Navigating the Ambiguities and Uncertainties of the Holocaust Expropriated Art Recovery Act of 2016

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INTRODUCTION

With an admirable purpose, a celebrity endorsement from Dame Helen Mirren, and unanimous support in Congress, the Holocaust Expropriated Art Recovery Act (HEAR Act), passed in late 2016, appears to be a rare legislative success. Its congressional momentum, however, belies the pitfalls that inhere in its text. The Act's nuanced and often ambiguous language raises many questions to be addressed in future litigation over restitution claims to Nazi-looted art.

The HEAR Act was meant to address a perceived problem that legitimate claims to recover art looted by the Nazis were not being heard "on the merits" in U.S. courts, but were instead too frequently being dismissed as brought too late—in particular, blocked by courts' application of state statutes of limitations. And, at a minimum, disputes over the timeliness of claims to Nazi-looted art rendered litigation of such claims protracted and costlier. The Act sought to relieve claimants of these obstacles by instituting a nationwide six-year limitations period running from "actual knowledge" of the relevant facts.

Despite its relatively short length, the HEAR Act brings a number of interpretive difficulties that will give rise to a new set of litigation hurdles for both claimants and possessors of artworks subject to claims. This Article is meant as a guide to courts and litigants in navigating key ambiguities and uncertainties in the statute.[1] The Article discusses the Act in three parts. First, we briefly explain the context in which the Act was enacted: the history of United States and international efforts to return art lost during the Holocaust to rightful owners. Second, we describe the Act's consideration by Congress and its operative provisions. We finally discuss half a dozen instances in which the HEAR Act's language is unclear, ambiguous, or raises difficult issues about the application or scope of the statute. Several of these instances are ambiguities created by the text of the statute, which is often in tension with its legislative history; others reflect an apparent mismatch between the statutory language and the practical reality of litigation. Where possible, we suggest what we believe is the most plausible and compelling reading of problematic statutory language in light of the text, history, and purposes of the Act, as well as the realities of litigation over Nazi-era art restitution claims.

Our concern with the uncertainties created by the Act's language is not theoretical. Litigants are already espousing conflicting interpretations of the Act's language on some of the points discussed below, and courts have already reached holdings at odds with the statute's language or legislative history (and sometimes both). All in, an Act meant to streamline claims to recover Nazi-looted art may well end up making

1. This Article does not address broader questions about the HEAR Act's potential constitutional infirmities, questions some commentators have already raised. *See* William L. Charron, *The Problem of Purely Procedural Preemption Presented by the Federal HEAR Act*, 2018 PEPP. L. REV. 19, 66–67 (2018) (arguing HEAR Act contravenes the Tenth Amendment because it purports to preempt state causes of action on a purely procedural basis); Herbert I. Lazerow, *Holocaust Art Disputes: The Holocaust Expropriated Art Recovery Act of 2016*, 51 INT'L LAW. 195 (2018) (arguing application of HEAR Act in circumstances where state statute of limitations had already expired would be an unconstitutional taking).

such litigation costlier and more time-consuming for parties and courts as litigants argue for their preferred meaning of the Act's terms.

I. HOLOCAUST-ERA ART RECOVERY IN THE UNITED STATES PRIOR TO THE HEAR ACT

As has been told before in greater detail, the scope of the Nazi's programmatic pillage of artworks has rendered it the "greatest displacement of art in human history."[2] From the time the Nazis took power in Germany in 1933, until the end of World War II in 1945, the Nazis stole and looted millions of artworks and other cultural property from museums and private collections throughout Europe.[3] These artworks were often forcibly taken outright or subjected to "forced sales" from which the owner received minimal compensation.[4] The mass theft and confiscation of artworks was not merely incident to war—rather, it was an expressed initiative of the Third Reich to amass works owned by Jews. Several organizations, such as the *Einsatzstab Reichsleiter Rosenberg fur Besetzten Gebiete* (The Reichsleiter Rosenberg Institute for the Occupied Territories, or ERR) were formed with the mandate to seize Jewish art collections and other objects.[5] The ERR held the works it looted in the *Museum Jeu de Paume* in Paris, where art historians inventoried them before sending them to Germany. Many of the works were kept by Hitler, made available to other Nazi leaders, auctioned off, or destroyed.[6]

A. RESTITUTION EFFORTS AFTER WORLD WAR II

Following World War II, the United States pursued policies and diplomatic efforts to help return artwork and other cultural property lost in the Holocaust to their rightful owners.[7] Shortly after the war, President Truman approved a policy of "external restitution," under which recovered artworks were delivered to post-war governments in the countries where the art was believed to have been seized, rather than to individual owners.[8] Those governments were expected to institute procedures to return particular artworks to the families that had lost them.[9]

As a general matter, external restitution proved unfruitful to put it charitably. After the war, the countries tasked with returning the artworks to their rightful

2. SENATOR GRASSLEY, HOLOCAUST EXPROPRIATED ART RECOVERY ACT OF 2016, S. REP. NO. 114-394, at 2 (2016).

3. Anne Rothfeld, *Nazi Looted Art*, PROLOGUE MAG., Summer 2002, at 127, *available at* https://perma.cc/24SZ-YNPR.

4. *Id.*; Simon J. Frankel & Ethan Forrest, *Museums' Initiation of Declaratory Judgment Actions and Assertion of Statutes of Limitations in Response to Nazi-Era Art Restitution Claims—A Defense*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 279, 285 (2013).

5. Rothfeld, *supra* note 3.

6. *Id.*

7. S. REP. NO. 114–394, at 2 (2016).

8. *Id.*

9. *Id.*

owners did not always, if ever, vigorously restitute works to their prior owners.[10] For example, some 8,000 to 9,000 works of art were returned to the Netherlands, but only about 500 to 1,000 of these were restituted to their original owners by 1951, when the Dutch government announced the restitution process was completed and stopped accepting claims.[11] Also hampering the effort was the fact some works of art seized by the Nazis had already left Europe during World War II and ended up in the hands of good faith purchasers around the world, particularly in the United States. Private lawsuits in the United States sought restitution of works now located there, or, in some instances, in foreign countries,[12] but there was no broad government policy or effort to support restitution of seized artworks. These obstacles were further compounded by the lack of information available to families whose artwork had been stolen and the psychological difficulty of pursuing their claims.[13]

The United States renewed its effort to return Holocaust-era stolen artworks to their rightful owners in 1998, when it convened the Washington Conference.[14] At the Conference, the forty-four participating nations unanimously approved the Washington Conference Principles on Nazi-Confiscated Art, which built on Association of Art Museum Directors guidelines announced several months earlier.[15] The Washington Conference Principles declared that Holocaust victims and their heirs "should be encouraged to come forward and make known their claims" to art looted or stolen by Nazis and that "steps should be taken expeditiously to achieve a just and fair solution" to those claims.[16]

Alongside its diplomatic efforts, the United States instituted a number of laws to advance, or at least advocate for, the goal of returning property lost or stolen during the Holocaust to rightful owners. The Holocaust Victims Redress Act, enacted by Congress in 1998, did not directly address rules for the return of artwork, but it included a "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art." This provision, directed at international restitution efforts, simply

10. *Id.*

11. Nina Siegal, *Are the Dutch Lagging in Efforts to Return Art Looted by the Nazis?*, N.Y. TIMES, May 12, 2017, https://perma.cc/L4CY-DBKN.

12. *See e.g.*, Republic of Austria v. Altmann, 541 U.S. 677 (2004); Bakalar v. Vavra, 619 F.3d 136 (2d Cir. 2010); Orkin v. Taylor, 487 F.3d 734 (9th Cir. 2007); DeWeerth v. Baldinger, 28 F.3d 1266 (2d Cir. 1994); Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473 (S.D.N.Y. 2010); Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659 (E.D. La. 2009); Vineberg v. Bissonnette, 529 F. Supp. 2d 300 (D. R.I. 2007), *aff'd*, 548 F.3d 50 (1st Cir. 2008); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802 (N.D. Ohio 2006); United States v. Portrait of Wally, No. 99 Civ. 9940, 2002 WL 553532 (S.D.N.Y. 2002); Menzel v. List, 246 N.E.2d 742 (N.Y. 1969).

13. S. REP. NO. 114-394, at 2–3 (2016); *see also The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Fed. Rights and Fed. Courts*, 114th Cong. 40 (2016) (statement of Agnes Peresztegi, President, Commission for Art Recovery); *id.* at 43–46 (statement of Simon Goodman).

14. S. REP. NO. 114-394, at 3 (2016).

15. *Id.*

16. *Id*. at 7; *see also* Press Release, U.S. Dep't of State, Bureau of European & Eurasian Affairs, Washington Conference Principles on Nazi-Confiscated Art (Dec. 3, 1998), https://perma.cc/LSS9-KNPD.

stated that it was "the sense of Congress" that "all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art" confiscated during the Holocaust to rightful owners where a claimant has reasonable proof of rightful ownership.[17] The U.S. Holocaust Assets Commission Act was also enacted in 1998 to establish the Presidential Advisory Commission on Holocaust Assets to conduct research on Holocaust-era property possessed by the United States Government and to advise the President on restitution measures.[18]

Following the Washington Conference, in 1999 the Alliance of American Museums adopted non-binding standards to help museums address issues relating to objects stolen during the Holocaust.[19] And, together with the State Department, the museum community established the Nazi-Era Provenance Internet Portal, which published provenance information on tens of thousands of Nazi-era works.[20] With these new standards and greatly increased availability of information on the location and history of looted works, more owners (or heirs to original owners) were able to make claims to recover works. Notably, claimants had reasonable success in achieving amicable agreements for restitution of, or compensation for, their artworks with the museums that possessed them.[21]

The United States' diplomatic efforts to ensure the return of Holocaust-era stolen artworks to their rightful owners continued in 2009, when the United States and forty-seven other nations signed the Terezin Declaration.[22] The Declaration urged signatories to ensure their legal systems facilitate just and fair solutions to Nazi-confiscated and looted art, with claims resolved "on their merits."[23] The phrase "on their merits" was meant to suggest that nations should not allow domestic statutes of limitations—statutory time periods in which a claim must be brought—to bar recovery of Nazi-seized art where a claim brought many decades after seizure was otherwise meritorious.[24]

17. S. REP. NO. 114-394, at 7 (2016); *see also* Holocaust Victims Redress Act, Pub. L. No. 105–158, § 202, 112 Stat. 15 (1998).

18. S. REP. NO. 114-394, at 3 (2016); *see also* U.S. Holocaust Assets Commission Act of 1998, Pub. L. No. 105–186, 112 Stat. 611 (1998).

19. S. REP. NO. 114-394, at 3 (2016); *see also* American Alliance of Museums, *Ethics, Standards, and Professional Practices: Unlawful Appropriation of Objects During the Nazi Era* [hereinafter AAM Standards] (1999), *revised* (2001), https://perma.cc/W8RL-3YJM.

20. S. REP. NO. 114-394, at 4 (2016); *see also* AAM Standards, *supra* note 19.

21. S. REP. NO. 114-394, at 4 (2016); *see also* Frankel & Forrest, *supra* note 4, at 324–36.

22. S. REP. NO. 114-394, at 4 (2016).

23. *Id.*; *see also* Press Release, U.S. Dep't of State, Bureau of European & Eurasian Affairs, Prague Holocaust Era Assets Conference: Terezin Declaration [hereinafter Terezin Press Release] (June 30, 2009), https://perma.cc/4N5X-8R2D.

24. S. REP. NO. 114-394, at 4–5 (2016); *see also* Douglas Davidson, Special Envoy for Holocaust Issues, U.S. Dep't of State, Bureau of European and Eurasian Affairs, Symposium on "Should Nazi-Looted Art Works be Returned?" at the Bureau of European & Eurasian Affairs Symposium at the New York County Law Association [hereinafter Davidson Remarks] (Mar. 25, 2013), https://perma.cc/GK8W-WWPE (noting that the Terezin Declaration and Washington Principles seek "to avoid if possible resorting to legal arguments grounded in procedural matters," which would include precluding claims based on statutes of limitations).

B. STATE STATUTES OF LIMITATIONS AS APPLIED TO CLAIMS FOR STOLEN ARTWORKS

Despite the return of many works, particularly by U.S. museums, some suits seeking recovery of artworks looted during the Nazi period have failed because courts found the claimants waited too long to bring suit.[25] In the United States, these suits typically follow the same format—an original owner of artwork stolen during the Holocaust, or the owner's heir, brings a state-law claim to recover the Nazi-seized art from the current possessor. This is possible because, in contrast to civil law countries, a possessor of artwork in the United States cannot claim good title if the work was previously stolen.[26] These state-law claims are generally based on theories of replevin and conversion, and are subject to available defenses, including state statutes of limitations and courts' application of laches.

Statutes of limitations and other time-based defenses, such as laches, promote the interests of fairness and equity.[27] Justice Jackson explained the conclusive effects of statutes of limitations and laches, namely that they "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[28] Statutes of limitations, supplied by legislatures, prevent stale claims from being brought far after a cause of action has accrued and evidence has disappeared, when it would be more difficult, if not impossible, to adjudicate the merits of a claim. Similarly, courts apply laches as an equitable rule to prevent plaintiffs from sitting on their rights. These time-based defenses, rooted in equity, have barred a number of suits seeking recovery of Nazi-looted artworks, even after the Washington Conference Principles.[29]

However, many states' statutes of limitations for conversion or replevin differ in both the length of the limitations period and in the conditions required to trigger that time period. For example, in Kansas, the two-year statute of limitations for replevin begins when "the fact of the injury becomes reasonably ascertainable to the injured party," but no later than ten years after the act giving rise to the injury.[30] In Michigan, the three-year limitations period runs from the date of dispossession, regardless of the original owner's discovery of the conversion.[31] In contrast, in the District of Columbia, the three-year statute of limitations for replevin begins immediately, but

25. Frankel & Forrest, *supra* note 4, at 309–23.

26. Andrea E. Hayworth, *Stolen Artwork: Deciding Ownership is No Pretty Picture*, 43 DUKE L.J. 337, 345–47 (1993).

27. Frankel & Forrest, *supra* note 4, at 302 (citing *Developments in Law: Statutes of Limitations*, 6 HARV. L. REV. 1177 (1950)).

28. *Id.* at 303 (citing Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944)).

29. *See e.g.*, Orkin v. Taylor, 487 F.3d 734, 741–42 (9th Cir. 2007); Grosz v. Museum of Modern Art, 772 F. Supp. 2d 473, 488 (S.D.N.Y. 2010); Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659, 663–64 (E.D. La. 2009); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 807 (N.D. Ohio 2006).

30. KAN. STAT. ANN. § 60-513 (Deering, Lexis Advance through the 2018 Legis. Sess.).

31. Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *3 (E.D. Mich. Mar. 31, 2007).

in the bailment context it begins upon demand and refusal.[32] Many states have limitations periods that run from when the original owner knew or should have known (that is, had constructive knowledge) of the whereabouts of the stolen property. Even in those states where the statute of limitations begins upon "knowledge" of the claim, different elements may suffice to constitute knowledge.[33] So, under many states' statutes of limitations, heirs' claims to artworks lost during the Holocaust might generally fail as a matter of course given the many decades since World War II and the greater availability of provenance information since the Washington Conference.[34]

In response to concerns about time-based challenges faced by claimants seeking to recover artworks lost during the Holocaust, at least one state has sought to soften its statute of limitations, but with mixed success. In 2002, California amended its statute of limitations for the return of property, which had previously provided that claims for return of property had to be brought within three years of constructive knowledge of the claim.[35] Under the new law, claims seeking the return of Nazi-confiscated artworks (as distinct from other property) did not have to be brought a certain time after constructive knowledge; rather, such claims could be brought at any time, as long as they were filed before December 31, 2010.[36]

In the *Von Saher* litigation, the plaintiffs sought, under the extended limitations period, the return of two Lucas Cranach paintings long held by the Norton Simon Museum in Pasadena.[37] The Court of Appeals for the Ninth Circuit recognized California's effort to overcome procedural hurdles that often prevent courts from adjudicating the merits of ownership claims, but ultimately struck down the new

32. D.C. STAT. § 12-301(2) (Deering, Lexis Advance through Dec. 31, 2018); Sea Search Armada v. Republic of Colombia, 821 F. Supp. 2d 268, 273 (D.D.C. 2011); Hunt v. DePuy Orthopaedics, Inc., 636 F. Supp. 2d 23, 28 (D.D.C. 2009).

33. For instance, in Wyoming, the four-year limitations period for conversion and replevin actions commences "when the plaintiff knew or should have known that the property was wrongfully converted," and knows the identity of the wrongdoer. WYO. STAT. ANN. § 1–3–106 (Deering, Lexis Advance through 2018 Budget Sess.); Cross v. Berg Lumber Co., 7 P.3d 922, 930 (Wyo. 2000). Arizona similarly requires knowledge or constructive knowledge of the wrongful possession, but does not explicitly require the claimant know the identity of the wrongdoer. ARIZ. REV. STAT. § 12-542 (Deering, Lexis Advance through 2018 Legis. Sess.); Atkins v. Calypso Sys. Inc., No. CV-14-02706, 2016 WL 10650809, at *9 (D. Ariz. Nov. 16, 2016).

34. *See e.g.*, Museum of Fine Arts v. Seger-Thomschlitz, 623 F.3d 1, 9 (1st Cir. 2010) (finding claimant was on notice of claim outside limitations period under Massachusetts' three-year limitations period running from constructive knowledge, due to availability after 1998 of provenance information concerning history and location of work allegedly taken by Nazis).

35. *See* CAL. CODE CIV. PROC. § 338 (2002); Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 957–58 (9th Cir. 2010).

36. *Id.* § 354.3(b)–(c) (2002) ("Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era artwork from any [museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.] . . . Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.").

37. Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 957 (9th Cir. 2010).

statute of limitations as unconstitutional under the foreign affairs doctrine.[38] It held the statute, by addressing only claims to art looted by the Nazis, impermissibly intruded on the federal government's authority to resolve war-related claims, "a field occupied exclusively by the federal government."[39] California has since amended its statute of limitations, limiting its application to claims against museums, galleries, auctioneers, or dealers for any artworks taken no more than 100 years prior to the statute's enactment, and broadening its application to all stolen artwork, not just those taken during the Holocaust.[40]

II. THE HEAR ACT

Congress perceived the impediments posed by state statutes of limitations as unfair in light of the unique and horrific circumstances of World War II.[41] In particular, Congress concluded that, for some decades after World War II, many families were not comfortable seeking recovery of seized works or did not even know the extent of their families' losses under the Nazis.[42] And, as noted, many more records have become available in the last twenty-five years, particularly after the fall of the Berlin Wall, and those records have further enabled families to discover and locate works their relatives owned in the 1930s. In addition, information about remedies to recover seized works and records about those works became more widely available and more widely known in the years following the Washington Conference in 1998.[43] So Congress acted in an effort to ensure that Holocaust-era art claims were more consistently resolved "on the merits."[44]

A. CONGRESSIONAL HISTORY AND PURPOSES

First introduced in the Senate by Senator John Cornyn (R-TX), and originally co-sponsored by Senators Ted Cruz (R-TX), Chuck Schumer (D-NY), and Richard Blumenthal (D-CT), the HEAR Act was intended to "help facilitate the return of artwork lost to Nazis during the Holocaust to their rightful owners or heirs, and [] ensure that American law encourages the resolution of claims on Nazi-confiscated

38. *Id.* at 968.

39. *Id.*

40. CAL. CODE CIV. PROC. § 338(c)(3)(A–B) (Deering, Lexis Advance through 2018 Legis. Sess.). This version of California's limitations period was upheld against a similar foreign affairs power challenge in *Cassirer*. *See* Cassirer v. Thyssen-Bornemisza Collection Found., 737 F.3d 613, 618–19 (9th Cir. 2013).

41. S. REP. NO. 114-394, at 5 (2016).

42. *Id.* at 2–3.

43. *Id.* at 4; *see also* AAM Standards, *supra* note 19.

44. *Id.* at 5. The suggestion that statutes of limitations prevent claims from being resolved "on the merits" is somewhat misleading. The purposes of statutes of limitations are to allow for and encourage adjudication of claims on their merits. Imposing a deadline to bring a claim discourages potential claimants from sleeping on their rights. The notion is the passage of time will limit the availability of evidence and make it more difficult for disputes to be adjudicated. *See* Frankel & Forrest, *supra* note 4, at 303–05 (citing *Order of R.R. Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342, 348–49 (1944)).

art on the merits, in a fair and just manner."[45] Senator Cornyn called the bill "an important and symbolic step to reclaiming not just artwork, but familial legacy," in light of the loss suffered by many families at the hands of the Nazis.[46] Senator Blumenthal added the Act "brings us one step closer to providing simple justice to families whose cherished art was brazenly stolen by the Nazis."[47]

After amending the bill, the Senate unanimously voted to send the Act to the House of Representatives, and Congressmen Bob Goodlatte (R-VA) and Jerrold Nadler (D-NY) introduced the Act in the House. Congressman Nadler explained that "[t]his legislation will ensure that the rightful owners and their decedents can have their claims properly adjudicated."[48] The Act passed the House by a unanimous vote, and was signed into law by President Obama on December 16, 2016.

To further Congress's goal to have Holocaust-era art restitution claims adjudicated on the merits, the HEAR Act provides for a single, nationwide federal limitations period tailored to the unique circumstances of Holocaust-era claims.[49] Congress explained such a federal limitations period is needed to guarantee that the United States fulfills the promises it made to the world with the Terezin Declaration, to "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."[50]

B. THE ACT'S OPERATIVE PROVISIONS

The central operative provision in the HEAR Act provides that:

> 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 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.[51]

Definitions in the statute fill out the application of this rule. The law applies to pictures, paintings, drawings, sculpture, engravings, prints and graphic art, applied art and assemblages, books, manuscripts, musical objects and drawings, photographs

45. Press Release, Senate, Blumenthal, Cornyn, Cruz, Schumer Bill to Help Recover Nazi-Confiscated Art Passes Judiciary Committee (Sept. 15, 2016), https://perma.cc/56C8-LJTW.

46. *Id.*

47. *Id.*

48. Press Release, House of Representatives, Goodlatte and Nadler Introduce Legislation to Help Recover Art Confiscated During the Holocaust (Sept. 22, 2016), https://perma.cc/D5T5-4WQU.

49. S. REP. NO. 114-394, at 5 (2016).

50. *Id.* at 5–6 (citing Terezin Press Release, *supra* note 23).

51. Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114–308, § 5(a), 130 Stat. 1524 [hereinafter HEAR Act].

and cinematography, and sacred and ceremonial objects.[52] "Nazi persecution" is defined as "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period."[53] The "covered period" runs from 1933 to 1945.[54] And the law applies to any civil claim or cause of action pending in any federal or state court on December 16, 2016, including those pending on appeal, or filed between December 16, 2016 and December 31, 2026.[55]

Under the Act, the new statute of limitations is triggered by the claimant's (or her agent's) "actual discovery" of the identity and location of the artwork or other property, and of her "possessory interest" in it.[56] The Act defines "actual discovery" as "knowledge," which in turn means "having actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof."[57] This is in apparent contrast to most state limitation periods, which are triggered not only by actual knowledge, but by "constructive knowledge"—when a claimant knew or, in the exercise of reasonable diligence *could have known* of the existence of a claim.[58] In the case of possible misidentification, where an artwork or other property is "one of a group of substantially similar multiple artworks," "actual discovery" occurs when there are facts sufficient to form a substantial basis to believe a particular work is the one that was lost.[59]

52. HEAR Act § 4(2) ("Artwork or other property. The term "artwork or other property" means—
(A) pictures, paintings, and drawings;
(B) statuary art and sculpture;
(C) engravings, prints, lithographs, and works of graphic art;
(D) applied art and original artistic assemblages and montages;
(E) books, archives, musical objects and manuscripts (including musical manuscripts and sheets), and sound, photographic, and cinematographic archives and mediums; and
(F) sacred and ceremonial objects and Judaica.").

53. HEAR Act § 4(5).

54. HEAR Act § 4(3).

55. HEAR Act § 5(d) ("Applicability. Subsection (a) shall apply to any civil claim or cause of action that is—
(1) pending in any court on the date of enactment of this Act, including any civil claim or cause of action that is pending on appeal or for which the time to file an appeal has not expired; or
(2) filed during the period beginning on the date of enactment of this Act and ending on December 31, 2026.").

56. *Id.*

57. HEAR Act § 4(1) ("Actual discovery. The term "actual discovery" means knowledge."); *id.* § 4(4).

58. *See, e.g.*, Orkin v. Taylor, 487 F.3d 734, 741–42 (9th Cir. 2007) (stating cause of action accrued when plaintiffs first reasonably could have discovered their claim and the whereabouts of the particular artwork); Dunbar v. Seger-Thomschitz, 638 F. Supp. 2d 659 at 663–64 (E.D. La. 2009) (explaining "liberative prescription," *i.e.*, limitations period under Louisiana law, begins when claimant reasonably should have discovered the injury); Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 806–07 (N.D. Ohio 2006) (explaining Ohio's four-year statute of limitations for replevin accrues when a person has "knowledge of such facts as would lead a fair and prudent man . . . to make further inquiry").

59. HEAR Act § 5(b) ("Possible Misidentification. For purposes of subsection (a)(1), in a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to

In plain terms, when a claimant knows the identity and location of a work lost during the Holocaust, and knows she has a claim to that work, she then has six years to sue the current possessor or putative owner to recover that work. In the legislative history, Congress explained that this rule is intended to open courts to claimants to bring covered claims and have them resolved on the merits, and the special circumstances created by Nazi persecution necessitate the temporary waiver of defenses related to passage of time.[60] For example, in *Cassirer v. Thyssen-Bornemisza Collection Foundation*, the Cassirer family sued the Thyssen-Bornemisza Collection for the return of a Camille Pissarro painting that was forcibly sold during World War II.[61] The Ninth Circuit held the Cassirers' claim was timely under the HEAR Act because the family acquired actual knowledge in 2000 and filed the action on May 10, 2005.[62] The court stated, "[s]ince the lawsuit appears to have been filed within six years of actual discovery, the Cassirers' claims are timely under the statute of limitations created by HEAR"—even if the limitations period under state law at the time might have been shorter.[63]

For claims as to which actual knowledge arises after passage of the HEAR Act, the Act's operation appears straightforward. Assuming such a claim is brought before the Act sunsets on December 31, 2026, the claimant has six years from when she acquired actual knowledge to bring a claim, regardless of any otherwise applicable state limitations period.

Less straightforward is the treatment of claims where the claimant may have had actual knowledge *before* enactment of the Act but has not yet sued. The HEAR Act has complicated provisions intended to address these preexisting claims. The Act provides that a claim shall be deemed to have been actually discovered on December 16, 2016 (the date of enactment) if either: (1) before December 16, 2016, a claimant had knowledge of the identity and location of a work, and her possessory interest in it, and her claim was barred by a federal or state statute of limitations, or (2) before December 16, 2016, a claimant had the requisite knowledge, and on December 16, 2016, her claim was not barred by a federal or state statute of limitations.[64]

occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.").

60. S. REP. NO. 114-394, at 9 (2016).

61. Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 957 (9th Cir. 2017).

62. *Id.* at 960.

63. *Id.*

64. HEAR Act § 5(c) ("Preexisting claims. Except as provided in subsection (e), a civil claim or cause of action described in subsection (a) shall be deemed to have been actually discovered on the date of enactment of this Act if—

(1) before the date of enactment of this Act—

(A) a claimant had knowledge of the elements set forth in subsection (a); and

(B) the civil claim or cause of action was barred by a Federal or State statute of limitations; or

(2)

(A) before the date of enactment of this Act, a claimant had knowledge of the elements set forth in subsection (a); and

Thus, a claimant will have six years, until December 15, 2022, to bring her claim if, before December 16, 2016, she had the requisite knowledge and her claim was time-barred under applicable state law, or she had knowledge before December 16, 2016, but her claim was not time-barred as of that date. Congress explained this subsection "gives an opportunity to claimants to resuscitate claims that may have been barred in the past."[65]

However, the Act includes an exception to this provision for preexisting claims. Such a claim will still be time-barred under state law *if* the claimant or her predecessor-in-interest had actual knowledge of the identity and location of the work and her possessory interest in it on or after January 1, 1999, "not less than 6 years have passed" from the date the claimant or her predecessor acquired such knowledge, and "during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations."[66]

Congress explained in the legislative history that this exception encapsulates the importance of quieting title in property generally, and the importance that claimants assert their rights in a timely fashion.[67] The 1998 Washington Conference led to the publication of information about artwork and other cultural property that may have been expropriated by the Nazis. Accordingly, claimants who acquired the requisite knowledge after the Washington Conference but failed to bring claims within six years do not benefit from the new statute of limitations under this provision. However, as discussed below, this subsection is not a model of clarity.

III. INTERPRETIVE CHALLENGES CREATED BY THE HEAR ACT

As noted, the HEAR Act was meant, in part, to streamline litigation over Nazi-looted art and make such litigation less expensive.[68] The Act will certainly have that effect in some cases—where a statute of limitations defense might have been interposed and litigated before but is now obviously precluded by the explicit language of the statute. However, the text of the Act presents numerous interpretive challenges, and those challenges will lead to more, not less, litigation down the line. We discuss here six interpretive challenges the text of the Act presents, how courts have grappled with them so far, and what we suggest are the most plausible and appropriate interpretations of the Act.

(B) on the date of enactment of this Act, the civil claim or cause of action was not barred by a Federal or State statute of limitations.").

65. S. REP. NO. 114-394, at 10 (2016).

66. HEAR Act § 5(e) ("Exception. Subsection (a) shall not apply to any civil claim or cause of action barred on the day before the date of enactment of this Act by a Federal or State statute of limitations if—

(1) the claimant or a predecessor-in-interest of the claimant had knowledge of the elements set forth in subsection (a) on or after January 1, 1999; and

(2) not less than 6 years have passed from the date such claimant or predecessor-in-interest acquired such knowledge and during which time the civil claim or cause of action was not barred by a Federal or State statute of limitations.").

67. S. REP. NO. 114-394, at 10 (2016).

68. S. REP. NO. 114-394, at 5–6, 8 (2016).

A. UNDERSTANDING PREEXISTING CLAIMS AND THE EXCEPTION

As noted, the HEAR Act provides that if a claimant acquires knowledge on or after December 16, 2016, then she can bring a claim within six years after acquiring knowledge or by December 31, 2026, whichever is sooner. This application of the statute is straightforward. What is more difficult is understanding how the law applies where a claimant had actual knowledge of a claim *before* the enactment of the Act.

As explained above, the statute's preexisting claims provision addresses this and states that if a claimant had actual knowledge of a claim before December 16, 2016 and the claim was barred by a federal or state statute of limitations before December 16, 2016, that claimant's claim would be deemed "actually discovered" on December 16, 2016—and thus revived for a six-year period starting at that time.[69] This would mean that, for example, if a claimant subject to a three-year state statute of limitations acquired actual knowledge on December 17, 2010 and did not bring a claim for more than three years from that date, the claimant would have a new opportunity to bring the claim for six years, from December 16, 2016 to December 15, 2022—apparently yielding a total of nine years (over a twelve-year period) to bring the claim.

The preexisting claims provision also appears to extend to a claim where the claimant had knowledge before December 16, 2016, but the claim was not time-barred under the state statute as of December 16, 2016.[70] Revising the previous example, if the claimant subject to a three-year state statute of limitations acquired actual knowledge on December 16, 2014 (two years before enactment), it would appear the claimant can now bring the claim until December 15, 2022, as the six-year clock for the claim starts on December 16, 2016—yielding a total of eight years to bring the claim.

But what the preexisting claims provision giveth, the exception taketh away—at least to some extent. Under the exception, a claimant's claim will *not* be revived if (1) the claimant had actual knowledge any time between January 1, 1999 and enactment of the Act (December 16, 2016), *and* (2) six or more years have passed from the date of knowledge and "during which time" the claim was *not* barred by a federal or state statute of limitations.[71] As noted, this section was intended to provide that if a claimant had the requisite knowledge to bring a claim after the Washington Conference Principles but did not do so timely, the preexisting claims provision would *not* revive the claim by deeming a claim "actually discovered" on December 16, 2016.

The interpretive challenge comes from the phrase "during which time," which appears to have two possible meanings in this context. The more natural reading of the language that "not less than 6 years have passed [from date of knowledge] and during which time the [claim] was not barred by a Federal or State statute of

69. *See supra* note 64 and accompanying text.
70. *See id.*
71. *See supra* note 66 and accompanying text.

limitations" is that the claim was not time-barred during the *entire* six years following actual knowledge. This is the "time" mentioned early in the same provision.

However, if that reading is correct, the exception to the revival of preexisting claims would rarely if ever apply because it would require that a claim that existed before the HEAR Act had been timely for at least six years under preexisting law. Only thirteen states have a statute of limitations as long as six years.[72] Only one of those states, California, sees any volume of Holocaust recovery claims. And, as noted above, California's limitations period was three years until it was extended for claims to artworks in 2010.[73] If a claim must have been timely under state law for a full six-year period in order *not* to be revived by the HEAR Act (and so be potentially time-barred), the provision on preexisting claims will only *possibly* apply in cases brought in those states. In the overwhelming majority of states, the exception would never apply. This means that even where a claimant knew all the necessary facts to sue at the time of or shortly after the Washington Conference Principles, she could claim that she could not have sued for a full six-year period under state law, and so her claim period should start over for six years on December 16, 2016 under the preexisting claims provision. This seems an odd result, but it might appear to follow from the most natural reading of the text of the statute.

However, the legislative history supports a different reading of the "during which time" language in the exception, stating that:

> [C]laims do not benefit from the HEAR Act limitations period if the claimant had the relevant actual knowledge on or after January 1, 1999, not less than six years have passed from the date the claimant . . . had such knowledge, *during any portion of that time the claim was timely* and, nonetheless, the claimant failed to bring it.[74]

72. Rhode Island has a ten-year statute of limitations for all civil actions, including conversion and replevin. 9 R.I. GEN. LAWS § 9-1-13(a) (Deering, Lexis Advance through 2018 Legis. Sess.). Alabama, Hawaii, Indiana, Maine, Minnesota, New Jersey, North Dakota, Oregon, South Dakota, Vermont, and Wisconsin all have six-year statutes of limitations, either for replevin specifically, for conversion generally, or for all civil actions. *See* ALA. CODE § 6-2-34(3) (LexisNexis, Lexis Advance through 2018 Legis. Sess.); HAW. REV. STAT. ANN. § 657-1(3) (LexisNexis, Lexis Advance through 2018 Legis. Sess.); IND. CODE ANN. § 34-11-2-7(3) (Burns, Lexis Advance through 2018 Legis. Sess.); ME. REV. STAT. Ann. tit. 14, § 752 (LexisNexis, Lexis Advance through 2018 Legis. Sess.); MINN. STAT. ANN. § 541.05(4) (LexisNexis, Lexis Advance through 2018 Legis. Sess.); N.J. REV. ANN. STAT. § 2A:14-1 (LexisNexis, Lexis Advance through 2018 Legis. Sess.); N.D. CENT. CODE § 28-01-16(4) (LexisNexis, Lexis Advance through 2017 Legis. Sess.); OR. REV. STAT. ANN. § 12.080(4) (LexisNexis, Lexis Advance through 2018 Legis. Sess.); S.D. CODIFIED LAWS § 15-2-13(4) (LexisNexis, Lexis Advance through 2018 Legis. Sess.); VT. STAT. ANN. tit. 12, § 511 (LexisNexis, Lexis Advance through 2018 First Special Sess.); WISC. STAT. ANN. § 893.51(1) (LexisNexis, Lexis Advance through Act 369 of the 2017–18 Legis. Sess.). California's six-year statute of limitations, enacted in 2010, specifically applies to recovery of a stolen work of fine art brought against a museum, gallery, auctioneer, or dealer. CAL. CODE CIV. PROC. § 338(c)(3)(A) (Deering, Lexis Advance through 2018 Legis. Sess.).

73. *Compare* CAL. CODE CIV. PROC. § 338(c)(3)(A) (Deering, Lexis Advance through 2018 Legis. Sess.), *with id.* § 354.3(b)–(c) (West 2002) (2002) (current version at CAL. CODE CIV. PROC. § 338(c)(3)(A) (Deering, Lexis Advance through 2018 Legis. Sess.)).

74. S. REP. NO. 114-394, at 10 (2016) (emphasis added).

The reference to "any portion of that time" indicates that a pre-HEAR Act claim that was timely under state law for *any* period of time is not revived by the statute, assuming the applicable state limitations period ran prior to enactment of the law. According to the legislative history, the exception "is not intended to extend shorter limitations periods that came and went prior to the enactment of the HEAR Act."[75] The Senate Report provides the following illustration: "if the relevant conditions are met and the claim arose after 1999; the applicable limitations period was three years; and three years elapsed before the HEAR Act was enacted, the claim would fall under the 5(e) exception"[76]—meaning existing state law would apply and the claim would not be revived as long as there had been *some* period when the claim could have been brought prior to enactment of the Act. Following the legislative history's guidance, claims in the vast majority of states with statutes of limitations triggered by the claimant's knowledge would never be revived.[77]

To date, only one court appears to have approached this issue but did not delve into it. In *De Csepel v. Republic of Hungary*, the Court of Appeals for the District of Columbia primarily addressed the application of the Foreign Sovereign Immunities Act to a family's attempt to recover two groups of artworks held by Hungary or related entities.[78] In passing, the court addressed the claimants' argument that, if any of their claims were dismissed, they would be allowed to amend their complaint in light of the HEAR Act.[79] The Court of Appeals granted the family's request without reasoning, stating "Plaintiffs whose claims were barred by a statute of limitations now have six years from the enactment of the new statute to file their claims."[80] It appears the court believed that preexisting claims, known for at least six years but barred by an otherwise applicable three-year limitations period, could still be brought after the HEAR Act. This conclusion followed the text of the Act, rather than its legislative history.[81] As noted, however, the court addressed the point in passing and there is no indication it engaged with the statute's ambiguity.[82]

75. *Id.* at 11.

76. *Id.*

77. The HEAR Act's definition of "knowledge" is more specific than many states' general knowledge requirement. *See supra* note 33; *see also*, *In re* Building Materials Corp. of Am. Asphalt Roofing Shingle Prods. Liab. Litig., No. 8:11-mn-02000, 2013 WL 1282223, at *4 (D.S.C. Mar. 27, 2013). For this reason, even in those states with knowledge-triggered limitations periods, there may be instances in which a claim is time-barred under the state statute of limitations but the claimant only subsequently acquires HEAR Act "knowledge," potentially reviving the claim.

78. De Csepel v. Republic of Hungary, 859 F.3d 1094, 1097 (D.C. Cir. 2017).

79. *Id.* at 1109.

80. *Id.*

81. *See id.* at 1109–10.

82. One court has noted the interplay between the preexisting claim provision in the HEAR Act and the exception to that provision for claims that could have been brought "during which time." *See* Maestracci v. Helly Nahmad Gallery, Inc., 155 A.D.3d 401, 404 (N.Y. App. Div. Nov. 2, 2017). In that case, however, the claim had not been discovered more than six years prior to 2016, so the court had no reason to consider whether a claim discovered after the Washington Conference Principles but more than six years before 2016 is resuscitated by the HEAR Act even if it would have been timely for some shorter period under state law. *See id.* at 405 ("[D]efendants have failed to establish that Maestracci had actual

It remains to be seen whether other courts will also reflexively apply the "during which time" language in the Act or instead follow the legislative history's guidance in deciding how to apply the dueling texts of the preexisting claims provision and its exception.[83] Given that, as explained above, the more natural reading of "during which time" results in a statutory category that will almost never apply, courts should follow the legislative history and treat a preexisting claim as untimely if it could have been brought for any period during six years after January 1, 1999 and the claimant acquired actual knowledge. It is unclear why Congress did not just use the language set out in the legislative history—"during *any portion of* that time the claim was timely"—but the foregoing arguments illustrate why this is the more appropriate reading of the statute.

B. THE HEAR ACT AND NEW YORK'S "DEMAND AND REFUSAL" RULE

New York's distinctive rule for triggering its state statute of limitations adds a curious wrinkle to the HEAR Act's application. Whereas in most states, statutes of limitations run from constructive discovery of the facts necessary to bring a claim, in New York, the limitations period for replevin only begins when a claimant makes a demand for the return of property to the current possessor and is refused. This rule is premised on the theory that the defendant's possession is not wrongful until he or she refuses to return the property to the claimant.[84]

As a practical matter, a claimant suing in New York need not bring a claim diligently once she has knowledge of the basis for the claim. She can make a demand years after knowledge and then, when the demand is refused, she has three years to bring a timely claim. In this situation, a court may still find laches are applicable.[85] The significance of this unusual rule is magnified because a large proportion of the Nazi-era art restitution claims in the United States have been brought in New York—not surprising, given the central role of New York in the art market in the United States and beyond. Hence the demand and refusal rule, which is more generous to

knowledge of the identity and location of the artwork before December 22, 2011 [when a disclosure of information occurred].").

83. Beyond the divergent effects of following the statute's plain text or its legislative history, application of the preexisting claims provision and its exception is likely to be inconsistent with one overall purpose of the HEAR Act—to create a nationwide six-year limitations period. Ostensibly, the preexisting claims provision revives a claim for six years *in addition to* the amount of time it was previously afforded by the state limitations period. This itself undermines there being a nationwide, uniform limitations period. The exception would make the limitations period even more variable. Consider a claimant subject to a three-year state limitations period who acquired actual knowledge on December 18, 2010 and failed to bring a claim in time. The preexisting claims provision would revive her claim on December 16, 2016, but as of December 17, six years will have passed. The exception would, presumably, bar the claim. But was it revived for a single day on December 16? Courts will have to grapple with such questions as they make sense of the Act's application to preexisting claims.

84. *See* N.Y.C Transit Auth. v. N.Y. Historical Soc'y, 635 N.Y.S.2d 998, 1001 (N.Y. Sup. Ct. 1995), *aff'd*, 656 N.Y.S.2d 731 (N.Y. App. Div. 1997).

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

claimants than a traditional statute of limitations, has an outsize role in determining the timeliness of these claims in the United States.

However, as noted, the key provision of the HEAR Act provides that a claim "may be commenced not later than 6 years after the actual discovery" of the claim.[86] If this language means a claim *must* be commenced within six years of knowledge, it would seem to now run the clock on claimants subject to New York law who have actual knowledge—even if they have not made demand and been refused.

Consider a claimant who has actual knowledge as of January 2, 2017. Under the Act, her claim expires on January 1, 2023. But suppose she does not make a demand until December 31, 2022 and is refused that day. Under New York law, her claim would expire three years later, on December 30, 2025. If that claimant sues on January 15, 2023, is her claim timely? It would have been timely under New York's demand and refusal rule, as she sued within three years of refusal. But she has sued more than six years after actual knowledge, so it might seem odd for the claim to still be timely. Perhaps, for claims arising on or after the Act's enactment, a New York claimant potentially has two bites at the apple. Specifically, she may bring a claim within six years starting from knowledge, or three years from demand and refusal. This appears consistent with the Act's legislative history, which states, "[n]othing, however, bars the claimant from asserting claims that remain timely under applicable State law."[87] And, arguably, an implicit purpose of the Act is to extend existing state limitations periods, rather than constrain them in some way. On the other hand, the Act explains that its six-year limitations period applies "[n]otwithstanding any other provision of Federal or State law . . . relating to the passage of time."[88] And, the legislative history states that the Act provides "a *uniform*, national, limitations period for covered claims."[89]

Nonetheless, the language used by Congress seems significant and should be given effect. As noted, a covered claim "*may* be commenced" within the six-year period from actual knowledge. The phrasing of other federal and state limitations periods suggests this is unusual language for a mandatory limitation period. Statutes of limitations are largely explicit that a claim "shall" or "must" be commenced within the specified time.[90] "May be commenced," by contrast, is typically used to describe

86. HEAR Act § 5(a).

87. S. REP. NO. 114-394, at 10 (2016).

88. *See supra* note 52 and accompanying text.

89. S. REP. NO. 114-394, at 9 (2016) (emphasis added). Following this logic, in *Maestracci*, the New York state court appears to have assumed that a claim governed by New York law would be time-barred if the plaintiff "discovered the claim on or before December 15, 2010 (six years before the day before the date of HEAR's enactment.)" Maestracci v. Helly Nahmad Gallery, Inc., 155 A.D.3d 401, 405 (N.Y. App. Div. 2017). The court did not mention demand and refusal following knowledge.

90. *See, e.g.*, 18 U.S.C. § 924(d)(1) (West, Westlaw through Pub. L. No. 115-231); 42 U.S.C. § 9613(g)(1)(B), (2)(A)–(B) (West, Westlaw through Pub. L. No. 115-231); 46 U.S.C. § 30511(a) (West, Westlaw through Pub. L. No. 115-231). Notably, California Code of Civil Procedure Section 338(c)(3), which was a source of key language in the HEAR Act, states an action for recovery "shall be commenced" within six years of actual knowledge. CAL. CODE CIV. PROC. § 338(c)(3)(A) (Deering, Lexis Advance

permissible venue or by whom a suit may be commenced, rather than a time period during which a suit may or must brought.[91] The few federal statutes that use the phrase in the context of a limitations period generally used "may" to provide a narrow exception to a more restrictive limitations period. For example, a statute of limitations for federal employment matters states that "[a]n action may not be commenced . . . after . . . 3 years after . . . actual knowledge of the breach . . ., except that, in the case of fraud or concealment, such action *may be commenced* not later than 6 years after the date of discovery of such breach . . . ."[92] For suits against the United States as a party, another statute provides, "[e]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability . . . at the time the claim accrues *may be commenced* within three years after the disability ceases."[93]

Given the apparently intentional use of "may" rather than "shall" in the statute and the overall purposes of the HEAR Act, courts should construe the ambiguity of "may be commenced" to allow claims to be brought that remain timely under applicable state statutes of limitations, such as under New York's demand and refusal rule.[94]

C. "NOTWITHSTANDING" LACHES?

Another notable question that arises under the Act is whether it sweeps aside state law doctrines of laches. Unlike legislatively set statutes of limitations, laches is an equitable doctrine that allows judges to refuse to hear claims where a claimant has waited too long to bring a claim *and* the defendant has been prejudiced by that delay (such as by the loss of evidence through the passage of time).

through 2018 Legis. Sess.); *see also* infra notes 110-112 (discussing parallel language in HEAR Act and Section 338).

91. *See e.g.*, 33 U.S.C. § 502(c) (LexisNexis, Lexis Advance through PL 115-281) ("[A]n action may be commenced in the district court of the United States for any district in which the violation occurs . . . ."); 26 U.S.C. § 6863(b)(3)(C) (LexisNexis, Lexis Advance through PL 115-281) ("[Tax Court] review may be commenced . . . by either the Secretary or the tax payer.").

92. 5 U.S.C. § 8477(e)(6)(B) (LexisNexis, Lexis Advance through PL 115-281) (emphasis added).

93. 28 U.S.C. § 2401(a) (LexisNexis, Lexis Advance through PL 115-281) (emphasis added); *see also* 29 U.S.C. § 1113 (LexisNexis, Lexis Advance through PL 115-281); 42 U.S.C. § 9613 (LexisNexis, Lexis Advance through PL 115-281); 17 U.S.C. § 115(d)(10)(C) (LexisNexis, Lexis Advance through PL 115-281); *cf.* 29 U.S.C. § 255 (LexisNexis, Lexis Advance through PL 115-281) (stating certain causes of action "*may* be commenced within two years after the cause of action accrued," and specifying that, if not brought within that two-year period, "such action[s] *shall* be forever barred" (emphases added)).

94. This approach would also avoid a nuanced issue as to how the HEAR Act would apply to preexisting claims in New York. Recall for the exception to apply (such that the preexisting claims provision would not revive a claim), a claim must not have been time-barred for the six years following knowledge. Yet, a New York claimant whose demand was not refused during the six years following knowledge would not have a ripe claim. Because her demand was not time-barred during that period, her claim would not be revived by the HEAR Act, though she was not yet able to bring suit during that time. Construing the HEAR Act to allow claims to be brought that remain timely under state law would at least enable preexisting claims to benefit from New York's statute of limitations.

In an early draft of the legislation, the HEAR Act would have explicitly swept aside "any defense at law or equity relating to the passage of time (including the doctrine of laches)."[95] That reference to laches, and, more broadly, equitable defenses, was removed in later versions of the bill. Congress explained that its amendment "remove[d] the reference precluding the availability of equitable defenses and the doctrine of laches."[96] So, as enacted, the Act states that a civil claim "may be commenced not later than 6 years after" actual knowledge "[n]otwithstanding any other provision of Federal or State law or any defense at law relating to the passage of time."[97]

Similarly, the Act's legislative history explains, "[w]hile defenses at law related to the passage of time are not merely procedural, the special circumstances created by Nazi persecution necessitate an opportunity for their temporary waiver."[98] The Act and its legislative history only refer to waiver of "defenses at law," and are silent as to whether this provision also includes similar defenses at equity, such as laches. In addition, one of the stated purposes of the Act is to "ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner."[99] In a prior version of the statute, this language had referred to ensuring such claims "are not barred by statutes of limitations *and other similar legal doctrines* but are resolved in a just and fair manner on the merits."[100]

The removal of laches from the legislation during drafting, and the parallel comments in the legislative history, would appear to be compelling evidence under principles of statutory interpretation that the Act was *not* meant to abrogate laches if otherwise applicable in a particular case. As the Supreme Court explained in *Russello v. United States*, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."[101] So by *removing* laches from the draft text of the

95. 162 CONG. REC. S1813 (daily ed. Apr. 7, 2016) ("SEC. 5. Statute of Limitations. (a) In General.—*Notwithstanding any other provision of Federal law, any provision of State law, or any defense at law or equity relating to the passage of time (including the doctrine of laches)*, a civil claim or cause of action against a defendant to recover any artwork or other cultural property unlawfully lost because of persecution during the Nazi era or for damages for the taking or detaining of any artwork or other cultural property unlawfully lost because of persecution during the Nazi era 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 cultural property; and (2) information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost." (emphasis added)).

96. S. REP NO. 114-394, at 7 (2016).

97. *See supra* note 52 and accompanying text.

98. S. REP. NO. 114-394, at 9 (2016).

99. HEAR Act § 3(2).

100. S. 2763, 114th Cong. § 3 (2016) (emphasis added), *available at* https://perma.cc/SFE2-AFAP.

101. Russello v. United States, 464 U.S. 16, 23–24 (1983); *accord* Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 442–43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (citation omitted) (emphasis in original); *see also*

statute, Congress intended laches and other equitable defenses under state law to remain available to good faith possessors of artworks.

The arguments that the HEAR Act sweeps away laches are weaker and necessarily depart from the Act's text. Congress's reasoning for precluding defenses at law applies with equal force to equitable defenses. The Terezin Declaration, in particular, stated that participating countries should "ensure that their legal systems . . . make certain that claims to recover such art are resolved . . . based on the facts and merits of the claims"—language that has been interpreted to militate against application of laches as well as statutes of limitations.[102] And, as discussed further below, one of the HEAR Act's stated purposes is to "ensure that laws governing claims to Nazi-confiscated art and other property 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."[103] The focus on resolution "on the facts and merits" might apply to laches as well as to statutes of limitations. Indeed, the special circumstances of Nazi persecution that justify a temporary waiver of defenses at law could likewise justify temporary waiver of equitable defenses. However, these are slender reeds on which to base an obvious departure from the text and legislative history of the Act.

But some have done so. For example, one commentator, without any analysis or reference to the statutory text, asserted that the HEAR Act "would also eliminate the defenses [sic] of laches."[104] With a similar absence of analysis, one trial court concluded that the HEAR Act abrogates any laches defense "where Nazi-looted art is at issue."[105] In *Reif v. Nagy*, the plaintiffs argued that laches could not apply because "the HEAR Act forecloses any laches argument" so long as the plaintiffs' actual knowledge was within six years, as required by the Act.[106] The defendants pointed out that the draft HEAR Act had been amended to omit mention of laches and referred only to statutes of limitations and defenses of law.[107] Alas, the state trial court in New York did not consider the actual language of the HEAR Act, let alone its drafting history (and the specific reference in the legislative history to continued availability of laches as a defense). Instead, the court concluded without any

William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 84–89 (1988) (discussing the "rejected proposal" inference for statutory interpretation).

102. Prague Holocaust Era Assets Conference: Terezin Declaration, Bureau of European & Eurasian Affairs [hereinafter Terezin Declaration] (June 30, 2009), https://perma.cc/WZY5-37BT; *see also* Bert Demarsin, *Let's Not Talk About Terezín: Restitution of Nazi Era Looted Art and the Tenuousness of Public International Law*, 37 BROOK. J. INT'L L. 117, 160–61 (2011); Jennifer Anglim Kreder, *Analysis of the Holocaust Expropriated Art Recovery Act of 2016*, 20 CHAP. L. REV. 1, 18 (2017).

103. HEAR Act § 3(1).

104. Kreder, *supra* note 102, at 19.

105. Reif v. Nagy, 61 Misc. 3d 319, 327–28 (N.Y. Sup. Ct. 2018).

106. *See* Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Summary Judgment and in Opposition to Defendants' Cross-Motion for Summary Judgment at 22, Reif v. Nagy, No. 161799/2015 (N.Y. Sup. Ct. Nov. 14, 2017), ECF No. 279.

107. *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Cross-Motion for Summary Judgment at 23, Reif v. Nagy, No. 161799/2015 (N.Y. Sup. Ct. Sept. 29, 2017), ECF No. 240.

additional analysis that, in light of the Act, "[t]he statute of limitations and laches defenses fail."[108] Future courts should pay closer attention to the Act's language and history when considering the continued availability of laches as a defense.

D. TWO RESPECTS IN WHICH THE HEAR ACT'S LANGUAGE SETS THE STAGE FOR ADDITIONAL FACTUAL DISPUTES

The ambiguities of the HEAR Act discussed above are instances in which the legal rule provided by the statute is unclear. This Article next considers two of the HEAR Act's new standards that will foster uncertainty about whether the law applies in particular circumstances, thereby making restitution litigation more protracted, not less. In effect, parties will litigate, as an initial matter, whether the HEAR Act applies.

1. A Claimant's Knowledge of "a Possessory Interest" in the Artwork

To trigger the limitations period, the Act requires "actual discovery." As defined in the Act, this means a claimant's or her agent's "actual knowledge" of both (a) the "identity and location of the artwork," and (b) "a possessory interest of the claimant in the artwork."[109] As a legal matter, actual knowledge of the "identity and location of the artwork" sounds fairly straightforward. The Act includes an additional provision to clarify its meaning with respect to artwork that is a "multiple."[110]

But what constitutes actual knowledge of "a possessory interest of the claimant" is not obvious from the plain text of the Act. As noted above, the statute defines most of its operative terms—"actual discovery," "artwork," and "Nazi

108. *Reif*, 61 Misc. 3d at 328 (2018). In so holding, the court declined to consider a prior case finding laches applicable because the decision "was issued before Congress enacted the HEAR Act, and its reasoning is inapplicable to [the Reif] case"—even though the prior case involved similar claims by the same plaintiffs to another work from the same collection. *Id.* at 322–28 (distinguishing Bakalar v. Vavra, 819 F. Supp. 2d 293 (S.D.N.Y. 2011), *aff'd*, 500 F. App'x 6 (2d Cir. 2012)).

109. HEAR Act § 5(a).

110. HEAR Act § 5(b), entitled "Possible Misidentification," states,

> [I]n a case in which the artwork or other property is one of a group of substantially similar multiple artworks or other property, actual discovery of the identity and location of the artwork or other property shall be deemed to occur on the date on which there are facts sufficient to form a substantial basis to believe that the artwork or other property is the artwork or other property that was lost.

It is unclear what this language adds to the HEAR Act's existing requirement that the limitations period runs from knowledge of "the identity and location of the artwork or other property" and the definition of "knowledge" as requiring "actual knowledge of a fact or circumstance or sufficient information with regard to a relevant fact or circumstance to amount to actual knowledge thereof." *Id.* §§ 4(4), 5(a)(1). The "Possible Misidentification" section of the HEAR Act appears to be drawn from the California Code of Civil Procedure § 338(c)(3)(A)(i), which states that "where there is a possibility of misidentification of the object of fine art in question, the identity can be satisfied by the identification of facts sufficient to determine that the work of fine art is likely to be the work of fine art that was unlawfully taken or stolen." *Id.*

persecution"[111]—yet does not define "possessory interest." Notably, the Act's legislative history does not discuss the phrase either. In addition, "possessory interest" is a curious choice of language, as it is unclear whether this phrase is intended to encompass broader or, perhaps, different interests in an artwork than "ownership," or of a claim of ownership, of it. If Congress had used "ownership" here, it would have presumably meant that, to trigger the limitations period, the claimant must have known that someone previously had an ownership claim to the artwork and lost it as a result of Nazi persecution, and that the claimant can herself claim an ownership interest in the work through the prior owner. But Congress did not use such simple and familiar language.

The phrase "possessory interest" in the HEAR Act, like some other language in the law, appears to have been borrowed from California's 2010 statute. The California statute likewise set a six-year statute of limitations for the recovery of artwork, commencing from the point at which the claimant discovers her "claim for a possessory interest in the work."[112] Similar to the HEAR Act, the California statute does not define "possessory interest," and the legislative history of the California law does not appear to shed any light on the intended meaning of the phrase.

Historically, the concept of "possessory interest" has been used in connection with real property and refers to a right to possess property by virtue of some interest in the property, but not necessarily accompanied by title.[113] A possessory interest involves a certain degree of control, including a right to exclude others, but is not limited to the real property's owner. For example, a tenant of real property could claim such an interest.[114] In an earlier federal statute concerning real property, "possessory interest" means an interest "consist[ing] of all incidents of ownership except legal title."[115] However, it remains unclear from the HEAR Act, the California statute, and the common law what exactly a "possessory interest" means as applied to personal property, such as a work of art.

111. *See* HEAR Act § 4.

112. CAL. CODE CIV. PROC. § 338(c)(3) (Deering, Lexis Advance through 2018 Legis. Sess.); *see generally* Rajika L. Shah, *The Making of California's Art Recovery Statute: The Long Road to Section 338(c)(3)*, 20 CHAP. L. REV. 77, 115 (2016) ("The main provision of the [HEAR] Act is modeled on the text of section 338(c)(3)."). As does the HEAR Act, the California statute requires "actual discovery" rather than just constructive discovery. *See* HEAR Act §§ 4(1), (4) (defining "actual discovery" to mean "knowledge" and "knowledge" to mean "actual knowledge"); CAL. CODE CIV. PROC. § 338(c)(3)(C)(i) (Deering, Lexis Advance through 2018 Legis. Sess.) (clarifying that "'actual discovery' . . . does not include constructive knowledge"). As noted in note 36, *supra*, an earlier version of the California Code of Civil Procedure § 354.3, governed only artwork lost to Nazi persecution, but the statute was struck down on the ground that it interfered with the federal government's sole power over federal affairs. *See* Von Saher v. Norton Simon Museum of Art at Pasadena, 592 F.3d 954, 964–65 (9th Cir. 2010).

113. *See* RESTATEMENT OF PROPERTY § 153(3) (1936) cmt.

114. *See Possessory Interest*, BLACK'S LAW DICTIONARY (10th ed. 2014). Such a possessory interest in real property is greater than a nonpossessory interest, such as an easement on real property, which does not include the right to exclude others. *See, e.g.*, Michel v. United States, 65 F.3d 130, 132 (9th Cir. 1995).

115. *See* Act of Oct. 9, 1965, Pub. L. No. 89-249, 79 Stat. 969, 970.

In cases unrelated to the HEAR Act, some courts have suggested that a "possessory interest" in art is a weak interest, akin to that of a mere caretaker. In one case, for example, a woman, following divorce, was allowed to possess certain artworks on the condition that she leave them to her ex-husband if he survived her and to their children if he did not. The court found she "had no more than a possessory interest in the . . . artworks. Thus, her estate has no ownership interest implicated by the current controversy."[116] In *Little Plantation Estates v. Loos*, a case that arose in the Virgin Islands, a party was tasked with selling artwork on behalf of the owner. The court explained, "there is no evidence that Loos had a security interest, entitlement, or ownership interest in the artwork, other than a possessory interest tantamount to that of a caretaker."[117] Instead, the court found that "Loos enjoyed only a possessory interest of the artworks as bailee, while Estates retained legal title and sole ownership to the artworks or property as bailor and owner."[118]

In addition to the uncertain meaning of "possessory interest" with regard to artwork, it is unclear what it means for a claimant to have *knowledge* of such an interest, as the statute states. To be sure, one can imagine instances where a person might only recently learn of her *ownership* interest in a piece of property. For example, a person may learn that she is the heir to someone recently deceased who had owned an artwork lost under the Nazis. Or a person might learn for the first time that a well-known relative had owned a work of art in the 1930s. But it is more difficult to imagine how a person would come to have knowledge of only a "possessory interest," short of a claim of ownership—she would have to discover that her relative had a right to possess the artwork for a period of time, even though the relative did not own it.

It remains to be seen whether this choice of words in the HEAR Act matters. But courts may be forced to discern whether a plaintiff who claims less than ownership of artwork—but still a right to possession—has a sufficient interest to invoke the limitations period in the HEAR Act. And there may be difficult issues in determining when a claimant gained knowledge of only a "possessory interest" in artwork. In theory, we may see cases where a claimant alleges the "possessory interest" sufficient to bring a timely claim under the HEAR Act, but then, at a later stage, loses on the merits because he or she cannot establish the ownership interest sufficient to recover the artwork at issue. At the least, this is another instance where the language of the HEAR Act leaves questions to be resolved in future litigation.

2. Was Art Lost "Because of Nazi Persecution"?

The language in the operative provision of the HEAR Act creates a similar issue. The Act applies to claims to recover artwork "lost . . . because of Nazi

116. Brown v. Kay ex rel. Estate of Brown, 889 F. Supp. 2d 468, 488 (S.D.N.Y. 2012).
117. Little Plantation Estates v. Loos, 46 V.I. 93, 104 (Super. Ct. 2004).
118. *Id.* at 105.

persecution."[119] As noted above, "Nazi persecution" is defined as "any persecution of a specific group of individuals based on Nazi ideology by the Government of Germany, its allies or agents, members of the Nazi Party, or their agents or associates, during the covered period."[120] But the Act does not define or explain what constitutes being "lost because of" that persecution. This ambiguity is significant because throughout the war artworks were not only seized outright by Nazi officers or stolen by the ERR; many were subjected to forced sales to private entities, and others were sold privately at depressed prices to allow their owners to flee.[121] Was the Act intended to extend the time period for bringing claims to art lost during the war generally in areas subject to Nazi control, or only for art that was lost as a direct result of Nazi persecution?

The Act's findings, for the most part, suggest a narrower interpretation. They refer to artworks "confiscated or otherwise misappropriated" by the Nazis and discuss the Washington Principles and the Holocaust Victims Redress Act, which both focused on Nazi-confiscated art. However, the findings also refer to the Terezin Declaration, which refers to forced sales as well.[122] Further, the stated purposes of the Act are "[t]o ensure that laws governing claims to Nazi-confiscated art and other property further United States policy" and "that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations."[123] These references suggest that the Act only revives claims to artwork stolen, misappropriated, or confiscated by Nazis, their allies, and their agents. Yet, in discussing legal actions to recover "Nazi-confiscated" art, the Act cites *Detroit Institute of Arts v. Ullin*, a case in which the artwork sought to be recovered was sold by the owner (who was fleeing from the Nazis) in a private sale to art dealers who were not alleged to be connected to the Nazi party.[124]

The legislative history is not particularly illuminating, but it could be read to suggest a broader interpretation. At one point, the history explains that the definition of "Nazi persecution" is intended to be broad, and to include persecution "by the Nazi Party, the government of Germany at the time, governments allied with Germany, *private agents and others*."[125] But elsewhere, when discussing Congress's pursuit of policies to reunite works with their owners, the history refers to art confiscated, misappropriated, stolen, expropriated, looted, and taken by, and lost to,

119. HEAR Act § 5(a).

120. HEAR Act § 4(5).

121. *The Holocaust Expropriated Art Recovery Act—Reuniting Victims with Their Lost Heritage: Hearing on S. 2763 The Holocaust Expropriated Art Recovery Act Before the S. Comm. on the Judiciary, Subcomm. on the Constitution and Subcomm. on Oversight, Agency Action, Federal Rights and Federal Courts*, 114th Cong. (2016) (statement of Agnes Peresztegi, President, Commission for Art Recovery), https://perma.cc/MH82-5UBM.

122. HEAR Act § 2.

123. HEAR Act § 3.

124. *Id.* § 2(6) (citing Detroit Inst. of Arts v. Ullin, No. 06-10333, 2007 WL 1016996, at *1 (E.D. Mich. Mar. 31, 2007)).

125. S. REP. NO. 114-394, at 9 (2016) (emphasis added).

the Nazis.[126] As in the text of the statute, the legislative history mentions time-barred suits for "art lost in the Holocaust" and cites to cases in which the art was not alleged to have been taken by or at the direction of the Nazis but was instead allegedly sold to a private individual by an individual fleeing the Nazis—without alleged *direct* involvement of the Nazi apparatus.[127]

The question of whether the Act revives only claims to art confiscated by Nazis or applies to art looted by others or to private sales by individuals in their effort to flee has already reached the courts. In *Zuckerman v. The Metropolitan Museum of Art*, a case pending appeal in the Second Circuit, the plaintiff sought to recover her grand-uncle's Picasso painting.[128] He had sold the work privately while attempting to flee Fascist Italy after previously leaving Germany due to persecution.[129] The plaintiff argued that her claim was timely under the HEAR Act because the Act cites both the Terezin Declaration, which referred to forced sales and sales under duress in its description of Nazi-confiscated and looted art, and *Ullin*, which involved a third-party sale.[130] By contrast, the Museum urged the Court to apply the Act only to claims made for artworks confiscated, stolen, misappropriated, or lost "at the hands of the Nazis," based on the Act's repeated reference to "Nazi-confiscated" art.[131] The Museum argued the claimed artwork was a negotiated sale for value on the open market without Nazi involvement, so the Appellant's claim should not be revived.[132]

The language "lost . . . due to Nazi persecution" may sound broad enough to include a private sale made by an individual fleeing from the Nazis, but the Act's general purposes and overall legislative history point to a narrow construction, limited to works stolen, confiscated, or otherwise lost *to* the Nazis. Moreover, construing the phrase broadly might extend the limitations period for cases where the claimant may be able to establish, as a threshold matter, that the art was lost to someone during the Nazi era, but will not ultimately be able to show that the art was lost in a manner that supports its return to the claimant. Avoiding this issue, the district court in the *Zuckerman* case did not decide whether the claim was timely under the HEAR Act; instead, it found insufficient the plaintiff's allegation that the private sale was void *ab initio* because the contract was made under duress due to the persecution of Jews in Fascist Italy. The district court found that "duress," whether under Italian law or New York law, cannot be based on "[a] general state of

126. *Id.* at 2–8, 10–12.

127. *Id.* at 5 (citing Museum of Fine Arts, Boston v. Seger-Thomschitz, Civ. Action No. 08–10097–RWZ, 2009 WL 6506658, (D. Mass. June 12, 2009); *Ullin*, 2007 WL 1016996; Toledo Museum of Art v. Ullin, 477 F. Supp. 2d 802, 806–07 (N.D. Ohio 2006)).

128. Zuckerman v. Metro. Museum of Art, No. 18-634-cv (2d. Cir. 2018).

129. Appellant's Brief at 17–18, Zuckerman v. Metro. Museum of Art, No. 18-634-cv (2d. Cir. 2018).

130. Appellant's Reply Brief at 25–26, Zuckerman v. Metro. Museum of Art, No. 18-634-cv (2d. Cir. 2018); Terezin Press Release *supra* note 23.

131. Appellee's Brief at 56, Zuckerman v. Metro. Museum of Art, No. 18-634-cv (2d. Cir. 2018).

132. *Id.* at 56–57.

fear arising from political circumstances" or being "forced by the circumstances in Fascist Italy."[133] Rather, the threat to the contracting party must be specific; and in New York, the threat must generally be made by the defendant.[134] The claimant there had a claim that lost on the merits regardless of its arguable timeliness.

A claim is not meritorious simply because it is timely, and any timely claim should be allowed to go forward to determine if it is meritorious. But as with the "possessory interest" language, Congress's imprecise or odd delineation of the circumstances in which the HEAR Act applies may revive claims that cannot ultimately succeed.

E. THE SIGNIFICANCE OF THE HEAR ACT'S FIRST "PURPOSE"

The ambiguities and complexities described above were created by the HEAR Act's plain language and arise from either its unclear wording or conflicts in attempts to apply the statute to existing law. The precatory language of the HEAR Act creates a larger and potentially more meaningful uncertainty. After setting out extensive congressional "Findings" concerning the scope of art lost under the Nazis and the challenges faced by claimants who seek to recover works, the statute states two "purposes of th[e] Act":

> (1) To ensure that laws governing claims to Nazi-confiscated art and other property 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.
>
> (2) To ensure that claims to artwork and other property stolen or misappropriated by the Nazis are not unfairly barred by statutes of limitations but are resolved in a just and fair manner.[135]

The operative provisions of the HEAR Act, setting out a six-year limitations period, no doubt sought to achieve the second enumerated purpose in the Act, by lifting potentially applicable statutes of limitations. But the first "purpose" is not made effective by any other provision in the Act, so its operative meaning remains unclear. Its language may simply mean that by achieving the second purpose, the statute also achieves the first. That is, ensuring that claims to artwork stolen by the Nazis are not "unfairly barred by statutes of limitations" also, in effect, "ensure[s] that laws governing claims to Nazi-confiscated art and other property 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." While it is possible that the first purpose is intended to have meaning or effect beyond the more specific language of the second purpose, such a meaning is not immediately apparent from the operative language of the Act.

This uncertainty matters because at least two courts have recently treated the HEAR Act as not just a new rule for timeliness but as an interpretive lens that must substantively shape how a court looks at claims to Nazi-looted art. In *Reif v. Nagy*,

133. Zuckerman v. Metro. Museum of Art, 307 F. Supp. 3d 304, 317 (S.D.N.Y. 2018).
134. *Id.* at 318.
135. HEAR Act § 3.

the plaintiffs sued an art dealer in New York state court to recover two Egon Schiele works. The dealer contended he, not the plaintiffs, had good title to the works. Although the plaintiffs were heirs to Franz Grunbaum, the dealer asserted that Mr. Grunbaum's sister-in-law had sold the two works (among others) to a gallery in Switzerland in a legitimate sale.[136]

The case presented difficult and contested factual issues about the history of the artworks, whether the plaintiffs could claim ownership, and whether laches might bar any claim.[137] But the trial judge swept all these issues aside, asserting that Congress "adopted the Washington Conference Principles on Nazi-Confiscated Art (Principles) in the HEAR Act" and that "[t]he HEAR Act *compels* us to help return Nazi-looted art to its heirs."[138] This is odd because the HEAR Act does not contain any operative language adopting any particular aspect of the Washington Conference Principles, aside from the specific provision providing for a nationwide limitations period.

The *Reif* court went on to declare that the HEAR Act and related policy instruct courts "to be mindful of the difficulty of tracing artwork provenance due to the atrocities of the Holocaust era, and to facilitate the return of property where there is reasonable proof that the rightful owner is before us."[139] Notably, the only citation provided for this sentence was the provision in the Holocaust Victims Redress Act setting out the "sense of the Congress" that "*governments* should undertake good faith efforts to facilitate the return" of Nazi-looted property to rightful owners.[140] The *Reif* court did not explain how this provision was given effect by any particular language in the HEAR Act. Instead, finding "no triable issue of fact" regarding Mr. Grunbaum's possession of the artwork before World War II, the court simply stated, "[w]e *accept* that that Artworks were the property of Mr. Grunbaum, and that the entirety of Mr. Grunbaum's property was looted by the Nazis."[141] The judge seemed to find it sufficient to grant summary judgment to the plaintiffs that "[they] made a *threshold* showing that they have an *arguable* claim of a superior right of possession to the Artworks."[142]

In another case, the New York Supreme Court also treated the HEAR Act as more than a statute of limitations, albeit in a subtler way. In *Gowen v. Helly Nahmad Gallery, Inc.*, the defendant argued that the Act of State doctrine should be applied to bar the plaintiff's claim.[143] This doctrine generally precludes U.S. courts from

136. Reif v. Nagy, 61 Misc. 3d 319, 322 (2018).
137. *Id*. at 321–22, 327.
138. *Id.* at 324 (emphasis added).
139. *Id.* at 325.
140. Holocaust Victims Redress Act, Pub. Law. 105-158, § 202, 112 Stat. 15 (1998) (emphasis added).
141. *Reif*, 61 Misc. 3d at 325 (2018) (emphasis added).
142. *Id.* (emphases added).
143. Gowen v. Helly Nahmad Gallery, Inc., 60 Misc. 3d 963, 987, 990 (N.Y. Sup. Ct. 2018). The decision is not entirely clear as to the basis on which the defendants contended the Act of State doctrine would bar plaintiff's claim.

inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory, even if those acts determine rights in a suit pending in the United States.[144] The *Gowen* court found the doctrine inapplicable, explaining "the United States and the State of New York have historical and public policy driven interests in adjudicating claims involving artwork looted during the Nazi regime"—including, the court listed, the HEAR Act—and that these "interests" "weigh[] against using the Act of State doctrine to defer to either Swiss or French law."[145] The court considered the HEAR Act as one reason not to apply a doctrine that might have barred the restitution claim, separate and apart from the applicable statute of limitations.

The language of the HEAR Act—specifically, that the six-year limitations period applies "[n]otwithstanding any other provision of Federal or State law" —suggests that the statute preempts application of any state choice-of-law rules that would result in a different limitations period governing a claim. For example, in a proceeding prior to *Gowen*, New York's Appellate Division held that New York choice-of-law rules could not be applied to select the shorter limitations period of a foreign jurisdiction (France or Switzerland) over the six years of the HEAR Act.[146] But that is quite distinct from saying, as the more recent *Gowen* decision did, that a court should ignore a rule such as the Act of State doctrine—or, for example, principles of international comity—that might substantively bar a claim simply because that claim would be timely under the HEAR Act.

In another case currently on appeal, the claimant-appellant is arguing that the HEAR Act *requires* U.S. courts to treat the Washington Conference Principles and the Terezin Declaration as substantive rules, calling for decisions in favor of claimants. As noted above, in *Zuckerman v. Metropolitan Museum of Art*, the Southern District of New York court ruled that the claimant had not adequately alleged that a work of art sold by Jewish owners in Italy in 1938 was sold under duress under either New York or Italian law, such that the sale was invalid.[147] On appeal to the Second Circuit, the claimant and several amici argue that the HEAR Act, through the first "purpose," requires courts to apply property ownership rules through a lens of effecting U.S. policy—specifically, that "the District Court should have rendered a decision in favor of Plaintiff consistent with U.S. policy."[148]

However, interpreting the Act's first statement of purpose as mandating some kind of presumption of success for these claims—a presumption that shifts in an unspecified way the otherwise applicable rules of decision and burdens of proof—

144. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 401 (1964).

145. *Gowen*, 60 Misc. 3d at 988–89.

146. Maestracci v. Helly Nahmad Gallery, Inc., 155 A.D.3d 401, 404 (N.Y. App. Div. 2017) ("We reject defendants' argument that HEAR can be displaced by a choice-of-law analysis.").

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

148. *See* Brief and Special Appendix for Plaintiff-Appellant at 25–33, Zuckerman v. Metro. Museum of Art, No. 18-0634-cv (2d Cir. May 25, 2018), ECF No. 51; *see also* Brief of Amicus Curiae Holocaust Art Restitution Project, at 12–13, Zuckerman v. Metro. Museum of Art, No. 18-0634-cv (2d Cir. June 1, 2018), ECF No. 70; Brief of Amicus Curia of B'nai B'right International et al. at 16–21, Zuckerman v. Metro. Museum of Art, No. 18-0634-cv (2d Cir. June 7, 2018), ECF No. 94.

misunderstands both the effect of congressional statements of purpose in general and the meaning of the HEAR Act's purposes in particular. It is a basic canon of interpretation that prefatory statements of purpose should not be understood to add to the specific operations of a statute's text.[149] For example, in *Henson v. Santander Consumer USA Inc.*, petitioners urged the Supreme Court to interpret a provision of the Fair Debt Collection Practices Act in light of its statutory purpose to protect consumers and encourage ethical practices by debt collectors.[150] But the Court was not interested in looking to the statute's purpose where petitioners' argument found no support in the operative text of the law.[151] The Court rejected petitioners' contention that, "'whatever' might appear to 'further[] the statute's primary objective must be the law.' Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage . . . , and no statute yet known 'pursues its [stated] purpose [] at all costs.'"[152]

The HEAR Act's operative provisions all focus on one set of issues: specifically, protecting those seeking to bring claims to recover artwork lost due to Nazi persecution from statutes of limitations or "any defense at law relating to the passage of time."[153] No operative provisions provide for anything other than a nationwide statute of limitations of six years from actual knowledge. In this way, the general purpose of ensuring that applicable laws "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"[154] cannot be interpreted more broadly than what the Act actually does. Specifically, the Act achieves this policy by ensuring that statutes of limitations do not bar claims unless six years have passed from actual knowledge.

Beyond this basic principle of statutory interpretation, the HEAR Act's history reflects Congress's intention that the Act further U.S. policy through a uniform and longer limitations period, and only that. The Senate Judiciary Committee's report found the most salient part of the Washington Principles to be its encouragement of Holocaust victims and their heirs "to come forward and make known their claims to art that was confiscated by the Nazis" and its admonishment of the Conference's participants to take steps "to achieve a just and fair solution" to these claims.[155]

149. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 219 (2012); *see also* Rapanos v. United States, 547 U.S. 715, 752 (2006) (noting that broad interpretations purporting to "advanc[e]" a statute's purpose are usually disfavored because "no law pursues its purpose at all costs").

150. 137 S. Ct. 1718, 1724 (2017); *see* Brief of Petitioners at 41, Henson v. Santander Consumer USA Inc., 137 S. Ct. 1718 (2017) (No. 16-349) (citing 15 U.S.C. § 1692(e) (2012)).

151. *Henson*, 137 S. Ct. at 1725 (alterations in original, quoting Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) (per curiam)).

152. *Id.*

153. HEAR Act § 5(a).

154. *Id.* at § 3(1).

155. *See* S. REP. NO. 114-394, at 3 (2016) (quoting U.S. Dep't of State, Bureau of European & Eurasian Affairs, Washington Conference Principles on Nazi-Confiscated Art, Principles ¶¶ 7, 8, (Dec. 3, 1998), https://perma.cc/ZFB3-C5D6.

Similarly, the Committee's report quoted the Terezin Declaration's urging of its signatories "to ensure that their legal systems . . . facilitate just and fair solutions with regard to Nazi-confiscated and looted art . . . [that] are resolved expeditiously and based on the facts and merits of the claims."[156] The Committee perceived that U.S. policy had failed to live up to its promise because state statutes of limitations were posing "an unfair impediment to the victims and their heirs, contrary to United States policy."[157]

Thus, the Committee concluded that a federal statute of limitations, "appropriately tailored to the unique circumstances of Holocaust-era claims," is necessary to "guarantee that the United States fulfills the promises it has made to the world."[158] The "Findings" of the HEAR Act also confirm the necessity of a federal statute of limitations. After recounting that California's attempt to legislate a longer limitations period for claims to art taken under the Nazis was held to be an "unconstitutional infringement of the Federal Government's exclusive authority over foreign affairs", the statute explains that "[i]n light of this precedent, the enactment of a Federal law is necessary to ensure that claims to Nazi-confiscated art are adjudicated in accordance with United States policy as expressed in the Washington Conference Principles on Nazi-Confiscated Art, the Holocaust Victims Redress Act, and the Terezin Declaration."[159]

This language confirms that the statute was intended to further U.S. policy by enacting a nationwide limitations period for bringing covered claims. There is no suggestion in the text or legislative history that Congress intended to do more. It is not proper to read the HEAR Act to place a broad thumb on the scale in favor of plaintiffs seeking to recover art lost in the Holocaust. As the legislative history reflects, the "focus of the legislation" is "to *open* courts to claimants . . . and have [claims] resolved on the merits," not to dictate particular outcomes.[160] One recent Court of Appeals decision, consistent with this statutory purpose, rejected plaintiffs' claim that application of Spanish law was prohibited by the HEAR Act. The Ninth Circuit rejected plaintiff's argument because the Act is silent on issues touching on the merits of claims and "simply supplies a statute of limitations during which such claims are timely."[161] Given the history and language of the HEAR Act, coupled with basic principles of statutory interpretation, other courts should find the same. Courts should reject the inchoate notion that the Act somehow recalibrates foundational principles of property law and burden of proof rules, and effectively requires courts to find for claimants in disputes over art that changed hands under the Nazis.

156. *See id.* at 4 (quoting Terezin Declaration, *supra* note 102). The Committee noted as well that the State Department's Envoy for Holocaust Issues understood "the intent of the Terezin Declaration and the Washington Principles" to be deciding Holocaust art recovery cases on their merits and "avoid[ing] if possible resorting to legal arguments grounded in procedural matters." *Id.* (quoting Davidson Remarks, *supra* note 24).

157. S. REP. NO. 114-394, at 5 (2016).

158. *Id.*

159. HEAR Act § 2(7).

160. *See* S. REP. NO. 114-394, at 9 (2016) (emphasis added).

161. Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 964 (9th Cir. 2017).

IV. CONCLUSION

The HEAR Act, though relatively short, is no simple text. It was enacted in the context of diverse, and often diverging, state statutes of limitations, with the intent to replace them with a more generous nationwide six-year limitations period for claims to Nazi-looted art, triggered by "actual knowledge" on the part of the claimant. Though driven by a noble cause in the abstract—to have more of these claims resolved "on the merits"—the Act will likely have the unintended consequence of producing more litigation to resolve the statute's meaning, which distracts from the merits of claims. The interpretive difficulties discussed above are ripe for litigation. Some are already being litigated, as noted. We have sought to offer a thoughtful guide for courts trying to work through a few of the Act's uncertainties.

Of course, more questions and conflicts over the Act's application may well arise as more claimants seek the return of Nazi-seized artwork. To some extent, at least, Congress's attempt to streamline the restitution of artworks lost in the Holocaust has instead further complicated the process.