No. 19-942

IN THE

Supreme Court of the United States

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

Petitioner,

v.

THE METROPOLITAN MUSEUM OF ART,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are scholars who teach and write about civil procedure and federal preemption of state law.[1] We file this brief to address the relationship between the role of the legislative branch in enacting statutes of limitation and the judiciary in interpreting them. *Amici* write to clarify that under this Court's long-standing precedent, federal statutes of limitation displace the state law defense of laches, unless the statute states the contrary. We also write to discuss the impropriety of addressing a laches defense at the rule 12(b)(6) stage of litigation. Absent unique circumstances, addressing the fact-intensive defense of laches pre-discovery upends well-defined pleading requirements, presumptions, and burdens on litigants.

Our scholarly interest in civil procedure arises from teaching and writing in a variety of related fields, including constitutional law, dispute resolution, and civil procedure. Dr. Deborah Hensler is the Judge John W. Ford Professor of Dispute Resolution at Stanford Law School where she teaches complex litigation, global litigation, arbitration law and policy, and empirical legal research. She writes on compensation for mass harms, aggregated litigation procedures and class actions. Carrie Menkel-Meadow is the Distinguished and Chancellor's Professor of Law at U.C. Irvine where she teaches civil

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1. Counsel for all parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

procedure, dispute resolution, and international law. A. Benjamin Spencer, a scholar in the field of civil procedure and federal jurisdiction is the Bennett Boskey Visiting Professor of Law at Harvard Law School, and the Justice Thurgood Marshall Distinguished Professor of Law at the University of Virginia School of Law, where he teaches civil procedure and federal courts. Professor Spencer writes in the area of civil procedure and is an author of Wright & Miller's *Federal Practice & Procedure*.

SUMMARY OF ARGUMENT

Where the legislature has determined through a statute of limitations that the door for bringing suit should remain open for a predetermined period of time, it should not be left to a judge's discretion to close that door early by the application of laches. Yet, the Second Circuit did just that in dismissing Laurel Zuckerman's claim for the return of her family's Picasso painting lost during the Holocaust.

The Second Circuit's decision is contrary to two recent decisions of this Court and a general rule of law established as early as 1891. *See SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 137 S. Ct. 954, 959 (2017); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677 (2014); *Cross v. Allen,* 141 U.S. 528, 537 (1891). According to this Court, "[t]he enactment of a statute of limitations necessarily reflects a congressional decision that the timeliness of covered claims is better judged on the basis of a generally hard and fast rule rather than the sort of case-specific judicial determination that occurs when a laches defense is asserted." *SCA Hygiene*, 137 S. Ct. at 960." [A]pplying laches within a limitations period

specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power." *Id.* (quoting *Patrella*, 572 U.S. at 678).

Rather than adhere to the congressionally set limitations period contained in the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. 114–308, 130 Stat. 1524 (HEAR Act), the Second Circuit opted instead to apply laches "in search of a just and fair solution." *See Zuckerman v. Metro. Museum of Art*, 928 F.3d 186, 196 (2d Cir. 2019). By doing so, the Second Circuit overrode the balance struck by Congress in the HEAR Act and exceeded its judicial power. Because the HEAR Act only provides claimants with a limited window of time to file claims "free from defenses relating to the passage of time," this Court should act now to clarify the scope of the HEAR Act.

Even if laches did apply, the Second Circuit's dismissal of the claim on Rule 12(b)(6) grounds is against this Court's precedent and the traditional role of the rule.

ARGUMENT

I. The Second Circuit exceeded its judicial power by reading the defense of laches into the HEAR Act's definitive limitations provision.

A. History of laches and the general rule.

The general rule in American law is that laches is an equitable defense that does not bar claims for legal damages brought within an applicable statutory limitations period. *See, e.g., Cty. of Oneida v. Oneida Indian Nation*

of N.Y., 470 U.S. 226, 244 n.16 (1985) ("[A]pplication of the equitable defense of laches in an action at law would be novel indeed."). This Court developed the general rule, recognizing the history of the doctrine of laches and the separation of powers between the legislative and judicial branches.

The American civil law system originally provided two means to resolve civil disputes: courts of law and courts of equity. *See* 1 James Wm. Moore et al., Moore's Federal Practice ¶ 2.02 [1] (3d ed. 2012). Equity courts were intended to provide relief to individuals who had no remedies at law. *Id.* Both court systems contained mechanisms for dealing with stale claims. In actions at law, a statute of limitations established a period of time for plaintiffs to raise claims which was predetermined by the legislature. Any delay by plaintiffs within the statutory period was immaterial. *See Wehrman v. Conklin*, 155 U.S. 314 (1894) ("If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed."). In actions at equity, the defense of laches was available, but required a fact-intensive, case-by-case prejudice analysis that focused on the circumstances and actions of the particular parties. *See Abraham v. Ordway*, 158 U.S. 416, 420 (1895).

Supported by history, this Court developed the general rule that laches cannot be invoked to bar a claim for damages incurred within a limitations period specified by Congress. *See Holmberg v. Armbrecht,* 327 U.S. 392, 395 (1946) ("If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter"); *United States v. Mack,* 295 U.S. 480, 489 (1935) ("Laches within the term of the statute of limitations

is no defense at law"); *Wehrman v. Conklin,* 155 U.S. 314, 326 (1894) ("Though a good defense in equity, laches is no defense at law. If the plaintiff at law has brought his action within the period fixed by the statute of limitations, no court can deprive him of his right to proceed"); *Cross,* 141 U.S. at 537 ("So long as the demands secured were not barred by the statute of limitations, there could be no laches in prosecuting a suit").

This Court recognized the importance of the general rule to the separation of powers between the legislature and judiciary. Most recently, the Court examined the relationship between the equitable defense of laches and claims for damages that are brought within the time allowed by a statute of limitations contained in the Patent Act. Relying heavily on an earlier decision addressing the Copyright Act, the Court refused to read the equitable defense of laches into the statute, the Court instructed that "it would be exceedingly unusual, if not unprecedented, if Congress chose to include in the Patent Act both a statute of limitations for damages and a laches provision applicable to a damages claim." *See SCA Hygiene*, 137 S. Ct. at 963; *Petrella,* 572 U.S. at 667, 669 ("dissent has come up with no case in which this Court has approved the application of laches to bar a claim for damages brought within the time allowed by a federal statute of limitations"). Indeed, the *SCA Hygiene* Court advised that neither the litigants in the case, *amici*, nor the Federal Circuit could identify a single federal statute that provides such dual protection against untimely claims. *SCA Hygiene*, 137 S. Ct. at 963.

Other than the Second Circuit's decision, *amici* here have found none. *See, e.g., Gates v. D.C.*, 66 F. Supp. 3d 1, 27 (D.D.C. 2014) (laches cannot bar claim where

Congress set limitations period for claims under 42 U.S.C. §1983); *Wilcox v. Swapp*, No. 2:17-CV-275-RMP, 2018 WL 2095722, at *3 (E.D. Wash. Apr. 26, 2018) (laches no defense under Driver's Privacy Protection Act,18 U.S.C. §§ 2721-2725); *Rb Jai Alai, LLC v. Sec'y of the Fla. Dep't of Transportation*, No. 613CV1167ORL40GJK, 2016 WL 3369259, at *1 (M.D. Fla. Feb. 2, 2016) (laches no defense under Administrative Procedures Act).

B. In the HEAR Act, Congress did not legislate against the general rule.

Congress enacted the HEAR Act 71 years after World War II to establish a six-year statute of limitations setting a window of time within which Holocaust victims can assert claims for art lost between 1933 and 1945 "free from defenses related to the passage of time." HEAR Act § 5(a). Congress recognized the difficulty proving these claims, advising that "those seeking recovery of Nazi-confiscated art must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide. This costly process often cannot be done within the time constraints imposed by existing law." HEAR Act § 2(6).

While the legislative history of the HEAR Act mentions the equitable defense of laches, the statute itself is silent on laches. Yet, the Second Circuit read into the Act the state law defense of laches, which is "a time constraint imposed by existing law" that Congress sought to avoid. The Act's silence on laches cannot be read to override the general rule that laches does not apply when Congress enacts a statute of limitations. Because the general rule is so well-ingrained, Congress "could not have missed

the cases endorsing the general rule." *See SCA Hygiene*, 137 S. Ct. at 963-64. Thus, an intent to override the rule should be express. *Id.* (refusing to read in defense of laches where Patent Act silent on defense).

And for this reason, the Second Circuit erred in finding that New York's defense of laches was not preempted by the HEAR Act's clear expression of a limitations period. "[S]tate law must give way" when it is in "clear conflict" with an "express federal policy." *See American Insurance Association v. Garamendi,* 539 U.S. 396, 421 (2003) (California's aggressive disclosure requirements for insurers selling policies in Europe during Nazi era preempted by President's policy encouraging voluntary settlement of Nazi-era insurance claims). Similarly, as the Ninth Circuit advised, the HEAR Act preempts existing state and federal statutes of limitations. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 682 F.3d 951, 965 (9th Cir. 2017) (Section 5 of the Act "prevent[s] courts from applying defenses that would have the effect of shortening the six-year period in which a suit may be commenced.").

Separation of powers principles dictate that an equitable timeliness rule adopted by state courts cannot bar claims that are brought within a legislatively prescribed statute of limitations. Using the words of this court, but substituting HEAR Act for the Copyright Act, "[i]nviting individual judges to set a time limit other than the one Congress prescribed, … would tug against the uniformity Congress sought to achieve when it enacted [the HEAR Act]." *Petrella*, 572 U.S. at 680–81.

This Court should exercise review now to clarify the scope of the HEAR Act because the Act's limitations

provision free from defenses of the passing of time will sunset in 2027. HEAR Act § 5(g). Refusing to do so, will allow rejection of many other HEAR Act claims as untimely, the very thing the HEAR Act was enacted to prevent.

II. The Second Circuit's dismissal of a complaint at the pleadings stage based on an fact-intensive affirmative defense is not a proper under Rule 12(b)(6) and conflicts with decisions from this Court, and the Seventh and Tenth Circuits.

The second question presented raises the appropriateness of dismissing a complaint based on a fact-intensive affirmative defense. In this case, the Second Circuit, relying on statements made in oral argument, defendant's contentions not contained in the complaint, and its own weighing of good faith, dismissed the complaint on the equitable affirmative defense of laches. The Second Circuit's decision runs afoul of well-established pleading principles, and has implications beyond just this case. If followed, it would require plaintiffs to anticipate affirmative defenses and plead facts in the complaint to overcome affirmative defenses not yet raised. This is clearly not required under the pleading standards of Rule 8, nor is it a proper consideration under Rule 12, especially in the context of laches, an equitable defense that requires a fact-intensive review of the circumstances involved. The Second Circuit's decision should not stand.

A. General pleading requirements and Rule 12(b)(6) require a plaintiff only to state a claim that is plausible on its face.

The Federal Rules of Civil Procedure, as interpreted by this Court, have required parties simply to provide each other with fair notice of their claims. Under Rule 8(a) of the Federal Rules of Civil Procedure, the plaintiff is required only to set forth its claims with a "short and plain statement." In 2007, this Court further interpreted Rule 8 to require a plaintiff to set forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions. . . .'").

A defendant may seek to test the sufficiency of this statement under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Under Rule 12(b)(6), a court may not dismiss a complaint when a plaintiff has plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Importantly, a Rule 12(b)(6) motion does not test the merits of the claim. Rather, it simply tests whether a plaintiff has adequately stated a claim. 5B Wright & Miller, Federal Prac. & Proc. Civil 3d § 1357.

On the other hand, Rule 8(c) requires a party responding to a pleading to "affirmatively state any avoidance or affirmative defense, including: . . . laches. . . ." And, Rule 8(b) much like Rule 8(a), requires that party to "state in short and plain terms its defenses to each claim." These defenses must be set forth in the defendant's answer. *Id*. Over a hundred years ago, this Court recognized that a plaintiff did not have to anticipate defenses to their claim in their complaint. Rather, in the "orderly course,

the plaintiffs were required to state their own case in the first instance, and then to deal with the defendants' after it should be disclosed in the answer." *Taylor v. Anderson*, 234 U.S. 74, 75 (1914).

B. A plaintiff is not required to anticipate affirmative defenses in its complaint.

Since the ruling in *Taylor*, this Court and several circuits have recognized that a plaintiff is not required to anticipate any affirmative defense that may be raised by the defendant. Rather, it's the defendant's burden to plead and prove that affirmative defense. For instance, in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), this Court reviewed whether a plaintiff needs to anticipate a qualified immunity defense in the context of his claim under 42 U.S.C. § 1983. In *Gomez*, the Court examined whether a plaintiff must allege bad faith in its complaint against a person that may be entitled to qualified immunity. If the defendant is entitled to qualified immunity, then a claim under § 1983 may only proceed if the defendant was acting in bad faith. As such, the defendant sought dismissal because the plaintiff had not alleged bad faith.

But this Court disagreed. The Court found that under § 1983, a plaintiff must allege only two elements: (1) that some person has deprived him of a federal right; and (2) that the person who has deprived him of that right acted under color of state or territorial law. *Id*. at 640. The plaintiff is not required to assert that the defendant was acting in bad faith. Rather, in asserting qualified immunity, because it is a defense, the defendant bears the burden of proving the defense. The Court concluded: "[w]e see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." *Id*.

The Court again found that a plaintiff is not required to anticipate an affirmative defense in *Jones v. Bock*, 549 U.S. 199, 216 (2007). *Jones* involved whether an inmate is required to allege exhaustion before a complaint can proceed. But, like the *Gomez* Court, the *Jones* Court similarly concluded that failure to exhaust is an affirmative defense. The Court concluded: "inmates are not required to specially plead or demonstrate exhaustion in their complaints."

Other circuit courts follow a similar rule. The Seventh Circuit has found: "[w]e have held many times that, because complaints need not anticipate defenses, Rule 12(b)(6) is not designed for motions under Rule 8(c)(1)." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012). In *Richards*, the Seventh Circuit reversed the district court's dismissal based on statute-of-limitations because it found a question as to whether the period was tolled by the plaintiff's incapacity. Because the plaintiff had not had the opportunity to present evidence regarding this tolling, dismissal on the pleadings was not appropriate. *Id.* at 638. The Seventh Circuit concluded that the district court had erred when it determined the plaintiff's reasons for the delay in bringing the claim as "unpersuasive," which is not appropriate at the pleadings stage. *Id.*

The Tenth Circuit has likewise found that dismissal based on a fact-intensive affirmative defense is inappropriate at the pleadings stage. In *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1299 (10th Cir. 2018), the Court refused to dismiss the plaintiff's claim on statute-of-limitations grounds. *Fernandez* involved a claim under the Federal Labor Standards Act (FLSA). In order for a claim to be timely under the FLSA, it must be

brought within two years. But the timeframe is expanded to three years when claims involve "willful violations." 29 U.S.C. § 255(a). The plaintiffs in the case brought the case within three years, and alleged that the defendants' actions had been willful. But the defendants moved to dismiss on the grounds that the allegations did not support the assertion of willfulness. *Id*. at 1297.

The Tenth Circuit reversed the district court's dismissal, finding that "[a] plaintiff need not anticipate in the complaint an affirmative defense that may be raised by the defendant; it is the defendant's burden to plead an affirmative defense." *Id*. at 1298–99. It found that "there can be no question that a limitations issue is an affirmative defense; Rule 8(c)(1) explicitly lists 'statute of limitations' as such." *Id*. at 1299. The Court also rejected the defendant's argument that the complaint contained an admission that the violations were not willful, which would extend the statute of limitations. Instead, the Court found the plaintiff's complaint adequately alleged willfulness. The Court concluded that its "decision does not represent a departure from the usual practice when defendants raise affirmative defenses," noting that the defendant's "first line of defense" is summary judgment, not dismissal on the pleadings. "Plaintiffs rarely confess such defenses in their complaints." *Id*. at 1300.

The District of Columbia Circuit reached a similar conclusion in a case involving a laches defense. In *Menominee Indian Tribe of Wisconsin v. United States*, 614 F.3d 519 (D.C. Cir. 2010), the district court dismissed a breach of contract claim, finding that it was barred by the statute of limitations and based on laches. The D.C. Circuit found the dismissal on these grounds to be in error,

and remanded the case for the district court to consider tolling and whether the delay in bringing the action was reasonable. But, the D.C. Circuit cautioned, that "a motion to dismiss generally is not a useful vehicle for raising the issue [of laches]." *Id.* at 532 (quoting 5 Wright & Miller, Federal Prac. & Proc. Civil 3d § 1277, at 644). The Court further cautioned: "Laches may be the 'legal cousin' of the statute of limitations, *Daingerfield Island Protective Soc'y v. Babbitt,* 40 F.3d 442, 448 (D.C. Cir. 1994) (Wald, J., dissenting), but it 'involves more than the mere lapse of time and depends largely upon questions of fact.'" *Id.* (quoting 5 Wright & Miller, Federal Prac. & Proc. Civil 3d § 1277, at 644).

In short, a plaintiff is not required to plead facts tending to rebut an affirmative defense to defeat a motion to dismiss at the pleading stage. While a claim may be dismissed at the pleadings stage where the complaint "admits all the elements of an affirmative defense" or where it "admits all the ingredients of an impenetrable defense," such dismissal will rarely be appropriate. *See Fernandez*, 883 F.3d at 1299; *Richards*, 696 F.3d at 637–8. Nor may a court rely on a factual determination to resolve a motion to dismiss based on an affirmative defense without running afoul of the Seventh Amendment. *See Byrd v. Blue Ridge Rural Elec. Co-op, Inc.,* 356 U.S. 525, 531–2 (1958).

C. The Second Circuit's decision required Petitioner to anticipate laches and persuasively argue facts to defeat it.

The Second Circuit dismissed the underlying complaint solely on the issue of laches. While it noted that

the defendant raised the affirmative defense of laches, it failed to consider the equitable nature of such a defense, finding it could decide the validity of the defense on the face of the complaint. In concluding that laches applied, the Second Circuit incorrectly found that (1) the complaint alleged facts to support that their delay was unreasonable; and (2) that the facts alleged in the complaint failed to persuasively support a finding that the defendant's unclean hands barred recovery. Neither of these are correct. First, the Second Circuit concluded that it was clear from the face of the complaint that the delay in bringing a claim was unreasonable. But the Second Circuit itself admits that it relied on facts not found in the complaint. *See* 928 F.3d 186, 191–92 (citing oral argument recording). The Second Circuit found that "Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting." *Zuckerman*, 928 F.3d at 193. First, the history in searching out other belongings after the war is nowhere in the complaint. Second, in concluding that the Petitioner failed to allege facts to support the reasonableness in the delay, the Second Circuit necessarily required the petitioner to anticipate the defense of laches, plead facts to support that the delay was not unreasonable, and used the lack of pleaded facts to conclude that laches applied. This conclusion by the Second Circuit conflicts with this Court's decisions, and the decisions in the Seventh and Tenth Circuits.

Additionally, the Second Circuit refused to consider the defendant's unclean hands, another element of laches that a party asserting such a defense must prove. The Second Circuit did not address the allegations in the complaint that the defendant was not diligent about the

Painting's origins, despite its expertise, resources, and post-War advisories warning of Nazi-looted art. Because the complaint alleges the defendant comes with unclean hands, the defendant could not have shown that laches was "an impenetrable defense." *Richards*, 696 F.3d at 637–38.

In essence, the Second Circuit required the plaintiff here to allege in its complaint justification for delay, something that is not required to support any of the causes of action alleged. Even worse, the Second Circuit rejected the facts alleged as unpersuasive when considering whether the defendant had come to court with clean hands. The Second Circuit's dismissal of the complaint, at the pleadings stage, based on such a fact-intensive affirmative defense conflicts with this Court's precedent and that of other Circuit Courts. The decision cannot stand.

CONCLUSION

Amici respectfully urge the Court to grant the petition.

Respectfully Submitted,

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