No. 20-1566

In the
Supreme Court of the United States

DAVID CASSIRER, ET AL.,
Petitioners,
v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION, an agency or instrumentality of the Kingdom of Spain,
Respondent.

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

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Respondent Thyssen-Bornemisza Collection Foundation was the defendant and appellee below. The Foundation is an agency or instrumentality of the Kingdom of Spain, a foreign sovereign. It is a not-for-profit entity established for educational and cultural purposes; it is a separate legal entity, created under the laws of the Kingdom of Spain. The Foundation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Petitioners David Cassirer, the Estate of Ava Cassirer, and the United Jewish Federation of San Diego County ("petitioners") were plaintiffs and appellants below. The United Jewish Federation of San Diego County has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

The sole issue raised in the petition is whether this Court's intervention is necessary to resolve a shallow and ineffectual circuit split. In this case, the Ninth Circuit followed its long-held practice of applying the federal common law's choice-of-law test, as set forth in the Restatement (Second) Conflict of Laws (1971) (the "Restatement"), in cases in which an exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1330 *et seq*. (the "FSIA"), permits a U.S. court to exercise jurisdiction. This path differs from the approach of four other circuits which apply the forum's choice-of-law test. As a result, there is a split among circuits regarding the proper choice-of-law test to employ in these narrow circumstances.

Notwithstanding the split, this Court's intervention is unwarranted because the split is shallow. Only five courts of appeals have taken a position. Thus, even if the split had some potential prospective significance—which it does not—the issue would benefit from further percolation in the lower courts.

Moreover, as courts in the Seventh Circuit recognize, the split itself is without impact. Most states have adopted the Restatement or a comparable modern test, which means that whether a court applies the federal common law's *or* the forum's choice-of-law test, the outcome is almost certain to be the same. And in the few cases in which courts engaged in a meaningful choice-of-law analysis—including the cases on which petitioners rely—those courts recognized that the same law would apply under either the federal common law's *or* the forum's choice-of-law test. Indeed,

that is that is what the district court concluded in this case.

Further, because one of the FSIA's primary goals is to ensure the uniform application of U.S. laws where a foreign sovereign has been stripped of its immunity, the Ninth Circuit's longer-held approach is correct.

Setting aside the split's negligible impact and the fact that fewer than half of the courts of appeals have examined the question, review is not warranted in *this case*. As the district court recognized after a thorough analysis, *both* tests mandate the application of Spanish law. Thus, even if this Court granted the petition and reversed the Ninth Circuit's holding with direction to review the district court's California choice-of-law determination, the result—that Spanish law must apply—would be the same.

STATEMENT OF THE CASE

1. Lilly Cassirer Neubauer, grandmother of the original plaintiff, Claude Cassirer, inherited *Rue Saint-Honoré, après-midi, effet de pluie*, oil on canvas, 81 x 65 cm (1897) by Camille Pissarro (the "Painting"), in 1926.[1] As a Jew, Ms. Neubauer was subjected to increasing persecution in Germany after the Nazis seized power. In 1939, in order for Ms. Neubauer and her second husband to obtain exit visas to flee Germany, Ms. Neubauer was forced to transfer the Painting to a Nazi art appraiser. In 1943, the Painting was sold at auction to an unknown buyer. After the

[1] Except where noted, the historical background facts in this section are taken directly from the petition's appendices B at 3-8 and D at 2-4.

war, Ms. Neubauer and another claimant sought restitution of the Painting, or if it could not be found, compensation. In 1958, after ten years of litigation, Ms. Neubauer settled her claim for monetary compensation with the German government in exchange for the Painting's agreed-upon 1956 value.

Unbeknownst to Ms. Neubauer or Germany, the Painting arrived in the United States in 1951 and subsequently was owned by a number of American collectors, most of whom were Jewish. In 1976, the Painting was purchased for its fair market value by art collector Baron Hans Heinrich Thyssen-Bornemisza of Lugano, Switzerland, from the Stephen Hahn Gallery in New York, a prominent gallery specializing in Impressionist and Modern art. There was no claim that the Painting—or the other three artworks acquired by the Baron at the same time—had been looted by the Nazis. Except when it was publically exhibited elsewhere, the Painting was maintained as part of the Thyssen-Bornemisza Collection at the Villa Favorita in Switzerland until 1992.[2]

In 1988, the Baron agreed to loan a large portion of the Collection to Spain. On October 10, 1992, the Thyssen-Bornemisza Museum opened to the public with the Painting on display. The following year, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the Spanish government to enter into a contract that would allow the Thyssen-Bornemisza Collection Foundation (the "Foundation") to purchase

[2] The Painting was identified in numerous publications and was exhibited frequently all around the world while part of the Baron's collection.

775 of the loaned artworks, including the Painting, for $338 million.[3] Spain funded the entire purchase.

2. Between 1958 and 1999, neither Ms. Neubauer nor Mr. Cassirer made any attempt to locate the Painting. Pet. App. D at 3. In 2001, after learning that the Painting was on public display at the Thyssen-Bornemisza Museum, Mr. Cassirer demanded that the Foundation give him the Painting. *Ibid.* In 2005, Mr. Cassirer filed suit against the Foundation and Spain in the United States in the U.S. District Court of the Central District of California.[4] *Id.* at 3-4. Years later, following two appeals and Spain's dismissal, the parties cross-moved for summary judgment regarding the proper choice of law and its application.

The FSIA does not contain an express choice of law provision, leaving the courts to determine which choice-of-law test to apply where jurisdiction is premised on the FSIA. Like all federal courts of appeals, the Ninth Circuit recognizes the general rule that "[i]n a diversity case, a federal court must apply the choice of law rules of the state in which the action was filed." *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 645 (9th Cir. 1988) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941)). But where an exception to the FSIA applies to strip a sovereign entity of its immunity, the Ninth Circuit holds that it is a *federal question*—not diversity—that serves as the basis for

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[3] The district court found this price to be reasonable.

[4] From 1980 to the time of his death in 2010, Mr. Cassirer was a resident of California. Pet. App. D at 4.

jurisdiction. *See Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991). Accordingly, the Ninth Circuit applies the federal common law's choice-of-law test, which follows the Restatement. *Ibid.* (holding that when jurisdiction is based on the FSIA, "federal common law applies to the choice of law rule determination. Federal common law follows the approach of the Restatement[.]"); *see also Chuidian v. Philippine Nat'l Bank*, 976 F.2d 561, 564 (9th Cir. 1992); *Liu v. Republic of China*, 892 F.2d 1419, 1425-1426 (9th Cir. 1989); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003-1004 (9th Cir. 1987).

Despite the Ninth Circuit's long-standing adherence to the federal common law's test, in an abundance of causation, the Foundation asserted that both the Restatement's *and* California's choice-of-law tests warranted the application of Spanish law. Under Spanish law, the Foundation asserted, it owned the Painting under several theories, including acquisitive prescription (analogous to adverse possession), by which the Foundation became the Painting's owner no later than 1999, six years after the Foundation's purchase. District Court Docket ("Dkt.") 240-1; Dkt. 271. Petitioners, in turn, argued that both tests warranted the application of California law, Dkt. 251, and that Spanish laws of acquisitive prescription did not apply because the Foundation was an accessory to the Holocaust, Dkt. 273 at 15; Dkt. 279, Exh. 55 ¶31(a).

Acknowledging that a footnote in *Sachs v. Republic of Austria*, 737 F.3d 584, 600 n.14 (9th Cir. 2013), *rev'd sub nom. OBB Personenverkehr AG v. Sachs*, 577 U.S. 27 (2015), appeared to approve of the use of the forum's

choice-of-law test, the district court conducted two separate choice-of-law analyses: one applying the Restatement and one applying California's test. Pet. App. D at 5. The district court found that *both* tests warranted the application of Spanish law, *id.* at 5-11, and rejected the assertion that the Foundation was an accessory to the Holocaust, *id.* at 15-17.

On appeal, the Ninth Circuit clarified that the *Sachs* footnote did not alter that court's reliance on the Restatement alone to determine the appropriate choice of law where jurisdiction is predicated on the FSIA. Pet. App. C at 19-20. Applying the Restatement, the Ninth Circuit held that Spanish law must be applied. *Id.* at 20-26. Analyzing an argument raised for the first time on appeal, the Ninth Circuit theorized that the Foundation could be deemed an accessory after the fact under an outdated Spanish code provision if the Foundation had *knowingly* received stolen property when it purchased the Painting in 1993. *Id.* at 26-50.

On remand, the district court conducted a bench trial, analyzing a significant amount of testimony and historical documents. In a thirty-four-page decision the district court rejected the claim that the Foundation was an accessory under the old Spanish code, finding no evidence that the Foundation had actual knowledge—or was willfully blind—that the Painting was taken from Ms. Neubauer decades earlier. Pet. App. B at 26-30. It therefore entered judgment for the Foundation. The Ninth Circuit affirmed. Pet. App. A.

REASONS FOR DENYING THE PETITION

Petitioners contend that this Court must grant review of the petition because it presents "an appropriate opportunity" to resolve a "conflict over an important issue of federal statutory interpretation." Pet. at 4. More specifically, petitioners contend that review of the Ninth Circuit's use of federal common law to determine the appropriate choice of law is necessary because "the choice of law issue is critical *in this case*[.]" Pet. at i. The Foundation does not dispute the existence of a split, but as explained below, petitioners dramatically overstate its depth, significance, and impact.

The split is shallow and its impact is negligible. Fewer than half of the courts of appeals have considered the issue and most states have adopted the Restatement as their choice-of-law test (the same test employed by the Ninth Circuit in cases where the FSIA permits jurisdiction) or a comparable "modern" choice-of-law test that, like the Restatement, examines the states' competing interests in (and relationships to) the parties and the claim. Further, the Ninth Circuit was correct to apply federal common law because the FSIA advocates that laws be applied uniformly in actions involving foreign states and this case involves challenges to a sovereign's public (rather than private) acts. Finally, even if the Court found that resolution of the question presented might be appropriate at some point in time, this case is a poor vehicle because, as the district court found, the application of California's choice-of-law test leads to the same result—that Spanish law applies to the parties' substantive claims.

I. The Scope of the Split Is Shallow

As noted above, the Ninth Circuit applies the federal common law's choice-of-law test—the Restatement—to determine which substantive law to apply in cases where the FSIA permits jurisdiction over a sovereign entity. *See Schoenberg*, 930 F.2d at 782. To determine which state has the "most significant relationship" to the parties, the case, and the relevant issues, the Restatement directs courts to consider:

> (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.

Restatement § 6(2). It is the state with the "most significant relationship" whose substantive law should be applied to the claim or claims.[5]

The Second Circuit applies a different test. That court determined that where the FSIA applies to strip a foreign sovereign of its presumptive sovereign immunity, the case is functionally premised on *diversity*—not federal question—jurisdiction, such that the court should apply the forum's choice-of-law test.

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[5] The Restatement also includes a number of additional considerations relevant to the choice-of-law analysis depending the nature of the claims.

See Barkanic v. Gen. Admin. of Civ. Aviation of the People's Republic of China, 923 F.2d 957, 959-960 (2d Cir. 1991) (citing *Klaxon*, 313 U.S. at 496). The primary support for this position comes from a statement in the FSIA, which provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, 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 (emphasis added); *see also Barkanic*, 923 F.2d at 961. Thus, there is a divergence between the Ninth and Second Circuits' approaches to determining the proper choice of law when the FSIA permits jurisdiction.

But the split is shallow. Only three other circuits—the Fifth, the Sixth, and the District of Columbia—have followed the Second Circuit and applied the forum's choice-of-law test to such cases. *See Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009); *O'Bryan v. Holy See*, 556 F.3d 361, 381 (6th Cir. 2009); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 842-843 (D.C. Cir. 2009).

And as is evident from petitioners' (and amicus's) reliance on the same handful of decisions, there are limited opportunities for courts to analyze choice-of-law issues under such circumstances. One reason is that the laws of different states and sovereigns often align, obviating any need to complete a choice-of-law analysis.

See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 88 (2d Cir. 2002) (employing New York's choice-of-law test and finding no conflict between the laws of New York and Indonesia, but noting if there was a conflict "New York choice of law rules would mandate application of Indonesian law"); *Owens v. Republic of Sudan,* 826 F. Supp. 2d 128, 155 (D.D.C. 2011) (applying District of Columbia law because its laws do not conflict with those of Kenya or Tanzania); *see also EM Ltd. v. Republic of Argentina*, 389 Fed. Appx. 38, 42-43 (2d Cir. 2010) (affirming the district court's finding that New York's choice-of-law test warranted the application of New York law, but acknowledging that the application of Argentinian law would lead to the same result).

In other cases, the parties do not dispute the applicable law. *See, e.g., Consulting Concepts Int'l, Inc. v. Kingdom of Saudi Arabia*, No. 19 Civ. 11787 (AKH), 2021 WL 1226361, at *5 (S.D.N.Y. Apr. 1, 2021) (noting that the "parties agree that English law governs"); *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 558 (E.D. Va. 2007) ("The parties agree that the appropriate choice of law principles are those applicable to maritime torts derived from the United States Supreme Court's opinion in *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L.Ed. 1254 (1953) and its progeny."); *Republic of Ecuador v. ChevronTexaco Corp.*, 426 F. Supp. 2d 159, 162 (S.D.N.Y. 2006) (noting that the parties agree as to "which choice-of-law rules should apply in deciding the issue"); *Orient Mineral Co. v. Bank of China*, 506 F.3d 980, 1001 (10th Cir. 2007)

(recognizing a choice-of-law analysis as unnecessary because the parties agreed that Utah law applied).

And in other cases, the parties fail to raise a choice-of-law challenge. *See, e.g., Wyatt v. Syrian Arab Republic*, 398 F. Supp. 2d 131, 139-140 (D.D.C. 2005), *aff'd*, 266 Fed. Appx. 1 (D.C. Cir. 2008) (holding that Syria waived the argument that the laws of Turkey or Syria conflict with U.S. law); *Schmidt v. Polish People's Republic,* 742 F.2d 67, 70 (2d Cir. 1984) (rejecting the plaintiffs' attempt to argue a different state's laws apply for the first time on appeal); *Bulgartabac Holding AD v. Republic of Iraq*, 451 Fed. Appx. 9, 10 (2d Cir. 2011) (applying New York law where the parties failed to assert that another sovereign's laws apply); *In re Estate of Ferdinand E. Marcos Human Rts. Litig.*, 978 F.2d 493, 499 n.15 (9th Cir. 1992) (finding no need to examine the choice of law where appellee did not appeal the district court's use of Philippine law); *Dar El-Bina Eng'g & Contracting Co. Ltd. v. Republic of Iraq*, 79 F. Supp. 2d 374, 383 (S.D.N.Y. 2000).

Because courts rarely analyze choice-of-law tests in this context—and very few courts have taken a formal position—review by this Court now is premature.

II. In Theory and in Practice, the Federal Common Law's and the Forum's Choice-of-Law Tests Lead to the Same Result

1. In addition to being shallow, the split is effectively meaningless. By examining the various choice-of-law tests employed by the states, it is evident that the split identified here is unlikely to produce different outcomes. States employ a variety of choice-of-law tests to tort claims, but the tests can be divided into two primary categories: traditional and modern. *See International Paper Co. v. Ouellette*, 479 U.S. 481, 503 n.1 (1987) (Brennan, J., concurring). The "traditional" rule of *lex loci delicti* requires application of the law of the jurisdiction where the injury occurred. *Ibid.* This rule comes from the Restatement (First) of Conflict of Laws (1934), and is premised on the idea that the affected state possesses a strong interest in redressing its citizen's injuries. *See Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 422 n.7 (2d Cir. 2001). Although the "traditional" test has increasingly lost favor, approximately ten states still employ this choice-of-law analysis in tort cases. *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey in 2002: Sixteenth Annual Survey*, 68 Am. J. Comp. L. 235, 258-259 (2020); Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 Am. J. Comp. L. 1, 4-5 (2003).

In contrast, the "modern" approach looks beyond the location of the injury to examine the various contacts and relationships that the different states may have to the parties and the claims, as well as the different

states' interests in having their own laws apply. *See* Patricia A. Carteaux, *Conflicts of Law and Successions: Comprehensive Interest Analysis as a Viable Alternative to the Traditional Approach*, 59 Tul. L. Rev. 389, 394 (1984) ("Modern [choice of law] approaches attempt to alleviate the harshness of the First Restatement's rigid rules by concentrating on the interests of the states involved in the controversy."). Under the "modern" approach umbrella, there are three primary analyses—the Restatement's "most significant relationship" test identified above, the "government interest" test, and the "better rule of law" test. Gary J. Simson, *The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren*, 36 Cornell Int'l L.J. 125 (2002).

The majority or jurisdictions—approximately twenty-seven, including Puerto Rico and the U.S. Virgin Islands—employ the Restatement's test. *See, e.g.,* Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 Am. J. Comp. L. at 258-259; *Wadsworth, Inc. v. Schwarz-Nin*, 951 F. Supp. 314, 320 (D.P.R. 1996); *In re Innovative Commc'n Corp.*, Adv. No. 08-3004, 2011 WL 3439291, at *40 (Bankr. D.V.I. Aug. 5, 2011), *aff'd* adv. No. 3:08-03004, 2013 WL 5432316 (D.V.I. Sept. 27, 2013). This is the same test employed by the Ninth Circuit.

The remaining states employ either a "government interests" approach, which directs the court to apply "the law of the state with the most significant interest in the litigation," *Kinsey v. New York Times Co.*, 991

F.3d 171, 176 (2d Cir. 2021) (internal citation omitted),[6] the "better rule of law" approach, under which courts analyze several factors including which state has the most significant relationship and the greatest governmental interests, *see, e.g., National Union Fire Ins. Co. of Pittsburgh, PA v. Donaldson Co., Inc.*, 272 F. Supp. 3d 1099, 1111 (D. Minn. 2017), or a combination of the modern approaches.[7] Courts in the District of Columbia, for example, employ a "blending" of the Restatement and the government interests test, *Hercules & Co., Ltd. v. Shama Rest. Corp.,* 566 A.2d 31, 40-41 & n.18 (D.C. App. 1989), while Hawaii employs a "flexible approach" that "look[s] to the state with the most significant relationship to the parties and subject matter" while placing 'primary emphasis…on deciding which state would have the strongest interest in seeing its laws applied,'" *Mikelson v. United Servs. Auto. Ass'n*, 111 P.3d 601, 607 (Haw. 2005) (citations omitted).

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[6] California applies a slightly modified version—the "governmental interest" test. Under California choice-of-law rules, if a conflict exists, courts analyze the jurisdictions' respective interest to determine which would be more severely impaired if that jurisdiction's law was not applied in that particular case. *See Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 917 (Cal. 2006).

[7] Although Michigan and Kentucky adopted the Restatement's choice-of-law test for contract claims, both recognize a rebuttable presumption in favor of applying their own law in tort actions. *See Standard Fire Ins. Co. v. Ford Motor Co.*, 723 F.3d 690, 693 (6th Cir. 2013) ("In a tort action, Michigan courts recognize a presumption in favor of *lex fori* and apply Michigan law "'unless a 'rational reason' to do otherwise exists.'") (internal citation omitted); *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 391 (6th Cir. 2000).

While the language may differ, common to all of the "modern" approaches is the desire for flexibility and a connection beyond the site of the injury. Katherine Florey, *Big Conflicts Little Conflicts*, 47 Ariz. St. L.J. 683, 731 (2015) ("Modern choice-of-law methods were, to begin with, developed with an eye to avoiding formalism and arbitrariness—to obviate the need for judicial manipulation by pointing to a law that seemed more intuitively fair to courts (and presumably to litigants as well)."). In fact, courts and commentators acknowledge that the modern tests are similar and almost inevitably lead to the same result. *See, e.g., P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008) ("New Jersey's governmental-interest test is substantially similar to the most-significant-relationship test adopted by the [Restatement]."); *see also id.* at 459 n.4 (recognizing as the "Restatement itself underscores, the most significant relationship test embodies all of the elements of the governmental interest test plus a series of other factors deemed worthy of consideration"); William L. Reynolds & William M. Richman, *Robert Leflar, Judicial Process, and Choice of Law*, 52 Ark. L. Rev. 123, 124 (1999) ("[A]nalysis of governmental interests, dominant contacts, most significant relationships, principles of preference, choice-influencing considerations, and (often but not always) preference for the forum's own law would all ordinarily lead to the same conclusion as to who should win the case."); Robert A. Leflar, *The "New" Choice of Law*, 21 Am. U. L. Rev. 457, 474 (1972) (noting that the modern approaches "regardless of exact language, are all substantially consistent with each other" and their results "are likely to be about the same"). Because most states employ a "modern" choice

of law approach like the Restatement, whether a court employs the federal common law's *or* the forum's choice-of-law test, the result is likely to be the same.[8]

2. That the application of the federal common law's and the forum's choice-of-law analyses lead to the same result is demonstrated clearly in one of the decisions on which the petition relies. *Oveissi* involved claims for intentional infliction of emotional distress and wrongful death brought by the American citizen grandson of Gholam Oveissi, an Iranian citizen and high ranking member of Iran's armed forces until early 1979, when revolutionaries overthrew the government and established an Islamic Republic. 573 F.3d at 837-838. Having fled the country, the grandfather relocated to France, where he was shot by terrorists on the streets of Paris in 1984. *Id.* at 838. The plaintiff's parents left France and eventually settled in the United States, where, during a brief visit to California years earlier, the plaintiff was born. *Ibid*.

In 2003, the plaintiff sued Iran asserting that the FSIA's former terrorism exception, 28 U.S.C. § 1605(a)(7), stripped Iran of its immunity. *Ibid.* The district court, dismissing all but the plaintiff's

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[8] Implicit in petitioners' argument is the assertion that forum choice-of-law tests are more likely to favor the forum's choice of law. Ten states employ the traditional approach, which applies the law of the state where the injury occurred, but, as in this case, the forum and the place of the injury are often different. Michigan and Kentucky prefer their forum's law, but that preference is rebuttable. *Supra* at 14, n.7. Because most states apply the "modern" approach's consideration of numerous factors, there is little reason to expect that the forum's choice-of-law test favors application of the forum's law.

emotional distress claim, applied the District of Columbia's choice-of-law test—a "constructive blending" of the "governmental interests" and "most significant relationship" analyses to determine whether to apply the law of France or California. *Oveissi v. Islamic Republic of Iran*, 498 F. Supp. 2d 268, 280 (D.D.C. 2007) (quoting *Hercules & Co.*, 566 A.2d at 41 & n.18). The district court recognized that both tests favored the application of French law, but after finding that the United States had a "unique" interest in having its domestic law apply "when its citizens are injured by state-sponsored terrorist acts," the court determined that California law should apply. *Id.* at 281.

The court of appeals found that the district court erred in finding that California law applied. Recognizing that both the plaintiff and his grandfather were domiciled in France when the injury occurred, the court of appeals recognized that France had a "strong governmental interest in both deterring attacks within its sovereign borders and ensuring compensation for injuries to its domiciliaries." *Oveissi*, 573 F.3d at 842. The court noted that California's interest was slight by comparison and that, while the United States has a strong interest in applying its domestic law to terrorist attacks on *U.S. citizens*, the plaintiff's grandfather was an Iranian national and there was no evidence that the attack targeted U.S. citizens. *Id*. at 842-843.

The court of appeals also recognized that France had the "most significant relationship" to the injury, the victim, and the plaintiff. *Id.* at 842. In fact, the court of appeals recognized specifically that the

outcome would be the same if it employed the federal common law test. *Id.* at 841 n.2.

> [A]ll of the usual choice-of-law factors—including those identified as important by the Restatement (Second) of Conflict of Laws—point in the same direction, so *there is no reason to believe that applying a federal common law choice of law rule would yield a different result* in this case.

Ibid. (emphasis added). In subsequent actions against foreign sovereigns brought in the District of Columbia—the venue that Congress set as the default for suits against sovereigns—the Restatement's "most significant relationship" test and the "governmental interest" test aligned in favor of the same law. *See*, *e.g.*, *Force v. Islamic Republic of Iran*, 464 F. Supp. 3d 323, 373 (D.D.C. 2020) (recognizing that Israeli law applies because Israel has the greatest interest in having its laws apply and it has the most significant relationship to the injury); *Fraenkel v. Islamic Republic of Iran*, 248 F. Supp. 3d 21, 39 (D.D.C. 2017), *rev'd in part on other grounds*, 892 F.3d 348 (D.C. Cir. 2018) (applying the law of Israel because "Israel ha[d] the greatest interest in having its laws apply and the most significant relationship to the events"); *Estate of Botvin ex rel. Ellis v. Islamic Republic of Iran*, 684 F. Supp. 2d 34, 41 (D.D.C. 2010); *Wachsman ex rel. Wachsman v. Islamic Republic of Iran*, 537 F. Supp. 2d 85, 96-97 (D.D.C. 2008); *see also In re Air Crash Disaster at Washington, D.C. on Jan. 13, 1982*, 559 F. Supp. 333, 342 (D.D.C. 1983) (recognizing that because the "most significant relationship" test and the "governmental

interest" test examine many of the same factors, "the state with the 'most significant relationship' should also be that whose policy would be advanced by application of the law,'" namely the state with the greatest "governmental interest").[9]

3. In fact, in *all* of the cases on which the petition relies, the split identified in the petition was irrelevant. In *Nnaka v. Federal Republic of Nigeria*, 756 Fed. Appx. 16, 18 (D.C. Cir. 2019), Pet. at 10, the court of appeals opined that "the FSIA requires us to apply the choice-of-law rules of the forum state" but then recognized that the exercise was unnecessary, as the

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[9] A narrow line of cases holds that where a state's "governmental interest" is different from (and superior to) the state with the "most significant relationship," the law of the state with the greater "governmental interest" should apply. These cases involve claims related to terrorist acts directed at U.S. nationals or U.S. property. Under these limited circumstances, the D.C. Circuit found that the unique "interests of the United States" are elevated "to nearly it[s] highest point," such that the U.S.'s "governmental interests" can outweigh a more significant relationship between the action and the foreign state. *Dammarell v. Islamic Republic of Iran*, No. Civ. A. 01-2224JDB, 2005 WL 756090, at *20 (D.D.C. Mar. 29, 2005) ("The injuries in this case are the result of a state-sponsored terrorist attack on a United States embassy and diplomatic personnel. The United States has a unique interest in its domestic law, rather than the law of a foreign nation, determining damages in a suit involving such an attack."); *see also Owens*, 826 F. Supp. 2d at 155; *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 65-66 (D.D.C. 2006), on reconsideration in part, 242 F.R.D. 125 (D.D.C. 2007); *Holland v. Islamic Republic of Iran*, 496 F. Supp. 2d 1, 22-23 (D.D.C. 2005). The purported tort (conversion) here—the Foundation's well-publicized purchase of the Painting with public funds—cannot be equated with terrorism; there is no "unique" or elevated U.S. interest to displace Spain's more significant interests in (and relationship to) this case.

parties "acquiesced in the application of the local law of the forum"—the District of Columbia—by failing to assert that a different law should apply. In *Pittston Co. v. Allianz Insurance Co.*, 795 F. Supp. 678, 682-683 (D.N.J. 1992), Pet. at 11, the district court acknowledged the split but noted that the parties *agreed* that "that New Jersey choice-of-law rules must be applied to determine which state's substantive law controls the rights and liabilities of the parties," obviating the need for a choice-of-law analysis. And in *Pescatore v. Pan America World Airways, Inc.*, 97 F.3d 1, 14 (2d Cir. 1996), Pet. at 14, the Second Circuit referenced *Barkanic* and applied New York's choice of law rules, but acknowledged that "[w]e reach the same conclusion when we apply federal common law conflict of law principles." *Id.* at 14.[10]

In *O'Bryan*, Pet. at 10, 14, the Sixth Circuit followed, without any analysis, the direction advocated by the Second Circuit in *Barkanic*. 556 F.3d at 381 n.8. The court applied the choice-of-law test of Kentucky,

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[10] *Bank of New York v. Yugoimport*, 745 F.3d 599 (2d Cir. 2014)—aside from the fact that it references *Barkanic*—is inapposite. That decision examined the choice-of-law principles as applied to a *contract* dispute between a Serbian entity and five sovereigns following the dissolution of the Social Federal Republic of Yugoslavia over competing claims to financial assets frozen in a New York bank. Noting that New York's contracts choice-of-law test applies the law of the jurisdiction "with the most significant interest in, or relationship to, the dispute," as well as "the place of contracting, the places of negotiation and performance, the location of the subject matter," while seeking to "require the court to honor the parties' choice [of law provision] insofar as matters of substance are concerned," the court of appeals found that the five sovereigns have the "strongest interest" in the dispute. *Id.* at 609.

one of two states recognizing an affirmative presumption in favor of Kentucky law in tort actions, *see supra* at 14 n.7. But because the class action representatives were Kentucky residents at the time of their injury, the abuse took place in Kentucky, and at the hands of priests in Kentucky, it is almost certain that Kentucky law would apply under any choice-of-law test.[11] More recently, in *Northrop Grumman*, Pet. at 10, the Fifth Circuit cited *O'Bryan* and applied the choice-of-law test of the forum, Mississippi. 575 F.3d at 498. But as Mississippi has adopted the Restatement, *id.* at 498-499, the decision would have been the same if the Fifth Circuit had applied the federal common law's test.[12]

Barkanic, Pet. at 10, 13, 14, 15, the decision on which all forum choice-of-law-focused decisions rely, embodies the inconsequential nature of the split. In that case, two American citizens died when a Chinese plane crashed en route to Beijing. 923 F.2d at 958. The decedents' representatives brought a wrongful death lawsuit against a Chinese instrumentality offering flight services within China. The instrumentality moved for partial summary judgment to limit its liability to $20,000, an airline's liability limit under Chinese law. *Ibid.* The district court

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[11] Only one court in the Sixth Circuit has applied *O'Bryan* in this context. *See DRFP, LLC v. Republica Bolivariana de Venezuela*, 945 F. Supp. 2d 890 (S.D. Ohio 2013). But after noting that Ohio applies the Restatement, the district court found that a choice-of-law analysis was unnecessary because both Ohio and Venezuela law lead to the same result. *Id.* at 916.

[12] *Northrop Grumman* has not been cited by any court in the Fifth Circuit for this proposition.

granted the motion on the theory that the FSIA warranted application of the choice-of-law rules of China, the place where the "act or omission" occurred. *Ibid.*

On appeal, the Second Circuit determined that the *forum's* choice-of-law test should apply instead. "Because we believe that applying the forum state's choice of law analysis will help ensure that foreign states are liable 'in the same manner and to the same extent as a private individual under like circumstances,' we conclude that incorporation of state choice of law rules is appropriate here." 923 F.2d at 961 (quoting 28 U.S.C. § 1606). But after applying New York's "government interests" analysis—a "modern" choice-of-law approach like the Restatement—the Second Circuit affirmed the district court's finding that Chinese law must apply. *Id.* at 963.[13]

4. Noticeably absent from the petition are references to any cases where a court noted the split but then wrestled with the application, finding that the federal common law's choice-of-law test warranted the application of one law, while the forum's choice-of-law test demanded application of another. Instead, the petition relies solely on decisions that note the different tests while acknowledging, implicitly or explicitly, that the tests as applied lead to the same result. In other

[13] Had the Second Circuit applied the Restatement instead, it would have reached the same result, as there was no connection between the parties, the injury, and the forum, beyond the fact that the plaintiffs chose to file the lawsuit in New York. *Barkanic*, 923 F.2d at 962-963.

words, petitioners identify a split of authority that exists entirely in theory, not in practice.[14] Because the purported impact of the split is purely academic, there is no need for this Court to issue an advisory decision.[15]

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[14] In fact, courts within the Seventh Circuit acknowledge the split as irrelevant, noting the identical nature of the federal common law's and the forum's choice-of-law test. *See Thornton v. Hamilton Sundstrand Corp.*, No. 12 C 329, 2013 WL 4011008, at *3 (N.D. Ill. Aug. 6, 2013) ("[T]he Seventh Circuit has not squarely decided whether the forum state or federal common law choice of law rules govern…. Nonetheless, because both federal common law choice of law rules and Illinois choice of law rules look to the Restatement…the Court need not decide this question at this stage.") (internal citations omitted); *In re Aircrash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 926 F. Supp. 736, 739 (N.D. Ill. 1996) (acknowledging that the disagreement between the Ninth and Second Circuits "is of no consequence").

[15] This Court previously rejected an invitation to review an analogous circuit split involving the proper choice-of-law test to apply in a different context. Like the feeble split identified in the petition, federal courts disagree as to whether federal common law or the forum should supply the choice of law rules in bankruptcy cases. *Compare PNC Back v. Sterba (In re Sterba)*, 852 F.3d 1175, 1177 (9th Cir. 2017) (holding that "where a federal court sitting in diversity applies the forum state's choice-of-law rules—a straightforward policy that prevents the forum's federal character from determining the outcome of disputes that are really about state law—we have held that in bankruptcy, federal choice-of-law rules control which state's law applies"); *with Bianco v. Erkins (In re Gaston & Snow)*, 243 F.3d 599, 605-606 (2d Cir. 2001) (concluding that, absent a strong federal interest, a bankruptcy court should apply the choice of law rules of the forum state). And as here, other courts recognize that the federal common law's and forum's choice-of-law tests lead to the same result. *See In re Miller*, 459 B.R. 657, 671-672 (B.A.P. 6th Cir. 2011), *aff'd*, 513 Fed. Appx. 566 (6th Cir. 2013) (noting a split but determining that both tests lead to the application of Michigan law); *Jafari v. Wynn Las*

III. The Ninth Circuit's Holding Is Correct

Noted above, *Barkanic's* holding that a forum's choice-of-law test should apply to sovereign defendants is premised primarily on a single statement in the FSIA which provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, 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 (emphasis added). Thus, according to the Second Circuit, if an exception to the FSIA strips a foreign sovereign (or its agency or instrumentality) of its presumptive immunity, it was Congress's intent to treat foreign states the same as *private* individuals such that the court should employ the forum's choice-of-law test, the process applied when a court exercises diversity jurisdiction.

There are, however, significant flaws with this reasoning. First, numerous statements in the FSIA make clear Congress's intent that a sovereign—immune or not—is *not* to be treated merely as a private

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Vegas, LLC (In re Jafari), 569 F.3d 644, 648-651 (7th Cir. 2009); *In re First River Energy, L.L.C.*, 986 F.3d 914, 924 (5th Cir. 2021).

As with the bankruptcy choice-of-law split, ineffectual as it has proven to be so far, this Court should to wait until the split identified in the petition creates an impact—should that ever happen—before weighing in. *See Sterba v. PNC Bank*, 138 S. Ct. 2672 (2018) (denying petition that sought review of split among the circuits regarding the proper application of choice-of-law rules in bankruptcy courts).

individual. For example, the FSIA provides that federal district courts have "original jurisdiction" over any action in which a foreign state is a party, because state courts are ill-equipped to handle international issues. 28 U.S.C. § 1330(a); H.R. REP. 94-1487, at 12-13 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6611 (vesting jurisdiction for cases brought under the FSIA "in the Federal courts should be conductive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences"). And foreign sovereigns—just like the United States—cannot be subjected to jury trials. 28 U.S.C. § 1441(d).

Second, by treating foreign sovereigns like private persons that are subject to inconsistent choice-of-law tests, the *Barkanic* rule ignores one of the FSIA's primary purposes: to address the need for national uniform standards in actions involving sovereign entities. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611, 622 n.11 (1983) ("When it enacted the FSIA, Congress expressly acknowledged the importance of developing a uniform body of law concerning the amenability of a foreign sovereign to suit in United States court.") (internal quotation marks omitted); H.R. REP. 94-1487, at 13, 32, 1976 U.S.C.C.A.N. at 6611, 6631 (noting Congress's intend to promote a "uniformity in decision" in "cases involving foreign sovereigns" as well as Congress's concerns about "the potential sensitivity of

actions against foreign states and the importance of developing a uniform body of law in this area").[16]

Finally, a blanket application of *Barkanic* ignores the inherent limitations provided by the last three words of the passage on which it relied: "under like circumstances." It is Congress's stated intention that the FSIA's first goal was to codify the so-called "restrictive" principle of sovereign immunity. Under this principle, "the immunity of a foreign state is 'restricted' to suits involving a foreign state's public acts (jure imperii) and does not extend to suits based on its commercial or private acts (jure gestionis)." H.R. REP. 94-1487, at 7, 1976 U.S.C.C.A.N. at 6605; *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 359-360 (1993); Restatement (Third) of the Foreign Relations Law of the United States § 451 (1987).

The goal of holding a foreign state accountable of its private acts is advanced through the FSIA's commercial activity exception, which allows that when a foreign state acts like an "every day participant" in the marketplace by engaging in commercial ventures of the sort that private parties undertake, claimants may seek judicial resolution of any resulting "ordinary legal

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[16] Petitioners assert that use of the federal common law choice-of-law test hinders rather than advances uniformity because its application "means that the same FSIA claim would be subject to a different choice of law rule if brought in federal court, since a state court hearing the same claim would apply its state's choice-of-law rules, thereby defeating Congress' mandate for consistency in the liability standards for foreign sovereigns and private parties." Pet. at 15-16. But as made clear in the FSIA and its legislative history, Congress intended for such cases to be litigated *exclusively* in federal, not state, court. 28 U.S.C. § 1330(a).

disputes." H.R. REP. 94-1487, at 6-7, 1976 U.S.C.C.A.N. at 6605; *see also Nelson*, 507 U.S. at 360 (stating that a foreign state "engages in commercial activity under the restrictive theory where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns'") (citation omitted)). Thus, it *may* be reasonable to apply a state's forum choice of law where the commercial activity exception is invoked, because there may be "like circumstances" under which the foreign state and a private individual can be held liable.

But the expropriation exception (which is what jurisdiction is premised on here) is different. It purports to strip a foreign state of its presumptive immunity for its "public" acts—acts that relate to those "powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360. Where a "public" or sovereign act is involved, a foreign state cannot be liable "in the same manner and to the same extent as a private individual under like circumstances" for the simple reason that a private individual cannot commit a public, sovereign act.

Germany's taking of the Painting in 1943—the act allows a U.S. court to exercise jurisdiction over the Foundation—was a public act. *See Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017) ("A sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a 'jure imperii') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit.").

And the Foundation's state-directed acquisition and ownership of the Painting—the purported conversion—was also a public act. A private individual can buy and sell art, but that person cannot use public funds to restore and redesign a historic landmark to house a public collection of art. Nor can a private individual receive, possess, and own public property purchased by the foreign sovereign (with public funds pursuant and to a newly enacted law) that is designated as inalienable Spanish Historical Heritage.[17]

Had Congress intended for foreign states to be held liable "same manner and to the same extent as a private individual" *in all cases* where an exception to presumptive immunity applied, it would not have included the phrase "under like circumstances." The addition of these three words demonstrates Congress's expectation that there would be situations—as here—where there are *no* "like circumstances" to allow a foreign state be treated as a private individual. Because the Foundation cannot be held liable "in the same manner and to the same extent as a private individual" with respect to public, sovereign acts—Germany's taking and the Foundation's formal acquisition of the Painting—the foundational basis for applying the forum's choice-of-law test is eviscerated. Under these circumstances, use of the federal common

[17] The Real Decreto-Ley 11/1993 classified the Collection as part of the Spanish Historical Heritage, making the Painting subject to the Spanish Historical Heritage Law. Pet. App. C at 10-11. This law preserves public access to the Collection and affirmatively bars *a private individual* from claiming ownership of any part of the Collection through acquisitive prescription. *Id.* at 56-58.

law's choice-of-law test is both necessary and appropriate.[18]

But even if the Court finds that the Ninth Circuit erred in applying the Restatement *and* determines that neither the shallowness of the split nor the lack of any meaningful impact renders the split unworthy of review, the Court should decline petitioner's invitation because *both* the Restatement and California's choice-of-law tests lead to the *same* result—the application of Spanish law.

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[18] Situations where the use of federal common law is sanctioned are "few and restricted," *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963), and are generally limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law," *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966). Nonetheless, this Court has recognized that federal common law affirmatively preempts state law in "narrow areas" involving "uniquely federal interests," including where the "international nature of the controversy makes it inappropriate for state law to control." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641-642 (1981); *see also Atherton v. FDIC*, 519 U.S. 213, 225, 226 (1997) (recognizing "relationships with other countries" as one of the "few and restricted instances in which this Court has created federal common law") (internal citations omitted); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 489 (1983) (noting the "potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area") (citation omitted); *Bancec*, 462 U.S. at 622 n.11 (rejecting the argument that the FSIA "requires application of the law of the forum state—here New York—including its conflicts principles"); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425-426 (1964) (recognizing that "rules of international law should not be left to divergent and perhaps parochial state interpretations" and that "there are enclaves of federal judge-made law which bind the States").

IV. This Case Is a Poor Vehicle to Decide the Question Presented

Petitioners contend that the Ninth Circuit *should* have applied California's governmental interest test which, according to petitioners, advocates the application of California, not Spanish, law. This is conjecture without foundation, however, as it ignores entirely the district court's detailed factual findings and legal conclusion that, after applying California's choice-of-law test in the alternative, Spanish law must apply.[19]

California applies the three-step "governmental interest" test to resolve choice-of-law issues; only application of the third step is relevant here:

> [I]f the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in

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[19] Although conducted in the context of its Restatement analysis, the Ninth Circuit *did* examine the various governmental interests. "Cutting in favor of the choice of California law is the fact that the forum, California, has a strong interest in protecting the rightful owners of fine arts who are dispossessed of their property," as memorialized by the legislature's enactment of California Civil Code § 338(c), as well as the concern that "it is more difficult for a federal court to discern, determine, and apply Spanish law than California law." Pet. App. C at 24. But "Spain's interest in having its substantive law applied is significant." *Ibid.; see also ibid.* ("In a highly publicized sale, Spain provided [the Foundation] public funds to purchase the Collection, including the Painting. [The Foundation], an instrumentality of Spain, has possessed the Painting for over twenty years and displayed it in the Museum."). Ultimately, the court recognized correctly that Spain has the "dominant" interest in having its laws applied. *Id.* at 25.

> the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.

Kearney, 137 P.3d at 922 (internal quotations and citations omitted). Petitioners contend that the interests of California—the state to which Mr. Cassirer retired in 1980—would be more impaired if not applied than the interests of Spain—the state that enacted laws and used public funds for the Painting's purchase, that protects by historical designation the Painting from harm or alienation, that provided a location for the public to view the Painting, and that made possible the public display of the Painting as Spanish property long before Mr. Cassirer's adverse ownership claim—if Spanish law is not applied. Petitioners are mistaken.

As the district court noted, Spanish law contains provisions that expressly govern the acquisition of moveable property under acquisitive prescription. Pet. App. D at 7-8. Moreover, "Spain unquestionably has an interest" in "protecting defendants from stale claims, and encouraging plaintiffs not to sleep on their rights," as well as a "strong interest in regulating conduct that occurs within its borders, and in being able to assure individuals and entities within its borders that, after they have possessed property uninterrupted for more than six years, their titled and ownership of the property are certain." *Id.* at 8-10, 19 (district court summarizing Spanish law).

In contrast, neither California statutes nor case law prohibits the acquisition of property under an adverse possession theory. *Id.* at 11. The district court acknowledged that California has a general interest in protecting the rights of its residents, including owners and collectors of art. This is reflected in California Civil Code § 338, which extends the statute of limitations for certain claims relating to art. *Id.* at 8-9. But the district court, nonetheless found it noteworthy that the California legislature chose not to create a new cause of action or restrict the applicable choice of law when it had the opportunity to do so. *Id.* at 11. Moreover, California's interest is "far less significant where the original victim did not reside in California, where the unlawful taking did not occur within its borders and where the defendant and the entity from which the defendant purchased the property were not located in California." *Ibid.* As the district court recognized,

> If Spain's interest in the application of its law were subordinated to California's interest, it would rest solely on the fortuitous decision of Lilly's successor-in-interest to move to California long after the Painting was unlawfully taken by the Nazis and the fact that he happened to reside there at the time the Foundation took possession of the Painting.

Id. at 10.

Tellingly, the petition relegates California's limited interests to few paragraphs, Pet. at 18-19, focusing instead on "national" interests, as purportedly reflected in the Holocaust Expropriated Art Recovery Act of

2016, Pub L. No. 114-308, 130 Stat. 1524 (the "HEAR Act"), Pet. at 19-21. But the United States' interests are not relevant to a choice-of-law test unless the case involves terrorist acts directed at American citizens. Moreover, as with California Civil Code § 338(c), the HEAR Act merely addresses the statute of limitations for certain art claims, it does not create a new cause of action or proscribe the source of substantive law, and it includes an exception for stale claims. 130 Stat. 1527. Lastly, the HEAR Act may promote restitution, but not in U.S. courts. *See Federal Republic of Germany v. Philipp*, --- U.S. ----, 141 S. Ct. 703, 715, --- L.Ed.2d ---- (2021) (recognizing that the HEAR Act "generally encourage redressing those [restitution-related] injuries outside of public court systems"); *ibid.* ("The HEAR Act, for example, states that 'the use of alternative dispute resolution' mechanisms will 'yield just and fair resolutions in a more efficient and predictable manner' than litigation in court.") (internal citation omitted).

Because Spain's interests would be significantly more impaired if a court was to apply California law, the district court correctly found that California's choice-of-law test mandates the application of Spanish law.[20]

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[20] If the Court remanded this case for the Ninth Circuit to review the district court's determination that California's choice-of-law test mandates the application of Spanish law, the district court's determination would be entitled to significant deference, as the factual findings supporting that determination are subject to clear error review. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187 (9th Cir.), *amended by* 273 F.3d 1266 (9th Cir. 2001) (reviewing for clear error the district court's findings underlying a choice-of-law determination).

CONCLUSION

For the forgoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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