No. 20-1566

IN THE

Supreme Court of the United States

DAVID CASSIRER, *et al.*,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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When the Ninth Circuit created its rule that federal common law must be used to decide choice of law in FSIA cases asserting state law claims, it did not purport to be effectuating congressional intent, nor did it find that its rule was necessary to protect uniquely federal interests. Instead, turning this Court's approach to federal common law on its head, the Ninth Circuit stated: "In the absence of specific statutory guidance, we *prefer* to resort to the federal common law for a choice-of-law rule." *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003 (9th Cir. 1987) (emphasis added). That decision was particularly puzzling given that the court at the same time acknowledged: "*We do not disagree* with the district court's choice [to apply state law], we simply are not persuaded that the FSIA requires a court to choose as did the district court." *Id*. (emphasis added).

As the United States and all of the other amici agree, the court of appeals was wrong to act on its "preference" for federal common law, and adopt its idiosyncratic FSIA choice of law rule. Respondent's efforts to salvage the Ninth Circuit's rule are unavailing.

I. Respondent's Reading of Section 1606 Is Insupportable

Respondent does not dispute that when interpreting a federal statute, the Court's responsibility is to discern Congress's intent, and then honor that intent by employing the best reading of the statute consistent with it. *See*, *e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019). Nor does it dispute the Court begins its inquiries concerning

the FSIA with the text. *See Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) ("We begin with [the FSIA's] text"); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007) ("We begin, as always, with the text of the statute."). But Respondent has little to say about the actual language of 1606—and what it does say makes little sense.

Section 1606 of the FSIA provides: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." This language is most logically read as manifesting Congress's intent that state law serve as the source for deciding choice of law in FSIA cases, because that is the only way to ensure that otherwise identical state law claims brought against a non-immune sovereign would result in imposing liability (or not) in the "same manner" and to the "same extent" as against a private party.

Respondent counterfactually insists that in this case its "liability was examined in 'the same manner and to the same extent as a private individual.'" Brief for Respondent ("Resp. Br.") 15. But that obviously was not so: An otherwise identical case against a private party would have proceeded in state court, or in federal court on the basis of diversity jurisdiction, and California choice of law principles would have applied in either instance. Treating Petitioners differently from such a private party may be outcome-determinative here since, correctly applied, California choice of law principles lead to the application of

California substantive law. *See* Pet. Br. 13; Petition for a Writ of Certiorari 17–22.[1]

Directing attention away from the clear language of Section 1606, "which itself suffices to resolve this case," Brief for United States as Amicus Curiae ("U.S. Br.") 9, Respondent invites the Court to take a series of detours, claiming "the proper interpretation of the FSIA is rarely straightforward." Resp. Br. 15.

For instance, Respondent inaccurately states that Petitioners ignore the phrase "under like circumstances" in Section 1606, and then repeats an argument made in opposing the certiorari, which Petitioners already refuted in their opening brief. *See* Resp. Br. 20–22; Brief for Petitioner ("Pet. Br.") 35–36. Respondent once again claims that Congress intended Section 1606 to apply only to commercial activities but not "public acts." Resp. Br. 21–22. Yet there is no evidence in the text of Section 1606, or elsewhere in the FSIA, to support Respondent's reading of the statute.

In this regard, Respondent fails to respond to Petitioners' argument (Pet. Br. 35) that one would "expect more than simple statutory silence" if Congress intended such an inconsistent approach to apply to the different exceptions to immunity which Congress established in the parallel subsections of Section 1605(a) of the FSIA. *See Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017).

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[1] As Respondent concedes, the court of appeals has not addressed, much less decided, whether California or Spanish substantive law would apply under California choice of law principles. Resp. Br. 7. That issue would be addressed on remand.

Indeed, Respondent's argument is not even consistent with the Ninth Circuit's "federal common law" FSIA cases, which are *not* limited to those involving "public acts." *See, e.g.*, *Schoenberg v. Exportadora de Sal, S.A.*, 930 F.2d 777, 781 (9th Cir. 1991) (finding FSIA jurisdiction over Mexican government instrumentality based on "commercial" (nonpublic) activity of "arranging transportation"); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1001 (9th Cir. 1987) (wrongful death action against Polish government-owned airline).

Respondent also again ignores that its strained reading of the FSIA contradicts the Court's edict in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), where 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,' 28 U.S.C. § 1606." *Id.* at 488–89 (emphasis added). *See* Pet. Br. 36.

II. The Adoption of 28 U.S.C. § 1330 as Part of the FSIA Confirms that State Choice of Law Rules Must Be Applied

A. The History of Diversity Jurisdiction and Adoption of the FSIA Supports Application of State Choice of Law Rules

Respondent's brief argues that federal common law governs choice of law in FSIA cases because, in enacting FSIA, Congress moved the provision granting subject matter jurisdiction over civil actions

against foreign sovereigns[2] from 28 U.S.C. § 1332 into a new juridictional provision, 28 U.S.C. § 1330. Resp. Br. 17–20. Respondent then argues this change requires treating Section 1330 cases as analogous to federal question cases under 28 U.S.C. § 1331 for choice of law purposes, rather than addressing them under the rubric of Section 1332 diversity juridsiction. Resp. Br. 23–27. Respondent's argument ignores both history and logic.

Respondent makes a straw man argument, claiming that Petitioners' position relies on the false premise "that Congress intended to subject a non-immune foreign sovereign to diversity jurisdiction," Resp. Br. 15, as if "diversity jurisdiction" were some kind of second-class status. But that premise precisely describes what has been the law for at least a century and a half. Respondent ignores that while sovereign immunity may have been a merits defense to claims brought against sovereigns, subject matter jurisdiction over such cases has existed as part of the express grant of diversity jurisdiction, which dates from at least 1875 and itself flows from the text of Article III, Section 2.[3]

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[2] As used in this brief, "foreign sovereign" or "foreign state" refers both to a foreign nation itself and to any agency or instrumentality of a foreign nation. *See* 28 U.S.C. § 1603(a).

[3] Indeed, even the relevant language of the jurisdictional provisions remained virtually unchanged over the centuries:

U.S. CONST. art. III, § 2: "The judicial Power shall extend to all Cases. . . *between a State, or the Citizens thereof, and foreign States, Citizens or Subjects*."

The Jurisdiction and Removal Act of 1875, 18 Stat. 470–71, provided: "the circuit courts of the United States shall have

Accordingly, when Congress moved the provision granting subject matter jurisdiction over claims against foreign sovereigns out of Section 1332 as part of FSIA's comprehensive codification of actions against foreign state defendants, which had as its principal goal the adoption of the "restrictive theory" of sovereign immunity, *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004), there is no reason to believe Congress intended to alter the continuous practice since at least 1875 of addressing such cases under the rules for diversity jurisdiction.

The statutory history of the FSIA fully supports this understanding. There is no indication that Congress intended the specialized FSIA jurisdictional grant of Section 1330 to alter the ancient understanding that diversity jurisdiction applies to sovereign parties. Indeed, the FSIA included an amendment to Section 1332, which now provides for diversity jurisdiction over civil actions between "a foreign state, defined in section 1603(a) of this title [i.e., in a provision of the FSIA], *as plaintiff* and citizens of a State or of different states." 28 U.S.C. § 1332(a)(4) (emphasis added). It would be bizarre if in codifying litigation in the federal courts involving

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original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . *between citizens of a State and foreign states, citizens, or subjects*."

Section 24(c) of The Judiciary Act of 1911, 36 Stat. 1091 provided: "The District Court shall have original jurisdiction . . . of all suits of a civil nature . . . *between citizens of a State and foreign States, citizens, or subjects*."

Prior to the 1976 FSIA amendments, 28 U.S.C §1332(a) provided: "The district courts shall have original jurisdiction in all civil actions . . . *between* . . . *citizens of a State, and foreign states or citizens or subjects thereof*."

foreign sovereigns, Congress at the same time made them subject to diversity jurisdiction when they are plaintiffs, but intended a different rule to apply when they are defendants. At the least, one would expect a clear statutory expression of any such change, with a cogent explanation of such a seemingly inconsistent purpose, but Respondent points to nothing of the sort. Thus, *Erie* and *Klaxon* have applied and continue to apply to state law claims by and against foreign sovereigns.[4]

And, contrary to Respondent's argument, the legislative history supports the analogy to diversity jurisdiction. The House of Representatives report on the FSIA explained:

> Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, *a similar jurisdictional basis under section 1332 becomes superfluous*.

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[4] *See, e.g.*, *Republic of Iraq v. First National Bank of Chicago*, 350 F.2d 645, 647 (7th Cir. 1965) ("The sole basis of the district court's jurisdiction, therefore, was diversity of citizenship between the Republic of Iraq and the Bank, an Illinois corporation, and substantive questions presented must be governed by Illinois law. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)."); *Republic of China v. American Express Co*., 195 F.2d 230 (2d Cir. 1952) (diversity jurisdiction over both claim brought by Chinese government instrumentality, and counterclaim in interpleader against it as to which sovereign immunity had been waived).

H.R. REP. NO. 94-1487, 14, 1976 U.S.C.C.A.N. 6604, 6613 (emphasis added). In other words, Congress viewed Section 1330 as establishing "a similar jurisdictional basis" to diversity jurisdiction under Section 1332. Since diversity jurisdiction encompassed actions involving foreign states from at least 1875 (and under the FSIA continues to do so in cases where foreign states are plaintiffs), the statutory history confirms that Section 1330 incorporates "similar" choice of law principles as Section 1332.

Removing claims against foreign sovereigns from Section 1332 (but not claims brought by foreign sovereigns) was not a "value-judgment" by Congress, as Respondent claims, Resp. Br. 20, but simply a matter of legislative housekeeping. That housekeeping was necessary because adoption of the FSIA required additional tweaks to the jurisdictional statue that would be out of place in Section 1332, such as eliminating the amount in controversy requirement and incorporating the FSIA's rules in Section 1608 for service of process.

B. Respondent's Reliance on Federal Question Jurisdiction Is Unavailing

Respondent argues that this case should be analogized, for choice of law purposes, to an action arising under federal question jurisdiction, 28 U.S.C. § 1331, because it is "from start to finish, *governed by federal law*." Resp. Br. 26 (emphasis added). That is flatly wrong. The question presented here only arises with respect to FSIA cases that allege claims based on *state law* causes of action. Resp. Br. i.

As explained above, the FSIA moved the grant of federal subject matter jurisdiction over foreign sovereigns into Section 1330 as part of a comprehensive statute designed to allow certain claims against sovereigns to proceed in accordance with the FSIA's parameters. Once a foreign sovereign is divested of immunity by operation of the FSIA, the statute permits assertion of claims based on State substantive law against sovereign defendants. Congress did not add such claims to the scope of federal question jurisdiction under Section 1331. If that had been Congress's intent, it could have added a simple phrase to Section 1331, such as a final clause saying "including actions brought under the FSIA." The absence of such action further supports Petitioners' statutory argument.

III. Respondent Disregards Fundamental Principles Underlying *Erie*, and Ignores *Klaxon*

"The nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945). "The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *see also* Henry Friendly, *In Praise of* Erie—*And of the New Federal Common Law,* 39 N.Y.U. L. REV. 383, 408 n.122 (1964) ("the *Erie* doctrine applies, whatever the ground for federal

jurisdiction, to any issue or *claim which has its source in state law*") (emphasis added).

Respondent barely mentions *Erie*, and entirely ignores *Klaxon,* 313 U.S. 487 (1941), where the Court held that the *Erie* principle "extends to the field of conflict of laws," explaining "[a]ny other ruling would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based." *Id*. at 496. As for "[w]hatever lack of uniformity this may produce between federal courts in different states," the Court recognized that is "attributable to our federal system, which leaves to a state . . . 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*." *Id*. (emphasis added).

Respondent similarly ignores the Court's observation in *Richards v. United States*, 369 U.S. 1, 13 (1962), that, despite the power of Congress to enact "a federal conflict-of-laws rule independent of the States' development of such rules, we should not . . . assume that it has done so." *Id.* "Congress has been specific in those instances where it intended the federal courts to depart completely from state law." *Id.* And, absent strong countervailing considerations, "the prudent course" is to "adopt the readymade body of state law." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979).[5]

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[5] Respondent's conclusory assertion that *this case* involves "uniquely federal interests" requiring the creation and application of federal common law is misguided. *See* Resp. Br, 10, 28. First, the Ninth Circuit's FSIA choice of law rule applies to all cases brought under Section 1330 which assert state law

Disregarding this Court's directives, the Ninth Circuit opted to require application of federal common law for choice of law in FSIA cases—even though no such common law yet existed. Working from a blank slate, the court looked to the Restatement (Second) of Conflict of Laws, published in 1971, as a "starting

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claims, and does not depend on the mix of interests at play in a *particular case*. Second, the fact that the FSIA expressly applies to jurisdiction over cases asserting state law claims disproves the notion that such cases implicate only federal interests. Third, Respondent misleadingly cites *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), as purported support for its view. Resp. Br. 10. *Verlinden*'s "core question" was whether Congress exceeded the scope of Article III by granting federal courts jurisdiction over certain actions by foreign plaintiffs against foreign sovereigns "where the rule of decision may be provided by state law." *Id*. at 491. Examining how such a FSIA case might "arise under" federal law, the Court concluded that the application of FSIA's standards governing immunity at the "very outset" of a case satisfies Article III. *Id*. at 493; *see also id*. (immunity is assessed "[a]t the threshold of every action"). Rather than support Respondent, *Verlinden* evidences the implausibility of its claim that FSIA cases are, "from start to finish, *governed by federal law*" (Resp. Br. 26). Were that true, the Court in *Verlinden* surely would have said so, and found Article III readily satisfied, rather than engaging in an extensive inquiry before concluding that Article III is satisfied by virtue of the "threshold" immunity question.

point."[6] *Harris*, 820 F.2d at 1003.[7] But the two cases establishing the rule, first *Harris* and then *Schoenberg*, were wrongful death actions arising from airplane crashes, which did little to flesh out the content of the rule and have little relevance to the factual circumstances here. *See Harris*, 820 F.3d at 1003–04; *Schoenberg*, 930 F.2d at 782–83. Today, more than three decades after the rule was adopted, the Ninth Circuit has scarcely developed it further despite its reliance on the now-half-century-old Restatement.[8]

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[6] Despite its reliance on the Restatement, the Ninth Circuit disregarded the Restatement's commentary, which explains that "the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained . . . . When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. b (1971). In neither *Harris* nor *Schoenberg* did the Ninth Circuit remotely grapple, as the Comment requires, with the relevant language in Section 1606 making foreign sovereigns liable in the "same manner" and "same extent" as private parties.

[7] Ignoring the Ninth Circuit's own characterization of the Restatement as a "starting point," Respondent says the Ninth Circuit has as "its long-standing rule that the Restatement *alone* determines the appropriate choice of law where jurisdiction is predicated on the FSIA." Resp. Br. 7 (emphasis added).

[8] The Restatement is in the process of being revised "in light of significant legal developments" since the Second Restatement was published. *See Restatement of the Law Third, Conflict of Laws*, ALI.ORG, https://www.ali.org/projects/show/conflict-laws/ (last visited Jan. 6, 2022).

V. Respondent's Claim that the Rules of Decision Act Applies Only in Diversity Cases Is Insupportable

Although Respondent admits that the Rules of Decision Act is an "explicit command" by Congress to apply state law (Resp. Br. 45), its assertion that "where jurisdiction is *not* premised on diversity, the Rules of Decision Act has no relevance" is baseless. Resp. Br. 46.

Respondent offers no substantiation for this claim,[9] which finds no support in either the statute itself, or in decisions of this Court. *See Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 397 (1906) (applying Rules of Decision Act in case arising under federal law); *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 164 n.2 (1987) (Scalia, J., concurring) (disputing idea that Rules of Decision Act "applies only in diversity cases"); *see also* 36 C.J.S. Federal Courts § 167, Rules of Decision Act ("Generally, a federal court must apply state law in determining a state question. This rule applies *without regard to the basis of federal court jurisdiction*.") (emphasis added); Alfred Hill, *The Erie Doctrine in Bankruptcy*, 66 HARV. L. REV. 1013, 1034 (1953) ("the [Rules of Decision] Act has

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[9] Respondent's sole supporting authority is a readily distinguishable 70-year-old circuit court decision, *Milwaukee Towne Corp. v. Loew's, Inc.*, 200 F.2d 17 (7th Cir. 1952). While the Seventh Circuit noted plaintiff's invocation of the Act as the basis for requesting an award of interest, it declined that request for unrelated reasons, with no suggestion the Act does not apply in non-diversity cases. *Id.* at 19–20.

traditionally been understood to apply in non-diversity as well as diversity cases").[10]

VII. Respondent's Conjecture About Hypothetical Forum Shopping Is Unfounded

Respondent dismissively labels choice of law as a "game," rather than a serious legal issue, when it argues that states will "encourage" forum shopping "in the choice-of-law game," and as a remedy urges the Court to endorse the creation and use of federal common law. Resp. Br. 41–42. As demonstrated above, this policy argument, has no basis in the text, structure, or history of the FSIA.

Moreover, Respondent's purported concern about forum shopping is based entirely on conjecture—some of which contradicts other claims by Respondent.

For example, the suggestion that federal common law is necessary to combat forum shopping makes little sense if Respondent were correct that "most states would ultimately apply the same rule of decision, regardless whether they apply federal common law or the forum choice-of-law test." Resp. Br. 11; *id*. at 13.

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[10] Respondent's two other arguments against application of the Rules of Decision Act are wrong. *See* Resp. Br. 46. First, as explained, the FSIA does not "require or provide" for the application of federal common law to decide choice of law for the adjudication of state law claims, and therefore the Rules of Decision Act applies. *See* 28 U.S.C. § 1652. Second, no established rule of statutory interpretation or decision by this Court supports Respondent's assertion that the Rules of Decision Act does not apply because it was enacted before FSIA.

Respondent's forum shopping concern also lacks factual support. Even though the Ninth Circuit alone has adopted federal common law for its FSIA choice of law rule, Respondent cites no evidence from other circuits that forum shopping has been a problem.

Respondent further ignores that venue rules constrain where civil cases may be brought, ensuring there is a connection to the forum. *See*, *e.g.*, 28 U.S.C. § 1391(f).

Also notably missing from Respondent's forum shopping argument is support from Spain or any other country which endorses Respondent's concerns—even though Spain previously submitted amicus briefs in this case, and even though foreign governments file amicus briefs in FSIA cases before the Court.[11]

VI. Respondent Has Failed to Show that Adoption of Federal Common Law Is Necessary to Ensure "Uniformity" or to Avoid Conflict with Federal Interests or Foreign Relations

Respondent's argument that federal common law must be adopted because the "FSIA was enacted to promote uniformity among actions involving foreign sovereigns," Resp. Br. 30, is based on a fundamental misunderstanding of the statute's purpose. The

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[11] *See*, *e.g.*, Brief of the Kingdom of Saudi Arabia as Amicus Curiae in Support of the Petitioner, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048 (No. 16-1094), 2018 WL 4091711 (involving application of FSIA); Motion for Leave to File a Brief as Amicus Curiae and Brief for the Republic of Liberia as Amicus Curiae in Support of Respondents, *Argentine Republic v. Amerada Hess Shipping Corp.* 488 U.S. 428 (No. 87-1372), 1987 WL 880145 (same).

"uniformity" called for by the FSIA pertains to the determination of whether a sovereign is immune from suit. Pet. Br. 33–34; U.S. Br. 9–10. Once that question is decided by application of uniform federal law, the FSIA "was not intended to affect the substantive law of liability." *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 620 (1983).

The fact that state choice of law rules are not uniform cannot possibly be inconsistent with a statute that already contemplates application of all the variations of 50 States' substantive laws. While Respondent disparages the role of States in our federal system by characterizing it as "subjecting sovereigns to the whims of state law," Resp. Br. 31, that is exactly what Congress intended. *See* Brief of Professors of Law as Amici Curiae10–14.

Equally meritless are Respondent's attempts to claim that federal interests in foreign relations and application of international law and policy justify adoption of federal common law. Resp. Br. 27–39. Those arguments ignore that in enacting the FSIA, Congress has already balanced such interests. *See, e.g., Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 715 (2021) (FSIA "provides the carefully constructed framework necessary for addressing an issue of such international concern."); *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 146 (2014) ("apprehensions" about "international-relations consequences" "are better directed to that branch of government with authority to amend" the FSIA). Congress's careful balancing of interests is shown by

FSIA provisions which provide special protections to foreign sovereigns.[12]

Rather than opening the door to judicial lawmaking by means of federal common law, these examples show that Congress addressed where it intended to treat foreign sovereigns differently in the text of the statute itself. It is a "precondition" to "judicial creation of a special federal rule" that "there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers v. Federal Deposit Ins. Co.*, 512 U.S. 79, 87 (1994). Respondent has failed to identify any such conflict.[13]

VII. Respondent's New Constitutional Objections to the Application of California Law Are Not Properly Before the Court

Respondent concludes its brief by asserting that the U.S. Constitution bars the application of California law in this case. Resp. Br. 50–52. First, Respondent claims that principles of extra-territoriality bar Petitioner's claim. This is an entirely new contention, never raised or presented to the courts below. Second, Respondent argues that application of California substantive law here would violate due process because, under its view of Spanish

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[12] *See, e.g.*, 28 U.S.C. § 1441(d) (removal); *id.* § 1608(a) (service of process); *id.* § 1391(f) (venue); §1608(d) (time to respond to complaint); *id.* § 1608(e) (default judgment requires "evidence satisfactory to the court"); *id.* § 1609 (execution of judgments); *id.* § 1330 (no jury trial); *id.* § 1606 (limiting punitive damages).

[13] *See, e.g.*, Pet. Br. 10–12; Brief for B'nai B'rith Int'l., et al. as Amici Curiae 6–28; Brief for The 1939 Society, et. al. as Amici Curiae 3–16; Brief for Comunidad Judía de Madrid and Federación de Comunidades Judías de España as Amicus Curiae 28–30; Brief for Mark B. Feldman as Amicus Curiae 14–26.

law, title in the Painting had vested by the time the Cassirers sought its return. But that argument wrongly assumes as its premise that Spanish law applies. If California law applies—and Respondent has had 17 years of due process to make every conceivable argument to avoid that result—then Respondent never had good title to which any due process right could attach.[14]

Nor do the facts support this new argument. Application of California law is wholly proper. The stolen Painting's first stop after it was smuggled out of Germany in violation of U.S. military law was a Beverly Hills gallery which sold it to a Los Angeles collector. Jt. App. 44a, 50a, 51a, 63a; *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 2:05-cv-03459 (C.D. Cal., filed May 10, 2005), Dkt. 377 at 54, ¶ 18–19; *id.*, Dkt. 456–26. California had been the Cassirers' home for over a decade when Respondent acquired the Painting in 1993 despite strong

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[14] A recent book review, written in conjunction with an international touring immersive exhibition of the works of Vincent Van Gogh, documents the renown of the Cassirer Gallery in promoting modern artists, and underscores the implausibility of Respondent's claims that neither the Baron nor TBC's curators would have recognized the Cassirer Gallery label on the Painting. *See* Matt Lebovic, *How Vincent Van Gogh Helped Jews Break into the World of Art – and Vice Versa*, THE TIMES OF ISRAEL (Oct. 24, 2021), https://www.timesofisrael.com/how-vincent-van-gogh-helped-jews-break-into-the-world-of-art-and-vice-versa/ ("The process of commercializing van Gogh started 120 years ago, when German-Jewish art collector Paul Cassirer staged the first showing of the Dutch painter's works in Berlin. After that exhibition, van Gogh's legacy—and modern art, in general—became intertwined with the trajectory of European Jews, according to historian Charles Dellheim.").

indications it had been looted by the Nazis, Jt. App. 65a, and nearly four decades after the U.S. Court of Restitution Appeals ("CORA") had declared Lilly Cassirer the Painting's rightful owner. *Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 2:05-cv-03459 (C.D. Cal., filed April 30, 2019), Dkt. 629 at 3.[15]

Further, Respondent waived this argument because its only due process argument below was a challenge to "retroactive application" of an amendment to the California Code of Civil Procedure which extended the statute of limitations for claims to recover stolen art.

In any event, since neither of Respondent's new constitutional arguments were previously presented to the lower courts, they are not properly raised for the first time here. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (this is a Court of "final review and not first view").

CONCLUSION

Because the judgment below was based on the Ninth Circuit's application of its erroneous choice of law rule, the judgment should be vacated, and the case remanded for further proceedings.

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[15] Respondent misleadingly refers to "compensation" paid by Germany to Lilly in 1958, Resp. Br. 1, but fails to acknowledge the Ninth Circuit specifically held "the 1958 Settlement Agreement did not extinguish Lilly's right to physical restitution of the Painting." 862 F.3d at 978.

January 2022

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