

18-634-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LAUREL ZUCKERMAN, AS ANCILLARY
ADMINISTRATRIX OF THE ESTATE OF ALICE LEFFMANN,
Plaintiff-Appellant,

v.

THE METROPOLITAN MUSEUM OF ART,
Defendant-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

**BRIEF OF AMICUS CURIAE
HOLOCAUST ART RESTITUTION PROJECT
IN SUPPORT OF APPELLANT AND REVERSAL**

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THE METROPOLITAN MUSEUM OF ART,

Defendant-Appellee.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Holocaust Art Recovery Project (HARP) respectfully submits this *amicus* brief to petition the Court to reverse the ruling of the District Court as undermining U.S. foreign policy to restitute artworks lost as a proximate consequence of policies and persecution by the Nazi government and its allies (*Nazi-confiscated artworks*). Because HARP researches and documents such losses, it has a strong interest in this subject as well as in the wrongful retention of these materials by U.S. tax-exempt museums. HARP submits this brief by consent of both parties.¹

¹ As FRAP 29(a) (4)(E) and Local Rule 29.1 (b) direct, the counsel of neither party authored this brief in whole or in part or contributed any money to preparing it, and

II. INTRODUCTION AND SUMMARY

Because the restitution of *Nazi-confiscated artworks* implicates U.S. foreign policy, the Court should invoke its plenary federal common law authority in foreign affairs to define *uniformly* the precise circumstances involving Nazi duress that delineate artworks eligible for restitution under this policy.

The District Court’s ruling confirms that notoriously multifarious and conceptually skewed state common law principles of economic duress, which seek only to sustain local commerce, are deficient for ascertaining whether – *and as a matter of U.S. foreign policy* - artworks coercively transferred in Europe as a consequence of Nazi violations of the international law of human rights and incident to “war” should be restituted. But by focusing upon whether *wrongful* duress induced a particular transfer and left the victim no reasonable alternative, § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) and § 175 of the *Restatement (Second) of Contracts* (1981) provide sound legal templates for crafting a uniform federal common law definition of *Nazi-confiscated artwork* that will implement appropriately U.S. foreign policy to retribute these materials “expeditiously”, and based upon the discrete “facts and merits” of each claim.

no person other than counsel for HARP contributed any money to preparing or submitting it.

III. STATEMENT OF FACTS AND LEGAL BACKGROUND

A. The MET is a Tax-Exempt, Federally Funded Public Trustee with Fiduciary Duties to Take Precautions Against Acquiring *Nazi-Confiscated Artworks* and to Oblige U.S. Restitution Policy

The Metropolitan Museum of Art (MET) is a not-for-profit corporation organized and existing under New York law. It owes formal fiduciary duties to the public to observe reasonable precautions against acquiring *Nazi-confiscated* and other contraband.² The failure of U.S. museums like the MET “to consider adequately the security of title” when acquiring art objects violates duties of loyalty and care.³ So “museums that do not exercise sufficient due diligence in acquiring works of art... are breaching their public and fiduciary obligations.”⁴

The MET also is tax-exempt under 26 U.S.C. § 501(c)(3), and so eligible to receive charitable donations of property under § 170. As public charities, tax-exempt entities must adhere to dominant U.S. public policies, and operate so as not to encourage crime or illegality.⁵ Accordingly, the signal U.S. foreign policy to

² Alan Ullberg, *Museum Trusteeship* (1981) at 17.

³ Patty Gerstenblith, *Acquisition and Deacquisition of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 *Cardozo J. Int'l & Comp. L.* 409, 454 (2003).

⁴ *Ibid.*

⁵ In *Bob Jones University v. United States*, 461 U.S. 574, 587 (1983), the Court ruled that to maintain its tax exemption under § 501 (c)(3), an entity must operate

restitute *Nazi-confiscated artworks* – discussed *infra* – necessarily informs the MET’s fiduciary and public policy obligations regarding *The Actor*.

Former MET director Thomas Hoving boasted in his 1993 autobiography *Making the Mummies Dance* that he habitually violated fiduciary duties in expanding the MET’s public collection: “[m]y collecting style was pure piracy.... My address book of dealers and private collectors, smugglers and fixers, agents, runners...was longer than anyone else’s in the field.”⁶ Hoving told the *Chicago Tribune* that “[i]f you don’t work yourself up into a fever of greed and covetousness in an art museum, you’re just not doing your job.”⁷

B. Nazi Human Rights Violations Excluding Jews from the Economy of Germany and Anticipating Genocide Deprived Leffmann of the Painting

The court recounts the systematic Nazi policies and concomitant coercion that wrested the Painting from Leffmann. As discussed, *infra*, these wrongs reflected not merely normative “economic duress,” but rather a veritable catalogue

consistent with important U.S. public policies. Otherwise, the entity would undermine –rather than promote – the public good that justifies its exemption. *Id. Bob Jones* “now stands for the rule that charities may not operate in ways that run contrary to ‘public policy.’” Susannah Camic Tahk, *Crossing the Tax Code For Profit/Non Profit Border*, 118 Penn. St. L. Rev. 489, 500 (2014).

⁶ Thomas Hoving, *Making the Mummies Dance* (1993) at 24.

⁷ Kenneth R. Clark, *The Fine Art of Greed*, *Chicago Tribune* (January 21, 1993). (Available at <http://artciles.chicagotribute.com> 1993-01-21/features/9303170935-1-hoving-art-museum).

of violations of the modern international law of human rights: “[w]e are talking about crimes committed against civilians in the course of persecution of a race.”⁸

C. Even Before the War Ended the U.S. Government Announced Its Intention to Restitute Property Transferred Under Nazi Coercion – Such as *The Actor* – And Repeatedly Cautioned Museums Against Acquiring Such Materials

In January 1943, the Allied Governments declared their intention to invalidate seemingly volitional property transfers occurring in Nazi-occupied countries with the *Inter-Allied Declaration against Acts of Dispossession Committed in Territories Under Enemy Occupation and Control (London Declaration)*. The *London Declaration* reserved the right to negate any such transfer, regardless whether it appeared volitional.

U.S. restitution policy became concrete in 1947 with Military Government Law No. 59 1947 (“MGL No. 59”) which applied in restitution courts in post-war Germany.⁹ It viewed Nazi economic and political duress as so *inherently coercive* as to justify a legal presumption that *any* transfer of property by a persecuted person – including expressly in transactions between private parties – was involuntary *as a matter of law* and so subject to restitution. MGL No. 59 made this

⁸ Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 Cardozo L. Rev. 601, 602 (1998).

⁹ *Military Government Law No. 59* (12 Fed. Reg. 7983, November 29, 1947).

presumption *irrebuttable* for transfers occurring after the Nuremberg Laws of September 1935. MGL No. 59 became the model for similar legislation.

In 1945 and 1950, the U.S. Government admonished museums about acquiring artworks emanating from this milieu. In 1945 the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas (the Roberts Commission) warned museums that “*it is, of course, obvious that no clear title can be passed on objects that have been looted from public or private collections abroad.*”¹⁰ (Italics supplied).

The Roberts Commission included Francis Henry Taylor, the MET’s director from 1939 until 1955.¹¹

In 1950, the U.S. State Department advised museums that it was the “responsibility and desire” of the U.S. Government to restitute artworks “improperly disbursed” in Europe and later brought to the U.S., and that “[t]he continued vigilance of American institutions and individuals in identifying cultural objects improperly dispersed during World War II is needed.”¹²

¹⁰ In NARA, RG 59, Entry 62D-4, State Department [Ardelia Hall], Box 1.

¹¹ www.monumentsmenfoundation.org/the-heroes/the-roberts-commission/taylor-francis.

¹² Ardelia R. Hall, *The Recovery of Cultural Objects Dispersed During World War II*, Vol. XXV, No. 635, The Department of State Bulletin (August 27, 1951), Appendix 2.

In 1951, State Department official Ardelia R. Hall in a *State Department Bulletin* article entitled *The Recovery of Cultural Objects Dispersed During World War II*¹³ reaffirmed that “[t]he introduction of looted objects into the United States is ... contrary to the general policy of this Government,” and that “[f]or the first time in history, restitution may be expected to continue for as long as works of art have been plundered during a war continue to be rediscovered.”¹⁴

D. In 1948 the International Community Reacted to Nazi Atrocities with *The Universal Declaration of Human Rights*

In 1948 the U.N. General Assembly adopted the Universal Declaration of Human Rights (Declaration).¹⁵ The Declaration contains 30 articles that are not legally binding but prescribe a consensus about rights to which all human beings are entitled. The Declaration secures “the right to life, liberty and security of person” (Article 3); prohibits slavery and involuntary servitude (Article 4); forbids torture or cruel and degrading treatment (Article 5); and ensures the right of everyone to be recognized as a person before the law (Article 6).

The Declaration responded to the notorious Nazi brutalities against Jews and other persecuted classes. Commentators have noted “the worldwide sense of

¹³ 25 State Dept. Bull 337 (August 27, 1951).

¹⁴ *Id.* at 339.

¹⁵ Tai-Heng Cheng, *The Universal Declaration of Human Rights at Sixty: Is It Still Right for the United States?* 41 Cornell Int’l L.J. 251, 251 (2008).

outrage at the Nazi atrocities ... which led both to the United States Charter and to the Universal Declaration of Human Rights,”¹⁶ as well as the “‘the inhumanity of the Nazi regime,’ whose demise preceded, and in effect gave rise to, the Universal Declaration of Human Rights.”¹⁷

The modern customary international law of human rights –expressed in § 702 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987) – similarly proscribes abuses that the Nazi government made infamous and which deprived Leffmann of *The Actor*, including “systematic racial discrimination.”¹⁸

E. In 1952 the MET Received *The Actor* as a Charitable Donation Without Investigating its Nazi-Era Provenance as the U.S. Government Repeatedly Had Admonished

In 1952 the MET received *The Actor* as a charitable donation.¹⁹ Even though the Painting had been transferred in 1938 in Italy – by then a formal ally of Nazi Germany – the MET has not contended that it investigated the Painting to ensure that it was not a casualty of Nazi policies.

¹⁶ William F. Swindler, “*Rights of Englishmen*” Since 1776: *Some Anglo-American Notes*, 124 U. Pa. L. Rev. 1083, 1101 (1976).

¹⁷ Peter E. Quint, *The Universal Declaration and South African Constitutional Law: A Response To Justice Arthur Chaskalson*, 24 Md. J. Int’l L. 40, 40 (2009).

¹⁸ §702 (f) (Customary International Law of Human Right).

¹⁹ Opinion at 1.

F. In 1998 the U.S. Government Reinvigorated Its Policy to Restitute *Nazi-Confiscated Artworks* with Multiple Federal Statutes and Landmark International Agreements

Since 1998, the U.S. has reaffirmed its foreign policy goal to *restitute Nazi confiscated artworks*. In 1998 the U.S. Department of State, Bureau of European and Eurasian Affairs, promulgated the *Washington Conference Principles on Nazi-Confiscated Art (Washington Principles or Principles)*, prescribing how countries affected with Nazi art looting should address this subject. The *Principles* refer repeatedly to the goal of *restitution* for *Nazi-confiscated artworks*.

On June 30, 2009, the U.S. and 45 other nations issued the Terezin Declaration (*Declaration*) which also repeatedly invoked *restitution*. The *Declaration* urges all “stakeholders to ensure that their legal systems or alternative processes, while taking into account the different legal traditions, 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.*” (Italics supplied).

The U.S. State Department also has punctuated U.S. policy to *restitute Nazi-confiscated artworks*. The U.S. Department of State Office of the Special Envoy for Holocaust Issues (*Office*) “encourages the *restitution* of artworks to rightful

owners” and relates that “[t]his is an important issue in our bilateral relations with countries of central and eastern Europe and with the state of Israel.”²⁰

On January 16, 2013 then Secretary of State Hillary Clinton reaffirmed the commitments of the U.S. government to the London Declaration, the Washington Principles and the Terezin Declaration.²¹

The U.S. Congress also has reaffirmed U.S. policy to restitute *Nazi-confiscated artworks*. In 1998 the U.S. Congress enacted three statutes to help Holocaust victims and their heirs locate and recover *Nazi-confiscated artworks*. These were the Holocaust Victims Redress Act (Redress Act) (Public Law 105-158, 112 Stat. 15), the Nazi War Crimes Disclosure Act, 5 U.S.C. § 552 note (Disclosure Act), and U.S. Holocaust Assets Commission Act of 1998, 22 U.S.C. § 1622, note (Commission Act).

Section 103(b) of the Redress Act allocated \$5,000,000 to the President for archival research and translation expressly to further “*restitution*”. (Emphasis and italics supplied) Section 202 expressed the “the sense of Congress that... all governments should undertake good faith efforts *to facilitate the return of private and public property, such as works of art*, to the rightful owners in cases where

²⁰ The goals of the Office are stated at www.State.gov./p/eur/rt/hlest/.

²¹ iipdigital.usembassy.gov/st/English/texttrans/2013/01/20130116141107.html

assets were confiscated from the claimant during the period of Nazi rule...”

(Italics added).

G. In 2010 the Court in *Von Saher v. Norton-Simon Art Museum of Art at Pasadena*, 592 F.3d 954, 966 (9th Cir. 2010) Ruled that the Subject Matter of *Nazi-Confiscated Artworks* Invokes the Exclusive War Powers Prerogatives of the Federal Government under the U.S. Constitution

In *Von Saher*, the court ruled that judicial claims for the recovery of *Nazi-confiscated artworks* necessarily implicate U.S. foreign policy and the exclusive authority of the federal government under the U.S. Constitution.²² The court invalidated a California statute that extended the applicable statute of limitations for judicial claims seeking to recover *Nazi-confiscated artworks* from California museums, observing that this statute “at its core, concerns restitution for injuries inflicted by the Nazi regime during World War II,” and that claims for the recovery of property (such as artworks) lost as a consequence of Nazi policies “*cannot be separated from the Nazi transgressions from which they arise.*”²³ (Emphasis and italics supplied). The court additionally declared that “[t]he recovery of Holocaust-era art affects the international art market, as well as foreign affairs,”²⁴ and that “California’s lack of authority to act is ultimately fatal.”²⁵

²² 592 F.3d at 966.

²³ *Id.* at 967.

²⁴ *Ibid.*

²⁵ 592 F.3d at 968.

H. In 2016 Congress Enacted the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act) to Help Ensure that Claims to Recover *Nazi-Confiscated Artworks* Are Resolved “Expediently” and Based Upon Their Underlying “Facts and Merits” and Invoked *Von Saher* as Entailing Federal Legislation

In December 2016 Congress enacted the HEAR Act to further U.S. foreign policy to restitute *Nazi-confiscated artworks* by removing statutes of limitations as time bars to judicial claims.²⁶ The HEAR Act reaffirms the restitution policies of the *Washington Principles*, the *Redress Act*, and the *Terezin Declaration*.²⁷ Based upon *Von Saher*, the HEAR Act acknowledges that the restitution of *Nazi-confiscated artworks* invokes exclusive federal authority under the U.S. Constitution over the power to make war and foreign affairs, and that the enactment of a federal statute precluding the application of state statutes of limitation to such claims “is the best way to ensure that claims to Nazi-confiscated art are adjudicated on their merits.”²⁸

The HEAR Act defines expansively the category of artworks that Congress intends to restitute, suspending for six years any state or federal limitation for judicial claims seeking the recovery of “any artwork or other property that was lost during the covered period *because of* Nazi persecution.”²⁹ (Italics supplied). The

²⁶ Pub. L. No. 114-302 Dec. 16, 2016).

²⁷ HEAR ACT Findings ¶¶ 3, 4, 5.

²⁸ Findings, ¶ 7.

²⁹ HEAR Act § 5.

statute also defines the term “Nazi persecution” broadly.³⁰ The words “because of”, of course, denote *legal causation*, and reflect an intention to restitute any artwork lost as a legal or “proximate” cause of wrongful Nazi persecution.³¹

The Senate Report (Report) accompanying the HEAR Act acknowledges the long standing U.S foreign policy to restitute *Nazi-confiscated artworks*: “[s]ince World War II ended, the United States pursued policies to help restore artwork and other cultural property to its rightful owners. The Holocaust Expropriated Art Recovery Act is the latest step in that pursuit.”³²

I. *Zuckerman* Applied New York State’s Distinctive Common Law of Economic Duress to Preclude Leffmann from Recovering *The Actor*

The court acknowledged that the Leffmanns sold *The Actor* after Nazi policies and concomitant coercion had dispossessed them of most of what they once owned, in order to escape encroaching Nazi persecution in Italy,³³ and in “fear of their liberty and their lives.”³⁴ The court also recognized that the MET received the Painting as a charitable donation in 1952.³⁵

³⁰ *Id.* at § 4(5).

³¹ *See* discussion, *infra*, at pages 13-16.

³² S. Rep. No. 114-394 (2016) at 2-3.

³³ *Zuckerman v. Metropolitan Museum of Art*, 2018 WL 791351 at 1 (S.D.N.Y. Feb. 7, 2018) (Opinion)

³⁴ *Id.* at 5.

³⁵ *Id.* at 1.

Nonetheless, the court ruled that for three reasons New York’s singular common law of voidable transfers afforded Plaintiffs no legal remedy. First, the court said, New York law requires that a party to the transaction – and not a third party such as the Nazi government – be the source of the wrongful coercion.³⁶

Second, the Plaintiffs could not show that Leffmanns’ sale of the Painting “preclude[ed] the exercise of [their] free will.”³⁷ The court found that because the Leffmanns took several years to negotiate the final sale and dealt with more than one potential buyer their “will” had not been “overcome.”³⁸

Third, the Plaintiffs failed to establish that the Leffmanns “had no other alternative” than to sell the Painting. Because the Leffmanns did not sell the Painting immediately – and had other financial assets in Italy when they did – the Plaintiffs could not satisfy this requirement.³⁹

³⁶ *Id.* at 11. The court misapplied New York law, which expressly recognizes – as does every other U.S. jurisdiction – that duress by a third party to a transaction can void a transfer if the person acquiring the disputed property received it gratuitously, or had either actual or constructive notice of the wrongful coercion inducing the initial transfer. *See, e.g. Oquendo v. CCC Terek*, 111 F. Supp.3d 389, 409 (S.D.N.Y. 2015); *Aylaian v. Town of Huntington*, 459 F. App’x 25, 27 (2d. Cir. 2012).

³⁷ Opinion at 11.

³⁸ *Ibid.*

³⁹ *Ibid.*

IV. ARGUMENT

A. U.S. FOREIGN POLICY – AS WELL AS ADDITIONAL FEDERAL INTERESTS – URGE THE COURT TO DEFINE UNIFORMLY WHAT CONSTITUTES A *NAZI-CONFISCATED ARTWORK* ELIGIBLE FOR RESTITUTION

“[N]o bright lines delineat[e] matters on which federal courts have the power to develop and apply federal common law”, but considerations include “the conflicting federal and state interests involved.”⁴⁰ Courts create federal common law in several overlapping contexts:

First, some uniquely federal interest may require protection from conflicting state rules.

Second, Congress may have created statutes which are so encompassing as to render an area of law totally federal but have left some gap in the statutory scheme which must be filled to decide the case at issue.

Third, some areas may be unmistakably imbued with uniquely federal concerns (perhaps due to the Constitution) so that the applicable rules should not be allowed to be as variable as are the laws of the different states.⁴¹

Each of these entail defining *Nazi-confiscated artwork* uniformly.

⁴⁰ Ved. P. Nand, Bryan Neihart, and David K. Pansius, *Litigation of International Disputes in U.S. Courts* § 11.4. (2d. ed. 2017) (Nand & Pansius).

⁴¹ Malla Pollack, *Litigation of Federal Common Law*, 150 Am. Jur. Trials 489 § 8 (2017) citing “Wright & Miller *et al.*,” Federal Practice and Procedure, Jurisdiction and Related Matters § 4516 (3d. ed.)”

1. Uniquely Federal Foreign Policy Regarding the Restitution of Nazi-Confiscated Artworks Alone Necessitates a Uniform Definition

The normative presumption against federal common law after *Erie v. Tompkins* does not apply to foreign affairs:⁴² “[p]resumptions against federal common law may not apply to foreign affairs.”⁴³ Nand and Pansius observe that the Court frequently has intimated as much citing : *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 640-641 (1981)(counseling that federal common law persists “when necessary to protect uniquely federal interests” and prevails “absent...congressional authorization to formulate rules of decision” in “our relations with foreign nations”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004) (declaring that “this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest” and “we have ... assumed competence to make judicial rules of decision of particular importance to foreign relations”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 399, 426-27 (1964) (observing past decisions applying federal common law when “neither the statutes nor the decisions of any state can control federal interests”).

⁴² While *Erie v. Tompkins*, 304 U.S. 64, 77-80 (1938) theoretically abrogated “federal common law”, as discussed certain limited federal “enclaves” persist – including foreign affairs – in which courts continue to formulate federal common law to protect uniquely federal interests.

⁴³ Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 Geo. Wash. L. Rev. 380, 405 (2015).

Federal common law frequently is necessary in foreign affairs contexts to ensure that state law does not impair U.S. foreign policy.⁴⁴ As the Court declared in *American Insurance Association v. Garamendi*, “[t]here is...no question that at some point an exercise of state power that touches on foreign relations must yield to the National Government’s policy, given the ‘concern for uniformity in this country’s dealings with foreign nations’ that animated the Constitution’s allocation of the foreign relations power to the National Government in the first place.”⁴⁵ In *Republic of Philippines v. Marcos*, this Court applied this principle in a not dissimilar context.⁴⁶ In a suit that a foreign government brought against its former head of state to recover certain U.S. properties, the Court hypothesized that “the federal common law ...of foreign affairs is so ‘powerful’, or important, as to displace a purely state cause of action of constructive trust... because of the necessary implications of such an action for United States foreign relations.”⁴⁷

⁴⁴ Nand & Pansius, *supra*, note 39 at § 11.4, observing that federal common law applies in “disputes implicating aspects of United States’ foreign relations.”

⁴⁵ 539 U.S. 396, 413 (2003) (Citation omitted).

⁴⁶ 806 F.2d 344 (2d. Cir. 1986).

⁴⁷ *Id.* at 354. See also, e.g. *Provincial Gov’t of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1089 (9th Cir. 2009)(federal common law governs foreign affairs); *Ungaro- Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1233 (11th Cir. 2004)(exception to Erie applies to litigation that implicates foreign relations, and federal common law applies); *Mashayekhi v. Iran*, 515 F. Supp. 41 (D.C. 1981)(federal interest in the consistent interpretation of a 1955 treaty compelled a federal rule).

Correspondingly, the U.S. foreign policy content inherent in claims to recover *Nazi-confiscated artworks* in the U.S. compels a similar conclusion.

Defining *Nazi-confiscated artwork* uniformly represents an *essential* exercise of federal common law authority. As discussed, the varying and frequently incoherent state common law principles for voiding contracts based upon economic duress such as *Zuckerman* applied not only conflict with – but also *repudiate* – the U.S. foreign policy to restitute *Nazi-confiscated artworks*. Moreover, because the restitution of *Nazi-confiscated artworks* expresses a signal U.S. foreign policy, federal authorities need to prescribe what *precise circumstances or conditions* involving Nazi duress delineate an artwork eligible for restitution within the meaning of this policy.

a. Federal Common Law is Essential When Contrarian State Laws Impair U.S. Foreign Policy

The Court frequently has stated that in foreign affairs, states have *no say whatsoever*, so that the federal government – through the President – can speak with “one voice”. “In our dealings with the outside world the United States speaks with one voice and acts as one unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national

government and the individual states.”⁴⁸ As the Court in *Banco National de Cuba v. Sabbatino* punctuated, “rules of international law should not be left to the divergent and perhaps parochial state interpretations.”⁴⁹ So ““in respect to our foreign relations generally, state lines disappear. As to such purposes, the state of New York does not exist.””⁵⁰

Because the restitution of *Nazi-confiscated artworks* engages U.S. foreign policy – over which states have no authority *whatsoever* – the Court can formulate a uniform federal rule without impairing any legitimate state interest. So the overarching foreign policy of the U.S. to restitute *Nazi-confiscated artworks* cannot depend – as in *Zuckerman* – upon inconsistent and conceptually unsound state common law rules of voidable transfer. For if under *Von Saher* the federal foreign policy content inherent in the subject matter of *Nazi-confiscated artworks* prohibits the several states from *legislating* remedies for the restitution of these materials, then these same considerations necessarily must preclude courts from *adjudicating* – and on a case by case, *ad hoc* basis under frequently conflicting and

⁴⁸ *United States v. Pink*, 315 U.S. 203, 242 (1942). *See also, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 214 (2012); *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 381 (2000).

⁴⁹ 376 U.S. 398, 426 (1964).

⁵⁰ Louis Henkin, *Foreign Affairs and the U.S. Constitution* (Oxford Press 1996) page 408, n. 13 quoting *United States v. Belmont*, 301 U.S. 324, 331 (1937).

conceptually skewed state common law principles – what a *Nazi-confiscated artwork* is for foreign policy.

Otherwise, courts will continue to sabotage U.S. foreign policy in this area and render it incoherent: federal law defines *when* plaintiffs can assert judicial claims for the recovery of these materials (the HEAR Act), but conceptually muddled and discrepant state common law rules continue to define *whether* a particular artwork allegedly lost due to Nazi atrocities can be recovered. The current regimen – which *Zuckerman* accentuates – improperly empowers the several states to apply their own parochial choice of law and commercial duress principles to determine whether a particular artwork should be restituted. But , and as discussed *infra*, states did not formulate these rules to decide whether – and as a matter of U.S. foreign policy - artworks coercively transferred in Europe as a consequence of Nazi war crimes and human rights abuses should be returned. Moreover, states lack such authority. Rather, states developed these rules merely to protect local commerce by safeguarding reasonable contract expectancies. But these confusing, flawed, and inconsistent principles are conspicuously deficient for implementing U.S. foreign policy to retribute *Nazi-confiscated artworks* – as *Zuckerman* corroborates.

b. State Common Law Principles of Economic Duress Are Defective for Ascertaining What Constitutes a “Nazi-Confiscated Artwork” Within the Meaning of U.S. Foreign Policy

For several reasons the inherently skewed U.S. common law principles of economic duress that *Zuckerman* applied are unsuitable for restituting artworks lost as consequence of systematic Nazi violations of the international law of human rights. First – and as a threshold matter – common law principles of economic duress were not designed to redress the Nazi war crimes upon which judicial claims for the restitution of *Nazi-confiscated artworks* are predicated. As legal scholar Irwin Cotler points out, “*restitution for Nuremberg crimes – genocide, war crimes, and crimes against humanity – is something dramatically different in precedent and scope.*”⁵¹ (Italics supplied).

Rather, the principles that *Zuckerman* applied instead seek merely to sustain local commerce by protecting reasonable contract expectancies in transactions affecting a particular state. Indeed, one commentator characterizes duress as “A Doctrine of Last Resort and a Policy to Safeguard Freedom of Contract”, contemplating the “adverse impact of readily available rescission upon the legitimate interest of vendors of goods and services, many of which are small

⁵¹ Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 *Cardozo L. Rev.* 601, 601-602 (1998).

businesses living on tight profit margins.”⁵² Accordingly, applying state common law principles of economic duress grounded upon these concerns to preclude recovery in claims based upon systematic Nazi violations of the international law of human rights is inherently anomalous.

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

The snapshot of the duress doctrine today is bothersome. Over and over again modern day courts struggle with defining the parameters of this doctrine. These courts state illogical or nonsensical tests for application of the doctrine and then apply the test conclusory or with an implausible or impossible explanation or rationale. Not surprisingly, the courts manifest a complete inability or unwillingness to apply the doctrine to the facts in any sort of reasoned way.

The result is a complete failure of the duress doctrine. First, courts rarely find duress or even make a decision in favor of finding duress. In addition, the decision of the courts are

⁵²Steve W. Feldman, *Pre-Dispute Arbitration Agreements, Freedom of Contract, and Economic Duress Defense: A Critique of Three Commentaries*, 64 Clev. St. L. Rev. 37, 61 (2015).

extraordinarily valueless as precedent: they provide virtually no instruction as to application of the doctrine.⁵³ (Italics supplied).

Commentary to § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* (2011) (discussed *infra*) – which focuses upon the **wrongful** character of the duress that induces a transfer as the exclusive criterion for voiding the transaction – echoes these sentiments and similarly advances extensive legal scholarship challenging the common law rules of duress for these same reasons. Reporter’s Note b.

Especially problematic in some formulations of the duress doctrine – such as *Zuckerman* applied – is the requirement that the duress at issue “*overcome the will*” of the dispossessed victim. As commentary to § 14 points out, however, merely because the “will” of one party to a transaction has been “overcome” does not justify voiding the transaction: “[t]he conclusion of every bargain transaction might be said to involve overcoming the other party’s will, but few bargains will

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

be condemned as involuntary. The fact that one party to a bargain has been obliged to choose between undesirable courses of action...does not of itself make a bargain involuntary, so long as the other party's threat or refusal is not regarded as *wrongful*.”⁵⁴ (Italics supplied). Notwithstanding the conceptual flaws inherent in this inquiry, many states continue to invoke it including: Wyoming,⁵⁵ Minnesota,⁵⁶ Missouri,⁵⁷ Oklahoma,⁵⁸ North Carolina,⁵⁹ South Carolina,⁶⁰ and Kansas.⁶¹

Finally, the common law of duress varies. While the majority of states appear to apply § 175 of the *Restatement (Second) of Contracts* (1981) to determine whether duress voids a particular transaction – which requires that wrongful duress induce a transfer and leave a victim with no “reasonable

⁵⁴ See also Karl Llewellyn, *What Price Contract - An Essay in Perspective*, 40 Yale L. J. 704, 728 n. 49 (1931) observing that “[t]he attempt to solve legal problems by the touchstone of ‘free will,’ by postulating an individual will insulated from the social environment, only serves to obscure the genuine problems of ethics and policy.” (Cited in Reporter’s Note b to *Restatement* § 14).

⁵⁵ *Applied Genetics International, Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

⁵⁶ *Wise v. Midtown Motors*, 231 Minn. 46, 52, 42 N.W.2d 404, 408 (Minn. 1950).

⁵⁷ *Vanguard Packaging, Inc. v. Midland Bank*, 871 F. Supp. 348, 352 (W.D. Mo. 1994).

⁵⁸ *Centric Corporation v. Morrison-Knudsen Company*, 731 P.2d 411, 415 (Okla. 1986).

⁵⁹ *Yurek v. Shafer*, 198 N.C. App. 67, 80 (N.C. App. 2009).

⁶⁰ *Hyman v. Ford Motor Company*, 142 F. Supp.2d 735, 744 (D. S.C. 2001).

⁶¹ *Luttjohann v. Goodyear Tire and Rubber Co.*, 927 F. Supp. 403, 411 (D. Kan. 1996).

alternative” – some states , as noted, still entail that the duress “overcome the will” of the victim.

c. Unless the Court Decides When Nazi Duress Induced the Transfer of an Artwork Eligible for Restitution under U.S. Foreign Policy, Claims for the Recovery of Such Materials Cannot Be Resolved Based Upon Their Discrete “Facts and Merits” and “Expediently” as the Political Branches Have Directed

Without a concrete, prospective, and “bright line” definition of *Nazi-confiscated artwork*, how can such claims be decided on their individual “facts and merits”? Indeed, just *what are* the relevant “facts and merits” of such a claim? Should the answer depend upon which sundry and conceptually muddled state common law test for economic duress a court adjudicating such controversy selects based upon nearly equally problematic state choice of law rules?⁶² Or should courts apply a uniform standard that the federal judiciary purposefully has crafted to respond to the unique, U.S. foreign policy-laden circumstances that gave rise to the claim?

⁶² Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good Faith Purchasers of Stolen Art*, 50 Duke L.J. 955, 963 (2001) (chaos surrounds choice of law determinations in *Nazi-confiscated* and other art recovery cases.) A uniform federal common law remedy will obviate this turmoil by establishing an independent basis for federal question jurisdiction under *Gunn v. Minton*, 568 U.S. 251, 258 (2013).

2. Additional Important Federal Interests Inhere When Holocaust Victims Seek to Restitute From U.S. Tax-Exempt Museums *Nazi-Confiscated Artworks* Taken in Violation of International Law

The multiple, discrete federal interests manifest when a claim for the restitution of a *Nazi-confiscated artwork* is asserted against a U.S. tax-exempt museum as in *Zuckerman* augment the need for a uniform federal standard. Federal statutes – as well as U.S. Constitutional foreign policy concerns – apply exclusively in this context. As noted, Congress enacted the Redress Act, the Disclosure Act, and the Commission Act as well as the HEAR Act to encourage U.S. foreign policy to restitute *Nazi-confiscated artworks*. The *Washington Principles* and *Terezin Declaration* punctuate this exclusively federal prerogative.

Moreover, restitution of a *Nazi- confiscated artwork* is sought in this case from a U.S. museum that enjoys tax-exempt status under 26 U.S.C. § 501 (c)(3), and that received the disputed artwork as a charitable donation under § 170. That Nazi violations of the international law of human rights gave rise to these claims accentuates uniquely federal concerns.

B. SECTION 14 OF THE *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (2011) AND § 175 OF THE *RESTATEMENT (SECOND) OF CONTRACTS* (1981) PROVIDE SOUND LEGAL TEMPLATES FOR APPROPRIATELY DEFINING *NAZI-CONFISCATED ARTWORK*

1. By Focusing Exclusively Upon Whether *Wrongful Duress Induced* a Particular Transfer of Property § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* Implements the Rationale Animating U.S. Foreign Policy to Restitute *Nazi-Confiscated Artworks*

By invoking § 14 of the *Restatement (Third) of Restitution and Unjust Enrichment* (“Duress”) (2011) (*Third Restatement*) the Court would implement consistent U.S. policy to restitute *Nazi-confiscated artworks* whenever paradigmatically wrongful Nazi duress induced the transfer of a particular artwork and its current possessor is not a *bona fide purchaser*, that is, either acquired the disputed artwork as a gratuitous donee (as did the MET), or had either actual or constructive notice of the wrongful Nazi duress that induced the initial coercive transfer (as did the MET also).

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

§ 14 Duress

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

Accordingly, the pivotal question in assessing duress as a basis for restitution – and determining whether economic or other duress results in an unjust enrichment – is whether such duress was *wrongful*. As commentary to §14 explains, “[i]f wrongful pressure induces a transfer, the transfer is subject to avoidance. *The whole task of the law is therefore to decide what forms of coercion are impermissible*, but – on the realistic view – this is inevitably the case anyway.”⁶³ (Italics added). In the final analysis, a conclusion that duress is legally impermissible hinges upon not only “an appreciation of the particular circumstances of the transaction – *including the considerations motivating one party to make the threat and the other to yield to it* – but upon an *underlying social judgment* about the forms and extent of pressure that one person may *legitimately bring to bear* in seeking to influence the actions of another.”(Italics added).⁶⁴ For example, any “threat or refusal that is independently illegal or tortious constitutes duress.”⁶⁵ Moreover, “[w]here coercion is independently tortious or illegal, the party seeking rescission need only establish that the coercion induced the transfer.”⁶⁶

⁶³ § 14 Duress, Reporter’s Note b.

⁶⁴ § 14 Duress, Reporter’s Note g. *Impermissible coercion*.

⁶⁵ § 14 Duress, Comment b.

⁶⁶ *Id.*

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

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

cmt. i. Duress by third parties: “The duress that makes a transfer subject to avoidance need not be exerted by the transferee”...

Ex. 26. Lender forecloses a mortgage on Blackacre, the property of Owner, although the mortgage debt has already been paid. The resulting financial pressure obliges Owner to sell Whiteacre. Buyer acquires Whiteacre from owner with notice of the coercion exercised by Lender. Owner is entitled to rescind the conveyance to Buyer.

Just as the merely normatively wrongful economic pressure of Lender upon Owner regarding Blackacre induced Owner to sell Whiteacre to Buyer, *far more pernicious and inherently wrongful Nazi duress and coercion that violate the modern international law of human rights* compelled Leffmann to surrender *The Actor*. And just as Buyer had actual notice of the wrongful coercion of Lender against Owner that induced the sale of Whiteacre, so, too, did the MET have reasonable constructive notice that encompassing and relentless Nazi persecution

compelled Leffmann to forfeit the Painting. In addition, the MET received the Painting as a charitable donation. That the MET obtained the disputed Painting gratuitously as a public, tax-exempt trustee after ignoring several U.S. government warnings (including from its own Director) highlights how the MET would be *unjustly enriched* were the Court to permit the MET to retain *The Actor*.

2. Section 175 of the *Restatement (Second) of Contracts* (1981) Similarly Returns Property to Rightful Owners When Wrongful Duress Induces the Transfer and the Victim Has No *Reasonable Alternative*

Section 175 of the *Restatement (Second) of Contracts* (1981) also prescribes an appropriate principle for developing a uniform federal common law definition of *Nazi-confiscated artwork*. This provision returns property to victims of duress when the duress exerted was wrongful and the victim lacks any *reasonable* alternative but to relinquish the disputed property. Section 175 states in applicable part:

§ 175 When Duress by Threat Makes a Contract Voidable

1. If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

Commentary to this provision confirms that a victim lacks a reasonable alternative if the threat leaves the victim with no effective means to obviate the wrongful coercion. An “alternative may not, however, be reasonable if the threat

involves, for instance, the seizure of property, the use of oppressive tactics, or the possibility of emotional consequences”.⁶⁷ Accordingly, “[t]he standard is a practical one under which account must be taken of the exigencies in which the victim finds himself, and the mere availability of a legal remedy is not controlling if it will not afford effective relief to one in the victim’s circumstances.”⁶⁸

Moreover, “whether the victim has a reasonable alternative is a mixed question of fact and law to be answered in clear cases by the court.”⁶⁹

Commentary to § 14 of the *Restatement (Third) of Restitution* makes clear that the standard stated in § 175 coheres with the principle prescribed in § 14, and merely “differs in emphasis but not substance.”⁷⁰ Section 14, however, abandons the “no reasonable alternative” condition as detracting from the central inquiry in this context: did wrongful duress induce or cause the transfer of the disputed property?⁷¹

Like § 14 of the *Restatement (Third) of Restitution*, Section 175 also expressly recognizes that duress by a third party can be a predicate for voiding a transfer and obtaining restitution if the current possessor either received the

⁶⁷ *Restatement (Second) Contracts* § 175 (1981) Comment b.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Restatement (Third) of Restitution and Unjust Enrichment* § 14 (2011) Comment a.

⁷¹ *Id.* at comment f. *Available alternatives.*

disputed property gratuitously or had actual or constructive notice of the initial coercion.⁷²

Beyond doubt, the Leffmanns had no “reasonable alternative” within the meaning of § 175 but to sell *The Actor*.

V. CONCLUSION

Defining *Nazi-confiscated artwork* as proposed will confirm the *bona fides* of the U.S. foreign policy commitment to the international community to work within its discrete legal system to restitute these materials” “expeditiously”, and in a “just and fair” manner. Because Congress “intends to incorporate the well-settled meaning of the common law terms it uses” – and equitable restitution comprises a familiar body of law – the Court enjoys inherent competence to implement this goal.⁷³ And federal equitable doctrine – which promotes statutory goals and policies – complements this objective.⁷⁴

In this way the Court can rectify the systemic defects that currently misinform judicial claims for the recovery of *Nazi-confiscated artworks*, and that frustrate U.S. foreign policy. It also can prevent the MET from making a mockery

⁷² *Restatement (Second) Contracts* § 175(2) (1981).

⁷³ *Sekhar v. U.S.*, 570 U.S. 729, 732 (2013).

⁷⁴ *See, e.g. Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (“Courts of equity ...go much further to give relief in furtherance of the public interest” than otherwise. (Citations omitted).

of its federal tax-exemption and putative public trusteeship by being unjustly enriched from *Nazi war crimes against persecuted Jews*.

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Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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I certify that this amicus curiae brief complies with Fed. R. App. P. 29(a)(4) and Local Rule 29.1(c). The brief contains 6996 words, excluding the parts of the brief exempted by Fed. R. App. 32 (f). Pursuant to Local Rule 29.1(c) and 32.1(a)(4)(A), the brief does not exceed 7000 words.

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Dated: June 1, 2018

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CERTIFICATE OF SERVICE

I certify that on June 1, 2018, I electronically filed the foregoing *amicus curiae* brief on behalf of the Holocaust Art Restitution Project in support of Appellant, 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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