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

AMICUS CURIAE BRIEF OF THE LAW FIRM OF BYRNE GOLDENBERG & HAMILTON, PLLC IN SUPPORT OF PETITIONER

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I. INTEREST OF *AMICUS CURIAE*

The Washington, D.C., law firm Byrne Goldenberg & Hamilton, PLLC (BGH) respectfully submits this brief with the consent of both parties.[1] BGH represents claimants seeking to recover artworks lost as a consequence of Nazi policies, and so has a strong interest in the wrongful presence of these materials in the public collections of U.S. tax-exempt museums.

II. SUMMARY OF ARGUMENT

BGH treats additional matter that will help frame the broader legal and constitutional context of this case. BGH agrees with Petitioner that the HEAR Act does not countenance equitable exceptions to its uniform statute of limitations. But the substantive rights and obligations of the parties, however, necessarily are governed by federal common law – rather than the provincial and conspicuously skewed New York state common law of economic duress. The District Court misapplied New York law to achieve a preposterous result: when the Leffmanns sold *The Actor* while fleeing for their lives and after years of racially exclusionary and genocidal Nazi persecution had all but dispossessed them, their "will" had not been "overcome."

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[1] BGH gave counsel of record for both parties notice of its intent to file this brief more than 10 days before the deadline, and both have consented to the filing in writing. BGH alone authored the brief and paid for it, and no counsel for either party contributed money to prepare or submit it.

Zuckerman presents whether a particular artwork lost as a direct consequence of abhorrent Nazi policies and concomitant duress that violated the modern international law of human rights (*Nazi-confiscated artwork*) – and which a U.S. tax-exempt § 501(c)(3) museum and federal public trustee misappropriated in reckless disregard of express governmental warnings, fiduciary duties, and statutory obligations to adhere to signal U.S. policies – lawfully should be restituted within the objectives of the HEAR Act and U.S. foreign policy. Accordingly, this controversy reflects an exercise by the U.S. Government of two *exclusively federal* prerogatives textually grounded in the Constitution, both of which the Court has said entail uniformity: the conduct of foreign affairs under Articles I and II, and the authority to impose a federal income tax and grant related exemptions under Amendment XVI. Therefore, the Court should preempt the body of notoriously confused, incoherent, and multifarious state common law of economic duress that the District Court misapplied with a uniform, "bright line" federal common law standard for identifying what particular artworks lost as a direct consequence of the Nazi genocidal campaign against Jews U.S. foreign policy seeks to restitute. Such a rule is essential so both U.S. foreign policy as well as the federal income tax scheme of charitable donations under 26 U.S.C. §§ 170 and 501(c)(3) can function intelligibly and uniformly as the Court has said they require.

BGH also seeks to persuade the Court that the state common law of economic duress – which legal

scholars have condemned for many decades as incoherent and dysfunctional and which focuses inappositely upon whether the subjective "will" of the duress victim somehow was "overcome" – constitutes an inappropriate body of law for implementing both foreign as well as federal income tax policies in this context. State choice of law rules amplify the conflict and uncertainty in both areas in violation of *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367-68 (1943). In *Clearfield Trust*, the Court declared that when the federal government exercises an authority grounded expressly in the U.S. Constitution and that requires uniform rules, federal common law necessarily preempts state law whenever state law fosters uncertainty in how the rights and obligations of the United States are determined. The state common law of economic duress that *Zuckerman* misapplied – and which also necessarily govern all other judicial claims in U.S. courts seeking to recover *Nazi-confiscated artworks* – not only sabotage the uniformity that foreign policy and the federal income tax demand, but also conflict impermissibly with U.S. foreign policy and customary international law in this area.

Finally, BGH invites the Court to invoke its plenary equitable authority to accomplish the discrete statutory objectives and policies of both the HEAR Act and § 501(c)(3) in this context, as well as to exercise the additional federal common law authority that the HEAR Act delegates. Section 3(1) of the HEAR Act makes clear that the 2009 Terezin Declaration prescribes U.S. policy for the restitution of *Nazi-confiscated artworks*. And the Terezin Declaration

commits all stakeholders – including the U.S. Government – to "ensure that their legal systems" "facilitate just and fair solutions with regard to Nazi-confiscated and looted art," "to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits," and to consider how applying various "legal provisions" "may impede the restitution of art."[2]

These directives *encourage* the Court to develop federal common law proactively in this area, thereby augmenting its already abundant and plenary federal common law authority. And because both political branches have made clear their objective – to facilitate the restitution of *Nazi-confiscated artworks* within the meaning of U.S. foreign policy – the Court need consult no other authority of the U.S. government to do so.

Section 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) (Duress) provides an appropriate legal template for the Court to develop a uniform rule that coheres with U.S. foreign policy and customary international law, and implements the goals of Congress and the President. Section 14 expressly eschews inapposite inquiries concerning whether the subjective "free will" of a duress victim somehow has been "overcome," and focuses instead exclusively upon whether the duress that induced the disputed transfer was ***wrongful***. The genocidal Nazi campaign to exclude Jews from the economy and culture of Germany – (and applied later in Nazi-affiliated

[2] *See* https://2009-2017.state.gov/p/eur/rls/or/126162.htm.

or occupied countries such as Italy) – that violated the modern international law of human rights was ***paradigmatically wrongful***. So the doctrine of restitution necessarily entails that property transferred incident to Nazi duress be returned to its rightful owner unless the current possessor acquired it for value and without constructive notice of the duress. The Petition establishes that the MET cannot make this showing.

For these reasons BGH respectfully requests that the Court also grant *certiorari* on the following essential question: *Whether a uniform federal common law standard preempts the multifarious state common law rules of economic duress for judicial claims seeking to restitute Nazi-confiscated artworks in the publicly funded collections of U.S. tax-exempt § 501(c)(3) museums and public trustees?*

III. BACKGROUND AND STATEMENT OF FACTS

BGH incorporates the Statement of the Case in the Petition for Writ of Certiorari (Petition).

The MET is a New York not-for-profit corporation with fiduciary duties to the public to take appropriate precautions against acquiring *Nazi-confiscated* and other contraband.[3] The failure of U.S. museums such as the MET "to consider adequately the security of

[3] Alan Ullberg, *Museum Trusteeship* (1981) at 17.

title" when acquiring artworks violates duties of loyalty and care.[4]

The MET also is tax-exempt under 26 U.S.C. § 501(c)(3) with a putative exempt purpose to educate the public about art. Under 26 U.S.C. § 170 the MET is eligible to receive charitable donations of property and cash. The "operational test" of Treas. Reg. § 1.501(c)(3)-1(c)1 prohibits the MET from attempting to accomplish charitable objectives in an illegal manner, or in a way that encourages crime or illegality such as recklessly acquiring problematic artworks such as *The Actor* so as to sustain the illicit commerce in *Nazi-confiscated artworks*, stolen art, and other cultural contraband.

As a public, tax-exempt charity the MET also must adhere to important U.S. public policies.[5] Accordingly, the signal U.S. foreign policy to restitute *Nazi-confiscated artworks* – discussed *infra* – as well as the policy that *necessarily* must preclude publicly supported museums from knowingly using materials taken in violation of the international law of human rights to perform their exempt "educational" function – inform the MET's fiduciary and public policy obligations regarding *The Actor*.

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[4] Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int'l & Comp. L. 409, 454 (2003).

[5] In *Bob Jones University v. United States*, 461 U.S. 574, 587 (1983), the Court ruled that to maintain its tax exemption under § 501(c)(3), an entity must operate consistent with signal U.S. public policies. *Otherwise, the entity would undermine – rather than promote – the public good that justifies its exemption*. *Id.*

The U.S. government implemented its formal policy for the restitution of personal property sold under duress during the Nazi era (1933-1945) in 1947 with Military Government Law No. 59 ("MGL No. 59"), 12 Fed. Reg. 7983 (November 29, 1947), which applied in special restitution courts in post-war Germany. MGL No. 59 employed the term "confiscation" to prescribe broadly the property lost as consequence of Nazi policies and persecution that it intended to restitute. Part II of MGL No. 59 defined expansively and inclusively the "Acts of Confiscation" the property that it intended to restitute.

MGL No. 59 viewed Nazi economic and political duress as so ***inherently coercive*** as to justify a legal ***presumption*** that ***any*** transfer of personal property by a persecuted person – including expressly in transactions between private parties – was involuntary ***as a matter of law*** and so subject to restitution. (Article 3 entitled "Presumption of Confiscation").

MGL No. 59 became the model for similar post-War legislation, and also has become a standard practice today among affected countries seeking to restitute artworks lost "because of" Nazi duress. Because affected countries apply it now out of sense of legal obligation, the "presumption of confiscation" enjoys likely status as customary international law.[6]

The U.S. consistently has reaffirmed its foreign policy goal to *restitute Nazi-confiscated artworks*. The

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[6] *Restatement (Third) Foreign Relations* § 102(2) (1987).

1998 *Washington Conference Principles on Nazi-Confiscated Art* (*Washington Principles or Principles*)[7], prescribe how countries affected by Nazi art looting should address this subject. These non-binding Principles state eleven (11) tenets or guidelines about how each of the 44 signatory countries (stakeholders) should deal with artworks that the Nazi regime wrongfully confiscated during the years 1933-1945. The Principles expressly invoke the phrase "Nazi-confiscated art" ten (10) discrete times. The *Principles* refer repeatedly to the *restitution* of *Nazi-confiscated artworks*.

The 2009 Terezin Declaration (*Declaration*)[8] reaffirms the *Washington Principles* and repeatedly invokes the term *Nazi-confiscated art* and the objective of U.S. policy to restitute these materials. The *Declaration* relates that Nazi policies "confiscated" artworks through various means, "including theft, coercion . . . and on grounds of relinquishment as well as forced sales and sales under duress, during the Holocaust era between 1933-45 . . . ," and urges all participating states to restitute artworks wrongfully so taken "in a manner consistent with national laws and regulations as well as international obligations."[9]

Moreover – and as noted – the *Declaration* urges all stakeholders to ensure that their respective legal systems facilitate restitution claims.

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[7] *See* https://2009-2017.state.gov/p/eur/rt/hlcst/122038.htm.

[8] *See* https://2009-2017.state.gov/p/eur/rls/or/126162.htm.

[9] *Id.*

The Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act") reaffirms the restitution policies of the *Washington Principles* and the Terezin Declaration.[10] The HEAR Act states as an express purpose to help claimants recover "Nazi-confiscated artworks": "[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act and the Terezin Declaration."[11]

The HEAR Act defines broadly the category of artworks that Congress intends to restitute: "any artwork or other property that was lost during the covered period ***because of*** Nazi persecution."[12] (Emphasis and italics supplied). The statute also defines the term "Nazi persecution" expansively.[13]

Zuckerman rebuked the proposal of *amicus* Holocaust Art Restitution Project that the court formulate a uniform federal common law standard to identify those artworks that U.S. foreign policy seeks to restitute.[14]

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[10] HEAR ACT Findings ¶¶ 3, 4, 5.

[11] HEAR Act § 3(1).

[12] HEAR Act § 5.

[13] *Id.* at § 4(5).

[14] *Zuckerman v. The Metropolitan Museum of Art*, 928 F.3d 186 n.9 (2d Cir. 2019).

IV. ARGUMENT

A. THE COURT – FOR SEVERAL REASONS – SHOULD FORMULATE A UNIFORM FEDERAL COMMON LAW STANDARD FOR DEFINING WHAT ARTWORKS LOST AS A CONSEQUENCE OF NAZI PERSECUTION U.S. FOREIGN POLICY SEEKS TO RESTITUTE (*NAZI-CONFISCATED ARTWORKS*)

No "bright lines" delineate when federal courts apply federal common law, and each exercise "is sui generis in that is the product of the unique interplay of specific statutory or constitutional language, case sensitive policy concerns, and other case specific factors."[15] Nonetheless, federal common law is necessary in several loosely defined and overlapping contexts: (1) when "there is a strong national or federal concern originating from the Constitution" and "there is a possibility that local law will not be sufficiently sensitive to federal concerns" or "is not likely to be uniform across state lines . . . "; (2) when federal policy conflicts impermissibly with state law, and; (3) when the policy of the law is so dominated by federal concerns that federal law necessarily must apply.[16] Federal common law

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[15] 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2019).

[16] *Id.*

also applies when Congress envisions that federal courts will develop law in a particular area.[17]

A uniform federal common law standard defining what constitutes a *Nazi-confiscated work* subject to restitution satisfies these criteria.

1. The Court Should Propound an Appropriate Federal Common Law Standard for the Reasons Stated in *Clearfield Trust Co. v United States*, 318 U.S. 363, 366-67 (1943): Federal Foreign Policy and the Federal Tax Exemption of 26 U.S.C. § 501(c)(3) Both Derive from the U.S. Constitution, and Entail Uniformity that the "Vagaries" of the Multifarious and Incoherent State Common Laws of Economic Duress and Related Choice of Law Rules Sabotage

Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) confirms that a uniform federal common law definition of the term *Nazi-confiscated artwork* is required to ensure that U.S. foreign policy and the federal income tax exemption – both textually grounded in the Constitution – have uniform meaning throughout the several states. In *Clearfield Trust*, the Court ruled that the rights and obligations regarding U.S. commercial paper necessarily are governed by federal

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[17] *See*, *e.g.*, *Texas Industries, Inc. v. Radcliff Materials*, 451 U.S. 630, 643 (1981), discussed *infra*.

law rather than by the law of the state where a particular check was issued. The Court instructed that because the authority of the federal government to issue commercial paper derives from the U.S. Constitution and entails uniform rules, federal – and not state law – necessarily governed. *Id*. at 366.

The Court underscored the potential for diverse state laws – *as well as state conflict of law rules* – to spawn unacceptable uncertainty in the law applying to U.S. commercial paper, and declared that these considerations made state law unacceptable: "[t]he application of state laws, even without the conflict of law rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. *It would lead to great diversity of results by making identical transactions subject to the vagaries of the several states.*"[18] (Italics added).

The Court consistently has reaffirmed the *Clearfield Trust* principle.[19] *See also United States v. Kimbell Foods, Inc*., 440 U.S. 715, 728 (1979), "[u]ndoubtedly, federal programs that 'by their very nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules." (Citation omitted); *Boyle v. United Technologies Corporation*, 487 U.S. 500, 508 (1988), "*[i]n some cases . . . where the federal interest requires a uniform rule, the*

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[18] 318 U.S. at 367.

[19] *See*, *e.g.*, *Bank of America National Trust and Savings Association v. Parnell*, 352 U.S. 29, 33 (1956); *United States v. Brosnan*, 363 U.S. 237, 260 (1960); *Miree v. Dekalb County, Georgia*, 433 U.S. 25, 28-29 (1977).

entire body of state law applicable to the area conflicts and is replaced by federal rules." (Italics added).

U.S. foreign policy and the federal income tax exemption – both of which derive textually from the Constitution – similarly entail that the Court give the pivotal term "Nazi-confiscated artwork" a uniform definition. The "entire body" of conflicting, incoherent, and multifarious state common law of economic duress which currently governs claims for the restitution of these materials – such as *Zuckerman* applied – makes this conclusion inescapable.

a. The Authority of Congress and the President to Formulate and Execute Foreign Policy is Grounded Expressly in the Federal Constitution and the Court Consistently Has Refused to Permit Provincial State Laws to Undermine the Uniformity that Foreign Policy Requires

The Constitution delegates authority to decide U.S. foreign policy exclusively to Congress and the President. *Oetjen v. Central Leather Co*., 246 U.S. 297, 302 (1918); *United States v. Pink*, 315 U.S. 203, 222-23 (1942).

Since *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) the Court consistently has reaffirmed that federal common law continues in discrete enclaves in which

uniquely federal interests are implicated.[20] These include both the rights and duties of the United States as a sovereign nation, and foreign affairs.[21] For example, in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964), the Court, in a case based upon diversity jurisdiction, observed that "rules of international law should not be left to divergent and perhaps parochial state interpretations," and so displaced state law with federal common law because the subject matter of the litigation (the act of state doctrine) raised uniquely federal interests. *See also*, *e.g.*, *American Insurance Association v. Garamendi*, 539 U.S. 396, 413 (2003) (concern for uniformity in foreign affairs can displace state law); *Sosa v. Alvarez-Machain*, 542 U.S. 726 (2004) (asserting competence to formulate federal common law in foreign relations).

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[20] *Erie*, of course, abrogated "federal common law" which permitted federal judges sitting in diversity to fashion "rules of general common law." *Boyle v. United Technologies Corp.*, 487 U.S. 500, 517 (1988). But after *Erie* federal courts continue to apply federal common law in certain discrete areas where the interests of the U.S. as a sovereign are concerned, such as when the rights and obligations of the U.S. are at issue or in foreign affairs. *Id.* at 518.

[21] *Texas Industries v. Radcliffe Materials, Inc.*, 451 U.S. 630, 641 (1981).

b. The State Common Law of Economic Duress and Related Choice of Law Rules Create a "Chaotic Palette" in Judicial Claims to Recover Nazi-Confiscated Artworks that Negate the Uniformity that U.S. Foreign Policy Demands

1. The State Common Law of Economic Duress is Notoriously Confused, Inconsistent, and Multifarious

For several reasons the inherently skewed N.Y. common law principles of economic duress that *Zuckerman* applied are unsuitable for restituting *Nazi-confiscated artworks*. First, state jurists did not formulate these principles to redress the Nazi war crimes upon which judicial claims for the restitution of these materials are predicated, and – of course – lack such authority. As legal scholar Irwin Cotler points out, "*restitution for Nuremberg crimes – genocide, war crimes, and crimes against humanity – is something dramatically different in precedent and scope.*"[22] (Italics supplied). Rather, the provincial common aw of economic duress of New York and other states instead *seek merely to sustain local commerce by protecting reasonable contract expectancies in transactions affecting a particular state*. Indeed, one commentator characterizes duress as "A Doctrine of Last Resort and a Policy to Safeguard Freedom of

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[22] Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 Cardozo L. Rev. 601, 601-02 (1998).

Contract," contemplating the "adverse impact of readily available rescission upon the legitimate interest of vendors of goods and services, many of which are small businesses living on tight profit margins."[23] Accordingly, applying muddled legal principles that state jurists formulated merely to safeguard local commerce to preclude judicial claims for the restitution of artworks coercively transferred as a consequence of systematic Nazi violations of the international law of human rights and incident to genocide is inherently anomalous.

Second, these principles are intrinsically flawed, and notoriously inadequate to achieve even their limited intended objective. Legal scholars long have criticized the traditional state common law of duress such as *Zuckerman* applied as being illogical, incoherent, and unmanageable. Writing in 2005, one commentator observed that for nearly 60 years legal scholars have faulted the prevailing common law of duress as disjunctive and chaotic:

> The snapshot of the duress doctrine today is bothersome. Over and over again modern day courts struggle with defining the parameters of this doctrine. These courts state illogical or nonsensical tests for application of the doctrine and then apply the test conclusory or with an implausible or impossible explanation or rationale. Not surprisingly, the courts

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[23] Steve W. Feldman, *Pre-Dispute Arbitration Agreements, Freedom of Contract, and Economic Duress Defense: A Critique of Three Commentaries*, 64 Clev. St. L. Rev. 37, 61 (2015).

> manifest a complete inability or unwillingness to apply the doctrine to the facts in any sort of reasoned way.
>
> ***The result is a complete failure of the duress doctrine***. First, courts rarely find duress or even make a decision in favor of finding duress. In addition, the decision of the courts are extraordinarily valueless as precedent: they provide virtually no instruction as to application of the doctrine.[24] (Emphasis and Italics supplied).

Commentary to § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) (discussed *infra*) reaffirms this view, and similarly advances legal scholarship rebuking the common law rules of economic duress. Reporter's Note b.

Especially problematic in many formulations of the duress doctrine – such as the District Court in *Zuckerman* applied – is the requirement that the duress at issue "*overcome the will*" of the dispossessed

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[24] Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. Va. L. Rev. 442, 446 (2005). *See also* Sian E. Provost, *A Defense of Rights-Based Approach to Identifying Coercion in Contract Law*, 73 Tex. L. Rev. 629, 633 (1995), "[t]he terminology that courts use to invalidate or alter contracts on grounds of coercion differs from jurisdiction to jurisdiction and even from case to case. Moreover, the law makes little attempt to define the terms precisely"; Julie Kostritsky, *Stepping Out of the Morass of Duress Cases: A Suggested Policy Guide*, 53 Alb. L. Rev. 581, 592 (1989), observing that "[c]onfusion prevails in duress law." Otit Gan, *Contractual Duress and Relations of Power*, 83 Harv. J.L. & Gender 171, 176 (2013), commenting that "duress doctrine has been criticized for its confusing nature."

victim. As commentary to § 14 points out, however, merely because the "will" of one party to a transaction has been "overcome" does not justify voiding the transaction: "[t]he conclusion of every bargain transaction might be said to involve overcoming the other party's will, but few bargains will be condemned as involuntary. The fact that one party to a bargain has been obliged to choose between undesirable courses of action . . . does not of itself make a bargain involuntary, so long as the other party's threat or refusal is not regarded as *wrongful*."[25] (Italics supplied). Notwithstanding the conceptual flaws inherent in this inquiry, most states continue to invoke it. *Amicus* has identified more than 30 states that continue to apply the "overcoming the will" standard.

2. Problematic State Choice of Law Rules Amplify the Scope for Diverse and Unpredictable Results in Judicial Claims Seeking to Recover Nazi-Confiscated Artworks

State choice of law rules similarly frustrate U.S. foreign policy to facilitate restitution and to resolve claims expeditiously, and further dilute the uniformity

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[25] *See also* Karl Llewellyn, *What Price Contract – An Essay in Perspective*, 40 Yale L. J. 704, 728 n.49 (1931), observing that "[t]he attempt to solve legal problems by the touchstone of 'free will,' by postulating an individual will insulated from the social environment, only serves to obscure the genuine problems of ethics and policy." (Cited in Reporter's Note b to *Restatement* § 14).

that *Clearfield Trust* demands. Claims for the recovery of stolen and *Nazi-confiscated artworks* often involve multiple jurisdictions with different substantive rules prescribing when property stolen or transferred under duress can be recovered, as well as varying choice of law rules.[26] So the affected states and nations often have "adopted significantly varied rules to reach divergent resolutions of complicated issues of public policy and private right."[27] Varying state choice of law rules complicate even further how these claims are resolved, and preclude any possibility that U.S. foreign policy to resolve restitution claims "on their merits" and expeditiously can be realized: "*[t]he result on a macro-level is virtually certain to undermine all relevant policy aspirations*."[28] (Italics added). So "[u]ntil a domestic or international consensus is reached as to if and how Nazi-tainted thefts are to be treated differently than other thefts," "Nazi-tainted art ownership disputes will be decided by application of the same legal rules and *subject to the same chaos as surrounds routine art theft cases.*"[29] (Italics added). The "chaotic palette" of divergent substantive as well as choice of law rules can be ameliorated only by employing a single, universal legal standard for stolen art recovery claims.[30]

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[26] Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers*, 50 Duke L. J. 955 (2001).

[27] *Id*. at 955.

[28] *Id.*

[29] *Id.* at 964.

[30] *Id.* at 1042-43.

Zuckerman corroborates this view. The District Court and parties invested heavily in choice of law analysis about what law should apply to decide ownership rights to an alleged *Nazi-confiscated artwork* within the meaning of U.S. foreign policy in the tortious possession of a U.S. tax-exempt museum and public trustee.[31] *Remarkably, however, neither the court nor the parties considered the overarching U.S. governmental interest in prescribing the relevant legal standard.* Obtuse to the properly controlling federal interests, the District Court then misapplied the notoriously problematic and dysfunctional New York state common law of economic duress to dismiss Zuckerman's meritorious claim. As discussed, *infra*, the uniform federal common law remedy proposed herein provides an appropriate legal standard for adjudicating claims for the restitution of *Nazi-confiscated artworks* that both coheres with consistent U.S. foreign policy and customary international law, and that will eliminate the wasteful and immaterial choice of law inquiries that currently skew how these claims are resolved.

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[31] *Zuckerman v. The Metropolitan Museum of Art*, 307 F. Supp. 3d 304, 316-25 (S.D.N.Y. 2018).

c. The Federal Income Tax Exemption of § 501(c)(3) – Which Enabled the MET to Acquire *The Actor* as a Charitable Donation in 1952 and for Which all Other U.S. Taxpayers Necessarily Were "Vicarious Donors" – Similarly Is Grounded in the Federal Constitution (16th Amendment) and Must Be Interpreted Uniformly

Congressional authority to impose a federal income tax – and to grant exemptions such as § 501(c)(3) – derives from Amendment XVI to the U.S. Constitution which prescribes as follows:

Income Tax

> **The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.**

The Court has declared that federal income tax statutes such as §§ 501(c)(3) and 170 must be interpreted *uniformly*. *See*, *e.g.*, *Burnet v. Harmel*, 287 U.S. 103, 110 (1932); *United States v. Pelzer*, 312 U.S. 399, 402 (1941).

Just as foreign policy cannot depend upon the multifarious and skewed state common law of economic duress, neither can federal income tax policy concerning the charitable donation of artworks to tax-exempt

museums. Whether a particular artwork is "Nazi-confiscated" – and so *necessarily ineligible* for charitable donation as well as for use by a tax-exempt museum in performing its exempt educational function – properly cannot be determined haphazardly either by the local provincial state law of economic duress or the malleable choice of law rules of the particular state where the prospective donee museum is located.

Rather, works of art transferred as a direct consequence of unconscionable Nazi duress were wrongfully taken in violation of both the international law of human rights and within the meaning of established restitution doctrine, and so have no lawful place in publicly supported, tax-exempt federal trusts.

1. The Incoherent State Common Laws of Economic Duress – Which Focus Upon Whether the Duress at Issue Somehow "Overcame the Will" of the Transferor – Conflict with the Consistent U.S. Foreign Policy to Restitute Artworks Lost Merely as a Consequence of Paradigmatically Wrongful Nazi Persecution as Well as With Customary International Law

Federal common law also is appropriate – if not imperative – when state law conflicts with an important federal objective.[32]

U.S. foreign policy consistently has sought to restitute artworks lost as a mere consequence of Nazi policies and related persecution, and never has inquired whether the subjective "will" of the Nazi victim somehow was "overcome." This conclusion is evident in how MGL No. 59 ***presumed*** that any transfer of property by a persecuted person during the Nazi era (1933-1945) was a "confiscation" entitling the victim to restitution, and how subsequent U.S. policy statements invoke the term "confiscation" liberally. The uniform current practice of other affected countries applying this presumption in restitution proceedings further

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[32] *See* 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4514 (3d ed. 2019).

supports this view and likely constitutes customary international law on this issue.[33]

The HEAR Act corroborates this conclusion, suspending otherwise applicable statutes of limitations for judicial claims seeking to recover artworks lost "because of" "Nazi persecution" which the Act defines broadly to include "any persecution" of a specific group based upon Nazi ideology.

2. Interpreting the Term "Nazi-Confiscated Artwork" Appropriately in the HEAR Act Represents Merely an Exercise of the Court's Plenary Authority to Construe Federal Statutory Terms According to Federal – and Not State – Law and Policy and to Fill the Interstices in an *Exclusively* Federal Statutory Framework

When Congress enacts a statute it presumably intends that federal courts interpret it uniformly as federal law, and is "not making the application of the federal act dependent on state law."[34] (Citations omitted). This principle is grounded upon the objective that

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[33] Restitution commissions in Britain, Germany, Austria and Holland all apply this presumption. *See*, *e.g.*, www.Restitutie commissie.nl/en/4_ forced_sale.html (Holland).

[34] *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989).

federal statutes have uniform meaning.[35] Moreover, only when Congress specifically does ***not*** intend that a federal statute have a uniform meaning do state law interpretations of federal statutes control.[36] Another reason for interpreting federal statutes uniformly is to ensure that provincial state laws not undermine federal goals.[37]

Only by defining "Nazi-confiscated art" ***concretely and specifically*** can the federal judiciary effectuate the prescribed goal of HEAR Act "[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." *For without a uniform "bright line" definition of the term "Nazi-confiscated art," how can courts implement this objective?*

Moreover, federal common law frequently is essential in order to fill "the interstices within a pervasive federal framework."[38] Congress did not contemplate every situation or context in which a particular statute might apply, and some statutory terms may lack a concrete and defined meaning. In such instance "there is the simple necessity of interpreting the text and filing in the interstices in a reasonably detailed federal

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[35] *Id.*

[36] 490 U.S. at 43-44.

[37] *Id.*

[38] 19 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4516 (3d ed. 2019).

statutory scheme – for example, by construing and applying vague statutory terms, an activity so basic to the judicial process that it really should not be thought of as the creation of federal common law."[39]

The several federal statutes and international agreements that collectively comprise the U.S. foreign policy scheme for restituting *Nazi-confiscated artworks* represent just such a "pervasive federal framework" – as the subject matter pertains *exclusively* to U.S. foreign policy. That Congress has not defined the pivotal term "*Nazi-confiscated art*," however, mandates that the federal judiciary do so to implement the overarching intention of both Congress and the President to restitute these materials.

3. Through the Terezin Declaration and the HEAR Act Congress Has Authorized – and Indeed *Intends* – that the U.S. Judiciary and the Court *Proactively* Employ the U.S. Legal System and Develop Federal Common Law to Facilitate the Foreign Policy Goal to Restitute *Nazi-Confiscated Artworks*

Federal common law also is appropriate when Congress envisions that federal courts will proactively develop federal law in a particular area. *See*, *e.g.*, *Texas*

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[39] *Id*.

Industries v. Radcliff Materials, Inc., 451 U.S. 630, 642 (1981), "[f]ederal common law also may come into play when Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law"; *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978); *Textile Workers Union of America v. Lincoln Mills of Alabama*, 359 U.S. 448, 451 (1957).

The HEAR Act – which expressly acknowledges that the Terezin Declaration embodies U.S. policy on restituting artworks lost "because of" Nazi persecution – similarly envisions that federal courts will promote the prescribed policy.

B. SECTION 14 OF THE RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (DURESS) (2011) PROVIDES A SOUND LEGAL TEMPLATE FOR APPROPRIATELY DEFINING THOSE ARTWORKS THAT U.S. FOREIGN POLICY SEEKS TO RESTITUTE ("*NAZI-CONFISCATED ARTWORKS*") THAT WILL ELIMINATE THE CONFUSION, DISORDER, AND CONCOMITANT WASTE OF RESOURCES THAT CURRENTLY AFFLICT RECOVERY CLAIMS

By invoking § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* ("Duress") (2011) (*Third Restatement*) the Court would implement consistent U.S. policy to restitute *Nazi-confiscated*

artworks whenever paradigmatically wrongful Nazi duress induced the transfer of a particular artwork and its current possessor is not a *bona fide purchaser*, that is, either acquired the disputed artwork as a gratuitous donee (as did the MET), or had either actual or constructive notice of the wrongful Nazi duress that induced the initial coercive transfer (as did the MET also).

Section 14 of the *Third Restatement* provides as follows:

> § 14 Duress
>
> (1) Duress is coercion that is *wrongful as a matter of law*.
>
> (2) A transfer induced by duress is subject to rescission as necessary to avoid unjust enrichment.
>
> (3) If the effect of duress is tantamount to physical compulsion, a transfer induced by duress is void. If not, a transfer induced by duress conveys voidable title. (Italics supplied).

Accordingly, the pivotal question in assessing duress as a basis for restitution – and determining whether economic or other duress results in an unjust enrichment – is whether such duress was ***wrongful***. As commentary to § 14 explains, "[i]f wrongful pressure induces a transfer, the transfer is subject to avoidance. *The whole task of the law is therefore to decide what forms of coercion are impermissible*, but – on the

realistic view – this is inevitably the case anyway."[40] (Italics added). In the final analysis, a conclusion that duress is legally impermissible hinges upon not only "an appreciation of the particular circumstances of the transaction – *including the considerations motivating one party to make the threat and the other to yield to it* – but upon an *underlying social judgment* about the forms and extent of pressure that one person may *legitimately bring to bear* in seeking to influence the actions of another." (Italics added).[41] For example, any "threat or refusal that is independently illegal or tortious constitutes duress."[42] Moreover, "[w]here coercion is independently tortious or illegal, the party seeking rescission need only establish that the coercion induced the transfer."[43]

There can be no doubt, of course, but that the systematic Nazi policies to exclude Jews from the economy of Germany based upon their race which compelled the Leffmanns to relinquish the Painting were "wrongful" within the meaning of these principles.

Duress exerted by third parties also expressly may void a transfer of personal property. Comment i to § 14 illustrates this principle with an example that provides a precise legal paradigm for Zuckerman's claim to recover *The Actor*: a buyer who knows that a third

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[40] § 14 Duress, Reporter's Note b.

[41] § 14 Duress, Reporter's Note g. *Impermissible coercion*.

[42] § 14 Duress, Comment b.

[43] *Id.*

party is employing wrongful duress to compel the owner to sell certain real estate takes the property subject to recission.

IV. CONCLUSION

For the foregoing reasons the Court properly should grant the Writ of Certiorari on the questions presented, and also on the question whether a uniform federal common law standard properly should govern judicial claims for recovery of *Nazi-confiscated artworks*.

Respectfully submitted,

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