No._____

In The
Supreme Court of the United States

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

Petitioner,

v.

THE METROPOLITAN MUSEUM OF ART,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Actor, a masterwork by Pablo Picasso currently held by The Metropolitan Museum of Art, once belonged to Paul and Alice Leffmann, German Jews who fled from Germany to Italy in 1937 to escape the Nazis. Paul was forced to sell the painting in 1938 for a price far below its actual value to finance his and Alice's safe passage out of Nazi-allied Italy, which had adopted and implemented the Nazi pattern of rampant anti-Semitic policies and outright physical persecution of Jews.

Laurel Zuckerman, the Leffmanns' great-grandniece, in her role as ancillary administratrix of the estate of Alice Leffmann, sought to recover *The Actor*. The District Court dismissed the action. The Second Circuit Court of Appeals affirmed the dismissal on a ground not reached by the District Court: it found laches, even though the action was brought within the time required by Section 5 of the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308.

The questions presented are:

1. Whether the nonstatutory defense of laches may bar an action to recover artwork lost because of Nazi persecution, where that action has been brought within the statute of limitations prescribed by Congress in the Holocaust Expropriated Art Recovery Act of 2016?

2. Whether an action may be dismissed for laches at the Rule 12(b)(6) stage without discovery or exploration of factual disputes about the laches defense?

PARTIES TO THE PROCEEDINGS

Petitioner Laurel Zuckerman, as ancillary administratrix of the estate of Alice Leffmann, is an individual who was the plaintiff in the District Court and the appellant in the Court of Appeals.

Respondent The Metropolitan Museum of Art, a New York not-for-profit corporation, was the defendant in the District Court and the appellee in the Court of Appeals.

STATEMENT OF DIRECTLY RELATED CASES

- *Zuckerman* v. *The Metropolitan Museum Art*, No. 1:16-cv-07665-LAP, U.S. District Court for the Southern District of New York. Judgment entered on February 7, 2018.
- *Zuckerman* v. *The Metropolitan Museum Art*, No. 18-634, U.S. Court of Appeals for the Second Circuit. Judgment entered on June 26, 2019.

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OPINIONS BELOW

The Court of Appeals' opinion (App.1-22) is reported at 928 F.3d 186. The District Court's decision (App.23-67) is reported at 307 F. Supp. 3d 304.

JURISDICTION

The Court of Appeals entered judgment on June 26, 2019 (App.1) and denied Petitioner's timely petition for rehearing or rehearing en banc on August 29, 2019. App.69-70. On November 20, 2019, Justice Ginsburg extended the time to file a petition for a writ of certiorari to January 24, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

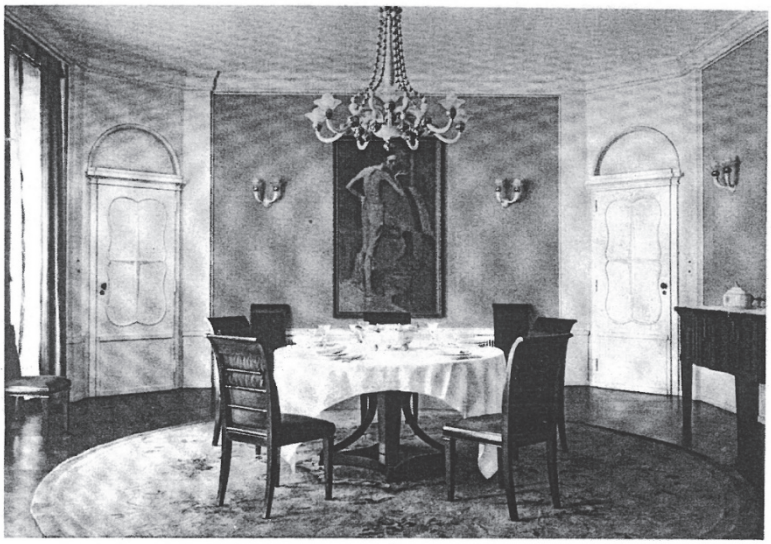
RELEVANT STATUTORY PROVISIONS

The Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act" or "Act"), Pub. L. No. 114-308, 130 Stat. 1524, is reproduced at App.71-79.

INTRODUCTION

Before Adolf Hitler's rise to power, Paul and Alice Leffmann enjoyed a prosperous life in Germany. They owned a home in Cologne. They ran a leading rubber manufacturing company. And they invested in real estate to secure a comfortable future. During this era, the Leffmanns came home to a dining room that featured,

as its centerpiece, Paul's prized painting: *The Actor*, one of the most recognized masterpieces from Pablo Picasso's Rose Period.



ARCHITECT BRUNO PAUL - BERLIN LEFFMANN HOUSE IN COLOGNE: DINING ROOM (PAINTING BY PICASSO)

F. Bruckmann A-G-, Decorative Art 79 (Munich 1921); App.2, 83-85.

The Third Reich shattered the life the Leffmanns once knew. In 1937, Nazi persecution, sanctioned by the Nuremberg Laws of 1935, robbed the Leffmanns of their business, their home, and most of their belongings. App.2. Paul and Alice fled Germany in fear for their lives and sought refuge in Italy. *Id.* But any hope of finding a haven from the Nazis in Italy was soon dashed. *Id.* Shortly after the Leffmanns' arrival, Mussolini and his Fascist regime increasingly implemented the Nazi pattern of rampant anti-Semitic policies and outright physical persecution of Jews,

particularly those from Germany. *Id.* By 1938, Italy was no longer safe for German Jews. *Id.* Desperate to flee, Paul was forced to sell the family's remaining possession of substantial value, *The Actor*, at a fire sale price. *Id.* This sale financed the Leffmanns' flight from Italy to Switzerland and, later, to Brazil, where they remained until the Allies prevailed in World War II. App.2, 99.

Paul's prized painting—the same one that once hung in the Leffmanns' dining room—now hangs in The Metropolitan Museum of Art ("The Met"), which accepted it as a donation just 14 years after Paul sold it to pay for his and his wife's safe passage out of Italy. App.101. Despite The Met's extensive resources, including staff members who were previously among the Monuments Men who located and identified art displaced during World War II on behalf of the United States and its Allies, The Met only recently acknowledged that Paul continually owned the painting until 1938. App.103.

In 2016, the Leffmanns' great-grandniece, Laurel Zuckerman, brought an action to recover *The Actor* (the "Painting") on behalf of the estate of Alice Leffmann, the sole heir of Paul Leffmann. App.106. Zuckerman brought the action, one at law (*John Paul Mitchell Sys.* v. *Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 478 (S.D.N.Y. 2000); *Crittenden* v. *Barkin*, 242 N.Y. 508, 509 (1926)), within the time Congress prescribed under the HEAR Act, which sets a nationwide statute of limitations that preempts existing state and federal statutes of limitations for "a civil

claim or cause of action . . . to recover any artwork or other property that was lost . . . because of Nazi persecution" by Holocaust-era Nazi "allies" like Italy. HEAR Act §§ 4(3), (5), 5(a).

Nonetheless, the Second Circuit affirmed the dismissal of the action on timeliness grounds, holding that a New York state-law laches defense barred the claims. App.6. The decision below guts the Act by allowing laches to block Holocaust-era art recovery claims that Congress allowed. This conflicts with an unbroken line of Court decisions holding that laches cannot bar a claim brought within a statute of limitations set by Congress—a longstanding, generally applicable rule of civil procedure whose importance recently prompted this Court to twice grant certiorari in intellectual property cases decided only three years apart. See *SCA Hygiene Prod. Aktiebolag* v. *First Quality Baby Prod., LLC*, 137 S. Ct. 954, 959 (2017) (Patent Act); *Petrella* v. *Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677 (2014) (Copyright Act).

Moreover, even if laches did apply, the court's Rule 12(b)(6) dismissal of the complaint, without discovery or any exploration of the factual disputes about the laches defense, also contravenes this Court's precedent. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009); *Jones* v. *Bock*, 549 U.S. 199, 215 (2007).

Certiorari is necessary to clarify how the HEAR Act applies to the estimated 100,000 Nazi-era art and works still subject to claims, and to correct the injustice to the Leffmanns. "[D]enying victims of the

Holocaust and their families access to a just hearing based on the merits of each case is wrong, plain and simple." *HEAR Act: Hearing on S.2763 Before the S. Comm. on the Judiciary*, 114th Cong. 3 (June 7, 2016) (Testimony of Ambassador Ronald S. Lauder). Burying these claims in procedural technicalities and preventing them from being heard on the merits, as The Met has urged, upends the HEAR Act and rewards those who benefitted from the spoils of Nazi policies and persecution.

STATEMENT OF THE CASE

I. Background: Holocaust-era artworks.

The "prelude to the largest mass murder in modern history was the largest robbery ever carried out." Orna Artal, *Rethinking the Application of Laches to Future Nazi-era Art Restitution Claims Under the HEAR Act*, 25 N.Y. State Bar Ass'n J. 1, 1-2 (Fall 2019). For the Nazis, the seizure of art became a weapon—a means by which the Nazi government could achieve its "Final Solution" to eradicate Jewish people and their culture. Alexandra Minkovich, *The Successful Use of Laches in World War II-Era Art Theft Disputes: It's Only a Matter of Time*, 27 Colum. J.L. & Arts 349, 352 (2004). During World War II, between "one-fourth and one-third of Europe's artistic treasure trove was pillaged by the Nazis in an effort to realize Hitler's vision for Germany as the cultural center of Europe." David Wissbroeker, *Six Klimts, a Picasso & a Schiele: Recent Litigation*

Attempts to Recover Nazi Stolen Art, 14 DePaul J. Art, Tech. & Intell. Prop. L. Rev. 39, 40 (2004). The Nazis tried to destroy "degenerate" modern art from modern masters like Picasso, Matisse, Van Gogh, and Cezanne, leaving in its place only art that lived up to an acceptably classical, "Germanic" ideal. Lynn H. Nicholas, The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War 3-25, 8-11, 22-23 (Vintage 1995).

"Beyond art directly looted by the Nazi officials, hundreds if not thousands of valuable works of art were procured" from profiteers who preyed on, and extracted "unconscionable economic advantage from," desperate victims of Nazi persecution who sold the artworks in "fire sales." Artal, *supra*, at 1. Holocaust-era art recovery claims therefore include not only, for example, art that "a Nazi soldier" took "from a Jewish family's apartment," but also art that a "Jewish persecute" sold below its true value "while fleeing for his life." See *HEAR Act: Hearing on S.2763 Before the S. Comm. on the Judiciary*, 114th Cong. 3 (June 7, 2016) (Testimony of Agnes Peresztegi).

After the War, the United States became one of the "consumer countr[ies]" for art displaced during the Holocaust, as purchasers here embraced the traditionally "lackadaisical 'ask no questions' commercial conventions of the international art trade." See Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 Seattle U. L. Rev. 631, 660-62 (2000).

As early as 1943, the then-Director of The Met acknowledged that Holocaust-era artworks were coming to the United States and admonished his museum brethren: "Private individuals might continue to operate in a 'black market' of antiquities in which no questions [are] asked, but public institutions . . . [should] not very well connive in the liquidation of the artistic patrimony of Europe and act as public receivers of stolen goods." Francis Henry Taylor, *Europe's Looted Art: Can It Be Recovered?*, N.Y. Times (Sept. 19, 1943).

The impact of Nazi looting and later trafficking of artworks is still felt today. "[M]ore than 100,000 pieces of art, worth at least $10 billion in total, are still missing from the Nazi era." Phelan, *supra*, at 660. As former U.S. ambassador to Austria and former chair of the Museum of Modern Art in New York, Ronald Lauder, put it: "because of these large numbers, every institution, art museum and private collection [likely] has some of these missing works." *Id.*; Stephen W. Clark, *Selected World War II Restitution Cases*, SJ049 A.L.I.-A.B.A. 311 (2004) (listing Nazi-looted art that has appeared in the Los Angeles County Museum of Art, The Met, the Seattle Art Museum, the Art Institute of Chicago, and other prominent museums).

II. Facing persecution in Nazi-allied Italy, Paul Leffmann (a German Jew who fled Germany to escape the Nazis) sells *The Actor* in 1938 to pay for his and his wife's safe passage out of Italy.

Paul Leffmann, a German-Jewish businessman, lived in Cologne, Germany with his wife, Alice, at the turn of the twentieth century. App.83. Paul bought one of his most valuable possessions, *The Actor*, in 1912 and later exhibited the prized Painting at various galleries. App.82.

With Hitler's rise to power in the 1930s, the Leffmanns' life in Germany became untenable. App.83. The Nuremberg Laws, adopted by Hitler's government in 1935, deprived German Jews of their property, and the rights and privileges of German citizenship, one of the first steps toward their mass extermination during the Holocaust. *Id.*

Between 1935 and 1936, the Nuremberg Laws required the Leffmanns to sell nearly all of their assets to non-Jewish Germans through a process known as "Aryanization." App.84-85. The Leffmanns sold their home, their company, and their real estate investments for only nominal compensation—transactions the Nazis purposefully designed to take almost everything the Leffmanns owned. *Id.* The Painting was saved from this systematic Nazi confiscation because it had been sent to a non-Jewish German acquaintance in Switzerland. App.85.

In 1937, the Leffmanns fled from Germany to Italy, where they rented a home in Florence after they sold at a "considerable loss" property that they bought in Italy to evade Nazi policies designed to prevent Jews from leaving Germany with their assets. App.89. But the Leffmanns were ultimately no safer in Nazi-allied Italy. App.90-91. Italy and Germany had secretly adopted in 1936 the Italo-German Police Agreement, which allowed the Gestapo to compel the Italian police to interrogate, arrest, and expel any German-Jewish refugee in Italy. App.90. Mussolini also publicly announced the Rome-Berlin Axis. *Id.* During the summer and fall of 1937, a member of the German police was assigned to the headquarters of each of the ten largest Italian cities, including Florence, facilitating Nazi efforts to check on "subversives," i.e., Jews. *Id.* In May 1938, Hitler himself visited Florence, an official state visit that Italian city officials commemorated with a postmark that was stamped "1938 Il Führer a Firenze" and decorated with swastikas. App.94. With the Nazis practically on their doorstep, the Leffmanns decided to flee for their lives yet again, this time to Switzerland. App.91-92.

To finance the Leffmanns' flight from Italy, Paul was forced to sell the Leffmanns' remaining possession of substantial value, *The Actor*, to French art dealer Käte Perls in June 1938. App.2, 86, 94-95. Perls acted on behalf of her husband, Hugo Perls, and another art dealer, Paul Rosenberg. App.94-95. Paul parted with the Painting for the drastically reduced net price of $12,000—an amount well below its true value and, in

fact, the same offer price that Paul had rejected before from another dealer known to traffic in Nazi-looted art. App.95.

The Leffmanns would not have disposed of the seminal painting but for Nazi and Fascist persecution. App.3. Since the Nazis had extracted most of their assets in Germany under the Nuremberg Laws, the Leffmanns had to rely on the $12,000 they received for the Painting to pay for their passage to Switzerland and, later, Brazil, where they remained until the end of World War II. App.87-88, 99. Had the Leffmanns not fled Italy, they would have likely suffered a much more tragic fate at the hands of the Nazis and their allies. App.99.

III. The Met acquires *The Actor* in 1952. It fails to conduct an immediate investigation of the Painting's origins and continues to inaccurately list its provenance until 2011.

The immediate history of the Painting after the 1938 "sale" is unclear, although it is known that in July 1938 Mrs. Perls's son, Frank Perls, asked automobile titan Walter P. Chrysler Jr. about his interest in buying the Painting. App.95-96. The Perls family had just acquired a Picasso masterpiece from a German Jew on the run from Nazi Germany living in Fascist Italy for an unconscionably low price. Yet Frank Perls told Mr. Chrysler that Mrs. Perls had purchased the Painting from "an Italian collector." *Id.* Then, in 1939, Rosenberg loaned the Painting to New York's Museum of Modern

Art. App.100. Before October 1940, Rosenberg consigned the Painting for sale to the well-known M. Knoedler & Co. Gallery, which later sold it to Thelma Chrysler Foy. App.100-01.

In 1952, Foy donated *The Actor* to The Met. App.101. The Met featured the Painting in its 2010 landmark exhibition, "*Picasso In The Metropolitan Museum of Art*." App.60.

There is no indication that the world-renowned museum made any effort to investigate the Painting's origins when it accepted the donation in 1952. App.101, 103. Indeed, The Met did not publish the Painting's provenance in 1952, nor did it question its origins until 15 years after the acquisition. App.103. In 1967, The Met's curators merely asked Hugo Perls where he had acquired the Painting. *Id.* Mr. Perls claimed to have bought it in 1938 from a "German Professor" in Solothurn, Switzerland, who had been "thrown out by the Nazis," although Perls claimed he could not remember the collector's name or any other details. *Id.*

Mr. Perls's suspicious answer should have raised red flags for The Met. App.103. The Met's staff from 1955 to 1966 included James Rorimer, a prominent participant in the Allies' Monuments, Fine Arts, and Archives program. The Met, *In the Footsteps of the Monuments Men: Traces from the Archives at the Metropolitan Museum* (Jan. 31, 2014), https://www.metmuseum.org/blogs/now-at-the-met/2014/in-the-footsteps-of-the-monuments-men. These so-called "Monuments Men" tracked, located, and returned more than five

million looted cultural items in the wake of World War II. Four other Monuments Men also served on The Met's staff. *Id.* Despite this wealth of experience, however, neither Rorimer nor any of his colleagues discovered *The Actor*'s provenance in the years after it was donated.

The Met's published provenance for the Painting in 1967 read: "P. Leffmann, Cologne (in 1912); a German private collection (until 1938)," indicating that Paul did not own the Painting before the 1938 sale. App.101-102. This error remained for the next 45 years, although the provenance listing changed many times in other ways between 1967 and 2010. App.102. The Met maintained this error even after over a "dozen members of [The Met's] curatorial and conservation staff devoted" a year "to an intensive study of the Museum's works by Picasso" in 2010. *Id.*

The Met's own policies require a higher level of diligence, even for donated artworks like *The Actor*. For works that were in German-occupied Europe between 1933 and 1945, The Met's Collections Management Policy instructs that "[w]here information is incomplete for a gift . . . curatorial staff should undertake additional research prudent or necessary to resolve the Nazi-era provenance of the work. All research efforts shall be documented." Metropolitan Museum of Art, Collections Management Policy 6 § IV.D.2 (Nov. 2008).

In 2010, Zuckerman, as the ancillary administratrix of the estate of Alice Leffmann, demanded that The Met return *The Actor*. App.105-06. Only in 2011,

at the behest of Zuckerman, did The Met finally acknowledge the Painting's inaccurate provenance listing and correct it to show that Paul had owned *The Actor* until the 1938 forced sale. App.103-04. But The Met refused to return the Painting after concluding on its own that Zuckerman's claim was unworthy, purportedly because, in The Met's view, she would be unable to establish duress under New York law. Oral Argument at 31:10-33:48, *Zuckerman* v. *The Metropolitan Museum Art*, No. 18-634, http://www.ca2.uscourts.gov/oral_arguments.html ("Oral Argument").

IV. Zuckerman sues The Met to recover *The Actor*. The Court of Appeals affirms the dismissal of the action based on laches.

Zuckerman sued The Met in 2016. App.106. She alleged claims for replevin and conversion under New York law. App.106-09. Zuckerman sought return of the Painting, monetary damages, and a declaration that the estate of Alice Leffmann is the Painting's rightful owner.[1] App.109.

The District Court dismissed the action on the ground that Zuckerman did not adequately plead

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[1] In the District Court, The Met suggested that the Painting, if recovered, would not remain on public display. But restituted Holocaust-era artworks are often kept in the public sphere even when there are numerous heirs. E.g., Luise Wank, *Germany Returns Two Nazi-Confiscated Old Masters to the Heirs of a Renowned Jewish Art Collector* (Sept. 13, 2019), https://news.artnet.com/art-world/artworks-confiscated-nazis-restituted-jewish-art-collector-1640692.

duress under New York law. App.25. Zuckerman appealed to the Second Circuit, which affirmed the judgment but employed a different rationale: laches. App.6. The court held, for the first time on appeal, that the suit was unreasonably delayed by over seventy years—the time between the Leffmanns' 1938 sale of the Painting and Zuckerman's 2010 demand for return of the Painting. App.13. In support, the Second Circuit relied on statements elicited from Zuckerman's counsel at oral argument that, after the War, the Leffmanns made claims for other items that were taken in Germany. App.9, 13; Oral Argument at 24:30-25:50. The court also concluded that the 70-year period prejudiced The Met, asserting that there were no witnesses who could speak to the voluntariness of Paul's sale of the Painting. App.15.

After conducting its state-law laches analysis, the Court of Appeals held that the HEAR Act's statute of limitations did not preempt the laches defense. App.17-18.

The court recognized that laches ordinarily cannot bar relief in the face of a limitations period set by Congress. App.18. But the court determined that Congress did not intend the HEAR Act to preempt the laches defense because the statute explicitly refers only to "defense[s] *at law* relating to the passage of time," while an early draft of the Act "would have explicitly swept aside a laches defense." App.18-22. The court added that allowing defendants to assert laches furthers the Act's goal of ensuring a "just and fair" resolution of claims. App.4, 19-20.

The Court of Appeals denied Zuckerman's petition for rehearing and rehearing en banc. App.69-70. This Petition followed.

REASONS TO GRANT THE PETITION

The holding that the HEAR Act allows "defendants to assert a laches defense, despite the introduction of a nationwide statute of limitations designed to revive Holocaust-era restitution claims," erects a roadblock to the very claims that Congress expressly allowed and encouraged. See App.19; HEAR Act § 4(4), 5(a). And there are likely many Holocaust-era claims that will be asserted, given the sheer number of pieces of art from that period that remain lost and found their way into American collections.[2] Clarification on the scope of the HEAR Act is needed now: many, if not most, of these claims will expire in 2022. See, e.g., *De Csepel* v. *Republic of Hungary*, 859 F.3d 1094, 1110 (D.C. Cir. 2017). Granting certiorari in this case would not only allow this Court to clarify the Act just in time

[2] See *American Federation of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964); see also *Rep. of Austria* v. *Altmann*, 541 U.S. 677, 681 (2004); *Am. Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413 (2003); Stuart E. Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it*, The Washington Post (Jan. 2, 2019); Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 Colum. J.L. & Arts 157, 172 (2019) ("a large proportion of the Nazi-era art restitution claims have been brought in New York" due to "the central role of New York in the art market in the United States and beyond").

for these claims to be filed, but it would also prevent the rejection of thousands of other HEAR Act claimants (those whose claims accrued or will accrue after 2016) based on laches. HEAR Act § 5(g).

Interpreting the Act to allow a laches defense (as the Court of Appeals did) misconstrues the plain language of the Act—which lacks a single word or phrase that codifies the defense of laches—and contravenes this Court's decisions holding that laches cannot bar a claim brought within a statute of limitations set by Congress. See *SCA Hygiene*, 137 S. Ct. at 959; *Petrella*, 572 U.S. at 677. The Act's legislative history, which the Court of Appeals relied on, cannot support rewriting the clear language of the HEAR Act to allow a laches defense. Indeed, a Ninth Circuit case already casts doubt on the Second Circuit's decision, although a firm circuit split has yet to develop. See *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 965 (9th Cir. 2017) (concluding that Section 5 of the Act "prevent[s] courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced"). If the decision below stands, litigants will mine the legislative histories of virtually any other federal statute of limitations in an effort to upend other limitations periods prescribed by Congress. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985).

Absent this Court's review now, the decision below may prompt thousands of HEAR Act claimants to forego filing their families' Holocaust art recovery claims only to later find out—once it is too late—that

the Second Circuit wrongly read a laches defense into the Act. This result runs contrary to the purpose of the HEAR Act, which was designed, consistent with the Washington Conference Principles and the Terezin Declaration, to eliminate procedural hurdles to the claims of the rightful owners of artworks lost "through various means," including "forced sales and sales under duress" due to persecution at the hands of the "Nazis, Fascists and their collaborators." See HEAR Act § 3(1); Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009), http://www.state.gov/p/eur/rls/or/126162.htm.

Indeed, the HEAR Act "would not achieve its purpose of enabling claimants to come forward if it [were to] eliminate[ ] one type of procedural obstacle in order to replace it with another." See *HEAR Act: Hearing on S.2763 Before the S. Comm. on the Judiciary*, 114th Cong. 3 (June 7, 2016) (Testimony of Agnes Peresztegi).

Recent legislation confirms Congress's continued interest in encouraging Holocaust-era art recovery claims, including those involving art sold under duress. The Justice for Uncompensated Survivors Today ("JUST") Act of 2017 aims to improve efforts assisting Holocaust survivors and the families of Holocaust victims by making more data about these claims available. The JUST Act requires the State Department to report to Congress with an assessment of the national laws and enforceable policies of foreign countries on the identification and return of, or restitution for, assets wrongfully seized or transferred during the Holocaust era, which includes not only art confiscated by

the Nazis themselves but also "sales or transfers under duress during the Holocaust era." Pub. L. No. 115-171, 132 Stat. 1288.

* * *

Certiorari is warranted for a second reason. The Court of Appeals here took the unusual and extraordinary step of resolving the fact-intensive laches defense in the first instance on appeal from a dismissal of the action at the Rule 12(b)(6) stage. See, e.g., *Menominee Indian Tribe of Wisconsin* v. *United States*, 614 F.3d 519, 532 (D.C. Cir. 2010) (observing that a "complaint seldom will disclose undisputed facts clearly establishing the defense" of laches). In so doing, the court improperly found that laches applied despite allegations in Zuckerman's complaint that The Met had unclean hands because it inaccurately listed, and failed to diligently investigate, the true provenance of *The Actor*. App.101-105. But see *Precision Instrument Mfg. Co.* v. *Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (one "who comes into equity must come with clean hands"); accord *Kaupp* v. *Texas*, 538 U.S. 626, 631 (2003) (granting certiorari where decision below was not based on the facts).

Both questions warrant an outright grant of certiorari. Alternatively, they warrant summary reversal or a grant, vacate, and remand ("GVR") order directing the lower courts to further consider the laches defense (1) after crediting all the allegations in Zuckerman's complaint, and (2) in view of this Court's recent *SCA Hygiene* and *Petrella* decisions. See *Youngblood* v. *W.*

Virginia, 547 U.S. 867, 870 (2006); *Valensia* v. *United States*, 532 U.S. 901 (2001); S. Ct. R. 16.1.

I. The decision below wrongly allows a state-law laches defense to override the HEAR Act's six-year statute of limitations.

A. The decision below contravenes the plain language of the HEAR Act and this Court's decisions. The Act's ambiguous legislative history does not support the decision either.

Unanimously passed by Congress and signed by President Obama on December 16, 2016, the HEAR Act was heralded as a bipartisan achievement for Holocaust victims and their families. Commission for Art Recovery, *HEAR Act Signed Into Law* (Mar. 7, 2018), http://www.commartrecovery.org/hear-act.

Congress promulgated the HEAR Act in response to *Von Saher* v. *Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2009), *cert. denied*, 564 U.S. 1037 (2011), which held that "the Constitution prohibits States from making exceptions to their statutes of limitations to accommodate claims involving the recovery of Nazi-confiscated art" because such claims implicate the "Federal Government's exclusive authority over foreign affairs." HEAR Act § 2(7).

With the HEAR Act, Congress did what States were held to be unable to do. The Act's centerpiece, Section 5, provides:

> Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—
>
> (1) the identity and location of the artwork or other property; and
>
> (2) a possessory interest of the claimant in the artwork or other property.

HEAR Act § 5(a). The HEAR Act defines "covered period" as the period between January 1, 1933 and December 31, 1945; it defines "Nazi persecution" as "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi party, or their agents or associates, during the covered period." *Id.* § 4(3), (5). Claims existing when the Act was passed are deemed to have been "actually discovered" on the date of the Act's enactment. *Id.* § 5(c), 5(d)(1).

Zuckerman's action falls within the Act's plain language. The Painting was sold under duress during the "covered period" (i.e., 1938), and the Painting was lost "because of" Nazi persecution: Paul involuntarily sold the Painting because he faced risk of death if he stayed in Nazi-allied, Fascist Italy. HEAR Act § 4(3), (5); App.94-95. Since the action existed when the

HEAR Act was enacted in 2016, Zuckerman's action benefits from the Act. See *De Csepel*, 859 F.3d at 1110.

Nonetheless, the Court of Appeals affirmed the dismissal of the complaint on timeliness grounds, citing laches. This was error, and flouts both the Act's plain language and this Court's precedent. Nothing in the plain language of the Act—not a "word or phrase"—"codifies laches as a defense." *SCA Hygiene*, 137 S. Ct. at 963. That alone renders it unnecessary to consider the Act's legislative history. *Ex parte Collett*, 337 U.S. 55, 61 (1949). Moreover, for over a century, this Court has held that laches cannot bar a claim at law brought within a federal statute of limitations. E.g., *Wehrman* v. *Conklin*, 155 U.S. 314, 326 (1894).

The Court recently reaffirmed this principle in *Petrella* and *SCA Hygiene*. In *Petrella*, this Court held that, in the "face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." 572 U.S. at 679. As this Court explained, where Congress enacts a statute of limitations, "courts are not at liberty to jettison Congress' judgment on the timeliness of suit" by invoking the laches doctrine. *Id.* at 667. Applying laches in such circumstances, this Court explained, would impermissibly give courts a "legislation-overriding" role. *Id.* at 680. Likewise, in *SCA Hygiene*, this Court held that laches could not bar a claim brought within the Patent Act's statute of limitations, explaining that the limitations period "represents a judgment by Congress that a patentee may recover damages for any infringement claim

committed within six years of the filing of the claim." 137 S. Ct. at 961.

The Court of Appeals concluded that this general rule does not apply to the HEAR Act, however, citing passages in Section 5(a) and Section 3 of the Act. App.19-20. But neither one supports shoehorning the laches defense into the Act.

1. Section 5(a). As the Court of Appeals observed, § 5(a) of the Act "explicitly sets aside 'defense[s] *at law* relating to the passage of time.'" App.19. "Read in context, HEAR's § 5(a) language that the six-year statute of limitations applies 'notwithstanding any defense at law relating to the passage of time' is meant to prevent courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced"—it does not open the door for a laches defense that would have precisely that effect. See *Cassirer*, 862 F.3d at 965.

The Court of Appeals inferred that the default rule in this context is that a laches defense remains available unless Congress explicitly says that it is *not*. See App.19. But Congress has long been presumed to legislate consistent with the "general rule" that laches cannot bar a legal claim brought within a limitations period. *SCA Hygiene*, 137 S. Ct. at 963.[3] Had Congress

[3] *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388 (2006), says nothing to the contrary. App.19. While *eBay* observed that "a major departure from the long tradition of equity practice should not be lightly implied," *eBay* did not address the relationship between laches and a claim brought within a statute of limitations. See *id.* at 391-92. Nor did *eBay* cast doubt on the long-established

intended the HEAR Act to depart from this general rule, it could have said so in the Act itself. See *id.* It did not.

The Second Circuit relied on the Act's legislative history. Even assuming the court's reliance on legislative history was proper—and it was not (see *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1814 (2019))—it does not support the court's analysis of the Act. App.21-22. The court noted that an early draft of the bill permitted claims despite any "defense at law *or equity* relating to the passage of time (*including the doctrine of laches*)," and stated that the Act's purpose was to ensure that claims were not barred by "statutes of limitations and *other similar legal doctrines*." *Id.* Later drafts of the bill deleted this italicized language, and a Senate Report noted that the new version of the bill "remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches." *Id.*

The Senate Report on which the Court of Appeals relied merely noted that the reference to laches had been removed; it did not explain why the change had been made. Senate Report 114-394 (Dec. 6, 2016) at 7. The counterweight to this legislative history is the Act's purpose of having claims resolved on their "facts and merits"—not blocked on technical procedural grounds—a theme that resonates throughout the legislative history. HEAR Act § 2(5); see also Jennifer

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"general rule" that this Court found to be firmly engrained in the fabric of the law as early as 1952. See *SCA Hygiene*, 137 S. Ct. at 963.

Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. Kan. L. Rev. 75, 133-37 (2012) (collecting Holocaust recovery cases dismissed on statute of limitations grounds).

Members of Congress underscored that the Act was intended to "provide the victims of the Holocaust and their heirs a fair opportunity in our courts to recover artwork that had been confiscated or misappropriated by the Nazis," Cong. Record H.7331, to "guarantee" that victims of Nazi persecution "are given the chance to have their day in court to pursue justice," Cong. Record H.7332, and to "establish a fair judicial process so that some victims can achieve some small measure of justice." Cong. Record H.7332. The Senate Report similarly confirmed that the Act is intended to "open courts to claimants to bring covered claims and have them resolved on the merits, consistent with the Terezin Declaration." Senate Report 114-394 (HEAR Act), at 9; Prepared Statement by Senator Chuck Grassley, Chairman, Senate Judiciary Committee (June 7, 2016) ("[T]he nature, scale, and particular circumstances of [the Nazi's] crimes render unfair the application of certain rules that typically govern the restitution of property. I'm referring . . . to statutes of limitations *and other time-based bars to litigation*.") (emphasis added).

Congress also sought to have the Act interpreted consistent with the U.S. policy embodied in the Washington Principles, the Holocaust Victims Redress Act, and the Terezin Declaration. See HEAR Act § (3). The Terezin Declaration specifically addressed artworks

lost "through various means including theft, coercion and confiscation, and on grounds of relinquishment as well as forced sales and sales under *duress*" due to "Nazi persecution," which (like the HEAR Act) is defined to include "Nazis, *Fascists* and their *collaborators*." Prague Holocaust Era Assets Conference: Terezin Declaration (June 30, 2009) (emphasis added), http://www.state.gov/p/eur/rls/or/126162.htm; HEAR Act § 3(1).

The Terezin Declaration also "urge[d] all stakeholders to ensure that their legal systems or alternative processes . . . *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 the parties." *Id.* (emphasis added). The HEAR Act confirms and implements this longstanding U.S. policy. HEAR Act § 3(1); Senate Report 114-394 at 2-3 (stating that the HEAR Act is the "latest step" in the pursuit of policies "to help restore artwork . . . to its rightful owners").

2. Section 3. The Court of Appeals also reasoned that allowing defendants to assert laches tracks the Act's goal of ensuring "that claims to recover art lost in the Holocaust era are 'resolved in a just and fair manner.' " App.19 (citing HEAR Act § 3(2)). But Congress already did this balancing when it passed the Act; there is no room for separate judicial balancing of the equities of applying laches to bar a claim brought

within the limitations period. See HEAR Act §§ 2(6), 5(a); *Petrella*, 572 U.S. at 677; Senator Chuck Grassley, *Grassley Statement at a Judiciary Committee Hearing on Recovering Artwork Stolen by Nazis* (July 7, 2016). Indeed, the 70-year period that the Second Circuit found fatal to Zuckerman's action is inherent in most, if not all, claims for art lost during World War II. Congress recognized that Holocaust-era art recovery claims involve a "costly process [that] often cannot be done within the time constraints imposed by existing law," and opened a new six-year window for these claims. See HEAR Act §§ 2(6), 4(3).

Moreover, since the laches defense under New York law does not focus on the merits of a plaintiff's claim—but rather on whether a plaintiff unreasonably delayed in bringing the claim and whether the delay prejudiced the defendant, *Capruso* v. *Village of Kings Point*, 23 N.Y.3d 631, 641 (N.Y. 2014)—dismissing a timely action based on this state-law laches defense undercuts the HEAR Act, which requires resolution of art recovery claims based on their "facts and merits." HEAR Act § 2(5).

* * *

It is implausible that Congress eliminated the procedural bar of a statute of limitations defense only to leave in place another procedural roadblock, i.e., a laches defense, that has the same practical effect. See *United States* v. *Wilson*, 503 U.S. 329, 334 (1992) ("absurd results are to be avoided" when construing a statute). Had Congress intended state law procedural

limitations to have any bearing on Holocaust-era art recovery claims covered by the Act, Congress could have said so. *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1626-27 (2018) ("Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes'") (Gorsuch, J.). Indeed, in Section 5(e) of the Act, Congress was explicit when it permitted courts to examine state-law limitations periods to determine whether an exception to the Act applies. See HEAR Act § 5(e). Further, under the Act's sunset provision, Congress made clear that defendants may once again invoke state-law limitation periods after the Act sunsets. See HEAR Act § 5(g).

B. This case is an ideal vehicle for review.

This case squarely presents a question of nationwide importance that goes to the heart of the HEAR Act. This issue is cleanly presented by this case. The Court of Appeals did not dispute that Zuckerman's claims were covered by, and timely brought under, the HEAR Act and the demand-and-refusal rule under the New York statute of limitations in place before the Act. App.17, 19 n.10, 20 n.12. Nor does this case come with any procedural quirks that could muddy review: there are no standing issues, the legal issues were preserved below, and no other threshold issues prevent review of the substantive questions presented.

Granting certiorari will provide urgently needed guidance on the availability of a laches defense under

the Act. Since the United States was one of the primary destinations for Holocaust-era art after the War and over 100,000 pieces of Nazi-looted art remain missing, clarifying the scope of the Act could impact thousands of potential claims. Stuart E. Eizenstat, *Art stolen by the Nazis is still missing. Here's how we can recover it*, The Washington Post (Jan. 2, 2019).

Waiting for an entrenched circuit split to develop is impractical. HEAR Act claims revived or deemed discovered in 2016 will expire in 2022. Indeed, there is no time to wait for a circuit split to develop; since the statute's enactment in December 2016, only two other federal circuit courts have addressed the HEAR Act: the Ninth and D.C. Circuits. *Cassirer*, 862 F.3d at 951; *De Csepel*, 859 F.3d at 1094. While neither circuit squarely addressed the issues in this petition, the Ninth Circuit's decision in *Cassirer* suggests that the construction of the Act urged by Zuckerman is the appropriate one. See *Cassirer*, 862 F.3d at 965.

There are no alternative ways to affirm dismissal of this action either.

Duress. The District Court dismissed the action on the ground that it did not allege three requirements for duress under New York law. App.25, 49-53. The District Court's conclusion, not adopted by the Second Circuit (see App.6), contradicts both blackletter law and the complaint's allegations.

First, the District Court concluded that Zuckerman could not establish that the transaction was procured by a wrongful threat because, in its view, New

York law requires that "the defendant must have caused the duress," and here the duress was caused by third parties: the Nazi and Fascist regimes and not the art dealers or The Met. App.50. But New York law recognizes a claim for third-party duress where the party that acquired the disputed property, although not the direct cause, had reason to know about the duress. See *Aylaian* v. *Town of Huntington*, 459 F. App'x 25, 27 (2d Cir. 2012); *Oquendo* v. *CCC Terek*, 111 F. Supp. 3d 389, 409 (S.D.N.Y. 2015).[4] This case demonstrates third-party duress: the dealers who bought the Painting were acutely aware of the extreme duress the Leffmanns, as German Jews, faced because of Nazi and Fascist persecution in the late 1930s. App.95-96.

Second, the District Court determined that Zuckerman failed to show that the Leffmanns lacked "free will" when they sold the Painting because she alleged that the Leffmanns "took nearly two years" to sell the Painting after receiving an unsolicited initial offer in 1936, during which time they "negotiated with several other parties" "to 'improve [their] leverage to maximize' the sale price." App.52. But the allegations, which the district court had to credit, tell a different story. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007). The Leffmanns first rejected an *unsolicited* offer in 1936 from a known trafficker in Nazi-looted art, after

[4] Third-party duress has long been recognized in other States as well. E.g., *Leeper* v. *Beltrami*, 53 Cal. 2d 195, 206 (1959); *Carroll* v. *Fetty*, 121 W. Va. 215 (1939); *Chan* v. *Lund*, 188 Cal. App. 4th 1159, 1174 (Cal. App. 2010); *Chase Manhattan Mortg. Corp*. v. *Machado*, 850 A.2d 260, 265 (Conn. App. 2004); accord Restatement (Second) of Contracts § 175(2).

they had been forced to "part with nearly everything [they] owned." App.93-95. They made no attempts to sell in the interim, and only later agreed to sell the Painting in 1938 because circumstances had grown so dire in Italy that the Leffmanns were "in fear of their liberty and their lives" and had "no time left" to attempt to flee. *Id.* The Leffmanns used the funds from that sale to finance their flight to Switzerland a mere three months later. App.98. These allegations undercut any suggestion that Paul exercised "free will" when he sold the Painting. See *Menzel* v. *List*, 49 Misc. 2d 300, 305 (N.Y. Sup. Ct. 1966) ("The relinquishment [of the artwork] by the Menzels in order to flee for their lives was no more voluntary than the relinquishment of property during a holdup.").

The District Court also concluded that the Leffmanns failed to plead that they had "no other choice" but to sell the Painting because they spent "several years looking to sell the Painting," rejected other offers, and had "additional assets including properties in Italy." App.53. But once again, those conclusions bear no resemblance to the allegations.

The Leffmanns did not spend two years "looking to sell" the Painting, nor did they reject multiple offers; they rejected one offer in 1936, and only reconsidered two years later because of the desperate circumstances they faced. See App.93, 95. Since the Nazis had robbed them of most of their belongings, the Leffmanns had to leverage their remaining asset of substantial value, *The Actor*, to flee Italy. App.84-88. Further, the Italian properties the District Court referenced were sold

before June 1938 at a "considerable loss." App.88-89. By the time of the sale, the Leffmanns were living in Italy as refugees, unable to work and with "*no choice* but to turn whatever assets they still controlled into cash." App.89-90, 92, 96 (emphasis added).

Only by incorrectly interpreting New York law, failing to credit Zuckerman's allegations, and repeatedly drawing impermissible adverse inferences did the court reach a result that defies common sense: that the sale of a masterpiece at a drastically reduced price by German Jews trying to flee Nazi and Fascist persecution on the eve of World War II was not one made under "duress."

Standing & Repudiation. Nor can the judgment be affirmed on any other ground advanced by The Met below. The Met at first disputed, but then conceded, Zuckerman's standing to sue on behalf of the estate of Alice Leffmann. App.43. The Met had also argued that the Leffmanns failed to repudiate the sale in the years after the War. App.24. But New York courts have declined to require victims of Nazi persecution to repudiate sales made under duress during the Nazi era, consistent with New York's "strong public policy to ensure that the state does not become a haven for trafficking in stolen cultural property, or permitting thieves to obtain and pass along legal title." See, e.g., *Reif* v. *Nagy*, 175 A.D.3d 107, 128-30, 132 (1st Dep't 2019).

Good Title. The Met also argued that it held good title to the Painting because The Met accepted it as a donation from Foy, who purportedly acquired good title

to the Painting when she supposedly bought it in good faith less than a handful of years after Paul was forced to sell it. App.24. But New York law provides that where, as here, a true owner has been wrongfully dispossessed of his property, a good-faith purchaser cannot obtain good title no matter how it acquires the property. *Reif* v. *Nagy*, 61 Misc. 3d 319, 326 (N.Y. Sup. Ct. 2018), *aff'd*, 175 A.D.3d 107, 129 (1st Dep't 2019) (good title cannot pass where artwork was transferred under duress); see also *Schoeps* v. *Museum of Modern Art*, 594 F. Supp. 2d 461, 467 (S.D.N.Y. 2009).

II. Even if the laches doctrine applies to a HEAR Act claim, dismissal was improper. Allegations of The Met's unclean hands were wrongly ignored, and further factual development was required before laches could be applied.

The Court of Appeals took the extraordinary step of resolving the fact-intensive laches issue in the first instance on review from a dismissal at the Rule 12(b)(6) stage. See *Menominee Indian Tribe of Wisconsin*, 614 F.3d at 532. In so doing, the court not only failed to credit numerous allegations about The Met's unclean hands and lack of diligence; it also drew adverse inferences and resolved disputed issues of fact *against* Zuckerman—going so far as to find that The Met was an "innocent defendant" for whom the laches defense should be applied. See App.4-6. These errors (which violate this Court's well-established precedent)

permeated both the "unreasonable delay" and "prejudice" prongs of the court's laches analysis.

Under this Court's precedent, a complaint need only plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. When ruling on a motion to dismiss, the court must credit the complaint's factual allegations and may dismiss an action only where, as a matter of law, "the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558; *Erickson* v. *Pardus*, 551 U.S. 89 (2007) (summarily reversing due to the "Court of Appeals' departure from the liberal pleading standards set forth by Rule 8(a)(2)").

Thus, at the motion-to-dismiss stage, a court cannot resolve factual questions, let alone resolve those questions against the plaintiff to justify dismissal based on an affirmative defense. See *Jones*, 549 U.S. at 215; *Menominee Indian Tribe of Wisconsin*, 614 F.3d at 532.

The Second Circuit's departure from these standards has implications beyond this case. "[E]lementary principles of procedural fairness," this Court has made clear, require that a court "give [plaintiffs] an opportunity to provide evidence" to respond to a defense before an action is dismissed. See *Alabama Legislative*

Black Caucus v. *Alabama*, 575 U.S. 254, 271 (2015) (reversing lower court's sua sponte determination that plaintiff lacked standing, where plaintiff was not afforded an opportunity to present evidence to establish standing). These fundamental principles underscore the impropriety of dismissing Zuckerman's action before she ever had an opportunity to conduct discovery or present evidence foreclosing The Met's laches defense.

1. The Met's Unclean Hands and Unreasonable Delay. The court failed to credit (or simply ignored) allegations indicating that The Met had unclean hands. A defendant lacks clean hands where, as here, it has "reason to know" about wrongdoing. *Schoeps*, 594 F. Supp. 2d at 468. Zuckerman alleged that The Met remained willfully ignorant about the Painting's provenance, conducting no initial investigation into its origins despite its expertise, resources, and post-War advisories warning of Nazi-looted art. App.101, 103-04. Zuckerman further alleged that The Met should have known about the Painting's illicit history as early as 1967, when art dealer Hugo Perls conveyed that he acquired the Painting from an unnamed "German professor" in Switzerland who had been "thrown out by the Nazis." App.103. These allegations alone precluded The Met from asserting laches. *Precision Instrument Mfg. Co.*, 324 U.S. at 814.

The court similarly failed to credit allegations reflecting The Met's own lack of diligence, which further undermined a finding of laches. See *Solomon R. Guggenheim Found.* v. *Lubell*, 77 N.Y.2d 311, 321 (N.Y.

1991). Zuckerman alleged that The Met "should have discovered, through due diligence, [Paul's] ownership [of the Painting] up and until 1938, and the circumstances under which he was compelled to dispose of the Painting because of Nazi and Fascist persecution." App.101. Zuckerman also alleged that The Met conducted no diligent investigation into the Painting's provenance, even after it learned that the Painting was acquired from a German who had been "thrown out by the Nazis." App.101-03.

The Met's lack of diligence was even more stark: it occurred against a backdrop of U.S. government post-War circulars in 1945 and 1947 reprinted in industry media outlets in 1950 and 1951. App.104. These circulars directed museums to report objects of "special artistic importance" that had "obscure or suspicious" provenances, and warned them to exercise "continued vigilance" in identifying objects with provenances tainted by World War II. *Id.* The Met's initial decision not to investigate *The Actor*'s origins was even inconsistent with the principles espoused by the American Alliance of Museums (by which The Met is accredited) and the Association of Art Museum Directors (of which The Met is a member). App.105. These principles direct museums to identify, research, and make the provenance available for all objects in their possession transferred in Europe during the Nazi era. *Id.*

The Court of Appeals not only failed to credit Zuckerman's allegations about The Met's unclean hands and lack of diligence; it compounded these errors by making factual determinations adverse to

Zuckerman and drawing adverse inferences relating to the Leffmanns' conduct. See *Twombly*, 550 U.S. at 558.

The court cast the Leffmanns as a "financially sophisticated couple [that] actively and successfully pursued other claims for Nazi-era losses," and concluded that this was "not a case where the identity of the buyer was unknown to the seller or the lost property was difficult to locate." App.14. But the complaint alleged that the Painting's immediate history after its sale in 1938 was "unclear." App.100-103.

The Leffmanns' history of pursuing claims for other Nazi-era losses appears nowhere in the complaint either. Further, after the War, "German restitution laws" allowed "property lost during the Nazi era" to be claimed "in cases where Nazi persecution caused the loss," including "property [that] had been left behind in Germany after" claimants immigrated to places where they "face[d] Nazi measures of persecution in the same way as Jews living in Germany." Harald Konig, *Claims for the Restitution of Holocaust-Era Cultural Assets and Their Resolution in Germany*, 12 Art Antiquity & L. 59, 63 (2007). Although the Leffmanns sought to recover under these laws property that had been lost during the War, expert testimony will show (contrary to the Court of Appeals' suggestion) that the Leffmanns could not have used this claims process to reclaim *The Actor*.

2. Prejudice. Although the court acknowledged that the prejudice analysis is "ordinarily fact-intensive," it still found that The Met established prejudice

because no first-hand witnesses remain to testify about the voluntariness of the 1938 sale. App.15-16. But the parties could have presented expert testimony on that issue, a practice that is common (and, indeed, often necessary) in Holocaust-era art recovery cases. See *Reif*, 175 A.D.3d at 119 (noting, in Nazi art theft case, that both parties submitted expert reports as evidence). Here, for example, Zuckerman could have presented expert testimony about: (a) the climate of Jewish persecution in Italy in 1938, (b) the true value of the Painting at the time of the sale, and (c) the imminent Nazi and Fascist persecution Paul faced when he was forced to sell the Painting far below its true value to escape the Nazis and their allies.

The Court of Appeals made the "unreasonable delay" and "prejudice" findings with no discovery on these two issues—let alone the merits of the parties' claims and defenses. Discovery was not rendered unnecessary merely because The Met shared with Zuckerman all the documents it had recently acquired as a result of its post-claim investigation into the provenance of *The Actor*. To address The Met's fact-intensive laches defense, Zuckerman was entitled to discover relevant third-party documents, including (for example) any relevant documents held by the two galleries that had the Painting before Foy (the Perls Galleries and the M. Knoedler & Co. Gallery), which often turned a blind eye to the provenance of Holocaust-era artworks. See *Bakalar* v. *Vavra*, 619 F.3d 136, 150 n.5 (2d Cir. 2010) (Perls Galleries); *Rosenberg* v. *Seattle Art Museum*, 42 F. Supp. 2d 1029, 1031-32 (W.D. Wash. 1999) (Knoedler

Gallery). Discovery may show precisely how The Met's lack of diligence impacted its failure to acknowledge—for over 50 years—Paul's continual ownership of the Painting until he parted with it during the "greatest displacement of art in human history." HEAR Act § 2(1).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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