Supreme Court of the United States

Claudia SEGER-THOMSCHITZ, Petitioner

v.

MUSEUM OF FINE ARTS, BOSTON, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTIONS PRESENTED

On June 30, 2009 at the close of the Prague Holocaust Era Assets Conference, the U.S. and 46 other "stakeholder" nations promulgated the "Terezin Declaration" (Declaration), a purposefully "non-binding" executive agreement prescribing how they would handle claims for the recovery of Nazi-confiscated assets. The stakeholders agreed "to make certain" that their individual national "legal systems" resolved claims for the recovery of Nazi-confiscated artworks "based on the facts and merits of the claim," and that "Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art." The Declaration explicitly augmented a similar predecessor agreement in 1998 (the Washington Principles) by which at the instigation of the U.S. Government 44 nations undertook to decide claims for the recovery of Nazi-confiscated artworks in merely a "just and fair" manner.

1. Does U.S. foreign policy that claims for the recovery of Nazi-confiscated artworks be resolved upon their substantive merits as expressed in the Declaration preempt—under the Supremacy Clause of the U.S. Constitution—state prescriptive periods governing the recovery of movable personal property within their borders that obstruct this objective when these periods reflect an exercise of the "'traditional competence'" of the several states within the meaning of *American Insurance Ass'n v. Garamendi,* 539 U.S. 396, 420 n.11 (2003)?

2. Does the foreign policy commitment of the U.S. Government in the Declaration to "make certain" that its discrete national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their substantive merits (which policy enjoys the express approval of *both* Congress and the President) obligate the Federal Judiciary—as a coordinate branch of the U.S. Government—to implement this goal through federal common law if necessary?

3. Does the identity of the Respondent as a federal tax-exempt institution under 26 USCA § 501(c)(3) as well as a public trustee—accountable as a matter of law to U.S. public policy—amplify the need to ensure that judicial claims brought against it to recover Nazi-confiscated artworks are resolved on their substantive merits as U.S. foreign policy and the Declaration prescribe?

LIST OF PARTIES

Petitioner Claudia Seger-Thomschitz (S-T) is an individual residing in Vienna, Austria.

Respondent Museum of Fine Arts, Boston ("Museum or "MFA") is a charitable not-for-profit corporation organized and existing under the laws of the state of Massachusetts and is a federal tax-exempt institution under 26 USCA § 501(c)(3).

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The First Circuit's October 14, 2010 Opinion affirming the ruling of the District Court that federal law and policy favoring the return to rightful owners of Nazi-confiscated artworks did not preempt a Massachusetts statute of limitation that time-barred the claim of Petitioner to recover a Nazi-confiscated painting is reported at 623 F.3d 1 (1st Cir. 2010). The ruling of the District Court is reported at 2009 WL 6506658 (D. Mass. June 12, 2009).

BASIS FOR JURISDICTION

The order of the First Circuit Court of Appeals was entered on October 14, 2010. The petition for certiorari was filed within ninety days from that date. The jurisdiction of this Court is invoked under 28 USCA § 1254(1).

The District Court and the Court of Appeals had jurisdiction under 28 USCA § 1332, in that the petitioner is a foreign citizen, the respondent is a citizen of the State of Massachusetts, and the value of the painting in controversy exceeds $75,000. The Court of Appeals had jurisdiction to entertain the appeal under 28 USCA § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI Clause 2 of the Constitution of the United States (Supremacy Clause)

The Holocaust Victims Redress Act, Public Law No. 105-158, 112 Stat. 15 (1998)

26 USCA § 501(c)(3)
26 CFR § 1.501(c)(3)-1(c)
Mass. Gen. Laws Ann. Ch. 260 § 2A (1948)

STATEMENT OF THE CASE

A. U.S. Policy to Restitute Nazi-Confiscated Artworks Began During World War II

U.S. foreign policy to return Nazi-confiscated artworks to rightful owners began on January 5, 1943 when the 18 Allied governments issued the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control," also known as "London Declaration." The London Declaration reserved the right of the Allied governments to invalidate transfers of property by victims of persecution occurring within Nazi Germany and occupied countries "even when they purport to be voluntarily effected."[1]

Immediately after the War the U.S. and Allied authorities sought to return to Nazi victims and their heirs artworks and other property lost in coercive transfers during the years 1933-1945. U.S. restitution policy became crystallized in 1947 with Military Government Law Number 59 (MGL No. 59), which nullified transfers of personal property by victims of Nazi persecution and became the centerpiece of post-War and Allied restitution policy. *See Schoeps v. Museum of Modern Art et al.,* 594 F. Supp.2d 461, 466 (S.D.N.Y. 2009).

U.S. foreign policy in this regard extended to judicial actions brought in U.S. courts. *See Bernstein v. N.V. Neerlandsche-Amerikaansche, Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d. Cir. 1954), following a State Department directive to entertain a

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[1] Elizabeth Simpson, *The Spoils of War, World War II and its Aftermath: The Loss, Reappearance and Recovery of Cultural Property*, (1997 Times Mirror Company) at 287.

judicial claim to recover property lost in a "forced transfer."

In 1946 and again in 1951 the U.S. Government—through the "Roberts Commission" and the State Department—formally admonished U.S. museums to take precautions against acquiring Nazi-confiscated artworks coming into the market and that good title to these materials never could be acquired.[2]

B. In the Early 1990's—Following the Collapse of the "Iron Curtain"—Restoring Nazi-Confiscated Artworks to Holocaust Victims Again Became Viable, Sparking a Renewed U.S. Initiative Which Gained International Momentum

As U.S. Ambassador J. Christian Kennedy explained, the Cold War forestalled restoring Nazi-confiscated artworks to Holocaust victims and their heirs.[3] U.S. Ambassador Stuart Eizenstat related that the London Conference for Nazi Gold in 1997 provided an opportunity to reintroduce this subject into international diplomacy and to set the stage for a conference in Washington D.C. (Washington Conference) the following year. [4]

In February 1998, the House Banking Committee under Chairman James Leach held

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[2] Brief of Appellant at pages 24-25; Answer and Counterclaim at par. 107.

[3] J. Christian Kennedy, Special Envoy for Holocaust Issues, United States Department of State, *The Role of the United States in Art Restitution*, Remarks at Potsdam, Germany, April 23, 2007 ("Potsdam Remarks").

[4] Stuart Eizenstat, *Imperfect Justice* (Public Affairs, New York 2004) at 191.

hearings on Nazi-confiscated art. Leach pressed representatives of the Association of Art Museum Directors—with about 170 members—to develop formal guidelines for handling Nazi-confiscated artworks.[5] The guidelines prescribed that museums would resolve claims for the recovery of such artworks in "an equitable, appropriate and mutually agreeable manner."[6] The U.S. hoped to persuade the nations attending the Washington Conference to adopt these guidelines.[7]

C. In 1998 the U.S. Congress Enacted Three Statutes to Help Holocaust Victims and Their Heirs Recover Nazi-Confiscated Artworks and Other Assets

In 1998 Congress enacted three statutes to help victims of Nazi persecution and their heirs locate and recover artworks and other property wrongfully confiscated during the years 1933-1945: (1) the Holocaust Victims Redress Act (Redress Act), Public Law. No. 105-158, 112 Stat. 15 (1998); (2) the Nazi War Crimes Disclosure Act (Disclosure Act) Public Law No. 105-567, 114 Stat. 2865 (1998), and; (3) the Holocaust Assets Commission Act of 1998 (Commission Act), Public Law No. 105-186 (1998). These statutes formally declare U.S. policy to return Nazi-confiscated artworks and other property to rightful owners and allocate five million dollars ($5,000,000) for this purpose. Appendix [A] at 51-52.

Section 201(2) of the Redress Act characterizes Nazi Germany's systematic persecution of Jews during the years 1933-1945 as part of World War II,

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[5] *Id.* at 192.
[6] *Id.* at 193.
[7] *Id.* at 193.

and prescribes that the principles of international law that require that artworks pillaged in war be returned to rightful owners should govern claims to recover Nazi-confiscated artworks. Section 202 declares that "(i)t is the sense of Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner." A at 35. The Redress Act also appropriated to the President $5,000,000 "to assist in the restitution of assets looted or extorted from victims of the Holocaust…" (§ 103). U.S. courts consistently have acknowledged that the Redress Act declares a compelling Congressional policy to return Nazi-confiscated artworks to rightful owners. *See, e.g.*, *Adler v. Taylor*, 2005 WL 4648511 at 1 (C.D. Cal. 2005), *aff'd Orkin v. Taylor*, 487 F.3d 734 (9th Cir. 2007); *Toledo Museum of Art v. Ullin*, 477 F. Supp. 2d 802, 806 n.2 (N.D. Ohio 2006); *Dunbar v. Seger-Thomschitz*, 638 F. Supp.2d 659, 664 (E.D. La. 2009), *aff'd* 615 F.3d 574 (5th Cir. 2010).

D. Late in 1998 the Executive Branch—Consonant with the Injunction of the Redress Act That All Nations Should Facilitate the Return of Nazi-Confiscated Artworks—Hosted the Washington Conference on Holocaust-Era Assets to Promote this Objective

In November 1998, "the Department of State convened the Washington Conference on Nazi looted

assets. Representatives of 44 countries attended."[8] The declared purpose of the Washington Conference was to find how the 44 participating countries could return Nazi-confiscated artworks to rightful owners. U.S. Secretary of State Madeleine K. Albright proclaimed: "[w]e're here to chart a course for finishing the job of returning or providing compensation for stolen Holocaust assets to survivors and the families of Holocaust victims."[9] She stressed the "moral imperative" to "develop specific principles and identify best practices for art"[10] and for "the return of property."[11]

E. While the U.S. Delegation Sought a Formal, Binding International Legal Agreement on Specific Principles to Restitute Nazi-Confiscated Artworks, Other Stakeholders Rejected this Proposal

While the U.S. preferred a binding international accord committing each stakeholder to implement national legislation to return Nazi-confiscated artworks, many countries rejected this initiative.[12] So to salvage some consensus on the responsibility of stakeholders to return Nazi-confiscated artworks, Eizenstat and Leach instead promoted a non-binding

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[8] Potsdam Remarks, *supra* note 3 at 2.

[9] Secretary of State Madeleine K. Albright, Remarks at Opening of Washington Conference on Holocaust-Era Assets, Washington D.C., December 1, 1998, as released by the Office of the Spokesman, U.S. Department of State at 1. (Available at http://fcit.usf.edu/HOLOCAUST/RESOURCE/Assets/981201.htm.

[10] *Id.* at 2.

[11] *Id*. at 2.

[12] Eizenstat*, supra* note 4 at 198.

agreement by which each country would commit to work within its own discrete national legal system to achieve this goal.[13]

As released on December 3, 1998, the "Washington Conference Principles on Nazi-Confiscated Art" (Washington Principles or Principles) contained 11 principles regarding how countries would address Nazi-confiscated artworks and related claims. Principle 8 prescribed that if the pre-War owners of Nazi-confiscated artworks or their heirs can be identified, a "just and fair" solution should be achieved.[14] A. at 45.

F. Notwithstanding that the Washington Principles are Legally Non-Binding, the U.S. Views Their Purpose as Securing the Return of Nazi-Confiscated Artworks to Rightful Owners

Both Ambassadors Kennedy and Eizenstat have made clear that the purpose of the Washington Principles is to return Nazi-confiscated artworks to rightful owners, and to induce each country to work within its own legal system to do so. As Kennedy declared at Potsdam: "[t]he Washington Principles are based on the simple premise that artworks displaced during the 1933-1945 period should be returned to rightful owners… (and) provide guidelines that could be applied to all countries under their own national laws, procedures and practices."[15] In July 2006, Eizenstat testified before a subcom-

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[13] *Id*. at 198.

[14] Stuart E. Eizenstat, Opening Plenary Session Remarks at Prague Holocaust Era Assets Conference ("Opening Remarks") at 10.

[15] Potsdam Remarks, *supra* note 3.

mittee of the U.S. House Committee on Financial Services (Subcommittee testimony) that the U.S. consistently has employed moral pressure to induce affected nations to return Nazi-confiscated art.[16]

Kennedy said further that the failure to follow these prescriptions invites the moral rebuke of other stakeholders.[17] Similarly, in his Opening Remarks at the Prague Conference, Eizenstat observed that the purpose of the Principles in prescribing that Nazi confiscated artworks be identified is to secure their return to rightful owners.[18]

G. In October 2000, the U.S. and 37 Other Governments Convened in Vilnius, Lithuania to Reaffirm Their Commitment to the Washington Principles

From October 3-5, 2000 officials from 38 governments, including the U.S., convened in Vilnius to confirm their commitment to the Washington Principles. On October 5, 2000, stakeholders agreed to the Vilnius Forum Declaration urging all stakeholders "to undertake every reasonable effort to achieve the restitution of cultural assets looted during the Holocaust to the original owners or their heirs" and "to take all reasonable measures to implement the Washington Conference Principles on Nazi-Confiscated Art…."[19]

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[16] Subcommittee testimony at 6.

[17] *Id.* at 3.

[18] Opening Remarks, *supra* note 14 at 9.

[19] Commission for Looted Art in Europe-Vilnius Forum Declaration, available at www.lootedartcommission.com/vilnius-forum.

H. Despite the 1998 Congressional Legislation and the Washington Principles, U.S. Courts Continued to Time-Bar Judicial Claims to Recover Nazi-Confiscated Artworks

The Principles did not achieve the foreign policy goal of the U. S. to restitute Nazi-confiscated artworks. At a hearing before the Commission on Security and Cooperation in Europe (CSCE) of the Helsinki Commission in Washington D.C. on May 25, 2010 (CSCE Hearing Testimony), Eizenstat testified: "[a]nd here, permit me to be very frank: The momentum following the 1998 Washington conference to return looted art to its rightful owners has significantly dissipated."[20] Indeed, as the court observed in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574, 576-77 (5th Cir. 2010), "[n]o court has ever adopted what Appellant is urging here—some form of special federal limitations period governing all claims involving Nazi-confiscated artworks. In such cases, courts have consistently applied state statutes of limitation."

[20] CSCE Hearing Testimony at 6.

I. To Redress the Failure of the Washington Principles to Return Nazi-Confiscated Artworks to Rightful Owners, The Terezin Declaration Decreed that All Nations Would "***Make Certain***" that Their Discrete National "***Legal Systems***" Resolved Claims for the Recovery of Nazi-Confiscated Artworks "Based on the Facts and Merits of the Claims and All Relevant Documents"

In June 2009—with strong U.S. backing—some 47 nations convened the Prague Holocaust Era Assets Conference (Prague Conference), "the fifth international Holocaust-related conference that began with the 1997 London Conference."[21] In his opening remarks Eizenstat lamented that while the Washington Conference contemplated that each nation would work within its own discrete legal system to achieve the prescribed objectives—most nations had neglected this commitment.[22]

When the Prague Conference ended, the stakeholders promulgated the Terezin Declaration (Declaration) which reaffirmed, clarified, and intensified their commitment to resolving claims for the recovery of Nazi-era artworks on their substantive merits. The Washington Principles had prescribed merely that claims for the recovery of Nazi-confiscated artworks be decided in a "just and fair" manner. The Declaration, however, expressly noted that the Principles had achieved disappointing results, and made clear that each stakeholder commits to ***"make certain"*** that its own national ***"legal system"*** decide such claim not merely in a

[21] CSCE Prepared Remarks at 1-2.
[22] Opening Remarks, *supra* note 14 at 9.

"just and fair" manner—as the Principles had prescribed—but rather "***on the facts and merits***" of the claim and with reference to "all relevant documents submitted by the parties":

> Keeping in mind the Washington Conference Principles on Nazi-Confiscated Art, and considering the experience acquired since the Washington Conference, we urge all stakeholders to ***ensure*** that their ***legal systems*** or alternative processes, while taking into account the different legal traditions, facilitate just and fair solutions with regard to Nazi-confiscated and looted art, and ***to make certain that claims to recover such art are resolved expeditiously and based on the facts and merits of the claims*** and all relevant documents submitted by all the parties. Governments should consider all relevant issues when applying various legal provisions that may impede the restitution of art and cultural property in order to achieve just and fair solutions, as well as alternative dispute resolutions, where appropriate under law. A at 19-20. (Emphasis, italics, and underlining added).

Both Eizenstat and Kennedy repeatedly have stressed that the purpose of the Declaration is to ensure that courts and other administrative bodies decide claims for the recovery of Nazi-confiscated artworks on their substantive merits, and without regard to otherwise applicable statutes of limitation. Before the Helsinki Commission Eizenstat related that the Declaration: "urged the courts, Mr. Chairman, and other fora that decide art restitution

cases to base their cases on the facts of the individual case rather than relying on technical grounds such as statutes of limitations."[23]

Similarly, Kennedy declared unequivocally that "[t]he Terezin Declaration reinforces the Washington Principles, urging that claims be resolved expeditiously and fairly, ***based on the facts and merits***." (Emphasis and italics added)[24] Kennedy explained that statutes of limitation frustrate the goal of resolving claims for the recovery of Nazi-confiscated artworks on their merits.[25] He further declared that historical circumstances as well as the uncertainty of the "current restitution processes" make it unfair that claims for the recovery of Nazi-confiscated artworks be barred by statutes of limitation. [26]

Kennedy's comments echo Eizenstat's declaration at the start of the Prague that statutes of limitation frustrate the resolution on the merits of claims to recover Nazi-confiscated artworks. [27]

J. While the U.S. Would Have Preferred to Have Made the Terezin Declaration Legally Binding, It Had to Settle for a "Non-Binding" Agreement That Similarly Relies upon Moral Suasion

At the Commission hearing Eizenstat explained that a "non-binding" agreement was ***the only practical way*** that the U.S. could promote its

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[23] CSCE Hearing Testimony, *supra* note 20 at 6.

[24] Statement by Ambassador J. Christian Kennedy, Special Envoy for Holocaust Issues Delivered During Town Hall Meeting at U.S. Department of State, September 22, 2009 ("Town Hall Statement").

[25] *Id*.

[26] *Id*.

[27] Opening Remarks, *supra* note 14 at 10.

foreign policy of returning property looted during the Holocaust to rightful owners. He said further that the stakeholders expected each country to achieve the stated goals of the Declaration ***in the context of their own national legal systems***: "it is meant to mean that each state can act within its own national laws, as it sees fit, but that these are moral principles that should guide it."[28]

Eizenstat also testified that through the Declaration the parties intended to establish an international benchmark by which the conduct of each country in returning Holocaust property could be gauged.[29]

Finally, Eizenstat related that "[o]ur job in the State Department is to work with the states that participated in the Prague Conference to convert the moral commitments in the Declaration into action. And that's what we're doing with the best practices that we're now negotiating."

The Current Proceeding

On July 24, 2008 Petitioner—the sole heir of Holocaust victim Oskar Reichel—filed her First Amended Answer and Counterclaim in the U.S. District Court for Massachusetts seeking to recover an oil painting by the artist Oskar Kokoschka entitled "Two Lovers" ("the Painting") in the possession of the MFA.[30] The Counterclaim set forth the unconscionable circumstances under which Reichel relinquished the Painting in Vienna Austria in February 1939 to art dealer Otto Kallir in a prototypical "forced sale," induced by rabid and

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[28] CSCE Hearing Testimony, *supra* note 19 at 8.
[29] *Id*. at 8.
[30] Brief of Appellant at 6-7.

intensifying Nazi persecution which already had deprived Reichel of his citizenship, his profession, his business and even his home.[31]

The Counterclaim contrasted sharply with how the MFA characterized Reichel's transfer of the Painting to Kallir. On January 22, 2008 the MFA filed an action for a declaratory judgment asserting that the three-year Massachusetts statute of limitations to recover personal property (Mass. Gen. Laws. Ann. Ch. 260 § 2A (1948)) as precluding any judicial remedy of Petitioner to reclaim the Painting and thus validating MFA's legal ownership. MFA's complaint asserted that "[t]he Painting was never confiscated by the Nazis, was never sold by force as a result of Nazi persecution, and was not otherwise taken from Dr. Reichel."[32] On May 28 2008, the ***Boston Globe*** published an article entitled ***Holocaust historians blast MFA stance in legal dispute,*** assailing the public position of MFA that Nazi persecution did not compel Reichel to relinquish the Painting.[33]

On May 28, 2009 the District Court granted Respondent's motion for summary judgment, ruling that as a matter of Massachusetts law the three-year prescriptive period precluded Petitioner's claim to recover the Painting and denying Petitioner any discovery on her claim. Petitioner appealed this ruling and on September 30, 2008 filed Brief of Appellant which alleged that the MFA had acquired and retained the Painting in bad faith and in breach of its fiduciary duties of honesty, loyalty and transparency to the charitable public trust that it

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[31] *Id*.

[32] *Id.* at 6. MFA Complaint at par. 15

[33] Available at http://www.boston.com/ae/theatre-art/artciles/2008/28/holocaust-historians-blast-mf

administers as a federal tax-exempt institution under 26 USCA § 501(c)(3). Petitioner also asserted that MFA's habitual fiduciary malfeasance and lack of public accountability—which the three year Massachusetts limitation period fosters—spawned the criminal trade in stolen art.[34]

On October 14, 2010 the Court of Appeals affirmed the ruling of the District Court. The court said, *inter alia,* that the Terezin Declaration, while "reflect[ing] a clear preference that Nazi-era disputes should be resolved 'based on the facts and merits' rather than on legal technicalities" was nonetheless "too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitation." 623 F.3d at 13. The court also said that Petitioner "has not shown that application of the Massachusetts statute of limitations…in this case would cause a 'significant conflict with, or threat to' the federal interests and policies embodied in section 501(c) (3) …." (Citation omitted). 623 F.3d at 11.

REASONS FOR GRANTING THE PETITION

MFA repudiates how the Court consistently has determined whether the President acts in foreign affairs in a manner that preempts conflicting state law. *MFA* undermines correspondingly the U.S. Constitution which allocates foreign policy to the "political branches" exclusively. *MFA* also subverts substantive U.S. foreign policy to encourage all affected nations to resolve claims for the recovery of Nazi-confiscated artworks on their merits, which

[34] Brief of Appellant at 3.

both Congress and the President have declared and pursued for many years.

MFA holds that an executive agreement between the U.S. and 46 other nations (Declaration) that expresses the textually clear commitment of all "stakeholders" to "make certain" that their discrete national "legal systems" resolve claims for the recovery of Nazi-confiscated artworks on their merits does not preempt—under the Supremacy Clause of the U.S. Constitution—a conflicting Massachusetts three-year prescriptive period for recovering chattels that precludes this objective. [Under this three-year period, the claim of the Reichel family to recover the Painting expired in February 1942, only two months after the attack on Pearl Harbor and one year before the London Declaration]. ***MFA then held that a Massachusetts statute of limitations prevents the U.S. Government from discharging its textually clear foreign policy commitment to 46 other nations in an international agreement.***

MFA reached this result by misapplying a questionable test for foreign affairs preemption that the Court intimated in *American Insurance Ass'n v. Garamendi,* 539 U.S. 396, 420 n.11 (2003) for when a state regulates within an area of "traditional responsibility" or "'competence.'" In such instance, the Court indicated that it might balance or weigh the "importance" of the state interest against the "strength" of the particular foreign policy. Applying this test, *MFA* relied upon the recent and wrongly decided *Dunbar v. Seger-Thomschitz,* 615 F.3d 574 (5th Cir. 2010), and implicitly concluded that the importance to Massachusetts of applying statutes of limitation for the recovery of personal property within its borders outweighed the strength of U.S. foreign policy expressed in the Declaration to resolve

claims for the recovery of Nazi-era artworks on their merits.

MFA's departure from the established tenets of foreign affairs "conflict" or "obstacle" preemption has sweeping significance for:

1) How the U.S. Constitution allocates foreign affairs authority to Congress and the President exclusively—with no role either for states or the Federal Judiciary—and entrusts the Court to ensure that state laws do not impair federal foreign policies;

2) The capability of the President to conduct foreign relations and to settle international claims;

3) The substantive foreign policy of both Congress and the President to return Holocaust-era artworks to rightful owners;

4) The textually explicit foreign policy commitment of the U.S. Government in the Declaration to 46 other stakeholders to "make certain" that the U.S. national "legal system" resolves these claims on their substantive merits;

5) The capability of the State Department to perform its declared mission of persuading other stakeholders to honor this promise;

6) The responsibility of federal tax-exempt institutions such as the MFA under 26 USCA § 501(c)(3) to adhere to clearly declared U.S. public policy to return Nazi-confiscated artworks in their possession to rightful owners;

7) The formal fiduciary duties of federal tax-exempt museums such as the MFA as public trustees to take affirmative precautions against acquiring Nazi-confiscated artworks for their public collections, to be honest with the public about whether they are in possession of Nazi-confiscated artworks, and to return these artworks to rightful owners;

8) Holocaust victims and their heirs internationally seeking to recover Nazi-era artworks;

9) U.S. private collectors in possession of Nazi-confiscated artworks; and

10) The international art market which is centered in New York with its concomitant ***international*** and ***interstate commerce*** in Nazi-era artworks.

I. *MFA* Abandons the Analytical Framework That the Court Consistently Has Employed to Determine When the President Acts in Foreign Affairs in a Manner that Preempts Conflicting State Law—the "Tripartite" Scheme of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer,* 343 U.S. 579 (1952)—Thereby Skewing the Court's Preemption Doctrine as well as Recent Foreign Affairs Decisions

A. *MFA* Scuttles the "Tripartite" Framework of *Youngstown*

Medellin v. Texas, 552 U.S. 491, 524 (2008) reaffirmed that the "familiar tripartite scheme" of Justice Jackson in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635 (1952) "provides the accepted framework for evaluating executive action in foreign affairs." 552 U.S at 524. Quoting *Youngstown*, the Court said that in foreign affairs "'[w]hen the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635. Moreover, the Court has adhered to this approach for many years. *See, e.g.*,

Dames & Moore v. Regan, 453 U.S. 654, 668 (1981), quoting *Youngstown.*

The declaration of Congress in the Redress Act that all nations should return Nazi-confiscated artworks to rightful owners—and its allocation of $5 million dollars toward this goal—amplified necessarily the President's ***already presumptively valid*** exercise of claims settlement authority in the Declaration.

MFA, however, ignores that the foreign policy embodied in the Declaration has the explicit textual approval of ***both*** political branches for preemption purposes. *MFA* then discards the lodestar that consistently has guided the Court in resolving the recurring and often vexing constitutional question whether a particular action of the President in foreign affairs preempts conflicting state law.[35] *MFA* thereby skews the Court's decisions and invites further error from the lower courts in this most consequential area.

B. *MFA* Overlooks that the Declaration Reflects a Prototypical Exercise of Presidential International Claims Settlement Authority

In *Medellin* the Court confirmed that the President enjoys a special capability in foreign affairs to settle international claims, and that the acquiescence by Congress for more than 200 years in this practice provides an historical "gloss" on the President's textual constitutional authority that validates this power. (Citation omitted) 552 U.S. at 530-31. Moreover, *Garamendi* said that the

[35] *See Dames & Moore v. Regan*, 453 U.S. 654, 660-62 (1981).

President's claims settlement authority includes specifically the power to resolve claims emanating from the Holocaust. 539 U.S. at 420.

MFA, however, fails to accord the Declaration the necessary preemptive effect that a paradigmatic exercise of the President's international claims settlement authority entails. *MFA* then undermines the capability of the President to conduct foreign affairs in an area where the Court has affirmed that the President enjoys presumptive autonomy, and to resolve Holocaust claims internationally in the manner that he has selected.

C. *MFA* Ignores that the "Non-Binding" Declaration Reflects a Discrete and Acknowledged Diplomatic Option For the President to Conduct Foreign Affairs and to Settle International Claims

Non-binding executive agreements are a recognized diplomatic alternative for promoting a particular foreign policy when a binding agreement is not politically possible, and create moral and political obligations. *See, e.g.*, *Restatement (Third) of the Law of Foreign Relations of the United States,* § 301 (1986), Reporters Note 2 at 151: "[p]arties sometimes prefer a non-binding agreement in order to avoid legal remedies. Nevertheless, the political inducements to comply with such agreements may be strong and the consequences of non-compliance may sometimes be serious."; Oskar Schacter, *The Twilight Existence of Non-Binding International Agreements*, 71 Am. J. Int'l L. 296, 300 (1977), observing that what "non-binding" means is "simply that non-compliance by a party would not be a ground for a claim for reparation of judicial

remedies... ***[T]he understanding and expectation is that national practices will be modified, if necessary, to conform to those understandings***." (Emphasis and italics added)

Indeed, Eizenstat explained the purpose of the Declaration in just these terms at the Helsinki Commission Hearing. (This testimony is available at http://csce.gov/index.cfm). By failing to honor the Declaration as a purposefully non-binding executive agreement, *MFA* denied the President a demonstrably ***essential*** diplomatic option to promote U.S. foreign policy to return Nazi-confiscated artworks to rightful owners.

D. *MFA* Presents the Court with a Need to Revisit When State Laws Within an Area of "Traditional Responsibility" Conflict Impermissibly with Executive Branch Foreign Policy and so Are Preempted Under the Supremacy Clause—A Test that the Court Hypothesized in *Garamendi* (539 U.S. at 420, n.11) and *MFA* Applied with Disastrous Consequences

1. The "Balancing" Test for Federal Foreign Affairs Preemption Suggested in Footnote 11 of *Garamendi*

Garamendi intimated a test for federal preemption in foreign affairs when a state addresses a "traditional state responsibility" (*"Garamendi* test") 539 U.S. at 420, n.11. The Court said that when a state regulates in "what Justice Harlan called its 'traditional competence'…but in a way that affects foreign relations, it might make good sense to require a conflict of a clarity or substantiality that

would vary with the strength or the traditional importance of the state concern asserted. Whether the strength of the federal foreign policy interest should itself be weighed is, of course, a further question." *Id.*

This test apparently contemplates that when a state law addresses such "traditional responsibility," the federal courts somehow will *balance* the "importance" of the particular state interest at issue with the "strength" of the foreign policy to determine whether foreign policy preempts state law. "[T]his language suggests that although foreign affairs is exclusively federal and no substantial conflict will be tolerated, the assessment will be made within the context of the relative legitimate interests of the states."[36]

But this test "ignore(s) the problem of discerning state and federal areas of supremacy" and "[a]s such…does not come close to setting a clear standard articulating when a state action sufficiently affects foreign affairs to necessitate preemption."[37] The failure of *Garamendi* to enunciate a clear test for foreign affairs "conflict" preemption is most consequential and deserving of the Court's attention, for preemption is "a bedrock feature of our constitutional system,"[38] and "is almost certainly the most frequently used doctrine of constitutional law in practice."[39] A clear and prospective standard is all the more important in a world in which the

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[36] Ved P. Nand, David K. Pansius, *2 Litigation of International Disputes in Federal Courts, §* 11:10 (2010).

[37] Joseph P. Crace, Jr., "*Gara-mending the Doctrine of Foreign Affairs Preemption,*" 90 Cornell L. Rev. 203, 223-224 (2004).

[38] Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 Tulane L. Rev. 1257, 1258 (2010).

[39] Caleb Nelson, *Preemption,* 86 Va. L. Rev. 225, 226 (2000).

individual states more frequently engage foreign countries in commerce, and the world is more "interconnected."[40]

While foreign affairs preemption doctrine may be a "muddle,"[41] it nonetheless traditionally has embodied certain core principles that the *Garamendi* test would appear to forsake. First, the *Garamendi* test challenges the prevailing assumption that the Court will readily preempt state laws that infringe upon foreign affairs. "Looking at the history of one area of federal law, the Court has been particularly willing to preempt state laws that touch on foreign affairs."[42] *See*, *e.g*. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985): "in the seminal case of *Hines v. Davidowitz*, 312 U.S. 52…(1941), the Court inferred an intent to preempt from the dominance of the federal interest in foreign affairs because 'the supremacy of the national power in the general field of foreign affairs…is made clear by the Constitution.' *Id*. at 62." And "[m]any have concluded that *Hines* establishes a rule that preemption is much more easily found when Congress has passed legislation relating to foreign relations." (Citation omitted)[43]

Second, the *Garamendi* test repudiates the Court's traditional approach to preemption—especially in foreign affairs—which views the importance of the affected state interest as

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[40] *See, e.g.*, Jack L. Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 S. Ct. Rev. 175, 196 (2000).

[41] Nelson, *supra* note 39 at 232-33. *See also* Goldsmith, *supra* note 40 at 178: "[t]he Supreme Court's preemption jurisprudence is famous for its incoherence. The doctrines of preemption are vague and indeterminate."

[42] Daniel E. Troy, Rebecca K. Wood, *Federal Preemption at the Supreme Court*, 2008 Cato Sup. C. Rev. 257, 274.

[43] Goldsmith, *supra* note 40 at 188.

inconsequential. *See, e.g. Felder v. Casey*, 487 U.S. 131, 138 (1988), "[u]nder the Supremacy Clause of the federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law for 'any state law, however within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.' Citing *Free v. Bland* , 369 U.S. 663, 666 (1962)"; *United States v. Belmont,* 301 U.S. 324, 331 (1937): "[i]n respect of all negotiations and compacts, and in respect of our foreign relations generally… state policies *are irrelevant to the inquiry and decision*." (Italics supplied)

Third, by envisioning that courts will balance the "strength" of clearly articulated U.S. foreign policy against the "importance" of competing state interests, the *Garamendi* test necessarily accords the Federal Judiciary a pivotal role in foreign affairs. This test would appear to allow federal courts to nullify expressly declared foreign policy objectives of both political branches whenever a court believes that competing state interests should predominate—thereby making the Judiciary, and not Congress and the President, the ultimate arbiter of U.S. foreign policy.

This role violates the U.S. Constitution and also contravenes the consistent historical understanding of the Court that foreign affairs decisions belong exclusively to the political branches (Congress and the President). The federal judiciary has ***no*** substantive foreign affairs authority. *See, e.g Medellin v. Texas,* 552 U.S. 491, 511 (2008), reaffirming the "principle that '[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political Departments'" (citing *Oetjen v. Central Leather Co.*,

246 U.S. 297, 301 (1918). Accordingly, "the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen*, 246 U.S. at 302. *See also, e.g., Garamendi*, 539 U.S. at 427 observing that "our thoughts on the efficacy of the one approach or the other are beside the point, since our business is not to judge the wisdom of the National Government's policy: dissatisfaction should be addressed to the President, or, perhaps, Congress."; *O'Melveny & Myers v. Federal Deposit Insurance Corporation*, 512 U.S. 79, 89 (1994), '[w]ithin the federal system, at least, we have decided that that function of weighing and appraising is more appropriately for those who write the laws, rather than for those who interpret them.'" (Citation and quotations omitted); *Dames & Moore v. Regan,* 453 U.S. 654, 660 (1981), noting that "the Framers 'did not make the judiciary the overseer of our Government.'" (Citation omitted). So "with regard to foreign affairs, judicial decision making bypasses procedural safeguards of the legislative process, producing a lack of political accountability and democratic legitimacy."[44]

Not only does the *Garamendi* test discount established tenets of foreign affairs preemption, it also opens a Pandora's box of questions about how federal courts should administer this test. Even assuming, *arguendo*, that this test reflected a valid exercise of federal judicial authority, what standards does a federal court invoke to balance or weigh the "strength" of an expressly stated and constitutionally legitimate foreign policy against the comparative "importance" of a conflicting state law? As a threshold matter, is a federal court equipped to gauge the

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[44] Joseph P. Crace, Jr., *Gara-mending the Doctrine of Foreign Affairs Preemption,* 90 Cornell L. Rev. 203, 229 n. 171 (2003).

true "strength" of a discrete foreign policy without jeopardizing a delicate and subtle balance of reciprocal concessions? Can a state immunize a particular law from preemption merely by declaring the importance of such law? Does an implicit balance decimate the traditional doctrine of "conflict" or "obstacle" preemption in foreign affairs in which all that has traditionally been required is an ascertainable conflict between express foreign policy and state law?[45]

Petitioner respectfully submits that the *Garamendi* implied "balancing" test is neither judicially appropriate nor manageable. Rather, the Court should limit its inquiries in federal foreign affairs preemption to: (1) whether the President's foreign policy in a particular instance is constitutionally valid under *Youngstown*, or represents an exercise of international claims settlement authority; and (2) whether the Executive Branch or Congress have stated the policy with sufficient clarity. These inquiries evoke core judicial competence. If the answer to both questions is in the affirmative, the Supremacy Clause requires that foreign policy preempt state law, regardless of the importance to the state of the particular interest in question or whether the law represents an exercise of a state's "traditional responsibility."

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[45] *See, e.g.*, *Garamendi*, 539 U.S. at 427; Goldsmith, *supra* note 40 at 185.

2. *MFA* Applied the *Garamendi* Test in a Manner That Makes Manifest Its Many Deficiencies and that Subordinates to State Prerogatives the Textually Clear and Proactive Foreign Policy of ***Both*** Congress and the President to Return Nazi-Confiscated Artworks to Rightful Owners

MFA makes palpable the many deficiencies of the *Garamendi* implied balancing test. As a threshold matter—and as noted—the transparent conflict between the clearly stated foreign policy embedded in the Declaration and the subject Massachusetts prescriptive period preempts Massachusetts law under any traditional foreign affairs preemption standard. Any contrary conclusion would allow state law to obstruct the textually clear foreign policy of both political branches in an executive agreement that also represents a prototypical exercise of Presidential international claims settlement authority. **But this is precisely what *MFA* does**.

MFA distinguished between the category of preemption in *Garamendi* and the argument that federal foreign policy expressed in the Declaration preempted the subject Massachusetts prescriptive period. 623 F.3d at 12. *MFA*, however, overlooked that in *Garamendi* the Court made clear that even when a state acts within such an area of "traditional competence"—with no intention of affecting foreign affairs—Executive Branch foreign policy nonetheless preempts such law if it has more than a merely incidental impact upon foreign policy, and most certainly when the state law frustrates or sabotages clearly expressed foreign policy objectives. The Court observed that even under the judicial view of preemption that protects the autonomy of the several

states to the greatest degree, "the likelihood that state legislation will produce something more than an incidental effect in conflict with express foreign policy of the National Government would require preemption of the state law." 539 U.S. at 420.

MFA, however, disregards this principle. While *MFA* acknowledges that the Declaration "reflects a clear preference that Nazi-era art disputes should be resolved 'based on the facts and merits' rather than legal technicalities" (623 F.3d at 13), *MFA* concludes nonetheless that this policy either was not sufficiently "weighty" or adequately stated to overcome the interest of Massachusetts in prescribing time limits for the recovery of personal property. *Id.* at 13-14.

MFA savages traditional foreign affairs "conflict" preemption doctrine. First, it ignores that all that has traditionally been required for federal foreign affairs preemption is a concrete conflict between legitimate federal foreign policy and state law. *Garamendi* reaffirms this principle. The clearly articulated U.S. foreign policy textually expressed in the Declaration satisfies this test beyond question.

Second, *MFA* all but obliterates the doctrine of conflict preemption in foreign affairs. *MFA* requires something tantamount to *express* preemption—an explicit statement by Congress or the President of a federal intent to preempt *specific* state laws (statutes of limitation) in a particular foreign affairs context. This prescription lacks Court precedent and is unworkable. If validated, it would undermine the capability of the political branches to conduct foreign policy. [46]

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[46] *See, e.g.*, Crace, *supra* note 37 at 232, relating that "[i]n the high stakes world of foreign affairs, Congress or the President

II. *MFA* Mistakes the Politically Brokered and Purposefully Non-Binding Language of the Declaration with the Far More Emphatic Foreign Policy of Both Congress and the President to Return Nazi-Confiscated Artworks to Rightful Owners Thereby Undermining—Correspondingly—U.S. Foreign Policy in Several Important Ways

MFA fails to distinguish the politically circumspect Declaration from the impassioned substantive U.S. foreign policy of both Congress and the President to return Nazi-confiscated artworks to rightful owners. *Garamendi* made clear that it is the substantive Executive Branch foreign policy that preempts conflicting state law and ***not*** the agreement itself. The Court noted that because the subject executive agreements "include no preemption clause," the preemption claim must "rest on asserted interference with the foreign policy those agreements embody." 539 U.S. at 417.

MFA misapplies this principle. *MFA* reasons that the Declaration's "language is too general and too hedged to be used as evidence of an express federal policy disfavoring statutes of limitations." 623 F.3d at 13. *MFA*, however, ignores that substantive U.S. foreign policy to return Nazi-era artworks is far stronger and more compelling than the temperate language of the Declaration.

MFA also misconstrues the Declaration in several other respects, impairing U.S. foreign policy correspondingly. MFA quotes language from the Declaration "that 'various legal provisions that may impede the restitution of art…' will continue to be

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often cannot effectively respond to offensive state activity before adverse consequences occur."

applied." 623 F.3d at 13. But rather than exonerating stakeholders from honoring their reciprocal commitments to resolve claims for the recovery of Nazi-confiscated artworks on their merits based upon their individual legal systems, this language instead seeks to ensure that each nation will achieve this objective within the context of its own legal tradition, ***notwithstanding*** that these traditions may vary and that legal provisions ***other*** than statutes of limitation might otherwise impede this goal.

MFA subverts U.S. foreign policy to return Nazi-confiscated artworks to rightful owners in several ways. First, *MFA* frustrates the clearly-declared substantive foreign policy of both political branches that U.S. courts adjudicate claims for the recovery of Nazi-confiscated artworks on their substantive merits.

Second, *MFA* breaches the promise of the U.S. Government in the Declaration to "make certain" that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits. *MFA,* then, undermines U.S. foreign policy credibility and commitment on an important issue that both Congress and the President have engaged and upon which the U.S. Government has taken the international initiative. *MFA* also almost certainly causes collateral but perhaps indeterminate damage to U.S. credibility on other foreign policy issues.

Third, by refusing to honor the U.S. commitment in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their merits, *MFA* precludes any possibility that the U.S. Government can persuade other stakeholders to

honor their reciprocal commitments. Eizenstat identified this to be U.S. foreign policy after the Declaration.

III. *MFA* Ignores that as a Coordinate Branch of the U.S. Government the Federal Judiciary—in the Absence of Congressional Legislation Implementing the Declaration—Has an Affirmative Responsibility to "Make Certain" (as the Declaration Prescribes) that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits By Invoking Appropriate Federal Common Law To Achieve This Objective

A. The Federal Judiciary Appropriately Applies Federal Common Law to Protect the Interests of the U.S. Government in Foreign Affairs

"Many of the rules that the Supreme Court… characterizes as federal common law are merely background rules that federal and state courts apply in order to avoid encroaching upon authority committed by the Constitution to Congress and the President. This is particularly true with respect to rules relating to foreign affairs."[47] Accordingly, "there is a remarkable consensus about the legitimacy of federal common law in foreign relations… Foreign relations is viewed as a special case because it is viewed as the exclusive prerogative of the federal government."[48] The traditional view is that courts

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[47] Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1252 (1996).

[48] Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 Va. L. Rev. 1617, 1632 (1997).

must apply federal common law in foreign affairs when necessary to safeguard "structural constitutional guarantees" and to ensure that state laws do not undermine U.S. foreign relations.[49] Accordingly, such "judge-made federal foreign relations law" constitutes the legitimate voice of the federal government in foreign affairs "until the federal political branches say otherwise."[50] *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n. 25 (1964) ("[v]arious constitutional and statutory provisions... reflect[ ] a concern for uniformity in this country's dealing with foreign nations and indicate a desire to give matters of international significance to the jurisdiction of the federal institutions."

In *Sabbatino* the Court invoked federal common law to protect the capability of the federal political branches to conduct foreign policy and to obviate state intrusions. *Sabbatino* underscored that the act of state doctrine was part of the federal common law, and that despite *Erie R. Co. v. Tomkins*, 304 U.S. 64 (1938) (generally abrogating "federal common law"), "there are enclaves of federal judge-made law which bind the states… and [p]rinciples formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests." 376 U.S. at 426. The Court said further that the "vitality" of the act of state doctrine as a principle of federal common law "depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." *Id.* at 427-28. *Sabbatino* deemed a uniform federal rule necessary to preclude the several states from impairing U.S. foreign policy

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[49] *Id*.
[50] *Id*.

by applying discrete and potentially provincial rules of decision to judicial controversies with foreign nations.

For these same reasons the Court should exercise its federal common law authority to create a uniform rule of timeliness for state courts when adjudicating claims for the recovery of Nazi-confiscated artworks. Just as the act of state doctrine in *Sabbatino* reflected the appropriate constitutional balance of authority "between the judicial and political branches of the Government on matters bearing upon foreign affairs," so, too, the Declaration entails a similar balance as it expresses the substantive foreign policy of both Congress and the President on how U.S. courts should decide judicial claims to recover Nazi-confiscated artworks. Just as in *Sabbatino*, the Court must fashion a uniform rule of decision for all U.S. courts adjudicating claims to recover Nazi-confiscated artworks that acknowledges the constitutional authority of the political branches to formulate substantive foreign policy in this area and implements—correspondingly—the express commitment of the U.S. Government in the Declaration to ensure that its national "legal system" resolves judicial claims for the recovery of Nazi-confiscated artworks on their substantive merits.

Moreover, the Court long has acknowledged the capability of the President—in the conduct of foreign affairs—to alter the substantive law that applies in private litigation. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981), noting "the difference between modifying federal court jurisdiction and directing courts to apply a different rule of law… ***The President has exercised power, acquiesced in by Congress, to settle claims, and as such, has simply effected a change in the substantive law governing the lawsuit."*** (Emphasis and italics added).

B. That the MFA is a Tax-Exempt Public Trustee under 26 USCA § 501(c) (3)—Required as a Matter of Law to Adhere to Clearly Declared U.S. Public and Foreign Policy—Makes It All the More Important That the Court Invoke Appropriate Federal Common Law

The U.S. Government has an acute interest in ensuring that the federal tax laws—including the tax exemption for charitable educational institutions under 26 USCA § 501(c)(3) that the MFA and many other U.S. museums enjoy—operate as Congress intended. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing,* 545 U.S. 308, 315 (2005). Moreover, "[f]or the large number of U.S. arts organizations (such as MFA) whose existence depends on private charitable donations, qualification for federal tax exemption under IRC 501(c)(3) is effectively a requirement for survival."[51]

In *Bob Jones University v. United States*, 461 U.S. 574 (1983) the Court affirmed an IRS ruling revoking the federal tax-exemption of a university that proscribed interracial dating. 461 U.S. at 599. The Court held that in addition to the statutory requirements for tax-exemption, "underlying all relevant parts of the Code, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity—namely that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." 461 U.S. at 586. The Court said further that because the university's dating proscriptions violated the public policy of racial equality that all three branches of the U.S.

[51] Micah J. Burch, *National Funding for the Arts and Internal Revenue Code § 501(c)(3),* 37 Fla. St. U.L. Rev. 303, 303 (2010).

government had prescribed, "an educational institution engaging in practices affirmatively at odds with this declared position of the whole government cannot be seen as exercising a 'beneficial and stabilizing influence in community life'" that justifies its exemption from federal taxation. (Citation omitted) 461 U.S. at 599. [52]

Correspondingly, both Congress and the President have prescribed an unequivocal foreign policy seeking to return Nazi-confiscated artworks to rightful owners, and so similarly have declared the policy of the "whole government" on this question. Moreover, this policy addresses the "core" exempt function of the MFA as a putative charitable educational institution that collects artworks for the ostensible purpose of educating the public. Just as the university in *Bob Jones* was necessarily accountable to federal public policy concerning racial equality, so, too, must the MFA as a § 501(c)(3) institution be accountable to U.S. foreign policy on Nazi-era artworks, and to the commitment of the U.S. Government in the Declaration to "make certain" that the U.S. national "legal system" resolves these claims on their substantive merits.

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[52] *Bob Jones* "is the judicial cornerstone" of the "public policy doctrine" requiring tax-exempt entities to operate consonant with clearly established public policies. Johnny Rex Buckles, *Reforming the Public Policy Doctrine*, 53 U.Kan.L.Rev. 397, 400 (2005).

C. The Failure of Respondent and Other Federal Tax-Exempt Museums—as Public Trustees Under § 501(c)(3)—to Discharge Their Fiduciary Duties of Loyalty, Care and Obedience that They Owe the Public in Their Stewardship of Artworks—Which Failure State Statutes of Limitations ***Incentivize***—Threatens Multiple Federal Interests

"Fiduciary obligations arise from museums' statuses as charitable trusts or non-profit corporations. Museum managers are trustees and thus are subject to the fiduciary duties common to all public and charitable trusts."[53] These include "the duty of care, the duty of loyalty and the duty of obedience." [54] The duty of obedience is "unique to the not-for-profit sector and recognizes that, as an institution held in public trust...[its] success is defined by the efficacy with which it fulfills its mission."[55] Because the "public is the ultimate beneficiary of a public charitable trust,"[56] "[t]he trustees of an art museum… owe a fiduciary duty … to the public as a whole."[57] Moreover, 26 CFR § 1.501(c)(3)-(1)(c) requires tax-exempt entities to operate in a manner that does not encourage illegal or criminal activity: "the operation test examines the

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[53] Emily A. Graefe, *The Conflicting Obligations of Museums Possessing Nazi-Looted Art*, 51 B.C. L. Rev. 473, 493 (2010).
[54] Peggy Sasso, *Searching for Trust in the Not-For–Profit Boardroom: Looking Beyond the Duty of Obedience to Ensure Accountability,* 50 U.C.L.A. L. Rev. 1485, 1485 (2003).
[55] *Id.*
[56] Jason R. Goldstein, *Deaccession: Not Such a Dirty Word*, 15 Cardozo Arts & Ent. L. J. 213, 214 n.5 (1997).
[57] *Id.* at 214.

actual… activities in practice and day-to day functioning" of a tax-exempt institution. [58]

The duties of care, loyalty and obedience collectively require that museums take reasonable and informed precautions against accepting Nazi-confiscated and other stolen artworks as charitable donations: "[i]n acquiring works and dealing with the risk of stolen works, museums must fulfill their duty of care,"[59] and "museums that do not exercise sufficient due diligence in acquiring works of art are …breaching their public and fiduciary obligations."[60]

The charitable trustee's duty of loyalty to the public entails a heightened duty of honesty—"[n]ot honesty alone, but the punctilio of an honor the most sensitive, is…the standard of behavior."[61]

U.S. museums habitually fail to exercise appropriate precautions against accepting Nazi-confiscated and other stolen artworks into their public collections. *See, e.g.*, Linda F. Pinkerton, *Acquisition Policies Concerning Stolen and Illegally Exported Art*, 5 Vill. Sports & Ent. L. J. 59, 59 (1998), "[i]f the art market is going to be cleaned up, that is freed of so much stolen and smuggled artwork, art museums in the United States are going to have to abandon the back seat and take a leading role in the cleaning. The dialogue and rhetoric have not changed for decades."; Julia A. McCord, *The Strategic Targeting of Diligence: A New Perspective*

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[58] Gina M. Lavarda, *Nonprofits: Are You at Risk of Losing Your Tax-Exempt Status*?, 94 Iowa L. Rev. 147, 181 (2009)

[59] Graefe, *supra* note 53 at 495.

[60] Patty Gerstenblith, *Acquisition and Deaccession of Museum Collections and the Fiduciary Obligations of Museums to the Public*, 11 Cardozo J. Int'l & Comp. L. 409, 453 (2003). *See also* Graefe, *supra* note 53 at 495-96.

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

on Stemming the Illicit Trade in Art, 70 Ind. L.J. 985, 997 (1995), "if museums could be eliminated from the illicit art trade, illegal art dealing could be significantly reduced."; Robin Morris Collin, *The Law and Stolen Art, Artifacts, and Antiquities*, 36 How. L.J. 17, 30 (1993), museums have "become a significant portal of entry for…stolen goods into the visible and legitimated world of art."

The pandemic failure of U.S. museums to take precautions against acquiring Nazi-confiscated artworks over the years—despite the warnings of the U.S. Government both in 1946 and 1951—has resulted in their being in possession of many contraband materials. *See, e.g.*, Barbara J. Tyler, *The Stolen Museum: Have United States Art Museums Become Inadvertent Fences for Stolen Artworks Looted By the Nazis in World War II?*, 30 Rutgers L. J. 441 (1999). *See also* http//www.nepip.org. in which 171 museums participating in the Nazi-Era Provenance Internet Portal Project of the American Association of Museums (and investigating the ownership history of their collections apparently for the ***first time***)—have identified (as of January 2, 2011) some 28,339 artworks in their collections that were potentially lost during the years 1933-45 as a result of Nazi coercion.

Applying state statutes of limitation to claims for the recovery of Nazi-era artworks threaten federal interests because these periods enable § 501(c)(3) museums to conceal their fiduciary malfeasance in acquiring and retaining contraband materials—such as MFA has done. This result not only misallocates increasingly scarce tax dollars but also makes U.S. museums catalysts for the international criminal trade in stolen art and cultural property. For as long as tax-exempt museums such as the MFA can raise a

three-year or comparable limitation period to defeat claims by rightful owners to recover Nazi-confiscated artworks, they have ***no legal incentive*** to obey their fiduciary duties, reform their lax acquisition practices, or adhere to U.S. public policy. Indeed, *MFA* concedes that because statutes of limitations "do not address the merits of a claim", they "do not vindicate the conduct of parties who successfully invoke them". 623 F.3d at 14. "[W]e make no judgment about the legality of the MFA's acquisition of the Painting in 1973", and MFA's apparent failure to investigate the Painting then was "legally inconsequential in this case." *Id*.

Moreover, "more than 100,000 works of art stolen by the Nazis are still missing." [62] If the Court does not reverse *MFA*, these artworks will continue to circulate throughout the U.S. art market immune from the judicial claims of rightful owners and be donated at taxpayers' expense to U.S. tax-exempt museums—notwithstanding the express foreign policy of both Congress and the President (the grantors of tax-exempt status) to return these artworks to rightful owners.

[62] Graefe, *supra* note 53 at 474.

D. Federal Common Law—and Federal Equitable Doctrine—Are the Appropriate Means For the Court To Ensure that the U.S. Government Fulfills Its Foreign Affairs Commitment in the Declaration to "Make Certain" that the U.S. National "Legal System" Resolves Judicial Claims for the Recovery of Nazi-Confiscated Artworks on Their Substantive Merits and in a "Just and Fair" Manner and that U.S. Tax-Exempt Museums Discharge Their Fiduciary Duties to the Public

Federal common law authority extends to replacing state prescriptive periods that impair federal policies or interests with alternative federal statutes of limitation or the equitable doctrine of laches. *See Occidental Life Insurance Company v. EEOC*, 432 U.S. 355, 367 (1977), ***"(s)tate legislatures do not devise their limitation periods with national interests in mind***, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies." (Citation omitted, emphasis and italics added).

By prescribing the flexible federal equitable doctrines of laches and unclean hands as a uniform rule of decision for U.S. courts adjudicating judicial claims to recover Nazi-confiscated artworks, the Court would implement appropriately the commitment of the U.S. Government in the Declaration to "make certain" that the U.S. national "legal system" resolves claims for the recovery of Nazi-confiscated artworks on their substantive merits and in a "just and fair manner." For unlike rigid statutes of limitation and related accrual principles, federal equitable doctrine focuses instead upon the fundamental

fairness of allowing a particular claim to proceed in a given context. *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946). Most importantly, federal equitable doctrine also explicitly promotes the discrete public policies that the U.S. government has enunciated in a particular context. *See, e.g., Virginia Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937): "(c)ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved"; *United States v. Morgan*, 307 U.S. 183, 194 (1939). And the federal equitable doctrine of "unclean hands" expressly accommodates the public interest. *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery*, 324 U.S. 806, 815 (1945). Federal equitable doctrine therefore can implement the foreign policy of the Declaration to resolve claims for the recovery of Nazi-era artworks on their merits. *See Schoeps v. Museum of Modern Art et. al.,* 594 F. Supp.2d 461, 467 (S.D.N.Y. 2009) applying in a diversity action New York equitable principles to entertain on their merits consolidated claims against two New York museums for the recovery of two iconic Picasso paintings that a victim of Nazi persecution putatively lost as a result of duress during the Nazi era.

Federal equitable doctrine also can redress the systemic failure of Respondent and other federal tax-exempt § 501(c)(3) museums to discharge their fiduciary duties that they have neglected. *See, e.g. Westinghouse Electric & Manufacturing Company v. Wagner Electric & Manufacturing Company,* 225 U.S. 604 620 (1912), "[o]n established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own

wrong." "A constructive trust arises where a person in a fiduciary relation acquires or retains property in violation of his duty as a fiduciary."[63]

CONCLUSION

For the foregoing reasons the Court should grant this petition for writ of certiorari.

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[63] V. Austin, W. Scott, *et al.*, *The Law of Trusts*, § 495 at 496 (4th ed. 1989).