No. 19-942

IN THE

Supreme Court of the United States

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

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

Amicus Curiae Brief of B'nai B'rith International, Raoul Wallenberg Centre for Human Rights, Simon Wiesenthal Center, et al., as Amici Curiae, in Support of Petitioner Zuckerman

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae[1] file this brief with consent of the parties. They have a strong interest in adherence by courts to historical truth in cases seeking restitution of Holocaust-era art pursuant to the propriated Art Recovery (HEAR) Act of 2016, Public L. No. 114-308 (2016). *Amici* are listed in alphabetical order with institutions listed first. These are particular interests they have in this appeal.

B'nai B'rith International is dedicated to improving the quality of life for people around the globe. It is a leader in advancing human rights; Israel advocacy; ensuring access to safe and affordable housing for low-income seniors and advocacy on vital issues concerning seniors and their families; diversity education; improving communities and helping communities in crisis. Making the world a safer, more tolerant and better place is the mission that still drives our organization.

Raoul Wallenberg Centre for Human Rights is based in Montreal. It is an international consortium of parliamentarians, scholars, jurists, human right defenders, NGOs, and students united in the pursuit

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[1] This Brief is submitted in accordance with Rule 37 of this Court. No counsel for a party authored this Brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this Brief, which is filed with timely notice to the parties and with their written consent. No counsel for Amici has charged a fee for service. To support an educational policy promoting advocacy *pro bono publico,* the Salmon P. Chase College of Law encourages counsel of record to train law students in such advocacy as part of her teaching duties, and provided resources for printing costs associated with this filing.

of justice, inspired by and anchored in Raoul Wallenberg's humanitarian legacy—how one person with the compassion to care, and the courage to act can confront evil and transform can confront evil and transform history.

The Simon Wiesenthal Center (SWC) is an international Jewish human rights organization dedicated to repairing the world one step at a time. Based in Los Angeles, the SWC Snider Social Action Institute generates changes by confronting anti-Semitism, hate, and terrorism, promoting human rights and dignity, standing with Israel, defending the safety of Jews worldwide, and teaching the lessons of the Holocaust for future generations.

Omer Bartov is the John P. Birkelund Distinguished Professor of European History and Professor of History and Professor of German Studies at Brown University. He is the author of many books, including *Murder in Our Midst: Mirrors of Destruction: War, Genocide, and Modern Identity* (2002).

Michael Berenbaum is Professor of Jewish Studies at the American Jewish University, Los Angeles. He served as Project Director of the United States Holocaust Memorial Museum, and is aware of the ethical obligation of museum directors to refrain from acts that would promote a market in stolen goods. *See* Michael Berenbaum, *The World Must Know: The History of the Holocaust as Told in United States Holocaust Memorial Museum* (2005).

Stuart E. Eizenstat is former U.S. Ambassador to the European Union, Under Secretary of

Commerce, Under Secretary of State, Deputy Secretary of the Treasury, and Special Representative of the President and Secretary of State on Holocaust Issues. He is the author of *Imperfect Justice: Looted Assets, Slave Labor, and the Unfinished Business of World War II* (2003), and was the principal negotiator for the United States Government of the *Washington Principles on Nazi-Looted Art* (1998) and the *Terezín Declaration* (2009).

Richard Falk is the Albert G. Milbank Professor Emeritus of International Law at Princeton University, and Research Fellow, Orfalea Center, University of California, Santa Barbara. He is the author of *On Humane Governance: Toward a New Global Politics* (1995).

Eugene J. Fisher directed Catholic-Jewish relations for the U.S. Conference of Catholic Bishops from 1977 until 2007. He has published over 20 books and 300 articles in the field of Christian-Jewish relations.

Rabbi Irving Greenberg is past President of Jewish Life Network–Steinhardt Foundation, former Chairman of the United States Holocaust Memorial Council, and a prolific author.

Peter Hayes is Professor of History and German, Theodore Zev Weiss Holocaust Educational Foundation Professor of Holocaust Studies Emeritus, Northwestern University. He is the author of *Why? Explaining the Holocaust* (2017).

Marcia Sachs Littell is Professor Emerita of Holocaust and Genocide Studies at Stockton University. She is a prolific author on the Holocaust

and genocide, and director emerita of The Scholars' Conference on the Holocaust and the Churches.

Wendy Lower is Director of the Mgrublian Center for Human Rights, John K. Roth Professor of History at Claremont McKenna College. She is Acting Director, Mandel Center for Advanced Holocaust Studies, USHMM. She is the author of *Hitler's Furies: German Women in the Nazi Killing Fields* (2013).

Sister Carol Rittner, RSM, is Distinguished Professor of Holocaust and Genocide Studies emerita at Stockton University. She is a prolific author and editor of books relating to the Holocaust and genocide. She is also the producer-director of the Oscar award-winning documentary film, "Courage to Care" (1985), and editor of an accompanying volume.

John K. Roth is the Edward J. Sexton Professor Emeritus of Philosophy and founding Director of the Center for the Study of the Holocaust, Genocide, and Human Rights at Claremont McKenna College. He is a prolific author and editor of books relating to the Holocaust and genocide, and edits the *Holocaust and Genocide Studies Series.*

Lucille A. Roussin is founding Director of the Holocaust Restitution Claims Practicum at Cardozo School of Law, where she taught a seminar on Remedies for War-Time Confiscation. She was Deputy Research Director of the Art and Cultural Property Team of the Presidential Commission on Holocaust Assets in the US.

William L. Shulman is President of the Association of Holocaust Organizations, a network of organizations and individuals for the advancement of

Holocaust programming, awareness, education, and research.

Stephen Smith is Executive Director of the University of Southern California Shoah Foundation, UNESCO Chair on Genocide Education, and Adjunct Professor of Religion. His publications include: *Never Again! Yet Again! A Personal Struggle with Holocaust and Genocide* (2009).

Alan Steinweis is Professor of History and Miller Distinguished Professor of Holocaust Studies at the University of Vermont. He is the author of *Art, Ideology, and Economics in Nazi Germany* (1993), *Kristallnacht 1938* (2009).

SUMMARY OF THE ARGUMENT

The HEAR Act requires that courts not repeat the mistakes of federal courts that required the Act's adoption in the first place. The Second Circuit has relied on unjustified excuses, such as the doctrine of *laches*, to avoid dealing with uncomfortable truths and the merits of Holocaust-era art claims in accordance with long-standing foreign and domestic law and policy.

The historical realities of Jews fleeing Nazi Germany moved Congress to wipe out the statute of limitations defense in such claims whereas many of our judges continue to turn a blind eye. Defenses should not be over-extended to bar fair resolution of cases seeking recovery of Flight Art in light of these realities—*on the merits*. Further, museums are obligated to investigate such sales in researching the provenance of their paintings and cannot be allowed

to dupe judges into a presumption of a valid good faith sale with the mere existence of a receipt.

ARGUMENT

The Metropolitan Museum of Art (the "Met") has convinced lower courts that Jews forced to flee for their lives, just barely avoiding the Third Reich, were able to transfer their property freely and voluntarily as they chose. The Second Circuit let such falsehoods remain, staining the judicial record by applying the *laches* doctrine to swallow the entirety of the HEAR Act. No U.S. case has addressed the uncomfortable issue of "Flight Art" head-on. It should be defined as 'artworks Nazi persecutees were forced to sell to pay discriminatory taxes, including the infamous Flight Tax, and make use of precious, hard-to-obtain visas to flee the continent.' The truth of refugees' duress held fast no matter where the property or refugees managed to get before being caught in the Nazis' web. Jews often faced certain death if they could not assemble enough Reichmarks to pay the taxes.

I. The Court Should Grant the Writ Because American Policy Crafted During and After World War II is Harmonious With the HEAR Act Supporting Restitution of Flight Art.

Diplomats from the State Department played a leading role in securing public commitment by the forty-four nations that adopted the Washington Conference Principles on Nazi-Confiscated Art. *See generally,* Washington Conference Principles on Nazi-Confiscated Art

(Dec. 3, 1998), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf. Additionally, the Terezín Declaration, signed by forty-six countries, including the United States, emerged from an international conference in June 2009. Signatories committed "to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims* and all the relevant documents submitted…." *See* Prague Holocaust Era Assets Conference: Terezín Declaration, "Nazi-confiscated and Looted Art," 2-3 (June 30, 2009), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf. Special Adviser to the Secretary of State for Holocaust Issues and former Ambassador to the European Union, Stuart E. Eizenstat, was the leading figure in Holocaust restitution throughout these negotiations.[2] In Washington, he stated:

> We can begin by recognizing this as a moral matter—*we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law* to people whose property and very lives were taken by

[2] *E.g.* STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003).

> one of the most profoundly illegal regimes the world has ever known.[3]

U.S. policy dating back prior to D-Day calls for effective, fair, fact-based resolution of Nazi-looted art claims. American diplomats led efforts to warn countries against looting in the London Declaration of January 5, 1943, 8 Dept. St. Bull. 984-85 (1952), which "declare[d] invalid any [coerced] transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, *or of transactions apparently legal in form, even when they purport to be voluntarily effected.*" (emphasis added).

On June 23, 1943, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas was established. Chaired by Supreme Court Justice Owen J. Roberts, the commission helped the United States Army and Armed Forces protect cultural works in Allied occupied areas. Before completing the work, Roberts wrote to museums urging them to be diligent in checking provenance of new works of art, to ensure that no American museum was purchasing looted art. During World War II, the Monuments, Fine Arts, and Archives Section of the Allied Armies was established to retrieve and return cultural artifacts and materials found during and after the war even from crooked art

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[3] Stuart E. Eizenstat, "In Support of Principles on Nazi-Confiscated Art," Presentation at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998), http://fcit.usf.edu/HOLOCAUST/RESOURCE/assets/art.htm (emphasis added).

dealers. *See, e.g.,* Michael Kimmelman, "The Void at the Heart of 'Gurlitt: Status Report,'" *The New York Times*, Nov. 19, 2017.

Immediately after the war, the International Military Tribunal at Nuremberg evaluated detailed evidence of *coerced sales* and declared the plunder of art a war crime and recognizes it thus even today. Who did what and to whom was clear to Justice Robert Jackson, Chief Prosecutor of the principal case against Nazi leaders and their collaborators. The fact-finders found strong evidence of a criminal conspiracy on the looting charges and convicted most perpetrators. *See* MICHAEL MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY* (2d ed. 2017).

In 1952, Jack B. Tate, Acting Legal Adviser in the Department of State, wrote:

> [The U.S.] Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . . [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.

26 Dep't. St. Bull. 984-85 (1952).[4]

One cannot forget what was so obvious during and immediately after the war. Unwinding forced transactions from the Nazi era requires thoughtful consideration of historical realities, not overly simplistic "common sense" drawn from assumptions about how people behave in normal times and when refugees could assert their rights.

In today's parlous times of fake news and exaggerated claims, which diminish the quality of our democracy, it is unseemly for the judiciary to allow lawyers to further corrode the judicial duty of accurate fact-finding by cutting off testimony about what actually happened in Germany from 1933 to 1945. If the decisions below are not reversed, it could easily have the effect of foreclosing any meaningful access to the judiciary by rightful heirs to hundreds of Jews whose families were dispossessed by adventitious art dealers and official Nazi rules that charged Jews exorbitant sums for a so-called "exit visa." Jews who managed to get out were—to use a term from Nazi-speak—"*gereinigt*" ("cleaned") of nearly all their assets in bank accounts, homes, furnishings, books, and paintings. If any of the Met's doyens read *The New York Times* or *The New Yorker* (see pp. 12, 13-14 *supra*) they surely know this sad tale of plunder. And their lawyers surely have read

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[4] Once the Court of Appeals for the Second Circuit was fully informed of the government's views of coerced "transactions" during the Nazi era in Germany, it acted *sua sponte* to reverse its previous ruling in the same case. *Bernstein v. N.V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954).

the *Menzel* and *Lubell* cases cited above. This Court should not turn a blind eye to the dirty hands of those now seeking equity.

Refusing to allow a fair and full hearing of this claim is yet another instance of counter-factual, unfounded judicial avoidance of difficult truths about the desperation of Jews fleeing for their very lives—and who profited. True, it does not adopt the disgusting language of classical nineteenth-century anti-Semitism. But, it fails the tests of procedural fairness, the scientific commitment to rigorous honesty in historical research, and the moral duty of respect owed to millions *See* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 19 (1994).

Read fairly in the context of the inadequate judicial performance after the adoption of the Washington Principles, and in the context of the testimony at the Senate hearings cited above, the HEAR Act—enacted by a unanimous Congress—marches to a different drummer. The time to hear and follow that new drumbeat is now.

II. The Court Should Grant the Writ Because Evaluating Whether a Refugee Could Have Asserted a Claim Earlier Requires an Understanding of the all-Encompassing Web the Nazis Wove to Extract all Jewish Assets for the Benefit of the Reich Economy Before Anyone Could Flee With a Visa.

A. Duress claims were masked as routine commercial transactions.

Determining whether a complaint is timely is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Cf. Ashcroft v. Iqbal*, 566 U.S. 662, 679 (2009). "Common sense" requires a deeper level of historical insight than was evidenced in this case. *Id.* Its dismissal compounds an error made in *Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 495 (S.D.N.Y. 2010), *aff'd*, 403 F. App'x 575 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 102 (2011).

Because the Nazis used many tactics to mask involuntary transactions in a cloak of legality, courts should view documentation of such transactions with a critical, historically informed eye. *See, e.g.*, WILLIAM L. SHIRER, *THE NIGHTMARE YEARS, 1930-1940* 30 (1992) (quoting the U.S. Consul General in Vienna immediately after the Anschluß of Austria in March 1938: "There is a curious respect for legal formalities. The signature of the person despoiled is always obtained, even if the person in question has to be sent to Dachau in order to break down his resistance.").

From their very first days in power, the Nazis forced Jews to abandon their property and flee. New York's leading decision found that fleeing Jews could not be deemed to have abandoned their property. *E.g., Menzel v. List*, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967); *rev'd on other grounds*, 246 N.E.2d 742 (N.Y. 1969). The Jews' loss of their property as they fled "for their lives was no more voluntary than the relinquishment of property during a holdup." *Id.* The landmark *Menzel* case reinforced this truth for all Holocaust-era expropriated art cases to come:

> Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief conveys no title as against the true owner . . . Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.

246 N.E.2d at 819. District Judge Korman reminded us of this important truth in his concurrence in *Bakalar v. Vavra*:

> The assumption that the Perls Galleries acted in good faith was undermined by its own conscious avoidance. As the New York Court of Appeals explained in the course of upholding the award of damages against it in favor of the good

> faith purchaser, the Perls Galleries was responsible for the position in which it found itself. Specifically, the Perls Galleries would not have been in that position if it had satisfied itself that it was getting good title from the art gallery from whom it purchased the artwork. Instead, the Perls testified "that to question a reputable dealer as to his title would be an 'insult.'" Perhaps, [the Court of Appeals responded], but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked.

Bakalar v. Vavra, 619 F.3d 136, 150 (2d Cir. 2010) (Korman, J., concurring) (*citing Menzel*, 24 N.Y.2d at 98, 298 N.Y.S.2d 979, 246 N.E.2d 742). It is now up to U.S. courts to stop avoiding the uncomfortable truth that when a deflated price was paid for an artwork so a Jew could pay discriminatory and extortionate "taxes" to flee the Nazis, the "transaction" was really a holdup.

After the Nazis' seizure of power, the effects of a series of boycotts, discriminatory treatment, conscripted real property and business forfeitures, and specific legal measures served to rapidly undermine Jewish businesses, employees, and professionals. Jews were not only excluded from government service, but state and Nazi Party initiatives progressively drove them out of many

trades and professions. RICHARD J. EVANS, THE THIRD REICH IN POWER 1933-1939 392 (2005).

James McDonalds, former High Commissioner for Refugees, detailed the economic devastation of German Jews preventing them from fleeing because of financial predation. Text of Resignation of League Commissioner for German Refugees, *The New York Times* (Dec. 30, 1935), https://www.wdl.org/en/item/11604/view/1/11/. More than half of Jewish businesses were sold or liquidated by the summer of 1938; the converse was true for non-Jews—they were the ones buying the businesses. Evans, *supra*, at 18.[5]

Jewish fire sales to art dealers were not routine, commercial transactions. Nazi officers were obsessed with art and wanted to accumulate it, which sent art market profiteers into a frenzy. *E.g.,* JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH (1996). Imprisonment of family members was used as a bargaining chip for sales. *E.g.,* SIMON GOODMAN, THE ORPHEUS CLOCK (2015). As for the middlemen profiteering, Hermann Goering did not care whether the art dealers were sympathizers or not—or even Jewish. *See* LEONARD MOSLEY, THE REICH MARSHALL 263 (1974) (relaying how Goering instructed part-Jewish dealer Bruno Lohse to deal with the "great many" Jewish art dealers and "forget

[5] For a reliable history of how the extortion of Jewish property progressed even in informal ways, see MARTIN DEAN, ROBBING THE JEWS: THE CONFISCATION OF JEWISH PROPERTY IN THE HOLOCAUST, 1933-1945 11 (2008).

about the racial background of the dealers with whom you come in contact.").

B. Returning flight art to refugees' heirs today does not unfairly punish American collectors and museums.

The Nazis allowed select Jewish art dealers to funnel undesired "degenerate" artworks out of Europe to "purify" the German art scene and convert undesirable works into currency to bolster the German economy. *E.g.,* LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 53 (1994). Americans were willing buyers who scooped up bargains and converted them to tax-deductible donations to our esteemed museums and institutions: "The paintings came to America because… there was no place else to sell them." *E.g.,* Adam Zagorin, "Saving the Spoils of War," *Time*, 87 (Dec. 1, 1997) (quoting Willi Korte, then consultant on Holocaust losses to the Senate Banking Committee).

The massive quantity of art the Nazis stole was well-known in American art circles, especially at The Met. Their 1943 Director, Monuments Man[6] Francis Henry Taylor, wrote for the *New York Times*: "[n]ot since the time of Napoleon Bonaparte has there been wholesale looting and destruction of art property that

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[6] *See* Part III, *infra*. *See also, e.g.,* ROBERT EDSEL and BRET WITTER, THE MONUMENTS MEN: ALLIED HEROES, NAZI THIEVES, AND THE GREATEST TREASURE HUNT IN HISTORY (2009) (describing the work of the approximately 345 "Monuments Men" and women).

is going on today in the occupied countries."[7] Taylor was succeeded by Monuments Man James J. Rorimer, who later told the *New York Times*: "[w]hen things are offered for sale, we are very careful to determine whether they are war loot." Milton Esterow, "Europe is Still Hunting Its Plundered Art," *New York Times*, 1 (Nov. 16, 1964) (reporting "From Greece to California, hundreds of art scholars, museum directors, private galleries, and police organizations, including Interpol, the international police organization, are watching for the reappearance of works stolen from museums, churches, libraries, galleries, and private collections.").[8] Yet the

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[7] Francis Henry Taylor, "Europe's Looted Art: Can It Be Recovered?," *New York Times*, Sept. 18, 1943, SM 18. See also *New York Times*, "In the Goering Gallery," Feb. 26, 1943, 12; *New York Times*, "Masterpieces of Art Found in Nazi Mine," May 5, 1945, 14. *New York Times,* "Nazi-'Purged' Art Is Acquired Here," June 8, 1941, 21; *New York Times*, "Nazis Deny Art Thefts," Jan. 14, 1943, 3; *New York Times*, "Free Art," June 27, 1942, X5. See also *New York Times*, "New Exhibits Crowd Art Show Calendar," Apr. 21, 1946, 17 (discussing exhibition at Buchholz Gallery of Max Beckman "who was driven from Germany by the Nazis"); *New York Times*, "Nazi-Seized Art Is Shown," June 14, 1947, 4 (discussing Philadelphia show of looted Dutch masters recovered by the Monuments Men); *New York Times*, "Museum to Show Dutch Art Work: Paintings Looted by the Nazis from Netherlands Will Go on View at Metropolitan," June 29, 1947, 17.

[8] In October of 1946, a former OSS (Office of Strategic Services, a U.S. wartime intelligence agency) officer and member of the Art Looting Investigation Unit broke the story with a five-page piece; *see* James Plaut, "Hitler's Capital: Loot from the Master Race," *The Atlantic*, Vol. 178, No. 4 (Oct. 1946) 75-80. Journalist Janet Flanner began a lengthy three-part essay on the Great

provenance of *The Actor* was misrepresented for forty-five years. There was no informed determination by any dealer or purchaser that the masterwork's indisputable owner, Paul Friedrich Leffmann, *voluntarily* sold the painting.

New York law's "onerous" burden on art buyers "well serves to give effect to the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril." *Solomon R. Guggenheim Found. v. Lubell,* 153 A.D.2d 143, 153, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990). In the 2010 *Bakalar v. Vavra* case, the Second Circuit reversed the misallocation of burdens of proof in a unanimous opinion. *See Bakalar v. Vavra*, 619 F.3d 136, 142 (2d Cir. 2010). On remand, however, the trial court again departed from long-standing New York art law jurisprudence. The court turned New York policy on its head ruling that the burden remained on the heirs to prove duress. *See Bakalar v. Vavra,* 819 F. Supp. 2d 293, 300-301 (S.D.N.Y. 2011). These errors were not corrected by the Second Circuit which pressed a heavy thumb on the scales of justice against the ability of heirs to even file a claim without fear of their emotionally and financially draining efforts being dismissed as too little too late.

> What makes this particular crime even more despicable is that this art theft,

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Nazi Art Heist called "The Beautiful Spoils." The essay ran in three consecutive issues of *The New Yorker* beginning in February 1947. Ten years later Harper & Row published Flanner's volume, *Men and Monuments* (1957). *See also* "Restitution of Identifiable Property to Victims of Nazi Oppression," in 44 *Am. J. Int'l. Law* 39 (1950) 39-67.

> probably the greatest in history, was continued by governments, museums and many knowing collectors in the decades following the war. This was the dirty secret of the post-war art world, and people who should have known better, were part of it.[9]

The desirability of promoting the free trade of goods is largely premised on the concept of a good faith purchaser engaged in a routine commercial transaction, such that they are entitled to legal peace in the future. Courts cannot, consistent with New York law, allow this unfounded presumption to prevent honest inquiry today using the seemingly innocuous doctrine of *laches*. Like the Perls Galleries that traded in the Menzels' Monet, the middlemen purchasers of *The Actor* should have known better, and the Met should have reconciled the painting's provenance before eagerly displaying it.

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[9] Testimony of Ronald S. Lauder, former U.S. Ambassador to Austria, former Chairman (current Board member) of MoMA, founder of the Commission for Art Recovery and co-founder of the Neue Galerie focused on Austrian artists like Gustav Klimt and Egon Schiele, to Congress in support of the HEAR Act on June 7, 2016, *https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf*.

III. The Court Should Grant the Writ Because the HEAR Act Requires Judges to Resolve the Claim on the Facts and Merits Without Genuflecting to Nonfactual Imaginations of the Past That Are Not Based in the Record, But That Masquerade as "Common Sense" Defenses.

As depicted in the chart "Federal Holocaust-Era Art Cases" https://www.lootedart.com/web_images/pdf/Chart%20of%20Dismissed%20Federal%20Holocaust%20Claims.pdf, for sixteen years after the landmark case of *Austria v. Altmann*, 541 U.S. 677 (2004), courts subjected Nazi-era art cases to a presumption of invalidity such that only one claimant successfully recovered Nazi-looted art in federal court.[10] Congress held hearings and drafted legislation designed to correct this line of misguided cases. After developing a factual record, the House and Senate unanimously adopted the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"), and President Obama signed it into law. Pub. L. 114-308, 114th Cong., H.R. 6130 (22 U.S.C. § 1621 note) (Dec. 16, 2016). Recovery of the art is an important part of preserving Jewish

[10] Since then, the heirs of Fritz Grunbaum successfully recovered "Woman in a Black Pinafore" and "Seated Woman" on summary judgment in the Supreme Court of New York. *Reif v. Nagy*, 149 A.D. 3d 532 (N.Y. App. Div. 2017), summary judgment for plaintiffs. The same heirs were denied restitution after trial in *Bakalar v. Vavra*, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd, Bakalar v. Vavra*, 500 Fed. Appx. 6 (2d Cir. 2012). The cases are diametrically opposed as to *fact-finding*.

history and culture, which Hitler sought to wipe from the face of the earth. *See, e.g.,* Nicholas, *supra*.

Perhaps the worst misapplication to a Holocaust-era expropriation claim occurred in *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007). It held that a Holocaust victim's claim expired in 1941, as if the 1938 purported sale were a routine commercial transaction. In December 1938, Martha Nathan sold some of her artwork, including the painting in question, to Jewish art dealers in Switzerland. Unfortunately, the court did not discuss the very high probability that the sale of the painting resulted from duress in the events leading up to World War II. The court's implicit characterization of these transactions as "fair" displays a shocking inattentiveness to facts and constitutes an improper finding of fact on a motion to dismiss: "In short, this sale occurred outside Germany by and between private individuals who were familiar with each other. The Painting was not confiscated or looted by the Nazis; the sale was not at the direction of, nor did the proceeds benefit, the Nazi regime." *Id.* at *2.

This finding implied that the Nazis' power reached only to the borders of the Reich, which is simply false. As recently recognized by the Second Circuit in *Bakalar*, the Nazis pressured Jews to transfer property in exchange for their safety: "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich . . . and those who remained, with the Reich

seeking to appropriate their domestically as well as their externally held assets." *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

The present case is exactly the type of case that the HEAR Act sought to correct. A June 7, 2016 hearing by the Subcommittee on the Constitution of the Senate Committee gives us two samples of poignant testimony.

Dr. Agnes Peresztegi, President of the Commission for Art Recovery, testified:

> The Committee should consider that the HEAR Act would not achieve its purpose of enabling claimants to come forward if it eliminates one type of procedural obstacle in order to replace it with another. To cite some concerns: narrowing the definition of looted art, shifting the burden of proof unnecessarily in some instances to the claimant; and generally adding or confirming other procedural obstacles. Cases related to Holocaust looted art should only be adjudicated on the merits.

Testimony of Agnes Peresztegi, Commission for Art Recovery Before the Senate Judiciary Committee Subcommittees on The Constitution & Oversight, Agency Action, Federal Rights and Federal Courts, 2 (June 7, 2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf.

Replacing one obstruction with another is exactly what happened in the present case. If Mr.

Leffmann fleeing for his life was not subject to duress, then it is unfathomable what duress means in any jurisdiction.[11] As accurately reflected in the Amended Complaint in this case, the Nazis used the Flight Tax and other means to confiscate most of fleeing Jewish families' wealth. It distorts historical reality to suggest that the financial despair of Jews in 1933, until the passage of the first Nuremberg law in 1935, was the result of a series of isolated private setbacks brought about by generalized severe financial conditions akin to the Great Depression. It is even more horrific to imply the same through 1938.

Ambassador Ronald S. Lauder stated the purpose of the HEAR Act deftly:

> The term "by the Nazis" includes the Nazis, their allies *and any unscrupulous individuals regardless of their location, who took advantage of the dire state of the persecutees,* and the term "confiscation" includes any taking, seizure, theft, forced sale, sale under duress, *flight assets*, or any other loss of

[11] The District Court's use of *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 123 (2d Cir. 2001) (NFL negotiations); *Bus. Incentives Co. v. Sony Corp. of Am.*, 397 F. Supp. 63, 69 (S.D.N.Y 1975) (evaluating "hard bargaining positions" for a party experiencing financial difficulty) and *Mfrs. Hanover Tr. Co. v. Jayhawk Assocs.*, 766 F. Supp. 124, 128 (S.D.N.Y. 1991) (describing hard ball negotiations regarding a refinancing agreement) is profoundly misguided. New York cases about duress are typically about corporate deals. To compare the Shoah to deal-making in American football is a gross mistake.

> an artwork that would not have occurred absent persecution during the Nazi era.

Testimony of Ronald S. Lauder Before the Senate Judiciary Committee Subcommittees on The Constitution & Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, 2, n.1 (June 7, 2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Lauder%20Testimony.pdf (emphasis added).

Like Justice Klein in *Menzel,* the Ninth Circuit in *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. 2014) (finding a forced transaction void in accordance with the Washington Principles and Terezín Declaration), Justice Ramos in *Reif v. Nagy,* and Judge Rakoff in *Schoeps v. The Museum of Modern Art and Solomon Guggenheim Foundation*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009), Justice John Paul Stevens knew a "holdup" when he saw one. He stated the point on coercion clearly and bluntly in *Republic of Austria v. Altmann*, 541 U.S. 677, 682-683 (2004). There is particular difference in the details of cases that come before any court. But the recurrent stories of Nazi-looted property fit a larger pattern and practice. They are an integral and connected part of the criminal conspiracy of the Nazis in their war against Jews. The very fact that Flight Art was bought at bargain-basement prices is itself an indication of criminal theft. Under the law of New York, stolen property is not dealt with causally under a "finders keepers" rule. The Flight Art must be returned.

CONCLUSION

For the foregoing reasons, the Court should GRANT Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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