NO. 24-_____

In the Supreme Court of the United States

JUAN CARLOS EMDEN,
NICOLAS EMDEN, AND MICHEL EMDEN,

Petitioners,

v.

THE MUSEUM OF FINE ARTS, HOUSTON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The act of state doctrine has been applied by the lower courts to bar United States courts from declaring invalid the official acts of a foreign sovereign performed within its own territory. But if a court is only required to review the effects of a foreign sovereign's act, but not the validity of the act, the act of state doctrine does not apply.

Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)") allows a court to dismiss a complaint if it fails to state a plausible claim upon which relief may be granted. However, a complaint survives a motion to dismiss if it contains sufficient factual matter that, accepted as true, states a claim to relief that is facially plausible.

In this case, the Fifth Circuit erred in affirming the trial court's improper inferences in favor of Respondent, and against Petitioner. Specifically, the Fifth Circuit erroneously concluded that (1) a foreign sovereign made a determination about the ownership of a piece of art, even though the well-pleaded allegations asserted that the artwork was never in that foreign sovereign's possession, and (2) the acts of a non-profit entity located within the jurisdictional limits of the foreign sovereign were "official acts" of the sovereign because the non-profit entity was sufficiently tied to the official foreign government , despite well-pleaded allegations to the contrary.

The questions presented are:

1. Whether the Fifth Circuit's application of the act of state doctrine conflicts with well-established precedent that adjudicating the effects of a foreign sovereign's acts is not a determination of the validity

of the acts, but rather is a determination of whether the act occurred at all.

2. Whether the Fifth Circuit's improper inferences impermissibly expands the scope of the Rule 12(b)(6) standards to dismiss and deprives Petitioners of the one forum available in the United States to recover stolen war art taken from Petitioner's forebears by the Nazi regime and now located in the United States.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 23-20224

Juan Carlos Emden; Nicolas Emden; Michel Emden, *Plaintiffs-Appellants,* v. The Museum of Fine Arts, Houston, *Defendant-Appellee.*

Date of Final Opinion: May 29, 2024

Date of Rehearing Denial: June 25, 2024

U.S. District Court for the Southern District of Texas

No. 4:21-CV-3348

Juan Carlos Emden et al, *Plaintiffs,* v.
The Museum of Fine Arts, Houston, *Defendant.*

Date of Opinion and Order: Signed April 20, 2023;
Entered April 24, 2023

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PETITION FOR A WRIT OF CERTIORARI

Juan Carlos Emden, Nicolas Emden, and Michel Emden respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App.1a) is reported at 103 F.4th 308 (5th Cir. 2024). The order of the district court granting Respondent's motion to dismiss Petitioners' first amended complaint (App.30a) is unreported. The order of the district court granting Respondent's motion to dismiss Petitioners' original complaint (App.39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2024. (App.1a). The court of appeals denied rehearing and rehearing *en banc* on June 25, 2024. (App.61a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

JUDICIAL RULES INVOLVED

Fed. R. Civ. P. 12(b)(6)

[. . .]

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

[. . .]

(6) failure to state a claim upon which relief can be granted;

STATEMENT OF THE CASE

This case is about the long overdue restitution of a valuable painting that was wrongfully taken by the Nazi regime from a displaced European Jew in the early years of World War II. As it stands, the lower courts have prevented this case from being decided on the merits; instead, they have erroneously relied on inferences drawn in favor of a Rule 12(b)(6) movant, despite the well-pleaded allegations in Petitioners' amended complaint.

As such, the Fifth Circuit has expanded the act of state doctrine so as to create a conflict both between the circuits and within the Fifth Circuit itself. *First*, the Fifth Circuit erroneously concluded that "the effect of the [foreign entity's] act intrinsically

implicates its validity." App.15a. *Second*, the Fifth Circuit drew improper inferences that were not in the light most favorable to Petitioners, asserted new unpleaded facts not found in the record, and disregarded Petitioners' well-pleaded allegations.

A. Background

This case involves the misidentification of one painting, owned by Dr. Max Emden, for another painting, owned by Hugo Moser, in the chaotic years just following the end of World War II. Both paintings were acquired by Nazi art dealers. Dr. Emden's painting was recovered by the Monuments Men, misidentified, and accidentally sent the Netherlands upon request by a non-profit organization that was seeking Mr. Moser's painting in its efforts to return stolen artwork.

1. The By Bellotto *Pirna*

Dr. Max Emden was a victim of the Nazi regime's systematic persecution of European Jews. Due to Nazi-induced financial distress, Dr. Emden sold three valuable paintings by famed eighteenth-century artist Bernardo Bellotto to a buyer of artworks for Nazi leader Adolf Hitler. This included a painting titled "The Marketplace at Pirna" bearing a unique identifying number 1025 (the "By Bellotto *Pirna*").[1] Petitioners (the "Emden Heirs") are the rightful owners of this family heirloom that was separated from their grandfather, Dr. Emden, by the racist persecution of

[1] In art parlance, works made by the hand of the artist are referred to as "By [the artist]". Copies of any date of a work by the artist by the hand of a different artist are referred to as "After [the artist]".

Nazi Germany. However, the By Bellotto *Pirna* is currently in the art collection of Respondent, The Museum of Fine Arts, Houston.

In 1945, the Monuments Men discovered the By Bellotto *Pirna* in a salt mine in Austria that contained thousands of works of art destined for Hitler's *Führermuseum*. The Monuments Men were a group of "scholar soldiers"—museum curators, art historians and professors, librarians, architects, and artists—attached to the Civil Affairs Division of the Western Allied armies.

2. The After Bellotto *Pirna*

Hugo Moser was a German art dealer and collector. In 1928, Mr. Moser bought a copy of *The Marketplace at Pirna* painted by an unknown artist (the "After Bellotto *Pirna*"). In 1933 when the Nazis came to power, Moser fled Germany for the Netherlands, and in 1940 fled the Netherlands for the United States. The After Bellotto *Pirna* remained in Amsterdam. The After Bellotto *Pirna* was eventually acquired by a Nazi art dealer for Hitler's *Führermuseum*. After the war, the After Bellotto *Pirna* was found in a storage facility containing dozens of other works of art owned by the Nazi art dealer.

3. The By Bellotto Pirna Is Accidentally Sent to the Netherlands

In 1946, the Monuments Men mistakenly included the then-misidentified By Bellotto *Pirna* (the original) in a shipment to the Netherlands, believing it to be the After Bellotto *Pirna* (the copy). The shipment was destined for the Netherlands Art Property Foundation (herein the "SNK"). In 1949, having only then

discovered its mistaken misidentification, the Monuments Men wrote the SNK requesting return of the By Bellotto *Pirna*. That letter arrived two weeks after the SNK had delivered the By Bellotto *Pirna* to a German art dealer in New York City who claimed to have lost a painting of the same urban scene—Hugo Moser. Moser only ever owned the After Bellotto *Pirna*. Therefore, his request to the SNK was for his After Bellotto *Pirna*, not Emden's By Bellotto *Pirna*.

When Moser received the By Bellotto *Pirna* instead of his own inferior copy, he created a false provenance to make the work marketable and removed identifying labels from the back of the painting and frame that would have proven Emden's prior ownership and Hitler's subsequent possession. In 1952, Moser sold the By Bellotto *Pirna* under the false provenance to a prominent U.S. collector. In the 1960s, the collector donated the By Bellotto *Pirna* to Respondent.

Recent new evidence proved the correct provenance of the By Bellotto *Pirna* and confirmed that it is one of three Bellotto paintings involuntarily sold by Dr. Emden in 1938 as a direct result of the Nazi's racial persecution. In 2019, the German Advisory Commission on the Return of Cultural Property Seized as a Result of Nazi Persecution, Especially Jewish Property (the "Commission") reviewed the Emden Heirs' claim seeking restitution of the other two Bellotto paintings owned by Emden which were then in Germany's possession. The Commission decisively concluded that the paintings belonged to Petitioners (Emden's heirs) and were sold by Dr. Emden under extreme financial distress constituting war lotting. The Commission recommended those other two Bellotto paintings be returned to Petitioners. The German government

accepted the findings and complied with the restitution of those two Bellotto works to Petitioners.

Additionally, the Commission concluded that the third Bellotto, the By Bellotto *Pirna*, was "of the same origin [and] was erroneously restituted to the Netherlands after 1945[. . .]." In sum, but for the clerical misidentification error made in 1946 by the U.S. officials with the erroneous shipment to the Netherlands, all three Emden Bellottos would have been together, in Germany, and all three would have been returned to Petitioners under the Commission's findings.

Respondent claims that the post-war restitution process in the Netherlands was an official act by a foreign sovereign that puts the By Bellotto *Pirna* outside Petitioners' reach. This assertion is meritless: the actual Dutch government has, for over twenty years, firmly dismissed and denounced the SNK as not being a "decision-making body," and the SNK mistakenly transferred the By Bellotto *Pirna* to Moser—who only had a claim of title to the After Bellotto *Pirna.*

4. The Dispute and Procedural History

The Emden Heirs sued Respondent for conversion, violations of the Texas Theft Liability Act, and a declaratory judgment. Respondent moved to dismiss the complaint under Rule 12(b)(6) alleging, among other things, that Petitioners' claims were barred under the act of state doctrine. The district court agreed holding that "the Act of State doctrine applies to quiet title actions that require the court to nullify a foreign nation's official conveyances", even though Petitioners did not bring a quiet title action App.51a. The district court also held that the SNK's misidenti-

fication of the By Bellotto *Pirna* as the After Bellotto *Pirna* did not undermine the act of state doctrine, "particularly where plaintiffs do not allege that the Dutch agreed about the claimed misidentification." *Id*. at App.52a.

Petitioners filed an amended complaint meticulously asserting its claims that the SNK was not an official actor constituting or equivalent to the then-actual post-war Dutch government. The district court again granted Respondent's motion to dismiss giving short shrift to the additional plausible allegations that the SNK was not an official actor for the Dutch government. In fact, in its opinion the district court attributes a statement to Plaintiffs that is neither found in the first amended complaint, nor in Respondent's motion which the court cited. *See* App.34a ("Plaintiffs claim that the Dutch government's receipt and subsequent restitution to Hugo Moser of the [By Bellotto *Pirna*] was the result of a clerical error by the Dutch.") (However, nowhere in the amended complaint do Plaintiffs contribute the clerical error to the Dutch. Rather, the clerical error is repeatedly attributed to the Monuments Men who were official actors of the United States). Regardless, the court held that Plaintiffs' allegations that the SNK was not an official actor for the Dutch government were not plausible because Plaintiffs "provided no citations for these assertions" at the 12(b)(6) stage of the proceedings. *See* App.35a.

Petitioners appealed to the Fifth Circuit asserting that they pleaded sufficient facts to plausibly show the act of state defense did not apply in this case. Specifically, Petitioners argued that they satisfied the Rule 8 requirements and plausibly alleged that

(1) the SNK was not an official governmental actor; (2) the SNK lacked authority to make an official act with regard to the By Bellotto *Pirna*; (3) the *Von Saher* cases are inapposite; and (4) US/Dutch policy supports the court's involvement in this dispute. The Fifth Circuit affirmed the dismissal based on a misapplication of the act of state doctrine and the Rule 12(b)(6) standards which greatly expands the act of state doctrine's applicability. The Fifth Circuit's opinion is at odds with well-established precedent and the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE PETITION

The questions presented in this case are of critical importance to the applicability of the act of state doctrine among the circuit courts and bear directly on whether the United States courts can still stand as the last forum for pursuing restitution of stolen war art. Further, the Fifth Circuit's decision grossly overlooks the Rule 12(b)(6) standards and places a higher pleading burden on Petitioners than required by the federal rules.

I. THIS COURT SHOULD GRANT REVIEW TO DECIDE WHETHER ADJUDICATING THE EFFECTS OF A FOREIGN SOVEREIGN'S ACTS NECESSARILY REQUIRES A DETERMINATION OF THE VALIDITY OF THE ACTS THEREBY IMPLICATING THE ACT OF STATE DOCTRINE

The act of state doctrine applies when the relief sought "require[s] a court in the United States to declare invalid the official act of a foreign sovereign

performed within its own territory." *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Intern*, 493 U.S. 400, 405 (1990).[2] When the court is not required to decide the validity of an official act, the doctrine does not apply. *See id.*

The circuit courts have consistently narrowly construed "invalidity" in act of state cases. For example, the Second Circuit has held the act of state doctrine is limited to cases where official acts of valid foreign governments must be declared "null and void" to afford the relief sought. *See Celestin v. Carribbean Air Mail, Inc.*, 30 F.4th 133, 137-38 (2d. Cir. 2022) (citing *Kirkpatrick*, 493 U.S. at 405); *see also Kashef v. BNP Paribas S.A.*, 925 F.3d 53 (2d Cir. 2019) (quoting *Kirkpatrick*, 493 U.S. at 406) (holding that "[v]alidity was simply not an issue: To evaluate the merits of the aiding and abetting claim, the Court had to determine 'not whether the acts are valid, but whether they occurred.'"). The Second Circuit also articulated the distinction between an invalidity declaration and a mere occurrence:

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[2] "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Kirkpatrick*, 493 U.S. at 405 (citing *Underhill v. Hernandez,* 168 U.S. 250, 254 (1897) (holding that act of state doctrine prevented U.S. court from deciding if plaintiff's detention was tortious because it "would have required denying the legal effect" to acts of military commander for the party that succeeded and was recognized by the U.S.); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918) and *Ricaud v. American Metal Co.*, 246 U.S. 304, 310 (1918) (denying title to purchaser that would require declaring government's seizure of property within its own territory, legally ineffective).

> The Supreme Court has determined that when the validity of a foreign state's action is not the question being litigated, and the inquiry is simply whether the conduct in question occurred, the act of state doctrine is not implicated. *Kirkpatrick*, 493 U.S. at 405, 110 S.Ct. 701. In other words, the doctrine applies only when "the relief sought or the defense [raised] would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Id.* at 405, 110 S.Ct. 701 (emphasis added).

Kashef v. BNP Paribas S.A., 925 F.3d 53, 59 (emphasis added).

Likewise, the Fifth Circuit has previously held that the act of state doctrine does not apply where the court is asked to "only determine the effect of such [governmental] action on the right of United States citizens . . . " *Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co.*, 850 F.3d 785, 797 (5th Cir. 2017). Additionally, the Fifth Circuit in *Geophysical* also drew a critical distinction between relief requiring an invalidity determination and the propriety of a subsequent independent act:

> [E]ven a ruling in favor of Geophysical will not invalidate any action by the Canadian government, but only determine the effect of such action on the right of United States citizens to import copies that a Canadian agency made. Indeed, even if upon remand the district court finds that the copies were not "lawfully made under this title," that ruling only restricts TGS's (and others')

> ability to freely import the copies. Any determination will not speak to the validity of the Canadian government's actions, only whether those actions support lawful importation into the United States by a private party.

Geophysical Serv., Inc. v. TGS-NOPEC Geophysical Co., 850 F.3d 785, 797 (emphasis added).

However, in the present case, the Fifth Circuit departed from these precedents and held that "any evaluation of the effect of the SNK's act intrinsically implicates its validity." App.15a (emphasis in original). This is predicated by the Fifth Circuit's inclusion of a new factual allegation not contained in Petitioners' amended complaint that "The SNK could not have sent the painting without concurrently determining its rightful owner." *Id.*; *see also infra* § B(1). The SNK received a request for the return of a painting from Hugo Moser. Mr. Moser only ever owned and had title to the After Bellotto *Pirna*. Thus, the SNK's sole determination as to who the Bellotto painting belonged to came from Moser—owner of the After Bellotto *Pirna*.

The Monuments Men (U.S. Officials) mistakenly identified the By Bellotto *Pirna* as Moser's missing painting upon receipt of the SNK's inquiry. The only act by the SNK was shipping the By Bellotto *Pirna* to Moser—the owner of the After Bellotto *Pirna*. The SNK made a rubberstamp conclusion that the After Bellotto *Pirna* belonged to Moser without investigation or rebuttal. There is no dispute regarding that fact. The Monuments Men determined, incorrectly, that the *Pirna* in their possession was Moser's After Bellotto *Pirna*. No government, entity, official, or any

other foreign sovereign with authority to act ever made a determination as to the By Bellotto *Pirna*, the painting sought by Petitioners.

An analysis of this case would not require invalidating the SNK's official act (if the SNK were in fact an official actor) (*see infra* § B(2)). An analysis would only involve assessing the effect of the SNK's shipping of the By Bellotto *Pirna* (mistakenly identified as the After Bellotto *Pirna*) to Moser. The Fifth Circuit's holding that the determination of this effect necessarily requires an evaluation of the validity of the act is erroneous. There is no dispute that the SNK's only conclusion regarded the painting it believed it had in its possession: the After Bellotto *Pirna* belonged to Moser. The issue is that the painting hanging on Respondent's wall is not the After Bellotto *Pirna*. It is the By Bellotto *Pirna* whose title has never been adjudicated. The question is not whether the determination of ownership as to the After Bellotto *Pirna* is invalid. Rather, the question is whether a determination of ownership of the By Bellotto *Pirna* occurred at all. Petitioners' claim depends on the latter; thus, the act of state doctrine does not apply to foreclose their claim. *See generally Kashef*, 925 F.3d 53.

The Fifth Circuit's holding in this case that "an evaluation of the effect of the SNK's act intrinsically implicates its validity" directly contradicts its own precedent regarding a mere "effect" versus an invalidity determination, and also conflicts with the Second Circuit's invalidity analysis. App.15a (emphasis in original). This Court should grant the petition to determine whether an evaluation of the effect of a

foreign sovereign's act requires an evaluation of the validity of the act.

II. THE FIFTH CIRCUIT'S INFERENCES IN FAVOR OF MOVANT IMPERMISSIBLY EXPANDS THE SCOPE OF THE RULE 12(B)(6) STANDARDS AND REQUIRES A HEIGHTENED PLEADING STANDARD AT ODDS WITH THE FEDERAL RULES

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' . . . it demands more than . . . 'labels and conclusions.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face." *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). Petitioners need only "nudg[e] the claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. "And of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* 550 U.S. at 556 (internal quotation omitted).

A. The Fifth Circuit's Improper Inferences and New Unpleaded Factual Allegations Undermine its Holding that Petitioners' Clams Implicate the Act of State Doctrine

As previously discussed, the act of state doctrine does not bar claims if a court is simply evaluating a mere occurrence as opposed to the validity of a foreign sovereign's act. *See supra* § A. The Fifth Circuit's opinion that the act of state doctrine bars Petitioners' claims erroneously turns on new factual allegations that are not contained in the first amended complaint or its referenced documents. The opinion stated that "The act of restitution legally established the owner and possessor of the By Bellotto *Pirna*." App.15a (emphasis added). This is the exact opposite of Petitioners' pleaded factual allegations, which repeatedly assert that the SNK did not and could not have made any legal decision or act about title to the By Bellotto *Pirna* because the SNK did not know they had that painting at all. Rather, Petitioners pleaded that the SNK by virtue of its ignorance made a legal decision or act about title only as to the After Bellotto *Pirna*, the painting they believed they had and that Moser sought.

This improper new "fact" was based on a second new "fact": "The SNK could not have sent the painting without concurrently determining [the By Bellotto *Pirna*'s] owner." App.15a. Just like the first new "fact," the second new "fact" violates well-established precedent by this Court and all Circuit Appellate Courts barring such *ad hoc* inferences at this stage in the proceedings, as well as falling far from the standard that all factual allegations be taken "in the

light most favorable" to Petitioners as the non-movants.

Both of these uncited, new assertions do not appear in the Petitioners' amended complaint or in anything else properly considered for a motion to dismiss under Rule 12(b)(6). Given the well-pleaded factual allegations are that the SNK had no idea it possessed the By Bellotto *Pirna*, it is an improper inference to assume the SNK made a legal determination about the By Bellotto *Pirna* simply because the SNK shipped the painting to Moser while believing it was the After Bellotto *Pirna*.

B. The Fifth Circuit's Improper Inferences Improperly Elevated the SNK to an Official Actor in Direct Contradiction of Petitioners' Well-Pleaded Facts

The Fifth Circuit's determination that the SNK had "sufficient governmental trappings . . . such that we cannot call its actions unofficial" is based on improper inferences. App.9a. To reach its conclusion about the SNK's status, the Fifth Circuit improperly weighed the competing factual allegations between the parties and drew improper inferences not in the light most favorable to the non-movants, as required by Rule 12(b)(6).

After lightly summarizing Petitioners' numerous factual allegations that show the SNK was not an official actor, the Fifth Circuit then launched into a lengthy application of the *Von Saher III* analysis of Dutch post-war restitutions and bodies, concluding that the *Pirna* case today is the same as that of the *Cranachs* in *Von Saher*. App.18a ("In the *Von Saher* trilogy, the Ninth Circuit thrice ruled on a dispute

like the one before us.") *See generally Von Saher v. Norton Simon Museum of Art at Pasadena*, 897 F.3d 1141 (9th Cir. 2018).

Indeed, the Fifth Circuit's failure to consider the plausible, pleaded facts is confirmed by comparing the facts in *Von Saher*. As opposed to the SNK's rubberstamp chaos detailed in Petitioners' amended complaint, *Von Saher* reflects a multi-proceeding, multi-decade set of true "official acts" of restitution that ultimately resulted in a post-discovery summary judgment on the act of state doctrine. Although both works were recovered by Allied Forces and sent to the Netherlands, from that point any material similarity between the two cases disappears:

By Bellotto *Pirna*

a. In 1946, the misidentified By Bellotto *Pirna* arrives in the Netherlands at the SNK.

b. In 1949, the SNK accepts the sole declaration of Moser claiming his "After Bellotto *Pirna*" and proceeds to mistakenly send the By Bellotto *Pirna* to him in the United States. No investigation, proceeding, or examination occurred.

c. No further action taken in the Netherlands, whether by the SNK, the succeeding post-1951 Dutch Council, nor any post-war Dutch agency or ministry.

d. First legal action taken in the US: the 2021 filing of this lawsuit.

Cranachs (from *Von Saher II*)

a. In 1952, the Goudstikker settled claims with the Dutch government regarding a specific list of artworks that intentionally did not include the Cranach paintings, which had been in Goudstikker's possession. *Von Saher II*, 897 F.3d at 1145-46.

b. In the early 1960s, George Stroganoff filed a restitution claim alleging that he was the rightful owner of the two Cranach paintings. After an investigation and formal restitution proceeding, the Dutch government agreed with his claim and, as part of settling the claim, sold him the two paintings in 1966.[3] *Id.* at 1146.

c. In 1998, Goudstikker heir M. von Saher challenged the Dutch government's restitution and sought the two Cranachs. In 1999, the Dutch Court of Appeals denied the claim on the basis that the 1952 settlement was a final resolution. *Id.* at 1151.

d. In 2004, Goudstikker heir M. von Saher again petitioned the Dutch government for return of the two Cranachs. In 2006, the Dutch State Secretary of Education, Culture and Science issued a binding decision denying the claim as to the Cranachs on the basis

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[3] This post-1951 proceeding took place after the Dutch government had taken ownership of all retained works. *Von Saher II*, 897 F.3d at 1149-50. Also, Stroganoff then sold the paintings to the Norton Simon Museum in 1971. *Id.* at 1145-46.

the claim had already been fully settled. *Id.*, at 1153.

e. In 2007, Goudstikker heir M. von Saher files her U.S. federal complaint seeking restitution of the two Cranachs. After discovery on the merits was ordered and completed, her claim is denied on summary judgment in 2018. *Von Saher II*, 897 F.3d at 1148.

The material distinctions between *Von Saher* and this case could not be more apparent. The By Bellotto *Pirna* was the subject of an unchallenged, rubberstamp transfer under a decision about a different painting by the legally-undermined SNK that was, at most, an advisory decision of that extra-governmental foundation that was never subject to an official binding act of the Dutch government.[4]

By comparison, the Cranachs in *Von Saher* were subject to an initial claim settlement by Goudstikker (1952), a formal restitution proceeding and settlement (1966), a petition by Goudstikker/Von Saher denied by the Dutch Court of Appeals because of the settlements (1998), and a second petition by Goudstikker/Von Saher denied by the Dutch State Secretary because of the settlements despite the 2001 Dutch legal changes (2004). *See id.* ("The Dutch State Secretary then issued a binding decision on von Saher's

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[4] *See also Von Saher II*, 897 F.3d at 1143 (holding that the 2006 Restitution Commission recommendation was not an official act because "Advisory recommendations that cannot bind the sovereign are not acts of state."; rather, it was not until the Dutch State Secretary issued her own decision following the recommendation that it became binding and thus an "official act").

restitution claim that accepted in part and rejected in part the Committee's advice." (emphasis in original)). The Ninth Circuit held that the 2004 Dutch State Secretary denial was "a third official act supporting the legality of the Stroganoff transfer" in addition to the 1966 settlement and 1998 Dutch Court of Appeals decision. *Von Saher II*, 897 F.3d at 1152.

But the Fifth Circuit ignored the well-pleaded (and briefed) material distinctions between (a) the few years immediately after WWII in which the SNK transferred the By Belloto *Pirna* and (b) the post-SNK decades of Dutch Ministry-run restitution proceedings and appellate court decisions relevant to the *Cranach* paintings in *Von Saher* detailed above. Said another way: the post-SNK *Von Saher III* analysis is entirely inapposite to the SNK-era at issue in this case, yet the Fifth Circuit (like the District Court) simply applied it whole cloth.

The Fifth Circuit concluded that "Until its dissolution, the SNK handled the restitution process under [Dutch governmental] decrees" with a citation to *Von Saher II*. App.17a-18a. But *Von Saher II* does not reference the SNK at all. *See Von Saher II*, 754 F.3d 712 et seq. Likewise, *Von Saher III* also does not mention the SNK. In sum, *Von Saher*'s analysis of the post-SNK institutions at issue are an improper counter to Petitioners' pleadings on the SNK's illegitimacy at the motion to dismiss stage.

However, the Ninth Circuit's opinion in *Von Saher II* shows what should have happened in this case when applying the act of state doctrine at the motion to dismiss stage. First, *Von Saher II* denied a motion to dismiss on act of state grounds because of the lack of information about the underlying trans-

fers, thus deferring those fact questions and competing views for resolution after discovery. *Von Saher II*, 754 F.3d 712, 726 (9th Cir. 2014). Second, *Von Saher II* denied the motion to dismiss because it acknowledged it had to "accept as true" the non-movant's allegations that *Cranachs* were "wrongfully delivered." *Id.*

The Fifth Circuit erred in utilizing the sum of its misapplication of *Von Saher* and the improper inferences stated above to conclude: "A body set up by the government, operating within it, and exercising governmental powers—even if not funded by it—is best categorized as an official actor." App.22a. However, Petitioners' well-pleaded factual allegations about the SNK's lack of legitimacy suffice to survive Rule 12(b)(6). For example, Petitioners cited a 2001 statement of the Dutch government undermining the SNK's legitimacy. All reasonable inferences in Petitioners' favor regarding this statement require a finding that Petitioners plausibly alleged the illegitimacy of the SNK.[5]

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[5] Additionally, the Fifth Circuit created another new factual premise from whole cloth: that the SNK adjudicated separate competing claims between the a gallery and Moser, ultimately siding with Moser. App.5a ("After adjudicating the conflict in Moser's favor . . . "). But Petitioners did not plead this—rather, Petitioners specifically pleaded that Moser filed the only claim, and it was only for the After Bellotto *Pirna* (no one filed a claim for the By Bellotto *Pirna*). Respondent also did not assert this fact (even though their assertions are not properly considered at this stage). This improper inference from the proper record wrongly supports the Fifth Circuit's conclusion that the SNK was acting with sufficient "trappings of authority" to be an official actor.

The *Von Saher* analysis at most merely validated the post-SNK processes. It is not a reasonable inference in Petitioners' favor to apply post-SNK validity to the SNK given Petitioners' plain allegations to the opposite and the favor/preference given to any inferences derived therefrom. Likewise, the purportedly conflicting/ competing factual statements in a report by a Dutch investigatory committee relied on by both parties must still be resolved in Petitioners' favor. *Lormand v. US Unwired, Inc.,* 565 F.3d 228, 266-67 (5th Cir. 2009) ("[U]nder Rules 8(a)(2) and 12(b)(6), at the pleading stage, the plaintiff is only required to plead a plausible cause of action; we are not authorized or required to determine whether the plaintiff's plausible inference of loss causation is equally or more plausible than other competing inferences[.]").[6]

Ultimately, *Von Saher*'s relevant events were entirely post-SNK and involved an agreed settlement, appellate court rulings, and government ministry restitution commission denials. App.19a. The By Bellotto *Pirna* had no decision made about it while briefly in the hands of the SNK other than being shipped, uncontested, under the mistaken belief that it was a different painting. Petitioners' well-pleaded

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[6] A serious concern with the Fifth Circuit's conclusions is an accidental expansion of the act of state doctrine. For example, the Fifth Circuit's complaint that Petitioners have not shown that the modern Dutch government has "renounced the SNK", *see* App.16a-17a, sets a new and specific hurdle for similarly-situated plaintiffs with art transferred by the SNK at the motion to dismiss stage. The Fifth Circuit cited to no case (and Petitioners could not find any case) showing the renouncement of the alleged official actor in an act of state case is a required element to survive the affirmative defense at this stage.

factual allegations control over the inapposite application of *Von Saher*'s inapposite facts.

C. The Fifth Circuit's Improper Inferences Resulted in Erroneous Conclusions under the Banco Nacional Policy Considerations

The Fifth Circuit relied on improper inferences and non-pleaded factual assertions to reach its conclusion that the *Banco Nacional* policy considerations "tilt in favor of finding an implied negative foreign relations impact." App.9a. Rather, Petitioners' well-pleaded allegations show a clear and positive consensus for allowing this case to be resolved by a U.S. Court, and the Fifth Circuit's finding of "an implied negative foreign relations impact" is both unsupported and improper.

Under *Banco Nacional*, there are two main policy considerations:

> [T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it . . . [and] The less important the implications of an issue are for our foreign relations, the weaker the justification for exclusivity in the political branches.

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964). Additionally, if the government which perpetrated the challenged act of state is no longer in existence, the balance of relevant considerations may also be shifted against applying the act of state doctrine. *Id.*

In this case, the Fifth Circuit has run afoul of this Court's warning in *Kirkpatrick* against "expanding judicial incapacities" through over-application of the act of state doctrine via the policy concerns noted in *Banco Nacional*. 493 U.S. at 409. Especially considering that the analysis must be done in the light most favorable to Petitioners, the Fifth Circuit erred by finding the policy considerations weigh in favor of judicial abstention. The Fifth Circuit leaned heavily on Respondent's objections, in error.

The Fifth Circuit improperly drew inferences in favor of Respondent regarding the modern Dutch government's creation of a new restitution commission in 2001. App.24a-25a. The Fifth Circuit goes on to give credence to the Respondent's factual assertions: "In its [the Museum's] telling, the failure to use that process suggests that government's implicit endorsement of the SNK's restitution decision." App.23a. The use of the phrase "in its telling," "suggests," and "implicit" are indicative of the Fifth Circuit's adoption of unpleaded facts and inferences favoring Respondent. Such assertions may or may not be proven during discovery, but they are entirely irrelevant at this stage in the proceedings.

Furthermore, the Fifth Circuit's conclusion is premised on the assumption that "the Dutch have not sought to disclaim the SNK's actions regarding the By Bellotto *Pirna* nor proceeded through the Netherland's alternative recovery process for wrongly restituted art." App.26a Neither of these "facts" exist in the record on appeal nor were presented to the trial court, nor are they properly inferred under the proper Rule 12(b)(6) standard.

Finally, the Fifth Circuit also ignores the Rule 12(b)(6) standard through its complaint that Petitioners "have still not shown that [the SNK restitution decisions] were invalid at the time they were made." App.25a. Proof is not required at this stage in the proceedings, and any obligation regarding proof in support of the act of state doctrine falls upon Respondent given this is an affirmative defense, and none of the controlling case law requires a demonstration that all of the SNK's decision were "invalid at the time they were made."[7]

III. THE FIFTH CIRCUIT'S DECISION WARRANTS THIS COURT'S REVIEW

The Fifth Circuit's decision creates a conflict within itself, and between other circuit courts. This Court, and other circuits applying this Court's precedent, consistently hold that evaluation of the effect of a foreign sovereign's act can be a separate determination from the validity of the foreign sovereign's act. If only the effect is being evaluated, a claim is not barred by the act of state doctrine. This Court should grant the petition to review the distinction between an effect and invalidity determination to reinforce consistency among the circuits. Additionally,

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[7] The conditional factor (whether the government at issue still being in existence) simply doesn't apply at all. *Banco Nacional*'s plain language means this factor only comes into play if that government doesn't exist anymore. Here, the Dutch government existed when the By Bellotto *Pirna* was mistakenly transferred to Moser and still does today. Thus this factor has no impact at all. The Fifth Circuit's conclusion that this is a negative factor is entirely unsupported; rather, that implied negative weight is improper because it runs counter to the favorable inferences given to Petitioners at this stage in the proceedings.

the Fifth Circuit granted several improper inferences to the 12(b)(6) movant that were not in the light most favorable to Petitioners. Petitioners' claims are plausible on their face. The Fifth Circuit has prevented this case from proceeding to discovery where the issues addressed by the Fifth Circuit can be fully adjudicated on the merits.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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