's property (allowing the original owner to keep the money). *Ibid.* CORVO made clear that original owners could still petition to have enemy transactions voided, and their property returned, under Royal Decree E100. *Ibid.*

B. Royal Decree E100

The Dutch government adopted Royal Decree E100 in September 1944. Pet.App. 7a-8a. It established a Council for Restoration of Rights ("the Council") with broad and exclusive authority to modify or void any wartime transactions, including forced transactions with the enemy. *Ibid.* The Council had the power to return property to former owners or order compensation. *Id.* at 8a; 82a. If the Council invalidated a wartime transaction, it would generally unwind the transaction in both directions; any payments received from the Nazis would have to be surrendered to the Dutch State. *Ibid.* E100 authorized the Dutch government to sell unclaimed property in its possession if no owner came forward by September 30, 1950. *Ibid*.

The Dutch government set a July 1, 1951 deadline for claimants to file restoration-of-rights petitions under E100. Pet.App. 8a. After that deadline, the Council retained the discretion to order restoration of rights "*ex officio*" (*sua sponte*) but claimants were no longer entitled to demand such relief. *Ibid.*

C. Royal Decree E133

The Dutch government adopted Decree E133 to facilitate reparations. Pet.App. 9a. Article 3 decreed that, within Dutch territory, all "'[p]roperty belonging to an enemy State or to an enemy national,

automatically passes in ownership to the State.'" *Ibid.* This expropriation automatically occurred until the Netherlands and Germany signed a Peace Treaty in July 1951. *Ibid.*

III. The Dutch Government's Restitution Proceedings and Actions

A. The Goudstikker Firm's Postwar Restitution Claims

After liberation, the Dutch government seized the Goudstikker Firm from Miedl. Pet.App. 9a. When Desi Goudstikker returned to the Netherlands to pursue restitution, she and her advisers became the Firm's directors. *Ibid.*

After consulting counsel and advisers, the Firm made the strategic decision to void only the Miedl transaction and recover the (predominantly) real property he acquired, and not to pursue restitution for the Göring transaction. Pet.App. 9a-10a. The Firm's counsel advised that seeking restitution for the Göring transaction would have "'left [the firm] with a large number of works of art that are difficult to sell'"; it would inevitably have "'led to the revival of an art dealership with all pertinent negative consequences,'" including "'find[ing] a suitable person to run such a business'"; and it would have "'led to a considerable reduction in the [business's] liquid assets.'" *Ibid.* The Firm therefore sought to unwind the Miedl transaction, while "'prevent[ing] inclusion of the Göring transaction in the restoration of rights.'" *Id.* at 84a. Counsel cautioned that the Firm "'had to manoeuver very carefully'" because the Dutch government might oppose selective restitution and "ma[k]e the restoration of rights conditional upon the

nullification of the Göring transaction," as well as the Miedl transaction. *Ibid.*

The Firm implemented its selective restitution strategy in a 1949 letter and memorandum to the Dutch agency holding the recuperated Göring artworks. Pet.App. 10a. The submission acknowledged that both the Göring and Miedl transactions were voidable under E100, but explained that the "'Goudstikker [Firm] waives the right to file for restoration of rights regarding goods acquired by Goering.'" *Ibid*.

The Dutch government initially rejected the Firm's selective restitution effort, deeming it "'incorrect to lift one transaction out of a complex of deeply intertwined war transactions.'" Pet.App. 85a. The Firm nevertheless filed a petition under E100 for restoration of rights with respect to the Miedl transaction only. *Id.* at 10a. The Dutch government eventually relented, entering into an August 1952 settlement with the Firm restoring rights only as to the Miedl transaction. *Ibid.* It is undisputed that the Firm allowed E100's deadline to expire without filing a petition challenging the Göring transaction, allowing the Firm "to keep the substantial sale price." *Id.* at 20a.

B. Stroganoff's Restitution Claim and Settlement with the Dutch Government

Following E100's deadlines, the Dutch government sold many unclaimed recuperated artworks at auction, including Goudstikker works. Pet.App. 20a, 86a. The government transferred other

such artworks, including the Cranachs, to the national collection. *Ibid.*

In 1961, George Stroganoff petitioned the Dutch government to return the Cranachs, a Rembrandt, and another painting, asserting that they had been wrongfully expropriated from his family by the Soviet Union. Pet.App. 11a.

After years of negotiating, Stroganoff proposed a settlement in which he would abandon his claim to the Rembrandt if the State would allow him to "'buy back'" the Cranachs. Pet.App. 11a. The Dutch Minister of Culture initially opposed the proposal, explaining that the Cranachs were "'especially important for the Dutch cultural collection,'" and that "'[t]he sale of paintings from the State's art collection only takes place in exceptional cases, actually only if the interest of the country requires such a sale.'" *Id.* at 21a, 87a. Ultimately, however, the Culture and Finance Ministers approved the settlement (*id.* at 21a), citing litigation risks, including "'possibly losing the Rembrandt'" (*id.* at 87a-88a).

In 1966, the Dutch government transferred the Cranachs to Stroganoff. Pet.App. 87a-88a. In 1971, respondent Norton Simon purchased the Cranachs from Stroganoff for $800,000. *Ibid.*

C. Petitioner's Dutch Restitution Claims

Desi Goudstikker and her son Edo died in 1996, leaving Petitioner, Edo's widow, as the sole Goudstikker heir. Pet.App. 11a. In 1998, Petitioner revived the Firm and began seeking the return of the artworks forcibly sold to Göring. *Ibid.*

First, Petitioner filed a petition with the Dutch Ministry of Education, Culture, and Science. Pet.App. 11a. In March 1998, the Ministry rejected the request, concluding that the Firm had intentionally decided against seeking restoration of rights as to the Göring transaction, and that "'even under present standards[,] the restoration of rights was conducted carefully.'" *Id.* at 22a.

Petitioner then filed an E100 petition for restoration of rights in the Dutch Court of Appeals, the successor to the Council for Restoration of Rights. Pet.App. 22a. The petition sought the return of Göring-acquired paintings in the Dutch government's possession, and was amended to seek compensation for artworks sold by the government—specifically, the Cranachs. *Ibid.*

The Dutch Court of Appeals, sitting as the Council's successor, rejected the petition in a December 16, 1999 decision. Pet.App. 22a. The Court concluded the claim was untimely because it was filed after E100's July 1, 1951 deadline. *Ibid.* The Court also declined to exercise its discretion to grant restoration of rights "*ex officio*," explaining that the Firm "'made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction.'" *Ibid.* By its 1950s process, the Court reasoned, "'[t]he Netherlands created an adequately guaranteed procedure for handling applications for the restoration of rights,'" which was not "'in conflict with international law.'" *Id.* at 22a-23a.

In 2001, the Netherlands adopted a new policy for recovered artworks in its possession, departing from

a "'purely legal approach to the restitution issue'" and taking "'a more moral policy approach.'" Pet.App. 89a-90a, 24a. The new policy was based on the recommendations of a special committee (the "Ekkart Committee") appointed to investigate the restitution process. *Ibid.* Although the Ekkart Committee found that one of the agencies involved in restitution had been "'legalistic, bureaucratic, cold and often even callous,'" the new policy did not reopen, let alone repudiate, old decisions. *Ibid.* To the contrary, the policy was inapplicable to "'settled cases,'" in which "'either the claim for restitution resulted in a conscious and deliberate settlement or the claimant expressly renounced his claim for restitution.'" *Id.* at 24a. The policy also did not extend to disputes over paintings, such as the Cranachs, that had been transferred to third parties, unless the third party and the original owner consented. *Ibid.*

The Dutch Advisory Committee on the Assessment of Restitution Applications for Items of Cultural Value and the Second World War (the "Restitutions Committee") administered new claims under the policy, advising the State Secretary on claims for Nazi-looted artworks "'which are currently in the possession of the State of the Netherlands.'" *Id.* at 25a.

In 2004, the Firm submitted yet another restitution petition seeking the return of 267 artworks under the new policy. Pet.App. 12a, 25a. The Restitutions Committee issued a non-binding recommendation, "'based more on policy than strict legality,'" that Petitioner's claim should largely be granted. *Id.* at 90a. On February 6, 2006, the Dutch State Secretary adopted the Committee's ultimate

recommendation to return the artworks forcibly purchased by Göring and still in the State's possession, but *rejected* the Committee's findings that Petitioner's family had not abandoned their E100 claim to those artworks in the 1950s: "'Unlike the Restitution Committee I am of the opinion that in this case it is a matter of restoration of rights which has been settled.'" *Id*. at 26a. She explained:

> In 1999 the Hague Court of Appeal in its capacity as Restoration of Rights Court gave a final decision in this case. This is why this case is not included in the current restitution policy.

Id. at 91a.

Although Petitioner's "settled" claim fell outside the new restitution policy, the State Secretary decided, *ex gratia*, to return 206 Göring-looted paintings remaining in State hands. Pet.App. 26a. In taking this discretionary action, the State Secretary "t[ook] into account the facts and circumstances surrounding the involuntary loss of property and the manner in which the matter was dealt with in the early Fifties." *Ibid.*

In correspondence with the parties, the State Secretary confirmed, consistent with the policy's exclusion of transferred works, that the Cranachs were "'not a part of the claim for which [the State Secretary] decided on February 6[, 2006] to make the return.'" Pet.App. 27a. The Secretary therefore "'refrain[ed] from an opinion regarding the two pieces of art under the restitution policy.'" *Ibid.* "'The State is of the opinion,'" she explained, "'that this concerns a dispute between two private parties.'" *Id.* at 92a.

D. Petitioner's Lawsuit in the U.S. Courts

In 2007, Petitioner filed the present diversity action seeking return of the Cranachs and treble damages. Pet.App. 12a.

1. *Von Saher I*

Petitioner's suit invoked a special California statute of limitations for claims seeking Holocaust-looted artworks. Pet.App. 12a. The district court concluded that the statute constituted a war remedy subject to foreign affairs preemption. *Ibid.* Applying California's general limitations period, the court dismissed Petitioner's suit as time-barred. *Ibid.* The Ninth Circuit affirmed the foreign-affairs preemption holding, but remanded to permit Petitioner to replead under the general limitations period. *von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965-67 (9th Cir. 2010) ("*von Saher I*").

Petitioner unsuccessfully sought review in this Court. Before denying certiorari, this Court solicited the views of the United States. In its brief urging denial of certiorari, the U.S. explained:

> When a foreign nation, like the Netherlands here, has conducted bona fide postwar internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, the United States has a substantial interest in respecting the outcome of that nation's proceedings.

U.S. Br. 19. The U.S. further observed that "[t]he act of state doctrine and considerations of international comity, although not directly applicable at this stage of the proceedings, also weigh in favor of giving effect

to the Dutch government's actions in this case." *Id.* at 20.

2. *Von Saher II*

In response to *von Saher I*, California enacted a new statute of limitations, and Petitioner filed an amended complaint. Pet.App. 13a. The district court again dismissed, concluding that Petitioner's lawsuit was itself preempted under the foreign affairs doctrine. *Ibid.*

The Ninth Circuit reversed. *See von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712 (9th Cir. 2014) ("*von Saher II*"). The panel majority accepted Petitioner's allegation that "the Cranachs were never subject to post-war internal restitution proceedings in the Netherlands"—an allegation soundly disproven in discovery—and held that Petitioner's claims therefore did not conflict with federal policy on recovered art. Pet.App. 52a.

Judge Wardlaw dissented, reasoning that Petitioner's lawsuit "directly thwarts the central objective of U.S. foreign policy in this area: to avoid entanglement in ownership disputes over externally restituted property if the victim had an adequate opportunity to recover it in the country of origin." Pet.App. 66a-67a.

This Court denied the Museum's petition for certiorari.

3. *Von Saher III*

On remand, the parties conducted more than a year of discovery, including with respect to foreign law and the actions of the Dutch government. Pet.App. 15a, 77a-92a. The parties filed cross-

motions for summary judgment, with both the Museum and Petitioner arguing the act of state doctrine and Dutch law on a fully-developed record about the Dutch restitution scheme and Goudstikker-related proceedings. *Ibid.*

The district court granted summary judgment to the Museum. After conducting an extensive analysis of Dutch law, the court concluded:

> (1) because CORVO revoked the automatic invalidity of the Göring transaction in 1947, that transaction was "effective" and the Cranachs were considered to be the property of Göring; (2) because Göring was an "enemy" within the meaning of Royal Decree E133, his property located in the Netherlands, including the Cranachs, automatically passed in ownership to the Dutch State pursuant to Article 3 of Royal Decree E133; (3) unless and until the Council annulled the Göring transaction under Royal Decree E100, the Cranachs remained the property of the Dutch State; and (4) because the Göring transaction was never annulled under Royal Decree E100, the Dutch State owned the Cranachs when it transferred the paintings to Stroganoff in 1966.

Pet.App. 94a-100a. Because Stroganoff had good title, the court reasoned, the Norton Simon has "'good title' to the Cranachs." *Id.* at 94a.

Petitioner appealed, affirmatively arguing that the Dutch government's 2004 proceedings under its new restitution policy, which resulted in the return of numerous other paintings to her, constituted acts of state foreclosing the district court's Dutch law ruling.

Appellant's Opening Br. ("AOB") 2, 20-27. The Ninth Circuit affirmed on act-of-state grounds, holding that Petitioner's claims would require it to invalidate "at least three 'official act[s]' of the Dutch government 'performed within its own territory.'" Pet.App. 17a (citation omitted).

First, the court found "little doubt that the Dutch government's conveyance to Stroganoff qualifies as an official act of the Netherlands." Pet.App. 18a. The transfer, the court explained, was "the product of the Dutch government's sovereign internal restitution process," through which the Netherlands "acted with authority to convey the paintings after [Petitioner's] predecessors failed to file a claim under E100." *Id.* at 18a-19a.

Second, the Ninth Circuit held that Petitioner's claims would require it to invalidate "the 1999 Dutch Court of Appeals decision denying the restoration of [her] rights in the paintings." Pet.App. 21a-22a. The Circuit reasoned that because the Dutch Court of Appeals acted as successor to the Council for Restoration of Rights, administering a "postwar remedial scheme for artwork taken by the Nazis," its decision was "an official action that is particular to sovereigns." *Id.* at 23a.

Third, the Circuit held that the Dutch government's more recent proceedings "provide[d] a third official act supporting the legality of the Stroganoff transfer," rejecting, as "incorrect," Petitioner's suggestion that they repudiated Dutch postwar proceedings. Pet.App. 24a. The Dutch State Secretary, the court explained, found Petitioner's "claim was 'settled' by the 1999 'final decision' of the

Court of Appeals," and therefore "'not included in the current restitution policy.'" *Id.* at 26a. The court rejected Petitioner's reliance on the Restitution Committee's non-binding determination that her family had not abandoned its claim to the Göring works in the 1950s proceedings. *Ibid.* "The Restitutions Committee's recommendation and findings were purely advisory," the court noted, and the State Secretary's "binding decision … disavowed the Committee's findings that [Petitioner's] predecessors had not waived their rights to restoration under E100." *Ibid.* Because the State Secretary deemed Petitioner's restoration-of-rights claim "settled" and outside Dutch policy, it foreclosed her claims. *Ibid.*

After setting out the controlling Dutch actions here, the Ninth Circuit considered and rejected two exceptions argued by Petitioner—commercial acts and the Hickenlooper Amendment—and held that the policies underlying the doctrine support its application. Pet.App. 30a-31a. "[U]pholding the Dutch government's actions is important for U.S. foreign policy," the Circuit explained, and reviewing them "would require making sensitive political judgments that would undermine international comity." *Id.* at 31a-32a.

In a concurrence, Judge Wardlaw added that "[t]his case should not have been litigated through the summary judgment stage," as "[t]he district court correctly dismissed this case on preemption grounds in March 2012." Pet.App. 34a.

REASONS FOR DENYING THE PETITION

I. The Petition and Questions Presented Are Premised on Mischaracterizations of the Opinion Below

The Petition's grounds for seeking review rest upon a mischaracterization of the Ninth Circuit's reasoning and holdings.

1. Petitioner's core theory is that the Ninth Circuit failed to assess "whether foreign sovereign interests and American foreign policy prerogatives" support its application. Pet. 2. The first Question Presented presupposes that the Circuit failed to "Require Proof of a Sovereign Foreign Interest Substantially at Risk." *Id.* at 15. The second Question similarly presupposes that the Circuit failed to require "Proof that the Foreign Policy of the United States Might be Abrogated." *Id.* at 18. Even a cursory review of the Opinion refutes these suppositions.

a. The Ninth Circuit expressly examined the Dutch government's interests, quoting the very passage from *Kirkpatrick* that Petitioner features on the need to consider whether "the policies underlying the act of state doctrine … justify its application.'" Pet.App. 30a (quoting 493 U.S. at 409); *compare* Pet. 14. "[T]he administration of E100 and E133, the settlement with von Saher's family, and the conveyance of the Cranachs to Stroganoff in consideration of his restitution claim constitute an official act of state that gives effect to the Dutch government's 'public interests.'" Pet.App. 21a. In particular, "the Dutch Minister of Culture considered the settlement [granting the Cranachs to Stroganoff]

to be in 'the interest[s] of the country.'" *Ibid.* The court reasoned that "the decisions of the Dutch Court of Appeals and the State Secretary that deemed the Cranachs a 'settled' question are quite recent" (*ibid.*) and reflected "the Dutch government's sensitive policy judgments" (*id.* at 32a). To "[r]each[] into the Dutch government's post-war restitution system" would thus "undermine international comity." *Id.* at 31a-32a.

b. The Ninth Circuit also carefully considered the Executive Branch's policies on recovered artworks, expressly concluding "that upholding the Dutch government's actions is important for U.S. foreign policy." Pet.App. 31a. Quoting the U.S. Brief, the court noted:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings.*

Ibid. In considering "the implications of [adjudication] for our foreign relations," the Ninth Circuit followed the analytic framework set out by this Court in *Sabbatino*, and undertook precisely the "assessment" that Petitioner demands. *Compare id.* at 32a, *with* Pet. 2.

Even while charging the Ninth Circuit with "not address[ing]" U.S. foreign policy at all, Petitioner contends it improperly "found the views of the Solicitor General dispositive" (Pet. 12) and gave them

"determinative weight" (*id.* at 4). This, too, mischaracterizes the Opinion and the record. As the Circuit noted, the amicus brief expressed the considered position of the United States, including "the State Department." Pet.App. 31a. Far from reflexively giving the brief "determinative weight" (Pet. 2), however, the Court noted that it was "not bound by those views," explaining only that it would "not exclude the State Department's views when considering the doctrine's application, especially when assessing the degree to which [its] decision will affect foreign policy." Pet.App. 31a-32a, n.15. This approach is firmly grounded in precedent. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

The Ninth Circuit independently concluded that "[s]econd-guessing the Dutch government would violate our 'commitment to respect the finality of 'appropriate actions' taken by foreign nations to facilitate the internal restitution of plundered art.'" Pet.App. 32a (quoting *von Saher II*, 754 F.3d at 721). In suggesting the Circuit failed to consider particular sources of U.S. policy (such as the Washington Principles) (Pet. 22-23 n.3), Petitioner ignores the fact that the Circuit thoroughly examined U.S. policy on recovered art not once, but *twice* in this case. *See* Pet.App. 31a; *von Saher I*, 592 F.3d at 961-63. And the Circuit had the benefit of the U.S. Brief synthesizing those very sources into the policy invoked by the Court: the Nation's "substantial interest in respecting the outcome" of restitution proceedings that, like the Dutch proceedings here, are "bona fide." U.S. Br. 19.

2. Petitioner attempts to give the Ninth Circuit's fact-specific holding broad significance by asserting

that the Ninth Circuit applied the act of state doctrine based on the mere "fact that there had been earlier proceedings in the Netherlands." Pet. 2. According to Petitioner, "[t]he crux of the holding below is that any action in American courts is barred, of necessity, by the fact that there had been prior legal proceedings in the Netherlands." *Id.* at 14. But the Ninth Circuit announced no such rule. Rather, in applying the doctrine, the Circuit stressed that the three controlling Dutch actions were bound up with "a decades-long 'considered policy decision' that was inextricably linked to [postwar] rights-restoration proceedings under the [Netherlands'] royal decrees." Pet.App. 20a.

First, the Circuit treated the Netherlands' conveyance of the Cranachs to Stroganoff "not as a one-off commercial sale, but as the product of the Dutch government's sovereign internal restitution process," a process undisputedly "administered 'in good faith.'" Pet.App. 18a, 24a n.11. The Circuit held that the transfer furthered "the interests of the country" (*id.* at 21a), and flowed from the Dutch government's "[e]xpropriation of private property," a "uniquely sovereign act" (*id.* at 19a), not from mere "legal proceedings" (Pet. 14).

Second, the Circuit concluded that the Dutch Court of Appeals "carried out an official action that is particular to sovereigns," "administering the exclusive postwar remedial scheme for artwork taken by the Nazis," when it "refus[ed] von Saher's restoration of rights in the paintings" and rejected her challenge to the Dutch postwar restitution system. Pet.App. 23a. To grant Petitioner relief, the Circuit explained, it would need to both set aside that

decision and render "a judgment that the post-war Dutch system was incapable of functioning." *Id.* at 32a.

Third, the Ninth Circuit concluded that the Dutch State Secretary's "final determination that rights to the Cranachs had been fully 'settled,'" and that Petitioner's claim "was 'not included in the current [Dutch] restitution policy,'" also involved postwar restitution concerns that were uniquely sovereign. Pet.App. 26a-27a. "Expropriation, claims processing, and government restitution schemes are not the province of private citizens." *Id.* at 28a.

The Opinion's actual holdings make clear, then, that this case furnishes no occasion to decide whether the mere "existence of *any* foreign rulings" (Pet. 16 (emphasis added)) or just "*any* foreign involvement in an American dispute [operates] as a near jurisdictional bar to consideration of the merits" (*id.* at 2 (emphasis added)).

3. In a further effort to cast the Opinion below as raising fundamental questions about the act of state doctrine, Petitioner asserts that the Ninth Circuit "transformed" the doctrine by improperly treating it as "a categorical obstacle to suit akin to a jurisdictional bar" (Pet. 28) and "a categorical abstention doctrine" (*id.* at 20). This characterization is also refuted by the Opinion.

The Ninth Circuit noted that the act of state doctrine is not a jurisdictional bar but "'a rule of decision' requiring that 'the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.'" Pet.App. 16a (quoting *Kirkpatrick*, 493 U.S. at 405, 409). That is plainly correct, as a century of

this Court's precedents confirms. *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918).

4. Petitioner's entire attack on the Ninth Circuit's invocation of the act of state doctrine elides a critical fact: Petitioner herself invoked the doctrine in both the district court and court of appeals below, and argued that it *should* be the basis for decision. While Petitioner now criticizes the Ninth Circuit for "invoking" the act of state in a "'drive-by'" fashion (Pet. 3, 27), she affirmatively argued in her briefs below that the doctrine applied and "should be the end of the matter" (AOB 37). In pressing this theory, she cited the same principles and precedents the court ultimately applied (AOB 26 (quoting *Kirkpatrick*, 493 U.S. at 405)), and cited the same undisputed facts the court relied upon (*id.* at 24-25). And while Petitioner now suggests the doctrine should not apply in an action between two private parties (Pet. 2, 15), she waived that argument below by arguing that "'our courts should be even more sensitive to the involvements of a sovereign's action *when the sovereign is not a party to the action*'" (AOB 26 (emphasis added)). Petitioner's real objection is not to the Ninth Circuit's reliance on the act of state doctrine, but rather its fact-specific application of that doctrine.

5. Stripped of the Petition's mischaracterizations, the Opinion below plainly raises no issue warranting review. The Ninth Circuit expressly considered whether "substantial foreign sovereign interests and the formal policies of the United States foreclose suit" (Pet. 2)—and determined that they did. In considering these and other settled factors, the court gave effect to specific sovereign actions taken by the

Dutch government in implementing its postwar scheme for restitution and reparations, making no general pronouncements about whether any "prior legal proceedings" or mere "foreign involvement in an American dispute" (*id.* at 14, 2) would suffice to invoke the doctrine. It correctly treated those Dutch actions as rules of decision sufficient to resolve the case. And, as explained below, it correctly concluded that both Dutch sovereign interests and U.S. policy weighed in favor of respecting "the validity of the Dutch government's sensitive policy judgments." Pet.App. 32a.

This Court should reject Petitioner's efforts to recast the Ninth Circuit's decision and seek review of questions that are not implicated by the Opinion below.

II. The First Question Presented Is Not Implicated by the Opinion Below and Does Not Merit Review

This case does not present the Question of whether the Ninth Circuit properly applied the act of state doctrine "when the Netherlands eschews any sovereign interest in the resolution of the dispute." Pet. i. And while Petitioner warns of "broader confusion" from the Opinion (*id.* at 14), she identifies no circuit split between the Opinion's case-specific analysis of Dutch restitution proceedings and any other decision.

A. The First Question Is Hypothetical Because the Ninth Circuit Considered the Netherlands' "Foreign Interest" and Correctly Determined it Supported the Act of State Doctrine

This case presents no occasion to decide whether the act of state doctrine should apply when a foreign state has "eschew[ed]" the controlling sovereign act. First, that Question rests on the false premise that the Ninth Circuit failed to look for "proof" of "a foreign commitment to the putative act of state." Pet. 15. As noted, the court expressly considered the "proof" of the Dutch government's interests and "commitment," and simply ruled against Petitioner. Second, the Question rests on the embedded factual premise that "the Netherlands eschew[ed] any sovereign interest in the resolution of the dispute." *Id.* at i. The Ninth Circuit considered and rejected that argument as "incorrect" (Pet.App. 25a), concluding instead that "the Dutch government's sensitive policy judgments" and interest in finality weighed in favor of applying the doctrine (Pet.App. 31a-32a). That determination is clearly correct, for the acts of "repudiat[ion]" offered by Petitioner (Pet. 15) are all unavailing.

1. As the Ninth Circuit explained, Petitioner's reliance on findings made by the Restitution Committee in response to her 2004 restitution claim (Pet. 16) fails because the State Secretary *rejected* that "non-binding recommendation" (Pet.App. 25a). The Restitutions Committee concluded that Petitioner's family "did not abandon its rights in the artworks taken by Göring" by failing to file a timely restoration-of-rights claim under Decree E100. *Ibid.*

But this was an "[a]dvisory recommendation[]" with no sovereign force, and the State Secretary *rejected it* in issuing the "*binding* decision on von Saher's restoration claim." *Id.* at 25a, 26a (emphasis in original). The State Secretary found: "unlike the Restitution Committee I am of the opinion that in this case it is a matter of restoration of rights which has been settled." *Id.* at 26a. Far from "repudiat[ing]" prior Dutch restitution proceedings involving Petitioner and her family, the State Secretary recognized them as controlling: "In 1999, the Hague Court of Appeal in its capacity as Restoration of Rights Court gave a final decision in this case. This is why this case is not included in the current restitution policy." SER 1545, ECF No. 39-7. This is exactly what Petitioner says is necessary: "a foreign commitment to the putative act of state." Pet. 15.

2. Petitioner and her Amici point to the State Secretary's ultimate decision to return other paintings to her. Pet. 15; Br. of 1938 Society *et al.* 17. But the State Secretary took that action *ex gratia*—"[a]lthough von Saher's was a settled claim that fell outside the new policy." Pet.App. 26a. Even that *ex gratia* decision "did not include the Cranachs," as they were in private hands. *Id.* at 25a. That is why, the Ninth Circuit explained, the State Secretary's decision "did not disrupt the government's prior, binding acts of state concerning the Cranachs" (*id.* at 26a), and is "a third official act supporting the legality of the Stroganoff transfer" (*id.* at 24a).

3. The Ninth Circuit correctly rejected Petitioner's interpretation of correspondence between the State Secretary and the parties as a "disavowal"

of interest in prior Dutch proceedings. Pet. 16. In response to the parties' inquiries, the State Secretary explained that the Cranachs were "'not a part of the claim for which [she] decided ... to make the return,'" that "'the State of the Netherlands is not involved in this ... dispute between two private parties,'" and that it would therefore "'refrain from an opinion regarding the two [Cranachs] under the restitution policy.'" Pet.App. 26a-27a, 56s, 91a. Petitioner insists this response "repudiated" the Dutch government's interest in its prior restitution actions. Pet. 15. But as the Circuit recognized, the decision to "refrain from an opinion regarding the two [Cranachs]" is a straightforward application of current Dutch policy, which does not permit the government to decide new restitution claims for works no longer in the State's possession, absent the consent of the parties. Pet.App. 25a. Indeed, it would have been bizarre for the State Secretary to implicitly "disavow[]" the very proceedings she had just explicitly reconfirmed in deeming Petitioner's claim "settled."

B. There Is No Disagreement Among the Circuits Over Whether a Foreign Sovereign's Interest Is Relevant to the Act of State Doctrine

Because the Ninth Circuit carefully considered the Netherlands' sovereign interest and concluded that it supported applying the act of state doctrine, the Opinion below does not conflict with decisions that similarly consider the relevant sovereign interests. The purported "confusion" on this Question (Pet. 14) is illusory.

Petitioner has identified no case applying the act of state doctrine while refusing to assess "the quality of a foreign state's interest" (Pet. 15). Conversely, while Petitioner suggests the Circuit should have required an affirmative "clear expression of foreign state interest," she identifies no case on that side of the "divide[]" either (*ibid.*). Petitioner points to *Bigio v. Coca Cola Co.*, 239 F.3d 440 (2d Cir. 2000), but the Second Circuit nowhere adopted this bright-line requirement; it applied the same "balancing of interest" principles, backed by the same precedents, applied by the Ninth Circuit. *See id.* at 452 (citing *Kirkpatrick* and *Sabbatino*). Nor is there any tension between the outcome reached by the *Bigio* Court and the Opinion below. The Second Circuit reasoned that the "current [Egyptian] government … ha[d] apparently repudiated the acts in question and ha[d] sought to have the property or its proceeds returned to the [plaintiffs]." *Id.* at 453. Here, the Ninth Circuit based its decision on its opposite reading of the positions taken by the Dutch government. *Ante* 16-18. The Dutch government transferred the contested property to *Stroganoff*, not Petitioner (Pet.App. 18a), and "fully 'settled'" Petitioner's claim to those works *against* her (*id.* at 27a).

Because *Bigio* and the Opinion below apply the same settled principles and precedents, the result would have been the same even if the Cranachs had "hung in a museum in New York rather than Los Angeles." *Contra* Pet. 17; Br. of Current and Former Members of Cong. 5-6. Those precedents make equally clear that it makes no difference that this case involves "a [private] dispute between American citizens" (Pet. 16), for the courts routinely apply the

doctrine in that situation. *See, e.g.*, *Kirkpatrick*, 493 U.S. at 402.

Nor is there any merit to Petitioner's passing suggestion that the Opinion below "gives weight to foreign judgments beyond the comity principles set out in the Fourth Restatement." *Cf.* Pet. 16. As the Ninth Circuit noted, the Dutch Court of Appeals was "administering the [Netherlands'] exclusive postwar remedial scheme" and acting as the Council for Restoration of Rights—not a Court—when it issued its judgment. Pet.App. 23a. Even apart from the act of state doctrine, giving effect to that final judgment coheres with "international comity" principles (*id.* at 32a), especially given that the State Secretary reconfirmed its validity. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 485.

III. The Second Question Presented Is Not Implicated by the Opinion Below and Does Not Merit Review

The Second Question is also not presented here. And even if it were, the Opinion below does not produce or "exacerbate[]" any "doctrinal uncertainty" (Pet. 20).

A. The Second Question Is Hypothetical Because the Ninth Circuit Considered U.S. Policy and Correctly Determined it Supported the Act of State Doctrine

As with the first Question, the second Question rests on a false premise: that the Ninth Circuit failed to "determine independently whether the foreign policy interests of the country [a]re truly at risk" before applying the act of state doctrine. Pet. 24-25.

The Ninth Circuit expressly considered that factor (*see ante* at 26-28), and correctly determined that it favored "'respecting the outcome of the nation's proceedings.'" Pet.App. 31a. And because the Circuit's application of the doctrine furthers, and is not "contrary to[,] the express foreign policy of the United States concerning the recovery of looted Holocaust assets" (Pet. i), the second Question is not legally *or* factually presented here.

1. The U.S. was explicit in its amicus brief: the Executive expressed a "continuing interest" in the finality of "wartime restitution process" when "appropriate actions have been taken by a foreign government concerning the internal restitution of art that was externally restituted to it by the United States." U.S. Br. 17. Because "this case concerns artworks and transactions that, *consistent with U.S. policies*, have already been the subject of both external and internal restitution proceedings" (*id.* at 16), and because those proceedings were "bona fide," the U.S. voiced "a substantial interest in respecting the[ir] outcome" (*id.* at 19). These clear statements refute Petitioner's astonishing claim to the "non-existence of any Executive interest in the purported finality of Dutch proceedings" (Pet. 30).[1]

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[1] Indeed, as Judge Wardlaw noted (Pet.App. 34a), Petitioner's lawsuit should have been dismissed on foreign affairs preemption grounds. Although the Ninth Circuit rejected that ground at the pleadings stage in *von Saher II*, the foreign affairs doctrine would independently require affirmance if this Court granted review—especially in light of the fully developed record, *see id.* at 14a n.4—because "[o]ur nation's foreign policy is to respect the finality of the Netherlands' restitution proceedings and to avoid involvement in any ownership dispute over the

2. Petitioner and her amici again attempt to second-guess the Executive, as they did below, by pointing to the Washington Principles and Terezin Declaration. Pet. 24; Br. of 1938 Society *et al*. 10-12. But as the U.S. Brief explained, "contemporary U.S. policy supports the fair and just resolution of claims involving Nazi-confiscated art, while also respect[ing] the bona fide internal restitution proceedings of foreign governments." U.S. Br. 6-7. That is clear from the texts of the Washington Principles and Terezin declaration, which confirm that their non-binding policies do "not support relitigation of all art claims in U.S. courts." *Id.* at 18. Rather, they are concerned with identifying and facilitating claims to "[a]rt that had been confiscated by the Nazis and *not subsequently restituted*" (Washington Principles), and expressly recognize the need to "tak[e] into account the different legal traditions" of foreign sovereigns (Terezin Declaration), because "countries act within the context of their own laws" (Washington Principles).

3. Petitioner's reliance on the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act") (Pet. 24) is equally unavailing, for that statute merely reiterates the U.S. commitment to the same policies already addressed by the U.S. Brief (*see* Pet.App. 113a). Because the HEAR Act coheres with prior U.S. policies on recovered art and establishes an "extended federal statute of limitations" that has no bearing on the act of state holding here, there is no "express congressional action" contradicting the Executive. Pet. 23. For this reason, both the political

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Cranachs," *von Saher II*, 754 F.3d at 727 (Wardlaw, J., dissenting).

question concerns in *Zivotofsky v. Clinton*, 566 U.S. 189 (2012), and the policy arguments made by amici (*e.g.* Br. of 1938 Society 6; Br. of Current and Former Members of Cong. 16-17), are inapposite. Indeed, Petitioner herself mentioned the statute only glancingly in her principal briefs below. AOB 36, n.11.

B. There Is No Disagreement Among the Circuits Over the Deference Owed to the Executive

There is no division on Petitioner's hypothetical question about "whether and how to weigh the interest of the Executive" (Pet. 19).

None of Petitioner's cases refused to consider the U.S.'s foreign policy interests in applying the act of state doctrine. To the contrary, both the Seventh and D. C. Circuit decisions expressly invoked this Court's foundational authorities and concern with "'frustrat[ing] the conduct of foreign relations.'" *Nocula v. UGS Corp.*, 520 F.3d 719, 728 (7th Cir. 2008) (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972)); *accord Riggs Nat'l Corp. & Subsidiaries v. Comm'r*, 163 F.3d 1363, 1368 (D.C. Cir. 1999). The Eleventh Circuit's decision in *Mezerhane v. Republica Bolivariana de Venezuela*, 785 F.3d 545, 552 (11th Cir. 2015), centered on a paradigmatic act of state—expropriation—and cited *Sabbatino*, another expropriation precedent.

Conversely, none of the decades-old decisions Petitioner attributes to the other side of the division refused to apply the act of state doctrine based solely upon "the Executive's position on the matter." Pet.

19. Rather, these decisions, consistent with this Court's precedents, considered U.S. foreign policy interests alongside other reasons for declining to apply the doctrine. *See United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 872-76 (2d Cir. 1976) (noting that the doctrine does not apply extraterritorially to foreign confiscations in U.S.); *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 796-97 (5th Cir. 2017) (holding doctrine inapplicable to copyright claims, which did not require review of foreign state's actions); *Envt'l Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1061-62 (3d Cir. 1988) (rejecting doctrine where claims required "at most an inquiry only into the motivations behind, rather than the legality of, the foreign government's acts"); *Indus. Inv. Dev. Corp. v. Mitsui & Co.*, 594 F.2d 48, 55 (5th Cir. 1979) (same).

Petitioner's authorities apply the same foundational act of state precedents and reached different results because of varying facts, not any fundamental disagreement over the required "proof" regarding U.S. foreign policy.

IV. Both Courts Below Carefully Considered and Properly Rejected Petitioner's Claims on the Merits

Petitioner's attempt to characterize the Ninth Circuit's 33-page unanimous decision as an "abrupt door-closing exercise" (Pet. 30) also contradicts the record below. The Circuit rendered its Opinion after 12 years of litigation, full fact and expert discovery, three dispositive district court decisions (the last on cross-motions for summary judgment), and three full appeals. The courts below thoroughly considered

Petitioner's claims and properly rejected them on the merits. And because the Ninth Circuit's Opinion simply applies settled principles to the particular facts of the Netherlands' bona fide restitution framework and actions, the Opinion announces no new principle that could act as a "barrier" in adjudicating claims to Nazi-looted artworks.

1. In addition to the Dutch restitution proceedings convened for her family, both courts below afforded Petitioner extensive process and "engage[d] the merits" of her claim to title (Pet. 30).

The district court oversaw more than a year of discovery, including extensive foreign discovery. Pet.App. 15a. The district court then resolved "the merits of the claim over the ownership of the Cranachs" against Petitioner under Dutch law (Pet. 30). The court determined that "the Dutch State acquired ownership of the Cranachs pursuant to Royal Decree E133, and thus that Norton Simon has 'good title' to the Cranachs." Pet.App. 108a. In a detailed analysis of Dutch postwar restitution decrees, the court reasoned that the Dutch government lawfully expropriated the Cranachs and the other works forcibly purchased by Göring after Petitioner's family decided against filing an E100 petition. *Id.* at 98a-99a. The Dutch government's ownership of these paintings was reflected in its sale of other works from the Goudstikker collection and its 1966 transfer of the Cranachs to Stroganoff. *Id.* at 86a, 20a. This independently sufficient Dutch law ground underscores why this case does not trigger any "public policy" concerns about U.S. courts declining to reach the merits of claims to Holocaust-looted art.

As noted, the summary judgment record developed by the parties also firmly supports the Ninth Circuit's act of state determinations—a "substantive defense on the merits." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). The record thus vindicates the U.S.'s position that the doctrine "weigh[s] in favor of giving effect to the Dutch government's actions" (U.S. Br. 20), as well as its underlying interpretation of Dutch proceedings "after the war and more recently" (*id.* at 19).

Among other things, the record confirms:

- "[A]t the time of the [Firm's] 1952 settlement Ms. Goudstikker 'made a conscious and well considered decision to refrain from asking for restoration of rights with respect to the Göring transaction.'" U.S. Br. 17; *see* Pet.App. 83a-85a.
- Petitioner's 1998 restitution claim "included the Cranachs," and the Dutch Court of Appeal rejected it on substantive, not merely "procedural and jurisdictional grounds." U.S. Br. 4 n.1; *see* Pet.App. 23a, 88a-89a.
- The State Secretary rejected Petitioner's 2004 claim because "'[i]n 1999 the Hague Court of Appeal … gave a final decision in this case,'" such that it "is not included in the current restitution policy.'" U.S. Br. 7; *see* Pet.App. 91a.
- Even under the new policy, the Dutch government does not "review claims for artwork that is in private possession"

absent a joint request. U.S. Br. 18-19; *see* Pet.App. 91a.

In these and other respects, the summary judgment record refutes the allegations in Petitioner's complaint, a point the Circuit specifically noted. Pet.App. 14a, n.4.

2. Precisely because it reflects the fact-intensive "merits" ruling that Petitioner says "public policy" demands (Pet. 30), the Opinion cannot, and does not purport, to govern other claims involving "coerced sale[s] of Jewish-owned property" (*ibid*). The Opinion rests upon "an official conveyance from the [*Allied*] Dutch government" that was "thrice 'settled' by Dutch authorities." Pet.App. 33a. As the U.S. observed, "the Dutch government has afforded petitioner and her predecessor adequate opportunity to press their claims, both after the War and more recently." U.S. Br. 19. The U.S. and Dutch governments have recognized, respectively, an interest in the proceedings' "finality" and "outcome" (*id.* at 17, 19), and the Netherlands' "final decision" (Pet.App. 26a). Applying the act of state doctrine in these circumstances sets up no "categorical obstacle" (Pet. 28) in situations where artworks were lost after the war and never subject to restitution proceedings. *Cf. Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 4 (1st Cir. 2010) (alleging discovery of claim in 2003). And as the U.S. has explained, the fact that Nazi-looted artwork was recovered and externally restituted to the country of origin may not "bar litigation" if artworks "had not been subject (or potentially subject) to bona fide internal restitution proceedings." U.S. Br. 17 n.3; *cf. Altmann*, 541 U.S. at 683-84 (noting that Austrian state museum

engaged in fraud in handling recovered artworks). The doctrine applies here only because "appropriate" Dutch restitution actions, including those taken regarding the Cranachs, foreclose Petitioner's claim and give the Museum title. Pet.App. 32a. Petitioner identifies no comparable case, much less one where the holding here would work an "injustice" (Pet. 30).

3. The Museum has never disputed the gravity of claims that "involve[] the coerced sale of Jewish-owned property" (Pet. 30). But as the U.S. has noted, "[t]his case does not involve artwork whose existence or provenance has only recently been discovered and has never been the subject of restitution proceedings." U.S. Br. 16. It is, instead, a case where the claimant and her family have been afforded extensive process both in the country of origin, where U.S. policy contemplates restitution should take place, and here in the United States, where plaintiff has been allowed to conduct discovery and litigate her claims on the merits, and where the federal courts carefully considered and properly rejected the plaintiff's claims on the particular facts presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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