No. 07-56691

In the United States Court of Appeals for the Ninth Circuit

MAREI VON SAHER, Plaintiff-Appellant,

vs.

NORTON SIMON MUSEUM OF ART AT PASADENA, NORTON SIMON ART FOUNDATION, Defendants-Appellees.

On Appeal From the Judgment of the United States District Court for the Central District of California

The Honorable John F. Walter

District Court No. CV-03-9407

BRIEF OF AMICUS CURIAE EARTHRIGHTS INTERNATIONAL IN SUPPORT OF PLAINTIFF-APPELLANT AND REHEARING

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STATEMENT OF CONSENT TO FILE

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-2(a).

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

EarthRights International (ERI) is a non-profit human rights organization which litigates and advocates on behalf of victims of abuses worldwide. ERI is counsel in several transnational lawsuits asserting state-law claims, such as *Bowoto v. Chevron Corp.*, No. 99-02506 (N.D. Cal.), No. 09-15641 (9th Cir.), which alleges that California corporations are liable under, *inter alia*, California state law for their complicity in abuses in Nigeria. ERI therefore has an interest in ensuring that state-law claims arising out of human rights abuses committed abroad are not improperly dismissed for perceived interference with federal foreign affairs powers.

STATEMENT OF THE ISSUES ADDRESSED BY AMICUS CURIAE

Amicus addresses three issues:

1. Whether the panel erred in failing to consider whether a facial challenge to California Code of Civil Procedure § 354.3 is available in light of the normal rules disfavoring full invalidation, where: a) most imaginable applications of

the law – including the one at bar, which involves a museum located in California – present no constitutional problem, and b) there are obvious limiting constructions available.

2. Whether providing a forum for restitution of wartime stolen art is outside a traditional area of state competence, even though transitory torts may traditionally be maintained by plaintiffs against out-of-state residents, subject to the due process limitations of personal jurisdiction.

3. Whether *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), which held that property restitution claims arising from the Second World War do not infringe upon powers constitutionally committed to the federal political branches, requires a finding that a law allowing such claims is not subject to foreign affairs field preemption, when the latter doctrine also targets interference with powers constitutionally committed to the federal political branches.

SUMMARY OF ARGUMENT

First, the panel suggested that California Code of Civil Procedure § 354.3 is constitutional as applied to a museum located in California, as is the case here. Nonetheless, it failed to undertake any analysis as to whether it was proper to invalidate the law, even as applied to the facts in this case. Courts may not fully

invalidate laws unless they are unconstitutional in all applications or no appropriate limiting construction is available. Had the panel applied those principles, it would not have precluded Ms. von Saher from relying on Section 354.3.

Second, the panel erred in holding that Section 354.3 was outside a traditional area of state responsibility because it created a forum for the resolution of restitution claims arising out of the Second World War that is open to out-of-state plaintiffs and defendants. Because, however, the statute does not alter the basic requirements for personal jurisdiction, it is no more wide-ranging than the common law has been for centuries; the Supreme Court has consistently held that, where personal jurisdiction is present, state courts are open to out-of-state or domestic plaintiffs for the resolution of claims that arise against out-of-state defendants.

Finally, the panel rationale contravenes years of careful jurisprudence by concluding that extending the statute of limitations on art restitution claims arising out of the Second World War infringes on executive war making prerogatives. This holding cannot be reconciled with this Circuit's decision in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005), which found that restitution claims against private parties are not constitutionally entrusted to the federal political branches.

ARGUMENT

I. Because the statute is undoubtedly constitutional when applied to a museum in California, which is the case here, the Court erred in failing even to consider well-established rules against facial invalidation.

As the panel noted, courts conduct a foreign affairs field preemption analysis *only* where a State "take[s] a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility." Slip op. at 11348 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 420 n.11); *id.* at 11352 (applying field preemption analysis only *because* of finding that California Code of Civil Procedure § 354.3 applies outside of area of traditional state authority). If the statute is within a state's traditional responsibility, field preemption cannot apply.

The panel's opinion indicates that, were the statute limited to preventing "museums and galleries operating within [California's] borders . . . from trading in and displaying Nazi-looted art," slip op. at 11350–51, it would be within the state's traditional responsibilities and would not trigger any foreign affairs preemption analysis.

Somehow, though, despite recognizing that the statute as applied to the facts at bar would be constitutional, the panel proceeded to strike down the law, even as applied to a California museum, without any analysis of whether this was permitted. This was an error. The panel should have – and easily could have – avoided facially invalidating the law because: 1) facial challenges are only

appropriate where there are no constitutional applications of the law or no suitable limiting construction is available, and 2) application of the law to the facts at bar posed no constitutional problem.

A. Courts are required to avoid striking down laws when they have some constitutional applications or a suitable limiting construction is available.

Full invalidations of statutes are rare. The Supreme Court has not been entirely consistent in articulating the standard under which courts may fully invalidate a state statute on constitutional grounds. Regardless, the panel's decision cannot be reconciled with either of the standards formulated by the Court.

At times, the Court has held that "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *accord Wash. State Grange v. Wash. State Republican Party*, 552 U.S. __, 128 S.Ct. 1184, 1190 (2008); *Hotel & Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003). The fact that a statute "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid" outside the context of the First Amendment. *Salerno*, 481 U.S. at 745. The Defendants obviously cannot meet that standard here, since Section 354.3 is constitutional under the circumstances at bar.

Elsewhere, the Supreme Court has detailed a less categorical approach. "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328–329 (2006) (citations omitted).

In determining the appropriate remedy, courts consider "[t]hree interrelated principles." *Id.* at 329. Each strongly supports avoiding invalidating Section 354.3 and applying it in this case, even assuming the statute is unconstitutional in certain applications.

First, courts "try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Id.* (quoting *Regan v. Time, Inc.*, 468 U. S. 641, 652 (1984) (plurality opinion)). Thus, "the 'normal rule' is that 'partial, rather than facial, invalidation is the *required* course,' such that a 'statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.'" *Id.* (quoting *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (emphasis added)).

Second, although courts "strive to salvage" state law, they restrain themselves "from rewriting [it] to conform it to constitutional requirements." *Id.*

(internal quotations omitted). Whether the remedy avoids "quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy." *Id*. Here, there can be no argument that the required "line-drawing is inherently complex." *Id.* at 330. The Court need only decline to strike the law down as applied to "museums and galleries operating within [California's] borders" that are "trading in and displaying Nazi-looted art." Slip op. at 11350–51.

Third, "[a]fter finding an application or portion of a statute unconstitutional, [courts] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte*, 546 U.S. at 330. Clearly, the California Legislature would have chosen to provide a remedy where the looted art was hanging in a California gallery, irrespective of whether it could also provide a remedy where the art was outside the state.

.All three *Ayotte* factors counsel against invalidating the law as applied to the facts at bar

B. Where unconstitutionality is merely speculative, courts should not grant a facial challenge.

Supreme Court precedent also clearly indicates that if possible, courts should avoid striking down laws when constitutional problems are purely prospective, as in the case at bar, where the facts present no constitutional problem. *See Wash. State Grange*, 128 S.Ct. at 1191. First, such challenges "often rest on speculation."

Id. In this case, the panel was concerned that some plaintiffs might bring suit to recover art held by non-resident museums or galleries. Yet it is not clear as a factual matter that any museums holding Nazi-looted art outside California have contacts with the state that would afford personal jurisdiction. At most, "[o]nly a few applications" of the law could even raise a constitutional issue. *Ayotte*, 546 U.S. at 331 (finding this supported narrower remedy than full invalidation).

Second, facial challenges undercut the fundamental principle that courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange*, 128 S.Ct. at 1191 (quoting *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring)). This is particularly important where, as here, state "courts have had no occasion to construe the law in the context of actual disputes . . . or to accord the law a limiting construction to avoid constitutional questions." *Id.* at 1190.

In sum, here as in *Ayotte*, the panel "chose the most blunt remedy," 546 U.S. at 330 – invalidating the state statute entirely. This contradicts well-established principles of constitutional adjudication. The panel clearly erred in invalidating Section 354.3 even as applied to a circumstance that the panel itself recognized would not raise constitutional concerns without undertaking the analysis required

by the Supreme Court. This Court should grant the petition in order to conduct that analysis.

II. Providing a forum open to out-of-state plaintiffs and defendants is a longstanding feature of civil courts of general jurisdiction and therefore falls within traditional state competence.

The panel reasoned that Section 354.3 was outside a traditional area of state responsibility because, in part, California had created a forum for the resolution of wartime art restitution claims that applied to out-of-state defendants. Slip op. at 11351–2.[1] But Section 354.3 does not purport to alter the basic rules governing personal jurisdiction. As a general principle, defendants may be sued based on their acts that have connections to the forum, or, if their contacts with the forum are sufficient, they may be subject to litigation arising out of transactions that occurred outside the forum. *See, e.g.*, *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003). This is not unique to Section 354.3, but is a longstanding common law principle, and well within a state's traditional competence.

As the Supreme Court has explained, the tradition of asserting personal jurisdiction based on the defendant's presence in the forum "had antecedents in English common-law practice, which sometimes allowed 'transitory' actions, arising out of events outside the country, to be maintained against seemingly

[1] *Amicus* takes no position on any other basis for excluding Section 354.3 from California's traditional competence.

nonresident defendants who were present in England." *Burnham v. Superior Court*, 495 U.S. 604, 611 (1977). Hence, the Supreme Court has repeatedly affirmed that actions may be maintained against nonresidents, so long as they meet the basic standards for assertion of personal jurisdiction, even where the cause of action arises elsewhere, *e.g., Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446, 447 (1952), and even where the plaintiff has no connection to the forum. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779–80 (1984); *accord Rasul v. Bush*, 542 U.S. 466, 484-85 (2004) ("The courts of the United States have traditionally been open to nonresident aliens.")

Thus, there is nothing unusual about opening the California courts to a claim against any defendant over whom the courts may constitutionally exercise personal jurisdiction. This is the ordinary situation: "the victim of any . . . tort, may choose to bring suit in any forum with which the defendant has certain minimum contacts such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Keeton*, 465 U.S. at 780–81 (internal punctuation and alteration omitted). Any reading that gives Section 354.3 a more expansive scope, such as allowing suits against defendants for whom such minimum contacts are lacking, would be a misreading; Section 354.3 expressly incorporates Section 410.10, which in turn incorporates the jurisdictional limits of the Constitution. *See* Cal. Code Civ. Proc. § 410.10.

Because state courts have long been open for suits against nonresident defendants based on claims arising elsewhere, there can be little argument that this would bring Section 354.3 outside the realm of traditional state responsibility.

III. The panel improperly applied field preemption to an issue not committed to the political branches, in conflict with *Alperin v. Vatican Bank.*

After determining that Section 354.3 falls outside areas of traditional state responsibility, the panel misapplied the foreign affairs field preemption doctrine. The question of whether a state law is preempted generally turns on whether it infringes on foreign affairs powers that are constitutionally committed to the federal political branches, or whether it fails to respect the federal political branches' ability to conduct foreign affairs. For example, in *Zschernig v. Miller*, the Court found that the statute at issue "is an intrusion by the State into the field of foreign affairs *which the Constitution entrusts to the President and the Congress*," 389 U.S. at 432 (emphasis added), and "may well adversely affect the power of the central government to deal with" relations with the communist bloc. *Id.* at 441; *see also Deutsch v. Turner*, 324 F.3d 692, 711 (9th Cir. 2003) (considering whether the California statute reviving wartime forced labor claims implicated federal war powers constitutionally committed to the President and Congress).

Critically, foreign affairs field preemption considerations are almost identical to two of the dispositive factors listed by the Supreme Court for

determining whether a case presents a non-justiciable political question. *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found textually demonstrable commitment of the issue to a coordinate political department… or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government"). Indeed, courts faced with a potential political question touching on foreign affairs consistently make the same inquiries as those faced with a foreign affairs preemption question.[2]

Accordingly, the panel's decision cannot be squared with the Ninth Circuit's decision in *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005). There, the Court held that causes of action of the sort at issue in this case — claims for conversion and restitution — are justiciable under the political question doctrine despite their

[2] Unsurprisingly, almost every court that has considered cases in light of both political question and field preemption has found that they both point to the same conclusion. *E.g., Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 73 (D.D.C. 2007), *vacated on other grounds by* 2009 U.S. App. LEXIS 17034 (D.C. Cir. July 31, 2009); *Ntsebeza v. Daimler A.G. (In re South African Apartheid Litig.)*, 624 F. Supp. 2d 336, 342 (S.D.N.Y. 2009); *Mujica v. Occidental Petroleum Corp*., 381 F. Supp. 2d 1164, 1188 (C.D. Cal. 2005). *But see Deutsch*, 324 F.3d at 713 n.11, 716 (rejecting application of political question doctrine, reasoning that courts are competent to interpret treaties, but applying foreign affairs preemption). The cross-pollination between the political question doctrine and foreign affairs preemption goes the other way, as well. For example, *Alperin* uses preemption cases to make the point that the political branches have the lead role in managing foreign affairs, 410 U.S. at 549 (citing *Garamendi*, 539 U.S. at 422 n.12), and that a pattern of executive agreements or treaties may be evidence that an area of foreign policy is committed to the political branches. *Id.* at 550 (citing *Deutsch*, 324 F.3d 692; *Garamendi*, 539 U.S. at 415–416).

nexus to the Second World War. The Court noted that these claims are "garden-variety legal and equitable claims," *id.* at 548, and, although they may incidentally touch on foreign relations, they are not constitutionally committed to the federal political branches. *Id.* at 551–552.[3] Given foreign affairs field preemption's overriding concern with protecting the powers constitutionally committed to the federal political branches, *Alperin*'s finding of a lack of commitment of this issue to Congress or the President also settles the question here. *Id. at* 551–552.

The panel, however, sought to distinguish *Alperin*, concluding that: "Our holding that the judiciary has the power to adjudicate Holocaust-era property claims does not mean that states have the power to provide legislative remedies for these claims." Slip. op. at 11354. This was error. A power is either textually committed to the political branches or it is not. The question of whether a power is so committed does not turn on whether a federal court or a state is alleged to have infringed upon that power. Thus, it makes no difference that the political question doctrine arises out of separation of powers concerns, *see Baker*, 369 U.S. at 210, as opposed to the federalism concerns that underlie foreign affairs preemption. The salient point is that both doctrines focus on whether power inheres in the federal political branches.

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[3]This contrasts with the *Alperin* plaintiffs' war crimes claims, which were constitutionally committed to the President pursuant to his power as Commander in Chief to discipline wartime enemies. *Id.* at 559 (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

Accordingly, *Alperin*'s holding that the power to resolve certain property claims is not textually committed to the federal political branches, 410 F.3d at 551–552, necessarily applies equally to the foreign affairs preemption context, and bars that defense. The panel's attempt to distinguish *Alperin* would only make sense if wartime restitution claims are *exclusively* committed to the federal judiciary, but *Alperin* says no such thing.

The similarities between the political question and field preemption analyses lead to the inevitable conclusion that despite the constitutional supremacy of the federal government in foreign affairs, *not all issues that touch on these areas are off-limits to state action*. *Zschernig*, 389 U.S. at 433; *accord Carr*, 369 U.S. at 211–214. The panel in this case, however, ended its analysis at the point where it concluded that the existence of claims arising during the Holocaust necessarily meant that federal war powers were infringed. A proper treatment of the issue would have required the court to reject field preemption and, in accordance with *Alperin*, 432 F.3d at 548, uphold Section 354.3, recognizing that despite their arising in the context of the Holocaust, claims for restitution of stolen property subject to California's jurisdiction impinge no more than incidentally on federal foreign affairs powers.

CONCLUSION

For the foregoing reasons, amicus urges this Court to grant the petition for panel rehearing or, in the alternative, for rehearing *en banc*.

DATED: October 5, 2009

Respectfully submitted,

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*In the interests of full disclosure, counsel Marco Simons was a law clerk for the Hon. Dorothy Wright Nelson during 2002–2003.

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Case No. 07-56722

I certify that, pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 4200 words or less, according to WordPerfect, the word-processor used to create the brief.

DATED: October 5, 2009

Respectfully submitted,

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9th Circuit Case Number(s) 07-56691

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