CIVIL PROCEDURE — EQUITABLE DEFENSES — SECOND CIRCUIT HOLDS THAT THE HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016 DOES NOT PRECLUDE APPLICATION OF LACHES DEFENSES TO NAZI-LOOTED ART RECOVERY CLAIMS. — *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186 (2d Cir. 2019).

Among the countless crimes of Nazi Germany were the theft, looting, and forced sale of hundreds of thousands of artworks.[1] Many owners never recovered these works, and restitution claims continue to occupy the dockets of American (and foreign) courts.[2] To ease some of the procedural hurdles to these claims, Congress passed the Holocaust Expropriated Art Recovery Act of 2016[3] (the "HEAR Act"), which established a nationwide six-year statute of limitations for claims related to art expropriated under "Nazi persecution" between January 1, 1933, and December 31, 1945.[4] However, the law, which is set to expire January 1, 2027,[5] has not lacked critics, some of whom have argued that its ambiguous language leaves many questions to be addressed by the courts.[6] Recently, in *Zuckerman v. Metropolitan Museum of Art*,[7] the Second Circuit held that the defendant museum was entitled to a laches defense in response to a HEAR Act claim.[8] By so holding, the panel resolved one ambiguity surrounding the HEAR Act: whether equitable defenses were viable under it. Yet this holding will likely limit the scope of the Act by narrowing its beneficiaries to a small group of restitution claimants.

Paul Friedrich Leffmann and Alice Leffmann, a wealthy German Jewish couple and the owners of *The Actor*, a painting by Pablo Picasso, fled Nazi Germany for Italy in 1937.[9] Italy soon also became unsafe for Jews, however. To finance their move from Italy, in 1938 the Leffmanns sold *The Actor* to a pair of art dealers.[10] The painting was then moved to New York, sold twice more, and donated in 1952 to the Metropolitan Museum of Art (the "Met"), where it has appeared in the museum's

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[1] *See generally, e.g.*, LYNN H. NICHOLAS, THE RAPE OF EUROPA: THE FATE OF EUROPE'S TREASURES IN THE THIRD REICH AND THE SECOND WORLD WAR (1994) (examining Nazi theft of art in occupied Europe).

[2] *See generally, e.g.*, NICHOLAS M. O'DONNELL, A TRAGIC FATE: LAW AND ETHICS IN THE BATTLE OVER NAZI-LOOTED ART (2017) (examining the legal battles over Nazi-looted art).

[3] Pub. L. No. 114-308, 130 Stat. 1524 (to be codified at 22 U.S.C. § 1621 note).

[4] *Id.* §§ 4(3), 4(5), 5. The limitations period begins to run after the claimant discovers "the identity and location of the artwork," *id.* § 5(a)(1), or "a possessory interest . . . in the artwork," *id.* § 5(a)(2).

[5] *Id.* § 5(g).

[6] *See, e.g.*, Simon J. Frankel & Sari Sharoni, *Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016*, 42 COLUM. J.L. & ARTS 157, 168–86 (2019).

[7] 928 F.3d 186 (2d Cir. 2019).

[8] *Id.* at 190.

[9] *See id.*

[10] *Id.* at 191.

"published catalogue of French paintings" since at least 1967.[11] However, until 2011, "the [Met's published] provenance incorrectly suggested" that the Leffmanns had sold *The Actor* decades before the start of Nazi persecutions.[12] The Leffmanns survived the war; Paul died in 1956 and Alice died in 1966.[13]

On September 8, 2010, Laurel Zuckerman, the Leffmanns' great-grandniece and heir, demanded the return of the painting.[14] The Met refused, and on September 30, 2016, Zuckerman brought her complaint in the United States District Court for the Southern District of New York.[15] She sought "replevin . . . , $100 million in damages for conversion, and a declaratory judgment"[16] that the Leffmann estate owned the painting "because the 1938 sale . . . was void for duress under Italian law."[17] The Met filed a motion to dismiss, arguing chiefly that Zuckerman had failed to adequately plead duress, and also that Zuckerman's claims were time barred under the New York statute of limitations and the equitable doctrine of laches.[18] The Met requested that the court resolve the issue on the merits in keeping with industry practices for litigating Nazi-era claims.[19]

In December 2016, before the court ruled on the motion, Congress passed the HEAR Act. The new law established a six-year statute of limitations for recovery claims involving art or other property lost "because of Nazi persecution."[20] Consequently, the HEAR Act replaced state-based statutes of limitations for such claims, which in most cases were three years.[21] In addition, the legislative history of the HEAR Act reflects Congress's preference that Nazi confiscated art recovery claims be heard on the merits.[22]

In February 2018, Judge Preska granted the Met's motion.[23] She did not mention the by-then eighteen-month-old HEAR Act, but decided

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[11] *Id.* at 192.

[12] *Id.*

[13] *Id.* at 191.

[14] Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 307, 315 (S.D.N.Y. 2018).

[15] Complaint at 1, 20, *Zuckerman*, 307 F. Supp. 3d 304 (No. 16-cv-07665); *see also* Amended Complaint at 21, *Zuckerman*, 307 F. Supp. 3d 304 (No. 16-cv-07665).

[16] *Zuckerman*, 307 F. Supp. 3d at 307.

[17] *Id.* at 308.

[18] Memorandum of Law in Support of Defendant the Metropolitan Museum of Art's Motion to Dismiss the Amended Complaint at 3–4, *Zuckerman*, 307 F. Supp. 3d 304 (No. 16-cv-07665).

[19] *Id.* at 4.

[20] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (to be codified at 22 U.S.C. § 1621 note); *see* Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 960 (9th Cir. 2017) (invoking the HEAR Act's statute of limitations provisions); Maestracci v. Helly Nahmad Gallery, Inc., 155 A.D.3d 401, 404–05 (N.Y. App. Div. 2017) (same).

[21] Nicholas M. O'Donnell, *The Holocaust Expropriated Art Recovery Act: A Sea Change in US Law of Restitution*, 22 ART ANTIQUITY & L. 273, 273–74 (2017).

[22] *Id.* at 275–77 (discussing the Act's legislative history).

[23] *Zuckerman*, 307 F. Supp. 3d at 308.

the case on the merits.[24] In particular, she held that the Leffmanns' sale of *The Actor* did not constitute duress under either 1938 Italian law or New York law.[25] Judge Preska concluded that under Italian law, fear induced by political circumstances did not rise to duress.[26] Rather, she found that duress requires "fear induced by a *specific and concrete threat of harm, purposefully presented by its author* to extort the victim's consent."[27] Similarly, she concluded that under New York law, a plaintiff must show that the defendant created a "wrongful threat that . . . precluded the exercise of [the plaintiff's] free will" to constitute duress.[28] Judge Preska found that Zuckerman was unable to plead a wrongful threat by any of the parties with which the Leffmanns contracted, nor was there any evidence that the contracting parties were operating "at the command of the Fascist or Nazi governments."[29]

The Second Circuit affirmed.[30] However, instead of addressing the district court's holding on the merits, the court affirmed on the grounds that Zuckerman's claims were barred by the equitable defense of laches.[31] The court stated that the doctrine of laches protects defendants against unreasonable and prejudicial delay by scrutinizing the claimant's due diligence in bringing a claim and its effect on the defense's case.[32] Writing for the unanimous panel, Chief Judge Katzmann[33] held that under New York law, the fact that neither the Leffmanns nor their heirs had made a demand for the painting until 2010 constituted an unreasonable delay that had prejudiced the Met by the loss of documentary evidence, deceased witnesses, and important memories.[34]

Moreover, the panel held that "assum[ing] *arguendo*" the Leffmanns' sale of *The Actor* to "non-Nazi affiliates" was a type of transaction that falls "within the ambit" of the HEAR Act, Zuckerman's claims would still be barred by laches because the recently passed federal law did not preclude defendants from asserting equitable defenses.[35] Examining the

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[24] *Id.*

[25] *Id.* at 317–20.

[26] *Id.* at 317.

[27] *Id.* (quoting Expert Opinion of Professor Pietro Trimarchi ¶ 13, *Zuckerman*, 307 F. Supp. 3d 304 (No. 16-cv-07665) (emphasis added)).

[28] *Id.* at 318 (quoting Interpharm, Inc. v. Wells Fargo Bank, Nat'l Ass'n, 655 F.3d 136, 142 (2d Cir. 2011)) (first citing Stewart M. Muller Constr. Co. v. N.Y. Tel. Co., 359 N.E.2d 328, 328 (N.Y. 1976); and then citing Kramer v. Vendome Group LLC, No. 11 Civ. 5245, 2012 WL 4841310, at *6 (S.D.N.Y. Oct. 4, 2012)).

[29] *Id.* at 319.

[30] *Zuckerman*, 928 F.3d at 190.

[31] *Id.* at 192.

[32] *Id.* at 193 (citing SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 960 (2017)).

[33] Chief Judge Katzmann was joined by Judges Livingston and Droney.

[34] *Zuckerman*, 928 F.3d at 193–94.

[35] *Id.* at 196 n.10; *see id.* at 196.

HEAR Act's text and legislative history, the court noted that the statute "explicitly sets aside 'defense[s] *at law* relating to the passage of time'" but "makes no mention of defenses *at equity*."[36] Furthermore, the court found that a Senate committee report noted the removal of any mention of equitable defenses from the final draft.[37] For the panel, the report "unequivocally indicate[d] that the [HEAR] Act does not preclude equitable defenses."[38]

The Second Circuit's choice to uphold *Zuckerman* on laches is noteworthy because the court decided not to simply affirm the lower court's ruling on the merits, which it likely could have done, but instead to apply an equitable defense lightly pleaded by the Met.[39] In so doing, the court showed an active desire to 1) align with New York courts' increasing receptivity to laches defenses in art recovery litigation[40] and 2) hold that the HEAR Act's provisions are compatible with this trend. New York courts and the Second Circuit adjudicate many of the art recovery cases brought in the United States, and many future claims will likely be against institutions such as the Met who have long possessed works of questionable provenance.[41] Thus, *Zuckerman*'s ruling on laches likely narrows the beneficiaries of the HEAR Act to a small group of restitution claimants, assuring that the Act will be limited in scope.

New York's statute of limitations for replevin and conversion claims begins to accrue after a defendant has refused the demand of a plaintiff

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[36] *Id.* at 196 (alteration in original) (quoting Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 5(a), 130 Stat. 1524, 1526 (to be codified at 22 U.S.C. § 1621 note)).

[37] *Id.* at 197 (citing S. REP. NO. 114-394, at 7 (2016)).

[38] *Id.* at 196.

[39] *See* Brief for Defendant-Appellee at 58–60, *Zuckerman*, 928 F.3d 186 (No. 18-634-cv) (arguing laches as the last of six grounds for dismissal of Zuckerman's claims); Memorandum of Law in Support of Defendant the Metropolitan Museum of Art's Motion to Dismiss the Amended Complaint, *supra* note 18, at 19–20 (same); *see also Zuckerman*, 928 F.3d at 192 n.4 (citing Brief for Defendant-Appellee, *supra*, at 55 n.15) (noting that the Met asserted statute of limitations and laches defenses "but 'requested that the district court address the merits-based defenses,' which the district court did").

[40] *See* Bert Demarsin, *Has the Time (of Laches) Come? Recent Nazi-Era Art Litigation in the New York Forum*, 59 BUFF. L. REV. 621, 621–22, 664 (2011) (arguing that since the mid-to-late 1990s courts in the New York forum have been "interpreting existing rules to provide significantly more protection for a good faith purchaser, as opposed to following New York's traditional policy of favoring the original owner," *id.* at 622, and that "henceforth it will be unlikely for Holocaust survivors (or their heirs) to prevail in their attempts to obtain recovery of their stolen heirlooms," *id.* at 664).

[41] *See, e.g.*, Charles Cronin, *Ethical Quandaries: The Holocaust Expropriated Art Recovery Act and Claims for Works in Public Museums*, 92 ST. JOHN'S L. REV. 509, 539 (2018) (arguing that most Nazi-related art claims in the United States have been asserted "against public museums or other non-profit organizations, and the U.S. or state governments").

for the return of property.[42] To discourage plaintiffs from delaying demands under the state's unique "demand and refusal"[43] rule, New York courts allow the equitable defense of laches.[44] In determining whether a laches defense is valid, courts take into account the time lapsed before a claim and two subjective factors: the reasonableness of the delay and the harm or prejudice the defendant suffered due to the delay.[45] Historically, courts have viewed laches defenses as heavily fact-specific and therefore best suited to resolution at trial.[46] For example, in *Solomon R. Guggenheim Foundation v. Lubell*,[47] the New York Court of Appeals held that the reasonableness of the Guggenheim Museum's delayed response to the theft of a work in its collection was a factual issue that made granting summary judgment on laches inappropriate.[48]

However, in the past couple of decades, courts in the New York forum have granted favorable rulings on laches defenses in art-theft cases on pretrial motions, particularly on summary judgment.[49] In one of the first such cases, *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*,[50] a case involving a Byzantine manuscript lost decades before the recovery claim,[51] the Southern District of New York court determined at summary judgment that laches applied, considering the plaintiff's decades of delay and failure to report the missing work.[52] As a result of the plaintiff's delay and the loss of evidence to support either a theft or the defendant's valid purchase, the court determined that it would be "virtually impossible for the [defendants] to prove ownership," therefore prejudicing them.[53]

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[42] For an early application of the judge-made rule, see Menzel v. List, 253 N.Y.S.2d 43, 44 (App. Div. 1964) (per curiam). *See also* Demarsin, *supra* note 40, at 639–42 (describing the rule).

[43] *Menzel*, 253 N.Y.S.2d at 44.

[44] *See* Solomon R. Guggenheim Found. v. Lubell, 569 N.E.2d 426, 431 (N.Y. 1991).

[45] Demarsin, *supra* note 40, at 629.

[46] *Id.* at 677–78; *see also* Schoeps v. Museum of Modern Art, 594 F. Supp. 2d 461, 468 (S.D.N.Y. 2009) (holding that genuine issues of material fact precluded the application of laches defense at summary judgment); Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc., No. 98 Civ. 7664, 1999 WL 673347, at *9 (S.D.N.Y. Aug. 30, 1999) ("In many cases, the application of the laches defense is an issue for trial."); Republic of Turk. v. Metro. Museum of Art, 762 F. Supp. 44, 46–47 (S.D.N.Y. 1990) (holding that genuine issues of material fact precluded the application of laches defense at summary judgment).

[47] 569 N.E.2d 426.

[48] *Id.* at 431.

[49] *See* Demarsin, *supra* note 40, at 678; *see also, e.g.*, Sanchez v. Trs. of the Univ. of Pa., No. 04 Civ. 1253, 2005 WL 94847, at *4 (S.D.N.Y. Jan. 18, 2004) (granting a motion for summary judgment on the grounds that the defendants had established a laches defense); *Greek Orthodox Patriarchate*, 1999 WL 673347, at *10–11 (same); Peters v. Sotheby's Inc. (*In re* Peters), 821 N.Y.S.2d 61, 69 (App. Div. 2006) (holding that the petitioner's application for preaction discovery was barred by laches).

[50] No. 98 Civ. 7664, 1999 WL 673347.

[51] *Id.* at *2–3.

[52] *Id.* at *10–11; *see also* Demarsin, *supra* note 40, at 682–83.

[53] *Greek Orthodox Patriarchate*, 1999 WL 673347, at *10; *see also Sanchez*, 2005 WL 94847, at *3–4 (granting the defendant's motion for summary judgment on laches through similar reasoning).

The Second Circuit's reasoning in *Zuckerman* aligns with the district court's in *Greek Orthodox Patriarchate*. First, the court concluded that the delay in making the claim was unreasonable because the Leffmanns had made no attempt to recover *The Actor* after the war, despite being a "financially sophisticated couple" that "actively and successfully pursued other claims for Nazi-era losses."[54] Then, it held that the six-decade interval between the end of the war and Zuckerman's claim was prejudicial to the Met, as the timespan "ha[d] resulted in 'deceased witness[es], faded memories, . . . and hearsay testimony of questionable value,' as well as the likely disappearance of documentary evidence."[55]

Nevertheless, the court's conclusion in *Zuckerman* provides even stronger support for the use of laches defenses at pretrial motions in art recovery claims than do the previous cases. The court made its determination at an earlier stage, the motion to dismiss,[56] than did the courts in *Greek Orthodox Patriarchate* and the cases that followed, which were decided at summary judgment.[57] Significantly, the court was confident enough to find laches at the motion to dismiss stage despite the fact that it failed to address several factual issues. For one, the plaintiff disputed the court's (and defense's) assertion that the Leffmanns had "actively and successfully pursued other claims" after the Second World War but chose not to pursue the loss of *The Actor*.[58] Moreover, the court did not address the possibility that the Met's misleading published provenance could have been responsible for the Leffmann heirs' failure to seek recovery of *The Actor* in a timely manner. The published provenance suggested that Leffmann had sold the painting over twenty years before the rise of the Nazi Party,[59] thereby leaving no indication that the sale of *The Actor* could have been related to Nazi persecution. Given that Paul and Alice Leffmann — the individuals best positioned to correct the mistaken provenance — both died before the earliest known date of its publication, it is by no means obvious that a reasonable jury would have found the mistaken provenance inconsequential to the equities of the case.

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[54] *Zuckerman*, 928 F.3d at 194; *cf.* DeWeerth v. Baldinger, 836 F.2d 103, 112 (2d Cir. 1987) (arguing that the plaintiff, "a wealthy and sophisticated art collector," should have acted more diligently in attempting to recover a Monet painting stolen during the Second World War).

[55] *Zuckerman*, 928 F.3d at 194 (second alteration and omission in original) (quoting Solomon R. Guggenheim Found. v. Lubell, 550 N.Y.S.2d 618, 621 (App. Div. 1990), *aff'd*, 569 N.E.2d 426 (N.Y. 1991)).

[56] *Id.* at 190.

[57] *See Sanchez*, 2005 WL 94847, at *1; *Greek Orthodox Patriarchate*, 1999 WL 673347, at *1.

[58] *Zuckerman*, 928 F.3d at 194; *see also* Reply Brief for Plaintiff-Appellant at 8–9, *Zuckerman*, 928 F.3d 186 (No. 18-634-cv).

[59] *Zuckerman*, 928 F.3d at 192.

Thus, in reaching its decision, the *Zuckerman* panel seemed to imply that any actions that did not rise to constant, public, and diligent attempts to recover lost work beginning relatively soon after the war would fail to defeat a laches defense to such claims. Or it reasoned that resolving these issues would require evidence that is now lost, thus prejudicing the Met.[60] Its rationale notwithstanding, the court's laches-based ruling on a motion to dismiss pushed the availability of the defense in Nazi and other art-theft cases to well before where it resided in the past: the trial or summary judgment stages. This shift will likely make future plaintiffs' attempts to overcome the defense much harder.

The *Zuckerman* panel affirmatively addressed one of the ambiguities of the HEAR Act, the availability of a laches defense under the statute, by stating that the new law's changes to defenses "*at law*" did not affect existing defenses "*at equity*."[61] The new law was passed because claimants of Nazi-looted art "must painstakingly piece together their cases from a fragmentary historical record ravaged by persecution, war, and genocide," a task that was difficult, if not impossible, to achieve under the previous statutes of limitations.[62] Yet, the Second Circuit concluded that potential claimants must still show diligence in trying to piece together their cases from some time relatively soon after any alleged confiscation.[63] The court attempted to narrow its ruling by stating that each laches defense should be assessed on its own terms.[64] However, the likely similarity in factual structure between this case and many potential recovery claims — an heir seeking to recover works from an institution that has had the work in its collection for some time[65] — coupled with the fact that New York's place within the art world means many, if not most, American Nazi art recovery claims are brought within the New York forum,[66] suggests that the court has likely narrowed the beneficiaries of the HEAR Act to the small group of possible restitution claims that can overcome a laches defense. These may include claims where the defendant purchased a work knowing claimants existed;[67] those where the work in question was reasonably thought to have been

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[60] *See id.* at 194–95.

[61] *Id.* at 196.

[62] Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 2(6), 130 Stat. 1524, 1525 (to be codified at 22 U.S.C. § 1621 note).

[63] *See Zuckerman*, 928 F.3d at 195–96.

[64] *Id.* at 197.

[65] *See* Cronin, *supra* note 41, at 539–40.

[66] *See* Jason Grant, *Fight to Reclaim Nazi-Stolen Art Plays Out in Manhattan Courts*, N.Y. L.J., Dec. 26, 2018, at 1.

[67] *See* Reif v. Nagy, 175 A.D.3d 107, 130–31 (N.Y. App. Div. 2019) (holding that laches did not bar the plaintiff's claims, as the defendant was not prejudiced since he was on notice of plaintiff's claims prior to his purchase of the works in question).

destroyed in the war;[68] or those where the federal government, which is not subject to laches defense enforcement, brings the case.[69]

Whether this narrowing of beneficiaries and the scope of the HEAR Act is good or bad is debatable. For those who believe the HEAR Act ought to force Nazi-related claims to be settled on the merits,[70] the court's ruling on laches at the motion to dismiss stage cuts against the Act's purpose. However, for those who argue that an expansive reading of the Act may unjustly enrich distant heirs,[71] the court's ruling may be welcome. In fact, Congress's decision to sunset the Act on January 1, 2027, around the time that all or almost all Holocaust survivors can reasonably be expected to have died of old age,[72] may signal its concern that heirs could bring claims ad infinitum. Moreover, as the Second Circuit stated, the HEAR Act's intention to resolve claims in a "just and fair manner" theoretically also considers justice done to the defendant.[73] Thus, while the Second Circuit's ruling on laches at such an early stage may seem rash considering the real factual issues at play, the court's overall interpretation of the HEAR Act may have limited the law as Congress intended.

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[68] *See, e.g.*, Sotheby's, Inc. v. Shene, No. 04 Civ. 10067, 2009 WL 762697, at *4–5 (S.D.N.Y. Mar. 23, 2009) (refusing to recognize a laches defense because the plaintiff reasonably believed until 2004 that the work had been destroyed in a fire during the Second World War); *see also* Demarsin, *supra* note 40, at 681–82.

[69] *See, e.g.*, United States v. Portrait of Wally, 663 F. Supp. 2d 232, 275 (S.D.N.Y. 2009) (citing United States v. Summerlin, 310 U.S. 414, 416 (1940)).

[70] *See* O'Donnell, *supra* note 21, at 275–77.

[71] *See, e.g.*, Cronin, *supra* note 41, at 547–48 ("[P]erhaps the most problematic aspect of HEAR . . . lies in [its] according heirs the same moral and legal standing as direct victims of Nazi persecution and predation. . . . [T]he end result of initiatives like HEAR may be to benefit a few claimants . . . who neither directly suffered at the hands of the Nazis, nor worked to acquire the artworks the Nazis looted from their forbears.").

[72] *See* TIME for Holocaust Survivors Act, S. 2179, 116th Cong. § 2(4)–(5) (2019) (estimating the number of Holocaust survivors living in the United States at the end of 2018 at approximately 80,000 and noting that "[e]very Holocaust survivor is now at least 74 years old, most are in at least their mid-to-late eighties, and many are in their nineties and beyond," *id.* § 2(5)).

[73] *Zuckerman*, 928 F.3d at 196 (quoting Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, § 3(2), 130 Stat. 1524, 1526 (to be codified at 22 U.S.C. § 1621 note)).