NO. 20-1566

In the Supreme Court of the United States

DAVID CASSIRER, *et al.*,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, AN AGENCY OR INSTRUMENTALITY OF THE KINGDOM OF SPAIN,

Respondent.

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

BRIEF OF *AMICI CURIAE* 14 PROFESSORS OF LAW IN SUPPORT OF PETITIONERS

Charles J. Cooper
Counsel of Record
P. Davis Cooper
COOPER & KIRK, PLLC
1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Amici Curiae

May 24, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES.................................... iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT...........................1

ARGUMENT 3

I. The Petition Presents An Important Question About The Foreign Sovereign Immunities Act On Which The Circuit Courts Are Split............... 3

A. The Question Has Generated A Circuit Split... 3

B. The Ninth Circuit's Approach Is Inconsistent With The Text Of The Statute.. 5

C. The Ninth Circuit's Approach Is Inconsistent With This Court's Precedent On Federal Common Law. 8

II. The Question Presented And The Role Of Federal Common Law Implicate Important Issues Beyond This Case. 10

A. Foreign Relations.. 10

B. Federalism 11

C. Separation Of Powers................................... 13

D. The Twin Aims Of *Erie*.................................. 15

CONCLUSION.. 16

APPENDIX: LIST OF AMICI................................... 1a

TABLE OF AUTHORITIES

Page

CASES

Alaska Packers Ass'n v. Indus. Accident Comm'n,
294 U.S. 532 (1935) 12

Allstate Ins. Co. v. Hague,
449 U.S. 302 (1981) 12

Atherton v. F.D.I.C.,
519 U.S. 213 (1997) 13

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964) 8

Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China,
923 F.2d 957 (2d Cir. 1991) 4

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020) 6

Boyle v. United Technologies Corp.,
487 U.S. 500 (1988) 11

Cassirer v. Thyssen-Bornemisza Collection Found.,
862 F.3d 951 (9th Cir. 2017) 5

City of Milwaukee v. Ill. & Mich.,
451 U.S. 304 (1981) 9, 10, 14

Clearfield Trust Co. v. United States,
318 U.S. 363 (1943) 9

Day & Zimmermann v. Challoner,
423 U.S. 3 (1975) 7, 8, 11

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 3, 9, 11

Fed. Republic of Germany v. Philipp,
141 S. Ct. 703 (2021) 10

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,
462 U.S. 611 (1983) 1, 3, 6

Griffin v. McCoach,
313 U.S. 498 (1941) 7

Hanna v. Plumer,
380 U.S. 460 (1965) 15

Ins. Co. of N. Am. v. Fed. Express Corp.,
189 F.3d 914 (9th Cir. 1999) 7

Jesner v. Arab Bank, PLC,
138 S. Ct. 1386 (2018) 14

Klaxon Co. v. Stentor Electric Manufacturing Co.,
313 U.S. 487 (1941) 1, 4, 7, 8, 12, 13

Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela,
575 F.3d 491 (5th Cir. 2009) 4

O'Bryan v. Holy See,
556 F.3d 361 (6th Cir. 2009) 4, 5

O'Melveny & Myers v. F.D.I.C,
512 U.S. 79 (1994) 14

Oveissi v. Islamic Republic of Iran,
573 F.3d 835 (D.C. Cir. 2009) 4

Owens v. Republic of Sudan,
864 F.3d 751 (D.C. Cir. 2017) 3

Rodriguez v. Fed. Deposit Ins. Corp.,
140 S. Ct. 713 (2020) 8, 9

Schoenberg v. Exportadora de Sal, S.A. de C.V., 930 F.2d 777 (9th Cir. 1991) 5

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001) 12

United States v. Kimbell Foods, 440 U.S. 715 (1979) 9, 11

Watson v. Emp. Liab. Assurance Corp., 348 U.S. 66 (1954) 12

STATUTES AND LEGISLATIVE MATERIALS

28 U.S.C. § 1606 .... 3, 6

28 U.S.C. § 1603(b) 15

H.R. REP. NO. 94–1487 (1976) 4, 6

OTHER AUTHORITIES

Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228 (1963) 12

Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020) 5

Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, U. PA. L. REV.

(forthcoming 2021), *available at* https://bit.ly/3fBcRWb...................................... 5, 9

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 14 professors of law (listed in Appendix A) with expertise in the Foreign Sovereign Immunities Act, civil litigation, federal common law, and the federal courts. They have a strong interest in the proper treatment of these issues by U.S. courts.

SUMMARY OF THE ARGUMENT

This case raises an important question about the choice of law rules applicable to state law claims under the Foreign Sovereign Immunities Act (FSIA). In the FSIA, Congress provided that foreign sovereign defendants should be liable "to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In this case and others, the Ninth Circuit has departed from this simple command.

As this Court stated in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983): "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), this Court held that a federal court sitting in diversity

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief, and all parties received timely notice of Amici's intent to file this brief.

applies the state law that the forum state would have chosen. To effectuate Congress's command in the FSIA, therefore, federal courts in FSIA cases should apply the horizontal choice of law rules of the forum state.

The Second, Fifth, Sixth, and D.C. Circuits follow this approach, but the Ninth Circuit—in this case and others—deviated from Congress's direction and created a federal common law rule for choice of law.

The Ninth Circuit's decision is wrong. It is inconsistent with the text of the FSIA, and it is inconsistent with this Court's precedent on federal common law.

The Ninth Circuit's decision also raises an important question of federal law. It implicates issues of foreign affairs. It implicates federalism principles embodied in choice of law rules. It implicates the separation of powers that traditionally allocates lawmaking authority to Congress, not the courts. And it implicates forum shopping and the inequitable administration of law that motivated this Court's decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

For these reasons, this Court should grant the petition and resolve this pressing circuit split.

ARGUMENT

I. The Petition Presents An Important Question About The Foreign Sovereign Immunities Act On Which The Circuit Courts Are Split.

This case raises an important question about the choice of law rules applied to state law claims under the Foreign Sovereign Immunities Act (FSIA). The Ninth Circuit's decision conflicts with decisions of other federal courts, including four circuit courts. The Ninth Circuit's decision is also inconsistent with the text of the statute and with this Court's precedent on the making of federal common law. This Court, therefore, should grant the petition and reverse the decision below.

A. The Question Has Generated A Circuit Split.

The FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.

This provision has been characterized as a "pass-through" for state law. *See Owens v. Republic of Sudan*, 864 F.3d 751, 763 (D.C. Cir. 2017). As this Court explained: "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *First Nat'l City Bank*, 462 U.S. at 620. The House Report accompanying the FSIA was similarly clear:

"The bill is not intended to affect the substantive law of liability." H.R. REP. NO. 94–1487, at 12 (1976).

To effectuate the "same extent as a private individual under like circumstances" command, most federal courts interpreting this provision have applied the forum state's choice of law rules to non-federal claims, as they would in a suit against a private party under *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941). *See*, *e.g.*, *Barkanic v. Gen. Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991) ("Because we believe that applying the forum state's choice of law analysis will help ensure that foreign states are liable 'in the same manner and to the same extent as a private individual under like circumstances,' 28 U.S.C. § 1606, we conclude that incorporation of state choice of law rules is appropriate here."); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) ("We thus agree with the Second Circuit that applying the forum state's choice-of-law principles, rather than constructing a set of federal common law principles, better effectuates Congress' intent that foreign states be 'liable in the same manner and to the same extent as a private individual' in FSIA actions."); *Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009) ("Because this case arises under the FSIA, we apply the choice-of-law rules of the forum state."); *O'Bryan v. Holy See*, 556 F.3d 361, 381 n.8 (6th Cir. 2009) ("[I]n FSIA cases, we use the forum state's

choice of law rules to resolve 'all issues,' except jurisdictional ones.") (citations omitted).[2]

The Ninth Circuit, however, applies a federal common law rule on the horizontal choice of law, derived from the Second Restatement. *See*, *e.g.*, *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). That is what the Ninth Circuit did in this case. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017).

These differing approaches can result in different law being applied in different circuits on the same facts. *See*, *e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020) (collecting state choice of law approaches, many of which deviate from the Second Restatement). As a result, the circuit split identified in the petition may have real and important consequences in cases arising under the FSIA, including this one.

B. The Ninth Circuit's Approach Is Inconsistent With The Text Of The Statute.

The Ninth Circuit is not only in the minority on the issue of the appropriate choice of law rule for FSIA cases, but it is also on the wrong side of the circuit

---

[2] At least the Second and D.C. Circuits permit exceptions from forum state choice of law to effectuate federal interests. When these exceptions apply, courts in these circuits may select different law in FSIA cases than they would in diversity cases under like circumstances. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, U. PA. L. REV. (forthcoming 2021), *available at* https://bit.ly/3fBcRWb.

split. In particular, the Ninth Circuit's rule is inconsistent with Congress's command that a foreign sovereign defendant is liable to the same extent as a private individual under like circumstances. This conflict with the text of the statute makes the question presented even more important.

The touchtone of statutory interpretation is the text of the statute. *See*, *e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). ("[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives.").

Again, the relevant text of the FSIA provides that "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. Both this Court and Congress acknowledged that this language was not meant to change the substantive law applicable to the claims at issue. *See First Nat'l City Bank*, 462 U.S. at 620 (quoted above); H.R. REP. NO. 94–1487, at 12 (1976) (quoted above). Indeed, this language *must* reach the substantive law to be applied, because applying different substantive law will frequently affect the extent of liability, as it did in this case, where the defendant's liability (or nonliability) was determined entirely by the choice of law applied by the courts below.

The key question, then, is what is the "extent" of liability of a private individual under like

circumstances? When a federal court hears a state-law claim in a case arising under diversity jurisdiction (including a claim by a U.S. citizen against a citizen of a foreign state), this Court has made clear that the federal court should apply the horizontal choice of law rule of the forum state. *See Klaxon*, 313 U.S. at 496.[3] This was the law at the time the FSIA was adopted, and it is the law today. In a case such as this one, the federal court in California should apply California's horizontal choice of law rule.

Moreover, the *Klaxon* rule gives no quarter to concerns of foreign affairs. In *Day & Zimmermann v. Challoner*, 423 U.S. 3 (1975), plaintiffs sued the manufacturer of a howitzer round for death and personal injury resulting from its premature explosion during U.S. military operations in Cambodia. The foreign-affairs concerns raised by a suit arising out of U.S. military operations in a foreign conflict are unambiguous. And yet, not only did this Court call for the application of forum-state choice of law, it did so in a short per curiam reversal. *Id.* "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court,

---

[3] The same result would hold under many other bases of jurisdiction, *see*, *e.g.*, *Griffin v. McCoach*, 313 U.S. 498 (1941) (applying forum-state choice of law in a statutory interpleader case decided on the same day as *Klaxon*); *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 920 (9th Cir. 1999) (applying state choice of law in a case under the Warsaw Convention), but this brief discusses diversity-of-citizenship jurisdiction because it presents the most "like circumstances" to cases such as this one.

but which have not commended themselves to the State in which the federal court sits." *Id.* at 4.

To be sure, foreign-affairs interests may lead a federal court to apply a substantive rule derived from federal common law in a diversity case. *See*, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) (applying federal common law Act of State doctrine in a case arising under diversity jurisdiction). But once a federal court has decided it must apply state substantive law in a diversity case, then it must apply state choice of law as well. *See Klaxon*, 313 U. S. at 496; *Day & Zimmermann*, 423 U.S. at 4. And because there is no contention that federal substantive law applies in this case, a federal court adjudicating a claim against a private individual under like circumstances would have followed *Klaxon* where it applies.

C. The Ninth Circuit's Approach Is Inconsistent With This Court's Precedent On Federal Common Law.

The Ninth Circuit's rule is also inconsistent with this Court's precedent on when federal courts can appropriately make federal common law. This, too, makes the question presented worthy of this Court's attention.

As this Court recently reminded, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). Federal common law

in specialized areas survived *Erie*'s admonition that "[t]here is no federal general common law," 304 U.S. at 78, "[b]ut before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. *See also United States v. Kimbell Foods*, 440 U.S. 715 (1979); *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

Among its many virtues, *Klaxon*'s decision to follow forum-state choice of law maintains the modest role of federal common law and reserves regulatory authority to the states. Rather than asking federal judges to develop a federal choice of law regime, *Klaxon* tells federal judges to repair to the well-developed choice of law rules of the forum state. Once it is decided that state law should provide the substantive law (as it was in this case), there is no uniquely federal interest in the choice among state laws. Again, there may be a federal interest justifying the application of uniform *federal* substantive law in the first instance. But in cases raising state law claims, there is no special federal interest in the choice among state laws that would justify federal judicial lawmaking. *See* Zachary D. Clopton, *Horizontal Choice of Law in Federal Court*, U. PA. L. REV. (forthcoming 2021), available at https://bit.ly/3fBcRWb.

It is especially concerning for a federal court to make federal common law that displaces a congressional command calling for a contrary result. *See supra* Section I.B; *infra* Section II.C. *Cf. City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 313–14 (1981) ("We have always recognized that federal common law

is subject to the paramount authority of Congress. It is resorted to [i]n absence of an applicable Act of Congress, and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone. Federal common law is a necessary expedient . . . .") (internal quotation marks and citations omitted). And yet the Ninth Circuit did exactly that, adopting federal common law despite contrary direction from Congress.

II. The Question Presented And The Role Of Federal Common Law Implicate Important Issues Beyond This Case.

The substantive law applied in cases against foreign states (and instrumentalities) and the role of federal judges in making law implicate important issues of foreign relations, federalism, the separation of powers, and the twin aims of *Erie*. Granting the petition for a writ of certiorari will allow this Court to resolve a circuit split implicating these important issues.

A. Foreign Relations

It almost goes without saying that the proper interpretation of the Foreign Sovereign Immunities Act implicates the foreign relations of the United States. *See*, *e.g.*, *Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 714 (2021) ("We interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, producing friction in our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.") (internal quotation marks omitted).

Importantly, though, a mere mention of foreign relations should not be treated as an invitation to create uniform federal common law. *Cf. Kimbell Foods*, 440 U.S. at 730 (suggesting that uniform federal common law is not justified by "generalized pleas for uniformity"); *Day & Zimmermann*, 423 U.S. at 4 (applying forum-state choice of law in a case implicating foreign affairs). Indeed, even the Ninth Circuit's approach will result in federal courts applying different states' laws in different cases. Instead, foreign relations should be treated as a reason for this Court to provide clear guidance on these questions, even if that guidance involves reference to state law.

B. Federalism

The creation of uniform federal common law necessarily affects important issues of federalism.

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938), struck a blow for federalism, announcing that "[t]here is no federal general common law." *Id.* at 78. The Court's reasoning was deeply connected to federalism, explaining that the expansive role for federal law under *Swift v. Tyson* was an "invasion of the authority of the state, and, to that extent, a denial of its independence." *Id.* at 79 (internal quotation marks omitted). *See also Boyle v. United Technologies Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) ("*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law.").

This federalism interest extends to choice of law.[4] Choice of law rules are expressions of substantive policies. *See*, *e.g.*, Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1963) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Watson v. Emp. Liab. Assurance Corp.*, 348 U.S. 66 (1954); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935). This Court recognized as much in its seminal decision on choice of law in federal court. In *Klaxon*, this Court explained that a federal court's application of forum-state choice of law is intimately connected with the state's ability to make policy via choice of law:

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper

---

[4] Indeed, in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), this Court looked to state law for the content of the federal common law of preclusion in diversity cases.

> function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

313 U.S. at 496–97 (internal citations omitted). The Ninth Circuit's federal common law rule thwarts the local policies of forum states, which under *Klaxon* are entitled to determine whether a case should be governed by their own law or the law of another jurisdiction. In this case, the Ninth Circuit's application of federal common law to select Spanish law thwarts the policies underlying California's choice of law rules, which would call for application of California substantive law to protect the property rights of California residents and prevent the transfer of stolen art. *See* Pet. for a Writ of Certiorari at 17–22 (May 6, 2021).

More generally, whether and when federal courts should make uniform federal common law are important questions of federalism that require this Court's attention.

C. Separation Of Powers

The decision to make uniform federal common law invokes the authority of the federal courts and thus implicates the separation of powers.

First, the limited role of uniform federal common law is a corollary of the limited power of federal courts to make law. "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997) (internal quotation marks omitted). This is not to say that federal courts

should never make law, but only that their lawmaking should be limited to "few and restricted" topics. *See O'Melveny & Myers v. F.D.I.C*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

Second, the separation of powers questions implicated by federal common law are even more pressing when there is a federal statute on point. Indeed, given that "federal common law is 'subject to the paramount authority of Congress.' " *City of Milwaukee*, 451 U.S. at 313 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)), federal common law *contradicting* a statutory command—as it does in this case—is a particularly troubling affront to the separation of powers. As this Court explained four decades ago, "Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315 (internal quotation marks omitted).

Third, this case also invites this Court to address the appropriate separation of powers considerations in cases implicating foreign affairs. As this Court noted in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), "Congress, not the Judiciary, is the branch with the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain." *Id.* at 1406 (internal quotation marks omitted). At a minimum, issues of foreign

affairs call for the careful judicial attention to the separation of powers that only this Court can provide.

D. The Twin Aims Of *Erie*

Famously, the decision in *Erie R.R. Co. v. Tompkins* furthers twin aims: "discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). This Court should provide guidance to the lower courts on issues of horizontal choice of law because they implicate both aims of *Erie*.

Horizontal choice of law implicates forum shopping because if state and federal courts in the same state applied different choice of law rules, parties would have an incentive to shop for different substantive law. Likewise, horizontal choice of law implicates inequitable administration because if state and federal courts in the same state applied different choice of law rules, parties would be treated differently depending on whether they had access to a federal forum.

Importantly, the twin aims of *Erie* are also implicated when federal courts apply different choice of law rules depending on the basis of federal jurisdiction, as the Ninth Circuit did in this case. If the choice of law rule (and therefore the substantive law) depended on the basis of federal jurisdiction, parties would have the incentive to "shop" among bases of jurisdiction. *See* Clopton, *supra*. Plaintiffs might, for example, select among potential defendants depending on whether they would qualify as agencies or instrumentalities of foreign states. 28 U.S.C. § 1603(b). Defendants, too, might press arguments

about their "agency or instrumentality" status in order to change the substantive law being applied. The ability to affect the choice of law in some but not all cases would thus result in the inequitable administration of the law that *Erie* sought to avoid.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge that the petition for a writ of certiorari be granted.

May 24, 2021

Respectfully submitted,

CHARLES J. COOPER
Counsel of Record
P. DAVIS COOPER
COOPER & KIRK, PLLC
1523 New Hampshire
Avenue, N.W.
Washington, D.C. 20036
(202) 220-9600
ccooper@cooperkirk.com

Counsel for Amici Curiae

APPENDIX

APPENDIX: LIST OF AMICI[1]

Zachary D. Clopton
Professor of Law
Northwestern Pritzker School of Law

Professor Emily Behzadi
Assistant Professor of Law
California Western School of Law

Professor Andrew D. Bradt
Professor of Law
University of California, Berkeley School of Law

Professor Stephen B. Burbank
David Berger Professor for the
Administration of Justice
University of Pennsylvania Carey Law School

Professor Kevin M. Clermont
Robert D. Ziff Professor of Law
Cornell Law School

Professor Brooke D. Coleman
Associate Dean of Research &
Faculty Development
Professor of Law
Seattle University School of Law

Professor William S. Dodge
John D. Ayer Chair in Business Law

[1] Institutions are listed for affiliation purposes only. All signatories are participating in their individual capacity, not on behalf of their institutions.

Martin Luther King, Jr. Professor of Law
University of California, Davis School of Law

Professor Robin Effron
Professor of Law
Brooklyn Law School

Professor Kenneth S. Klein
Louis and Hermione Brown Professor of Law
Associate Dean for Assessment and Teaching
California Western School of law

Professor Glenn Koppel
Professor of Law
Western State College of Law

Professor Jennifer A. Kreder
Professor of Law
NKU-Chase College of Law

Professor Jonathan R. Nash
Associate Dean for Research
Robert Howell Hall Professor of Law
Emory University School of Law

Professor John T. Parry
Associate Dean of Faculty
Edward Brunet Professor of Law
Lewis & Clark Law School

Professor Maggie Gardner
Associate Professor of Law
Cornell Law School