No. 19-942

In the Supreme Court of the United States

LAUREL ZUCKERMAN, AS ANCILLARY ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,
Petitioner,
v.
THE METROPOLITAN MUSEUM OF ART,
Respondent.

On Petition for a Writ of Certiorari To The United States Court of Appeals For The Second Circuit

Amici Curiae Brief Of The 1939 Society, Bet Tzedek, and The Holocaust Education Center in the Desert, Inc. d/b/a Tolerance Education Center In Support of Petitioner

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BRIEF OF AMICUS CURIAE

Amici The 1939 Society, Bet Tzedek, and The Holocaust Education Center in the Desert submit this brief supporting Laurel Zuckerman's petition for certiorari.[1]

INTEREST OF AMICUS CURIAE

The 1939 Society, located in Southern California, was formed in 1952 by Holocaust survivors dedicated to Holocaust remembrance and education to support Holocaust survivors and their legacy. The 1939 Society partners with academic institutions to support educational programming to teach the lessons of the Holocaust. These partners include the Chair in Holocaust Studies Program at UCLA (the first in the nation and where Chair Saul Friedlander received a MacArthur Award and Pulitzer Prize for his work on the Holocaust), UCLA's Center for Jewish Studies, California State University Northridge's Graduate Holocaust Studies course, Loyola Marymount University's Jewish Studies Program, and Chapman University's Rodgers Center for Holocaust Education. The restitution of Nazi-looted art and ensuring justice for Holocaust victims and their heirs is integral to Society's purpose and mission.

In its mission to be amici in Nazi-confiscated, stolen, or forced-sale art cases, The 1939 Society

[1] Counsel for Amici authored this brief in whole. No other person or entity other than Amici, their members, or counsel made a monetary contribution for preparation or submission of this brief. Amici's counsel notified the parties' counsel of their intent to file this amicus brief and received consent.

has filed amicus briefs in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 862 F.3d 951 (CA9 2017), and *Von Saher v. Norton Simon Museum*, 897 F.3d 1141 (CA9 2018) and No. 18-1057 (U.S. 2019).

Bet Tzedek (Hebrew for "House of Justice"), located in Los Angeles, California is a nonprofit public interest law firm founded in 1974 to achieve full and equal access to justice for all vulnerable members of its community, and is an internationally recognized force in poverty law. Bet Tzedek is widely respected for its expertise on reparations claims and has particular expertise in drawing on the World War II historical context to support Holocaust victims' compensation claims. Bet Tzedek has represented over 5,000 survivors and their families in reparations claims. Bet Tzedek's Holocaust Survivors Justice Network received the ABA Pro Bono Publico award.

Bet Tzedek has also litigated various Holocaust-era restitution cases, including the landmark *Grunfeder v. Heckler*, 748 F.2d 503 (CA9 1984), and has been amicus in many Nazi looted art cases, including *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Von Saher v. Norton Simon Museum*, *supra*.

The Holocaust Education Center in the Desert, Inc. d/b/a Tolerance Education Center, located in Rancho Mirage, California, is a nonprofit organization focused on promoting tolerance, civility, respect and understanding by the elimination of atrocities, hatred, and bigotry. Founded by Holocaust survivor Earl Greif in 2006,

it provides tolerance-themed programming, activities, and exhibits to students and adults with the intent of reducing prejudice and promoting diversity.

SUMMARY OF ARGUMENT

During the Holocaust, one of the favored methods of stealing Jewish property was to force the victims to sell their possessions at very low prices as they would flee to safety. Such forced sales by desperate Jews trying to save their lives were nevertheless viewed as legal, both during and after the war. But with the passage of time came new insights, new theories, and most importantly, new facts.[2] Today, the federal government recognizes that such forced sales by Holocaust victims amounts to theft, requiring restitution or compensation.

The Second Circuit's formalistic application of laches, and conclusion that the rightful owners of a masterpiece artwork unreasonably delayed bringing their claims, prejudicing The Metropolitan Museum of Art (the "Museum"), fails to account for the complex historical and legal realities that, due

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[2] Graham Bowley, *The Mystery of the Painting in Gallery 634*, N.Y. Times (2/8/2020) ("For years, a large, richly colored painting depicting a moment of sexual violence has stopped visitors in Gallery 634 at the Metropolitan Museum of Art. … Now newly discovered evidence suggests the painting's history is as painful as its theme. … As much as the story of the painting is a question of ownership, it is also a vivid illustration of how much less equipped and attentive the world once was on the issue of art lost during the Nazi era.").

to the passage of time, have come to light. The Second Circuit's ruling erroneously stunted a search for truth and justice, resting its decision on the very thing that defined the importance of resolving these claims on the merits: time. This decision is also misaligned with the federal government's current policies pertaining to Holocaust-era art claims by impermissibly returning to an outmoded approach to such claims that has been statutorily chastised.

This case provides a critical opportunity to provide a small measure of justice for the terrible events surrounding the greatest human catastrophe of the modern era, the Holocaust. The Second Circuit failed this opportunity.

The Actor, a monumental work of art by Pablo Picasso, was sold for purposes of survival during the Holocaust. Rather than evaluating a legal claim for the Picasso under a modern-day statutory standard that considers both historical context and current morality, the Second Circuit instead dismissed the claim at the pleading stage based on a formalistic use of the common law laches doctrine, that flies in the face of a Congressionally-enacted statute of limitations. In doing so, the Second Circuit gutted the intended effects of the Holocaust Expropriated Recovery Act of 2016 (the "HEAR Act")[3] and returned to pre-HEAR Act

[3] Pub. L. 114-308, 130 Stat. 1525, § 3; *see also* Emmarie Huetteman, Holocaust Survivors Score Victory in Reclaiming Stolen Art (12/10/2016).

grounds for denying these gravely important claims.

The Museum's refusal to return the Picasso to the undisputed rightful heir of its prewar owner renders the painting one of the "last prisoners" of World War II.[4] During the war, the Nazis plundered European Jewry of approximately 600,000 paintings and artworks, at least 100,000 of which remain missing.[5] In the 1940s, the Monuments Men—350 artists, architects, scholars, and curators—deployed to Europe to recover and return Nazi-stolen artworks to their rightful owners, and sought to preserve these looted symbols of identity.[6] The artwork they fought to preserve was returned to the countries where it was stolen, in the hopes that the original owners or their heirs would regain possession. But "[t]hat hope was misplaced: Most items were sold or incorporated into public and private collections, lost to their rightful owners."[7] Historians today also recognize that "[t]he return of looted art is not just

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[4] *See* Bruce Hay, *Nazi Looted Art and the Law 1* (Springer Int'l Publ'g 2017).

[5] Stuart Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it*, Wash. Post (1/2/19).

[6] Even 70 years after the end of the war, this service is well-remembered as a valiant and fruitful effort to rescue artworks that would otherwise have remained with those who stole them. House Minority Leader Nancy Pelosi stated, "[They saved the] creativity that connects us to the heritage of civilization." Remarks at Congressional Gold Medal Ceremony Honoring the WWII Monuments Men (10/22/2015).

[7] *Id.*

about objects; it is about the restoration of dignity and respect to those whose basic humanity was denied."[8]

But this case is about one masterwork, on the walls of the Museum against the will of its rightful heir. In contrast to the artworks whose provenance was permanently lost in the aftermath of World War II, the Picasso's chain of ownership is well-documented.[9] By refusing to return this painting, the Museum continues to deny the painting's painful history, much like it did for years until it changed the painting's provenance in 2011.[10] This Court has the profound opportunity to properly resolve the disposition of the Picasso and restore some dignity to the Jewish family stripped of their possessions as they fled first from Nazi Germany and then Fascist Italy in a fight for their lives.

Paul Friedrich Leffmann and his wife Alice were German Jews who had sizeable assets, including the Picasso. After the Nazis adopted the Nuremberg Laws in 1935, the Leffmanns were forced to sell their home in Germany and their other assets to German corporations for well-below actual value. They had previously sent the Picasso

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[8] Deborah Solon, *Returning Stolen Art to Its Rightful Owner is Also About Restoring Dignity*, L.A. Times (12/17/2016).

[9] *Zuckerman v. The Metropolitan Museum of Art*, No. 19-942, Petition For Certiorari ("Pet.") 12-13; Colin Moynihan, *The Nazi Downstairs: A Jewish Woman's Tale of Hiding in Her Home*, N.Y. Times (10/5/18) ("It's so unusual to have a victim of Nazi theft or expropriation who writes everything down. Usually you're trying to join the dots far apart.").

[10] Pet. at 29-30.

to a non-Jewish friend in Switzerland for safe-keeping.

By the spring of 1938, after Hitler's visit to Italy, it became clear that Fascist Italy was no safer than Nazi Germany. In their desperation to fund their further escape, liquidation of the Picasso became an urgent necessity. Paul sold his beloved Picasso to Kate Perls, acting on behalf of art dealers Hugo Perls and Paul Rosenberg, in June 1938. This "forced sale"[11] took place only a month before the Leffmanns were forced to submit their Directory of Jewish Assets as required by the Reich.[12] Using funds from the Picasso's sale, the Leffmanns were able to buy temporary visas to Switzerland and escape Mussolini's Italy just days after the enactment of anti-Semitic racial laws. The decision to sell their beloved Picasso for

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[11] Forced sales are "sometimes called 'fluchtgut' or 'fluchtkunst' ('flight goods' or 'flight art,' which are cultural objects sold, generally at a steep discount, by owners desperate to finance their escape from Nazi-occupied or threatened areas)." Kevin Ray, *The Restitution, Repatriation, and Return of Cultural Objects: Restitution of Cultural Objects Taken During World War II (Part I), Cultural Assets*, Cultural Assets (3/19/2015).

[12] *See* Peter Hayes, *Plunder and Restitution*, Oxford Handbook of Holocaust Studies 544 (Peter Hayes & John Roth, eds., 2010) ("In the succeeding years, the regime may have raked in as much as half of the remainder through additional impositions … [such as] the terms of the Eleventh Decree to the Reich Citizenship Law, which declared that the property of German Jews 'fell' to the state at the moment they exited the country, whether through emigration or deportation.").

significantly under actual value was no more voluntary than sales of last possessions conducted by Jews in the ghettoes and concentration camps.[13] None were done by free will; all were done for survival.

In 1941, with their diminished funds mainly from the sale of the Picasso, the Leffmanns were able to escape to Switzerland and then to Brazil. While the Leffmanns escaped the Holocaust in Europe, their key to survival, the Picasso, was making its way from Switzerland to New York through a variety of profitable sales and the eventual donation to the Museum.

There is no dispute that the painting was sold by the Leffmanns well below its true value to fund their escape from the rising threat of Nazism, putting the Picasso squarely in the category of flight art.[14] There is also no dispute that petitioner Zuckerman is a administrator of the estate of the paintings' prewar owners.

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Scholars readily recognize the parallels between plunder and genocide. The rhetoric behind both destructive campaigns undertaken by the Nazis "shared a pathology of domination, subjugation and

[13] Indeed, the Leffmanns refused to sell the Picasso to an unsolicited buyer (and known trafficker of Nazi-looted art) for the same under-actual value just two years earlier in 1936. *See* Pet. at 29-30.

[14] *See supra*, n.11.

extermination."[15] During the 20th century, art collecting by Jews signified integration with Western Christian society and, from the Nazi perspective, unacceptably tainted Aryan culture, just as the existence of Jewish people tainted the Aryan race.[16] The Holocaust forced Jewish families to sell their artwork at basement prices to fund their escapes; thus, such cultural objects have come to be known as "flight art."[17] Given this context, the restitution of forced sale art provides an opportunity to bring justice to Holocaust victims.[18]

Three international conferences exemplify the international community's concern for resolving forced-sale art-controversies: the 1998 Washington Conference on Holocaust Era Assets, the 2000 Vilnius Conference on Holocaust Era Looted Cultural Assets, and the 2009 Prague Holocaust Era Assets Conference. Attended by delegates from over 40 nations, including the United States, these conferences recognized the failings in handling restitution claims for Nazi-looted art, and produced

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[15] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?* 22 Eur. J. Int'l L. 49, 57-58 (2011).

[16] *See* Emily Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?* 51 DePaul L.Rev. 1103 (2002); Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U.PA. J. Int'l Econ. L. 383, 383-84 (2000).

[17] *See supra*, n.11.

[18] O'Donnell, *supra*, at 54.

specific international policies to promote just and fair resolutions. These procedures for restitution appear in two documents: the Washington Conference Principles on Nazi-Confiscated Art of 1998 (signed by 44 countries) and the Terezín Declaration of 2009, agreed to by 47 countries, including the United States.

The Washington Principles established a set of standards addressing the need for international cooperation in resolving the Holocaust's tragic aftermath. The Terezín Declaration reiterates the Washington Principles' resolve to promote justice for victims of the Nazis. Together, these documents generated an international norm, now part of international customary law, that claims involving Holocaust-era art against museums worldwide must be resolved fairly and justly, with the goal of resolving claims on their facts and merits rather than on the basis of technical legal defenses.

In November 2018, twenty years after they were established, the Washington Principles were reaffirmed in a follow-up conference in Berlin, "20 Years of the Washington Principles: Roadmap for the Future." The Joint Declaration signed at that conference "appeal[ed] to all government bodies and institutions that possess cultural objects, and to all private collectors, to honor the Washington Principles fully and to do their part to fully implement the Principles."[19]

[19] *See* Joint Declaration, *available at* https://www.lootedart.com/web_images/pdf2018/2018-11-26-gemeinsame-erklaerung-washingtoner-prinzipien-engl-data.pdf.

The Second Circuit failed to recognize the complex historical and legal context of this case, wrongly preventing Zuckerman's claims from reaching the merits by applying laches to affirm dismissal of her Holocaust-era claims. Its decision not only misinterprets the facts and circumstances surrounding the Leffmanns' sale of their Picasso, but also disregards the laws of equity endorsed by the United States in the Terezín Declaration and the policies underlying the HEAR Act.

The United States is not only party to the Washington Principles and Terezín Declaration, but also has taken other actions evidencing its fervent commitment to returning art "sold" during the Holocaust to its rightful owners. The Second Circuit's insistence on adopting a narrowly formalistic approach to this claim, ruling that the family on the run from Nazi terror waited too long to assert its rights to the painting, is unfathomable.

In finding prejudice to the Museum, which neither paid for the painting nor properly displayed its provenance until 2011, rather than to Zuckerman as the administrator of the rightful owner's estate, the court upended the plain language and purpose underlying the HEAR Act by averting the claims on technicalities rather than considering their merits. The result was neither just nor fair. This Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

Zuckerman seeks certiorari to resolve the misapplication of the non-statutory state-law defense of laches to a claim brought within the

statute of limitations set forth in the HEAR Act, and to rectify the error of a laches ruling at the pleadings stage without discovery.

In her Petition, Zuckerman explains how the laches analysis upends the purposes and plain language of the HEAR Act, guts its effect, and wrongly allows laches to override the Act's statute of limitations.

Zuckerman also urges this Court to consider the impropriety of applying laches in complete ignorance of Zuckerman's allegations of the Museum's unclean hands, and where further factual discovery was necessary.

Amici endorse those arguments. But this litigation presents issues not merely concerning laches or other potential procedural barriers involving just another piece of personal property. Rather, it presents questions pertaining to overall justness and fairness of national interest related to rectifying the devastating loss experienced by an entire population during the Holocaust. This Court should view U.S. policy on Holocaust losses as a guiding light propelling it towards a just resolution of this Holocaust-era claim and not as a restraint compelling it to follow a state-law affirmative defense at the outset of litigation, replicating an approach that the HEAR Act was designed to avoid.

I.

UNITED STATES POLICY AND INTERNATIONAL NORMS DICTATE THAT ZUCKERMAN'S SUIT SHOULD NOT BE BARRED

This Court's review is critical to clarify that U.S. policy considerations are relevant to laches, and to Holocaust-era art cases more generally. Otherwise, the Second Circuit's opinion could be used to bar all claims by Holocaust survivors or their heirs raised decades after the turmoil leading to forced sales. Given the strong foreign policy and federal statutes aimed at rectifying these forced sales by providing restitution to the victims, this decision cannot stand.

Despite the United States' overwhelming recognition of its commitment to reviewing Holocaust-era art claims on the merits, the Second Circuit found that a procedural barrier, laches, governed Zuckerman's claims.

United States policy promoting restitution for victims of forced sales dates back to at least the 1943 Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control. In April 1949, the State Department issued Press Release No. 296, emphasizing the Government's "opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the [Nazis]":

> it is this Government's policy to undo the forced transfers and restitute identifiable property to the victims of Nazi

> persecution wrongfully deprived of such property; and … the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.[20]

This early statement indicates the importance of returning property to rightful owners and considering historical circumstances when reviewing such claims.

The United States has continued to express its interest in the fair and just resolution of Holocaust era claims through its conduct of foreign affairs. Over the past 20 years, more than 40 countries, including the United States, have recognized the unfairness inherent in how such claims were initially handled. These countries came together to rectify these errors and demonstrate their dedication to resolving Holocaust-era art controversies through international conferences, producing the Washington Principles[21] and the Terezín Declaration, which urged that "every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales, and *sales under duress* of property, which

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[20] *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375 (CA2 1954).

[21] Washington Conference Principles on Nazi-Confiscated Art, *available at* https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/

were part of the persecution of these innocent people and groups" during the Holocaust.[22] The United States played a prominent role in drafting these documents, establishing a norm—now part of international customary law—to promotes justice by advocating that Holocaust-era claims must be resolved fairly and justly, with the goal of resolving them on their facts and merits *rather than on technical legal defenses*.

The United States has clearly expressed its national interest in the just and fair resolution of Holocaust-era art conflicts. In 2016, Congress unanimously passed the bipartisan HEAR Act, governing the statute of limitations applicable to Zuckerman's claims and which "ensure[s] that claims to artwork ... stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."[23] It aims to ensure that claims to Nazi-confiscated art are adjudicated in accord with U.S. policy as expressed in the Washington Principles and the Terezín Declaration.[24]

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[22] Terezín Decl. ¶9, *available at* https://www.state.gov/p/eur/rls/or/126162.htm. The Terezín Declaration also called for "all stakeholders to ensure that their legal systems or alternative processes … facilitate just and fair solutions with regard to Nazi-confiscated and looted art." *Id.* at ¶32.

[23] HEAR Act § 3. The HEAR Act was designed to Nazi-confiscations, forced sales, and sales under duress. *Id.* § 3(1); *see supra* n. 22.

[24] *Id.* at § 2(7).

More recently, both houses of Congress unanimously passed The Justice for Uncompensated Survivors Today ("JUST") Act, signed into law in May 2018, requiring the State Department to report on the progress of European countries "toward the return of or restitution for wrongfully confiscated or transferred Holocaust-era assets, including … art."[25] "This is a powerful statement of America's unwavering commitment to supporting Holocaust survivors in their quest for justice."[26]

Additionally, in November 2018, the U.S. sent Special State Department Envoy for Holocaust Issues, Thomas Yazdgerdi, and expert adviser to the State Department on Holocaust-era issues, Stuart Eizenstat, to Berlin, to "recommit to the international effort to return these personal and cultural treasures to the families to which they belong."[27]

Thus, this Court should recognize that Zuckerman's claims must be heard on the merits and not barred by the affirmative defense of laches

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[25] JUST Act of 2017, Pub. L. 115-171, 132 Stat 1288 (2018).

[26] *Id.*

[27] Eizenstat, *supra*, n.5; *see also* https://www.deutschland.de/en/washington-principles-joint-declaration-by-germany-and-the-usa (since the Washington Principles, "Germany has returned over 16,000 individual objects to Holocaust survivors or their families. … Both governments recognize the burdens on large museums of going through their collections, and on smaller museums that lack of staff trained to do provenance research, and aim to encourage and promote their respective efforts").

at the pleading stage, absent factual development. Indeed the ruling contravenes clear government policy covering claims related to Holocaust-era art. In applying laches, the Second Circuit found that the Leffmanns unreasonably delayed bringing their claims and relied, in part, on the Leffmanns' decision to seek restitution of certain assets but not the Picasso (despite the Museum failing to display the painting's proper provenance until 2011).

This finding ignores the post-war economic realities that blurred the lines of legality in almost every type of transaction both during the Holocaust and in its aftermath. "It is estimated that the Nazis stole 20 percent of all Western Art in Europe, or about three million objects."[28] In the 1930s and 1940s, these takings were technically "legal" under the 1933 Reichstag Fire Decree and the Enabling Act.[29] After the Holocaust, these once-valid laws left countries swarmed with claims for stolen property. These countries faced early missteps and errors in handling these claims. After the Holocaust, European countries were overwhelmed by problems and scrambled to create proceedings to address them.[30] In so doing, they inadequately

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[28] *Id.*

[29] United States Holocaust Memorial Museum, *Timeline of Events, Reichstag Fire Decree*, https://www.ushmm.org/learn/timeline-of-events/1933-1938/reichstag-fire-decree.

[30] *See* Phil Hirschkorn, Why finding Nazi-looted art is 'a question of justice', PBS (5/22/2016) (Governments were overwhelmed with problems after the war: 'The last thing

handled restitution claims. It is no wonder, then, that the Leffmanns may have waited to seek the return of their prized Picasso. Accordingly, Zuckerman's claims should not be barred on such procedural grounds in this case.

The policies endorsed by the Washington Principles and the Terezín Declaration have borne fruit within many non-governmental institutions. Like the international community, museums recognize their ethical duty to restore artworks to their rightful owners. Both the American Alliance of Museums ("AAM") and the International Council of Museums ("ICOM") strongly support restitution:

> When faced with the possibility that an object in a museum's custody might have been unlawfully appropriated as part of the abhorrent practices of the Nazi regime, the museum's responsibility to practice ethical stewardship is paramount. Museums should develop and implement policies and practices that address this issue in accordance with these guidelines …. [I]n order to achieve an equitable and appropriate resolution of claims, museums may elect to waive certain available defenses.[31]

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they wanted to deal with was some annoying man like my father who said, 'What happened to my mother's teacups?'").

[31] AAM, *Unlawful Appropriation of Objects During the Nazi Era*, https://www.aam-us.org/programs/ethics-standards-and-professional-practices/unlawful-appropriation-of-objects-during-the-nazi-era/.

These organizations also impose ethical duties on members. Under AAM's Code of Ethics "competing claims of ownership ... should be handled openly, seriously, responsively and with respect for the dignity of all parties involved."[32] Similarly, ICOM requires that "[e]very effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained. … Due diligence in this regard should establish the full history of the item since discovery or production."[33]

The Museum's membership in both of these organizations but refusal to follow their principles by failing to conduct a proper provenance of the Picasso, and not changing its listing until 2011, is telling. Its approach starkly contrasts with other prestigious institutions that strive to ensure the identification and return of Holocaust-era art. Between 1999 and 2009, 25 U.S. museums negotiated settlements over Holocaust-era stolen or looted art.[34] Other American museums have proactively sought to return artworks.

The Museum of Fine Arts, Boston, undertook a Nazi-Era Provenance Research project that strives

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[32] AAM, *Code of Ethics for Museums*, https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/.

[33] ICOM, *Code of Ethics for Museums*, § 2.3 (2006), http://archives.icom.museum/ethics.html#section2.

[34] *See* Steve Chawkins, *Hearst Castle to Return Artworks Seized by Nazis*, L.A. Times (4/9/2009).

to "identify objects in the collection that were lost or stolen and never returned to their rightful owners."[35] The MFA pursues these goals by researching and publishing proper provenances to facilitate restitution claims, and has resolved several claims since the project began in 1998.[36]

The Hearst Castle, part of California's State Parks Department, also evinced a commitment to restitution by repatriating to Holocaust survivors' heirs paintings that had been at the castle for decades. As the State Parks Director explained, repatriation presents "an opportunity to right a wrong" and educate the public and "to tell the story over and over, so we don't forget our history."[37]

And Christie's and Sotheby's employ full-time staff to implement the Washington Principles, and "both auction houses decline to deal in art with suspicious Holocaust-era histories."[38]

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[35] *Nazi-Era Provenance Research*, Museum of Fine Arts Boston, https://www.mfa.org/collections/provenance/nazi-era-provenance-research (many resolutions involve financial settlements allowing the MFA to continue displaying the work).

[36] Eileen Kinsella, *MFA Boston Reaches Settlement in Nazi-Related Claim Over Rare Figurines*, ArtNetNews (5/4/2017) ("it's a 'moral responsibility of the current possessor to redress these past injustices'"; recently the MFA "reached an agreement with the heirs of a Jewish collector involving seven rare porcelain figurines that have long been shadowed by claims they were sold in the midst of Nazi persecution" allowing the institution to keep the works).

[37] Chawkins, *supra* n.34.

[38] Eizenstat, *supra*, n.5.

In Europe, the Louvre, for example, "create[d] a permanent space" for exhibiting this art, with the intention of returning it to its rightful owners explaining: "Although museums are often suspected of wanting to keep the pieces ... our goal is clearly to return everything that we can."[39]

In the Netherlands, the Museums Association asked museums to investigate the provenance of their collections to compile an inventory of items stolen, confiscated, or sold under duress or other suspicious circumstances between 1933 and 1945.[40] Since 2009, under this project, 42 Dutch institutions have identified 170 artworks suspected of being wrongfully taken.[41] Another 163 member institutions are still investigating their collections. At the Rijksmuseum in Amsterdam, a team of experts remains dedicated to uncovering questionable provenances. As of October 2018, that team identified 22 potentially Nazi-looted items. A spokesman explained: "The research is important to do justice to history. A museum can only show a piece of art properly if the story and history behind the object is clear."[42]

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[39] Aurelien Breeden, *Art Looted by Nazis Gets a New Space at the Louvre. But Is It Really Home?* N.Y. Times (2/8/2018); Eleanor Beardsley, *France Hopes Exhibit of Nazi-Stolen Art Can Aid Stalled Search for Owners*, NPR (2/23/2018) ("'If the seller was Jewish, then there's a good chance it was a forced sale.'").

[40] https://www.musealeverwervingen.nl/en/10/home/.

[41] Sarah Cascone, *Dutch Museums Discover Hundreds of Artworks Stolen by the Nazis* ArtNetNews (10/11/18).

[42] *Id.*

As these institutions exemplify, museums must ensure that the art on their walls was not ripped from the walls of victims of history's most tragic time, and that the artworks' true story is relayed. These institutions recognize that with the passage of time available information has improved, so their behavior must follow suit.[43]

Indeed, had the Museum satisfied industry-standard legal and ethical duties and conducted a proper due diligence provenance search before purchasing the Picasso, it would have discovered that the Leffmanns were the rightful owners until 1938. The Museum's inadequate diligence deviated substantially from industry standards and signified that it acted, at a minimum, negligently.

The Second Circuit ignored these facts and instead rewarded the Museum for violating its ethical duties—effectively holding that a museum is better off not investigating the origins of its acquisitions. Application of the laches defense in these circumstances merely ratified the Museum's actions which obscured the painting's true history for decades. This undermines the international community's efforts to achieve just and fair results for Holocaust victims.

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[43] Hirschkorn, *supra* n.30; *see* Bowley, *supra* n.2

II.
THE SECOND CIRCUIT'S LACHES APPLICATION IS AN IMPERMISSIBLE RETURN TO PRE-HEAR ACT DISMISSALS

Flouting United States policy as articulated in the HEAR Act, the Second Circuit ignored the impetus underlying the statute. By affirming dismissal of Zuckerman's claim using laches, the Second Circuit adopted a decades-earlier approach to Nazi-era claims—an approach marked with statute of limitations defenses and procedural barriers that prevented courts from hearing these cases on the merits. Thus, the Second Circuit's approach, which starkly parallels the outcomes and reasoning of pre-2016 litigation concerning Holocaust-era art claims, directly contradicts the HEAR Act's purpose.[44]

Before 2016, numerous cases were dismissed or protracted due to statute of limitations defenses. For example, in 2007 in *Orkin v. Taylor*, a particularly high-profile case involving a Van Gogh painting possessed by actress Elizabeth Taylor, the Ninth Circuit dismissed state law claims finding they were barred by the statute of limitations.[45] In *Orkin*, descendants of a Jewish art collector alleged the painting was sold in the 1930s under duress; Taylor argued that the painting was sold through

[44] *See supra*, n.3 (Ronald S. Lauder stated, "This important legislation will allow those seeking to recover art and other heritage stolen by the Nazis a fair opportunity to have their cases judged on the facts, rather than be undercut by legal technicalities").

[45] 487 F.3d 734, 736 (9th Cir. 2007).

Jewish art dealers to a Jewish art collector and the Nazis were not parties to those transactions.[46] The court dismissed the claims as time-barred finding that they expired, at the latest, three years after Taylor's public announcement of ownership of the artwork.[47]

In 2006 and 2007, two district courts in the Sixth Circuit dismissed claims brought by Claude George Ullin concerning the ownership of paintings sold during the Holocaust. First, in 2006, the Northern District of Ohio dismissed Ullin's counterclaim against the Toledo Museum of Art on the grounds that the claim was barred by Ohio's four-year statute of limitations governing conversion claims where claims accrue upon discovery.[48] The court stated that the prior owner, "pursued restitution and damages immediately after the war for property she lost as a result of Nazi persecution, but did not file a claim for the Painting. If she believed she had a claim to the Painting, she could have investigated and brought suit back then."[49] The court reasoned further:

> Even if, for some unexplained reason, she could not discover any wrongdoing at that time, once the chaos of World War II Europe subsided, a reasonable and prudent person would have made further

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[46] *Id.*

[47] *Id.* at 741.

[48] *Toledo Museum of Art v. Ullin*, 447 F. Supp. 2d 802, 806 (N.D. Ohio 2006).

[49] *Id.* at 807.

> inquiry into the terms of her sale to the art dealers. Defendants, heirs to the Nathan Estate, are imputed with knowledge of her interest.[50]

Similarly, in 2007, the Eastern District of Michigan dismissed Ullin's claim to a Van Gogh painting based on Michigan's three-year statute of limitations.[51]

And in 2010, the First Circuit affirmed summary judgment for the Museum of Fine Arts, Boston, finding that Massachusetts's three-year statute of limitations applied to claims for

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[50] *Id.*; *see also Adler v. Taylor*, No. CV 04-8472-RGK, 2005 WL 4658511, *4 (C.D. Cal. Feb. 2, 2005) (applying California's three-year statute of limitations which began to run when defendant acquired the property or when plaintiffs should have discovered their claims to dismiss the claims).

[51] *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996, *3 (E.D. Mich. Mar. 31, 2007) ("Even if this Court were to apply the discovery rule …, this would not save the Counterclaims from being barred by the statute of limitations. In 1973, the executor of Mrs. Nathan's estate made claims in addition to those previously asserted by Mrs. Nathan, for his families wartime losses. At this point, Mrs. Nathan's heirs, 'through the exercise of reasonable diligence should have discovered' that they had a possible cause of action to recover the Painting."); *see also* Mark Labaton, *Restoring Lost Legacies Absent Statute of Limitations Defenses, the United States Is A Favorable Venue for Nazi-Looted Art Claims, Even When the Art Is Located Abroad*, 41:4 L.A. Law. 34, 40 (2018) ("District courts dismissed both Ullin cases, based on similar three- and four year SOLs, holding Nathan had constructive notice (imputed to her heirs) of any claims in the 1940s *during the chaos of World War II, when no court would have entertained either action*.") (emphasis added).

conversion and replevin brought by a Jewish art collector's heir for Nazi-confiscated art.[52]

It is precisely these technical, formalistic approaches to Holocaust-era artwork claims that prompted Congress to enact the HEAR Act as a call for change.[53] For example, in *Reif v. Nagy*, a post-HEAR Act case, the court granted summary judgment for plaintiffs on conversion and replevin claims related to Nazi-looted art, and denied a "laundry list" of defenses, including laches.[54] Decisions like *Reif* evidence the intent of the HEAR Act—that these cases "must be viewed in context" and heard on the merits instead of dismissed on procedural defenses.[55]

Therefore, the Second Circuit's opinion details a clear setback in this area by placing a "significant procedural obstacle[]" in the way of the Leffmanns which directly contradicts the purpose of the HEAR Act and post-HEAR Act litigation.

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[52] *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.2d 1 (CA1 2010).

[53] HEAR Act § 2(6).

[54] *Reif v. Nagy*, 61 Misc.3d 319, 327-28 (N.Y. Sup. Ct. Apr. 5, 2018), *aff'd as modified* 175 A.D.3d 107 (1st Dep't 2019) ("The tragic consequences of the Nazi occupation of Europe on the lives, liberty and property of the Jews continue to confront us today. We are informed by the intent and provisions of the HEAR Act which highlights the context in which plaintiffs, who lost their rightful property during World War II, bear the burden of proving superior title to specific property in an action under the traditional principles of New York law.").

[55] *Id.* at 323.

CONCLUSION

The Second Circuit's decision carries broad implications that contradict U.S. policy aimed at encouraging the return of looted or forced sale art to its rightful owners and heirs. Certiorari and reversal will promote the existing strong policy in favor of returning Holocaust-era art subjected to forced sales.

This case is of great significance to U.S. policy. The Second Circuit's ruling ignores prevailing American and international principles. Amici urge a grant of certiorari and a reversal.

Respectfully submitted,

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