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

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

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I. INTRODUCTION AND SUMMARY OF HARP'S POSITION[1]

Through the Terezin Declaration and the HEAR Act both political branches responsible for formulating U.S. foreign policy have entrusted the Federal Judiciary with a special role in implementing their emphatically declared U.S. foreign policy to restitute *Nazi-confiscated artworks* to rightful owners. Both have urged the Judiciary to exercise its plenary discretion – and to employ the U.S. judicial system – to resolve claims for the restitution of *Nazi-confiscated artworks* on a case-by-case basis in a "just and fair" manner and "expeditiously." Indeed, the success of U.S. foreign policy depends upon the Court embracing this role.

The Court therefore should exercise liberally its plenary authority to consider new arguments on appeal that present purely legal issues and to avoid manifest injustice. The Court also should invoke established federal equitable doctrine to buoy the fundamental judicial remedy of Zuckerman to recover the Painting: an action for constructive trust based upon equitable restitution. Federal equitable doctrine promotes both statutory objectives as well as public policies – like the U.S. foreign policy expressed in the Terezin Declaration and HEAR Act to restitute *Nazi-confiscated artworks*. Federal equitable doctrine also prevents

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

beneficiaries of federal privileges – such as the MET enjoys as a federal tax exempt entity under 26 U.S.C. § 501(c)(3) – from abusing their special status to injure rather than promote the public good for which the privilege was intended.

The MET has abused its federal tax-exemption and breached its concomitant fiduciary duties and public policy obligations in several ways. First, it acquired a conspicuously *Nazi-confiscated artwork* in violation of its fiduciary duty to take precautions against introducing contraband into its public trust. Second, it has attempted wrongfully to retain the Painting by invoking the spurious AAM *Standards* which purport to prescribe concrete criteria for identifying a putative "unlawful appropriation" and "illegal confiscation," but which in fact are designed merely to enable U.S. museums to retain *Nazi-confiscated artworks*. Because the *Standards* are patently misleading they seek to undermine the integrity of judicial decision-making.

The MET's extensive malfeasance in mishandling the Painting are equitable and public policy considerations that necessarily must inform the Court's decision about what a "just and fair" resolution of this controversy entails.

The federal common law remedy that HARP advocates, the identity of the MET as a federal tax exempt entity in wrongful possession of a *Nazi-confiscated artwork*, and the indisputable relevance of federal equitable doctrine to this controversy create an independent basis for federal question jurisdiction under

Gunn v. Minton, 568 U.S. 251 (2013). Federal question jurisdiction over claims to recover *Nazi-confiscated artworks* will eliminate the non-germane and wasteful choice of law analysis that regrettably has afflicted this proceeding, and enable courts in the future to resolve these claims "expeditiously" as U.S. foreign policy demands.

II. BACKGROUND STATEMENT

HARP incorporates the Statement of Facts contained in Brief of Amicus Curiae Holocaust Art Restitution Project In Support of Appellant and Reversal (HARP'S Brief) filed in this proceeding on June 1, 2018. In addition, HARP notes:

On July 20, 2018 the MET filed Brief for Defendant-Appellee (MET's Brief). The MET gave HARP's Brief short shrift, asserting that HARP's proposal for uniform federal common law to denote *Nazi-confiscated artworks* which U.S. foreign policy seeks to restitute demonstrates only that the Appellants' claim to recover the Painting "is not supported by existing law."[2]

In addition, the MET's Brief relied upon "the principles and guidelines established by the Association of American Museums (the "AAM") and the Association of American Museum Directors (the "AAMD") ("Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era") (hereafter

[2] MET's Brief at 67.

Standards).[3] The Met similarly invoked the *Standards* in its initial Memorandum of Law in Support of Defendant the Metropolitan Museum of Art's Motion to Dismiss the Amended Complaint (the "Memorandum") filed on November 30, 2016.

The Memorandum related that the MET, "with great care" had examined the facts supporting the Appellants' claim, and "shared with Plaintiff the full universe of relevant documents and information it collected in the course of an exhaustive, multi-year investigation into the facts and circumstances surrounding the Painting and the 1938 Sale."[4] But the MET "ultimately concluded that the 1938 sale was not an 'illegal confiscation' or 'unlawful appropriation' (the AAMD and AAM standards of restitution)."[5] *Nowhere, however, did the Memorandum define either term, or relate how the MET applied the definition of either term to the facts supporting Zuckerman's claim*.

The MET'S Brief similarly invokes the *Standards* – and their criteria for restitution ("illegal confiscation" and "unlawful appropriation") in support of its argument that the MET is entitled to retain the Painting. The MET's Brief reaffirms that "[b]ased upon careful work, the Museum ultimately concluded that the 1938 Sale was not an 'illegal confiscation' or 'unlawful appropriation,' the

[3] *Id.* at 8-9.
[4] Memorandum at 2.
[5] Memorandum at 1-2.

AAMD and AAM standard for restitution. Nor was it an involuntary sale compelled by Nazi coercion and duress."[6] Once again, however, the MET fails to define either term, or to explain how the MET applied either term to conclude that wrongful Nazi duress did not induce Leffmann to relinquish the Painting.

III. ARGUMENT

A. THE TEREZIN DECLARATION REPRESENTS A FOREIGN POLICY EXPECTATION BY THE POLITICAL BRANCHES (ARTICLES I & II) THAT THE FEDERAL COURTS (ARTICLE III) WILL EXERCISE THEIR INHERENT DISCRETION AND UTIILZE THE DISCRETE U.S. LEGAL SYSTEM TO FACILITATE THE RESTITUTION OF ARTWORKS – LIKE THE PAINTING – LOST AS A PROXIMATE CONSEQUENCE OF NAZI DURESS

1. The Terezin Declaration Charges the Federal Judiciary With an Affirmative *Responsibility* to Implement U.S. Foreign Policy To Restitute *Nazi-Confiscated* Artworks in a "Just and Fair" Manner and "Expeditiously"

The Terezin 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

[6] MET Brief at 9.

expeditiously and based on the facts and merits of the claims."[7] Moreover, federal courts have exercised their inherent common law authority proactively when state laws obstruct foreign policy goals, as well as to implement foreign policy goals that the political branches have clearly defined.[8]

In this vein the Terezin Declaration represents an expectation by the Executive Branch – in the exercise of its Constitutional authority to conduct foreign affairs – that the Federal Judiciary will invoke its broad authority to effectuate these goals in judicial claims to recover *Nazi-confiscated* artworks. And Congress – through the Holocaust Expropriated Art Recovery Act of 2016 (HEAR Act)[9] – expressly has adopted the Terezin Declaration as prescribing U.S. foreign policy, leaving no doubt whatsoever that this goal represents unequivocal U.S. foreign policy.[10]

The Terezin Declaration then embodies the emphatic foreign policy goal of ***both*** political branches that the Constitution entrusts with U.S. foreign policy. So if the Court promotes these objectives it will effectuate U.S. foreign policy, but if the

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[7] HARP Brief at 9.
[8] *Id.* at 15-20.
[9] Pub.L. No.105-158, 112 Stat. 15 (Dec. 16, 2016).
[10] Section 3(1) of the HEAR Act states that a primary purpose is "[t]o ensure that laws governing claims to Nazi-confiscated art further United States policy as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration."

Court declines to so exercise its judicial authority it will frustrate U.S. foreign policy.

At least three discrete vehicles enable the Court to implement the foreign policy goal of restituting *Nazi confiscated artworks* in a "just and fair manner" and "expeditiously." These include:

(1) The Court's inherent discretion to entertain new arguments on appeal, which the Court most commonly exercises if purely questions of law are presented or if manifest injustice otherwise would result;

(2) Plenary federal common law authority as set forth in the HARP Brief; and

(3) Federal equitable doctrine which expressly promotes federal statutory objectives and U.S. public policies.

Both political branches necessarily intend that federal courts employ each of these to restitute *Nazi-confiscated artworks* in a "just and fair" manner and "expeditiously."

2. In This Discrete Context the Terezin Declaration Empowers the Court – as a Branch of the U.S. Government That Granted the MET's Federal Tax-Exemption and Established Its Public Trust – To Enforce the Terms of this Trust and Direct the MET To Restitute the Painting

This proceeding raises issues of especial national and U.S. foreign policy importance, and also entails federal oversight of a renegade tax-exempt entity that has acquired what is a conspicuously *Nazi-confiscated artwork* in violation of its fiduciary duties. This privileged entity – which does not own the artwork but rather merely holds it in ***trust*** for the American people – now refuses to return it as both Congress and the President (the grantors of its tax-exemption) have directed. So it is now incumbent upon this Court to direct the MET to obey this mandate and the terms of its public trust and restitute the Painting.

Because Congress and the President have assigned the Federal Judiciary a proactive role in implementing U.S. foreign policy to restitute *Nazi-confiscated artworks*, the Court functions not merely as an independent "referee" between contestants: it also necessarily must implement – in individual cases – declared U.S. foreign policy.

B. BECAUSE FEDERAL APPELLATE COURTS ENJOY BROAD DISCRETION TO ENTERTAIN NEW ARGUMENTS ON APPEAL THE COURT – AS THE TEREZIN DECLARATION ENCOURAGES – SHOULD EXERCISE ITS DISCRETION TO INVOKE FEDERAL COMMON LAW AND FEDERAL EQUITABLE DOCTRINE TO RESTITUE THE PAINTING

1. Federal Appellate Courts Exercise Their Broad Discretion to Entertain New Arguments Most Often When a Purely Legal Question is Presented or When a "Manifest Injustice" Otherwise Would Result

The Court enjoys plenary authority to consider new issues and arguments on appeal, and exercises this discretion most frequently: (1) "where consideration of the issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no need for further fact-finding."[11]

2. The Proposed Application of Federal Common Law and Federal Equitable Doctrine to Resolve this Controversy in a "Just and Fair" Manner Presents Purely Legal Issues

HARP's proposal that the Court develop a uniform federal common law definition of "Nazi-confiscated artwork" which U.S. foreign policy intends to restitute presents a purely legal issue, and so is appropriate for the Court to consider for the first time on appeal. Moreover, the Terezin Declaration – as an

[11] *Streeteasy, Inc. v. Chertok*, 651 Fed. Appx. 37, 40 (2d Cir. 2016). *See also Yong Qin Luo v. Mikel, Jr.*, 625 F.3d 772, 778 (2d Cir. 2010), prescribing same standards.

expression of affirmative U.S. foreign policy – urges the Court to so exercise its discretion.

Similarly, HARP's proposal that the Court invoke federal equitable doctrine that promotes statutory objectives and relevant public policies in a discrete context similarly presents a purely legal question, which the Court should also entertain.

3. "Manifest Injustice" Will Result for Several Reasons Unless the Court Affords Zuckerman and Other Claimants a Viable Judicial Remedy to Recover *Nazi-Confiscated* Artworks

First, the refusal to accord a judicial remedy to deserving claimants will frustrate and skew emphatic U.S. foreign policy to restitute *Nazi-confiscated artworks*.

Second, the failure of the U.S. Government to provide international claimants a viable remedy will make a mockery of U.S. restitution policy when other affected nations – at the behest of the U.S. Government no less – now pro-actively restitute *Nazi-confiscated artworks.*

Finally, the refusal of U.S. courts – at this late juncture – to afford claimants a viable remedy also will perpetuate a colossal injustice upon Holocaust victims and their heirs who reasonably have relied to their detriment that they would enjoy meaningful opportunities to reclaim *Nazi-confiscated artworks*, and have expended extensive – and often limited – personal resources investigating and developing their claims.

C. THE PRIMARY LEGAL REMEDY APPELLANTS ENJOY TO RECOVER THE PAINTING IS A CLAIM FOR CONSTRUCTIVE TRUST BASED UPON THE DOCTRINE OF EQUITABLE RESTITUTION

Restitution may be either legal or equitable depending upon the relief requested.[12] If a remedy in restitution seeks to compel a defendant to do a particular thing – as opposed merely to pay a certain sum of money – then such remedy is equitable. So when – as in this proceeding – the relief sought seeks to recognize the right of plaintiff in a particular asset (such as the Painting) the relief is equitable. As Comment *d* (*Restitution Legal or Equitable or Both*) to § 4 of the *Restatement (Third) Restitution* (Constructive Trust) (2011) (*Restatement*), explains:

> In restitution as elsewhere, equitable remedies may be distinguished from legal ones because they order the defendant to do something; but the judicial command in restitution is usually implicit. Thus a defendant who is declared to be a constructive trustee is implicitly ordered to convey the trust property to the claimant…***For this reason the hallmark of equitable remedies in restitution is that they give relief to the claimant via rights in identifiable assets*** (§§ 54-61). (Emphasis and italics supplied).

See also Comment *a* to § 55 of the *Restatement* instructing that "[c]onstructive trust is the principal device for vindicating equitable ownership against conflicting

[12] *See Restatement (Third) Restitution* § 4 (Restitution May Be Legal or Equitable or Both) (2011) and related commentary.

legal title; the rules by which equitable property rights are recognized are ***among the most predictable of equity jurisprudence.***" (Emphasis and italics supplied).

Because Zuckerman's claim for the restitution of the Painting invokes the expressly equitable remedy of constructive trust in an identifiable asset, equitable doctrine and equitable principles inform how this remedy applies.[13] As discussed below, these include importantly how expressly stated statutory goals and public policies as well as the public interest – as embodied in the overarching federal policy to restitute *Nazi-confiscated artworks* and the legal obligations of tax-exempt entities such as the MET to obey these policies – inform appropriate equitable relief in this context.

D. BECAUSE FEDERAL EQUITABLE DOCTRINE EXPRESSLY PROMOTES FEDERAL STATUTORY OBJECTIVES AND PUBLIC POLICIES THE COURT SHOULD UTILIZE IT BOTH TO HELP RESTITUTE THE PAINTING AS WELL AS TO PREVENT THE MET FROM ABUSING ITS FEDERAL TAX EXEMPTION PRIVILEGE UNDER 26 U.S.C. § 501(C)(3)

1. The Court Should Apply Federal Equitable Doctrine to Promote the Emphatic Statutory Objectives of the HEAR Act and U.S. Foreign Policy to Restitute *Nazi-Confiscated Artworks*

The MET maintains that HARP's proposal for a uniform common law standard identifying artworks subject to restitution within the meaning of U.S.

[13] While Plaintiff does not employ this nomenclature expressly, the Amended Complaint seeks a judgment "directing that Defendant immediately deliver the Painting to Plaintiff," and thereby invokes an equitable remedy.

foreign policy is based upon "non-binding and inapposite policy considerations."[14] This argument, however, ignores that the Court consistently invokes federal equitable doctrine to promote federal statutory objectives as well as public policy goals in a particular context. As the Court instructed in *Mitchel v. Robert De Mario Jewelry, Inc.* 361 U.S. 288, 291 (1960):

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.

Moreover, and as *Mitchel* punctuated, Congress enacts legislation like the HEAR Act fully cognizant of the inherent equitable authority of the federal judiciary to carry out statutory objectives:

> When Congress entrusts to an equity court the enforcement or prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes. As this Court long ago recognized, '*there is inherent in the Courts of Equity a jurisdiction to give effect to the policy of the legislature*.'[15] (Citation omitted, italics supplied).

*See also United States v. Morgan***,** 370 U.S. 183, 194 (1939), "[i]t is a familiar doctrine that the extent to which a court of equity may grant or withhold its aid,

[14] MET Brief at 67.
[15] 361 U.S. at 291-92.

and the manner of molding its remedies, may be affected *by the public interest involved*" (Italics supplied).

Accordingly, and because the HEAR Act is an expressly remedial statute, the Court should exercise its plenary equitable authority to accomplish its intended objectives to restitute *Nazi-confiscated artworks*.[16]

2. The Court Also Should Invoke Federal Equitable Doctrine to Prevent the MET From Abusing Its Federal Tax-Exemption Privilege

The Supreme Court consistently has denied equitable relief – on public policy grounds – to parties who have misused a federal privilege such as a patent, trademark, or government contract. *See, e.g. Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942), refusing to grant a patent holder an equitable injunction when the petitioner was misusing its patent to further an unlawful tying arrangement under the federal antitrust laws: "[i]t is a principle of general application that courts, and especially courts of equity, may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest", and "[a]dditional considerations must be taken into account where

[16] *See, e.g., Atchison, Topeka and Santa Fe Railway Company v. Buell*, 480 U.S. 557, 562 (1987), observing that for remedial statutes the Court has "adopted a 'standard of liberal construction in order to accomplish [Congress'] objects.'" (Citation omitted).

maintenance of the suit concerns the public interest as well as the private interests of suitors.";[17] *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 343 (1971), a "patent is a privilege. But it is a privilege which is conditioned by public purpose."; *S&E Contractors, Inc. v. United States*, 406 U.S. 1, 15 (1972), "[c]ontracts with the United States – like patents – are matters concerning far more than the interest of the adverse parties: they entail the public interest."

Like a patent, trademark, or government contract, a federal tax-exemption under § 501(c)(3) such as the MET enjoys also is a federal privilege invested with a compelling public interest.[18] Accordingly, the public has an acute interest in ensuring that beneficiaries of this privilege exercise it lawfully and in a manner that does not undermine its charitable purpose. As the Court instructed in *Bob Jones University v. United States*, 461 U.S. 574, 585 (1983):

> "***[w]hen the Government grants exemptions or allows deduction all taxpayers are affected***; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be ***indirect and vicarious 'donors'***. Charitable exemptions are justified on the basis that the exempt entity confers a public benefit – a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported

[17] 314 U.S. at 493.

[18] *See, e.g., The Synanon Church v. United States*, 579 F. Supp. 967, 976 (D.D.C. 1984), relating "the public interest in conferring the privilege of tax exemption – which amounts to a subsidy from the public coffers…."

> by tax revenues…. The institution's purpose must not be so at odd with the common community conscience as to undermine any public benefit that might otherwise be conferred. (Emphasis and italics supplied).

Accordingly, the MET's misuse of its federal tax-exemption in acquiring, wrongfully retaining, and improperly seeking to justify its illegal retention of the Painting violate U.S. foreign and public policy, and so represent signal equitable considerations that properly should inform how the Court decides Zuckerman's claim for equitable restitution.

3. The Court Additionally Should Employ Federal Equitable Doctrine To Safeguard the Integrity of the Federal Judicial Process Which the MET Has Subverted in this Proceeding by Invoking the Spurious *Standards* in an Attempt Both to Conceal and Perpetuate Its Extensive Fiduciary Malfeasance in Mishandling the Painting

a. U.S. Courts Consistently Apply Federal Equitable Doctrine to Protect the Probity of the Federal Judiciary

For example, in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[19] the Court refused to enforce a patent obtained by fraud, finding a "deliberately planned and carefully executed scheme to defraud not only the Patent office but the Circuit Court of Appeals."[20] The Court underscored that an attempt to judicially enforce a fraudulent patent sabotages the judicial process:

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[19] 322 U.S. 238 (1944).
[20] 322 U.S. at 245-46.

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.[21]

*See also Theokary v. Shay***,** 592 Fed. Appx. 102, 107 (3d Cir. 2015)**, "**fraudulent conduct (does) not simply impact the tainted evidence…or the adversarial proceedings as a whole – it represents a direct and brazen affront to the judicial process…."; *Pumphrey v. K.W. Thompson Tool Co*., 62 F.3d 1128, 1132 (9th Cir. 1995), (by presenting "fraudulent" evidence and failing to correct a false impression created by an expert's testimony, "[t]he end result …was to undermine the judicial process, which amounts to fraud upon the court."); *Bulloch v. United States*, 763 F.2d 1115, 1124 (10th Cir. 1985)(fraudulent advocacy undermines the integrity of the judicial process).

The MET's reliance upon the *Standards* as somehow legally validating its decision to retain the Painting seeks to undermine the Court's deliberative process in this proceeding in the same way that the tainted evidence corrupted judicial integrity in these cases.

[21] *Id*. at 246.

4. By Employing the Sham *Standards* the MET Has Attempted to Mislead Both the Public and the Court that It Has Fulfilled Its Legal, Fiduciary, and Public Policy Obligations Regarding the Painting: "Toto, I've a Feeling We're Not in Kansas Anymore."[22]

The American Alliance of Museums' ("AAM") *Standards Regarding the Unlawful Appropriation of Objects During the Nazi Era* (*Standards*) – which the MET invoked in moving to dismiss the Complaint and again in its Memorandum in an attempt to bolster its legal position – confirm a collective breach by AAM members of the fiduciary duties of loyalty and honesty in responding to claims for the recovery of *Nazi-confiscated artworks*. The AAM proclaims that it promulgated the *Standards* putatively to help their member museums achieve "the highest standard of legal and ethical collections stewardship practices" regarding their handling of artworks that potentially may be Nazi-confiscated. *Standards* at 2. But while purporting to provide ***legal*** and ethical advice to public trustees and stewards, the *Standards* are not premised upon any recognized legal authority ***whatsoever***, but rather upon three expressly *non-legal* AAM documents and declarations.[23]

Rather than providing genuine legal or fiduciary guidance, the *Standards* instead represent an elaborate ruse that confers open-ended discretion upon

[22] Dorothy Gale, *The Wizard of Oz*.
[23] *Standards* at 1.

individual museums to decide – on a case-by-case basis and premised foremost upon their own self-interest in responding to a particular claim – whether an individual artwork was the subject of a nebulous, purposefully undefined "unlawful appropriation." But both by adopting the *Standards* and invoking them as a putative criterion for this purpose, the MET is violating core fiduciary duties of loyalty and honesty to the public in several ways. It also is attempting to mislead the Court and corrupt its decision on a matter of signal public policy importance: whether a U.S. tax-exempt museum and public fiduciary and trustee that received a *Nazi-confiscated artwork* as a charitable donation by breaching its fiduciary duties of honesty, loyalty, competence, and care should be allowed to retain it in derogation of emphatically declared U.S. foreign policy and the rights of its true owners.

First, by adopting the *Standards* for this purpose the MET has violated the elemental duty of loyalty that museums owe as public trustees. Fiduciaries must ***obey*** all relevant law as well as the discrete terms of the trust: they do not promulgate substitute standards of conduct when they find legal and fiduciary obligations objectionable, or when trust terms impair their pursuit of flagrant conflicts of interest with trust objectives. The *Standards* do not consult the substantive U.S. law of restitution with its focus upon the ***wrongful misconduct*** of transferees or third parties inducing a transfer and the constituent doctrine of *bona*

fide purchaser (which would preclude nearly all U.S. museums from retaining the many *Nazi-confiscated artworks* that they recklessly have acquired over the years) as legally dispositive criteria. Instead, the *Standards* purport to ***override*** the established U.S. laws of restitution and fiduciary responsibility – as well as U.S. foreign policy – pulling the deliberately nebulous, vague, and elastic concept of "unlawful appropriation" out of the vapors without grounding it in any legal, legislative, or U.S. foreign policy foundation.

Second – and even more insidious – the *Standards* define neither "illegal confiscation" nor "unlawful appropriation." Rather, the *Standards* instead prescribe only that "[f]or the purpose of these guidelines, objects that were acquired through theft, confiscation, coercive transfer or other methods of wrongful expropriation may be considered to have been unlawfully appropriated, depending on the specific circumstances."[24] But the *Standards* offer no further "guidance" about ***the specific circumstances or conditions*** that may make a particular transaction an "unlawful appropriation" – the pivotal question. The *Standards* merely say that objects wrongfully expropriated through some means may be considered to be the subject of an "unlawful appropriation" "depending on the specific circumstances." Accordingly the *Standards* do not help member museums decide whether a particular work art should be restituted, much less

[24] *Standards* at 2.

provide "guidance" enabling museums to operate at "the highest standard of legal and ethical collections stewardship practices."

The *Standards*, therefore, leave to the unbridled discretion of each confederate AAM museum member to determine on a case-by-case basis whether a particular artwork qualifies as an "unlawful appropriation" based upon whatever criteria that the museum choses to invoke – or rather, and more likely – whatever fabricated test the museum calculates that it can get away with. (In this case the MET would have the Court believe that because the Painting was putatively sold on the "open market," wrongful Nazi persecution and concomitant duress somehow did not induce the transfer).[25] Having so consulted the *Standards*, the respondent museum – as has the MET in this proceeding – then recounts with a melodramatic flourish the putative ardor and candor with which it investigated the claim before denying it. The museum then invokes the *Standards* as putatively demonstrating that it has complied in exemplary good faith with its fiduciary and legal obligations to investigate whether a disputed artwork in its collection was wrongfully transferred as a consequence of Nazi policies, and to justify retaining the item. In reality, however, the museum purposefully has perpetrated a colossal misimpression to this effect. For – and again – the *Standards* prescribe ***no concrete criteria*** for deciding this pivotal question, and instead invest each museum with

[25] *See, e.g.*, MET Brief at 4-5, 18, 29 n.6, 39-40, 46, 54, 56-57, and 66.

unfettered discretion to designate nearly any controverted artwork as not being the subject of an "unlawful appropriation".

Finally, the *Standards* sabotage the judicial deliberative process in a category of judicial claim laden with foreign policy and public interest significance. Through the Terezin Declaration and HEAR Act the political branches – to further U.S. foreign policy – have asked the federal courts to resolve these claim in a "just and fair" way. As a publicly supported trustee and fiduciary that received the Painting as a charitable donation, the MET owes an especially heightened duty of honesty and loyalty concerning this objective: "the punctilio of an honor the most sensitive."[26] But by invoking the spurious *Standards*, the MET has attempted to evade its obligations, and to mislead the Court that it has complied with its legal and fiduciary duties. And it has urged the Court to rely upon the *Standards* both as prescribing the relevant rule of decision for this controversy, as well as a benchmark for gauging its fiduciary compliance. But the *Standards* – as we have seen – are a subterfuge.

Accordingly, the *Standards* then represent the antithesis of a coherent legal standard that fosters consistent results – which U.S. foreign policy ***demands.*** Much less do the *Standards* embody either the substantive law of restitution or relevant U.S. policy to restitute *Nazi-confiscated artworks*, discussed *supra*. Even

[26] *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E 545, 546 (N.Y. 1928).

less still do the *Standards* cohere with the obligations of U.S. museums as public fiduciaries and trustees. Indeed, the *Standards* fail to acknowledge that most U.S. museums acquired *Nazi-confiscated artworks* by abdicating their fiduciary responsibilities to take precautions against acquiring contraband for their public collections, and ignoring the repeated warnings of the U.S. government after the War to be circumspect about accessioning materials emanating from Europe. Rather, the *Standards* instead signify a breach of the elemental duties of honesty, loyalty, competence, and care that inform and animate all other fiduciary duties. The *Standards* then mislead both the public and the Court. The Court properly should condemn the *Standards* as such, and ***for this reason alone*** taint the MET with disqualifying Unclean Hands.

The *Standards* conceal an elaborate, embellished sham in much the same way as did the curtain that Dorothy's dog Toto withdrew in the perennial American movie classic *The Wizard of Oz*. Just as the "The Great and Powerful Oz" was revealed as a fantastic hoax, so, too, are the *Standards*. But the Wizard did not owe fiduciary and public policy obligations to Dorothy and her friends which he breached by concocting his charade. Nor did he do so to mislead them that he was entitled to retain – against the claim of rightful owners – property taken in violation of the international law of human rights and incident to genocide. Had he

done so, the Wizard would have lived in perpetuity as an arch villain, and this classic would have resonated across the generations with a different tenor entirely.

E. THE APPARENT COLLECTIVE RELIANCE OF THE ENTIRE U.S. MUSEUMS' COMMUNITY UPON THE SHAM *STANDARDS* AMPLIFIES THE NEED FOR THE COURT TO DEVELOP A UNIFORM FEDERAL COMMON LAW DEFINTION OF WHAT CONSTITUTES AN ARTWORK WRONGFULLY TRANSFERRED AS A PROXIMATE CONSEQUENCE OF NAZI PERSECUTION WHICH U. S. FOREIGN POLICY SEEKS TO RESTITUTE

That AAM member museums confronted with Nazi era art restitution claims habitually invoke the spurious *Standards* to defend such claims amplifies the need for the Court to discredit them, and to propound a uniform federal common law standard for ascertaining an artwork that U.S. foreign policy seeks to restitute, as HARP's Brief urges. The *Standards* – along with the current propensity of courts adjudicating such claims to apply multifarious and conceptually skewed state laws of duress (as HARP points out) – obstruct both the "just and fair" as well as "expeditious" resolution of such claims as Congress intends.

The Court should not permit U.S. museums to continue to skew relevant legal issues to thwart these claims, as well to make a mockery of their fiduciary and public policy obligations. As both the *Zuckerman* decision and the *Standards* confirm, only a clear, uniform, and prospective federal common law definition of artworks intended for restitution within the meaning of U.S. law and foreign policy

will achieve the emphatic U.S. foreign policy objective of resolving these claims in a "just and fair" manner and "expeditiously."

F. THE HEAR ACT SUSPENDS OTHERWISE APPLICABLE STATUTES OF LIMITATIONS FOR JUDICIAL CLAIMS SEEKING TO RECOVER, BROADLY, ALL ARTWORKS LOST "BECAUSE OF" NAZI PERSECUTION – THAT IS, AS A PROXIMATE OR "BUT FOR" CAUSE OF NAZI PERSECUTION LIKE THE PAINTING

The MET wrongly maintains that the HEAR Act did not revive judicial claims for the recovery of artworks that victims of Nazi persecution lost in third party transactions when the Nazi government or its agents did not proactively order or compel such sale. In *Reply in Further Support of Defendant the Metropolitan Museum of Art's Motion to Dismiss the Amended Complaint (Reply*) , the MET argues that "[t]he HEAR Act's purpose is …to revive claims for artworks 'confiscated', 'stolen', or 'misappropriated' by the Nazis."[27] The MET says further that "[t]he HEAR Acts' reference to art 'lost …because of Nazi persecution' cannot be stretched to encompass a voluntary transaction for cash, which – according to Plaintiff's own allegations – was a negotiated 'sale' on the open market …where no Nazis or Fascists took action to compel or restrict the Sale, or otherwise were involved in it."[28]

[27] *Reply* at 12.
[28] *Id.* at 13.

But the text of the HEAR Act alone repudiates this argument, and confirms that U.S. law and foreign policy prescribe the recovery of artworks that Nazi persecution merely *caused,* and do not entail that the Nazi government or its agents ever seized or directed the sale of such artwork, or benefitted financially from such sale in any way. A declared purpose of the HEAR Act is "[t]o ensure that laws governing claims to Nazi-confiscated art…further United States policy, as set forth in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration."[29]

To promote this goal the HEAR Act suspends for six years any state or federal limitation for judicial claims seeking to recover art lost "***because of***" Nazi persecution. The legislative history of the HEAR Act corroborates that this provision delineates the category of artworks lost as a consequence of Nazi persecution that U.S. policy seeks to restitute: "[s]ubsection 5 defines the Nazi persecution that may ***cause*** the loss of art or other cultural property" that the bill covers. (Emphasis and italic added). S. Rep. 114-394, at 11 (2016).

The HEAR Act's use of the words "because of" denotes legal causation, of course, and reflects an intention to restitute any artwork lost as a legal cause of wrongful Nazi persecution – which necessarily includes sales that Jews oppressed by Nazi duress made to third parties. The Supreme Court recently has defined the

[29] HEAR Act § 3(1).

language "because of" in several federal statutes as entailing "but for" causation, or proof that the relevant injury would not have occurred in absence of the wrongdoing or violation of the defendant.[30]

G. THE MET'S ARGUMENT THAT THE U.S. GOVERNMENT DOES NOT INTEND THAT ARTWORKS BE RESTITUTED UNLESS THE NAZI GOVERNMENT OR NAZI OFFICIALS PROACTIVELY COMPELLED THE SALE IS WRONG AND CONTRARY TO UNIVERSAL PRINCIPLES OF RESTITUTON BASED UPON THIRD PARTY DURESS

The MET seeks to "highlight" a putative difference between a true "forced sale" at the hands of the Nazis, on the one hand, and an open market sale between private parties during the Nazi era, on the other."[31] But the MET's tortured argument seeking to limit the category of artworks that the HEAR Act makes eligible for restitution rebukes elemental principles of restitution and third party duress.

As the HARP Brief elaborates, duress exerted by third parties expressly may void a transfer of personal property, regardless whether the sale occurs on "the open market" (as the MET professes) or in some other venue.[32]

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[30] *See, e. g., University of Texas Southwestern Medical Center v. Nassar* , 570 U.S. 338, 350 (2013); *Gross v. Financial Services, Inc.*, 557 U.S. 167, 177 (2009); *Safeco Insurance Company of America v. Burr*, 551 U.S. 47, 63-64 n. 14 (2007); *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 594 (2004).
[31] MET Brief at 11.
[32] *See, e.g.*, HARP Brief at 14 n.36, 29-30.

The MET's argument spuriously treats Nazi duress and coercion – (which were not merely normatively "wrongful" within the meaning of restitution law, but rather violated the international law of human rights) – as somehow ***legally incapable*** of sustaining a claim for third party duress under these principles. Had the MET, however, acquired an artwork that it knew the donor had wrested from a former owner by merely wrongful economic duress, the above cited principle would require the MET, of course, to return it. But according to the MET's fatuous argument if the same donor received the painting from a former owner who surrendered it (as did Leffmann) ***under far more egregious Nazi duress and coercion,*** the MET, would be (and is, it says) entitled to keep it. Especially – the MET urges repeatedly – if the sale occurred on the "open market."[33]

The MET's argument is untenable. Moreover, it signals yet another flagrant violation of the duties of loyalty and honesty that it owes the American people as a public fiduciary and trustee.

[33] *See*, *e.g.*, MET Brief at 4-5, 18, 29 n.6, 39-40, 46, 54, 56-57, and 66.

H. THE MET'S MULTIPLE BREACHES OF FIDUCIARY DUTIES AND PUBLIC POLICY OBLIGATIONS REGARDING HOW IT ACQUIRED THE PAINTING AND HAS ATTEMPTED TO RETAIN IT – INCLUDING MISLEADING THE COURT AND PUBLIC WITH ITS SPECIOUS *STANDARDS* – TAINT IT WITH *UNCLEAN HANDS* WHICH PRECLUDES IT FROM ASSERTING ANY EQUITABLE DEFENSES TO ZUCKERMAN'S CLAIM FOR EQUITABLE RESTITUTION

The MET's extensive fiduciary misconduct in recklessly acquiring the Painting in violation of its affirmative duties of care and precaution – as well as its wrongful attempt to retain the Painting by invoking the spurious *Standards* – are equitable public policy considerations that taint the MET with Unclean Hands. As the Court instructed in *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co*., 324 U.S. 806, 814 (1945) , unclean hands precludes a party – such as the MET – who has acted in bad faith regarding the subject matter of the controversy from invoking equity in its favor:

> This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief…. Thus while 'equity does not demand that its suitors shall have led blameless lives'…as to other matters it does require that they shall have *acted fairly and without fraud or deceit as to the controversy*." (Emphasis and italics supplied).

Courts consistently regard breaches of fiduciary duties as "Unclean Hands." For example, § 43 of the *Restatement (Third) of Restitution and Unjust Enrichment*

(2011) (Fiduciary or Confidential Relation) makes clear that any person who obtains a benefit in violation of a fiduciary duty or equivalent duty imposed by a duty of trust and confidence is liable in restitution to the person to whom the duty is owed. *See also Metro Motors v. Nissan Motor Corporation in U.S.A.*, 339 F.3d 746, 750 (8th Cir. 2003), "[w]ell-accepted general principles of equity support…that a statutory violation gives a party unclean hands."; Ward Farnsworth, *Restitution*: *Civil Liability for Unjust Enrichment* (2014) at 62-63, observing that "[a] breach of the duty of loyalty owed by a fiduciary …is always a good basis for a restitution claim…."

Accordingly, the MET's extensive malfeasance concerning the Painting preclude it from asserting any equitable defenses to Zuckerman's equitable restitution claim to recover the Painting, including *bona fide* purchaser, ratification, and laches, and properly should inform the Court's decision to return the Painting to Zuckerman.

I. A FEDERAL COMMON LAW REMEDY TO RECOVER ARTWORKS LOST AS A PROXIMATE CONSEQUENCE OF NAZI DURESS –AS THE HARP *AMICUS* BRIEF PROPOSES – WOULD ESTABLISH AN INDEPENDENT BASIS FOR FEDERAL QUESTION JURISDICTION UNDER *GUNN v. MINTON*, 568 U.S. 251 (2013) AND SO ELIMINATE NON-GERMANE AND WASTEFUL STATE CHOICE OF LAW DELIBERATIONS

1. Multiple Federal Interests Confirm that Judicial Claims Seeking to Recover *Nazi-Confiscated Artworks* "Arise Under" U.S. Law To Create Federal Question Jurisdiction under 28 U.S.C. § 1331

Judicial claims for the recovery of *Nazi-confiscated* artworks satisfy each criterion for federal question "arising under" jurisdiction that the Supreme Court prescribed in *Grable & Sons Products, Inc. v. Darue Engineering & Manufacturing*[34] and *Gunn v. Minton*[35] when federal law does not create the particular cause of action. In *Gunn*, the Court observed that in *Grable* it had attempted to prescribe the discrete circumstances under which claims will "arise under" federal law for purposes of § 1331 federal question jurisdiction.[36] The Court reiterated that federal jurisdiction over a state law claim will lie if a federal issue is:

[34] 545 U.S. 308 (2005).
[35] 568 U.S. 251 (2013).
[36] 568 U.S. at 258.

(1) necessarily raised;

(2) actually disputed;

(3) substantial, and;

(4) capable of resolution in federal court without disturbing the federal-state balance approved by Congress.[37]

A federal common law remedy for the restitution of *Nazi-confiscated artworks* satisfies each criterion. First, federal law is "necessarily raised" in resolving any judicial claim for the recovery of a *Nazi-confiscated artwork.* Because a claim to recover a *Nazi-confiscated artwork* inherently invokes subject matter (U.S. foreign policy) over which the federal government has exclusive authority under the U.S. Constitution the federal question is "necessary" to resolve such claim.

Second, the federal issue necessarily is "actually disputed" in this context as the pivotal question inquires whether the defendant is in possession of what the U.S. government has decreed is such an artwork.

Third, the federal issues raised in such claims are important to the federal system as a whole including both U.S. foreign policy as well as federal policies governing how U.S. tax-exempt museums operate. As HARP's Brief makes clear –

[37] The Court recently reaffirmed these criteria. *See Merrill, Lynch, Fenner & Smith, Inc. v. Manning*, 136 S.Ct. 1562, 1569-60 (2016).

the restitution of *Nazi-confiscated artworks* is integral to U.S foreign policy and affects the international art market.[38]

Finally, prescribing federal jurisdiction for claims seeking to recover *Nazi-confiscated artworks* preserves the appropriate federal-state balance of interests in this context. As HARP's Brief discusses, states have no foreign policy power, nor do they have any legitimate interest regulating how federal tax-exempt museums operate.[39]

Federal question jurisdiction in claims to recover *Nazi-confiscated artworks* also will eliminate what – appropriately conceived – are inapposite state choice of law deliberations that derive from jurisdiction being improperly grounded under 28 U.S.C. § 1332 (federal diversity jurisdiction) with its concomitant *Erie* doctrine. Regrettably, these considerations misinform both the *Zuckerman* decision as well as many of the arguments of the parties.

[38] *See* HARP Brief *passim*.
[39] *See, e.g.*, HARP Brief at 18-25.

IV. CONCLUSION

For the foregoing reasons and those set forth in HARP'S Brief, the Court should propound a uniform federal common law standard for identifying a *Nazi-confiscated artwork* that U.S. foreign policy seeks to restitute.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I certify that this Reply Amicus Curiae brief complies with Fed. R. App. P. 29(a)(4) and Local Rule 29.1(c). The brief contains 6989 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.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

Dated: August 3, 2018

BYRNE GOLDENBERG & HAMILTON, PLLC

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CERTIFICATE OF SERVICE

I certify that on January 16, 2019, I electronically filed the foregoing *Reply Brief of Amicus Curiae Holocaust Art Restitution Project in Support of Appellant and Reversal*, with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. This filing is made pursuant to the Court's Order of January 15, 2019.

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.

Dated: January 16, 2019.

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