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 COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMBASSADOR JAMES D. BINDENAGEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

James D. Bindenagel[1] served as a diplomat in East, West, and united Germany from 1972 to 2002, including serving as Deputy U.S. Ambassador. His distinguished diplomatic career spanned the fall of the Berlin Wall, end of the Cold War, German reunification, and the litigation that then ensued regarding unresolved issues relating to the Holocaust, including Holocaust-era assets.

Ambassador Bindenagel served as U.S. Ambassador and Special Envoy for Holocaust Issues from 1998 to 2002, serving as Conference Director for the Washington Conference on Holocaust-Era Assets and editor of its published proceedings. He also represented the United States at the Washington Conference, and in the negotiations leading to the creation of the German Foundation for Remembrance, Responsibility and Future, a multi-billion dollar fund established as part of the resolution of U.S. Holocaust-related class action litigation, as well as in the other major U.S. Holocaust litigation settlements. As such, he is intimately familiar with the issues surrounding Holocaust-looted art, especially as to the myriad time-based defenses frequently used to frustrate the claims of survivors and their heirs.

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1. Counsel for Appellant and Appellees have consented to Mr. Bindenagel participating and filing this brief as an amicus curiae. Counsel can certify that counsel of record for all parties received notice at least 10 days prior to the due date of Mr. Bindenagel's intention to file this brief. No other counsel for any party authored this brief in whole or in part, and no person or entity other than counsel to amicus curiae made a monetary contribution to the preparation or submission of this brief.

Given his experience, Ambassador Bindenagel understands that U.S. policy as to Holocaust-era art claims is guided by the principle that an array of time-based "technical defenses" should not be available to thwart the resolution of Holocaust-era claims on their merits. As much as anyone, Ambassador Bindenagel understands that the HEAR Act was intended to accomplish that goal, and that the ruling of the Second Circuit threatens to irreparably frustrate U.S. policy in this area.

Ambassador Bindenagel currently serves as a senior non-resident fellow with The German Marshall Fund of the United States, and is the Henry Kissinger Professor and Director of the Center for International Security and Governance at the Rheinische Friedrich-Wilhelms-University in Bonn, Germany.

SUMMARY OF ARGUMENT

For over seventy years, U.S. policy regarding the return of Holocaust-era assets has been consistent, anchored in an understanding that "[t]he Nazis' policy of looting art was a critical element and incentive in their campaign of genocide" against the Jewish people. Holocaust Victims Redress Act, Pub. L. No. 105-158, § 201(4), 112 Stat. 15, 17 (1998). Thus "the Nazi regimentation of inhumanity we characterize as the Holocaust, marked most horrifically by genocide and enslavement, also entailed widespread destruction, confiscation, and theft of property belonging to Jews." *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 430 (2003) (Ginsburg, J., dissenting). The nature and unprecedented scale of Nazi looting not only facilitated the strategy of eliminating Jews from all spheres of society, it was itself an act of genocide profoundly different from the

"normal" circumstances from which claims for replevin might typically arise.

Holocaust looting created circumstances that the law was ill-equipped to address, both as to a victim's ability to police and pursue their property, and as to the tracking of the stolen property itself. It was in this world of abnormal theft that Paul and Alice Leffmann found themselves. The Leffmanns, German-Jewish refugees, who fled to Italy in 1937 only to flee in terror again in 1938, were forced to sell their treasured Pablo Picasso painting, *The Actor* (the "Painting"), in order to finance their escape (the "Sale"). The Painting ultimately was resold and donated to The Metropolitan Museum of Art ("The Met") in 1952—which then failed to correctly list the Painting's provenance for decades.

The abnormality of the looting process was then compounded after World War II. Although the Allies had widely publicized the fact of Nazi looting, especially to museums and the professional art market, no systematic or uniform approach ever was implemented to address how Holocaust victims or their families should identify, locate, or recover their property. Absent a systematic legal approach, Holocaust-era art claims have always been uniquely susceptible to an array of time-based defenses that go beyond simple statutes of limitation—a problem expressly acknowledged at the two major international conferences dedicated to Holocaust-era asset issue (the Washington and Prague conferences). But, as recognized by the U.S. State Department and Congress, time-based defenses premised on transaction occurring in societies operating under the rule of law cannot fairly be applied to claims for art looted or forcibly sold under the unique and profoundly illegal circumstances of the Holocaust.

The Holocaust Expropriated Art Recovery ("HEAR") Act of 2016 represented the first attempt by the United States to address this issue by ensuring that museums and other holders act honorably, equitably, and responsibly by not relying on time-based technical defenses, such that Holocaust-era art claims could be resolved on their merits. The HEAR Act does this by creating a limited six-year federal window for Holocaust survivors and their heirs to bring claims for art lost during the Holocaust. Addressing the patchwork quilt of state law time-based defenses—*in addition to* statutes of limitations—Congress employed broad language to preempt "*any* defense at law relating to the passage of time." HEAR Act, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (2016) (emphasis added). The Second Circuit's decision eviscerates the HEAR Act by reading the Act as limited to state statutes of limitations, thus allowing the continued use of the time-based defenses that Congress knew are routinely used to thwart potentially meritorious claims. The Court's review and intervention is warranted.

ARGUMENT

I. The nature of Holocaust looting was uniquely abnormal and tainted all transactions involving Jewish property.

The Nazi regime murdered six million men, women, and children simply because they had Jewish blood. For each victim, death was only the final step in a State-administered process of exclusion, expropriation, and extermination. From 1933 to 1945, the Nazis wielded the rule of law as a tool of oppression, enacting over 400 decrees aimed at eradicating "Jewish corruption" from

Germany and German-controlled Europe. *See United States* v. *Goering*, Judgment, 6 F.R.D. 69, 79–82, 126–30 (Int'l Military Trib. at Nuremberg 1946) ("Nuremberg Judgment"). This co-opting of law for illegal purposes infected all transactions involving Jews and Jewish-owned property, including the Sale at issue here.

A. The Nazis stripped Jews of all legal vestiges of personhood, including as related to their property.

The Leffmanns lived in Germany until 1937. App. to Pet. Cert. ("App.") 85. Under Nazi rule, Jews were stripped of all identity, except that of "enemy." Götz Aly, Hitler's Beneficiaries: Plunder, Racial War and the Nazi Welfare State 91 (Jefferson Chase trans., 2007); Hector Feliciano, The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art 40 (Tim Bent trans., 1997). Germany revoked Jewish citizenship and Jews were later declared stateless, thereby forfeiting all protections at law. Unlike in a "normal" society, Jews had no right to invoke normal processes by which the State would protect their person or property, nor could they readily seek redress from the courts. Jews ceased to exist as citizens under German law; they had become, at best, "hostages" in a country that was once their own. David Cesarani, Final Solution: The Fate of the Jews 1933–1949 117 (2016). As Jews, they were identifiable, segregated, and in peril.

German Jews like the Leffmanns witnessed firsthand the terror of this reality. By the mid-1930s, even the judiciary had succumbed to "Himmler's vision of unrestrained police power" and coordinated with the Gestapo to fill

new and ever-expanding camps with prisoners. Nikolaus Wachsmann, KL: A History of the Nazi Concentration Camps 64 (2015). Initially, the Reich unleashed a campaign of forced Jewish emigration, using fear to "encourage" and ultimately compel hundreds of thousands of German Jews to flee the country. Cesarani, *supra*, at 118. By 1937, Nazi strategy was intent on "eliminating the economic basis for Jewish existence." *Id.* at 127. To facilitate their elimination from the economy, Jews were required to register their assets with the State—whether located in Germany *or abroad*—which registries then facilitated future asset confiscations. Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War 39 (1995).

Of the hundreds of anti-Jewish measures initiated by the Reich, those aimed at Jewish property created "an almost inescapable legal net which the Nazis used to snare their victims." Jonathan Petropoulos, Art as Politics in the Third Reich 84 (1996). Jewish businesses and assets, including art and cultural property, were subject to forced sale to Aryan trustees for a fraction of their value. Richard Z. Chesnoff, Pack of Thieves: How Hitler and Europe Plundered the Jews and Committed the Greatest Theft in History 8–9 (2001). The proceeds were paid into blocked bank accounts to which Jews had no access, and which ultimately were seized by the State. Nicholas, *supra*, at 104. It is well-documented that Jews were forced to sell their remaining valuables at steep discounts "in fear of imminent expropriation." Cesarani, *supra*, at 161 (citing extensive examples).

In the years leading up to the war, Jews were allowed to escape, but only by buying their way out. Those too poor to emigrate or who could not find a destination willing

to receive them would be, over time, forcibly relocated to ghettos, and then to death or concentration/labor camps. *Id*. at 163–65; Nuremberg Judgment at 127–28. For Jews, economic liquidation was a portent of physical liquidation—a signpost of eventual genocide. *See* Irwin Colter, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 Cardozo L. Rev. 601, 607–09 (1998).

For those prepared to flee, the Nazis imposed a "Reich Flight Tax" that forced Jews to relinquish almost all of their property to layers of Nazi bureaucrats. Chesnoff, *supra*, at 21–22. To satisfy State-mandated exit fees, Jews sold possessions "which in normal times they would never have let go." Nicholas, *supra*, at 31. Even then, the regulatory maze and repressive exchange rate left Jews fleeing Germany with almost nothing. As the American Counsel General in Berlin recorded:

> There is a curious respect for legalistic 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. The individual, moreover, must go through an endless series of transactions in order to liquidate his property and possessions, and proceed abroad penniless.

Id. at 39.

The Reich thus used the color of law to certify a system of mass extortion—or "thefticide"[2]—that stripped Jews of

2. *See* Cotler, *supra*, at 602 (using the term "thefticide" to describe what was "the greatest mass theft on the occasion of the greatest mass murder in history").

their liberty and property. *See, e.g.*, Martin Dean, Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945 (2008); Richard J. Evans, The Third Reich in Power 332–411 (2005); David Cesarani, Becoming Eichmann: Rethinking the Life, Crimes, and Trial of a Desk Murderer 67 (2004); Ingo Müller, Hitler's Justice: The Courts of the Third Reich (1991). This process, experienced firsthand by the Leffmanns, was designed to terrorize, and as evidenced by the flood of refugees, it was wildly successful. It was also entirely inequitable. As Professor Karl Loewenstein wrote in 1936, normal rules of law no longer protected or applied to the Jews:

> Jews are finally driven out even from the remaining nooks and crannies of economic life by the official economic boycott, more or less endorsed by the courts. . . . Obligations of contract, vested rights, the right to dispose freely of property, were superseded by political coordination. Legal titles were voided and property confiscated under the pressure of party members and officials.

Karl Loewenstein, *Law in the Third Reich*, 45 Yale L.J. 779, 797, 807 (1936). The historical record leaves no doubt that artworks extorted from Jews through forced sales—including sales of so-called "flight art" used to finance escape—flooded the market.

It was common knowledge among dealers, auction houses, museums, and the international art trade that, while the Nazis were otherwise busy liquidating Jewish assets, art could be acquired directly from fleeing Jews at fire sale prices. Nicholas, *supra*, at 27–30. The Reich relied

on a network of art dealers to orchestrate off-the-books transactions to evade import-export restrictions and/or conceal the provenance of acquired works. Feliciano, *supra*, at 116–17, 126–27; Jonathan Petropoulos, The Faustian Bargain: The Art World in Nazi Germany 85–87, 102–03 (2000). These dealers manipulated bureaucrats, orchestrating bounties for information on Jewish-owned art. Feliciano, *supra*, at 70–71. Oftentimes, dealers sidestepped the Nazis entirely by extorting art directly from Jews by threatening to report their collections to the authorities. This practice became so prevalent that the Nazis issued decrees to remind the public that, legally, all now "ownerless" property belonged to the State. Petropoulos, *Faustian Bargain*, *supra*, at 28–29.

At bottom, this process was wholly abnormal in terms of how the law is designed to address theft. Legal doctrines relating to property ownership and transfer rest on a foundation that assumes freedom of choice, the right to bargain, and the ability to test unfair contracts in court. In the event of property loss, the law presumes that individuals will ascertain what property is missing and report losses to the police (and often insurers), who are expected to assist in seeking recovery, *and* that other potential buyers will refrain from accepting stolen property. These presumptions, in turn, support the requirement across a range of legal doctrines that those who have lost property act with certain levels of diligence in seeking recovery, or be subject to defenses that will prevent any dispute from reaching the merits of ownership. As is obvious from the above, however, *none* of these "normal" presumptions about property loss and recovery applied to Holocaust-looted art. Rather, it was uniquely *abnormal*.

B. Fascist Italy provided no relief from Nazi-driven theft or forced sales.

As the Leffmanns escaped Germany in 1937, anti-Semitism and Nazi policy spread like a contagion across Europe. Michele Sarfatti, The Jews in Mussolini's Italy: From Equality to Persecution 122 (John and Anne C. Tedeschi trans., 2006). To the extent it had ever been a relative safe haven, the situation in Fascist Italy deteriorated quickly—keeping pressure on Jewish refugees to scatter their property in order to support further escape. The first weeks of 1938 brought State-mandated identification and census of Jews, then "Aryanization" of Jewish property, expulsion of Jews from government and the press, adoption of a legal definition of "Jew" as distinctly *other*, and the openly-reported drafting of decisive racial legislation. *Id.* at 121.

During the first nine months of 1938—*i.e.*, the months leading up to the Sale—the corrosive measures implemented against the Jews by Italy's Fascist government were among Europe's "most draconian, after Germany's, and contained certain specific provisions which were . . . even harsher than corresponding measures" employed by the Nazis. *Id.* at 124–25. Jews in Italy had become wide-awake to "the spread of an appreciable and painful . . . anti-Semitism," a specter of what they perceived as "a preordained and broadly organized scheme, which is not satisfied with simple intimidation, but aims for concrete results." *Id.* at 123 (quoting Gino Luzzatto, an Italian Jew, in January 1938).

For German-Jewish refugees like the Leffmanns, the situation in Italy was especially precarious. Since the

formation of the Rome-Berlin Axis in 1936, a German-Italian Police Agreement had allowed for the exchange of information about and identification of German Jews residing in Italy, as well as for their interrogation, arrest, and/or extradition. Renzo De Felice, The Jews in Fascist Italy: A History 232–33 (Rober L. Miller trans., 2001). By March, Italy had slammed its doors to continued immigration following Germany's annexation of Austria.

By May 1938, the Reich had formally weaponized the asset inventory system, first by requiring German Jews—including those living abroad—to declare all valuables still in their possession,[3] and then prohibiting Jews from selling "objects made from precious metals, jewelry and works of art with a value over RM 1,000" as of December.[4] Together, these orders attempted to ensure that any valuable property Jews had left not only would be sequestered by the Reich, but also would become worthless because, come December, that property could not be legally sold. The pressure was unfathomable; German Jews seeking to escape had but one choice—to sell, and sell quickly.

Without legal property rights, power to bargain, time to spare, or the ability to seek redress in court, no Jew was in a position to freely choose a buyer or obtain fair terms. Jews—especially German Jews like the Leffmanns—had no adequate legal remedies and no sources of alternative

3. Property registered in accordance with the order would "be secured in accordance with the dictates of the German economy." *Anmeldung des Vermögens von Juden*, RGBl I, 414 (Apr. 26, 1938).

4. *Verordnung* über *den Einsatz des jüdischen Vermögens,* RGBl I, 1709 (Dec. 3, 1938).

funding because they were being stripped of *all* rights in property and forced to emigrate almost destitute.[5] Jews fleeing persecution also had no ability to later rescind sales of flight art. The abhorrent reality of the Holocaust, which supplanted ordinary conditions of law, equity, and economics, thus rendered transactions like the Sale at issue irreversibly tainted.

II. Significant post-war obstacles to recovery took no account of time-based defenses.

A. Victims had no systematic means to identify, locate, or seek return of Holocaust-looted art.

After the war, art and other assets looted or forcibly sold by Jews fleeing the Holocaust were transferred from territories previously controlled by the Nazis to European nations and the United States. Notwithstanding the abnormal nature of the Holocaust, no unified framework was created to assist survivors and their families identifying, locating, or seeking return of lost art. Rather, chaos in the post-war restitution process compounded the injustices of Nazi looting and forced sales. Thus, no steps were taken to restore balance or normalcy to legal rights or obligations. Instead, Holocaust victims were left to navigate the complicated and ever-changing systems of

5. Rejection of German Jews at the Swiss border, for example, was a daily occurrence. Jewish refugees like the Leffmanns could only enter Switzerland if they paid the required fee—called "a bail"—in exchange for a *temporary* permit. For those not immediately turned away, the "J Stamp" on their passports rendered it impossible to avoid paying the "bail." *See* Salomé Lienert, *Swiss Immigration Policies 1933–1939*, 2 Int'l Holocaust Remembrance Alliance Series 41, 43, 46–48 (2016).

multiple countries—none of which were geared towards fairness for those victims.

The Monuments, Fine Arts, and Archives ("MFAA") Section of the Allied Armies, charged with protecting cultural treasures during the war, was faced with the "Sisyphean task" of returning vast repositories of recovered art in its aftermath. Nicholas O'Donnell, A Tragic Fate: Law and Ethics in the Battle Over Nazi-Looted Art 18 (2017). There were literally millions of objects, little staff, and no unified, international restitution commission or rules to guide the process. Nicholas, *supra*, at 407. The Allies implemented a policy of "external restitution," whereby artworks were returned to the countries from which they had been removed, rather than to individuals. Presidential Advisory Commission on Holocaust Assets in the United States, Plunder and Restitution: Findings and Recommendations of the Presidential Advisory Commission on Holocaust Assets in the United States and Staff Report (2000); *see also* O'Donnell, *supra*, at 18; Nicholas, *supra*, at 407–09. Each receiving nation then became responsible for identifying rightful owners and implementing its own restitution system, with no overarching body to set standards or ensure compliance. Nicholas, *supra*, at 413–14. Thus, the frenzy of Holocaust looting was replaced by the chaos of Holocaust-related property recovery.

In addition to the overwhelming trauma of the Holocaust, victims were faced with a many-headed hydra of obstacles to recover their art and other possessions. Significantly, many of these obstacles related in different ways to the passage of time. For example, claims periods set by European states were variable and discouragingly

short, taking no account for the way the law was twisted in the original looting, or the lack of a central registry of recovered property. There was no effort to extend even U.S. limitations periods, which for personal property generally do not exceed three to five years. In any event, the sheer volume of material and lack of centralized records made it nearly impossible for victims to conduct multi-jurisdictional searches, even if they had the capacity and financial means to do so.

Claimants who had lost their possessions likewise lacked evidence of that dispossessed property—or where it might have gone after it was lost and they were fleeing for their lives. The Nazis had not provided detailed receipts. Family members and heirs may not even have been aware of art for which they were entitled to restitution. Jews that escaped the Holocaust, like the Leffmanns, also may not have returned to their country of origin, and, if they did, may have been fearful of engaging with government authorities. Jennifer Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 Chapman L. Rev. 16 (2017). Indeed, "those staffing the governmental bureaucracies after the war were not too uncommonly aligned with the Nazis during the war; many were anti-Semitic and biased against the victims." *Id.* at 8.

Switzerland, where the Leffmanns emigrated from Brazil in 1947, exemplifies the failures of post-war restitution. Despite its alleged neutrality during the war, Switzerland in fact profited greatly from its role as an intermediary and repository for trafficked art, and only nominally adhered to Allied restitution protocols. Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 Kansas L. Rev. 100–02 (2002).

Britain identified a preliminary list of less than 100 works that had reached the Swiss Federation. That list—itself inconsistent with Allied records of how much looted art moved among Swiss dealers—represented the entire scope of Swiss post-war restitution efforts. The Swiss then enacted a two-year claims period (expiring in 1947) that only applied to property removed from *German-occupied* territories, thereby excluding art stolen from Germany and Austria, which had been *absorbed* by the Third Reich. Those who did bring claims in Switzerland faced serious legal hurdles, as a presumption of validity often applied to Nazi seizures or sales made under duress. *See* Independent Commission of Experts Switzerland – Second World War, Switzerland, National Socialism, and the Second World War: Final Report 473 (2002).

In the years following the Holocaust, the wrongs flowing from the lack of a systematic approach to restitution cascaded and multiplied logarithmically, leaving Holocaust victims without a framework for navigating a patchwork quilt of laws in Europe and the United States. Without knowing where their property was or even how to search for it, there was no way to ascertain which country's complex processes for bringing claims were potentially applicable. Short limitations periods in all countries then blocked many claims before claimants were even aware that a claim existed. In short, by the late 1940s, survivors like the Leffmanns would have had good reason to believe that they already had lost any chance to recover property like the Painting.

B. Museums knowingly participated in a tainted market.

U.S. museums, art dealers, and collectors were acutely aware of the flow of tainted art coming from Europe. By 1943, the Allies had issued the *Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control* (the "London Declaration"), formally recognizing the mass looting, and reserving the right to invalidate transfers of Nazi-looted property *and* "transactions apparently legal in form, even when they purport to be voluntarily effected." London Declaration, *reprinted in* 8 Dep't St. Bull. 21, 21–22 (1943). Later that year, the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (the "Roberts Commission"), which would oversee the MFAA, was formed. From 1943 to 1946, the Roberts Commission warned museums against the acquisition of stolen artworks.

Ironically, MFAA and other U.S. officials who witnessed the scale of Nazi looting firsthand then returned to work at America's most prominent museums. James Rorimer, for example, resumed his position at The Met and became its director in 1955. *See* Kreder, *Fighting Corruption*, *supra*, at 96. Nonetheless, as early as 1948, American museum officials openly advocated dealing in Holocaust-looted art to improve museum collections. As one former officer of the U.S. wartime intelligence agency, Office of Strategic Services, who had gone on to become a curator at The Met told *The New Yorker*:

> America has a chance to get some wonderful things here during the next few years. . . . I

> think it's absurd to let the Germans have the paintings the Nazi big-wigs got, often through forced sales, from all over Europe. Some of it ought to come here, and I don't mean especially to the Metropolitan, which is fairly well off for paintings, but to museums in the West which aren't.

Nicholas, *supra*, at 438–39 (quoting statements by Theodore Rousseau). That museums snapped up tainted art cannot be doubted. As recognized by the preeminent scholar Lynn H. Nicholas: "This unrecovered art is the most difficult category to deal with, for we do not know where or exactly what it is until it suddenly appears in a museum or on the market and is recognized." Proceedings of the Washington Conference on Holocaust-Era Assets 450–51 (J.D. Bindenagel ed., 1999).

After the Roberts Commission disbanded, Ardelia Hall became Fine Arts and Monuments Advisor to the U.S. State Department. A staunch advocate for restitution, Hall maintained extensive lists and circulated multiple alerts to U.S. institutions about not accepting Holocaust-looted art. Hall also warned museums that "restitution may be expected to continue for as long as works of art known to have been plundered during the war continue to be rediscovered." Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, 25 Dep't St. Bull. 337, 339 (1951).

In short, major museums like The Met were on notice not to acquire art tainted by the Holocaust, like the Painting at issue, well before it was donated to the museum in 1952. App. 95, 100–01. When The Met first listed the Painting in its catalogue in 1967—after both

Paul and Alice Leffmann had died, App. 99–100—it, like other museums, knew of U.S. policy against acquiring looted art. Even so, after waiting *another 50 years* to correct the Painting's erroneous provenance, The Met now relies on a time-based defense to hold on to a work it received for nothing and should have known better than to accept. It is this type of inequitable conduct—designed to prevent Holocaust-era art claims from reaching their factual merits—that the HEAR Act was meant to address.

III. Consistent with longstanding U.S. policy, the HEAR Act was designed to preempt all time-based defenses.

In response to the abnormal nature of Holocaust looting and the chaos surrounding post-war restitution, U.S. policy has been clear that Holocaust-era art claims should be resolved on their merits, without the burdens of technical defenses inappropriate to the context of the Holocaust. The Washington Conference on Holocaust-Era Assets, jointly hosted in 1998 by the U.S. Department of State and United States Holocaust Memorial Museum, recognized that,

> After existing art works have been matched with documented losses comes the delicate process of reconciling competing equities of ownership to produce a just and fair solution . . . begin[ning] 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 one of the most profoundly illegal regimes the world has ever known.

Stuart E. Eizenstat, *In Support of Principles on Nazi-Confiscated Art*, Presentation at the Washington Conference on Holocaust-Era Assets (Dec. 3, 1998).

Notwithstanding clear U.S. policy, museums holding artwork stolen or forcibly sold during the Holocaust have continually asserted time-based technical defenses, including laches, to thwart fact-based resolution of Holocaust-era art claims. Indeed, museums even have gone on the offensive to keep Holocaust-looted art, launching actions as plaintiffs to "quiet title." *See* Kreder, *Fighting Corruption*, *supra*, at 82. Sadly, this approach almost always works. Without an understanding of the uniquely abnormal nature of Holocaust-era property transactions or the chaotic aftermath that perpetuated that injustice, federal courts have broadly rejected virtually all Holocaust-era art claims on procedural grounds, most often based on time-based defenses like laches and statutes of limitations—defenses that are often asserted interchangeably. *See id.* at 85. Only one such claim has survived a laches defense and secured an order of replevin. *See Vineberg* v. *Bissonnette*, 548 F.3d 50, 56–59 (1st Cir. 2008).

In response to this abuse of time-based defenses, the United States and 46 other nations signed the Terezín Declaration at the 2009 Holocaust-Era Assets Conference in Prague. Central to the proceedings was a concern with "the tendency for holders of disputed art to seek refuge in technical defenses to avoid potentially meritorious claims, including statutes of limitation; adverse possession; de-accession laws [*i.e.*, laws creating a legal presumption against removing artwork from a museum collection after it has been accessioned into the collection]; and export

control laws, which bar the export of looted art back to their rightful owner, even when its ownership has been established." Stuart E. Eizenstat, Keynote Address, Proceedings of the Holocaust Era Assets Conference 76 (2009). In an effort to ensure that looted art claims receive "fair and just solutions encompassing decisions on their merits, i.e. on a moral basis and not on technical defenses such as the passage of time," *id.* at 48, the Terezín Declaration urged all governments to "make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims" and to "consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property." Terezín Declaration on Holocaust Era Assets and Related Issues, June 30, 2009, at 4. It was this understanding that shaped the HEAR Act.

As signatories of the Washington Conference Principles and Terezín Declaration understood, "technical defenses" include multiple defenses like laches, adverse possession, and abandonment—all of which are rooted in the passage of time and its relationship to the relative rights of a holder to cut off the rights of a true owner. U.S. state law contains a veritable patchwork quilt of defenses which vary in form (and are not reliant on a distinction of law and equity), but have a common and defining characteristic: each involves the passage of time to cut-off a claim for replevin. Adverse possession, for instance, requires a prescribed time period to have elapsed before title passes. *See, e.g.*, *Henderson* v. *First Nat'l Bank*, 494 S.W.2d 452, 459 (Ark. 1973) (three-year limitations period); *O'Keeffe* v. *Snyder*, 416 A.2d 862, 870 (N.J. 1980) (six-year limitations period). The passage of time, together with other factors, also informs a court's

analysis whether a claimant intended to abandon property. *Snell* v. *Levitt*, 18 N.E. 372-373, 370 (N.Y. 1888) ("The length of time that is continued is one of the elements from which the intention to abandon or retain the right is inferred."). Lack of diligence due to the passage of time can also bar a claim, even if brought within the relevant statute of limitations. *Autocephalous Greek-Orthodox Church* v. *Goldberg & Feldman Fine Arts, Inc.*, 917 F.2d 278, 287-88 (7th Cir. 1990) (considering whether a ten-year delay in bringing suit caused the action to be untimely, and noting the importance of plaintiff's diligence in investigating the cause of action); *DeWeerth* v. *Baldinger*, 836 F.2d 103, 107 (2d Cir. 1987) (considering whether a 37-year delay in bringing the action made it untimely, or whether plaintiff had acted diligently in attempting to locate the missing art).

Each of these defenses—like statutory limitations periods—looks to the timeliness of the claim to in some manner assess the litigants' respective obligations of due diligence. *See* John Henry Merryman, Albert E. Elsen & Stephen K. Urice, Law, Ethics and the Visual Arts 989–90 (2007). To be sure, in a normal world, these diligence considerations are logical to a system of law. Time brings the erosion of memory, disappearance of witnesses or evidence, and increased opportunity for fraud; it may become increasingly unfair to upset the reasonable expectations of purchasers or donees; and, finally, we should not reward those who "sleep on their rights." *Id.* But Holocaust looting and forced sales had none of the attributes that support application of these normal time-based doctrines. To the contrary, as shown above, Holocaust looting was *abnormal* in all respects. Victims were not able assert and protect their property

rights, engage in fair transactions, or access state authorities or the courts to validate their rights. Under these circumstances—widely known to museums, art dealers, and collectors—it would seem axiomatic that normal time-based defenses could not be available to cut off potentially meritorious claims. As long recognized by the Court, "he who seeks equity must do equity." *United States* v. *Giles*, 13 U.S. 212 (1815); *see also Brown* v. *Lake Superior Iron Co.*, 134 U.S. 530, 535 (1890) ("[T]he maxim, 'He who seeks equity must do equity,' is as appropriate to the conduct of the defendant as to that of the complainant.").

The HEAR Act was designed to reinsert that idea into the consideration of Holocaust-era art claims. In 2016, Congress "created a unique federal statute of limitations preempting other defenses related to the passage of time and providing six years to file a claim only after a claimant has discovered the identity and location of the artwork." Stuart E. Eizenstat, *Art Stolen By the Nazis is Still Missing. Here's How We Can Recover It.*, Wash. Post (Jan 2 , 2019). Faced with a patchwork quilt of time-based defenses that could be used to stop Holocaust-era art claims from reaching their merits—and rather than create a list that might have omitted one of the many time-based defenses—Congress employed broad language preempting "*any* defenses at law relating to the passage of time" for claims brought within the Act's six-year statute of limitations. HEAR Act, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (2016) (emphasis added). Highlighting the desire to address the problem of "technical defenses" writ broadly, Congress directly cited the principles adopted at the Washington and Prague conferences in the Act's preamble. *See* HEAR Act § 2(4)-(5). Hence, rather than

looking at the statute in a vacuum, as the court below erred in doing, the HEAR Act—and its express preamble—must be viewed as seeking to address comprehensively a multifaceted problem.

The decision below threatens to eviscerate the express will of Congress. By limiting the HEAR Act to one time-based defense, the court below will prevent Holocaust-era art claims from being heard on their merits—the precise result that the HEAR Act seeks to avoid. Given that the HEAR Act was a statute intended to have national reach, this Court's intervention is warranted to prevent the Act from becoming a dead letter.

CONCLUSION

Amicus Curiae respectfully urges the Court to grant the petition.

Respectfully submitted,

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