18-634

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
Southern District of New York No. 16-civ-07665

BRIEF OF *AMICI CURIAE* THE 1939 SOCIETY AND BET TZEDEK IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29 of the Federal Rules of Appellate Procedure, *Amici Curiae* state that they are nonprofit corporations, have no parent corporations, and have no stock, let alone stock held by any publicly held company.

June 1, 2018 Respectfully submitted,

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I. INTEREST OF AMICI CURIAE[1]

Amicus The 1939 Society, located in Southern California, was formed in 1952 by fourteen Holocaust survivors dedicated to Holocaust remembrance and education, and to support Holocaust survivors and their legacy. The 1939 Society partners with academic institutions to support educational programming to teach the lessons of the Holocaust. Those educational programs and institutions include the Chair in Holocaust Studies Program at UCLA (the first in the nation and where Chair Saul Friedlander received a MacArthur Award and a Pulitzer Prize for his work on the Holocaust), the UCLA Center for Jewish Studies, the Graduate Holocaust Studies course at California State University at Northridge, the Jewish Studies Program at Loyola Marymount University, and The Rogers Center for Holocaust Education at Chapman University. With Chapman University, The 1939 Society sponsors an annual Holocaust Art and Writing Contest, the largest such contest in the nation, where upwards of 6,000 middle and high school students participate in writing a poem or essay or creating a work of art on the Holocaust, relating it to their lives. The restitution of Nazi-looted art and ensuring justice to

[1] The parties consented to these Amici filing a brief. No party or party's counsel authored any portion of this brief, and no one other than Amici or their counsel contributed any money to fund this brief or aid in its preparation or submission.

Holocaust victims and their heirs is integral to The 1939 Society's purpose and mission.

Amicus Bet Tzedek (Hebrew for "House of Justice"), located in Los Angeles, is a nonprofit public interest law firm founded in 1974 to achieve full and equal access to justice for all vulnerable members of its community and is an internationally recognized force in poverty law. Bet Tzedek is widely respected for its expertise on reparations claims and has particular expertise in drawing on the historical context of the Second World War to support Holocaust victims' compensation claims.

Bet Tzedek has represented more than 5,000 survivors and their families in reparation claims from both public and private entities and is one of the only organizations in the United States to extend these services to Holocaust survivors. Bet Tzedek also founded the Holocaust Survivors Justice Network through which it links survivors with legal and social services providers to provide support on a range of issues. The Holocaust Survivors Justice Network received the American Bar Association Pro Bono Publico award.

Bet Tzedek has also litigated a number of appeals involving claims for restitution of Nazi-looted art, including the landmark case of *Grunfeder v. Heckler*, 748 F.2d 503 (9th Cir. 1984), which dealt with reparations payments and federally funded public benefits, and has acted as amicus curiae in many prominent cases in this area,

including *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), and *Von Saher v. Norton Simon Museum of Art*, 131 S. Ct. 3055 (2011).

The 1939 Society and Bet Tzedek have previously served as amici in the *Cassirer* and *Von Saher* cases in the Ninth Circuit as part of their respective missions to be amici in Nazi confiscated, stolen, or forced sale art cases.[2]

II. INTRODUCTION AND SUMMARY OF ARGUMENT

This case provides an important opportunity to provide a small measure of justice for the terrible events surrounding the greatest human catastrophe of the modern era, the Holocaust. Specifically, the case involves the disposition by a German Jewish family who fled Nazi Germany, and who were living stateless in Fascist Italy, of an oil painting by Pablo Picasso, The Actor, a work that the District Court deemed "monumental." (SPA-1.) The Picasso, sold by the family under desperate circumstances and well below market value, now hangs in the Metropolitan Museum of Art in New York, as it has since 1952 when the museum received it as a donation. The Museum stubbornly refuses to return the painting to its rightful owners, the

[2] *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017), *cert. denied*, 2018 WL 1184953 (U.S. May 14, 2018); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 9th Cir. No. 16-56308 (argued Feb. 14, 2018).

Leffmanns, making the Picasso one of the "last prisoners" of World War II.[3]

In October 2015, the United States Congress awarded its highest civilian honor, the United States Congressional Gold Medal, to the "Monuments Men," a group of 350 artists, architects, scholars, and curators who deployed to Europe during World War II to recover and return Nazi-stolen artworks to their rightful owners. Even 70 years after the end of the war, the service of these men and women is well-remembered by the United States as a valiant and fruitful effort to rescue these priceless artworks that would otherwise have remained in the possession of those who stole them. House Minority Leader Nancy Pelosi stated, "[They saved the] creativity that connects us to the heritage of civilization."[4]

These cultural artifacts have developed and retained great symbolic meaning. Scholars readily recognize the parallels between

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[3] *See* Bruce L. Hay, Nazi Looted Art and the Law 1 (Springer Int'l Publ'g 2017). Survivors and their heirs have tried to claim artworks in public and private collections asserting that they were seized by the Nazis or sold under duress by owners desperate to flee occupied countries. These "artworks … have been called the 'last prisoners' of the Second World War." *Id.* at 1.

[4] Pelosi Remarks at Congressional Gold Medal Ceremony Honoring the WWII Monuments Men, Oct. 22, 2015, https://www.democraticleader.gov/newsroom/pelosi-remarks-at-congressional-gold-medal-ceremony-honoring-the-wwii-monuments-men/.

plunder and genocide: The rhetoric behind both destructive campaigns undertaken by the Nazis during World War II "shared a pathology of domination, subjugation and extermination."[5] During the 20th Century, art collecting by Jews signified integration with Western Christian society and, from the Nazi perspective, unacceptably tainted Aryan culture, just as the existence of Jewish people tainted the Aryan race.[6] The Nazis aimed to destroy this invasion of culture and forced Jewish art collectors to "sell" their art at substantially below market value in order to divest them of their German and European culture. Given this context, the restitution of Holocaust stolen art allows society to tread through an uncharted "discursive terrain of repair" and provides an opportunity to bring justice to Holocaust victims and heirs.[7]

Paul Friedrich Leffmann and his wife Alice were German Jews who had sizeable assets, including a rubber manufacturing company,

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[5] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?* 22 Eur. J. of Int'l L. 49, 57-58 (2011).

[6] *See* Emily J. Henson, *The Last Prisoners of War: Returning World War II Art to Its Rightful Owners—Can Moral Obligations Be Translated into Legal Duties?* 51 DePaul L. Rev. 1103 (2002). *See also* Kelly Ann Falconer, *When Honor Will Not Suffice: The Need for a Legally Binding International Agreement Regarding Ownership of Nazi-Looted Art*, 21 U. Pa. J. Int'l Econ. L. 383, 383-84 (2000).

[7] O'Donnell, *supra* n.1, at 54, citing Woolford & Wolejszo, *Collecting on Moral Debts: Reparations for the Holocaust and Porajmos*, 40 L. & Soc'y Rev. 871, 898 (2006).

real estate properties, and a significant art collection, including the Picasso. After the Nazis adopted the Nuremberg Laws in 1935, Paul and Alice were forced to sell their home in Germany and their other assets to German corporations for well-below market value. Watching their world crumble around them, Paul and Alice arranged for the Picasso to be held in Switzerland for safe-keeping by a non-Jewish German acquaintance, Professor Heribert Reiners. Having been dispossessed of most of their remaining assets, the Leffmanns fled Germany in the spring of 1937 for Fascist Italy.

By the spring of 1938, after Hitler's visit to Italy, it became clear that Fascist Italy was no safer than Nazi Germany and the Leffmanns prepared their second escape. In a desperate effort to fund his choice for life over death, Paul in June 1938 sold his beloved Picasso to Hugo Perls, an art dealer. This "Forced Sale," took place a mere month before the Leffmanns were forced to submit their Directory of Jewish Assets as required by the Reich.[8] Using some of the funds from the Forced Sale of the Picasso, the Leffmanns were

[8] *See* Peter Hayes, *Plunder and Restitution*, *in* The Oxford Handbook of Holocaust Studies 544 (Peter Hayes & John K. Roth, eds., 2010), ("In the succeeding years, the regime may have raked in as much as half of the remainder through additional impositions … [such as] the terms of the Eleventh Decree to the Reich Citizenship Law, which declared that the property of German Jews 'fell' to the state at the moment they exited the country, whether through emigration or deportation.").

able to buy temporary visas to Switzerland and escape Mussolini's Italy just days after the enactment of anti-Semitic racial laws. The Leffmanns' decision to sell their beloved possession for significantly under market value was no more voluntary than sales of last possessions conducted by Jews in the ghettoes and concentration camps of the Holocaust. None were done by free will; all were done for survival.

In 1941, with their diminished funds mainly from the sale of the Picasso, the Leffmanns were able to escape to Switzerland and then emigrate, yet again, to Brazil. While the Leffmanns escaped the Holocaust now taking place in Europe, their key to survival, the Picasso, was making its way from Switzerland to New York through a variety of profitable sales and the eventual donation to the Museum.

* * *

The international community's interest in resolving Nazi-looted art controversies is demonstrated by two international conferences, the Washington Conference on Holocaust Era Assets in 1998 and the Prague Holocaust Era Assets Conference in 2009. Attended by delegates of over forty nations, including the United States and Italy, these conferences produced a specific international norm for Nazi-looted art. This norm is reflected in two remarkable documents: (1) the Washington Conference Principles on Nazi-Confiscated Art of

1998, agreed on by 44 countries and (2) the Terezín Declaration of 2009, agreed on by 47 countries.[9]

The Washington Conference Principles establish a set of standards addressing the need for international cooperation in resolving the tragic aftermath of the Holocaust. The Terezín Declaration reiterates the Washington Conference's resolve to promote justice for those who suffered at the hands of the Nazi regime. The international norm, which is now part of international customary law, is that claims involving Nazi-looted art against museums worldwide must be resolved fairly and justly, with the goal of resolving claims on their facts and merits rather than on the basis of technical legal defenses.

Amici contend that the District Court erred in failing to recognize the complex historical and legal context from which this case unfolds. The court incorrectly treated this as an ordinary business transaction taking place during ordinary times, ignoring the factual context of the sale, to hold that this monumental work of art was validly sold and now rightfully sits in the Museum. That decision not only misinterprets the facts and circumstances surrounding the sale,

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[9] The United States played a prominent role in drafting the norms reflected in these two documents, which are available on the U.S. Department of State website:
- Washington Principles, www.state.gov/p/eur/rt/hlcst/270431.htm;
- Terezín Declaration, www.state.gov/p/eur/rls/or/126162.htm.

but also disregards the laws of equity signed by both countries with an interest in the case. The United States has not only been party to the Washington Principles and Terezín Declaration but also has taken other actions, detailed below, evidencing its fervent commitment to returning art sold during the Holocaust to its rightful owners. The District Court's insistence on adopting a narrow formalistic approach to this Forced Sale within the context of the Holocaust is unfathomable.

The equities show that the Picasso must be returned to the Leffmann Estate. In fact, this case does not even involve a typical balancing of the equities because the facts show that no other party involved in the long chain of transactions experienced *any* disadvantage—economic or otherwise. Only the Leffmanns sustained a loss in regard to the Forced Sale of the painting. Each party who purchased the painting—first Perls and Rosenberg and then a member of the Chrysler family—paid a below-market price for the masterpiece (which nonetheless far exceeded the price paid to the Leffmanns). At the end of this chain is the Museum, which did not lose a penny on this transaction, having received the painting as a donation.

The reality is this: The Museum is fighting to keep a monumental artwork, for which it paid nothing, from the estate of Holocaust survivors, who survived only because they sold that beloved artwork well below market value to save their lives. There are

hardly any equities to be "balanced" when at the end of the case, only one side, the Leffmanns, suffered any losses.

The result was neither just nor fair, and should be reversed.

III. ARGUMENT

The District Court erroneously concluded that typical business rules of economic duress applied to the Forced Sale of this monumental work by failing to consider (1) the unique nature of the property, (2) international norms established for such property, (3) similar national policies of the United States and Italy, or (4) the broader historical and legal consequences at stake. (SPA- 48.)

A. The District Court's Analysis Ignored the Unique Nature of Holocaust Forced Sale Property

After the atrocities of World War II, countries around the globe renewed their commitments to defend human rights, forming covenants that would set global moral standards, while also accounting for national differences. The Washington Principles and the Terezín Declaration are part of this ongoing international commitment.

In 1998, the Washington Conference on Holocaust-Era Art Assets produced a set of nonbinding principles reflecting "a consensus reached by the representatives of 13 nongovernmental organizations and 44 governments." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014). The Principles seek to

resolve issues related to forced-sale art by first identifying art that had been confiscated by the Nazis, and then making "every effort … to publicize" this art to locate owners and heirs. *Id.* Signatories further agreed that former owners and their heirs should be "encouraged to come forward," and that "steps should be taken expeditiously to achieve a just and fair solution," including but not limited to developing any "national processes to implement [the] Principles" such as alternative dispute resolution. *Id.*

This international commitment to justice was confirmed about a decade later, in 2009, when the Prague Holocaust Era Assets Conference produced a second international agreement, the Terezín Declaration. Both the United States and Italy are signatories to the Terezín Declaration, which not only reaffirmed support for the Washington Conference Principles, but also urged that "every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales, and *sales under duress* of property, which were part of the persecution of these innocent people and groups" during the Holocaust. Terezín Decl. ¶9 (emphasis added).

In addition, the Terezín Declaration called for "all stakeholders to ensure that their legal systems or alternative processes … facilitate just and fair solutions with regard to Nazi-confiscated and looted art." Terezín Decl. ¶32.

As signatories to the Washington Conference Principles and the Terezín Declaration, both Italy and the United States have voluntarily recognized restitution for Holocaust victims as a need that involves—and indeed necessitates—the cooperation of all nations. Because international agreements serve as the most concrete manifestation of multinational policies and interests, the court was required to consider the impact of Italy's and the United States' participation in the Washington Conference Principles and Terezín Declaration.

Here, the court's narrow business-view of duress serves neither country's policy nor the needs of the international system because it precludes a just and fair resolution of this issue. Furthermore, beyond international agreements and United States federal policy regarding the restitution of Nazi-confiscated art, the United States government has made clear its own domestic commitment to the just and fair resolution of conflicts over Nazi-looted art.

For instance, in December 2016, the Holocaust Expropriated Art Recovery Act (the "HEAR Act") was signed into law by the President. 22 U.S.C. §§ 1621-1627. The bipartisan HEAR Act, introduced by Senators Ted Cruz (R-Texas) and Chuck Schumer (D-New York), and unanimously passed by both houses of Congress, aims to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner." The HEAR Act

was enacted to specifically ensure that "claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration." HEAR Act of 2016, 22 Pub. L. 114-308, 130 Stat. 1525 (2016), § 2(7).

More recently, both houses of Congress unanimously passed The Justice for Uncompensated Survivors Today ("JUST") Act, which requires the State Department to report on the progress of European countries "toward the return of or restitution for wrongfully confiscated or transferred Holocaust-era assets, including … art." JUST Act of 2017, Pub. L. 115-171, 132 Stat 1288 (2018). "This is a powerful statement of America's unwavering commitment to supporting Holocaust survivors in their quest for justice."[10] The JUST Act was signed into law on May 9, 2018.

Had the court taken into account international policy, the mutual policies of Italy and the United States, and the unique nature of the property, it would have, and should have, concluded that the determination of the ownership of the Picasso should not be analyzed under the laws of business economic duress for either country, but

[10] *See House unanimously passes bill to help Holocaust survivors obtain restitution and seized assets*, Jewish Telegraphic Agency (Apr. 24, 2018), https://www.jta.org/2018/04/24/news-opinion/united-states/house-unanimously-passes-bill-help-holocaust-survivors-obtain-restitution-seized-assets.

rather under the shared equitable laws of resolving ownership of the Picasso based on what is just and fair.

B. The District Court Erred by Applying A Narrow Formalistic View of Economic Duress to Forced Sales Under Fear of Death That Occurred During the Holocaust

The District Court incorrectly analyzed this case under the principles of economic duress and concluded that duress was not adequately pled under both Italian and New York law. The court found that under Italian law, "A general state of fear arising from political circumstances is not sufficient to allege duress." (SPA-27.) While that may be true, the court was incorrect in making its first assumption: that what the Leffmanns experienced was fear from "political circumstances." (SPA-27.) What the Leffmanns feared was not a "general" change in politics as usual, but rather justified fear for their *lives*. Estimates suggest that about 10,000 Jews were deported from Italy and the vast majority perished, principally at Auschwitz.[11]

The court significantly watered down the threats to survival that the Leffmanns, and other Jews living in Italy, confronted during this time. Being stripped of property rights and facing the probability of death is not merely the "generic indiscriminate persecutions of

[11] *The Holocaust in Italy*, United States Holocaust Memorial Museum, https://www.ushmm.org/learn/mapping-initiatives/geographies-of-the-holocaust/the-holocaust-in-italy. *See generally* Susan Zuccotti, *The Italians and the Holocaust: Persecution, Rescue, and Survival* (Univ. of Neb. Press 1996).

fascism." (SPA-27.) Contrary to the court's conclusion, the persecutions Jews faced in Italy in 1938 were neither indiscriminate nor generic. They were targeted, extreme, and most likely would have cost the Leffmanns their lives had they not fled. Indeed, as one New York court recently recognized, the Holocaust is "the most tragic event of our time" and cases like this "must be viewed in context." *Reif v. Nagy*, 2018 WL 1638805, at *1-*2 (N.Y. Sup. Ct. 2018). The court's decision here appears to miss this context.

The court relied primarily on Italy's passage of Article 19 of legislative decree lieutenant April 12, 1945, no. 222, contemplating rescission for sales contracts after October 6, 1938 because Jews were "weak contracting parties during the Holocaust." (SPA-29.) However, the court's position that this precludes Plaintiff's claim is incorrect. While Article 19 is certainly one means of voiding Nazi-era contracts, it is not the *exclusive* means. It is certainly evidence that Italy recognized one means of protecting individuals impacted by the atrocities of the Holocaust, but there was no evidence from which the court could properly conclude Article 19 was the only means.

Similarly, the court found that under New York's business economic duress law, Plaintiff had to prove that the 1938 sale was procured by "a wrongful threat that … precluded the exercise of its free will." (SPA-31.) Again, the court should not have based its opinion on the formalistic *legal* principles of *economic* duress. The

economic aspect of the Forced Sale, to raise money, was the only way to save their lives. The circumstances the Leffmanns faced, "permitted no other alternative" and while the threat came from the fear for their own lives and not the sellers, this one factor should have been enough for the court to conclude that this contract must be voided. (SPA-31.)

In framing this case as merely one of economic duress, the court seems to forget, as one district court eloquently put it, "that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity." *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001). And it is understood that "[a] signature at gunpoint cannot lead to a valid conveyance." *Reif*, 2018 WL 1638805, at *4; Indep. Int'l Comm'n of Experts Switz.--Second World War, Switzerland, National Socialism and the Second World War: Final Report 322-23 (2002) [the Bergier Report] ("Even if they were based at the time on the agreement of both parties, such takeovers cannot be termed 'fair deals' without closer investigation. The contracts were not drawn up on a legal basis and under free-market conditions. Instead the situation was one in which the Jewish businessmen were offering under great pressure to sell ….").

New York has even recognized that individuals must be protected from an unscrupulous marketplace when faced with dire circumstances occasioned by catastrophes in enacting its Price Gouging Law. The Price Gouging Law is an explicit recognition that crises, whether human-made, such as the Holocaust, or natural, like Hurricane Sandy, cause an "abnormal disruption of the market" which effectively vitiate an individual's economic free will due to the necessity for basic survival. *See* N.Y. Gen. Bus. Law § 396-R.

The Forced Sale of the Picasso is no different—it was a transaction necessary for survival during a catastrophic time in which the Leffmanns' economic free will virtually ceased to exist.

Viewed in this essential historical context, there can be little doubt that the Leffmanns' sale of their treasured Picasso, for a price clearly less than it was worth, "was no more voluntary than the relinquishment of property during a holdup." *See Menzel v. List*, 267 N.Y.S.2d 804, 810 (N.Y. Sup. Ct. 1966). The formalistic judicial methodology that the District Court used in narrowly examining the law of duress is akin to that used in Nazi Germany, Fascist Italy, and Vichy France to formalistically uphold anti-Jewish laws passed in those countries.[12]

[12] *See* Vivian Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 Cornell Int'l L.J. 101, 134-36 (2002) ("[A]t some point law must cease to be considered law when it contravenes the

C. The District Court Was Required to Use Its Equitable Powers

Case law has repeatedly affirmed that "all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). Equity allows courts to "mould each decree to the necessities of the particular case. … The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944).

Equity is a concept widely applied in the law. Equitable considerations are integral in the doctrines of unjust enrichment and constructive trusts. For instance, "disgorgement [of ill-gotten gains] has been used by the … courts to prevent wrongdoers from unjustly enriching themselves … [and is] 'an exercise of the equity powers of the federal courts.'" *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Equitable relief also comes in the form of a constructive trust,

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basic requirements of justice, and therefore judges should declare that such enactments do not constitute law, and do not warrant judicial interpretation or application at all. … [And]when popular opinion views technically legitimate acts as illegitimate, they eventually do lose their claim to legitimacy irrespective of technical internal categories of legitimacy."). Judge Galante Garrone, an Italian judge in Mussolini's Italy, even "concluded that he himself was doing more harm than good by continuing to be a judge purporting to apply fascist law." *Id.* at 137.

which are "the formula through which the conscience of equity finds expression." *Brand v. Brand*, 811 F.2d 74, 77 (2d Cir. 1987) (affirming district court's use of a constructive trust remedy); *Akerson Advert. & Mktg., Inc. v. St. John & Partners Advert. & Pub. Relations, Inc.*, 89 F. Supp. 3d 341, 355-56 (N.D.N.Y. 2015) (recognizing that the application of equitable doctrines requires "sufficient flexibility to prevent unjust enrichment"). The court's powers of equity are even available in the adjudication of statutes of limitation. *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 135-36 (E.D.N.Y. 2000) (in cases involving confiscation of assets looted by the Vichy Government, court's powers in equity merit the application of equitable tolling). Thus, the invocation of equitable principles is not an unfamiliar task for courts, and the District Court in this case was more than allowed to make equitable considerations.

1. The Leffmanns are the Only Ones Who Experienced Losses with Regard to the Forced Sale

If the court analyzed ownership of the Picasso based on international principles and equity, it should have recognized that only one party in the entire chain of custody of the painting experienced *any* losses: the Leffmanns.

The Leffmanns were forced to sell the Picasso below its market value based exclusively on the life-and-death circumstances they

faced. Though the court acknowledges that the Leffmanns were able to survive based on the amount they raised, the court blindly views survival as justice. The court implies that because the Leffmanns sold the Picasso and survived, they received a fair deal. Would their deaths at the hands of the Nazis, likely in an extermination camp, provide more compelling facts to show that this sale was devoid of any fairness?

While the Leffmanns experienced obvious and great losses from the sale, no other party down the line experienced even the smallest loss. Each and every buyer and seller after the Leffmanns received fair payment. The ultimate holder of the Picasso, the Museum, cannot plausibly claim any loss because it received the painting as a donation. The Museum would not lose a penny were it to return the painting to its rightful owners.[13] Each buyer or seller after the Leffmanns adequately prospered, especially the Museum which

[13] Even if the Museum had purchased the painting, the context surrounding the Leffmann's forced sale shows that equity would require returning it, because the initial buyers knew the purpose of the sale was to fund the Leffmann's survival, and was able to purchase the painting at a steep discount. Yet, the court mischaracterized the facts surrounding the sale, portraying it as a shrewd business decision. (SPA-34-35.) On the contrary, the Leffmanns recognized that the sale was anything but an economic deal—it was merely a choice of life over death. The court not only should have recognized this, but also should have weighed the fact that the buyers knew this was the case.

only experienced an upside. The equities clearly show that only the Leffmanns must be made whole, at no downside to the Museum.

2. The District Court Erred by Refusing to Consider the Museum's Willful Failure to Conduct a Proper Provenance Investigation

In failing to consider the equities of the situation, the district court refused to account for the Museum's failure to conduct a proper provenance investigation for the Picasso. The court accepted as true the allegations regarding the Museum's wholesale failure to investigate the provenance of the painting. (*See* SPA-19-20 ["The Museum's published provenance for the Painting was manifestly erroneous when it first appeared in the Museum's catalogue of French Paintings in 1967. … This remained the official Museum provenance for the Painting for the next forty-five years, including when it was included on the Museum's website as part of the 'Provenance Research Project,' which is a section of the website that includes all artworks in the Museum's collection that have an incomplete Nazi-era provenance."].) However, the court failed to consider the impact of these facts on the legal issues before it, even though this evidence is material to the court's analysis.

It is neither just nor fair for the court to resolve a dispute over Nazi-confiscated art in a vacuum, without considering the parties' respective efforts and intentions. The Museum should be bound by

internationally recognized standards and ethical duties intended to ensure the professionalism of the field, the integrity of the art market, and to protect victims' rights.

In particular, the Terezín Declaration emphasizes the need for museums to conduct proper provenance to ensure justice for Holocaust victims: "to achieve just and fair solutions, we stress the importance for all stakeholders to continue and support intensified systematic provenance research … in both public and private archives …." Terezín Decl. ¶ 31.

As a member of the International Council of Museums ("ICOM"), the Museum also voluntarily bound itself to certain ethical duties, including the duty to conduct an adequate title investigation for all acquisitions. The ICOM Code of Ethics for Museums states: "Every effort must be made before acquisition to ensure that any object or specimen offered for purchase, gift, loan, bequest, or exchange has not been illegally obtained …. Due diligence in this regard should establish the full history of the item since discovery or production." ICOM Code of Ethics § 2.3.

The Museum's inadequate due diligence deviated substantially from museum industry standard. Indeed, as early as 1967, the Museum learned Perls had acquired the painting from a "German professor" who has been "thrown out by the Nazis." (*See* A-49.) Had it satisfied its legal and ethical duties and conducted a proper

provenance search, the Museum would have discovered that the rightful owners were the Leffmanns. (*See generally* A-47-49.) The Museum's significant departure from industry standard is strong evidence that it acted in bad faith or, at a minimum, negligently.

Yet the court ignored this evidence and rewarded the Museum for violating its own ethical duties—holding that a museum is better off if it makes no effort to understand the origin of its acquisitions. That ruling undermines the purpose of the Principles, the Declaration, the states' shared interest, and the interest of the international community, in achieving a just and fair result for Holocaust victims—and also rewards the Museum for violating its own ethical duties.

The Museum's approach stands in stark contrast to that of other similarly prestigious institutions that have engaged in efforts to ensure that art sold under duress during the Holocaust is returned to its proper owners. The Louvre, for example, "create[d] a permanent space" for exhibiting Nazi-stolen art explaining that "[a]lthough museums are often suspected of wanting to keep the pieces … our goal is clearly to return everything that we can."[14] As the Louvre, and others,

[14] Aurelien Breeden, *Art Looted by Nazis Gets a New Space at the Louvre. But Is It Really Home?*, N.Y. Times, https://www.nytimes.com/2018/02/08/world/europe/louvre-nazi-looted-art.html (Feb. 8, 2018); *see also* Eleanor Beardsley, *France Hopes Exhibit Of Nazi-Stolen Art Can Aid Stalled Search For Owners*, NPR, https://www.npr.org/sections/parallels/2018/02/23/588374670/france-hopes-exhibit-of-nazi-stolen-art-can-aid-stalled-search-for-owners

demonstrate, world-class institutions such as the Museum have an obligation to ensure that the art it hangs on its walls has not been ripped from the walls of another during the most tragic time in history.

IV. CONCLUSION

The district court did not sufficiently address the particular issue of Nazi-looted art because it did not meaningfully consider how the Washington Principles and Terezín Declaration are fundamentally resolutions about people, not property. What gives the disposition of Nazi- looted art its legal significance is not its sheer artistic or monetary value, but rather its role in the restitution of Holocaust victims—a goal shared by both Italy and the United States. The decision should be reversed.

June 1, 2018 Respectfully submitted,

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(Feb. 23, 2018) ("[Louvre curator, Vincent] Delieuvin says … 'If the seller was Jewish, then there's a good chance it was a forced sale.'").

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of the Federal Rule of Appellate Procedure 32(a)(7)(B) and contains **5,478** words, exclusive of the corporate disclosure statement, the table of contents, the table of authorities, as counted by the 2003 Microsoft Word word–processing program used to generate this brief.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using 2003 Microsoft Word word-processing program with a 14 point Times New Roman font.

June 1, 2018

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CERTIFICATE OF SERVICE

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

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