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Supreme Court of the State of New York
Appellate Division – First Department

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Appellate Division, First Department, Calendar No. 2016-2552
Supreme Court, New York County, Index No. 161799/2015

TIMOTHY REIF and DAVID FRAENKEL,
as Co-Executors of the
ESTATE OF LEON FISCHER and MILOS VAVRA,
Plaintiffs-Respondents,

-against-

RICHARD NAGY, RICHARD NAGY LTD.,
Artworks by the Artist Egon Schiele known as
WOMAN IN A BLACK PINAFORE and WOMAN HIDING HER FACE,
Defendants-Appellants.

Brief Amicus Curiae on Behalf of The American Jewish Committee, Omer Bartov, Michael Bazyler, Haim Beliak, Michael Berenbaum, Donald Burris, Judy Chicago, Richard Falk, Hector Feliciano, Eugene Fisher, Irving Greenberg, Peter Hayes, Douglas and Marjorie Kinsey, Douglas Kmiec, Marcia Sachs Littell, Hubert Locke, Carrie Menkel-Meadow, Bruce Pauley, John Pawlikowski, Carol Rittner, John Roth, Randol Schoenberg, William Shulman, Stephen Smith, Alan Steinweis, Melvyn Weiss, Donald Woodman, and Jonathan Zatlin, in Support of *Plaintiffs-Respondents*

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Introduction: When Humans Burn Children to Produce a Master Race, It Is Necessary for Everything, Especially the Law, to Be Reevaluated.

When law and politics single out a particular religious community for persecution, it destroys the rights of other vulnerable persons such as Jehovah's Witnesses or gays and lesbians or critics of the government, all to the mockery of any semblance of equal protection of the laws or the conservative value of the rule of law. *See, e.g.,* Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (1992). Amici believe in a moral duty expressed powerfully by one of the Amici, Rabbi Yitzhak Greenberg: "No statement, theological or otherwise, should be made that would not be credible in the presence of burning children." Greenberg, "Judaism, Christianity, and Partnership after the Twentieth Century," in *Christianity in Jewish Terms* 27 (Peter Ochs, ed. 2000). We are united in this commitment—Never forget! Never again!

On December 16, 2016, President Obama signed into law the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"), which passed both the House and Senate unanimously. *See* Pub. L. 114-308, 114th Cong., H.R. 6130 (22 U.S.C. § 1621 note) (Dec. 16, 2016). Amici have particular interests implicated by the HEAR Act, which are set forth in *Appendix A.* None of the Amici has any financial or economic interest in the outcome of this appeal.

Amici underscore one specific way in which Nazis victimized Jews: robbery on a grand scale. The grand larceny should not be overlooked merely because mass murder was the foulest crime perpetrated by the Nazi conspirators. Or vice versa. Recovery of the art is an important part of preserving Jewish history and culture, which Hitler sought to wipe from the face of the earth. Lawyers', judges' and witnesses' oaths require us all to view the legal and factual questions presented in this appeal through the stark historical and moral prism of a specific criminal conspiracy to annihilate the Jews of Europe. *See* Peter Hayes, *Confiscation of Jewish Property in Europe, 1933–1945*, 147 (2003) (law established, defined and normalized Aryanization project or seizure of Jewish assets, removing any question of the morality or legitimacy of the process).

Amici note that many judges in this State have for decades exhibited an empathetic understanding of the historical circumstances of the Shoah,[1] including Judge Ramos in the instant case. Sadly, this generous spirit is often missing in the hasty disposition of cases dismissing claims for restitution brought by heirs of

[1] Amici acknowledge the common usage of the term "Holocaust" to designate the entire period of Nazi persecution from 1933 to 1945. So we do not correct the word when it occurs in the statute or in the literature we cite throughout this brief. Amici note, however, that the Hebrew term "*olah*" which is the root for our term "holocaust" is a religious category referring to the burnt offering of animal sacrifice at the ancient Temple in Jerusalem (*see, e.g.*, Psalm 20:2). For this reason alone, the term "holocaust" seems to many of the Amici an inappropriate way of describing the crematoria and ovens of Auschwitz and the other Nazi killing centers. Hence when writing in our own voice in this brief, we prefer the Hebrew word "*shoah*" (meaning "catastrophe" or "disaster").

victims of Nazi persecution. Inattentiveness to these historical circumstances led to a dismal judicial record in this nation crying out for change. *See* Chart of post-*Altmann* decisions in *Appendix B*. Indeed, the frequent failure to allow fair—that is to say, attentive, fact-based, diligent, careful, intelligent, reasonable, and responsible—resolution of these claims on the merits was a principal reason impelling congressional action. *See, e.g.*, Statement of Rep. Goodlatte, House Rep., at H7331. Amici offer comment on the two purposes of this important legislation:

> (1) To 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 [. . .] and the Terezín Declaration.
>
> (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.

In Part I of the brief, we suggest that the HEAR Act does exactly what the Washington Principles and the Terezín Declaration failed to accomplish: provide binding legal language enabling fair and just resolution of conflicts over Recovery of Holocaust Expropriated Art. In Part II, we explain how the HEAR Act intersects with various technical defenses in this case focused on two pieces of art that were indisputably the property of Fritz Grunbaum, a Viennese Jew arrested shortly after the Anschluss in 1938. The Nazis deported Grunbaum to Dachau, where he was tortured and ultimately murdered in 1941 after he and his wife Elisabeth (Lily)

signed Nazi documents purporting to transfer to the Reich their entire estate, including a fabulous collection of 449 works of art.

I. The HEAR Act Mandates Greater Coherence between State Law Governing Property Rights and Long-Standing Federal Policy Condemning War-Time Looting and Nazi Expropriation.

A. The Need for the HEAR Act

The HEAR Act is an instance of federal legislation seeking to correct mistakes. Sometimes, the bigger the mistake, the more unanimous the judicial support for the power of the political branches in the federal government to correct it. For example, when the Supreme Court decided *Brown v. Board of Education*, 347 U.S. 483 (1954), it spoke with one voice in an opinion written by the Chief Justice and without any concurring opinion. The Court did so out of awareness that its ruling would be controversial since it reflected a major shift in the history and culture of race in America. The HEAR Act reflects a bipartisan—indeed a unanimous—congressional consensus followed by immediate presidential approval that we must find a better way of dealing with one of the last remaining clusters of messy and unfinished business from World War II.

Indifference or lack of care about problems associated with Nazi-looted art and other property must now yield to greater attentiveness, greater understanding, greater reasonableness, and greater responsibility among people of many walks of life before we dare close the books on the gnarly questions of Nazi confiscation

and who among us curiously seek to remain its beneficiaries within our republic, for example, by retaining looted art. *See, e.g.*, Götz Aly, *Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* (2007).

Weak legal reasoning about consequences flowing from the Shoah leads to the enfeebling of opposition to all genocides, from the mass murders of Native Americans through the Armenian Genocide and the Shoah to the atrocities in the killing fields of Cambodia and the slaughters in Rwanda. *See, e.g.*, Samuel Totten, William S. Parsons, and Israel Charny, eds., *Century of Genocide: Critical Essays and Eyewitness Accounts* (2d ed. 2004); and Israel Charny, ed., *Encyclopedia of Genocide* (2 vols. 2002).

Amici are also aware that anti-Jewish bias has a long, ugly pedigree in American society that erupted at various times in ugly ways that have stained our national identity in the past. *See, e.g.*, Gustavus Myers, *History of Bigotry in the United States* (1943). Aware that bigoted attitudes still retain a tenacious grip in the fears of a mean minority in this country, Amici acknowledge that antisemitism has a capacity to erupt in new forms, one of which is denial that the events of the Shoah ever happened or are greatly exaggerated. *See, e.g.*, Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* 19 (1994) (“These attacks on history and knowledge have the potential to alter dramatically

the way established truth is transmitted from generation to generation."); *History on Trial: My Day in Court with a Holocaust Denier* (2006).

A full and fair hearing to determine property rights in the twenty-first century is not the same thing as classical antisemitism of the nineteenth century or the teaching and practice of contempt for Jews throughout the Christian centuries from the late fourth century to the decree of Vatican II repudiating that distortion in 1965. To be sure, overt denial of the Shoah is not usually within the vocabulary or habits of the heart of sophisticated museum-lovers or collectors of art or their legal champions. But the purchasers should have known better; the museums accepting the donations of beautiful art should have researched its provenance before accepting it. And the museums today should adhere to the Washington Principles, which they helped draft, rather than trample on them by suing survivors' heirs to defeat their claims on technical grounds. *See* Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 *Or. L. Rev*. 37 (2009).

In the midst of these errors, some federal judges created a cluster of decisions that eventually proved to be unsustainable. *See* Appendix B. Amici do not think that any of the judges who have decided these cases are tainted with the racism of the 1950s and 1960s or with the antisemitism that we identified above.

Instead, Amici offer three reasons for gap that emerged between the promise of the Washington Principles on the one hand and the cluster of decisions summarized in Appendix B on the other. First, these judicial decisions exalted form (adherence to technical defenses such as statutes of limitation and laches) over substance (returning stolen property to heirs, typically family members of victims of the Shoah). Second, they gave insufficient thought to the tradition of judicial deference to executive power in determining foreign policy. Third, in the exercise of diversity jurisdiction, some federal judges were inattentive to the interpretation of state law issues by state judges.

In the face of all such complexities, a unanimous Congress dared in the HEAR Act to hope for greater adherence to federal policy against looting in judicial disposition of cases involving restitution of Nazi-looted art. The time had come to "get on the right side of history." Congress underscored the magnitude of the theft: "hundreds of thousands of works … greatest displacement of art in human history." HEAR Act § 2 (Findings of Fact). Former director of the Cleveland Museum of Art Robert P. Bergman agreed: "We're talking about hundreds of thousands of objects. I believe that for the rest of my professional career, this issue will face the museums of the world." *Id.* Perhaps no one appreciates the enormity of the loss more than Ambassador Stuart Eizenstat. In his book on the many recovery efforts he led diplomatically at the end of the past

century, including the signing of the 1998 Washington Principles, Eizenstat refers to the perpetrators of the Nazi art crimes as "Barbarians of Culture." Stuart E. Eizenstat, *Imperfect Justice: Looted Assets, Slave Labor and the Unfinished Business of World War II* 187-205 (2003). Also in 1998, Congress enacted the Holocaust Victims Redress Act, Public Law 105–158, 112 Stat. 15, favoring "good faith efforts to facilitate the return of … works of art to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule…."

In 2009, the United States again attempted to commit itself to proper resolution of claims arising from the Shoah at the Holocaust Era Assets Conference in Prague. With 45 other nations, the United States endorsed the Terezín Declaration to "facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and 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 by all parties . . ." *See* also Stuart E. Eizenstat, "The Prague Conference on Holocaust Era Assets: An Overview," Testimony before Commission on Security and Cooperation in Europe, May 25, 2010, https://www.csce.gov/sites/helsinkicommission.house.gov/files/Eizenstat%20Testimony%202010%20FINAL.pdf (emphasis added).

The sixth finding of fact in Section 2 of the HEAR Act correctly summarized the problem:

> Victims of Nazi persecution and their heirs have taken legal action in the United States to recover Nazi-confiscated art. These lawsuits face significant procedural obstacles partly due to State statutes of limitations…. In some cases, this means that claims expired before World War II even ended. The unique and horrific circumstances of World War II and the Holocaust make statutes of limitations especially burdensome to the victims and their heirs. Those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law.

To resolve this problem, the HEAR Act establishes for all judges—state and federal—a six-year statute of limitations triggered only when a victim has *actual knowledge* of (a) the identity and location of the artwork, and (b) his possessory intent in it. Section 5 of the HEAR Act also imposes a uniform period of *six years* before which no claim for restitution of Nazi-looted art may be extinguished because of a failure to comply with the new federal statute of limitations.

B. Other Facts Relevant to a Respectful Reading of the HEAR Act

Amici add to the congressional statutory findings of fact several other indisputable facts—often taken from the reports of this Court or the New York Court of Appeals—that confirm both that (a) at this moment the HEAR Act reflects a paradigm shift in current understanding of the need to require fair and reasonable means of resolving claims for restitution of Nazi-looted art, and (b) a correction of relatively recent aberrations that were disjunctive with American commitments extending from the administrations of Presidents Theodore

Roosevelt and Franklin D. Roosevelt to the modern period of foreign policy under Presidents Clinton and Obama.

1. The United States is a High Contracting Party to the Hague Convention on Laws and Customs of War on Land (Hague IV), Art. 47 of which clearly condemns pillage as a crime of war.

2. American diplomats led efforts to warn other countries against looting in the famous 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." *See generally* Avraham Barkai, "Arisierung," 1 *Encyclopedia of the Holocaust* 84-87 (Israel Gutman, ed., 1990).

3. On June 23, 1943 President Franklin D. Roosevelt established the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas. Chaired by Supreme Court Justice Owen J. Roberts, the commission helped U.S. Army and Armed Forces to protect cultural works in Allied occupied areas. Its officers cooperated with the U.S. Army in protecting cultural treasures, gathered information about war damage to such treasures, compiled data on cultural property appropriated by the Axis Powers, and encouraged its restitution. The commission also prepared and distributed lists and

handbooks to the military's Monuments, Fine Arts and Archives (MFA&A) officers in the field to assist them with preparation of official lists of sites and monuments to protect. Before completing the work of the Roberts Commission in June of 1946, Roberts wrote to museum directors and curators urging them to be diligent in checking provenance of new works of art, to be certain that no American museum was purchasing looted art. As described more thoroughly below, during World War II the United States established a unit called the Monuments, Fine Arts, and Archives ("MFAA") Section of the Allied Armies. The purposes of this unit were to retrieve and return cultural artifacts and materials found during and after the war. *See* Robert Edsel and Bret Witter, *The Monuments Men: Allied Heroes, Nazi Thieves, and the Greatest Treasure Hunt in History* (2010) (describing the work of the approximately 345 "Monuments Men" and women); and *see* the film "The Monuments Men" (dir. George Clooney, 2014); Robert Edsel, *Saving Italy: The Race to Rescue a Nation's Treasures from the Nazis* (2014).

4. Immediately after the war, the International Military Tribunal at Nuremberg evaluated detailed evidence of *coerced sales*. The plunder of art was declared a war crime and is so recognized today. Who had done what and to whom was perfectly clear to Justice Robert Jackson, Chief Prosecutor of the principal case against the Nazi leaders and their collaborators. The factfinders found strong

evidence of a criminal conspiracy on the looting charges and convicted most of the perpetrators. *See* Michael Marrus, ed., *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (2014).

5. In the normal course of judicial administration touching on foreign policy, federal judges typically defer to determinations of policy matters by the executive branch. For example, in 1949 the Second Circuit ruled inadmissible the statements of a Jewish victim of Nazi persecution describing his brutal imprisonment by the Nazis that led him to "transfer" major assets under duress, on the ground that to do so would denigrate a foreign country (post-war West Germany). *Bernstein v. N. V. Nederlansche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949). In 1952, however, Jack B. Tate, Acting Legal Adviser in the Department of State, clarified:

> [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 Dept. St. Bull. 984-85 (1952).

Once the Circuit Court 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).

6. After the war had ended in Europe, American diplomats succeeded in persuading leaders of Austria's Second Republic to repudiate officially all transactions involving the property of Nazi victims, declaring all such “deals” null and void. The Austrian authorities did so in the Nullity Act of May 15, 1946. Soon thereafter, on July 26, 1946 and February 6, 1947, Austria enacted three statutes apparently designed to accomplish restitution of Nazi-looted property. In 1955 when Austria sought to rejoin the family of nations as an independent nation, it pledged to repudiate *all* spurious “transactions” of the Nazi era (1938-1945), including art “deals” that were really seizures, and to restitute all unreturned Nazi-looted property. 1955 State Treaty, Art. 26, ¶ 1, TIAS 3298, 6 U.S.T. 2369 (May 15, 1955).

As Maria Altmann was to learn when she tried to reclaim Klimt paintings that she knew from early childhood—including a famous one of her aunt Adele Bloch-Bauer—a law appearing on its face to be as clear as day could, in actual application, be as obscure as night and as dense as fog. In practice, Austria required such hefty fees for getting one’s own property back that these taxes, in effect, nullified the nullity laws. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 682-683 (2004). For reliable accounts of antisemitism in Austria, *see, e.g.*, Bruce Pauley, *Hitler and the Forgotten Nazis: A History of Austrian National Socialism* (1981); and Bruce Pauley, *From Prejudice to Persecution: A History of*

Austrian Anti-Semitism (1998); George Clare, *Last Waltz in Vienna: The Rise and Destruction of a Family: 1842-1942* (1982); Ilana Fritz Offenberger, *The Jews of Nazi Vienna, 1938-1945: Rescue and Destruction* (forthcoming, May 2017); Ivar Oxaal, Michael Pollak, and Gerhard Botz, eds., *Jews, Antisemitism and Culture in Vienna* (1988); Doron Rabinovici, *Eichmann's Jews: The Jewish Administration of Holocaust Vienna, 1938-1945* (2011); Thomas Weyr, *The Setting of the Pearl: Vienna Under Hitler* (2005); and George E. Berkley, *Vienna and Its Jews* (1988).

7. The first Holocaust-era art case in the United States was heard before this Court in 1966. Justice Arthur G. Klein was attentive to the factual circumstances surrounding the "relinquishment" of the artwork at issue: "The relinquishment here by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup." *Menzel v. List*, 267 N.Y.S.2d 804, 810 (Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (App. Div. 1967); *rev'd on other grounds*, 246 N.E.2d 742 (N.Y. 1969). The Court of Appeals of New York reinforced this truth for all 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 742, 819 (N.Y. 1969).

From that decision by the Court of Appeals in 1969 to its most recent decision on this matter, *In the Matter of Flamenbaum*, 978 N.Y.S.2d 708 (2013), the law of New York has always been sensitive to protecting the axiomatic Anglo-Saxon principle that "a thief conveys no title as against the true owner."

8. One of the urban legends in recent publishing history is that the German-Austrian-Russian plundering of art only came to light recently, with publication of several superb volumes documenting the scale of the plunder, and the intrigue surrounding efforts to conceal it. *See, e.g.*, Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (1995); Jonathan Petropoulos, *Art As Politics in the Third Reich* (1996) (documenting Nazi art looting practices); Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (1998); Jonathan Petropoulos, *The Faustian Bargain: The Art World in Nazi Germany* (2000) (questioning the ethics of European art dealer networks following World War II).

Although these recent volumes on this subject are very well researched and written, the enthusiasm of publicists or whoever got out the story of an "amazing discovery" in art history is unfortunate for two reasons. First, it doesn't happen to be true. Second, if the legend were taken too literally or seriously, it might be used to the advantage of current possessors of stolen art who could conveniently claim without resistance that they could not have known of an artwork's sordid history.

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, perhaps stated it best while testifying to Congress in support of the HEAR Act on June 7, 2016:

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

He also explained the broad scope of the massive theft:

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

In October of 1946, a former OSS 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* (Oct. 1946) 75-80. Within a few months, the next major piece appeared in *The New Yorker*, in its section that is justly famous for in-depth reporting on criminal matters called "Annals of Crime." Exactly seventy years ago, on February 22, 1947, journalist Janet Flanner began a lengthy three-part essay on the Great Nazi Art Heist called "The Beautiful Spoils." The essay ran in three consecutive issues of *The New Yorker*. 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. Law* 39 (1950).

Other key figures in the Allies' restitution effort also wrote memoirs. *See* Thomas Carr Howe, *Salt Mines and Castles: The Discovery and Restitution of Looted European Art* (1946), and James Rorimer, *Survival: The Salvage and Protection of Art in War* (1950). Howe became the director of the San Francisco Legion of Honor and Rorimer later headed the Metropolitan Museum of Art in New York. This increased the impact of their books, which recounted both the Nazis' plundering operations and the challenges of restitution work. Dozens of Americans who had served as Monuments Officers assumed leading positions in U.S. museums in the postwar period, including the Metropolitan Museum of Art, MoMA, National Gallery of Art, Cleveland Museum of Art and Toledo Museum of Art. *See* The Monuments Men Foundation Website: http://www.monumentsmenfoundation.org/the-eroes/the-monuments-men; *see also* Robert Edsel, *Saving Italy: The Race to Rescue a Nation's Treasures from the Nazis* (2014). As the Monuments Men Foundation Website documents, others helped found the National Endowment for the Humanities and the National Endowment for the Arts.

Then, as now, thinking of itself as the nation's paper of record, *The New York Times* also published important pieces on this immensely significant story. For example, the *Times* informed its readers: "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." Milton Esterow, "Europe is Still Hunting Its Plundered Art," *New York Times,* Nov. 6, 1964.

This awareness of both the facts of the massive plunder and the corresponding moral obligation of returning stolen goods to their rightful owners was, moreover, not a deep secret cherished exclusively by wealthy elites. Reliable factual data and ethical seriousness about what to do with this information were shared with the general public in newspapers and magazines across the nation.

9. The same is true of historical scholars, who have conducted meticulous archival investigation of various ways in which the Nazis plundered the Jewish population not only in Germany and then Austria, but also in almost all the lands they subsequently occupied. For example, on March 22, 2001, the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum sponsored a symposium with papers by ten prominent Holocaust scholars from around the world. In 2003 the USHMM published all the papers on its website. *See*

Gerald D. Feldman, "Confiscation of Jewish Assets, and the Holocaust," 1-8; Martin C. Dean, "The Finanzamt Moabit-West and the Development of the Property Confiscation Infrastructure," 9-20; Alfons Kenkmann, "The Supervision and Plunder of Jewish Finances by the Regional Financial Administration: The Example of Westphalia," 21-32; Jeanne Dingell, "Property Seizures from Poles and Jews: The Activities of the Haupttreuhandstelle Ost," 33-42; Jean Ancel, "Seizure of Jewish Property in Romania," 43-56; Eric Laureys, "The Plundering of Antwerp's Jewish Diamond Dealers, 1940–1944," 57-74; Jean-Marc Dreyfus, "Franco-German Rivalry and 'Aryanization' as the Creation of a New Policy in France, 1940–1945," 75-92; Susanne Meinl, "The Expropriation of Jewish Emigrants from Hessen during the 1930s," *Id.* 93-104; Britta Bopf, "Economic Discrimination and Confiscation: The Case of Jewish Real Estate," *Id.* 105-126; Elisabeth M. Yavnai, "Jewish Cultural Property and Its Postwar Recovery," *Id*. 127-142. At the end of the conference Peter Hayes offered a summary and conclusions, *Id.* 143-148. *See Confiscation of Jewish Property in Europe, 1933–1945*, 147 (2003), https://www.ushmm.org/m/pdfs/,Publicaiotn_OP_2001-01.pdf

Seven years after the conference, Martin Dean contributed a powerful overview of the grand Nazi project of confiscation. *See* Dean, *Robbing the Jews: The Confiscation of Jewish Property in the Holocaust, 1933-1945*, 11 (2008). In the first phase (1933-1941) the Nazis persecuted Jews by seizing their property,

freezing their bank accounts, charging discriminatory tax rates, even ordering a "Special Tax" paid by Jews to clean up the mess after official violence planned and executed by the SS in every political region (or *Land*) in the November pogrom, *See, e.g.*, Alan Steinweis, *Kristnallnacht 1938* (2009).

The Nazis exploited those who sought to escape by extorting a forfeiture of their property—sometimes virtually everything of economic value they owned—in "exchange" for an exit visa. *Id*. at 17-172. As demonstrated by Martin Dean in *Robbing the Jews*, sometimes the extortion was practiced by officials of the Reich; sometimes it extended to a network of nefarious art dealers.

In the second phase of the Nazi terror (1941-1945), the "final solution" came to the fore, and Dean fully appreciates the horrific task of the historian's dutym to be precise. *Id.*, 173-398. Depriving Jews of their basic civil liberties and robbing them of their often meager possessions would go on apace. But now, close attention was paid to a crime that did not yet have a name, genocide. The murder of millions took place swiftly, first by the *Einsatzgruppen* and then—as an improvement in efficiency calculus—by the creation of the monstrous camps that manufactured death by assembly line. Even here in the thick and thin of all that blood, Dean calls attention to the Nazi insistence on the necessity of further robbery.

Amici offer one more resource on this point from a profound scholar universally regarded as a superb historian of the Shoah, Raul Hilberg (1926-2007). Hilberg was a Viennese Jew who escaped from Europe in the nick of time in 1939, served in the occupying U.S. Army after the war, and became the author of the ground-breaking work, *The Destruction of European Jews* (1st ed., 1 vol., 1961; 2nd ed. expanded, 3 vols. 1985). Hilberg is credited with giving clarity to what he called "the structure of the destruction," with these four phases: (1) *Definition by Decree* (Nuremberg Laws) and marking (yellow stars of David), *see Destruction of European Jews*, 2nd ed., Chapter Four, 63-80; (2) *Concentration* (ghettoes and camps), Chapter Six, *Id*. 155-270; (3) *Mobile Killing Operations*, Chapter Seven, *Id*. 271-390; and (4) *Deportations,* Vol. 2, Chapter Eight, *Id*. 391-860. Vol. Three, Chapter Nine is on the Killing Center Operations, *Id*. 861-1044. In Chapter Five of Hilberg's seminal work, *Expropriation*, he described the Nazis' task crisply as "removing the Jew from the economy." He deftly subdivided that task into seven ways of robbing Jews: Dismissals [from employment], Chapter Five, *Id.* 83-94, Aryanizations, *Id.* 94-134, Property Taxes, *Id.* 134-139, Blocked Money, *Id.* 139-144, Force Labor Wage Regulations, *Id.* 144-148, Special Income Taxes, *Id.* 148-149, and Starvation Measures, *Id.* 149-156.

In short, Martin Dean and other historians build new rooms, so to speak, within the space of Hilberg's architecture. Similarly, the current generation of

scholars focused on Nazi-looted art build on the work of the Monument Men who searched all over for the looted art, often at risk to their lives, and went on to take jobs in museums to ensure that these special spaces for objects of beauty would never yield to the temptation to put blood on their walls.

Judges are usually keen in attentiveness to particular details of a specific person or event. This underscores that each story is unique and worthy of attention. But the "big picture" many not be so easy to grasp. Solid historical research along the lines described above can enable a court to locate specific lootings of art within a larger framework of systematic or programmatic confiscation. Once a valuable insight like that has dawned, it is easier to recognize and identify the real reason why something dreadful is happening in the first place.

Stripping people of their civil liberties emboldens the desire to rob their assets to render them defenseless. Attacking the defenseless to create a purified race free and clean of the inferior and the unwanted is the final step to the misuse of power by destroying life itself. The Reich targeted not simply this or that person, but sought intentionally to destroy whole communities deemed undesirable—gays and lesbians, political rebels and resisters, Jews, "Living persons unworthy of life."

What are the resources needed to reject and resist the march along this downward spiral? In the American experience a "constitutional moment" occurred

when after abolishing slavery (Amend. XIII) we recommitted ourselves to a Second Reconstruction featuring procedural fairness and equal protection of the laws (Amend. XIV). *See genenerally* Bruce Ackerman, *We, the People: The Civil Rights Revolution* (2014).

It is no accident that the HEAR Act resists the vestiges of the Shoah by laying upon all courts in the United States, state and federal, an obligation to restate and renew the noblest purposes of our republic—procedural fairness and equal protection of the laws—in the adjudication of claims to restitution of objects of art, things of beauty stolen by the Nazis as part and parcel of a deeper desire and a thicker conspiracy to rob Jews of their very lives.

II. This Case is Clearly Governed by the HEAR Act, Which Mandates Fairness and Even-Handed Justice in All Disputes over Good Title to Nazi-Looted Art

Part I of this brief commented on the first purpose of the HEAR Act: "to ensure that laws governing claims to Nazi-confiscated art and other property further United States policy as set forth in the Washington Conference Principles … and the Terezín Declaration." This Part comments on the second purpose of the Act: "To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."

A. A Short Guide to the Terms of the HEAR Act and Why They Matter

On June 7, 2016, the Subcommittee on the Constitution of the Senate Committee on the Judiciary held hearings on the bill that became the HEAR Act. Two brief samples of testimony are relevant to the procedural aspects of the HEAR Act. First, Dr. Agnes Peresztegi, President of the Commission for Art Recovery, testified as follows on June 7, 2016:

> 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.

Second, Ronald S. Lauder, former Chairman of the Museum of Modern Art, founder of the Commission for Art Recovery and President of the World Jewish Congress, testified as follows:

> Our adherence to this commitment requires that resolution of such cases be based on the merits of each case and not on procedural technicalities or the capacity of one party to outspend, or outwait, the other.

Perhaps the most significant part of the HEAR Act is its insistence that the claimant have "actual discovery" of the facts necessary to start the running of the limitations period. Pub. L. 114-308, § 5(a). Section 4(1) defines the term "actual discovery" to mean "knowledge"; and Section 4(4) defines the term "knowledge"

to mean "having *actual knowledge* of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to *actual knowledge* thereof." *Id.* §§ 4(1), 4(4) (emphasis added). Crucially, actual knowledge is not the same thing as constructive knowledge, imputed knowledge or conjecture about when a claimant might have been able to unearth evidence of a family's war-era claim.

B. There are no Procedural Bars to a Fair and Full Disposition of this Case on Remand

To avoid repetition of the arguments already lodged with this Court by the parties, Amici limit this section of the brief to succinct comments on defenses raised in the case that intersect with the HEAR Act. The HEAR Act prohibits the overexertion of defenses unrelated to the merits to swallow Holocaust expropriated art claims whole.

1. *Relationship between Federal and State Courts.* Federal judges exercising diversity jurisdiction are required to reflect the interpretation of state law articulated by the highest appellate tribunal of that state. *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (state limitations period should be the same in federal court). Occasionally, however, federal judges have strayed far from the clear teaching of state courts on state law matters. *See*, *e.g.*, *Detroit Inst. of Arts v. Ullin*, No. 06-10333, 2007 WL 1016996 (E.D. Mich. Mar. 31, 2007) (holding that Holocaust victim's claim expired in 1941 as if the theft were a routine commercial

transaction). The HEAR Act removes doubt about such fanciful interpretation of state law matters by federal judges, at least when they construe state procedural requirements in a manner that impedes the restitution of art stolen by Nazis.

It is axiomatic that a state judge need not follow the opinion of a federal judge on a non-federal question. *See, e.g., Marsich v. Eastman Kodak Co.*, 244 App. Div. 295, 296 (2d Dep't 1936); *see also Conergics Corp. v. Dearborn Mid-W. Conveyor Co.*, 144 A.D.3d 516, 526 n.9, 43 N.Y.S.3d 6, 8 n.9 (1st Dep't Nov.17, 2016); *Merrill Lynch, Pierce, Fenner & Smith v. McLeod*, 208 A.D. 2d 81, 83, 622 N.Y.S.2d 954 (1st Dep't 1995).

New York's jurisprudence protecting its art market from stolen art is strong. A cornerstone of New York law is that the burden is on a good faith purchaser of artwork to establish the superiority of its title, either on the merits or because a defense precludes the claim. *See Solomon R. Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 626 (1991); *Menzel v. List*, 49 Misc.2d 300, 305, 267 N.Y.S.2d 804 (1966), *modified as to damages*, 28 A.D.2d 516, 279 N.Y.S.2d 608 (1st Dep't 1967), *rev'd as to modification*, 24 N.Y.2d 91, 298 N.Y.2d 91, 298 N.Y.2d 91, 298 N.Y.S.2d 979, 246 N.E.2d 742 (1969). This Court recognized that the "onerous" burden on the purchaser "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 (1st Dep't 1990). The Court of Appeals in *Lubell* declined to "impose the additional duty of diligence before the true owner has reason to know where its missing chattel is to be found." 77 N.Y.2d at 320, 567 N.Y.S.2d 623, 569 N.E.2d 426. In contrast, New Jersey is the lone state in the union that imposes a due diligence obligation on an art theft victim. *See O'Keefe v. Snyder*, 83 N.J. 476, 416 A.2d 862 (N.J. 1980).

When the New York Court of Appeals decided *Lubell*, it corrected a federal court's mistaken interpretation of New York policy as to stolen art litigation in *DeWeerth v. Baldinger*, 836 F.2d 103 (2d Cir.), *cert. denied*, (1987). In *Lubell*, the Court of Appeals also expressly coupled the laches defense with New York's unique demand-and-refusal rule. The Court stated as to the laches defense:

> [W]e think it plain that the relative possessory rights of the parties cannot depend upon the mere lapse of time, no matter how long. Indeed, rather than harming defendant, delay alone could be viewed as having benefited her, in that it gave her that much more time to enjoy what she otherwise would not have had . . .
>
> *Lubell*, 153 A.D.2d at 149-150.

In the 2010 *Bakalar v. Vavra* case, the Second Circuit reversed the District Court's misallocation of burdens of proof in its first unanimous opinion. *See Bakalar v. Vavra*, 619 F.3d 138, 142 (2d Cir. 2010). On remand, however, the trial court again departed from long-standing New York art law jurisprudence. The court again turned New York policy on its head when it ruled that the burden

remained on the Grunbaum heirs to prove duress and imposed an onerous burden on them to have searched for property in the aftermath of the *Shoah*. *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.

Shortly after the U.S. District Court for the Southern District of New York decided *Bakalar* on remand, the New York Court of Appeals reaffirmed New York policy favoring art theft victims:

> As we observed in *Lubell*, in a related discussion of the defense of the statute of limitations, "[t]o place the burden of locating stolen artwork on the true owner and to foreclose the rights of that owner to recover its property if the burden is not met would . . . encourage illicit trafficking in art."
>
> *In the Matter of Flamenbaum*, 22 N.Y.3d 962, 966 (2013).

2. *Statute of Limitations.* This case falls within the HEAR Act's uniform six-year statute of limitations triggered by *actual knowledge* of the claim and location of the artwork in question. On November 13, 2015, defendant Nagy—an art dealer—entered the Park Avenue Armory with two drawings alleged to have belonged to Fritz Grunbaum. On November 16, the very next business day after plaintiffs-appellees first had *actual knowledge* of the whereabouts of the disputed artworks, they filed this action to stop any potential sale and to keep the paintings here in New York.

3. *Laches.* The *Bakalar* case, discussed above, illustrates not just the general issue of identifying the respect federal judges owe to state court interpretation of state law. It also serves as an example of misunderstanding about Fritz Grunbaum's family's purported "lack of diligence." *Bakalar,* 819 F. Supp. 2d at 305-06. On the one hand, District Judge Pauley acknowledged that the *defense* of laches is "governed by New York law." *Bakalar,* 550 F.Supp.2d at 551. On the other, his ruling on laches was grounded in a misreading of New York law, for he incorrectly placed on Grunbaum's heirs a burden to search in most elaborate fashion for cultural property, including difficult-to-trace drawings. However unwittingly, he contradicted New York law when he opined that "The opposing party need not have had actual knowledge of the claim; rather, it is sufficient that the opposing party *should have known*." *Bakalar*, 2006 WL 2311113, at *3 (emphasis added). In any event, this is precisely what the HEAR Act now preempts by adopting the *actual knowledge* standard. See Part II. A above.

The Supreme Court of the United States resolved a similar issue in regard to the Copyright Act in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014). There, a defendant was urging that because Federal Rule of Civil Procedure 8(c) lists laches as an affirmative defense, that it must potentially apply to every cause of action. The Court explained the historical need for the laches doctrine in cases for which the law provided no applicable statute of limitations

and cautioned against expansive use of the doctrine when the United States Congress has provided a uniform statute of limitations. The Court stated:

> Such an expansive role careens away from understandings, past and present, of the essentially gap-filling, not legislation-overriding, office of laches. This Court has never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period. Inviting individual judges to set a time limit other than the one Congress prescribed would tug against the uniformity Congress sought to achieve in enacting [the statute.]

Id. at 1965.

The Court further stated, "The federal limitations prescription governing copyright suits serves two purposes: (1) to render uniform and certain the time within which copyright claims could be pursued; and (2) to prevent the forum shopping invited by disparate state limitations periods, which ranged from one to eight years." *Id.* at 1969.

The HEAR Act addresses the same concern. It was intended to render uniform and certain the period in which a claim for Holocaust Expropriated Art could be brought. This uniformity and certainty eliminates the need for courts to wrangle with the following wildly unpredictable issues in such cases:

1. What nation's or state's law applies to decide what the statute of limitations is in this case?

2. Under that law, is this a case for replevin, conversion, adverse possession or the UCC, each of which likely have different limitations or prescription periods under the applicable law.
3. Under that law, when does the statute of limitations accrue? Does the discovery rule apply? New York's demand-and-refusal coupled with laches rule? New Jersey's due diligence rule? Or some other rule under European law?
4. Which U.S. forum's courts are more likely to apply the law that favors my side? Federal or state?

See Jennifer A. Kreder, Reconciling Individual and Group Justice with the Need for Repose in Nazi-looted Art Disputes, 73 Brook. L. Rev. 155, 204 (2007) (discussing how authorizing a tribunal to "make a decision on the facts, instead of formalistic interpretations of vague legal principles such as bona fide purchaser status, jurisdiction, choice of law, and statute of limitations, would decrease the legal uncertainty surrounding claims").

The inability to predict how judges might resolve these questions has been a significant roadblock to parties hoping to reach "just and fair" solutions. *See id.* Neither side to the disputes could even agree on what the rules applied, much less whose rights to the artworks were superior. The litigation in these cases often dragged on for well more than a decade, usually without a court ever hearing the

merits. Only two Holocaust expropriated art cases have made it to trial—*Menzel* and *Bakalar*. Only *Menzel* resulted in a judgment on the merits about Nazi-era looting.

Now, the HEAR Act's uniform statute of limitations triggered only by *actual knowledge* of the identity and location of the artwork, the laches doctrine is inapplicable to any heirs' claim to Holocaust expropriated art until the Act sunsets. Even if a survivor's family may have had actual knowledge in the past, the HEAR Act resets the clock so that time frame will indeed be uniform and certain. The demand-and-refusal rule no longer matters, nor does the discovery rule or laches doctrine. Understanding a few of the cases that led to the HEAR Act's adoption will help the Court understand this analysis.

When District Attorney Robert M. Morgenthau seized Egon Schiele's *Portrait of Wally*, he forced us to confront the truth about the dim chances of success Jews like Lea Bondi had when seeking restitution in post-war Austria and Eastern Europe. One heir to a collection in Poland accurately described the problem as follows:

> Many direct victims of Nazi looting tried to reclaim their property in the late 1940s and early 1950s. But they came up against a wall of dishonesty and contempt on the part of collectors, auction houses, museum curators and dealers, who ducked and delayed in the hope that the problem would go away.

Adam Zamoyski, "Restitution Will Benefit the Public More Than the Heirs," *The Independent*, Jan. 9, 2009, at 10; *see also* Jennifer A. Kreder, *The New Battleground of Museum Ethics and Holocaust-Era Claims: Technicalities Trumping Justice or Responsible Stewardship for the Public Trust?*, 88 *Or. L. Rev*. 37, 42-43 (2009) (discussing obstacles and criticisms heirs faced).

The aftermath of the escape of Maria Altmann and her husband from Vienna also highlights the double victimization of Austrian Jews seeking restitution after the War. *See* the recent film "Woman in Gold" (dir. Simon Curtis, 2015); *see* also Anne-Marie O'Connor, *The Lady in Gold: The Extraordinary Tale of Gustav Klimt's Masterpiece, Portrait of Adele Bloch-Bauer* (2015). First, it was officials in the post-World War II Republic of Austria, not a cagy art dealer in the Nazi era, who practiced an extortion on Maria's relatives by imposing such hefty fees for getting their own property back that these taxes, in effect, eviscerated the Austrian Nullity Laws of 1946 and 1947 that had purported to render null and void all sham "transactions" that had occurred in the era of National Socialism. In the unfair bargaining that ensued, a lawyer for the Bloch-Bauer family surrendered valuable property of the family in "exchange" for being able to receive other parts of their family's goods.

Second, officials at the highest level of the Republic distorted their claim to good title to the famous Klimts that Altmann sought to recover, by insisting that a

provision in the will of Maria's aunt Adele Bloch-Bauer, who died in 1925, meant under Austrian law that Adele had made a binding promise to donate the Klimts to the Austrian Gallery.

Third, high-ranking officials of the Republic of Austria claimed that they would never surrender the Klimts since they now formed an essential part of the "national heritage" or patrimony of Austria.

Fourth, like Justice Klein of this Court in *Menzel* and Justice Ramos in this very case, Justice John Paul Stevens knew a "holdup" when he saw one, and stated the point on coercion thoughtfully in *Republic of Austria v. Altmann*, 541 U.S. 677, 682-683 (2004).

Fifth, the *Altmann* case is the last time the Supreme Court has granted certiorari in a case involving restitution of Nazi-looted art. *See* Chart of post-*Altmann* decisions in Appendix B. And it is one of the very few cases that ultimately yielded the result of restitution of stolen property to heirs of victims of Nazi persecution, whether they were murdered by the Nazis or survived the ultimate horror of the Shoah, the planned destruction of Europe's Jews.

As *Menzel* and *Altmann* illustrate, there is particular difference in the details of each case that comes before any court. But many of these stories of Nazi-looted property fit a larger pattern and practice identified at the Nuremberg Tribunal as an integral and connected part of the grand criminal conspiracy of the Nazis in their

war against the Jews. Another thing in common is that the key to the claims—ainformation—was inaccessible during the Cold War and, too commonly, remains locked away to this day, often by individuals and institutions right here in the United States. *See Grosz v. Museum of Modern Art*, 772 F. Supp. 2d 473, 481-89 (S.D.N.Y.) (discussing MoMA's refusal to provide access to provenance documents despite public statements to the contrary), *aff'd*, 403 F. App'x 575 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 102 (2011).

The HEAR Act finally provides justice for the heirs of Nazi victims like Ms. Bondi, Mr. Grunbaum, Mr. Zamoyski and Ms. Altmann whose cases were impossible to assert in the post-war era. Ruling against them on laches grounds in a case like this would stop the HEAR Act in its tracks. The purpose of the deletion of the word "laches" from the legislation certainly was not to rip away any hope the HEAR Act gives to survivors' heirs that they may finally have a chance to recover their heirlooms and cultural property.

On February 14, 2017, the First Department became the first court in the nation to consider the HEAR Act in a case brought by heirs to recover a Modigliani offered for sale in New York, before the sellers pulled it back to Switzerland. This Court recognized that "[w]hile millions of works were recovered and returned to the rightful owners, individual Holocaust victims and their heirs have struggled for decades to seek replevin." *Matter of Stettiner*, 2017 N.Y. Slip

Op. 01168 (1st Dep't Feb. 14, 2017), http://nycourts.gov/reporter/3dseries/2017/2017_01168.htm. Fortified by the HEAR Act, New York judges can confidently render justice in Holocaust expropriated art cases on the merits—to finally award justice far too long denied.

4. *Res judicata.* The defendants seek to use the res judicata doctrine to expand the scope of the narrowly drawn *Bakalar* decision to cover *all artworks* owned by Fritz Grunbaum. *Bakalar* was limited to the *one* drawing at issue, *Woman with Bent Left Leg (Torso)*. The U.S. District Court decided only the case before it; the decision in no way ousts the courts of the State of New York from exercising jurisdiction to hear claims as to other works stolen from Fritz Grunbaum.

In fact, the Grunbaum heirs attempted to invoke class action procedure to try to use the federal court's jurisdiction to locate more of his collection. There was some limited discovery as to "statistical matters" leading up to the court's order denying the motion to certify a class action, but the district court prohibited discovery of the names of anyone who may have purchased artworks other than *Woman with Bent Left Leg (Torso)*. It is completely unreasonable to allege that the claims as to *Woman in Black Pinafore* or *Woman Hiding Her Face* could have and should have been asserted previously.

Moreover, such an argument is invalidated by the HEAR Act itself. The HEAR Act's six-year limitations period expressly applies to pending cases. Pre-existing claims are deemed to have been actually discovered on the date the HEAR Act was enacted even if, prior to enactment, the plaintiff had knowledge of the facts necessary to begin running the HEAR Act's limitations period, whether the claim was previously time-barred or not. Pub. L. 114-308, § 5(c). This provision is intended to give survivors a chance on the merits of these claims.

The Act applies to any claims pending at the time of enactment, whether or not on appeal, or filed from the date of enactment through December 31, 2026. *Id*. § 5(d). The only exception is for claims already time-barred on the date prior to enactment of the HEAR Act where plaintiff had knowledge of the relevant facts on or after January 1, 1999, and not less than six years had passed from the time plaintiff acquired such knowledge during which the claim was not time-barred. *Id*. § 5(e).

The HEAR Act now ensures that survivors—the last generation of which is rapidly aging and expected to pass within the next ten years—have the opportunity to see and experience firsthand their property restituted to the rightful owners and some measure of justice being done.

5. *Collateral estoppel.* Shortly after the *Anschluss* in March of 1938, the SS arrested Grunbaum in Vienna and immediately transferred him to the internment

camp at Dachau. In August of that year Adolf Eichmann took over the command of the Central Agency for Jewish Emigration in Vienna. Grunbaum died at Dachau in 1941; a modern prosecutor would not hesitate to charge a prison warden with murder or at least manslaughter for imposing brutal terms of incarceration for which this camp became notorious. After using his wife Elisabeth (Lily") to inventory the entire estate in order to seize it, the Nazis also murdered her in a camp in Belarus called Maly Trostene. The *Bakalar* record contains no evidence whether the artworks at issue in this case were in the custody of the Schenker storage company in 1938 and eventually sold to art dealer Eberhard Kornfeld, as the *Bakalar* court found as to *Woman with Bent Left Leg (Torso)*. In fact, JK 257 and 292 attached as Exhibit 5 to the Declaration of Raymond J. Dowd, provide evidence that the artworks at issue in this case took an entirely different path. Individuals routinely break up collections for convenient sale; Holocaust victims sometimes could smuggle out a few pieces from a larger collection; and Nazis did not care about preserving a collection as a whole when converting it into cash for armaments.

In this case, the art dealer attempts to invoke the doctrine of non-mutual, offensive issue preclusion to meet his burden of proving his allegedly superior title to the artworks. *See, e.g., Parklane Hosiery Co., Inc. v. Shore,* 429 U.S. 322 (1979). Courts typically decline to apply the doctrine for such reasons as the

opposing party's inability to call important witnesses or extensively litigate the particular factual issue in the first case. *See Restatement (Second) of Judgments* § 28 (1982). Caution is particularly warranted when the issue is one of particular relevance to the public interest, "[t]he issue is one of law[, or] . . . a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws." *Id.; see also id.* at § 28 and cmt. h. Finally, the most important "danger lies in the simple but devastating fact that the first litigated determination of an issue may be wrong." *Wright & Miller, et al., 18 Fed. Prac. & Proc. Juris.* § 4416 (3d ed.) (citations omitted). All of these red flags are waving strongly here.

In sum, the HEAR Act restores what was lost in sixteen years of federal cases misapplying state replevin and conversion law in the context of Holocaust expropriation. Now, without distraction about the applicable statute of limitations, courts can confidently render justice based on the merits of a claim consistent with U.S. domestic and foreign policy stretching back for more than a century.

Conclusion

For these reasons, this Court should swiftly affirm the judgment below as it accords with the HEAR Act, U.S. policy and New York law.

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Appendix A: Specific Interests of Amici Curiae

The American Jewish Committee (AJC) for more than a century has been the leading global Jewish advocacy organization. With offices across the United States and around the globe, and partnerships with Jewish communities worldwide, AJC works to enhance the well-being of the Jewish people and to advance human rights and democratic values for all.

Omer Bartov is 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 *The Eastern Front, 1941-1945: German Troops and the Barbarization of Warfare*, 2001; *Hitler's Army: Soldiers, Nazis, and War in the Third Reich*, 1992; *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation*, 1996; *Mirrors of Destruction: War, Genocide, and Modern Identity*, 2002.

Michael Bazyler is professor of law and The 1939 Law Scholar in Holocaust and Human Rights Studies at Chapman University. Bazyler is the author of *Holocaust Justice: The Battle for Restitution in America's Courts* (2003), the co-editor with Roger Alford of *Holocaust Restitution: Perspectives on the Litigation and Its Legacy* (2006), and co-author of *Forgotten Trials of the Holocaust* (2014).

Rabbi Haim Beliak has engaged in postgraduate studies in the Holocaust program of the Hebrew University's Institute for Contemporary Jewry. The focus of his research was on religious and psychological dimensions of the restoration of stolen goods as a dimension of restorative justice.

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 familiar with the needs of museums for pieces of art, artefacts, and other visual means of communicating themes central to exhibitions. See, e.g., Michael Berenbaum, T*he World Must Know: The History of the Holocaust as Told in United States Holocaust Memorial Museum* (2d ed. 2008). He is well aware of the ethical obligation of museum directors to refrain from theft of intellectual property or from acts that would promote a market in stolen goods.

Judy Chicago and Donald Woodward are artists and the authors of Holocaust Project From Darkness Into Light (1993); they are deeply sensitive to issues of devaluation of art by governmental censors.

Richard Falk is Albert G Milbank Professor Emeritus of International Law at Princeton University. He is the author of *Law, War, and Morality in the Contemporary World; The Role of Domestic Courts in the International Legal Order; Legal Order in a Violent World; The Status of Law in International Society; This Endangered Planet; A Study of Future Worlds; Human Rights and State Sovereignty; The End of World Order; Reviving the World Court; The Promise of World Order; Revolutionaries and Functionaries; Revitalizing International Law; Explorations at the Edge of Time; On Humane Governance: Toward a New Global Politics;* and *Law in an Emerging Global Village: A Post-Westphalian Perspective.*

Hector Feliciano is the author of *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* (1998).

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

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

Peter Hayes is Professor of History and German, Theodore Zev Weiss Holocaust Educational Foundation Professor of Holocaust Studies Emeritus. He is the author of *Why? Explaining the Holocaust*, 2017; Cooperation to Complicity: *Degussa in the Third Reich*, 2004; *Industry and Ideology: IG Farben in the Nazi Era*, 1987.

Douglas Kinsey, Professor of Art Emeritus at the University of Notre Dame, and his wife *Marjorie Kinsey*, an art historian, are familiar with the long history of looting of art in time of war, by the military and private parties, from the ancient world to the present century.

Douglas Kmiec is the Caruso Family Chair and Professor of Constitutional Law at Pepperdine University School of Law. His published works include The *Attorney General's Lawyer* (1992), three books on the American Constitution, a two-volume legal treatise, related books, and hundreds of published articles and essays. He is a frequent guest in the media on programs such as PBS's NewsHour, Meet the Press, and NPR, analyzing constitutional questions.

Dr. Marcia Sachs Littell is Professor of Holocaust and Genocide Studies and Director of the Master of Arts Program in Holocaust and Genocide Studies at Stockton University, Galloway, New Jersey. She is a prolific author on the Holocaust and genocide.

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E. Randol Schoenberg represented Maria Altmann in the federal litigation culminating in *Republic of Austria v. Altmann*, (2004) (retroactivity of the Foreign Sovereign Sovereign Immunity Act. He was the founding president of the Los Angeles Museum of the Holocaust, and is an adjunct law professor of law at the

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Melvyn Weiss is the founder of the Holocaust Memorial Art Foundation.

Jonathan Zatlin is Associate Professor of History at Boston University He is the author of *Jews and Money: Economic Change and Cultural Anxiety in Germany, 1870-1990*, this monograph argues that anti-Semitism was based on a peculiarly European confusion of money with the market and Jews with money. This double confusion provided psychological relief and economic compensation for the widespread anxiety, triggered by Germany's rapid industrialization, that market-oriented practices were reducing spiritual to financial values, and contributed to racialized understandings of economic activity and citizenship.

Appendix B, Holocaust-Era Art Cases

FEDERAL HOLOCAUST-ERA ART CASES FILED BY SURVIVORS & HEIRS SINCE AUSTRIA RETURNED KLIMTS TO MS. ALTMANN IN 2006

Updated February 2017

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GOOD FAITH CASES LOST BY SURVIVORS & HEIRS (* pending after remand)

	Case Name	Case Number	Citation or Court in Which Pending	Disposition
*1	*Cassirer v. Thyssen-Bornemisza Collection Foundation, an Agency of Instrumentality of the Kingdom of Spain*	No. CV 05-03459 GAF (Ex)	153 F.Supp.3d 1148 (C.D. Cal. June 4, 2015).	Dismissed due to the museum's adverse possession of Camille Pissarro's *Rue St. Honoré, après-midi, êffet de pluie*. After appeal reinstating case and rehearings en banc, SCOTUS denied certiorari. Case remanded for further proceedings. District court dismissed again. Appeal pending in 9th Circuit (No. 15-55977), submitted for decision December 2016.
*2	*von Saher v. Norton Simon Museum of Art at Pasadena*	07-05691	Remanded from 9th Cir. to C.D. Cal. 754 F.3d 712 (9th Cir. June 6, 2014).	Struck down all claims filed pursuant to California statute extending limitations period to 2010 and remanded to determine whether statute of limitations has run on common law conversion claim. SCOTUS followed Solicitor General to deny certiorari. On remand, trial court dismissed, appellate court reversed in part, SCOTUS again denied cert. Trial court then ruled in favor of museum. Now on appeal in the 9th Circuit.

3	*Bakalar v. Vavra*	05-3037	619 F.3d 136 (S.D.N.Y. Aug. 17, 2011).	Claimant lost after trial, incorrect choice-of-law and burden of proof analysis. 2d Circuit reversed. On remand, claimant lost again. 2d Circuit affirmed in 2012 "Summary Order."
4	*Grosz v. MoMA*	09-CV-3706 (CM)	403 Fed.Appx. 575 (2d Cir. 2010) (unpublished opinion).	Court granted museum's motion to dismiss on ground that recently exchanged letters triggered demand and refusal such that the statute of limitations just barely ran out. Affirmed on appeal. SCOTUS denied petition for certiorari.
5	*Boston MFA v. Seger-Thomschitz*	08-10097-RWZ	633 F.3d 1 (1st Cir. Oct. 14, 2010).	Court granted museum's motion for summary judgment declaring its superior interest in painting. Affirmed on appeal. SCOTUS denied petition for certiorari.
6	*Dunbar v. Seger-Thomschitz*	09-30717	615 F.3d 574 (5th Cir. Aug. 20, 2010).	Prescriptive ownership by present-day possessor under Louisiana law; motion for summary judgment granted. Affirmed on appeal. SCOTUS denied petition for certiorari.
7	*Orkin v. Taylor*	05-55364	487 F.3d 734 (9th Cir. 2007).	Holocaust Victims Redress Act did not create a private right of action. State law claims barred by statute of limitations. Affirmed on appeal. SCOTUS denied certiorari.
8	*Detroit Inst. of Arts v. Ullin*	06-10333	2007 WL 1016996 (E.D. Mich. Mar. 31, 2007).	Declaratory judgment issued to museum and claimants' state law claims dismissed on statute of limitations grounds (claim accrued in 1938 and expired in 1941, before the end of WWII).
9	*Toledo Museum of Art v. Ullin*	3:06 CV 7031	477 F.Supp.2d 802 (N.D. Ohio 2006).	Declaratory judgment issued to museum and claimants' state law claims dismissed on statute of limitations grounds. Analysis similar, but not identical to *Detroit Inst. of Arts v. Ullin*.

10	*Orkin v. The Swiss Confederation, et al.*	09-10013 (LAK)	2011 WL 4822343 (2d Cir. Oct. 12, 2011).	MTD granted for lack of jurisdiction under FSIA and Alien Tort Statute. Affirmed on appeal.
11	*Westfield v. Federal Republic of Germany*	09-6010	633 F.3d 409 (6th Cir. Feb. 2, 2011).	Court ruled that Germany could not be sued under FSIA for any taking of property during the war without even citing Bernstein on the ground that the taking had no "direct effect" in the U.S. 6th Circuit affirmed.
12	*Schoeps v. Bayern*	13 Civ. 2048	27 F.Supp.3d 540 (S.D. N.Y. June 27, 2014).	Grant of MSJ to Bayern on grounds FSIA barred jurisdiction. Affirmed. Certiorari denied.

ONLY 1 CASE WON BY HOLOCAUST VICTIM OR HEIR

Vineberg v. Bissonnette	08-1136	548 F.3d 50 (1st Cir. 2008).	Affirmed D. R.I. summary judgment in favor or claimant. Only case won by a private claimant in federal court since 2004. Defendant's father was Nazi officer who took painting.

CURRENTLY PENDING CASES
(See also * in first chart)

de Csepel, Herzog, et. al v. Rep of Hungary, et. al.	1:10-01261	169 F.Supp.3d 143 (Mar. 14, 2016).	D.C. Cir. held MSJ should not have been granted. Legal issues: FSIA, treaty. Fact issues: comity & time bar. On remand, trial court dismissed the claim as to most paintings, but some claims still remain. Cross appeals filed. Oral argument scheduled March 2017.
Philipp v. The Federal Republic of Germany, et. al.	1:15-cv-00266	(D.D.C. Feb. 23, 2015).	Action for declaratory judgment, restitution/replevin of medieval art collection (*Welfenschatz*) & $250,000,000.

Chabad v. Russia	1:05–cv–01548	128 F.Supp.3d 242 (D.D.C. 2015).	Default judgment and sanctions. No enforcement.
Zuckerman v. The Met	1:16-cv-07665	Motion to dismiss pending.	Action by estate of Alice Leffman *The Actor* by Picasso.

NOTABLE SETTLEMENTS AFTER PRIVATE LITIGANTS FILED COMPLAINTS

1. *Museum of Modern Art v. Schoeps*, 549 F.Supp2d 543 (S.D.N.Y. 2008), 594 F.Supp.2d 461 (S.D.N.Y. 2009).

2. *Estate of Irene Korhumel v. Estate of I.K. and John Does*, No. 1:2011cv05557 (N.D. Ill. Aug. 15, 2011).

3. *Meyer v. The Board of Regents of the University of Oklahoma*, 5:2015cv00403 (W.D. Ok. Apr. 15, 2015).

NOTABLE NEW YORK STATE COURT CASES (3 STILL PENDING)

1. *In the Matter of Flamenbaum*, 95 A.D.3d. 1318 (N.Y. July 5, 2012). Germany successfully recovered ancient tablet stolen from museum during war.

2. *Frenk v. Solomon*, 123 A.D.3d 416 (N.Y. 2014). Motion to dismiss denied; affirmed on appeal; pending.

3. *Maestracci* v. *Seated Man with a Cane, 1918 et al.*, Appellate Division, 1st Dep't remanded for further proceedings after affirming Surrogate's Court estate issues.

4. *Reif v. Nagy*, Index No. 161799/2015. Fritz Grunbaum heirs' claims for artworks on sale in New York. On appeal to Appellate Division, 1st Dep't.