No. _____

In the Supreme Court of the United States

OLIVER WILLIAMS, *et al.*,
Petitioners,

v.

THE NATIONAL GALLERY OF ART, LONDON, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act ("FSIA") provides the sole basis for the exercise of jurisdiction over foreign sovereigns, and their instrumentalities, in the courts of this country. Pursuant to the FSIA, a foreign state shall be immune from jurisdiction of the United States and the States subject to certain specific exceptions. 28 U.S.C. § 1604. One significant exception provides, in relevant part, that "A Foreign State shall not be immune from the jurisdiction of the United States or the States in any case… in which *rights in property taken in violation of international law* are in issue….28 U.S.C. § 1605(a)(3) ("The Expropriation Exception")".

One question is presented:

Is a sovereign's, or its instrumentality's, refusal to return property wrongfully held a *taking of rights in property in violation of international law* affording subject matter jurisdiction under 28 U.S.C. § 1605(a)(3) in instances where the sovereign was not involved in the initial, physical taking of the property but is in alleged wrongful possession of the property and refuses -after demand- to return the property?

LIST OF PARTIES

The Parties to this Petition are:

Petitioners: The Petitioners are all individuals namely, Oliver Williams, Margarete Green and Iris Filmer.

Respondents: The National Gallery, London, The American Friends of the National Gallery, London, Inc. and The United Kingdom.

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STATEMENT OF JURISDICTION

The Second Circuit affirmed the District Court's dismissal on September 10, 2018. Petitioners sought *en banc* review of the Second Circuit decision. The Second Circuit denied rehearing *en banc* on October 29, 2018 (Pet. App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1604, *et seq*. and, in particular, the exception at issue in this case set forth in 28 U.S.C. § 1605(a)(3) ("The Expropriation Exception) which states: "A Foreign State shall not be immune from the jurisdiction of the United States or the States in any case… in which *rights in property taken in violation of international law* are in issue and that property… is owned or operated by an instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States".

STATEMENT OF THE CASE

Petitioners (the "Moll Heirs") seek to recover a painting by Henri Matisse entitled *Portrait of Greta Moll*, oil on canvas (1908) (the "Painting") from Defendant, The National Gallery, London, a museum and public instrumentality of the British government wholly owned by Defendant, The United Kingdom. Petitioners are the heirs of Margarete Moll ("Greta Moll"), who was the subject and owner of the Painting. The Painting was lost in the aftermath of World War II. Petitioners alleged claims under New York law for declaratory judgment, replevin, conversion, restitution based upon unjust enrichment, and constructive trust. The Painting is currently in the possession of The National Gallery in London, England.

Oskar Moll, the husband of Greta Moll, commissioned Henri Matisse to paint a portrait of Greta Moll and purchased the Painting from Matisse in 1908. As noted in an advertisement of The National Gallery, Greta and Oskar Moll had the "rare" opportunity to request the commission of a painting from Matisse.

After the Nazis came to power in 1933, Oskar Moll was dismissed from his position as a professor at the prestigious Dusseldorf Academy of Art due to Nazi persecution. The Nazis considered the art that he and his wife created to be "degenerate" and "bolshevist." Such artists were considered "un-German" by the Nazis. As a result, Greta and Oskar Moll were not allowed to work or display their art, faced near starvation, and lost their home and virtually all of their belongings during the war. The Painting was one of the

few possessions of Greta and Oskar Moll that survived the war and still remained in their possession.

At the end of WWII, Oskar and Greta Moll lived in Berlin under Allied occupation. However, Nazi Germany's defeat did not end the suffering. In the aftermath of the war, the Soviet Union ushered in a new era of destruction, looting and brutality in Germany. Germany was divided into four zones of allied military occupation. Berlin, as the nation's capital, was of particular significance and was also divided into four sectors among the Allied forces. The Soviet Union had an advantage in Berlin because it had exclusive control of the city before the end of the war and prior to the agreement for the joint occupation of Berlin. "The Soviets stripped the city, dismantling and removing over 380 factories from Berlin…they arrested and deported Berliners and refugees" and engaged in "pillaging, rape and often random murder." Grathwol, *Berlin and the American Military: A Cold War Chronicle*, p. 24 "While some indiscipline and vengeance plagued all the occupying forces, the Red Army's conduct in Berlin was particularly harsh." *Id*.

The Soviet forces also engaged in systematic pillaging and looting on a monumental scale and set up special forces to confiscate valuable property in Germany with the sole goal of "taking as many valuables from Germany" as possible. (ILSA Journal of Int'l & Comparative Law, Vol 4:141, p. 142.) It is estimated that at least 2.5 million works of art and 10 million books and manuscripts were looted in the aftermath of World War II and transported to Russia. *The Spoils of War Time,* Robert Hughes (April 3, 1995).

A political and ideological fight between the Soviets and Western allies resulted in hardships for the people in Berlin and fear that the city would be surrendered by the three Western allied forces to the Soviets. Although Berlin was divided among the four allies, the city itself was surrounded by the Soviet zone. Berlin was 100 miles deep in the Soviet zone and all road and rail connections had to pass through Soviet-controlled territory.

Fearing for their lives and the loss of what little belongings remained in their possession, Oskar and Greta Moll sought to flee Berlin to their daughter's home in Wales. In 1947, just before finally receiving permission to leave Germany, Oskar Moll passed away, in large part due to the deprivations he had suffered during and after the war, including near starvation. The Painting—the Moll family's only remaining artwork and asset of substantial value— passed to his wife, Greta Moll.

Under duress, Greta Moll was forced to part with the Painting for safekeeping to avoid its loss or destruction if it remained with her. Greta Moll was informed of a gallery in Switzerland that would safekeep the Painting. She entrusted the Painting to Gertrud Djamarani to take it to Switzerland. Without authorization from Greta Moll, Djamarani, taking advantage of Greta Moll's dire situation, wrongfully sold the Painting to the gallery in Switzerland. Djamarani stole the Painting and could not pass good title to the gallery or any subsequent purchaser. Moreover, *Allied Military Government Law 52*, which was in effect at the time, prohibited and rendered null and void the transfer or sale of cultural property from

"the occupied territory" without a duly issued license or authorization from the Military Government.

Later, in 1949, the Painting was illegally acquired and imported into the United States by the Knoedler & Co. art gallery and Fine Arts Assoc. (collectively "Knoedler") in New York City. Since then, it has been revealed that Knoedler was involved in several WWII art-related disputes and eventually closed as a result of scandal and lawsuits involving fraud.

From Knoedler, the Painting was sold to Lee Blaffer, an oil baron in Texas. Blaffer conveyed the stolen Painting to a private collector in Switzerland. The Painting was subsequently conveyed to the Alex Reid & Lefevre Ltd. Gallery (the "Lefevre Gallery") in London, which sold it to The National Gallery in 1979, two years after Greta Moll died. A provenance list provided by the Lefevre Gallery to The National Gallery stated that Oskar and Greta Moll were the owners of the Painting from 1908 to 1945, the year the war ended. The provenance list does not provide information on the whereabouts of the Painting between 1945 and Knoedler's acquisition in 1947.

Petitioners are, and have been, prevented from claiming the return of the Painting in a British court because under English law the statute of limitations expired six years from the theft of the Painting in or around 1947, and deaccession of the artwork was barred by The National Gallery and Tate Gallery Act of 1954 and later by the Museums and Galleries Act 1992.

In late 2009, the United Kingdom enacted the *Holocaust (Stolen Art) Restitution Act* which, for the first time, opened the possibility for museums to return WW II era stolen art to their former owners provided there was a recommendation to do so by *the Spoliation Advisory Panel* ("SAP"). After the SAP rendered its first recommendation based on this new legislation in September 2010, the Moll Heirs contacted The National Gallery in February 2011. After first engaging in lengthy discussions with The National Gallery, the Moll Heirs commenced a proceeding with the SAP on March 14, 2014. The SAP dismissed the Moll Heirs' claim one year and eleven days later, on March 25, 2015, for lack of jurisdiction.

Immediately following the SAP's decision that it lacked jurisdiction to hear this matter, the Moll Heirs, for the first time, sent a demand for the return of the Painting to The National Gallery dated April 27, 2015. By letter to the Moll Heir's counsel in New York dated September 21, 2015, The National Gallery refused Greta Moll's heirs demand to return their property.

The Painting remains in the possession of The National Gallery. This "rare" piece is used to promote The National Gallery. The National Gallery has profited from the sale of prints, posters, books and numerous other goods bearing the portrait of Greta Moll in New York and through licensing rights. Thus, while The National Gallery stated in its brief that the Painting is available to the public "free of charge" it is clear the Painting provides a substantial monetary and promotional benefit to the Defendants.

I. REASONS FOR GRANTING THE PETITION

In this case, the Second Circuit issued a decision directly contrary to the law of at least two other Circuits and one District Court when it ruled that subject matter jurisdiction did not exist over The National Gallery, London under the Expropriation Exception because a sovereign's refusal to return property wrongfully held is a not a "taking" of rights in property in violation of international law when the sovereign was not involved in the initial, physical seizure of the property.

Petitioners had alleged, *inter alia,* subject matter jurisdiction over The National Gallery, London, ("The National Gallery") an instrumentality of The United Kingdom, under, *inter alia*, 28 U.S.C. § 1605(a)(3) based upon, *inter alia*, a conversion claim under New York law, namely The National Gallery's refusal -after demand- to return a valuable Henri Matisse painting that had been stolen in wartime conditions and which is owned by Petitioners by inheritance.

The Second Circuit's ruling is not only contrary to existing law in other Circuits but also runs contrary to U.S. policy during and subsequent to World War II and current international law relating to a sovereign's obligation to return cultural property, including art, relics and antiquities to their rightful owners, particularly where such property was stolen or otherwise misappropriated in wartime or similar conditions. The Second Circuit's decision is also contrary to U.S. policy which does not extend immunity to sovereigns for their private commercial acts and contrary to scholarly authority recognizing that a taking of property in violation of international law is a

broad concept, including a sovereign's refusal to return property wrongfully held.

This Petition should be granted because the Second Circuit holding:

(i) conflicts with the authoritative decisions of other United States Courts of Appeals, namely the Court of Appeals for the D.C. Circuit in *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2010) and the Court of Appeals for the Ninth Circuit in *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1040 (9th Cir. 2010). *Cassirer* acknowledged *a taking in violation of international law* under the Expropriation Exception where the sovereign was not involved in the initial seizure of the wrongfully withheld property. The decision also conflicts with the D.C. District Court's decision in *Malewicz v. City of Amsterdam*, 362 F. Supp. 298 (D.D.C. 2005);

(ii) presents an exceptionally important issue relating to jurisdiction over a foreign sovereign, and its instrumentalities, in the context of stolen or misappropriated property in the possession of state-owned institutions, such as museums. The Second Circuit decision conflicts with U.S. policy with respect to art, antiquities, relics and cultural property stolen or otherwise misappropriated in wartime conditions or through acts of terrorism, including, but not limited to, the conditions and policies existing in this case when this Painting was lost in the immediate

aftermath of World War II as well as conditions currently existing from recent wartime and terrorism conditions in which cultural property has been stolen and sold to private dealers and which is subsequently transferred to state owned museums. As more fully discussed below, the recent conflicts in Iraq and Syria are examples of the looting of cultural property which raise important issues as to the effective enforcement of international law and the ability of the Expropriation Exception to afford assistance in the enforcement of international law with respect to stolen property; and

(iii) is contrary to current scholarly authority which urges that a taking in violation of international law is not limited to instances in which a sovereign engages in a physical seizure of property but necessarily extends to significant forms of interference with property, including ownership rights in property, such as a sovereign's or its instrumentalities' refusal to return property wrongfully held after demand.

Moreover, the Second Circuit's decision is contrary to the general policy of the United States which exercises jurisdiction over sovereigns for a sovereign's private commercial acts as opposed to affording immunity to sovereigns or their instrumentalities for official acts of a sovereign nature. In this case, The National Gallery is clearly involved in a commercial enterprise in New York which supports the operation

of its museum in London and this is the kind of activity in which private commercial enterprises engage. Finally, any concern that the exercise of jurisdiction in the present case would lead to an unreasonable proliferation of litigation against sovereigns is not warranted.

As shown below, review of this matter is warranted in order to avoid a conflict with the Circuit decisions in *Chabad* and *Cassirer* and to foster U.S. policy with respect to stolen property as well as U.S. adherence to the principles of international law which prohibit the taking of rights in property in violation of international law.

A. The Second Circuit Decision Conflicts with the D.C. Court of Appeals Authoritative Decision in *Chabad* and a Decision of the D.C. District Court in *Malewicz.*

The Second Circuit affirmed the District Court's dismissal of Petitioner's amended complaint finding that the initial taking of the Painting was by a private individual and that The National Gallery's subsequent refusal -after demand- to return the Painting was not a "taking" within the meaning of the Expropriation Exception (Pet. App. A, p. 6).

The Court of Appeals for the D.C. Circuit, has acknowledged the proposition that under the Expropriation Exception a "taking" is not fixed to the date the property at issue first gets into the possession or control of the State.

In *Chabad* the Court of Appeals analyzed "three distinct takings" of a library in the possession of the Russian federation over the course of the 20th century,

two of which occurred **after the property had already been in the possession of the State** for approximately 70 years. *Agudas Chasidei Chabad of United States v. Russian Fed'n*, 729 F. Supp. 2d 141, 146 (D.C. 2010). The defendants in *Chabad* argued that the taking in the early 1920s by the Soviets constituted the taking and thus was not in violation of international law because it involved property taken from the citizens of the sovereign state. (*Agudas Chasidei Chabad v. Russian Fed'n*, 466 F. Supp. 2d 6, 17 (D.D.C. 2006)). The Court of Appeals, however, found that there were two more subsequent takings that occurred in 1991-1992, namely, "the unfulfilled promises by the newly constituted Soviet government to return the Library to plaintiff could properly constitute a [second] separate taking" and the governments' refusal to return property and "frustration of a decree's enforcement" to be another [third] separate taking. (*Chabad*, 729 F. Supp. 2d at 146, citing *Chabad,* 528 F.3d 934, 945-946 (D.C. Cir. 2008).) While the facts of *Chabad* are clearly distinguishable to the case at hand, *Chabad* nevertheless shows that the term "taking" should not be construed in such an overly restrictive manner as proposed by the District Court and affirmed by the Second Circuit in this action. The District Court's and the Second Circuit's interpretation of "to take," is directly contrary to *Chabad* because if the Expropriation Exception requires a sovereign physical seizure there could be no separate and distinct "taking" of the property in *Chabad* in 1991-1992 because the library was already in the possession and control of the defendant when the subsequent wrongful acts occurred.

Furthermore, the District Court for the District of Columbia found that the Expropriation Exception applied under circumstances very similar to the present case, including the refusal of the sovereign to return a painting. *Malewicz v. City of Amsterdam*, 362 F. Supp. 298 (D.D.C. 2005).

Malewicz involved the works of Russian artist Kazimir Malewicz. In 1927, Malewicz brought his works to Berlin for exhibit. He unexpectedly had to return to Russia and could not take the works back with him to Stalinist Russia. As such, Malewicz entrusted his works for safekeeping with several friends. The *Malewicz* case focuses on the works entrusted by Malewicz to his friend Hugo Haring. The plaintiffs in *Malewicz* alleged that from 1951-1956, the Stedelijk Museum sought to obtain the Malewicz works on loan for exhibition from Mr. Haring. (Malewicz First Amended Complaint ¶15). The plaintiffs in *Malewicz* alleged that Mr. Haring clearly conveyed that he was merely custodian of the works. *Id*. The plaintiffs further alleged that due to illness and pressure from his family, Mr. Haring finally agreed to loan the works to the Stedelijk Museum in February of 1956. The plaintiffs in *Malewicz* alleged that the Stedelijk Museum only sought a loan and there was no request to purchase the works at this time. *Id*. It was not until several months later when Mr. Haring's "trusted secretary" contacted the Stedelijk Museum reiterating the terms of the loan and, surprisingly, providing an option for the museum to purchase the works. The first amended complaint in *Malewicz* confirmed that the museum "readily accepted the loan" but had concerns regarding the newly proposed option that it could purchase the works. *Id*. at ¶ 20. In *Malewicz*, once the

works were offered for sale by the private individual, the lawful possession by the individual became a conversion because of the wrongful exercise of ownership over the Malewicz works. "The attempt to sell turns lawful possession of property into conversion because the defendant exercised dominion and control over the property to the exclusion of the rightful owner." *Popper v. Podhragy*, 48 F. Supp. 2d 268, 273 (SDNY 1998). Thus, the District Court, in distinguishing *Malewicz* from the facts of this case, wrongly found that the illegal conversion in the first instance was by a sovereign. To be sure, the plaintiffs in *Malewicz* allege that it was **not until two years after** the offer to sell the works, in 1958, that the Stedelijk Museum, in exercising the right to buy the works, "*joined in*" on the fabrication by the German lawyer. (Malewicz First Amended Complaint, ¶35).

The Plaintiffs in *Malewicz* allege that it was not until 2001 that their claim of replevin accrued (five years after the plaintiffs demanded the return of the works) at which time the Stedelijk finally provided sufficient and unequivocal notice to the plaintiffs that it refused to return the works and "that the City was claiming ownership of the paintings." *Malewicz,* 362 F. Supp. 2d at 336.

In both *Malewicz* and this action, private individuals were initially lawful custodians of the property at issue, namely a painting, and the property was **subsequently converted by private individuals before any taking was committed by the State**. In both cases, the rightful owners were already dispossessed of their property when the State took an affirmative act which deprived the plaintiffs of

their rights in the property at issue. At the time that The National Gallery refused the Moll Heir's demand to return the Painting, The National Gallery also "joined in" on the fabrication by refusing to return the stolen work or justly compensate the Moll Heirs, benefiting from the theft of the Painting, which would never have left the possession of Greta Moll but for the deprivations and fear experienced by the Moll family as a result of the atrocities and upheaval during and after the war.

The *Malewicz* case fully supports Petitioners' position that the Expropriation Exception applies to a sovereign's refusal to return a painting even when there is a prior conversion by a private individual. The facts in *Malewicz*, like those of this action, involve the initial illegal conversion of the property in the first instance by a private individual and a subsequent taking by a sovereign entity.

B. The Second Circuit Holding Conflicts with the Ninth Circuit's Authoritative Decision in *Cassirer*.

The Ninth Circuit in *Cassirer* exercised jurisdiction over a sovereign under the Expropriation Exception even where the sovereign had not been involved in the initial taking of property rights at issue. Thus, in *Cassirer* the court exercised jurisdiction over the Spanish government where the Nazis initially seized the property at issue. *Cassirer, supra*. This supports a conclusion that jurisdiction should be exercised over a sovereign's refusal to return property wrongfully in its possession.

C. The Question Presented Involves An Exceptionally Important U.S. Policy Instituted During and Maintained Subsequent to World War II Relating to Stolen Property and Jurisdiction Over Foreign Sovereigns and their Instrumentalities in Wrongful Possession of Stolen Property in Violation of International Law

The Second Circuit decision addressed an exceptionally important issue relating to U.S. policy instituted during and maintained subsequent to World War II in the context of artworks, antiquities, relics and cultural property which are stolen or otherwise misappropriated in wartime conditions.

During and subsequent to World War II, and at the time of the illegal transfer of the Painting to Knoedler in New York City in 1947, the United States Department of State and the Roberts Commission issued warnings to museums, collectors, dealers and the art community not to acquire works of art that were looted, stolen or improperly dispersed from public and private collections in war areas and brought to the United States during and following World War II. These communiques explicitly stated that "no clear title [could] be passed." In addition to the general warnings given by the U.S. government, the importation of stolen art into the United States was, and still is, a crime under the *National Stolen Property Act of 1934*. The acquisition of such stolen property is also contrary to established international legal norms as evidenced by *The Hague Convention for the Protection of Cultural Property in the Event of Armed*

Conflict of 1954 (the "Hague Convention") as well as the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (the "UNESCO Convention"), which imposes legal and moral obligations to ensure that stolen cultural property is returned to their rightful owners and "cultural institutions, museums, libraries and archives…..are built up in accordance with universally recognized moral principles."

The Second Circuit's refusal to exercise jurisdiction over The National Gallery as an instrumentality of The United Kingdom for refusal to return stolen property clearly conflicts with the U.S. policy instituted during and maintained subsequent to World War II as well as well recognized international law requiring stolen property to be returned to its rightful owner.

The exceptional importance of the issue of jurisdiction over a foreign sovereign which refuses to return stolen property after a demand is magnified by current reports of the looting of cultural property as a result of wars and terrorism such as the recent lootings of cultural property in Iraq and Syria. The recent conflicts in Iraq and Syria are significant examples of the looting of cultural property, relics and antiquities of great and immeasurable historical value. These lootings are well documented in current periodicals and scholarly research. *See* D. Bowker, et al *Confronting ISIS' War on Cultural Property* Vol. 20, Issue 12 (Pet. App. D, pp. 50-51). In fact, it is documented that stolen cultural property, art, relics and antiquities from the Iraqi conflict are often taken by private looters raising the prospect that such stolen property could end up in

the hands of state owned museums. *See* Palko Karasz, N.Y. Times, *British Museum To Return Looted Antiquities to Iraq,* August 10, 2018 (https://nytimes.com/2018/08/10/arts/iraq-looted-objects-british-museum.html).

There is a consensus among civilized nations that these lootings and thefts are violations of international law and such cultural property should be returned to its rightful owners. *See* D. Bowker, et al *Confronting ISIS' War on Cultural Property* Vol. 20, Issue 12 (Pet. App. D, pp. 49-52). Despite this consensus, authorities have also noted that there are significant procedural and substantive obstacles to enforcement of international law for these thefts through existing treaties and international conventions. *Id.* at pp. 50-57. The Expropriation Exception would be an important vehicle for the enforcement of international law. Given the hurdles of various conventions and treaties in securing the return of stolen cultural property, the interpretation of the Expropriation Exception presents an exceptionally important issue. It would be particularly appropriate for United States courts to exercise jurisdiction over claims for the return of such stolen property -after a demand and refusal- even if neither the sovereign or its instrumentality being sued were involved in the initial, physical seizure of the wrongfully held property. This is particularly the case where the law of foreign jurisdictions does not afford reasonable avenues for recovery of stolen property such as unreasonably short or expired statutes of limitations, as in the present case, laws prohibiting deaccession or other barriers to causes of action analogous to New York's demand and refusal law with respect to conversion.

D. Recent Scholarly Treatment Indicates That A "Taking of Property In Violation of International Law" Includes Any Interference with Property and Ownership Rights, Including Refusals to Return Stolen Property.

Recent scholarly treatment of this issue indicates that a violation of international law occurs even if there is no physical seizure by a sovereign and a refusal to return property wrongfully held should be considered a taking in violation of international law.

Prof. G. C. Christie, in "What Constitutes a Taking in Violation of International Law" citing a Harvard conference on this issue, states:

> A 'taking of property" includes not only an outright taking of property, but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an interference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference.

Francisco Franconi, in "Enforcing International Cultural Heritage Law", states:

> For U.S. courts, an expropriation contrary to international law is a broad concept, which covers any state deprivation of property rights, either directly or indirectly and carried out either for a non-public purpose or for a public purpose, but without payment of prompt, fair and adequate compensation.

Petitioners' claim of, *inter alia,* conversion under New York law is a taking of rights in property in violation of international law which falls squarely under both of these definitions. Moreover, there is no language in the Expropriation Exception that states a taking is fixed to the date of the physical acquisition of the property or that the property must even be tangible, further emphasizing that the term "taken" should not be construed in such a limited manner. The FSIA requires that rights in property be taken, without specifying or limiting the manner in which the owner is deprived of the rights in their property.

II. THE EXERCISE OF JURISDICTION WOULD NOT LEAD TO AN UNREASONABLE PROLIFERATION OF LITIGATION

Moreover, the District Court's concern that the exercise of jurisdiction would lead to an unreasonable proliferation of litigation conflicts with the Ninth Circuit's *Cassirer* reasoning and decision (Pet. App. B, pp.17-18). *Cassirer* rejected the notion that exercising jurisdiction would open the litigation floodgates because restraints are in place to deflect that risk, including defenses of statute of limitations and laches and by the statute itself which requires that the instrumentality be engaged in commercial activity in the U.S.

The District Court cited the defendants' argument in *Cassirer v. Kingdom of Spain,* 616 F.3d 1019 (9th Cir. 2010) for the proposition that unintended and bizarre consequences will occur if § 1605(a)(3) is interpreted to grant jurisdiction against foreign entities without regard to who did the expropriation or when it occurred. As an initial matter, this was not the holding

of the court in *Cassirer,* but was the argument presented by the defendants in *Cassirer* which was rejected by the court. (*Id. at* 1031.) *Cassirer* concerned an expropriation by the German government of an artwork that many years later was allegedly purchased in good faith by the Kingdom of Spain. (*Id. at* 1023.) The defendants in *Cassirer* argued that to disregard who did the expropriating or whether defendant was a good-faith purchaser would result in bizarre consequences. (*Id*. at 1031.) In rejecting this argument, the Ninth Circuit held that "we cannot say whether floodgates might open…" but "restraints are in place to deflect that risk." *Id*. The Ninth Circuit held that "the FSIA is purely jurisdictional; it doesn't speak to the merits or to possible defenses that may be raised to cut off stale claims or curtail liability." *Id*. The Ninth Circuit noted that the FSIA states that the property at issue must have been "taken in violation of international law" and it does not state "taken in violation of international law by the foreign state being sued" as proposed by the defendant. (*Id.* at 1032.) The Ninth Circuit found that to accept defendants' interpretation would require the text of the FSIA to be redrafted. *Id*.

III. THE SECOND CIRCUIT'S REFUSAL TO EXERCISE JURISDICTION UNDER THE EXPROPRIATION EXCEPTION IS CONTRARY TO LONGSTANDING U.S. POLICY WHICH DOES NOT EXTEND IMMUNITY TO PRIVATE COMMERCIAL ACTS OF SOVEREIGNS OR THEIR INSTRUMENTALITIES

The Second Circuit decision reflects an overly restrictive view of the FSIA and is contrary to longstanding U.S. policy which does not extend immunity to the private, commercial acts of sovereigns or their instrumentalities. The FSIA was not enacted out of concern that subjecting a foreign state to jurisdiction in the U.S. would harm foreign relations. To the contrary, the FSIA was enacted to avoid political considerations and diplomatic pressures from unfairly shielding States under the defense of immunity, leaving parties with no means of legal recourse. H. R. Rep. No. 94-1487 (p.6-7)(1976). That is because "until 1952, the State Department ordinarily requested immunity in all actions against friendly foreign sovereigns." (*Verlinden B.V. v. Cent. Bank of Nig.,* 461 U.S. 480, 486 (1983).) The U.S., falling in line with the international community, disposed of absolute immunity and adopted the restrictive theory. (*Id*. at 487.) However, the courts still routinely deferred to the political branches as to whether immunity should be granted. *Id*. at 497. As a result, political considerations and diplomatic pressure often—**wrongly**—influenced the court's decisions as to whether immunity applied. *Id*. "On occasion, political considerations led to suggestions of immunity in cases where immunity would ***not*** have been available under the restrictive theory." *Id*. (emphasis added). Indeed,

the House Report refers to the growing number of disputes between private individuals and foreign states and emphasizes the FSIA would avoid diplomatic influences that previously bore upon the State Department's determination. *Id*. (citing H. R. Rep. No. 94-1487 (p. 6-7) (1976):

> A "**principal purpose**" of the FSIA is to "transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and **assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process**.

Id. (citing H.R. Rep. No. 94-1487, p. 7 (1976) (emphasis added)

The rational of the FSIA is not to protect the foreign sovereign from being liable for the tortious conversion of property, but to preserve immunity with respect to only sovereign behavior. As the District Court noted, the FSIA "provided that foreign sovereigns would be immune with respect to public acts of state but not with respect to acts that were commercial in nature or those which private persons normally perform." (Pet. App.) (citing *Altmann v. Republic of Austria,* 317 F.3d 954, 967 (9th Cir. 2002)). The District Court emphasized that the Expropriation Exception to the FSIA is based upon the general presumption that states abide by international law and, hence, violations of international law are not sovereign acts." *Id*. There is nothing sovereign about a museum's acquisition of a rare painting that was stolen from the owner who was

under duress or a museum's subsequent refusal to return the stolen Painting upon the demand by the rightful owners. If the point of departure of foreign immunity is that a sovereign is only immune for sovereign behavior, then any unlawful expropriation without just compensation by the foreign sovereign should fall under this exception.

Finally, the exercise of jurisdiction in this case would not offend traditional notions of fair play. The Plaintiffs alleged and the District Court recognized that The National Gallery has significant commercial contacts with New York and the United States (Pet. App. B, p. 25). The District Court recognized that these connections include transacting business through Defendant The American Friends of The National Gallery, London, Inc., which is located in New York City and which raises significant revenues for The National Gallery by raising millions of dollars in tax free charitable donations for The National Gallery from U.S. taxpayers. The National Gallery also raises revenue in New York and the United States through the sale and licensing of prints, books and posters consisting of and including images of the Painting. The National Gallery has also loaned the Painting to a museum in New York for exhibition. In brief, The National Gallery is doing substantial business in New York, and in the United States, and should not be surprised by the exercise of jurisdiction in this case.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court review this matter.

Respectfully submitted,

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