

No.

**In the Supreme Court of the United States**

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Laurel Zuckerman, as Ancillary Administratrix of the  
Estate of Alice Leffmann,

*Petitioner,*

*v.*

The Metropolitan Museum of Art,

*Respondent.*

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**APPLICATION FOR EXTENSION OF TIME TO FILE A  
PETITION FOR WRIT OF CERTIORARI**

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To the Honorable Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court and Circuit Justice for the United States Court of Appeals for the Second Circuit:

1. Pursuant to Supreme Court Rules 13.5 and 30.2, Petitioner Laurel Zuckerman, as Ancillary Administratrix of the estate of Alice Leffmann (the “Ancillary Estate”), hereby respectfully requests a 58-day extension of time, to and including January 24, 2020, within which to file a petition for writ of certiorari. This Court’s jurisdiction would be invoked under 28 U.S.C. § 1254(1).

2. The Second Circuit issued its decision on June 26, 2019, and it declined to rehear this case on August 29, 2019. Copies of the decision and order denying rehearing are attached. Without an extension of time, a petition for writ of

certiorari would be due on November 27, 2019. No prior application for an extension of time has been made in this case.

3. In this action, Petitioner Laurel Zuckerman, on behalf of the Ancillary Estate, seeks to recover *The Actor* (the “Painting”), a masterwork by Pablo Picasso. Zuckerman’s great-granduncle (Paul Leffmann, a German Jew) sold the painting under duress in 1938 for a price far below its actual value to pay for his and his wife’s safe passage out of Italy, which by that time had adopted and implemented the Nazis’ anti-Semitic policies and physical persecution of Jews.<sup>1</sup>

4. The Painting now hangs in the Metropolitan Museum of Art (the “Met”), which has changed the provenance listing of the Painting numerous times since it first received the Painting from a donor in the early 1950s. It was not until 2011, however, that the provenance acknowledged Leffmann’s ownership through 1938 and his transfer of the painting during the Nazi era.

5. In 2010, Zuckerman demanded that the Met return the Painting. The parties entered into multiple standstill agreements to toll the statute of limitations from February 7, 2011 to September 30, 2016. But the Met ultimately refused to return the Painting. Zuckerman, on behalf of the Ancillary Estate, sued the Met, asserting causes of action for replevin and conversion, and seeking monetary and declaratory relief.

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<sup>1</sup> In 2010, Zuckerman received Ancillary Letters to administer the estate of Alice Leffmann, the sole heir of Paul Leffmann.

6. The U.S. District Court for the Southern District of New York dismissed the action for failure to state a claim, concluding that the complaint had inadequately alleged duress under New York law in connection with the sale of the Painting. *Zuckerman v. Metro. Museum of Art*, 307 F. Supp. 3d 304, 308 (S.D.N.Y. 2018).

7. On June 26, 2019, the U.S. Court of Appeals for the Second Circuit affirmed the judgment of the District Court, but on a different rationale. *Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 190 (2d Cir. 2019). The Second Circuit held that the defense of laches barred Zuckerman's claims against the Met, reasoning that the suit was unreasonably delayed by seventy years (the period between Paul Leffmann's sale of the Painting in 1938 and Zuckerman's demand for the painting in 2010) and that this delay would prejudice the Met. *Id.* at 190, 193.

8. The court further concluded that the Holocaust Expropriated Art Recovery ("HEAR") Act of 2016 did "not preempt the Met's laches defense," and therefore affirmed the dismissal of Zuckerman's complaint on the pleadings, without allowing for any discovery on the inherently fact-specific defense of laches. *Id.* at 190; *see also id.* at 196 (concluding that the HEAR Act allows "defendants to assert a laches defense, despite the introduction of a nationwide statute of limitations designed to revive Holocaust-era restitution claims").

9. On August 29, 2019, the Second Circuit denied Zuckerman's petition for rehearing or rehearing en banc.

10. This case presents an issue of national importance. The HEAR Act establishes a uniform six-year statute of limitations, running from “actual discovery” of the identity and location of the Holocaust-era artwork at issue, in which to assert claims to recover the artwork. Yet, in holding that the judicially created doctrine of laches overrides the HEAR Act’s congressionally mandated statute of limitations, the Second Circuit ignored United States policy, the purpose of the HEAR Act, and this Court’s precedents.

11. United States policy on Holocaust-era art, as reflected in the 1998 Washington Conference Principles on Nazi-Confiscated Art and the Terezin Declaration on Holocaust Era Assets and Related Issues, mandates that claims to recover artworks unlawfully lost because of Nazi persecution be adjudicated on the merits, rather than dismissed on technical procedural grounds. *See Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014). The HEAR Act embodies these policies: it removes “procedural obstacles” that had prevented suits to recover Holocaust-era artworks from proceeding, so that these lawsuits could be heard and resolved “based on the facts and merits of the claims.” Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2, 130 Stat. 1524, 1525 (2016). Inconsistent with these policies, the Second Circuit’s decision now endorses the use of laches to bar otherwise timely claims under the HEAR Act. If permitted to stand, the Second Circuit’s decision will pose a considerable obstacle to parties seeking to recover Holocaust-era art, a result that would undermine Congress’s intent in enacting the HEAR Act.



12. The Second Circuit’s decision also ignored Supreme Court precedent, which holds that “in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (“applying laches within a limitations period specified by Congress would give judges a ‘legislation-overriding’ role that is beyond the Judiciary’s power”); *see also Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 965 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1992 (2018) (“Read in context, HEAR’s § 5(a) language that the six-year statute of limitations applies ‘notwithstanding any defense at law relating to the passage of time’ is meant to *prevent* courts from applying *defenses that would have the effect of shortening the six-year period in which a suit may be commenced.*”) (emphasis added). Contrary to this precedent, the Second Circuit’s decision now permits defendants to rely on laches to bar claims to recover Holocaust-era artworks brought well within the limitations period.

13. Petitioner intends to address these and other issues at greater length in a petition for writ of certiorari.

14. Petitioner’s requested 58-day extension of time is justified. S. Ct. R. 13.5. Undersigned counsel was retained this week, only two weeks before the November 27, 2019 due date for a petition for writ of certiorari. The requested extension will allow recently retained counsel sufficient time to review the record, research and analyze the issues in the case, and prepare a petition for writ of

certiorari that fully addresses the far-reaching issues raised by the decision below and frames those issues in a manner that will be most helpful to this Court.


15. Respondent consents to Petitioner's request for a 58-day extension of time.

WHEREFORE, for the foregoing reasons, Petitioner Laurel Zuckerman respectfully requests an extension of 58 days (to and including January 24, 2020) to prepare and file a petition for writ of certiorari.

Dated: November 14, 2019

Lawrence M. Kaye  
Ross L. Hirsch  
Yael M. Weitz  
Herrick, Feinstein LLP  
Two Park Avenue  
New York, New York 10016  
(212) 592-1400

Respectfully submitted,

  
Mary-Christine Sungaila  
*Counsel of Record*  
Haynes and Boone, LLP  
600 Anton Blvd., Suite 700  
Costa Mesa, CA 92626  
Telephone: 949-202-3000  
mc.sungaila@haynesboone.com

*Attorneys for Petitioner Laurel Zuckerman,  
Ancillary Administratrix of the Estate of Alice Leffmann*

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2018

(Argued: February 27, 2019                      Decided: June 26, 2019)

Docket No. 18-634

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LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE  
LEFFMANN,

*Plaintiff-Appellant,*

— v. —

THE METROPOLITAN MUSEUM OF ART,

*Defendant-Appellee.*

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Before:

KATZMANN, *Chief Judge*, LIVINGSTON and DRONEY, *Circuit Judges.*

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Plaintiff-Appellant Laurel Zuckerman appeals from the judgment of the United States District Court for the Southern District of New York (Preska, J.) dismissing her complaint for failure to state a claim. Zuckerman seeks recovery of a painting by Pablo Picasso that has been in the Metropolitan Museum of Art's

possession since 1952. The painting once belonged to Zuckerman's ancestors, Paul and Alice Leffmann, who sold it in 1938 to a private dealer to obtain funds to flee fascist Italy after having already fled the Nazi regime in their native Germany. The district court concluded that Zuckerman failed to allege duress under New York law. We do not reach the issue of whether Zuckerman properly alleged duress because we find that her claims are barred by the doctrine of laches. Accordingly, we **AFFIRM**.

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LAWRENCE M. KAYE (Ross L. Hirsch, Yael M. Weitz, *on the brief*),  
Herrick, Feinstein LLP, New York, NY, *for Plaintiff-Appellant*.

DAVID W. BOWKER, Wilmer Cutler Pickering Hale and Dorr LLP,  
Washington, DC; Michael D. Gottesman, Wilmer Cutler  
Pickering Hale and Dorr LLP, New York, NY, *for Defendant-  
Appellee*.

Thomas J. Hamilton, John J. Byrne, Jr., Byrne Goldenberg &  
Hamilton, PLLC, *for Amicus Curiae Holocaust Art Restitution  
Project*.

Stanley W. Levy, Benjamin G. Shatz, Diana L. Eisner, Danielle C.  
Newman, Manatt, Phelps & Phillips, LLP, *for Amici Curiae The  
1939 Society and Bet Tzedek*.

Owen C. Pell, White & Case LLP, *for Amici Curiae Natalia Indrimi,  
Professor Guido Alpa, and Avv. Renzo Gattenga*.

Jennifer A. Kreder, Cincinnati, OH, *for Amici Curiae B'nai B'rith  
International, Raoul Wallenberg Centre for Human Rights,  
Simon Wiesenthal Center, Omer Bartov, Michael Berenbaum,  
Stuart Elliot Eizenstat, Richard Falk, Eugene Fisher, Irving  
Greenberg, Peter Hayes, Marcia Sachs Littell, Hubert G.  
Locke, Wendy Lower, Bruce F. Pauley, Carol Rittner, John K.  
Roth, Lucille A. Roussin, William L. Shulman, Stephen Smith  
and Alan Steinweis*.



KATZMANN, *Chief Judge*:

In the 1930s, the German government, under the control of Adolf Hitler's National Socialist German Workers' Party (the "Nazis"), launched a campaign of oppression against German Jews and other minorities. As part of its reign of terror, the Nazis and their affiliates forced Jews out of their homes, seized their businesses, and stripped them of their property. By the late 1930s, life in Germany for Jewish people became so dangerous that many were forced to flee the country. Of those who were unable to escape, most were removed from their homes, shipped to concentration camps, and murdered.

In recent decades, with the passage of time and as the number of survivors of Nazi brutality diminishes, there has been a sense of urgency that some measure of justice, albeit incomplete, be given to those victims and their heirs. International conferences and subsequent declarations have outlined principles designed to ensure, for example, that "legal systems or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art." Prague Holocaust Era Assets Conference: Terezin Declaration, Bureau of European and Eurasian Affairs, U.S. Department of State (June 30, 2009), <https://2009->

[2017.state.gov/p/eur/rls/or/126162.htm](https://www.2017.state.gov/p/eur/rls/or/126162.htm). What was a moral imperative has appropriately been converted into statute, with such landmark legislation as the Holocaust Expropriated Art Recovery Act of 2016 (the “HEAR Act”). Pub L. No. 114–308, 130 Stat. 1524. These efforts are grounded in the recognition that the claims of survivors and their heirs must be given serious and sympathetic consideration. To facilitate the processing of such claims, the HEAR Act creates a nationwide statute of limitations for bringing claims to recover artwork and other property lost during the Holocaust era. The HEAR Act directs that every case be given individual attention, with special care afforded to the particular facts. In that effort to render justice, the law does not eliminate equitable defenses that innocent defendants may assert, where to do otherwise would be neither just nor fair.

Paul and Alice Leffmann (the “Leffmanns”) were German Jews who, prior to Hitler’s rise to power, enjoyed a flourishing and prosperous life in Germany. They had “sizeable assets,” including a manufacturing business and multiple properties. J. App’x 33. Among the items they owned, purchased in 1912, was *The Actor*, a “masterwork” painting by the famed artist Pablo Picasso. *Id.* When the Leffmanns were forced to sell their business and flee Germany in 1937, they

lost much of their property. Once in Italy, they sold their Picasso painting to raise money to escape Hitler's growing influence in Italy and relocate to Brazil.

Plaintiff-Appellant Laurel Zuckerman is the Leffmanns' great-grandniece. Zuckerman seeks replevin of the painting from Defendant-Appellee the Metropolitan Museum of Art (the "Met"). Zuckerman argues the Leffmanns sold the Painting under duress and that the sale is therefore void. The district court (Preska, J.), concluding that Zuckerman had failed to adequately allege duress under New York law, dismissed her complaint.

On appeal, the Met argues, *inter alia*, that Zuckerman's claims are barred by the doctrine of laches and that such a determination can be made on the pleadings. In this Court's narrow ruling, we agree. Laches is an equitable defense available to a defendant who can show "that the plaintiff has inexcusably slept on [its] rights so as to make a decree against the defendant unfair," and that the defendant "has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers v. Optibase Ltd.*, 337 F.3d 125, 132 (2d Cir. 2003).<sup>1</sup> Here, despite the facts that the painting was a significant work by a celebrated artist, that it was sold for a substantial sum to a well-known French

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<sup>1</sup> Unless otherwise indicated, case quotations omit all citations, internal quotation marks, footnotes, and alterations.

art dealer, and that it has been in the Met's collection since 1952, neither the Leffmanns nor their heirs made any demand for the painting until 2010. Such a delay is unreasonable, and the prejudice to the Met is evident on the face of Zuckerman's complaint. We further conclude that the HEAR Act does not preempt the Met's laches defense. Accordingly, we **AFFIRM** the judgment of the district court.

## BACKGROUND

The following facts are drawn from the allegations in Plaintiff-Appellant's Amended Complaint or are "matters of which judicial notice may be taken."

*Wilson v. Merrill Lynch & Co.*, 671 F.3d 120, 123 (2d Cir. 2011).

### I. The Leffmanns

Paul Friedrich Leffmann, a German Jew from Cologne, purchased *The Actor*, a painting by Pablo Picasso, in 1912 (the "Painting"). Mr. Leffmann and his wife, Alice, lent the Painting for various exhibitions throughout Germany in the early 20th Century. The Painting was also featured in articles, magazines, and monographs.

After the adoption of the Nuremberg Laws in September 1935, the Leffmanns' lives in Germany became untenable. Stripped of the rights and privileges of German citizenship, they were forced to sell their property and businesses to "Aryan" corporations, receiving "nominal compensation." J. App'x 34.

By 1937, it became clear that life in Germany for Jews like the Leffmanns was no longer simply difficult, but genuinely perilous. The Leffmanns decided to flee Germany for Italy. After paying exorbitant "flight taxes," the Leffmanns arrived in Italy in April 1937. They engaged in financial transactions at a loss in order to settle in Italy. For example, the Leffmanns arranged to purchase a home for 180,000 Reichsmark ("RM") but pre-agreed to later sell it back to the original owners at a substantial loss. These "triangular agreements" were common at the time, as they allowed individuals outside of Germany to acquire RM while simultaneously permitting German emigrants to circumvent "the ever-tightening regulations governing the transfer of assets" outside of the country. *Id.* at 37.

Prior to fleeing Germany, the Leffmanns "arranged" for the Painting, one of their few remaining assets, "to be held in Switzerland by a non-Jewish German acquaintance." *Id.* at 35.



But by early 1938, Italy was no longer a safe place for Jews. The growing influence of Nazi Germany resulted in anti-Semitic policies—for example, in 1937, Italy’s Ministry of the Interior produced a list of all German refugees (most of whom were Jewish) living in Italy—and a warm welcoming of Adolf Hitler in May 1938. The Leffmanns began to make plans to flee to Switzerland, which required money. On April 12, 1938, Paul Leffmann wrote to C.M. de Hauke, an art dealer whom the U.S. State Department later identified as dealing in Nazi-looted art, from whom Leffmann had previously rejected an offer to sell the Painting. Leffmann now sought to revive discussions about the possibility of a sale. As matters became more perilous for Jews in Italy, Leffmann “continued to try to sell the Painting through de Hauke.” *Id.* at 42. “Trying to raise as much cash as possible,” and in attempt to “improve his leverage to maximize the amount of hard currency he could raise,” in 1938, Leffmann told de Hauke that he had rejected a \$12,000 offer from another dealer. *Id.* at 42-43.

Shortly after writing to de Hauke stating he had rejected an offer for \$12,000 from another dealer, Leffmann sold the Painting in June 1938 for that

very price to the Paris art dealer Käte Perls, who was acting on behalf of her former husband, Hugo Perls, and another art dealer, Paul Rosenberg.<sup>2</sup>

Funded partially by their June 1938 sale of the Painting (the “Sale”), the Leffmanns fled to Switzerland in October 1938. The record on appeal is unclear as to how much the Leffmanns had to pay in order to leave Italy and arrive in Switzerland, but Plaintiff-Appellant alleges that Swiss authorities required immigrants to pay substantial fees and taxes in order to enter the country. According to Plaintiff-Appellant, “[g]iven the various payments required by Switzerland . . . the Leffmanns depended on the \$12,000 . . . they received from the [S]ale” in order to survive. *Id.* at 46.

Their stay in Switzerland was short. Having only been able to procure a temporary Swiss residence visa, the Leffmanns fled to Brazil. Relocating to Brazil was similarly expensive. The Leffmanns had to pay unspecified bribes to acquire the necessary documentation from the Brazilian government and deposited at least \$20,000 in the Banco do Brasil. They arrived in Rio de Janeiro on May 7, 1941. Once in Brazil, they had to pay a “levy” of \$4,641 imposed by the Brazilian government on all Germans living in the country. *Id.* at 46. Plaintiff-Appellant

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<sup>2</sup> The selling price was \$13,200, but after a 10% selling commission, the Leffmanns came away with \$12,000.

avers that the Leffmanns “depended on the \$12,000” from the Sale for these payments. *Id.*

The Leffmanns lived in Rio de Janeiro for six years. In 1947, after the war had ended, the Leffmanns returned to Europe and settled in Zurich, Switzerland, where they lived for the rest of their lives. Paul Leffmann died in 1956; Alice Leffmann died in 1966. While they were still alive, the Leffmanns brought a number of successful claims with the assistance of counsel for Nazi-era losses, but those claims were limited to property that was “taken in Germany” before the Leffmanns fled Germany. Oral Argument at 25:34-58, *Zuckerman v. The Metropolitan Museum Art*, No. 18-634, [http://www.ca2.uscourts.gov/oral\\_arguments.html](http://www.ca2.uscourts.gov/oral_arguments.html). The Leffmanns made no demand to reclaim the Painting.

## II. The Painting after the Leffmanns’ Sale

In 1939, Paul Rosenberg loaned the Painting to the Museum of Modern Art (“MoMA”) in New York. Rosenberg asked MoMA to insure the Painting for \$18,000. Sometime before October 28, 1940, Rosenberg consigned the Painting to the M. Knoedler & Co. Gallery in New York. In November 1941, that gallery sold

the painting to Thelma Chrysler Foy for \$22,500. Thereafter, Foy, an arts patron noted for her gifts of prized pieces to public institutions, donated the Painting to the Met in 1952.

Since at least 1967, when the Painting appeared in the Met's published catalogue of French paintings, the Met's published provenance of the Painting listed Leffmann as a previous owner. Until recently, however, the provenance incorrectly suggested that Leffmann sold the Painting after 1912; it listed the provenance as "P. Leffmann, Cologne (in 1912); a German private collection (until 1938)." J. App'x 48.

### III. Procedural History

On September 8, 2010, Plaintiff-Appellant, the Leffmanns' great-grandniece, demanded that the Met return the Painting. The museum refused. On October 18, 2010, Zuckerman was appointed Ancillary Administratrix of the estate of Alice Leffmann by the New York Surrogate's Court.<sup>3</sup> On September 30, 2016, Zuckerman filed suit in the Southern District of New York, asserting claims for conversion and replevin on the theory that the 1938 Sale was

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<sup>3</sup> On February 7, 2011, Zuckerman and the Met entered into a standstill agreement tolling any statute of limitations as of that date.

made under duress. On February 7, 2018, the district court dismissed

Zuckerman's claims "[f]or failure to allege duress under New York law." Special

App'x 3. The district court did not address the Met's contention that

Zuckerman's claims are time-barred in New York by the statute of limitations

and laches. This appeal followed.

### DISCUSSION

On appeal, the Met argues, among other things, that Zuckerman's claims are barred by the doctrine of laches. We agree.<sup>4</sup> Neither the Leffmanns nor their heirs made a demand for the Painting until 2010. This delay was unreasonable, and it prejudiced the Met. We further conclude that the HEAR Act, which creates a uniform, nationwide six-year statute of limitations for claims to recover art lost during the Holocaust era, does not preempt the Met's defense.

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<sup>4</sup> Below, the Met asserted its affirmative defenses—statute of limitations and laches—but “requested that the district court address the merits-based defenses,” which the district court did. Appellee's Br. 55 n.15.



## I. Standard of Review

We review *de novo* a district court's decision to grant a motion to dismiss. See *Arar v. Ashcroft*, 585 F.3d 559, 567 (2d Cir. 2009). "In so doing, we accept as true the factual allegations of the complaint, and construe all reasonable inferences that can be drawn from the complaint in the light most favorable to the plaintiff." *Id.* "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

## II. The Doctrine of Laches

It is well established that "[w]e may . . . affirm on any basis for which there is a record sufficient to permit conclusions of law, including grounds upon which the district court did not rely." *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 584 (2d Cir. 2000). The doctrine of laches "protect[s] defendants against unreasonable, prejudicial delay in commencing suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017). "A party asserting a laches defense must show that the plaintiff has inexcusably slept on

its rights so as to make a decree against the defendant unfair. Laches . . . requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action." *Merrill Lynch Inv. Managers*, 337 F.3d at 132 ; see also *Matter of Stockdale v. Hughes*, 189 A.D.2d 1065, 1067 (N.Y. App. Div. 1993) ("It is well settled that where neglect in promptly asserting a claim for relief causes prejudice to one's adversary, such neglect operates as a bar to a remedy and is a basis for asserting the defense of laches . . .").

"[M]ere lapse of time, without a showing of prejudice, will not sustain a defense of laches." *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003).<sup>5</sup> "A defendant has been prejudiced by a delay when the assertion of a claim available some time ago would be inequitable in light of the delay in bringing that claim." *Conopco Inc. v. Campbell Soup Co.*, 95 F.3d 187, 192 (2d Cir. 1996). Finally, laches may be decided "as a matter of law" when "the original owner's lack of due diligence and prejudice to the party currently in possession are apparent." *Matter of Peters v. Sotheby's Inc.*, 34 A.D.3d 29, 38 (N.Y. App. Div. 2006).

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<sup>5</sup> Both parties rely solely on New York law in making arguments concerning laches. Therefore, we do the same.

a. Unreasonable Delay

First, we conclude that the delay in this case was unreasonable. The Painting is an important and well-known work by an influential and celebrated artist. The Leffmanns sold it for a substantial sum to a French dealer. The Painting was then moved to the United States, where it was acquired by a major public institution. Meanwhile, the Leffmanns were in Brazil beginning in October 1938, and Switzerland from 1947 until Alice Leffmann died in 1966.

It is evident on the face of the complaint that the Leffmanns knew to whom they sold the Painting in 1938, and Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting. Indeed, over seventy years passed between the sale of the painting in 1938 and Zuckerman's demand that the Met return the Painting in 2010. *See, e.g., Krieger v. Krieger*, 25 N.Y.2d 364, 370 (1969) (delay of twelve years in commencing an action for declaratory judgment that a Florida divorce decree was void was an "inordinate length of time").

It is eminently understandable that the Leffmanns did not bring any claim for the Painting during the course of World War II and even, perhaps, for a few years thereafter, given their specific circumstances. However, it is simply not

plausible that the Leffmanns and their heirs would not have been able to seek replevin of the Painting prior to 2010. As noted above, the Leffmanns, being a financially sophisticated couple, actively and successfully pursued other claims for Nazi-era losses. This is not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate. Indeed, the Painting was a “masterwork” of Picasso, not an obscure piece of art. J. App’x 33. Nor is this a case where the plaintiff alleges that the buyers themselves exerted any undue or improper pressure on the sellers. The Leffmanns could have contacted Käte Perls, the MoMA, or the Met. Since at least 1967, “P. Leffmann” has been listed as a prior owner of the Painting. Although that—concededly incomplete—provenance was included in the Met’s published catalogue, none of the Leffmanns’ heirs demanded that the Painting be returned. *See Peters*, 821 N.Y.S.2d at 68-69 (concluding that the pre-suit delay was unreasonable given that “neither the estate nor anyone in the [original owner’s] family . . . attempted to recover the painting from the [subsequent purchaser], even though both families lived in Manhattan and the painting was exhibited . . . at prominent museums, galleries, and universities”).

## b. Prejudice

While the determination of prejudice is ordinarily fact-intensive, even at this early stage of the proceedings, based on the unusual circumstances presented by the complaint, we conclude that the Met has been prejudiced by the more than six decades that have elapsed since the end of World War II. This time interval has resulted in “deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,” as well as the likely disappearance of documentary evidence. *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149 (N.Y. App. Div. 1990). Assuming *arguendo* that Plaintiff’s central claim that the Sale is void because it was made under third-party duress is cognizable under New York law, resolution of that claim would be factually intensive and dependent on, among other things, the knowledge and intent of the relevant parties. See Restatement (Second) of Contracts § 175(2) (1981). No witnesses remain who could testify on behalf of the Met that the Sale was voluntary,<sup>6</sup> or indeed on behalf of the Plaintiff that the Painting was sold “involuntar[ily],” *Kammerman v. Steinberg*, 891 F.2d 424, 431 (2d Cir. 1989), because the Leffmanns “had absolutely no other alternative,” *Kenneth D. Laub & Co., Inc. v. Domansky*,

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<sup>6</sup> Käte Perls died in 1945. Paul Rosenberg died in 1959. Hugo Perls died in 1977.



172 A.D.2d 289, 289 (N.Y. App. Div. 1991).<sup>7</sup> Nor are there first-hand witnesses who could testify to facts relevant to the Met's possible affirmative defenses, including whether Foy purchased the Painting in good faith. On these facts, "the original owner[s'] lack of due diligence and prejudice to the party currently in possession are apparent," and the issue of laches can be decided as a matter of law. *Peters*, 34 A.D.3d at 38.<sup>8</sup>

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<sup>7</sup> Under New York's "demand and refusal" rule, the statute of limitations is not triggered "until a *bona fide* purchaser refuses an owner's demand for return of a stolen art object." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272 (2d Cir. 1994). If this rule applies to claims for art objects sold under duress, the failure to pursue legal proceedings related to the Painting—namely, to make a demand—also prejudiced the Met by essentially extending the New York statute of limitations indefinitely. *See Peters*, 34 A.D.3d at 36. In *Peters*, the Appellate Division recognized that a consequence of New York's "demand and refusal" rule is that "there is a potential for a plaintiff to indefinitely extend the statute of limitations by simply deferring the making of the requisite demand" and that such a consideration is relevant to a laches analysis. *Id.* We do not reach the question of whether New York's "demand and refusal" rule, which unquestionably applies to stolen and looted art, applies to claims of an owner demanding the return of an art object sold under duress.

<sup>8</sup> *Peters* also involved a claim to recover a Nazi-era loss. In that case, in the early 1930s, the original owner of the painting at issue, Professor Curt Glaser, entrusted it to his brother, Paul, while fleeing Nazi Germany. *Id.* at 31. Paul, however, "apparently sold the work within the following year without first obtaining [Curt's] consent." *Id.* The painting ended up at a well-known art gallery in Cologne, Germany. *Id.* That gallery sold it to a steel magnate named Otten. *Id.* Otten fled Germany in 1937 but sent the painting out of the country. *Id.* at 32. Soon after learning that the painting had been sold, Curt Glaser attempted

## c. The HEAR Act

Zuckerman argues in the alternative that, because her claims are timely pursuant to the applicable statute of limitations as codified by the HEAR Act, a laches defense is unavailable in this case.

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to buy it back but was rebuffed. *Id.* at 31. He never “report[ed] a theft and, indeed, did not regard the painting as having been stolen.” *Id.* at 35.

The painting eventually ended up in the United States, where it was exhibited in several museums and universities. *Id.* at 32. Decades later, the Otten family consigned the painting to Sotheby’s which, in 2002, sold it for \$1.5 million. *Id.* It was only in December 2003 that the petitioner (a descendant of Glaser’s) sought to recover the painting on the theory that it was converted or otherwise misappropriated. *Id.* at 33.

The Appellate Division rejected the request for pre-action discovery to identify the new owner of the painting. It did not squarely hold whether the sale in that case constituted a conversion, finding instead that even “assum[ing] that the subject [painting] was converted,” any claim for recovery was barred by the statute of limitations and the doctrine of laches. *Id.* at 37. With respect to laches, although Glaser attempted to buy back the painting soon after his brother sold it, he never made a legal claim for the painting. *Id.* at 35. Further, “[t]he delay by the Glaser family and the estate in asserting any claim of ownership during the approximately 70-year odyssey of [the painting] prejudiced the good-faith purchaser since none of the parties to the original sale of the painting—Professor Glaser, Albert Otten and Paul Glaser—are alive.” *Id.* at 38. The Appellate Division determined that “the original owner’s lack of due diligence and prejudice to the party currently in possession are apparent,” such that the issue of laches could be decided as a matter of law, even at the pre-action discovery stage. *Id.* The Court of Appeals denied petitioner’s motion for leave to file an appeal. *Matter of Peters v. Sotheby’s Inc.*, 8 N.Y.3d 809 (2007).

The HEAR Act addresses the “unfair impediment” caused by “[s]tate statutes of limitations” that do not account for “the unique and horrific circumstances of World War II and the Holocaust.” S. REP. NO. 114-394, at 5 (2016). The HEAR Act encourages the return of Nazi-stolen and looted artwork to Holocaust victims, heirs, and their survivors by preempting state statutes of limitations and imposes instead a uniform nationwide six-year statute of limitations. Specifically, the statute provides that “a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during [the period between 1933 and 1945] because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant . . . .” HEAR Act § 5(a).<sup>9</sup>

Generally, “in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014); *see also SCA Hygiene Prods.*, 137 S. Ct. at 960 (“The enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally

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<sup>9</sup> *Amicus Holocaust Art Restitution Project (“HARP”)* urges us extend the HEAR Act beyond its enumerated scope and to create a federal common law cause of action for replevin for “Nazi-confiscated artwork.” HARP Br. 15-30. We decline to do so.

hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted.”).

This general rule does not apply to the HEAR Act. While the HEAR Act revives claims that would otherwise be untimely under state-based statutes of limitations, it allows defendants to assert equitable defenses like laches. The statute explicitly sets aside “defense[s] *at law* relating to the passage of time.”

HEAR Act § 5(a) (emphasis added). It makes no mention of defenses *at equity*.

“[A] major departure from the long tradition of equity practice should not be lightly implied.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

Moreover, a key Senate committee report accompanying the statute, discussed *infra*, unequivocally indicates that the Act does not preclude equitable defenses.<sup>10</sup>

S. REP. NO. 114-394, at 7.

Allowing defendants to assert a laches defense, despite the introduction of a nationwide statute of limitations designed to revive Holocaust-era restitution

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<sup>10</sup> The HEAR Act applies to claims to “recover any artwork . . . that was lost during the [Holocaust era] because of Nazi persecution.” HEAR Act § 5(a). A stated purpose of the law is to recover property “stolen or misappropriated by the Nazis.” *Id.* § 3(2). We need not and do not decide whether Zuckerman’s claims, for recovery of art sold under duress to non-Nazi affiliates, are within the ambit of the statute. Even if we assume *arguendo* they are, her claims are nevertheless barred by the doctrine of laches.

claims, comports with the overall legislative scheme advanced by the HEAR Act.

One of the stated purposes of the HEAR Act is to ensure that claims to recover art lost in the Holocaust era are “resolved in a just and fair manner.” HEAR Act § 3(2). But the HEAR Act does not allow potential claimants to wait indefinitely to bring a claim.<sup>11</sup> To do so would be neither just nor fair. At the very core of a successful laches defense is prejudice to the defending party: even an unreasonable delay is not fatal to a claim if there has been no harm to the other party. Unlike a mechanical application of a statute of limitations, a laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution.<sup>12</sup>

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<sup>11</sup> The HEAR Act’s six-year statute of limitations applies after “actual discovery” of the claim. HEAR Act § 5(a). The statute also contains an exception to this generally applicable rule for preexisting claims: those will still be time-barred under the applicable state statute of limitations if “(1) the claimant or a predecessor-in-interest of the claimant had knowledge of [the claim] on or after January 1, 1999; and (2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.” *Id.* § 5(e). The Senate Report explained that Congress “recognizes the importance of quieting title in property generally and the importance that claimants assert their rights in a timely fashion.” S. REP. NO. 114-394, at 10.

<sup>12</sup> The general principle that a codified statute of limitations prevents a defendant from asserting a laches defense does not apply to New York’s applicable three-year statute of limitations for recovery of a chattel, N.Y. C.P.L.R. § 214. Even when a claim is timely pursuant to the statute of limitations, a

Finally, the legislative history of the HEAR Act makes clear that Congress intended that laches remains a viable defense to otherwise covered claims. An early draft of the bill, introduced in the Senate Committee on the Judiciary on April 7, 2016, would have explicitly swept aside a laches defense. Holocaust Expropriated Art Recovery Act, S. 2763, 114th Cong. § 5(c)(2)(A) (as introduced in Senate, Apr. 7, 2016) (permitting recovery “[n]otwithstanding . . . any . . . defense at law *or equity* relating to the passage of time (*including the doctrine of laches*)” (emphasis added)). That draft also stated that one of the purposes of the HEAR Act was to ensure that claims for the recovery of art lost during the Holocaust era were “not barred by statutes of limitations *and other similar legal doctrines* but are resolved in a just and fair manner on the merits.” *Id.* § 3 (emphasis added).

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defendant may still assert a laches defense. *See, e.g., Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 321 (1991) (holding that “although [defendant-appellant’s Statute of Limitations argument fails, [its] contention that the [plaintiff] did not exercise reasonable diligence in locating the painting” is relevant “in the context of [a] laches defense”). Were this not the case, plaintiffs could, as discussed *supra* n.7, delay bringing their claims indefinitely without consequence. The availability of a laches defense in this context allows courts to examine whether a plaintiff has abused New York’s idiosyncratic “demand and refusal” rule in a way that is unfair to defendants, while keeping that rule in place. Thus, even if Zuckerman’s claims were properly brought within the New York statute of limitations (a question we do not reach), they can still be barred by laches.

The final version of the bill, however, drops this language. Introduced in the House on September 22, 2016, and the Senate on September 29, 2016, the final version does not include any mention of laches or other equitable defenses. In addressing the amendment, which was in the nature of a substitute, the Senate Report explicitly noted that the new version “remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches.” *See* S. REP. NO. 114-394, at 7. Moreover, there is no mention of “other similar legal doctrines” in the purposes section of the final version of the statute. The final version notes that one of the purposes is to “ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.” HEAR Act § 3(2). “Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.” *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *see also* Simon J. Frankel & Sari Sharoni, Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016, 42 Colum. J.L. & Arts 157, 175-76 (2019) (“[B]y removing laches from the draft text of the statute, Congress intended laches and other equitable defenses under state law to remain available to good faith

possessors of artworks.”). The HEAR act does not prevent defendants from asserting a laches defense. We emphasize that each case must be assessed on its own facts: while the laches defense succeeds here, in other cases it will fail and not impede recovery for claims brought pursuant to the HEAR Act.

### CONCLUSION

For the reasons set forth above, we conclude that the HEAR Act does not preempt the Met’s laches defense and that Zuckerman’s claims are barred by laches. Accordingly, we AFFIRM the judgment of the district court.



**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29<sup>th</sup> day of August, two thousand nineteen.

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Laurel Zuckerman, as Ancillary Administratrix of the  
estate of Alice Leffmann,

Plaintiff - Appellant,

v.

The Metropolitan Museum of Art,

Defendant - Appellee.

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**ORDER**

Docket No: 18-634

Appellant, Laurel Zuckerman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe



**CERTIFICATE OF SERVICE**

I, Mary-Christine Sungaila, a member of the bar of this Court, certify that on November 14, 2019, all parties required to be served have been served with copies of the foregoing *Application for Extension of Time to File Petition for Writ of Certiorari* via first-class mail at the addresses listed below:

***Counsel for the Metropolitan Museum of Art***

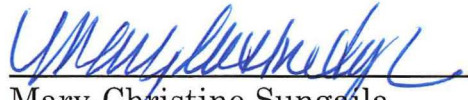
David W. Bowker  
Wilmer Cutler Pickering Hale and Dorr LLP  
1875 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 663-6000

Michael D. Gottesman  
Wilmer Cutler Pickering Hale and Dorr LLP  
Seven World Trade Center  
250 Greenwich Street  
New York, New York 10007  
(212) 230-8800

***Counsel for Petitioner Laurel Zuckerman (courtesy copy)***

Lawrence M. Kaye  
Ross L. Hirsch  
Yael M. Weitz  
Herrick, Feinstein LLP  
Two Park Avenue  
New York, New York 10016  
(212) 592-1400

Dated: November 14, 2019

  
Mary-Christine Sungaila  
*Counsel of Record*  
Haynes and Boone, LLP  
600 Anton Blvd., Suite 700  
Costa Mesa, CA 92626  
Telephone: 949-202-3000  
mc.sungaila@haynesboone.com