Nos. 15-55550, 15-55951, 15-55977

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

David Cassirer, et al.,

Plaintiffs-Appellants,

v.

Thyssen-Bornemisza Collection Foundation,

Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 05-cv-03459-JFW
Hon. John F. Walter, Judge

BRIEF FOR THE STATE OF CALIFORNIA AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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INTEREST AND AUTHORITY

The Attorney General of California files this brief on behalf of the State of California, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.[1]

California has a strong interest in defending state statutes against improper declarations of unconstitutionality or preemption. The State participated in this case as amicus curiae during a prior interlocutory appeal, *see Cassirer v. Thyssen-Bornemisza Collection Foundation*, Case No. 12-56159 (Dkt. No. 18), explaining that the district court was wrong to hold that section 338(c)(3) of the California Code of Civil Procedure was preempted by the United States Constitution's grant of foreign affairs powers to the national government. This Court agreed with that argument, reversed the district court's dismissal of plaintiffs' case, and remanded the case for further proceedings. *See Cassirer v. Thyssen-Bornemisza Collection Foundation*, 737 F.3d 613, 618-619 (9th Cir. 2013).

[1] No party's counsel authored this brief in whole or in part, and nobody other than amicus and its counsel has contributed financially to the preparation or submission of this brief. Although neither the consent of the parties' nor leave of court is required for the filing of a State's amicus curiae brief under Rule 29(a), counsel for the State endeavored to obtain the consent of all parties to the filing of the brief. Counsel for the plaintiffs-appellants consented; counsel for the defendant-appellee did not.

In the ruling now under review, the district court has once again dismissed plaintiffs' case. The court's opinion reasons that section 338(c)(3) is unconstitutional to the extent its application would violate the defendant's rights under the Due Process Clause. That reasoning casting a cloud on section 338(c)(3) is incorrect, because the defendant, as an agent and instrumentality of the Kingdom of Spain, is not a "person" protected under the Due Process Clause. Because the district court addressed the statute's constitutionality only in an abbreviated, alternative holding, the issue is likely to receive less attention in the parties' submissions than their arguments on other subjects. The Attorney General believes the State's submission will assist the Court by addressing the issue separately, allowing the Court to avoid any unnecessary and incorrect comment on the constitutionality of state law.

STATEMENT

1. California Code of Civil Procedure section 338 establishes a general three-year limitations period for tort claims, including claims for the recovery of personal property. Cal. Civ. Proc. Code § 338. In 2010, the Legislature amended section 338(c) to provide a longer, six-year limitations period from the date of actual notice for claims for the recovery of unlawfully taken or stolen fine art in cases against museums and against

entities engaged in the business of selling fine art. Cal. Stats. 2010, ch. 691 (A.B. 2765), § 2. The amendment is not limited to claims arising after the amendment's effective date; rather, it applies as well to claims that arose previously. *See id.*; Cal. Civ. Proc. Code § 338(c)(3)(B). The Legislature enacted these changes because California has an "interest in determining the rightful ownership of fine art," a task that may be frustrated by the passage of time, as such objects "often circulate in the private marketplace for many years" before moving back into the public eye. Cal. Stats. 2010, ch. 691, § 1(a)(1), (2).

As the legislative history relating to the 2010 amendment makes clear, the amendment to section 338(c) is the most recent of a line of legislative enactments intended to address this "vexing problem."[2] The amendment was intended to provide an incentive for museums and galleries to fulfill their "important role" of researching and publishing provenance information about works in their possession "in order to encourage the prompt and fair resolution of claims." Stats. 2010, ch. 691, § 1(c)(1), (2).

[2] Assem. Comm. on Judiciary, Analysis of A.B. 2765, as amended Apr. 22, 2010, at 2-3; *see* Sen. Comm. on Judiciary, Analysis of A.B. 2765, as amended Apr. 22, 2010, at 3-4 (discussing legislative history).

2. In this case, the district court held that application of section 338(c)(3) would violate the due process rights of the defendant Thyssen-Bornemisza Collection Foundation. The discussion about section 338(c)(3) occurs, however, only in a brief section at the opinion's end, and contains far less analysis than the court's discussion of the parties' disputes over whether California law or Spanish law ultimately controls the painting's ownership and over the content of Spanish law. The Court's reasoning as to due process was essentially that:

> In this case, the Court has concluded that the Foundation acquired ownership of the Painting under Spanish law prior to [the] California Legislature's retroactive extension of the statute of limitations in 2010. Moreover, it is undisputed that, before the California Legislature retroactively extended the statute of limitations in 2010, Plaintiffs' claims were time-barred under the prior version of California Code of Civil Procedure § 338. Accordingly, to the extent that application of amended California Code of Civil Procedure § 338(c) would result in depriving the Foundation of its ownership of the Painting, the statute violates the Foundation's due process rights.

ER 25 (footnote omitted).[3] The court indicated that this was an alternative—and perhaps hypothetical—holding, because "under California

[3] This brief uses "Cassirer Opening Brief" to refer to the opening brief filed by plaintiffs-appellants David Cassirer, et al., and uses "SA" and "ER," respectively, to refer to the Statutory Appendix and Excerpts of Record that were submitted with that brief.

law, it does not appear that retroactive extension of the statute of limitations would result in depriving the Foundation of ownership of the Painting." ER 25 n.18. The court did not consider whether the Foundation's status as an instrumentality of the Spanish government affected the Foundation's ability to invoke the protection of the Due Process Clause.

SUMMARY OF ARGUMENT

The district court held that it would violate the due process protections of the United States Constitution if application of a California statute of limitations effectively divested the Foundation of rights in a previously stolen painting. That holding was incorrect regardless of whether Spanish law applies and regardless of whether Spanish law (if applicable) would support a judgment of adverse possession here. Recent precedents from other federal circuit courts make plain that foreign governments, such as the Kingdom of Spain, are not "persons" protected by the federal Due Process Clause. Nor are instrumentalities, such as the Foundation, that are controlled by foreign governments—particularly where extending due process rights would work a substantive injustice. The district court thus was wrong to base any part of its ruling on the theory that due process rights assertable by the Foundation would be violated by any decision allowing plaintiffs to prevail in this case.

ARGUMENT

This Court reviews de novo the question of section 338(c)(3)'s constitutionality. *See United States v. LeMay*, 260 F.3d 1018, 1024 (9th Cir. 2001). In reviewing the district court's grant of summary judgment to the defendant, all factual submissions by the plaintiffs must be credited and all inferences drawn in the plaintiffs' favor. *See Tarabochia v. Adkins*, 766 F.3d 1115, 1120-1121 (9th Cir. 2014).

I. FOREIGN GOVERNMENTS ARE NOT "PERSONS" PROTECTED UNDER THE DUE PROCESS CLAUSE

The Due Process Clauses of the Fifth and Fourteenth Amendments prohibit the federal government and the States from depriving a "person" of "life, liberty, or property, without the due process of law." U.S. Const., Amend V; U.S. Const., Amend. 14, § 1. Because foreign governments are not "persons" within the meaning of the Due Process Clause, they can claim no protection under the Clause.

A. The leading case on this point is *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002). In *Price*, two American citizens sued the government of Libya in federal court in the District of Columbia, alleging that they had been arrested and tortured by the authorities in Tripoli. *Id.* at 86. Libya moved to dismiss the case, arguing,

among other things, that the district court's exercise of personal jurisdiction over the Libyan government was unconstitutional under the Due Process Clause. *Id.* The court of appeals recognized that, if the Due Process Clause applied, then the facts of the case would not allow personal jurisdiction to be constitutionally exercised. *Id.* at 95. Nevertheless, the court held that the case could proceed. "Implicit in Libya's argument is the claim that a foreign state is a 'person' within the meaning of the Due Process Clause." *Id*. Recognizing the issue as one that was "open" under Supreme Court and circuit precedent, the court analyzed the issue at length before concluding "that foreign states are not 'persons' protected by the Fifth Amendment." *Id*. at 96. "Neither the text of the Constitution, Supreme Court decisions construing the Due Process Clause, nor long standing tradition provide a basis for extending the reach of [the Due Process Clause] for the benefit of foreign states." *Id.* at 99.

The court's opinion noted the Supreme Court's instruction that, "'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.'" *Id.* at 96 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989)); *see also United States v. Errol D., Jr.*, 292 F.3d 1159, 1162-1163 (9th Cir. 2002) ("there is a 'longstanding interpretive presumption that "person" does not

include the sovereign,'" which "'may be disregarded only upon some affirmative showing of statutory intent to the contrary'" (quoting *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-781 (2000)). Although a broader meaning for the term "person" may sometimes be implied in particular statutes, *see Price*, 294 F.3d at 96 (giving examples), *Price* found it decisive in this context that the Supreme Court has held the Due Process Clause *not* to include *domestic* sovereigns—U.S. States—among its protected "persons," *id.* "[I]t is highly significant that in *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24 (1966) … , the [Supreme] Court was unequivocal in holding that 'the word "person" in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union.'" *Id*. (quoting *Katzenbach*, 383 U.S. at 323-324). Given that holding, logic could not support viewing the clause as protecting *foreign* governments. "[I]t would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system." *Id.*

Moreover, *Price* recognized, extending due process protections to foreign nations would create an asymmetry. "[T]he Constitution does not

limit foreign states … in the power they can exert against the United States or its government." *Id.* at 97. "It would therefore be quite strange to interpret the Due Process Clause as conferring upon [a foreign state] rights and protections *against* the [U.S.] government." *Id.* Indeed, such an interpretation would be antithetical to traditional notions of international law. "Relations between nations in the international community are seldom governed by the domestic law of one state or the other." *Id.*

Under U.S. precedent, too, "legal disputes between the United States and foreign governments are not mediated through the Constitution." *Id.* Instead of constitutional protections, it is "principles of comity and international law" which "protect foreign governments in the American legal system"—an approach which "preserves the flexibility and discretion of the political branches in conducting this country's relations with other nations." *Id.* at 97.[4] Finally, *Price* noted, conferring due process rights on foreign

[4] *See also TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300 (D.C. Cir. 2005) ("That is not to say a foreign state is utterly without recourse but only that, '[u]nlike private entities, foreign nations [being] the juridical equals of the government that seeks to assert jurisdiction over them,' have available 'a panoply of mechanisms in the international arena through which to seek vindication or redress' …. In short, it is not to the due process clause but to international law and to the comity among nations, as codified in part by the FSIA, that a foreign state must look for

(continued…)

governments would cause "serious practical problems" for the political branches' ability to conduct foreign affairs and safeguard this nation's security. *Id.* at 99. For instance, foreign nations whose assets were frozen by congressional statute or executive order could challenge those actions as deprivations of property without due process—an unheard of impingement on the political branches. *Id.* at 99.

Other courts have found *Price*'s analysis persuasive. In *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009), the Second Circuit, agreeing with "the reasons discussed by the *Price* court in its thorough opinion," declared itself similarly "'unwilling to interpret the Due Process Clause as conferring rights on foreign nations that States of the Union do not possess.'" *Id.* at 399. Indeed, *Frontera* found Price's reasoning so compelling that the Second Circuit—with the approval of all judges on the Circuit—overruled its prior precedent to the contrary.[5] The Seventh Circuit, considering *Price*'s and

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(…continued)
protection in the American legal system." (quoting *Price*, 294 F.3d at 97-98)).

[5] Although *Frontera* was not an en banc opinion, the panel opinion noted that, in keeping with Second Circuit practices, the opinion overruling the prior precedent was circulated "to all active members of our court, and

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Frontera's reasoning, likewise agreed with their conclusion "that foreign states are not 'persons' entitled to rights under the Due Process Clause." *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d 661, 694 (7th Cir. 2012). In light of *Price*'s persuasive reasoning, "the vast majority of federal courts to address [the] issue have determined that foreign states are not persons within the meaning of the Due Process Clause." *DRFP, LLC v. Republica Bolivariana de Venezuela*, 945 F. Supp. 2d 890, 906 (S.D. Ohio 2013); *see id.* (finding "the underlying reasoning of the majority position persuasive").[6]

B. Although the Supreme Court has not decided whether foreign governments are "persons" covered by the Due Process Clause, it has suggested that they are not. In *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), where the Republic of Argentina argued that U.S. courts had no personal jurisdiction to adjudicate the dispute, the Supreme Court

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none has objected to our departure from [the prior contrary precedent]." *Id.* at 400.

[6] *DRFP* cited one Fifth Circuit case as "applying traditional due process analysis for personal jurisdiction to the national oil company of Brazil without addressing the issue of whether a foreign state is a person under the Fifth Amendment." *DRFP*, 945 F. Supp. 2d at 906 (citing *Strata Heights Int'l Corp. v. Petroleo Brasileiro, S.A.*, 67 F. App'x. 247 (5th Cir. 2003)). But as *DRFP* noted, that unpublished Fifth Circuit case simply did not decide the issue; it hardly represents an evaluation of or rejection of *Price*'s reasoning.

found it unnecessary to decide the issue because the minimum-contacts test for personal jurisdiction would have been met even if the Due Process Clause applied. 504 U.S. at 619-620. The Court nevertheless expressed skepticism about whether the Due Process Clause would protect a foreign sovereign:

> Assuming, without deciding, that a foreign state is a "person" for purposes of the Due Process Clause, cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 323-324 (1966) (States of the Union are not "persons" for purposes of the Due Process Clause), we find that Argentina possessed "minimum contacts" that would satisfy the constitutional test.

Id. at 619.

As multiple courts have noted, the Court's use of a "cf." citation to *Katzenbach* directly after noting the assumption "that a foreign state is a 'person' for purposes of the Due Process Clause" indicates considerable doubt about that proposition. "*Weltover* did not require deciding the issue because Argentina's contacts satisfied the due process requirements, but the Court's implication was plain: If the 'States of the Union' have no rights under the Due Process Clause, why should foreign states?" *Frontera*, 582 F.3d at 398-399 (citation omitted); *see also Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1206 (C.D. Cal. 2001) (*Weltover*'s "cf." citation to *Katzenbach* "suggests that the Court, in a case that properly presents the

issue, would hold that foreign sovereigns are not entitled to due process protections"); *DRFP*, 945 F. Supp. 2d at 906-907 (discussing the implication of *Weltover*'s citation to *Katzenbach*).[7] This view rests on an foundation that makes sense: "it would be highly incongruous to afford greater Fifth Amendment rights to foreign nations, who are entirely alien to our constitutional system, than are afforded to the states, who help make up the very fabric of that system." *Price*, 294 F.3d at 298.

C. This Court has not addressed whether foreign States are protected under the Due Process Clause. During an interlocutory appeal in this case, the question was noted but held to be outside of the court's interlocutory appellate jurisdiction. *See Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1025-1026 (9th Cir. 2010) (en banc).

Two of this Court's pre-*Weltover* opinions might be read as assuming that due process protections do apply to foreign sovereigns. In *Gregorian v. Izvestia*, 871 F.2d 1515, 1529 (9th Cir. 1989), this Court, citing *Thomas P.*

[7] This interpretation of *Weltover*'s citation to *Katzenbach* is widespread. *See, e.g., Weininger v. Castro,* 462 F. Supp. 2d 457, 493 n.29 (S.D.N.Y. 2006); *Wasserstein Perella Emerging Markets Fin., LP v. Province of Formosa*, 2000 WL 573231, at *10-11 (S.D.N.Y. May 11, 2000); *Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1, 20-21 (D.D.C. 1998), *abrogated on other grounds as recognized by Haim v. Islamic Republic of Iran*, 425 F. Supp. 2d 56, 71 n.2 (D.D.C. 2006).

Gonzalez Corp.v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1254 (9th Cir. 1980), stated that "if defendants are not entitled to immunity under the [Foreign Sovereign Immunities Act (FSIA)], a court must consider whether the constitutional constraints of the Due Process [C]lause preclude the assertion of personal jurisdiction over them" under the "'traditional minimum contacts standard'" (emphasis omitted). But neither *Gregorian* nor *Thomas P. Gonzalez* considered the logically prior question of whether the due process clause applies at all to foreign governments and their instrumentalities. *See Gregorian*, 871 F.2d at 1528-1529; *Thomas P. Gonzalez*, 614 F.2d at 1250-1254.

Both cases also preceded the Supreme Court's *Weltover* decision. When the issue of due process protections for foreign sovereigns arose after *Weltover*, this Court cited *Weltover* and made clear that the question was an open one under Ninth Circuit law. *See Theo H. Davies & Co., Ltd. v. Republic of the Marshall Islands*, 174 F.3d 969, 975 n.3 (9th Cir. 1998) ("We need not decide whether [either defendant] is a 'person' for purposes of the Due Process Clause. We simply assume, without deciding, that both are." (citing *Weltover*, 504 U.S. at 619)); *see id.* at 975 (concluding that defendants' contacts would be sufficient to satisfy traditional personal jurisdiction requirements); *see also Altmann v. Republic of Austria*, 317 F.3d

954, 970 (9th Cir. 2002) (following approach of *Theo H. Davies*). As one court has noted, that approach in *Theo H. Davies* confirms that the prior Ninth Circuit cases, which at most implicitly assumed that foreign sovereigns are covered under the Clause, cannot be read as creating binding precedent on the issue. *See Altmann*, 142 F. Supp. 2d at 1207. And when district courts in this Circuit have confronted the issue, they have followed the natural implication of *Weltover*, and the unanimous view of other circuits, in holding that foreign sovereigns are not "persons" protected under the Due Process Clause. *See Cruz v. United States*, 387 F. Supp. 2d 1057, 1067 (N.D. Cal. 2005); *Altmann*, 142 F. Supp. 2d at 1207.

* * *

The D.C. Circuit's thorough analysis in *Price* is correct, as indicated by its wide acceptance and by the compelling inference from the Supreme Court's opinion in *Weltover*. Although the issue of foreign sovereigns' due process rights is an open one under Ninth Circuit law, it need not remain so given the overwhelming consensus of legal authority. If the issue proves pertinent to this appeal, this Court should hold that foreign sovereigns such as Spain are not protected "persons" under the Due Process Clause.

II. THE FOUNDATION, AS AN INSTRUMENTALITY OF SPAIN, HAS NO GREATER DUE PROCESS RIGHTS THAN SPAIN ITSELF

At this stage of the case, the sole remaining defendant is not Spain itself, but rather the Foundation. But the Foundation is an instrumentality and agency of the Spanish government, and can assert no greater due process rights than Spain itself.

In determining whether due process protections extend to an entity controlled by a foreign sovereign, courts have employed "the same analysis" as that required under *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (*Bancec*), to determine whether a foreign nation may be sued under federal law due to the acts of that nation's instrumentality. *TMR Energy*, 411 F.3d at 301. Thus, an entity controlled by the foreign nation receives no due process protection if either of two conditions applies: "if the state so 'extensively control[s]' the instrumentality 'that a relationship of principal and agent is created,' or if 'adher[ing] blindly to the corporate form … would cause … injustice.'" *Frontera*, 582 F.3d at 400 (quoting *Bancec*, 462 U.S. at 629, 632). The first prong of this test reflects a logical principle: "If the [foreign nation] exert[s] sufficient control over the [instrumentality] to make it an agent of the State, then there is no reason to extend to the [instrumentality] a constitutional

right that is denied to the sovereign itself." *TMR Energy*, 411 F.3d at 301. The second prong reflects "'the broad[] equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice.'" *Bancec*, 462 U.S. at 629 (quoting *Taylor v. Standard Gas Co.*, 306 U.S. 307, 322 (1939)). Both prongs of the test provide reason to conclude that the Foundation does not enjoy due process rights.

A. For summary judgment purposes, the record here provides ample evidence that the Foundation operated essentially as Spain's agent with respect to the acquisition of the painting at issue, and that it continues to operate as Spain's agent with respect to the painting's possession, maintenance, and display. The degree of control required for application of this prong of *Bancec* is not entirely clear.[8] Nevertheless, if the plaintiffs' factual submissions are credited and all reasonable inferences are drawn in

[8] *Compare TMR Energy*, 411 F.3d at 302 n.* ("It is far from obvious that even an independent [defendant] would be entitled to the protection of the fifth amendment…." (citations omitted)), *and Frontera*, 582 F.3d at 401 (citing *TMR Energy* on same point), *with GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 815 (D.C. Cir. 2012) ("the extent of a state-owned corporation's juridical independence plays a dispositive role in the constitutional analysis," because, under *Bancec*, "if an instrumentality does not act as an agent of the state, and separate treatment would not result in manifest injustice, the instrumentality will enjoy all the due process protections available to private corporations" (citation omitted)).

the plaintiffs' favor—as must be the case when reviewing the defendant's motion for summary judgment—even a robust requirement of control would be satisfied on this case's record.

1. The Foundation, throughout this litigation, has taken the position that it is both an "agency" and an "instrumentality" of the Spanish government. *See* ER 144 (Agreed Order Regarding Substitution of Plaintiff and Change of Caption, captioning the Foundation as "an agency and instrumentality of the Kingdom of Spain"). Courts have taken the Foundation at its word on the matter. *See* ER 196 (2006 district court order, stating that "[t]he Court … concludes that the property in dispute is owned by an agency or instrumentality of Spain"); ER 219-220 (same order, noting Foundation's admission that it "is an agent or instrumentality of the Spanish government"); ER 11 (district court order under review, stating that the Foundation is "an instrumentality of the Kingdom of Spain").

The Foundation's emphasis on the closeness of its relationship to the Spanish government is not accidental; presumably, it was done so that the Foundation could seek to enjoy the benefits of the FSIA. *See Cassirer*, 616 F.3d at 1027 ("the Foundation … concedes it is an instrumentality of Spain for purposes of the [FSIA]").

Indeed, the Foundation's close relationship with the Spanish government was integral to the district court's decision that Spain had a special sovereign interest in the case justifying the application of Spanish law. *See* ER 13 ("Spain unquestionably has an interest in … applying its law of adverse possession to the Foundation's claim of ownership, especially given that the Foundation is an instrumentality of the Kingdom of Spain …."). Whether or not the Spanish government's close relationship with the Foundation was properly cognizable in the choice of law analysis, *cf.* Cassirer Opening Brief 62, the Foundation's avowed status as an agency of the Spanish government cannot be reconciled with any application of a due process theory that would require it to be an independent, private actor.

2. The record, when examined under the standard required in evaluating the defendant's motion for summary judgment, also gives ample evidence from which a reasonable trier of fact could conclude that the Foundation does not operate sufficiently independently of Spain so as to enjoy due process rights not granted to Spain itself.

Indeed, the Foundation's proffered facts support the inference that, whatever the Foundation's nominal role, the initial loan and subsequent sale to the Foundation of the collection involved here was entirely due to, and subject to the control of, the Spanish government. As the Foundation puts it,

"[t]he eventual installation of the collection in Spain was the outcome of a gradual process and carefully thought out agreements between the Baron Thyssen-Bornemisza and the Spanish government." ER 1900.

In 1988, when the Baron initially loaned the collection for exhibition in Spain, the loan agreement was "signed by and between" the Baron's art-holding trust and "the Kingdom of Spain." ER 1901. The key benefit for the Spanish government was that the Baron's collection would be "delivered to the Kingdom of Spain" for exhibition in Madrid and Barcelona. *Id.* "In exchange, the government [of Spain] would provide [the] building" to house the collection. *Id.*; *see also* ER 1900 (a "key factor" resulting in the Baron's selection of Spain over other governments bidding for the collection was the Spanish government's offer of an "exceptional location" to house the collection). The Foundation was to be "funded by the government with sufficient funds to run the museum." ER 1901.

The Foundation's description of the events leading to the collection's subsequent sale likewise provides a basis from which a reasonable factfinder could infer that, regardless of the nominal titleholder after the sale, the de facto purchaser was the Kingdom of Spain itself. *See* ER 1902-1903 ("the Spanish state was no ordinary purchaser, but would acquire a series of obligations concerning the future of the collection, including the most

important obligation: an agreement not to sell any of the works purchased"); ER 1902 (stating that negotiations for the transfer of title to the Foundation were negotiations with "the Spanish state"); *see also* SA 49 (Royal Decree 11/1993, recounting negotiations by Spain's Ministry of Culture). The sale took place pursuant to an official act by the Spanish government: "On June 18, 1993, the Spanish cabinet passed Royal Decree 11/1993 authorizing the government to sign a contract allowing the Thyssen-Bornemisza Collection Foundation to take over the ownership of 775 paintings [including the Pissarro painting at issue here] that comprised the collection of the same name." ER 1905; *see also* ER 1906. The Royal Decree was specifically intended to have "the force of law." SA 50. The Spanish government funded the acquisition with an appropriation of $327 million. *Cassirer*, 616 F.3d at 1023.

Years after the acquisition's completion, Spanish law continues to control management of the art collection. The 1993 Royal Decree governs where the Collection must be housed and displayed. SA 53 (Articulo 2).[9] If the Foundation, for any reason, does not meet those obligations, or if the

[9] An English translation of Articulo 2 (Article 2) of the Royal Decree can be found at pages 228-229 of the appendix to the amicus brief submitted by the Comunidad Judía de Madrid and Federación de Comunidades Judías de España.

Foundation is dissolved, then the collection becomes the property of Spain. *Id.*; *see also* ER 6287 (1993 contract, providing that, "In the event of the extinction or dissolution of the Foundation the remaining assets or net assets resulting from liquidation shall be transferred in their entirety to the Kingdom of Spain"); ER 6231 (providing for contingent obligations "[i]n the event that the Collection passes into the ownership of the Kingdom, on dissolution of the Foundation or otherwise"); ER 7453 (minutes of Foundation's founding meeting, noting that "It is the will of the Founders that in any event of extinction or dissolution of the Foundation the remaining assets or net assets … be adjudged in its entirety to the Spanish State").

3. For purposes of reviewing the grant of summary judgment, the Foundation's structure should also be interpreted as making it effectively an agent of Spain. The Foundation, though at one point describing itself as a "private" foundation, ER 1901, has maintained in this litigation that it was "set[ ]up between the Spanish Government, represented by Jorge Semprúm, the then-Minister for Culture, and Baron Hans Heinrich Thyssen-Bornemisza," *id.* Although the Foundation briefly had equal representation between governmental appointees and appointees of the Thyssen-Bornemisza family, *id.*, the composition of the Foundation's board was later changed to give the Spanish government predominance: The Chairman of

the Board is the Spanish Minister for Culture, and the Spanish government appoints two-thirds of the Foundation's governing board. ER 1905.[10] *Cf. Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 398 (1995) discussing government's power to appoint officers as an indication of governmental control for purposes of state-action doctrine).

Under the standard which applies when evaluating the Foundation's motion for summary judgment, treating the Foundation's actions in the acquisition and continued holding of the painting as independent of the government of Spain would exalt form over function. The district court, under the first prong of *Bancec* and *TMR Energy*, should have viewed the Foundation as having no greater due process rights than Spain itself—which is to say, none at all.

B. The second prong of the *Bancec* test likewise requires that the Foundation's due process rights be seen as no greater than Spain's own when evaluating the Foundation's motion for summary judgment, to the

[10] Under the 1993 contract providing for the collection's purchase, the Foundation's ordinary voting procedures permit the trustees appointed by the Baron's family to effectively veto certain actions, including the dissolution of the Foundation. *See* ER 6271-6272. However, the same document implies that that veto power, rather than being absolute, is subject to governmental control, in that "[t]he Foundation shall be dissolved for the reasons provided in law." ER 6287.

extent a contrary result would work an "'injustice.'" *Frontera*, 582 F.3d at 400 (quoting *Bancec*, 462 U.S. at 629).

Plaintiffs have discussed numerous facts which could support an inference that the Baron, the Foundation, and the Spanish Government all ignored clear warning signs that the painting at issue here had been illegally expropriated from a rightful owner. *See* Cassirer Opening Brief 7-13. Amicus curiae Bet Tzedek has similarly argued that the behavior of those actors did not comply with the international community's or the art community's standards for redressing cases of unlawful expropriation. Brief of Bet Tzedek Legal Services as Amicus Curiae, at 33-45.

It was presumably these factors which led the district court, in its most recent order, to recommend that the Foundation "pause, reflect, and consider whether it would be appropriate to work towards a mutually-agreeable resolution of this action, in light of Spain's acceptance of the Washington Conference Principles and the Terezin Declaration, and, specifically, its commitment to achieve 'just and fair solutions' for victims of Nazi persecution." ER 25. But, at least with respect to the due process issue that this brief discusses, the district court was not obliged to commit the issue of achieving a "just and fair solution[]" to the defendant's goodwill. Rather, the court's misgivings about whether the Foundation's victory would work

an injustice was reason for the district court to withhold summary judgment from the Foundation under the second prong of the *Bancec* test.

C. At the very least, the district court should not have declared that California limitations law would be unconstitutional as applied in this case without engaging in the analysis required to determine whether the defendant is eligible to claim the protections of federal constitutional due process to begin with. State statutes, no less than federal statutes, are presumed to be valid and constitutional. *See Pharm. Research & Mfrs. v. Walsh*, 538 U.S. 644, 661 (2003) (plurality opinion); *see also Masayesva ex rel. Hopi Indian Tribe v. Hale*, 118 F.3d 1371, 1377 (9th Cir. 1997) ("a court should invalidate a statutory provision 'only for the most compelling reasons'"). Declaring an application of section 338(c)(3) unconstitutional under a provision which does not even apply to the defendant does not illustrate "'the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented.'" *Illinois v. Gates*, 462 U.S. 213, 218-219 (1983). The district court's resolution of the due process issue was thus incorrect, and should be reversed.

III. EVEN IF THE FOUNDATION DOES HAVE DUE PROCESS RIGHTS, THOSE RIGHTS ARE NOT VIOLATED BY SECTION 338

Finally, even if the Foundation did have due process rights, there is no basis on which to conclude that those rights would be violated by the application of section 338.

Due process generally does not forbid a State from retroactively lengthening a statute of limitations, even if the limitations period has already run and "the effect is seen as creating or reviving a barred claim." *Starks v. S.E. Rykoff Co.*, 673 F.2d 1106, 1109 (9th Cir. 1982); *see Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (noting that "as a matter of constitutional law, … statutes of limitations go to matters of remedy, not to destruction of fundamental rights"). If the Foundation's claim is that plaintiffs' ability to file suit was time-barred before the enactment of section 338(c)(3) but was not barred afterwards, then that alteration in the law affected no due process rights under *Starks* and *Chase*.

Courts have noted an exception where the lapse of time has "invested a party with title to real or personal property." *Starks*, 673 F.2d at 1109; *see Campbell v. Holt*, 115 U.S. 620, 623 (1885) ("It may … well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed

after the bar has become perfect, that such an act deprives the party of his property without due process of law."). But for that exception to operate requires, as a premise, that under prior law the property would be the defendant's, in the sense that "[b]oth the legal title and the real ownership had become vested in him." *Campbell*, 115 U.S. at 623. This, in turn, depends on the applicable substantive law.

Here, if the defendant's adverse possession defense is governed by California law, then section 338(c)(3)'s lengthening of the limitations period for bringing suit could not have divested the Foundation of any substantive rights. Given the district court's holding that California law recognizes no adverse possession of personal property at all, *see* ER 12, California's substantive law never recognized any transfer of title and would not have allowed the Foundation's claim of title even before the passage of section 338(c)(3). Conversely, if Spanish law governs the adverse possession defense as the district court held, then the application of section 338(c)(3) presumably does not alter the substantive requirements for such possession in a way that would violate *Campbell*. Instead, the state provision affects whether a plaintiff has acted within the time period allowed to bring suit and test the fulfillment of those requirements in a California court—something the Legislature was free to adjust under *Starks* and *Campbell*. Under neither

choice-of-law scenario would the operation of California's limitations provision be subject to any valid constitutional objection.

CONCLUSION

The district court's judgment should be reversed.

Dated: January 26, 2016

Respectfully submitted,

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Nos. 15-55550, 15-55951, 15-55977

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

David Cassirer, et al., Petitioner, **v.** **Thyssen-Bornemisza Collection Foundation,** Respondent.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases pending in this Court.

Dated: January 26, 2016

Respectfully Submitted,

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