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 CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are a bipartisan group of current and former members of the United States Congress, who come before the Court in their individual capacities.

A number of *Amici* were sponsors or co-sponsors of the Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act"), the federal law at issue in this case. Pub. L. No. 114-308, 130 Stat. 1524 (App. 71–79). Those *Amici* include:

Senator Richard Blumenthal (D-Conn.), who co-sponsored the Act in the Senate, and who has served in Congress since 2011;

Former Representative Robert W. Goodlatte (R-Va.), who sponsored the Act in the House, and who served in Congress from 1993 to 2019;

Representative H. Morgan Griffith (R-Va.), who co-sponsored the Act in the House, and who has served in Congress since 2011; and

Representative Jerrold L. Nadler (D-N.Y.), who co-sponsored the Act in the House, and who has served in Congress since 1992.

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[1] The parties were notified ten days prior to the due date of this brief of *Amici*'s intention to file. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* or their counsel made a monetary contribution to its preparation or submission.

In addition, *Amici* include current and former members of Congress who voted in favor of the HEAR Act's enactment or, if they served in Congress before the Act's enactment, were directly involved with the federal government's efforts on Holocaust restitution policy leading up to the HEAR Act. Those *Amici* include:

Senator Christopher J. Dodd (D-Conn.), who served in Congress from 1981 to 2011;

Representative Stephen I. Cohen (D-Tenn.), who spoke in support of the Act in the House, and who has served in Congress since 2007;

Representative Theodore E. Deutch (D-Fla.), who has served in Congress since 2010;

Representative Eliot L. Engel (D-N.Y.), who has served in Congress since 1989;

Representative David E. Price (D-N.C.), who has served in Congress since 1987; and

Representative Deborah Wasserman Schultz (D-Fla.), who has served in Congress since 2005.

As current and former members of Congress, many of whom were directly involved in enacting the HEAR Act, *Amici* have a unique interest in ensuring that the Act is interpreted in a manner that effectuates the intent of Congress. Indeed, the Act fulfills commitments that Congress made to Holocaust survivors and their families, some of whom are, or were, *Amici*'s constituents.

Congress enacted the HEAR Act to provide a remedy for Holocaust survivors and their heirs in view

of the largest displacement of artwork in human history: the Nazis' forced displacement of artwork from Jewish families in Europe during the 1930s and 1940s. Many Holocaust survivors and their heirs had pursued legal claims to recover this lost artwork, but courts were dismissing these claims on timeliness grounds—an obvious injustice. To ensure that these claims would not fail on timeliness grounds, the HEAR Act created a temporary window in which these claims can be brought and decided on their merits.

In the decision below, however, the Second Circuit adopted an interpretation of the HEAR Act that countermands the Act's fundamental purpose. The court recognized laches, a timeliness defense under state law, as a valid defense to claims under the HEAR Act. In other words, the court recognized a timeliness defense to a federal law that sought to eliminate timeliness defenses. Also contrary to the HEAR Act's purpose, the court dismissed Petitioner's claims on timeliness grounds at the pleadings stage, before she could conduct any discovery or pursue factual development to further support her claims.

The Second Circuit's approach is incompatible with the fundamental purpose of the HEAR Act: eliminating timeliness defenses to claims by Holocaust survivors and their heirs, so that those claims can be resolved on the merits. If left undisturbed, the Second Circuit's decision would eviscerate the protections of the HEAR Act.

*Amici* respectfully urge the Court to grant certiorari.

## SUMMARY OF ARGUMENT

The Second Circuit dismissed Laurel Zuckerman's HEAR Act claims based on laches, a state-law defense that focuses on whether a claim is untimely. That decision warrants this Court's review because it undermines the fundamental purpose of the HEAR Act in two ways.

First, the decision below contravenes the HEAR Act's primary purpose: ensuring that courts do not dismiss claims by Holocaust survivors and their heirs as untimely. Laches is, in essence, a time-bar defense. If laches is a valid exception to the HEAR Act, it will become the exception that swallows the rule, upending the Act's fundamental purpose of eliminating time-bar defenses. Nothing in the Act's text or legislative history supports that result.

Second, the decision below conflicts with the other stated purpose of the HEAR Act: ensuring that Holocaust-era art claims are decided on the merits. Even if laches could be a valid defense to HEAR Act claims, it is, at most, a defense that ought to be sparingly recognized at the summary judgment stage or at trial, after the parties have had the opportunity to engage in significant factual development.

Here, by applying laches to HEAR Act claims at the Rule 12 stage—the inception of the case, where no factual development has occurred—the Second Circuit overlooked the express directive from Congress that HEAR Act claims should be resolved on the merits.

For these reasons, the Second Circuit's decision warrants this Court's review.

## ARGUMENT

### I. The decision below countermands the HEAR Act's fundamental purpose.

#### A. Congress enacted the HEAR Act to ensure that courts would not dismiss Holocaust-era art claims as untimely.

The loss of artwork from Jewish families during the Holocaust was the "greatest displacement of art in human history." HEAR Act § 2(1). Immediate post-war efforts to recover this art faced enormous challenges. Among these challenges, "the psychological trauma of the Holocaust often prevented victims from pursuing lost property." 162 Cong. Rec. H7331 (daily ed. Dec. 7, 2016). Destitute Holocaust survivors also lacked the financial resources to pursue claims to their lost property. *See* S. Rep. No. 114-394, at 2–3 (2016).

In addition to these challenges, Holocaust survivors and their heirs faced another obstacle to their claims: the passage of time. Bound by modern timeliness defenses under state law, courts were repeatedly dismissing cases brought by Holocaust survivors and their families who pursued their claims after World War II. *Id.* at 5. As Congress observed, "the time constraints imposed by existing law" typically bar these claims, some of which may have "expired before World War II even ended." HEAR Act § 2(6).

Representative Nadler, a co-sponsor of the Act and the current Chair of the House Judiciary Committee, explained on the floor of the House that "[t]hese laws

generally require a claimant to bring a case within a limited number of years from when the loss occurred or should have been discovered." 162 Cong. Rec. H7332. He further described how, "in many instances, the information required to file a claim regarding artwork stolen by the Nazis was not brought to light until many years later, forcing courts to dismiss cases before they could be judged on the merits." *Ibid.*

As Representative Nadler explained, "[i]n some cases, the law would have required a claim to be brought even before World War II ended. This is obviously unjust." *Ibid.*

Under these circumstances, Congress recognized the "obvious" injustice of imposing time constraints on these claims. *Ibid.* Congress was committed to restitution for Holocaust survivors and their heirs, and it heard compelling testimony about how "adherence to this commitment requires that resolution of such cases be based on the merits of each case and not on procedural technicalities." *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Fed. Rights and Fed. Courts of the S. Comm. on the Judiciary*, 114th Cong. 2 (2016) (statement of Ambassador Ronald S. Lauder, Chairman of the Council, World Jewish Restitution Organization); *see also* S. Rep. No. 114-394, at 4 (explaining that these claims should be decided "on the merits," not "upon technical defenses, like the statute of limitations"

(quoting *Review of the Repatriation of Holocaust Art Assets in the United States: Hearing Before the Subcomm. on Domestic and Int'l Monetary Policy, Trade, and Tech. of the H. Comm. on Fin. Servs.*, 109th Cong. 12 (2006))).

In view of this testimony, Representative Goodlatte, who sponsored the Act, and who was the Chair of the House Judiciary Committee at the time, explained to his colleagues in the House that allowing courts to apply these "procedural hurdles" to Holocaust survivors and their heirs would be especially unjust. 162 Cong. Rec. H7331.

Thus, in December 2016, Congress unanimously passed the Holocaust Expropriated Art Recovery Act. The bipartisan legislation sought to ensure that Holocaust-era art claims would be resolved "based on the facts and merits of the claims." HEAR Act § 2(5); *see also* S. Rep. No. 114-394, at 9. As Senator Blumenthal and other co-sponsors explained when the legislation was introduced, the legislation would "give these families the opportunity to have their day in court," because "it is never too late to do the right thing." Press Release, Senate, Blumenthal, Cornyn, Cruz, Schumer Bill to Help Recover Nazi-Confiscated Art Passes Judiciary Committee (Sept. 15, 2016).

To that end, the HEAR Act created a temporary window of time for Holocaust survivors and their heirs

to assert claims without the burden of time bars.[2] Section 5 of the Act provides as follows:

> Notwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time, and except as otherwise provided in this section, a civil claim or cause of action against a defendant to recover any artwork or other property that was lost during the covered period[3] because of Nazi persecution may be commenced not later than 6 years after the actual discovery by the claimant or the agent of the claimant of—
>
> (1) the identity and location of the artwork or other property; and
>
> (2) a possessory interest of the claimant in the artwork or other property.

HEAR Act § 5(a).

As the Senate Report confirms, this section of the HEAR Act was intended to create a "uniform, national, limitations period," which would "open courts to claimants to bring covered claims and have them resolved on the merits." S. Rep. No. 114-394, at 9.

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[2] This window of time is temporary because the Act sunsets ten years after its enactment. HEAR Act § 5(g).

[3] The statute defines "covered period" to mean "the period beginning on January 1, 1933, and ending on December 31, 1945." HEAR Act § 4(3).

In the decision below, however, the Second Circuit interpreted the Act in a way that undermines this fundamental purpose.

### B. The Second Circuit dismissed Petitioner's HEAR Act claims after concluding, under a laches theory, that those claims were untimely.

As this Court has repeatedly cautioned, federal statutes must not be interpreted in ways that "frustrate Congress' manifest purpose." *United States v. Hayes*, 555 U.S. 415, 426–27 (2009); *see also*, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 82 (2006) (vacating decision that would "undercut" the Securities Litigation Uniform Standards Act's stated purpose); *United States v. Dann*, 470 U.S. 39, 45 (1985) (reversing decision that "would frustrate the purpose" of the Indian Claims Commission Act).

The Second Circuit failed to give sufficient weight to this important principle of statutory construction. As described above, Congress enacted the HEAR Act to ensure that courts would not dismiss Holocaust-era art claims as untimely. Yet that is precisely what the Second Circuit did. The court applied a state-law defense of laches—a defense that, at its core, is a timeliness defense. Indeed, "timeliness is the essential element" of laches. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 684–85 (2014); *see also SCA Hygiene Prods. Atiebolag v. First Quality Baby Prods., LLC*, 137

S. Ct. 954, 960 (2017) (noting that laches focuses on the "unreasonable, prejudicial delay in commencing suit").

Despite the HEAR Act's fundamental purpose of *eliminating* timeliness defenses to Holocaust-era art claims, the Second Circuit dismissed Petitioner's claims as untimely. The court relied on the fact that "[n]either [the original owners] nor their heirs made a demand for the painting until 2010," and "over seventy years [had] passed." App. 11, 13. In other words, the court held that these Holocaust survivors and their heirs had waited too long, so their claims were untimely.

Notwithstanding the HEAR Act's directives on timeliness, the Second Circuit instead applied its own views on timeliness. The court held that it was "understandable" that Petitioner's family did not bring a claim to recover their artwork "during the course of World War II and even, perhaps, for a few years thereafter," but their 2010 demand was too late and warranted dismissal. App. 14. Even though Petitioner's claims fell within the statute of limitations of the HEAR Act, Pet. 24, the court held nonetheless that "this delay was unreasonable." App. 11.

Finally, as evidence of "prejudice" for a laches defense, the Second Circuit relied solely on circumstances that are common among HEAR Act cases. The court relied on the potential for " 'deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence." *Id.* at 15

(quoting *Solomon R. Guggenheim Found. v. Lubell*, 153 A.D.2d 143, 149 (N.Y. App. Div. 1990)).

This decision—both its result and its rationale—is especially problematic, because it would provide a defense to virtually any claim brought under the HEAR Act. After all, *every* HEAR Act claim will be brought more than 70 years after the Holocaust, and virtually *every* claim will involve deceased witnesses, faded memories, and the likely disappearance of documentary evidence. App. 15.

Congress carefully considered all of this when it established a temporary window for bringing these claims more than 70 years after the Holocaust. Congress knew that these cases would involve "deceased witnesses." *Ibid.* Congress knew that these cases would involve "faded memories." *Ibid.* And Congress knew that these cases would involve "the likely disappearance of documentary evidence." *Ibid.*

Congress carefully considered that these claims would turn on a "fragmentary historical record ravaged by persecution, war, and genocide." HEAR Act § 2(6). But Congress enacted the HEAR Act nevertheless, deeming these evidentiary issues secondary to a much more important objective: the critical need to ensure restitution for Holocaust survivors and their families.

In other words, "Congress must have been aware that the passage of time and [witnesses'] death[s] could cause a loss or dilution of evidence," but "Congress chose, nonetheless, to give [Holocaust survivors and

their heirs] 'a second chance to obtain fair remuneration.'" *Petrella*, 572 U.S. at 683 (quoting *Stewart v. Abend*, 495 U.S. 207, 220 (1990)).

Here, by dismissing Petitioner's claims as untimely, the Second Circuit upended the Act's fundamental purpose and, in essence, rebalanced the policy considerations that Congress had already balanced in enacting the HEAR Act.

### C. The Second Circuit misapprehended the HEAR Act's text and history.

As described above, the Second Circuit's decision carves out a HEAR Act exception that would swallow the rule: an exception for a timeliness defense in a federal statute that sought to eliminate timeliness defenses. The court reached this conclusion by misapprehending certain portions of the Act's text and legislative history. But neither the Act's text nor its legislative history points toward this conclusion.

First, the statutory text does not support the timeliness exception that the Second Circuit created. The court relied on the Act's reference to "defense at law" as a signal that Congress intended to recognize equitable defenses. App. 18–19. The court inferred that Congress intended to create an exception for time-bar defenses, so long as those time-bar defenses were "equitable" in nature, as opposed to existing "at law." *Ibid.*

But it would be illogical for Congress to enact legislation for the express purpose of eliminating timeliness defenses, only to silently preserve timeliness defenses. *See*, *e.g.*, *Hayes*, 555 U.S. at 727 ("[A]s interpreted by the Fourth Circuit, [the statute] would have been a 'dead letter'. . . ."); *United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring) ("Congress presumably does not enact useless laws."); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 63 (2012) (discussing the "Presumption Against Ineffectiveness").

Moreover, the HEAR Act leaves no room for such silent or "implied" exceptions, because it contains an explicit preclusion provision: The Act states that "*except as otherwise provided in this section*," covered claims are timely if brought within the Act's limitations period. HEAR Act § 5(a) (emphasis added). As this Court has held, the words "except as otherwise provided in this section" amount to "plain, preclusive language" that eliminates the possibility of any other exceptions not explicitly mentioned. *Bd. of Governors of Fed. Reserve Sys. v. MCorp Fin., Inc.*, 502 U.S. 32, 38–39 (1991); *see also O'Gilvie v. United States*, 66 F.3d 1550, 1555 (10th Cir. 1995), *aff'd*, 519 U.S. 79 (1996). Thus, the only exceptions to the time period that Congress chose are those that the statute explicitly provides.

Here, this preclusion provision is critical, because the HEAR Act does not "otherwise provide" an express exception for laches. The Act does not mention laches at all. Nor does the Act "otherwise provide" an

exception for any timeliness defense—legal, equitable, or otherwise. Nor would it make any sense to do so; the purpose of the Act was to eliminate timeliness defenses, not preserve them.

The other justification that the Second Circuit offered—a portion of the HEAR Act's legislative history—also does not support a timeliness exception to the Act. The Second Circuit relied on a revision to an earlier draft of the Act, which removed language that expressly "swept aside a laches defense." App. 23.[4] In the court's view, that revision evinced the intent of Congress to *retain* a timeliness defense in the form of laches.

But that reading is directly at odds with the Act's primary purpose: *removing* timeliness defenses. *See supra* at 7–14. The better and more logical explanation for the revision is that an express laches exclusion would have been superfluous under this Court's precedent, so Congress removed it.

When Congress enacts a federal statute of limitations and a claimant asserts a claim "within the period fixed by the statute of limitations, no court can deprive him of his right to proceed." *Wehrman v. Conklin*, 155 U.S. 314, 326 (1894); *see also SCA Hygiene*, 137 S. Ct. at 954; *Petrella*, 572 U.S. at 677.

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[4] Because this revision was one of several in a substitution adopted by voice vote in the Senate, the legislative record on this revision does not provide support for the Second Circuit's conclusions on legislative intent. *See* S. Rep. No. 114-394, at 6–7.

This is because the "statute of limitations . . . itself takes account of delay." *Petrella*, 572 U.S. at 677.

Thus, the Court in *Petrella* reversed the Ninth Circuit for applying laches to a copyright claim that was timely under the federal statute of limitations. *Ibid.* The Court held that laches is appropriately applied to "claims of an equitable cast *for which the Legislature has provided no fixed time limitation*." *Id.* at 678 (emphasis added).

For that reason, this Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period." *Id.* at 680. Rather, the Court has always "adhere[d] to the position that, in [the] face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.* at 679.

Likewise, the Court in *SCA Hygiene* recently reminded litigants that "[w]hen Congress enacts a statute of limitations, it speaks directly to the issue of timeliness and provides a rule for determining whether a claim is timely enough to permit relief." 137 S. Ct. at 960. As the Court explained:

> The 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.

*Ibid*.

Because "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power[,]" this Court once again stressed that "courts are not at liberty to jettison Congress' judgment on the timeliness of suit." *Ibid*. (quoting *Petrella*, 572 U.S. at 667).

These decisions reflect that laches originated as a tool to measure the timeliness of claims in the *absence* of statutory directives. *See* 1 D. Dobbs, *Law of Remedies* § 2.4(4), at 104 (2d ed. 1993) ("[L]aches . . . may have originated in equity because no statute of limitations applied, . . . suggest[ing] that laches should be limited to cases in which no statute of limitations applies.").

Congress understood this precedent when it enacted the HEAR Act, and the law presumes as much. *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696–98 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law."). There is also a strong presumption that Congress does not enact "superfluous" provisions. *See*, *e.g.*, *Hayes*, 555 U.S. at 426–27.

It should be presumed, therefore, that Congress understood that the federal statute of limitations it was enacting would, under this Court's precedent, preclude a laches defense for claims falling within the

HEAR Act's limitations period. And there was no need for Congress to reinforce this well-established rule.

Thus, the express exclusion of laches in the initial draft of the HEAR Act would have been superfluous. So there was every reason to remove it from the legislation, and that is precisely what happened. Indeed, before the legislation was introduced in the House, the Senate removed this superfluous language by voice vote—another indication that the revision was an uncontroversial revision to eliminate superfluous language, rather than a revision designed to undo the Act's entire purpose. S. Rep. No. 114-394, at 6–7.

In sum, neither the text nor the history of the HEAR Act supports the Second Circuit's conclusion that laches—a timeliness defense—is an exception to the Act.

## II. The decision below undermines the HEAR Act's purpose of ensuring that Holocaust-era art claims are decided on the merits.

### A. Congress expressly directed courts to resolve HEAR Act claims "on the facts and merits of the claims."

The text of the HEAR Act expressly states its intent to ensure that Holocaust-era art claims "are adjudicated in accordance with . . . the Terezin Declaration," HEAR Act § 2(7), such that these claims are resolved "based on the facts and merits of the claims." *Id*. § 2(5); *accord* Terezin Declaration (June 30, 2009), Press Release, U.S. Dep't of State, Bureau of European & Eurasian Affairs, Prague Holocaust Era Assets Conference [hereinafter Terezin Declaration].

The Terezin Declaration was a 2009 pact between the United States and forty-five other nations. Among other important objectives, the signatories to the Terezin Declaration: (1) "urge[d] that every effort be made to rectify the consequences of wrongful property seizures, such as confiscations, forced sales and sales under duress"; and (2) "urge[d] all stakeholders to ensure that their legal systems or alternative processes . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art and to make certain that claims to recover such art are resolved expeditiously and *based on the facts and merits of the claims and all the relevant documents submitted by the parties*." Terezin Declaration (emphasis added).

Thus, the HEAR Act contains a clear Congressional directive, consistent with preexisting foreign policy set forth in the Terezin Declaration, that HEAR Act claims should be decided "on the facts and merits of the claims." HEAR Act § 2(5) (quoting Terezin Declaration).

This textual directive is also well-supported by the history of the Act. The Senate Report accompanying the Act states that "[t]he purpose of this section is to open courts to claimants to bring covered claims and have them *resolved on the merits*, consistent with the Terezin Declaration." S. Rep. No. 114-394, at 9 (emphasis added). This report is strong evidence—if not an "authoritative source"—of legislative intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984).

In addition, members of Congress emphasized that the HEAR Act would ensure that these claims are resolved on their merits. Representative Goodlatte described the legislation as "an important step" in ensuring that these claims "are resolved expeditiously and based on the facts and merits of the claims." 162 Cong. Rec. H7331.

Likewise, Representative Nadler described how the passage of many decades since the Holocaust was "forcing courts to dismiss cases before they could be judged on the merits." *Id.* at H7332. He explained that the HEAR Act "would finally ensure that the rightful owners and their [descendants] can have their claims properly adjudicated." *Ibid.*

As described below, however, the Second Circuit's decision undermined this expressly stated purpose of the Act.

### B. The Second Circuit dismissed HEAR Act claims at the pleadings stage, before any factual development.

As the decision below recognized, laches is an affirmative defense that demands a fact-intensive inquiry. App. 20 ("[A] laches defense requires a careful analysis of the respective positions of the parties in search of a just and fair solution."). But because this fact-intensive inquiry requires significant factual development, it is rarely appropriate to dismiss cases on laches grounds at the pleadings stage. *See*, *e.g.*, 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1277 (3d ed. 2004), at 643–44 (noting that laches "depends largely upon questions of fact," and stating that "a complaint seldom will disclose undisputed facts clearly establishing the defense of laches" such that "a motion to dismiss generally is not a useful vehicle for raising the issue").

Nevertheless, the Second Circuit not only held that Petitioner's claims were untimely under a laches theory, but did so at the Rule 12 stage—well before any written discovery, affidavits, or depositions, and without affording Petitioner the opportunity to pursue factual development of claims that involved events going back more than 70 years. This premature, pleadings-stage dismissal was directly contrary to the

HEAR Act's stated purpose of ensuring that Holocaust-era art claims are resolved on the merits.

Moreover, the way in which this premature dismissal manifested itself here was particularly troubling. The Second Circuit supplied its own views on how much delay was "understandable," and whether the reasons that the Holocaust survivors and their heirs offered for the delay here were "plausible." App. 14.

It is true that "plausibility" has its place in a Rule 12 analysis. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). But the type of credibility determinations that the Second Circuit engaged in here about what was "understandable" or "plausible"—without the benefit of any sworn testimony or other evidence—were not appropriate for a HEAR Act case in its earliest stages, where Petitioner lacked the benefit of discovery and further factual development.[5] This is especially true given Petitioner's undisputed allegations that The Met's provenance for the painting had been incorrect for decades, and that The Met only changed the provenance *after* the executor of Alice Leffmann's

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[5] Moreover, to reach conclusions about what was "plausible," the Second Circuit went beyond the allegations of the complaint. For example, the court relied on the "facts" that the Leffmanns "actively and successfully pursued other claims for Nazi-era losses." App. 14; *see also id.* at 13 ("Zuckerman nowhere contends that the Leffmanns, despite making some post-war restitution claims, made any effort to recover the Painting."). Those facts do not appear in the complaint. App. 80–109.

estate (Petitioner) made the demand for the painting. App. 103–04.

At a minimum, the Second Circuit should have given Petitioner a chance to develop these and other key facts in discovery, and, ultimately, to present her case on a thoroughly developed factual record in opposition to summary judgment, if not at trial.

As these points show, by endorsing the dismissal of HEAR Act claims at the Rule 12 stage, rather than "on the facts and merits of the claims," as the HEAR Act expressly requires, the decision below undermined the purpose of the Act.

* * *

The fundamental purpose of the HEAR Act was to eliminate timeliness defenses to Holocaust-era art claims so that these claims could be decided on their merits. In the decision below, the Second Circuit jettisoned that fundamental purpose.

By recognizing a timeliness defense to HEAR Act claims, and by endorsing dismissal on those timeliness grounds at the earliest possible stage of litigation, the court countermanded the fundamental purpose of the Act. If left undisturbed, the decision below would eviscerate the protections of the Act that Congress sought to provide to Holocaust survivors and their families.

The Court's intervention is warranted.

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## CONCLUSION

*Amici* respectfully urge the Court to grant the petition.

Respectfully submitted,

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