No. 18-1057

IN THE

Supreme Court of the United States

MAREI VON SAHER,

Petitioner,

v.

NORTON SIMON MUSEUM OF ART AT PASADENA AND NORTON SIMON ART FOUNDATION,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

LAWRENCE M. KAYE
HOWARD N. SPIEGLER
DARLENE FAIRMAN
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, NY 10016

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square South, 411J
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ALAN DERSHOWITZ
1525 Massachusetts Avenue
Cambridge, MA 02138

Counsel for Petitioner

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INTRODUCTION

The core question in this Petition remains whether a suit between American citizens over property held in the United States may be frozen out of American courts because assessment of a foreign proceeding might be implicated. As emphasized in the Petition, this Court has repeatedly warned that claims processing rules should not morph into a canon of avoidance of the responsibility to adjudicate claims over which federal courts have jurisdiction, even on matters that might touch on "the most sensitive issues in American foreign policy, and... one of the most delicate issues in current international affairs." *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2081 (2015). Strikingly, this point is unaddressed by Respondents, and *Zivotofsky* is mentioned only once for an irrelevant aside on statutory construction. Resp. Br. at 33 (hereinafter "Br.").

That courts must decide cases properly before them is a well-established proposition of law. *Cf. Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("[W]hen a federal court has jurisdiction, it also has a 'virtually unflagging obligation ... to exercise' that authority.")).

The act of state doctrine is a "substantive defense on the merits," not a "jurisdictional defense." *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004). Although Respondents slyly speak of a "fully developed summary judgment record," Br. at i, and of the court below "considering the extensive factual record," Br. at 1, these terms are deliberate obfuscations. The only fact considered below was the existence of prior Dutch proceedings that, under the act of state doctrine, the Ninth Circuit allowed to pretermit further inquiry.

Respondents seek to avoid the simple fact that a straightforward common law dispute over the ownership of domestic property claimed by two American citizens was never subject to any merits adjudication. Instead, an American Petitioner is told that American courts are closed because a foreign proceeding is sacrosanct, without even a judicial examination of whether there is any foreign sovereign interest or American foreign policy interest at risk.

Even under the Full Faith and Credit Clause that constitutionally compels courts of one state to follow judgments of another, public policy must be honored before mechanically shutting the door of finality. *Franchise Tax Bd. of Cal. v. Hyatt*, 136 S. Ct. 1277, 1281 (2016) ("[T]he Clause 'does not require a State to substitute for its own statute … the statute of another State reflecting a conflicting and opposed policy.'" (quoting *Carroll v. Lanza*, 349 U.S. 408, 412 (1955))).

Unlike constitutional full faith and credit, the act of state doctrine is unclear federal common law. Yet, the Ninth Circuit's approach would leave American litigants at the mercy of unreviewable foreign proceedings, a measure of judicial abstention that would not even be extended to sister states. The Second, Third and Fifth Circuits correctly reject this courthouse-door shutting view of the act of state doctrine. That conflict and the merits of this dispute necessitate certiorari review.

I. This Case Properly Presents the Question of the Act of State Doctrine.

The facts necessary for certiorari review are beyond dispute. The paintings at issue belonged to Petitioner's family until forcibly taken by Herman Göring. Pet.App. 4a-6a. The Dutch postwar restoration program often failed to restore artworks to victims' families absent

payment to Dutch authorities of what had putatively been received from the Nazis. Pet.App. 225a. Many families either never received such funds or had to turn them over to escape the death grip of German occupation. Pet.App. 226a. More recently, the Dutch reversed course, resulting in the restoration of artwork to the victims' families, regardless of the prior "extremely cold and unjust" restitution program. Pet.App. 225a.[1] As a result, all looted artwork from the Goudstikker collection still in the custody of the Dutch Government was restored to Petitioner's family. The Cranachs, too, would have been returned, but they were no longer in government custody. Pet.App. 11a-12a.

Respondents assert that the Ninth Circuit granted summary judgment "[a]fter carefully considering the extensive factual record," Br. at 1, but by that court's own admission, this is not what occurred. The Ninth Circuit affirmed the district court, "but not under Dutch law" or any lower court fact finding, Pet.App. 5a, but instead on a de novo application of the act of state doctrine. Pet.App. 16a. The district court had granted summary judgment on a determination that under Dutch law good title existed when the paintings were sold to Respondents, without any factual examination of the act of state doctrine. Pet.App. 103a-104a, 108a. By contrast, the Ninth Circuit relied exclusively on the existence of Dutch proceedings to foreclose suit.[2] Pet.App. 17a.

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[1] The French government is now similarly redressing a disgraced postwar restitution system. https://www.nytimes.com/2019/04/15/arts/design/france-art-looted.html.

[2] Respondent argues that Petitioner somehow waived objections to the use of the act of state doctrine below. Br. at 24. To the contrary, Petitioner consistently argued that the doctrine was

Specifically, there has been no judicial finding that there were "bona fide" proceedings in the Netherlands permanently resolving ownership,[3] or that Petitioner's claim to the Cranachs was "settled."[4] There has been no examination by any court of how a museum acquired these masterpieces for $800,000 while staring at the name "Herman Göring" in the chain of title. Pet.App. 167a. Nor has there been any examination of Respondents' derogation of the Code of Ethics of museum governance bodies concerning Holocaust art, as amicus 1939 Society helpfully documents. 1939 Society Amicus Br. at 18-19.

For the Ninth Circuit, the fact there had been Dutch proceedings, regardless of any subsequent Dutch repudiation of those proceedings, rendered nonjusticiable a

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"inapplicable to the Dutch Government's conduct alleged by the Museum" because the Dutch government claimed no interest in a private dispute and the Dutch had restored art notwithstanding the earlier putative proceedings. Reply Brief of Appellant at 32–42, Von Saher v. Norton Simon Museum of Art at Pasadena, No. 16-56308 (9th Cir. Sept. 27, 2017).

[3] Although Respondents repeatedly assert that there were "bona fide" proceedings in the Netherlands, no court in this case has agreed with that conclusion, and Respondents provide no authority for the proposition. Even the Ninth Circuit previously concluded that the Cranachs "were never subject to postwar internal restitution proceedings in the Netherlands." Pet.App. 13a.

[4] Respondents assert that "Petitioner's family made a conscious decision not to seek return of the artwork in question." Br. at i. No finding supports this claim. The district court acknowledged that "[t]he parties dispute whether the settlement agreement released the Firm's claims to the Göring artworks." Pet.App. 85a. Dutch authorities in effect repudiated this claim by returning 200 paintings in 2006 because Petitioner "had suffered involuntary loss of possession, since the rights to these works were never waived." Pet.App. 155a.

dispute over ownership of paintings hanging in California. This case graphically illustrates the circuits' continuing division over when "the policies underlying the act of state doctrine [do] not justify its application." *W.S. Kirkpatrick & Co. v. Envrtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

1. Under the Ninth Circuit's test, there is no factual requirement of "proof of demonstrable threat" to foreign relations. Instead, the act of state doctrine is a "rule of decision," such that once "official acts of the Dutch government performed within its own territory" are identified, the inquiry ends, and the act of state doctrine bars further litigation. Pet.App. 16a-17a. Similarly, the Seventh, Eleventh, and D.C. Circuits apply the doctrine automatically whenever a court might "declare invalid" an act of a foreign state. *Nocula v. UGS Corp.*, 520 F.3d 719, 728 (7th Cir. 2008); *Glen v. Club Méditerranée, S.A.*, 450 F.3d 1251, 1253 (11th Cir. 2006); *Rigg's Nat'l Corp. v. Comm'r*, 163 F.3d 1363, 1368 (D.C. Cir. 1999).

By contrast, in the Second, Third, and Fifth Circuits, it is not enough to show that the court *might* have to declare an act of state invalid. There must also be "proof of 'a demonstrable, not speculative, threat to the conduct of foreign relations by the political branches…." *Grupo Protexa, S.A. v. All Am. Marine Slip*, 20 F.3d 1224, 1238 (3d Cir. 1994). The Second Circuit requires "a balancing of interests," such that "the act of state doctrine should not be invoked if the policies underlying the doctrine do not justify its application." *Bigio v. Coca-Cola Co.*, 239 F.3d 440, 452 (2d Cir. 2000). The act of state doctrine is fact-laden, not jurisdictional, and operates as a "principle of abstention." *Id.* at 451; *see also Hachamovitch v. DeBuono*, 159 F.3d 687, 693 (2d Cir. 1998); *Industrial*

Inv. Dev. Corp, 594 F.2d 48, 48 (5th Cir. 1979) (reversing on basis of factual insufficiency).

2. Most tellingly, under Ninth Circuit doctrine, the act of state doctrine operates independently of any examination of the weight of the foreign sovereign interest. Respondents offer only that a generic Dutch "interest in finality weighed in favor of applying the doctrine." Br. at 26. This fails as a matter of fact and law. First and foremost, the Dutch government expressly refuted any interest in the current dispute: "The State is of the opinion that this concerns a dispute between two private parties." Pet.App. 92a. Second, inconsistent with the Court's description of act of state as an affirmative defense, the Ninth Circuit placed the burden of proof on Petitioner to prove no ongoing Dutch interest, rather than presuming that an American forum would be available to resolve a dispute between two American citizens. By contrast, in the Second Circuit, "the burden of proof rests on defendants to justify application of the act of state doctrine." *Bigio*, 239 F.3d at 453.

Without the presence of a foreign sovereign or an examination of the nature of the foreign interest, the act of state doctrine takes the form of *Hamlet* without the Prince. This is precisely what other circuits reject. In *Industrial Investment Development Corp. v. Mitsui & Co*, a district court dismissed an American antitrust claim implicating actions of the Indonesian government. 594 F.2d at 51. The Fifth Circuit reversed because the presence of foreign sovereign conduct "cannot prevent Industrial Investment from having its claims adjudicated by the district court. There are no special political factors which outbalance this country's legitimate interest in regulating anticompetitive activity both here and abroad." *Id*. at 53.

Similarly, in *Grupo Protexa*, the fact that an insurance dispute might implicate official Mexican decisions did not bar suit in the U.S.:

> Protexa has not demonstrated… that this controversy implicates separation of powers concerns.... This litigation is between private parties for the sole purpose of resolving an insurance coverage dispute.... We see no reason for believing that a judicial inquiry … would hinder the conduct of foreign relations by the United States government."

20 F.3d at 1238.

3. The Ninth Circuit did not independently assess foreign policy implications. Both Respondents and the Ninth Circuit solely rely on the Solicitor General's 2011 amicus brief which states:

> When a foreign nation, like the Netherlands here, has conducted bona fide post-war internal restitution proceedings following the return of Nazi-confiscated art to that nation under the external restitution policy, *the United States has a substantial interest in respecting the outcome of the nation's proceedings.*

Pet.App. 31a

The court below first misreads the brief to constitute an executive finding "that post-war restitution proceedings in the Netherlands were 'bona fide.'" *Id.*[5] The

[5] The Ninth Circuit earlier declared that it "d[id] not find convincing the [Solicitor General's] position—presented in a brief in a different iteration of this case that raised different arguments, that involved different sources of law and that seems to have misunderstood some of the facts essential to our resolution of this appeal." Pet.App. 59a.

Solicitor General's brief challenged the foreign policy implication of a California statute (not at issue in this case) that would have extended state jurisdiction to Holocaust disputes *internationally*. That prompted the claimed "substantial interest in respecting the outcome of the nation's proceedings." *Id.*

Proper application of the act of state doctrine is grounded in "separation of powers." *Kirkpatrick*, 493 U.S. at 404. The Ninth Circuit does not look for evidence of the United States's interests beyond one amicus brief, and Respondents add nothing further. This ignores "[o]ver half a century of U.S. policy, including numerous congressional enactments, call[ing] for the return of Nazi-looted art to its rightful owners." Current and Former Members of Congress, Amicus Br. at 17. *See Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224 (2d Cir. 1985) (doctrine requires "the political branches be preeminent in the realm of foreign relations.").

This again divides the circuits. Under the Ninth Circuit's opinion, it is enough that the Executive has expressed a non-specific interest in respecting the "bona fide proceedings" of the Netherlands to foreclose suit, assuming such proceedings even took place. In the Third Circuit however, a party wishing to invoke the doctrine must show demonstrable proof of "the effect that inquiry into the validity of the order might have on relations between the United States and [the foreign government.]" *Grupo Protexa*, 20 F.3d at 1238. It is not enough to show that the Executive might have an interest in a particular resolution of the case; instead, parties must prove that the case will have a negative impact on foreign relations. If "no such threat has been demonstrated," then the court "will not engage in speculation on [that] question." *Id.*

Moreover, this test cannot be satisfied without a corresponding examination of the interest of the Netherlands, an interest that the Dutch government has already disavowed in this case. Pet.App. 92a.

II. This Court Should Resolve the Continued Application of the Act of State Doctrine.

Repeatedly, this Court has insisted on a presumption against extraterritorial application of American law and cautioned against allowing American courts to serve as a magnet forum internationally. The corollary must be a presumption that American courts do serve to resolve disputes between American citizens over domestic property. The presence of foreign legal issues informs but does not foreclose the responsibility of American courts to perform their functions. *See Animal Sci. Prods., Inc. v. Hebei Welcome Pharms. Co.*, 138 S. Ct. 1865, 1869 (2018) (federal courts must resolve legal disputes and need not necessarily defer to foreign government's interpretations of its own laws).

The circuit split highlights the need to clarify when "the policies underlying the act of state doctrine [do] not justify its application." *Kirkpatrick*, 493 U.S. at 409. Some ambiguity inheres from where the Court last left the doctrine 30 years ago, serving as an initial placeholder for many considerations, including "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408.[6] In the meantime, other areas of law have matured, allowing these policy

[6] *Cf. Bigio*, 239 F.3d at 452 ("The act of state doctrine...has not been explored extensively by the modern Supreme Court").

considerations to be better served by other, clearer lines of precedent.

First, international comity is now subsumed under the presumption against extraterritoriality,[7] prescriptive comity,[8] and even state choice-of-law rules.[9] Second, statutory foreign sovereign immunity has emerged as the primary, if not sole, form of protecting foreign interests in American courts.[10] Third, "domestic separation of powers"—the fear expressed in *Kirkpatrick* that "'passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs"[11]—is

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[7] *See WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). ("Courts presume that federal statutes 'apply only within the territorial jurisdiction of the United States.'"); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115–16 (2013) (presumption protects against foreign policy consequences not intended by political branches).

[8] *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (prescriptive comity is a "rule of statutory construction caution[ing] courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws"); Restatement (Fourth) of the Law of Foreign Relations § 405 & cmt. a (2018) (prescriptive comity limits "geographic scope of federal law... to avoid unreasonable interference with the sovereign authority of other states.").

[9] *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (courts should not "thwart such local policies by enforcing an independent 'general law' of conflict of laws.").

[10] *See Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989) (sovereign immunity statute "provides the sole basis for obtaining jurisdiction over a foreign state in federal court.").

[11] *Kirkpatrick*, 493 U.S. at 404 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

addressed by the political question doctrine and foreign affairs preemption.[12]

Foreign affairs preemption focuses on federal enactments and Executive agreements, thus eliminating the need for abstract inquiry into "embarrassment" of the executive. Preemption also takes into account the important federalism concerns inherent in overriding a state rule of decision. *See Garamendi*, 539 U.S. at 418–20 (requiring courts "consider the strength of the state interest, judged by standards of traditional practice...before declaring the state law preempted").

As emphasized by *Zivotofsky* and *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010), the Court has cautioned against free-floating doctrines that stand as jurisdictional bars to the resolution of claims properly before American courts. As applied by the Ninth Circuit, the act of state doctrine is another such unmoored form of court-closing. The time has come for its reexamination.

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[12] 13C Charles Alan Wright et al., Federal Practice & Procedure § 3534.2 (3d ed. 2018) ("The act-of-state doctrine bears a close relationship to political-question theory that has not yet been clearly defined."). On preemption see *Garamendi*, 539 U.S. at 413 (Holocaust-specific California statute preempted by conflicting executive agreement); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000) (preempting Massachusetts law restricting trade with Burma).

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE M. KAYE
HOWARD N. SPIEGLER
DARLENE FAIRMAN
FRANK K. LORD IV
HERRICK, FEINSTEIN LLP
Two Park Avenue
New York, NY 10016

SAMUEL ISSACHAROFF
Counsel of Record
40 Washington Square
South, 411J
New York, NY 10012
(212) 998-6580
si13@nyu.edu

ALAN DERSHOWITZ
1525 Massachusetts Avenue
Cambridge, MA 02138

Counsel for Petitioner

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