No. 18-0634-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Laurel Zuckerman, As Ancillary Administratrix of the Estate of Alice Leffmann,

Plaintiff–Appellant,

v.

The Metropolitan Museum of Art,

Defendant–Appellee.

On Appeal from the United States District Court for the Southern District of New York Civil Action No. 16-cv-07665 (LAP)

Brief Amicus Curiae of B'nai B'rith International, Raoul Wallenberg Centre for Human Rights, Simon Wiesenthal Center, Omer Bartov, Michael Berenbaum, Stuart E. Eizenstat, Richard Falk, Eugene Fisher, Rabbi Irving Greenberg, Peter Hayes, Marcia Sachs Littell, Hubert G. Locke, Wendy Lower, Bruce F. Pauley, Carol Rittner, John K. Roth, Lucille Roussin, William L. Shulman, Stephen Smith, and Alan Steinweis as Amici Curiae, in Support of Plaintiff-Appellant Zuckerman

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CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1 and Second Circuit Rule 26.1, *amicus curiae B'nai B'rith International* states that it has no parent corporation, no publicly held corporation owns 10% or more of its stock, and does not have a direct financial interest in the outcome of this litigation.

Pursuant to F.R.A.P. 26.1 and Second Circuit Rule 26.1, *amicus curiae Raoul Wallenberg Centre for Human Rights* states that it has no parent corporation, no publicly held corporation owns 10% or more of its stock, and does not have a direct financial interest in the outcome of this litigation.

Pursuant to F.R.A.P. 26.1 and Second Circuit Rule 26.1, *amicus curiae The Simon Wiesenthal Center* (SWC) states that it has no parent corporation, no publicly held corporation owns 10% or more of SWC's stock, and SWC does not have a direct financial interest in the outcome of this litigation.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

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

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

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

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and Local Rule 29.1(b) of this Court, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person made a monetary contribution intended to fund the preparation or submission of this brief.

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

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

Omer Bartov is the John P. Birkelund Distinguished Professor of European History and Professor of History and Professor of German Studies at Brown University. He is the author of many books, including *The Eastern Front, 1941-1945: German Troops and the Barbarization of Warfare* (2d ed. 2001); *Hitler's Army: Soldiers, Nazis, and War in the Third Reich* (1992); *The Holocaust, Industrial Killing, and Representation* (1996); *Murder in Our Midst: Mirrors of Destruction: War, Genocide, and Modern Identity* (2002).

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

Michael Berenbaum, *The World Must Know: The History of the Holocaust as Told in United States Holocaust Memorial Museum* (Rev. ed. 2005).

Ambassador Stuart E. Eizenstat, former U.S. Ambassador to the European Union, Under Secretary of Commerce, Under Secretary of State, Deputy Secretary of the Treasury and Special Representative of the President and Secretary of State on Holocaust Issues in the Clinton Administration, during which he was the principal negotiator for the United States Government of the Washington Principles of Nazi-Looted Art, and Special Adviser to Secretary of State Clinton and Secretary of State Kerry on Holocaust-Era Issues in the Obama Administration, during which he was the principal negotiator for the United States Government of the Terezín Declaration.

Richard Falk is the Albert G. Milbank Professor Emeritus of International Law at Princeton University, and Research Fellow, Orfalea Center, University of California, Santa Barbara. He is the author of *Power Shift: On the New Global Order* (2017)*; Human Rights Horizons* (2002); *Law in an Emerging Global Village: A Post-Westphalian Perspective* (1998); *On Humane Governance: Toward a New Global Politics* (1995).

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

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

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

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. She is a prolific author on the Holocaust and genocide, and a co-director of The Scholars' Conference on the Holocaust and the Churches.

*Dr. Hubert G. Loc*ke is Professor Emeritus at the University of Washington, and is the co-founder of The Scholars' Conference on the Holocaust and the Churches. He is a prolific author on the Holocaust and genocide, and on American history, especially race relations and the civil rights movement.

Wendy Lower is the Director of the Mgrublian Center for Human Rights and the John K. Roth Professor of History and the George R. Roberts Fellow at Claremont McKenna College. She has served as Director of the Visiting Scholars Program in the Center for Advanced Holocaust Studies at the United States

Holocaust Memorial Museum (USHMM). She initiated an oral history program for the USHMM on German Witness to War and its Aftermath. Since 2016 she has served as the Acting Director, Mandel Center for Advanced Holocaust Studies, USHMM. She is the author of *Nazi Empire-Building and the Holocaust in Ukraine* (2005); and *Hitler's Furies: German Women in the Nazi Killing Fields* (2013).

Bruce F. Pauley is a Professor Emeritus of History at the University of Central Florida, and the author of *From Prejudice to Persecution: A History of Austrian Anti-Semitism* (1998) and *Hitler and the Forgotten Nazis: A History of Austrian National Socialism* (1981).

Sister Carol Rittner, RSM, is Distinguished Professor of Holocaust and Genocide Studies emerita at Stockton University. She is a prolific author and editor of books relating to the Holocaust and genocide. She is also the producer-director of the Oscar award-winning documentary film, "Courage to Care," (1985) and the editor of an accompanying volume, *Courage to Care: Non-Jews Who Rescued Jews During the Holocaust* (1986).

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

Lucille A. Roussin is the founding Director of the Holocaust Restitution Claims Practicum at Cardozo School of Law, where she taught a seminar on Remedies for War Time Confiscation. She has a Ph.D. in Art History and Archaeology from Columbia and a law degree from Cardozo. She was Deputy Research Director of the Art and Cultural Property Team of the Presidential Commission on Holocaust Assets in the US. She served on the Cultural Properties Legislation Committee of the Archaeological Institute of America and was Vice Chair of the Art and Cultural Heritage Committee of the American Society of International Law. She currently serves on the Board of the Lawyers Committee for Cultural Heritage Preservation, and is a member of the Art Law Committee of the Association of the Bar of the City of New York. She participated in the international conference on Restitution of Holocaust-Era Assets in Prague in June of 2009.

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

Stephen Smith is Executive Director of the University of Southern California Shoah Foundation, UNESCO Chair on Genocide Education, and Adjunct Professor of Religion. He founded the U.K. Holocaust Center, is Patron of the South Africa Holocaust and Genocide Foundation, and is a member of the International Holocaust

Remembrance Alliance. His publications include: *Never Again! Yet Again! A Personal Struggle with Holocaust and Genocide* (2009).

Alan Steinweis is Professor of History and Miller Distinguished Professor of Holocaust Studies at the University of Vermont. He is the author of *Art, Ideology, and Economics in Nazi Germany* (1993), *Kristallnacht 1938* (2009) and *Studying the Jew: Scholarly Antisemitism in Nazi Germany* (2006).

ARGUMENT

The Metropolitan Museum of Art (the "Met") has convinced the lower court that Jews forced to flee for their lives three times, just barely avoiding the clutches of the Third Reich, were able to freely and voluntarily transfer their property as they chose. This falsehood denies historical truth and stains the judicial record. No United States case to date has addressed the uncomfortable issue of "Flight Art" head-on. "Flight Art" should be defined as artworks Nazi persecutees were forced to sell to pay the discriminatory taxes, including the infamous Flight Tax, and make use of precious, hard-to-obtain visas to flee the continent. The truth of the refugees' duress held fast no matter whether the property or refugees managed to get as far as Switzerland or Italy before being caught in the Nazis' web. Jews often faced certain death if they could not assemble enough Reichmarks to pay the taxes.

In Part I, we argue that plausibility pleading should not be over-extended to bar fair resolution of cases seeking recovery of Flight Art in light of historical

realities. In Part II, we urge that the HEAR Act requires that courts not repeat the mistakes of federal courts that required the HEAR Act's adoption in the first place—overemphasis on unjustified excuses to avoid dealing with uncomfortable truths. In Part III, we explain how restitution of Flight Art is consistent with American policy dating back to World War II.

I. EVALUATING WHETHER A CLAIM OF DURESS IS PLAUSIBLE REQUIRES UNDERSTANDING THE ALL-ENCOMPASSING WEB THE NAZIS WOVE TO EXTRACT ALL JEWISH ASSETS FOR THE BENEFIT OF THE REICH ECONOMY BEFORE ANYONE COULD FLEE THE CONTINENT WITH A VISA.

A. Plausibility Pleading in Holocaust-Era Claims Requires Understanding That Fleeing Jews Were Not Engaged in Routine Commercial Transactions.

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

Judges have the power to take judicial notice of widely known historical facts. As to factual allegations that are less readily understandable, judges should welcome

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

From their very first days in power in 1933, the Nazis forced Jews to abandon their property and flee. As a matter of law, this court is bound by the leading decision of the New York judiciary that fleeing Jews cannot be deemed to have abandoned their property. *E.g.*, *Menzel v. List*, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966), *modified*, 279 N.Y.S.2d 608 (N.Y. App. Div. 1967); *rev'd on other grounds*, 246 N.E.2d 742 (N.Y. 1969). The Jews' loss of their property as they fled "for their lives was no more voluntary than the relinquishment of property during a holdup." *Id.* The landmark *Menzel* case reinforced this truth for all Holocaust-era expropriated art cases to come:

> Throughout the course of human history, the perpetration of evil has inevitably resulted in the suffering of the innocent, and those who act in good faith. And the principle has been basic in the law that a thief

> conveys no title as against the true owner . . . Provisions of law for the protection of purchasers in good faith which would defeat restitution [of Nazi confiscations] shall be disregarded.

246 N.E.2d at 819. District Judge Korman**,** concurring in an opinion of this Court, reminded all of this important truth in *Bakalar v. Vavra*:

> The assumption that the Perls Galleries acted in good faith was undermined by its own conscious avoidance. As the New York Court of Appeals explained in the course of upholding the award of damages against it in favor of the good faith purchaser, the Perls Galleries was responsible for the position in which it found itself. Specifically, the Perls Galleries would not have been in that position if it had satisfied itself that it was getting good title from the art gallery from whom it purchased the artwork. Instead, the Perls testified "that to question a reputable dealer as to his title would be an 'insult.'" Perhaps, [the Court of Appeals responded], but the sensitivity of the art dealer cannot serve to deprive the injured buyer of compensation for a breach which could have been avoided had the insult been risked.

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

After the Nazis' seizure of power in early 1933, the effects of a series of boycotts, discriminatory treatment, conscripted real property and business forfeitures, and specific legal measures served to rapidly undermine the position of

Jewish businesses, employees, and professionals. Jews were not only excluded from government service, but state and Nazi Party initiatives progressively drove them out of many other trades and professions. RICHARD J. EVANS, THE THIRD REICH IN POWER 1933-1939 392 (2005).

In 1935, James McDonald resigned on moral grounds from his post as High Commissioner for Refugees. He detailed the economic devastation of German Jews and noted that many wanted to flee but could not because of financial predation occurring between 1933 and 1935. Text of Resignation of League Commissioner for German Refugees, *The New York Times* (Dec. 30, 1935), https://www.wdl.org/en/item/11604/view/1/11/. More than half of all Jewish businesses were sold or liquidated by the summer of 1938; the converse was true for non-Jews—they were the ones buying the businesses. Evans, *supra*, at 18 ("Aryanization did indeed offer many opportunities to non-Jewish businesses and businessmen to enrich themselves.").[2]

Jewish fire sales to art dealers, whom the Nazis allowed to operate, were not routine, commercial transactions. A city's art market profiteers sometimes reached a frenzied pace as the Nazis took over the city, because Nazi officers were obsessed

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

with art and wanted to accumulate it. *E.g.*, JONATHAN PETROPOULOS, ART AS POLITICS IN THE THIRD REICH (1996). Of course, many Jews went into hiding and tried desperately to escape, selling whatever they could to flee. Their precarious position left them open for predation. Imprisonment of family members was used as a bargaining chip for sales. *E.g.*, SIMON GOODMAN, THE ORPHEUS CLOCK (2015). As for the middlemen profiteering, Hermann Goering did not care whether the art dealers who informed on the location of prized artworks were sympathizers or not—or even Jewish. *See* LEONARD MOSLEY, THE REICH MARSHALL 263 (1974) (relaying how Goering instructed part-Jewish dealer Bruno Lohse to deal with the "great many" Jewish art dealers and "forget about the racial background of the dealers with whom you come in contact.").

B. Returning Flight Art to Refugees' Heirs Today Does Not Unfairly Punish American Collectors and Museums.

The Nazis allowed select Jewish art dealers to funnel undesired "degenerate" artworks out of Europe to "purify" the German art scene and ensure undesirable works would be converted into currency, particularly foreign currency, to bolster the German economy. *E.g.*, LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR 53 (1994). And Americans were willing buyers who scooped up bargains and converted them to tax-deductible donations to our most esteemed museums and institutions: "The

paintings came to America because for more than ten years during and after the war there was no place else to sell them." *E.g.,* Adam Zagorin, "Saving the Spoils of War," *Time*, 87 (Dec. 1, 1997) (quoting Willi Korte, then consultant on Holocaust losses to the Senate Banking Committee).

The massive quantity of art the Nazis stole was well known in American art circles, especially at The Metropolitan Museum of Art (Met). The Met's Director in 1943, Monuments Man[3] Francis Henry Taylor, wrote for the *New York Times*: "Not since the time of Napoleon Bonaparte has there been wholesale looting and destruction of art property that is going on today in the occupied countries."[4] Taylor was succeeded at The Met in 1955 by Monuments Man James J. Rorimer, who later told the *New York Times*: "When things are offered for sale, we are very careful to determine whether they are war loot." Milton Esterow, "Europe is Still Hunting Its Plundered Art," *New York Times*, 1 (Nov. 16, 1964) (reporting "From Greece to

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

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

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

New York law's "onerous" burden on art buyers "well serves to give effect to the principle that persons deal with the property in chattels or exercise acts of ownership over them at their peril." *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 153, 550 N.Y.S.2d 618 (N.Y. App. Div. 1990). In the 2010 *Bakalar v. Vavra* case, the Second Circuit reversed the District Court's misallocation of burdens of proof in a 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

[5] In October of 1946, a former OSS (Office of Strategic Services, a U.S. wartime intelligence agency) officer and member of the Art Looting Investigation Unit broke the story with a five-page piece; *see* James Plaut, "Hitler's Capital: Loot from the Master Race," *The Atlantic*, Vol. 178, No. 4 (Oct. 1946) 75-80. Journalist Janet Flanner began a lengthy three-part essay on the Great Nazi Art Heist called "The Beautiful Spoils." The essay ran in three consecutive issues of *The New Yorker* beginning in February 1947. Ten years later Harper & Row published Flanner's volume, *Men and Monuments* (1957). *See also* "Restitution of Identifiable Property to Victims of Nazi Oppression," in 44 *Am. J. Int'l. Law* 39 (1950) 39-67.

when it ruled that the burden remained on the Grunbaum heirs to prove duress. *See Bakalar v. Vavra*, 819 F. Supp. 2d 293, 300-301 (S.D.N.Y. 2011). These errors were not corrected by the Second Circuit and leave the impression that courts give museums a favorable presumption that transactions between Jews and third persons should be presumed commercially reasonable. Given the breadth of the Nazis' web to capture all Jewish-owned assets for the German economy—no matter where they may have been located on the continent—such a presumption is not only illegal, but also historically unwarranted.

> 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.[6]

The desirability of promoting the free trade of goods is largely premised on the concept of a good faith purchaser engaged in a routine commercial transaction. Courts cannot, consistent with New York law, presume that purchasers of Holocaust assets acted in good faith. Like the Perls Galleries that traded in the Menzels' Monet, the middlemen purchasers of *The Actor* should have known better, and The Met

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

should have reconciled the donated painting's provenance before eagerly hanging it on the wall.

II. THE HEAR ACT GIVES THIS COURT A CLEAN SLATE TO RESOLVE THE CLAIM ON THE FACTS AND MERITS WITHOUT GENUFLECTING TO A FALSE PRESUMPTION OF A COMMERCIALLY REASONABLE TRANSACTION.

As depicted in the chart entitled Federal Holocaust-Era Art Claims https://www.lootedart.com/web_images/pdf/Chart%20of%20Dismissed%20Federal%20Holocaust%20Claims.pdf, for sixteen years after the landmark case of *Austria v. Altmann*, 541 U.S. 677 (2004), courts seem to have subjected Nazi-era art cases to a presumption of invalidity such that only one claimant successfully recovered Nazi-looted art in federal court.[7] Congress held hearings and drafted legislation designed to correct this long line of misguided cases decided at the motion to dismiss stage without the benefit of expert historians. After developing a factual record on these matters, the House and Senate unanimously adopted the Holocaust Expropriated Art Recovery Act of 2016 (the "HEAR Act"), and President Obama signed it into law. Pub. L. 114-308, 114th Cong., H.R. 6130 (22 U.S.C. § 1621 note)

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

(Dec. 16, 2016). 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. *See, e.g.*, Nicholas, *supra*.

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

This finding implied that the Nazis' reach was limited to the borders of the Reich, which is simply false. As recently recognized by the Second Circuit in *Bakalar*, the Nazis pressured Jews to transfer property located outside the Reich in exchange for safety for themselves or others: "Of particular significance is the ordinance dated April 26, 1938, which required Jews to register their assets and which covered both those who sought to leave the Reich . . . and those who remained, with the Reich seeking to appropriate their domestically as well as their externally held assets." *Bakalar v. Vavra*, 619 F.3d 136, 138 n.1 (2d Cir. 2010).

The present case is exactly the type of case that the HEAR Act sought to correct. 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 poignant. First, Dr. Agnes Peresztegi, President of the Commission for Art Recovery, testified as follows:

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

Testimony of Agnes Peresztegi, Commission for Art Recovery Before the Senate Judiciary Committee Subcommittees on The Constitution & Oversight, Agency

Action, Federal Rights and Federal Courts, 2 (June 7, 2016), https://www.judiciary.senate.gov/imo/media/doc/06-07-16%20Peresztegi%20Testimony.pdf.

Replacing one obstruction with another is exactly what happened in the present case. If Mr. Leffmann fleeing for his life barely one step ahead of the Nazis was not subject to duress, then it is unfathomable what duress means under any jurisdiction's definition.[8] As accurately reflected in the Amended Complaint in this case, the Nazis used the Flight Tax and other means to confiscate most of a fleeing Jewish family's wealth. It distorts historical reality to suggest that the financial despair of Jews in 1933, during widespread, sporadic boycotts, until the passage of the first Nuremberg law in 1935 was the result of a series of isolated private setbacks brought about by generalized severe financial conditions akin to the Great Depression. It is even more horrific to imply the same through 1938.

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

> The term "by the Nazis" includes the Nazis, their allies *and any unscrupulous individuals regardless of their location, who took advantage of the dire state of the persecutees,* and the term

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

> "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.

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

Like Justice Klein in *Menzel*, the Ninth Circuit in *Von Saher v. Norton Simon Museum of Art*, 754 F.3d 712 (9th Cir. 2014) (finding a forced transaction void in accordance with the Washington Principles and Terezín Declaration), Justice Ramos in *Reif v. Nagy* and Judge Rakoff in *Schoeps v. The Museum of Modern Art and Solomon Guggenheim Foundation*, 594 F. Supp. 2d 461 (S.D.N.Y. 2009), Justice John Paul Stevens knew a "holdup" when he saw one, and stated the point on coercion clearly and bluntly in *Republic of Austria v. Altmann*, 541 U.S. 677, 682-683 (2004). There is particular difference in the details of each case that comes before any court. But the recurrent 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. The very fact that Flight Art was bought at bargain basement prices is itself an indication of

criminal theft. Under the law of New York, stolen property is not dealt with causally under a "finders keepers" rule. The Flight Art must be returned.

III. AMERICAN POLICY CRAFTED DURING AND AFTER WORLD WAR II IS HARMONIOUS WITH CURRENT LEGISLATION SUPPORTING RESTITUTION OF FLIGHT ART.

Diplomats from the State Department played a leading role in securing public commitment by the forty-four nations that adopted the Washington Conference Principles on Nazi-Confiscated Art in December 1998. *See generally*, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf. Additionally, the Terezín Declaration, signed by forty-six countries, including the United States, emerged from the international conference hosted by the Czech Republic in June 2009. The signatories committed "to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims* and all the relevant documents submitted by all parties." *See* Prague Holocaust Era Assets Conference: Terezín Declaration, "Nazi-confiscated and Looted Art," 2-3 (June 30, 2009), http://www.ngv.vic.gov.au/wp-content/uploads/2014/05/Washington-Conference-Principles-on-Nazi-confiscated-Art-and-the-Terezin-Declaration.pdf. Special Adviser to the Secretary of State for Holocaust Issues and former Ambassador to the European Union, Stuart E. Eizenstat, was the leading figure in

Holocaust restitution throughout these negotiations.[9] He spoke at both conferences. In Washington, he stated:

> We can begin by recognizing this as a moral matter—*we should not apply the ordinary rules designed for commercial transactions of societies that operate under the rule of law* to people whose property and very lives were taken by one of the most profoundly illegal regimes the world has ever known.[10]

Similarly, the preamble to the Terezín Declaration states:

> Art and cultural property of victims of the Holocaust (Shoah) and other victims of Nazi persecution was confiscated, sequestered and spoliated, by the Nazis, the *Fascists and their collaborators* through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and *sales under duress*, during the Holocaust era between 1933-45 . . .[11]

These recent statements call for effective, fair, fact-based resolution of Nazi-looted art claims, and they are consistent with American policy dating back to the war and its aftermath. American diplomats led efforts to warn other countries against looting in the famous London Declaration of January 5, 1943, 8 Dept. St. Bull. 984-

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

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

[11] 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_Testimony_2010_FINAL.pdf (emphasis added).

85 (1952), which "declare[d] invalid any [coerced] transfers of, or dealings with, property . . . whether such transfers or dealings have taken the form of open looting or plunder, *or of transactions apparently legal in form, even when they purport to be voluntarily effected.*" (emphasis added).

On June 23, 1943, 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 the United States Army and Armed Forces to protect cultural works in Allied occupied areas. 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. During World War II the United States established a unit called the Monuments, Fine Arts, and Archives 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 even from crooked art dealers like Hildebrand Gurlitt. *See, e.g.*, Michael Kimmelman, "The Void at the Heart of 'Gurlitt: Status Report,'" *The New York Times*, Nov. 19, 2017.

Immediately after the war, the International Military Tribunal at Nuremberg evaluated detailed evidence of *coerced sales.* The plunder of art was declared a war crime and is so recognized today. Who had done what and to whom was clear to

Justice Robert Jackson, Chief Prosecutor of the principal case against the Nazi leaders and their collaborators. The fact-finders found strong evidence of a criminal conspiracy on the looting charges and convicted most of the perpetrators. *See* MICHAEL MARRUS, *THE NUREMBERG WAR CRIMES TRIAL, 1945-46: A DOCUMENTARY HISTORY* (2d ed. 2017).

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

> [The U.S.] Government's opposition to forcible acts of dispossession of a discriminatory and confiscatory nature practiced by the Germans on the countries or peoples subject to their controls . . . [and] the policy of the Executive, with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials.

26 Dept. St. Bull. 984-85 (1952).[12]

We cannot today forget what was so obvious during and immediately after the war. Unwinding forced transactions from the Nazi era requires thoughtful consideration of historical realities, not overly simplistic "common sense" drawn from assumptions about how sales transpire in normal times.

[12] Once this 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).

Our times are also abnormal in the sense that we are now inundated with exaggerated claims and fake news diminishing the quality of our democracy. In this parlous setting it is unseemly for the judiciary to allow lawyers to corrode the judicial duty of accurate fact-finding by cutting off testimony about historical consensus about what actually happened in Germany from 1933 to 1945. If the decision below is not reversed, it could easily have the effect of foreclosing any meaningful access to the judiciary by rightful heirs to hundreds of Jews whose families were dispossessed by the combination of adventitious art dealers and official Nazi rules that charged Jews an exorbitant sum of money for a so-called "exit visa." Jews who managed to get out before the full catastrophe struck were—to use another term from Nazi-speak—"cleaned" ("*gereinigt"*) of nearly all their assets in bank accounts, homes and furnishings, fiddles and pianos, books and paintings. If any of the doyens of The Met read *The New York Times* or *The New Yorker* (see pp. 12, 13-14 *supra*) they surely know this sad tale of plunder. And their lawyers surely have read the *Menzel* and *Lubell* cases cited above (pp. 10,15). This Court should not turn a blind eye now to the dirty hands of those now seeking equity.

Refusing to allow a fair and full hearing of this claim on its ugly merits is yet another instance of counter-factual, unfounded judicial assumptions

about the desperation of Jews fleeing Germany for their very lives. True, it does not adopt the disgusting language of classical nineteenth-century anti-Semitism. But it fails the tests of procedural fairness that is a central component of constitutional due process, the scientific commitment to rigorous honesty in historical research, and the moral duty of respect owed to the millions of the dead, and to the children and grandchildren of the survivors. *See* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 19 (1994).

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

CONCLUSION

For the foregoing reasons, the Court should vacate the opinion below and direct the lower court to deny the Defendant The Metropolitan Museum of Art's Motion to Dismiss the Amended Complaint.

Dated: June 1, 2018

Respectfully submitted,

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Certificate of Compliance

I affirm that I am a member of the Bar of this Court.

Pursuant to the Rules of this Court, I used the word count function of MS Word, and certify that this Petition contains 6,396 words, including all footnotes, and excluding the Table of Contents, Table of Authorities, and signature block.

The font I used is Times New Roman 14 point.

Respectfully submitted,

/s/Jennifer A. Kreder
Jennifer Anglim Kreder *

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on June 1, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Respectfully submitted,

/s/Jennifer A. Kreder
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