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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Respondent TBC's arguments in opposition to the Cassirers' petition for certiorari further underscore why the Court should grant review to resolve a clear, entrenched circuit split in interpreting an important federal statute. If California substantive law applies, TBC would be compelled to return the stolen Painting to the Cassirer family. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 960 (9th Cir. 2017) ("Under California law, thieves cannot pass good title to anyone, including a good faith purchaser").

Indeed, if Claude Cassirer had been living in New York, Houston, Cleveland, or Washington, D.C, when he brought this action, the federal courts in those cities would have applied state choice-of-law rules. But he lived in California, where the Ninth Circuit threw out his claims based on its idiosyncratic version of "federal common law." In doing so, it usurped the authority of Congress as embodied in the FSIA and failed to respect state policies as mandated by *Klaxon*. These are serious breaches of fundamental principles of separation of powers and federalism. They cannot be brushed aside by TBC's glib assertion that the same outcome might have resulted from actual application of California's choice-of-law test.

ARGUMENT

I. THERE ARE COMPELLING REASONS TO RESOLVE THE CIRCUIT SPLIT CONCERNING CHOICE-OF-LAW UNDER THE FSIA

TBC concedes there is a circuit split, but claims it is "shallow" because "only" five Circuits have addressed the issue. Brief in Opposition ("Opp.") 1. But if the "shallow" label has any relevance, it is because *only* the Ninth Circuit takes the questionable federal common law approach, while *four* Circuits apply state choice-of-law tests. And of course, certiorari does not depend on a head-count. *E.g.*, *Jam v. Int'l Fin. Corp.*, 139 S.Ct. 759, 767 (2019) (split between two circuits).

Moreover, the split involves an issue of great public importance that is likely to recur. The choice of substantive law applicable to claims against foreign nations and their instrumentalities that have wronged U.S. citizens implicates important issues of separation of powers, federalism, and foreign policy. By their nature, FSIA cases often involve important matters such as international human rights and they are not rare.[1]

A. The Ninth Circuit's Application of "Federal Common Law" Ignores Congress' Clear Statutory Mandate in the FSIA

The Ninth Circuit's rule, and TBC's defense of it, have no basis in the text or legislative history of the FSIA. This Court has rejected litigants' efforts to ignore,

[1] In the past five years alone, this Court has addressed the FSIA in merits decisions six times and FSIA has been involved in at least a dozen Ninth Circuit cases.

manipulate, or misconstrue the FSIA to subvert Congress' intent. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 617 (1992) ("We think this line of argument is squarely foreclosed by the language of the FSIA.").

The United States also has consistently opposed efforts by foreign governments to circumvent Congress' mandate. At an earlier stage of this case, the Government filed an *amicus curiae* brief opposing TBC's petition for certiorari, which argued that 28 U.S.C. §1605(a)(3) did not apply because Germany, not Spain, originally stole the Painting. The Government opposed that position because it conflicted with the explicit terms of the FSIA:

> Congress drafted the exception to govern all cases 'in which rights in property taken in violation of international law are in issue' (if the requisite nexus to commercial activity is also present), without regard to whether the defendant foreign state took the property or subsequently came into possession of it. . . . The text of the FSIA supplies the answer . . . .

U.S. Br., 2011 WL 2135028, *9–10.

The four Circuits which have concluded that the law of the forum state governs choice-of-law analysis for state law claims brought under the FSIA rely squarely on the language of the statute, 28 U.S.C. §1606: a "foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." Petition for Certiorari ("Pet.") 10–11 (collecting cases based on language of §1606).

Moreover, as the Second Circuit explained in the leading case of *Barkanic v. Gen. Admin. of Civil Aviation of China*, 923 F.2d 957, 960 (2d Cir. 1991):

> Our conclusion that forum law provides the proper choice of law rules for FSIA cases is supported by the statute's legislative history. . . . Any other conclusion would permit courts to apply different substantive laws than those that would control if jurisdiction over the foreign state were based on diversity of citizenship—as it was before the FSIA was enacted—and would therefore *alter the substantive law of liability in violation of congressional intent*.

(Emphasis added). *See 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." (quoting 28 U.S.C. §1606)); Pet. 10–11 (collecting cases).

Indeed, TBC cannot cite any statutory basis for the Ninth Circuit's "federal common law" approach. That is because there is none. TBC acknowledges it is based on nothing but the Ninth Circuit's entrenched practice of applying the choice-of-law rule of the Second Restatement. Opp. 8. TBC further admits that the four-Circuit majority that applies the forum state's choice-of-law test finds "primary support" for that view in the statutory language of §1606. Opp. 9. These admissions are fatal because they concede that the majority follows FSIA's text, while the Ninth Circuit does not.

TBC argues that federal common law should apply where the substantive claims involve "challenges to a sovereign's public (rather than private) acts," Opp. 7, because, it claims, the "like circumstances" proviso in §1606 only applies when jurisdiction arises under the commercial activities exception, §1605(a)(2), but not under the expropriation exception, §1605(a)(3), which is at issue here. Opp. 27.

TBC's argument is wrong on both counts. First, the Ninth Circuit's "federal common law" cases are not limited to those involving "sovereign acts." *See, e.g.*, *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 781 (9th Cir. 1991) (FSIA jurisdiction based on "commercial activity" of Mexican government's salt producing instrumentality); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987) (wrongful death action against the Polish government-owned airline).

More importantly, TBC's argument that §1606 applies differently to different FSIA exceptions is flatly inconsistent with *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). There, the Court held: "When one of these [§1605(a)(1) or §1605(a)(2)] *or the other specified exceptions applies*, 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances,' §1606." *Id.* at 488–89 (emphasis added).

TBC also misconstrues the FSIA's "uniformity" principle. TBC argues that "'Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States

courts.'" Opp. 25 (quoting *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983)). But "*amenability* of a foreign sovereign to suit" refers to whether one of the FSIA's exceptions to immunity applies. As to that issue, there is no doubt that uniform federal standards must apply. But once the plaintiff shows that an exception is applicable, "where state law provides a rule of liability governing private individuals, the FSIA requires application of that rule to foreign states in like circumstances." *Banco*, 462 U.S. at 622 n.11.

Faced with these obstacles to its argument, TBC attempts to twist the statutory phrase "in like circumstances" beyond recognition. TBC argues that "like circumstances" cannot exist here "for the simple reason that a private individual cannot commit a public, sovereign act," and that TBC's "state-directed acquisition and ownership of the Painting" was "a public act." Opp. 27–28. But this is merely a restatement of TBC's flawed argument, contrary to *Verlinden*, that §1606 has a different meaning for commercial activity and expropriation cases. *See* p. 5 *supra*.

Moreover, TBC's attempt to characterize its possession of the Painting as a "public act" ignores that TBC is *not* the government of Spain, but rather an agency or instrumentality to which a different immunity test applies. As such, TBC is bound by the Ninth Circuit's previous holding, left intact by this Court, that TBC is not immune because the Painting was taken in violation of international law, and TBC has engaged in substantial commercial activities in the United States. *See* Pet. 6 n.3.

In sum, because the FSIA's goal is to "apply[] identical substantive laws to foreign states and private individuals," equal treatment of foreign states "cannot be achieved unless a federal court utilizes the same choice-of-law analysis in FSIA cases as it would apply if all the parties to the action were private." *Barkanic*, 923 F.2d at 959–60. And that is the choice-of-law rule of the forum state.

B. The Ninth Circuit's Choice-of-Law Rule Undermines Fundamental Principles of Federalism and Separation of Powers

The Ninth Circuit's use of "federal common law" to determine choice-of-law is inconsistent with principles of federalism and separation of powers that underlie *Erie*, *Klaxon,* and their progeny, and that were recently reaffirmed in *Rodriguez v. Fed. Deposit Ins. Corp*., 140 S.Ct. 713, 717 (2020).

Separation of Powers. As Amici in this case, fourteen professors of law with particular expertise in federal courts and the FSIA wrote: "The Ninth Circuit's rule is . . . inconsistent with this Court's precedent on when federal courts can appropriately make federal common law." Amicus Br. 8 (filed May 24, 2021). Judicial 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." *Id.* (citing *Rodriguez*, 140 S.Ct. at 717. "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 the 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." *Id.* at 9. Further, "[i]t is especially concerning for a federal court to make federal common law that displaces a congressional command calling for a contrary result." *Id*. (citing *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 . . . .")).

Federalism. The Ninth Circuit rule undermines federalism principles embodied by the mandate of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), to apply state choice-of-law rules in diversity cases. 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." Amicus Br. 12–13 (citing *Klaxon*, 313 U.S. 496–97 ("It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws.")).

Foreign Relations. This Court is rightly concerned about the potential reciprocal effects of lawsuits against foreign sovereigns in U.S. courts. The Court has recognized that it is the prerogative of Congress—not the Judicial Branch—to determine the contours of the federal courts' role. *See, e.g., Jesner v. Arab Bank,*

PLC, 138 S.Ct. 1386, 1405 (2018) ("Congress, not the Judiciary, is the branch with the facilities necessary to make fairly such an important policy decision").

Congress has spoken clearly in the FSIA, and the courts have applied its mandate. That has resulted in a determination here that TBC is subject to suit on the Cassirers' claims that TBC wrongfully possesses the Painting that the Nazis expropriated in violation of international law. That question was settled in 2010 by the Ninth Circuit, and this Court denied certiorari sought by Spain and TBC. *See* Pet. 6 n.3. If a private person or entity in possession of property looted by the Nazis was sued in California state court or in a federal court in California under diversity jurisdiction, California's choice-of-law rules would apply. Pet. 17–22. Section 1606 requires TBC "to be liable in the same manner and to the same extent as a private individual under like circumstances." That is the balance Congress has struck which the courts must enforce.

C. TBC's Result-Oriented Argument Provides No Basis to Ignore the Ninth Circuit's Fundamental Errors in Adopting Federal Common Law

TBC argues that whether choice-of-law is determined under state law or federal common law is irrelevant because both "lead to the same result." Opp. 12. This gross over-generalization is meaningless. TBC points to observations by "commentators" that the most common state choice-of-law tests may lead to the same result as the federal test. But the argument proves too much because it

ultimately amounts to saying that choice-of-law rules don't really matter since they are rarely outcome determinative. Yet they have been a key part of American jurisprudence for centuries.

In any event, all choice-of-law tests require close examination of the facts in the particular case. Although the district court concluded that California choice-of-law principles led to the same result as federal common law, that finding has never been subject to appellate review because the Ninth Circuit automatically applied federal common law. As the Cassirers demonstrated in their prior Ninth Circuit briefing (Appellants Br. 38–57 (No. 15-55550, Dkt. 23-1)), proper application of California choice-of-law principles inevitably leads to application of California substantive law.

TBC's argument that some courts have determined that foreign law applies, even when the forum state's conflict-of-law rules are utilized, misses the point. Those cases have nothing to do with the Cassirers' right to have an appellate court analyze whether *California's* choice-of-law rules apply to their claims under *California* substantive law.

TBC cites the D.C. Circuit's decision in *Oveissi*, arguing that because it applied the forum's choice-of-law test and still concluded that foreign substantive law applied, there is no point in worrying about the use of federal common law to decide choice-of-law. Opp. 16–18. But the *Oveissi* decision was properly tailored

to the facts of that case, not this one. The terror attack that killed the *Oveissi* plaintiff's grandfather occurred in France, where the plaintiff was domiciled. Accordingly, unlike here, *Oveissi* was "not a case in which we must choose between applying the law of the jurisdiction where the tort occurred, versus that where the plaintiff was domiciled, as both are the same." 573 F.3d at 842. Unlike the D.C. Circuit, the Ninth Circuit *categorically rejects* any consideration of the forum state's choice-of-law rule. That evinces profound disrespect for state law that offends the principles underlying *Klaxon*, and ignores Congress' mandate in the FSIA.

D. This Is an Appropriate Case to Resolve the Circuit Split

The Ninth Circuit's insistence on applying "federal common law" and its refusal in this case even to address California's choice-of-law rules eviscerated the Cassirers' rights to the protection of the laws of their home state of California and of the United States. That failure compromised the balance Congress has struck between the immunity of foreign sovereigns and the rights of U.S. citizens.

Claude Cassirer survived the Holocaust and became a United States citizen in 1947. He lived in New York and then Cleveland before retiring to California in 1980.[2] Claude's grandmother, Lilly Cassirer, indisputably owned the Painting when it was looted by the Nazis in 1939. Ms. Cassirer pursued her rights under

[2] Ironically, if Claude had not moved from New York to Cleveland in the 1940s, or retired from Cleveland to San Diego in 1980, the federal court would have applied New York or Ohio choice-of-law rules.

international law and the United States Court of Restitution Appeals (CORA) determined she was the rightful owner, but believed the Painting was lost or destroyed in the War. In fact, the Painting was smuggled out of Germany in direct violation of U.S. military law in 1951, and then traded underground as contraband in California, Missouri, and New York for 25 years.

In 1976, the Baron purchased the Painting in New York City, notwithstanding that no information was provided about its provenance during the decades between 1899 and 1976. Nor was there any explanation of how the Painting came to leave France (where it was created) or Germany (as the Cassirer Gallery's partial label on the verso showed it had been at the family's renowned art gallery in Berlin). The district court found the Baron had "actual and concrete reasons for suspicion" and did not purchase the Painting in good faith. Pet.App. B-21–25. When TBC acquired the Painting, its highly-qualified experts observed the same evidence of likely theft. Pet.App. B-29. Under California substantive law, the Cassirers were entitled to the Painting's return by whomever possessed it at the time—the Baron, Spain, TBC, or anyone else. Pet. 17.

This Court should grant certiorari to rein in the Ninth Circuit's judicial lawmaking and require application of California's choice-of-law rules to determine the substantive law governing the Cassirers' state law claims.

CONCLUSION

This is the right case, and the right time, for this Court to address the deep and persistent circuit split affecting the application of an important federal statute. Petitioners respectfully request that the Court grant the Petition for Certiorari.

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Respectfully submitted,

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