No. 20-1566

IN THE

Supreme Court of the United States

DAVID CASSIRER, *et al.*,

Petitioners,

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION,

Respondent.

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

BRIEF FOR PETITIONERS

SCOTT E. GANT
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, Florida 33134
(305) 371-4700

LAURA W. BRILL
NICHOLAS DAUM
KENDALL BRILL & KELLY LLP
10100 Santa Monica Boulevard
Suite 1725
Los Angeles, California 90067
(310) 556-2700

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, New York 10504
(914) 749-8200
dboies@bsfllp.com

DAVID A. BARRETT
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards, 20th Floor
New York, New York 10001
(212) 446-2300

STEPHEN N. ZACK
ANDREW S. BRENNER
ROSSANA BAEZA
BOIES SCHILLER FLEXNER LLP
100 SE Second Street
Suite 2800
Miami, Florida 33131
(305) 539-8400

Attorneys for Petitioners

307924

QUESTION PRESENTED

Whether a federal court hearing state law claims brought under the FSIA must apply the forum state's choice of law rules to determine what substantive law governs the claims at issue, or whether it may apply federal common law.

PARTIES TO THE PROCEEDING

Petitioners are David Cassirer, the Estate of Ava Cassirer, and the Jewish Federation of San Diego County, the plaintiffs below.

Respondent is the Thyssen-Bornemisza Collection Foundation ("TBC"), an agency or instrumentality of the Kingdom of Spain, and the defendant below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND LEGISLATIVE MATERIALS

REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The opinions of the Ninth Circuit directly at issue in this appeal are published at *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 F. App'x 452 (9th Cir. 2020) ("*Cassirer IV*") and *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951 (9th Cir. 2017) ("*Cassirer III*"), and are reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at A and C respectively.

The district court decision from which the 2020 appeal was taken is unpublished and is reproduced at Pet. App. B. The 2017 appeal was taken from a district court decision published at *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148 (C.D. Cal. 2015) and is reproduced at Pet. App. D.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit decision affirming the final judgment that respondent TBC is the lawful owner of the stolen artwork was issued on August 17, 2020. Pet. App. A. A timely-filed Petition for Panel Rehearing or Rehearing En Banc was denied on December 7, 2020. Pet. App. E. The petition for a writ of certiorari was timely filed on May 6, 2021. It was granted on September 30, 2021.

STATUTORY PROVISIONS

The relevant provisions of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1606 are reproduced at Pet. App. F.

STATEMENT OF THE CASE

The courts below acknowledged *Rue Saint-Honoré, Afternoon*, *Rain Effect*, by Jacob Abraham Camille Pissarro (the "Painting"), was stolen from the Cassirer family by the Nazis in violation of international law. It was acquired more than five decades later by Respondent TBC through an heir to the Thyssen Steel empire, Baron Hans Heinrich von Thyssen-Bornemisza. The lower courts found the Baron did not act in good faith when he acquired the Painting because he had "actual and concrete reasons for suspicion" that it was stolen, and because he failed to investigate its provenance. They found TBC was aware of the same "red flags" of theft, also failed to investigate, and "may have been irresponsible under these circumstances." The lower courts nevertheless held that under "federal common law" Spanish law applied, and effectively extinguished the Cassirers' ownership rights, concluding the family did not prove TBC or the Baron had "actual knowledge" the Painting was stolen, under their interpretation of Spanish law. The lower courts applied Spanish law despite the fact that relevant provisions conflict with the law and public policy of California—the Cassirers' home for more than 40 years, the forum state, and the place to which the Painting was first transferred out of Germany 70 years ago—as well as numerous international agreements and conventions concerning Nazi-looted art.

A. Factual Background

This appeal arises from a two-decade legal battle by the family of Holocaust survivor Lilly Cassirer to recover a family treasure, *Rue Saint-Honoré,*

Afternoon, *Rain Effect*, an 1897 oil painting by the renowned French Impressionist artist Jacob Abraham Camille Pissarro (the "Painting").

In the nineteenth and early twentieth centuries, the Cassirers were one of Europe's most prominent families in business, culture, and academia. Among their achievements, cousins Paul and Bruno Cassirer championed the nascent Impressionist movement through their prestigious Berlin art gallery and publishing house. Paul Cassirer bought *Rue Saint-Honoré* in 1900 directly from Pissarro's exclusive agent in France, Paul Durand-Ruel.

Lilly inherited the Painting in 1926 and displayed it prominently in her parlor, where her grandson, Claude Cassirer, the original Plaintiff in this case, played as a child. The Painting captures an iconic Paris streetscape after an early afternoon rain shower, and a photograph in evidence shows the Painting in Lilly's Weimar Germany home. Jt. App. 43a.

In 1939, the Nazis forced Lilly to "sell" the Painting for the equivalent of $360 USD (paid into a blocked account she could never access) to obtain exit visas for herself and her husband, Professor Otto Neubauer, to flee Germany. As Jews, had Lilly and Professor Neubauer not escaped when they did, they likely would have been murdered in a concentration camp, as was Lilly's sister Hannah, who stayed behind to care for their elderly mother. Lilly survived the war in England, and she eventually moved to the United States, where she died in 1962.

After the War, Lilly attempted to recover the Painting. In 1954, the U.S. Court of Restitution

Appeals ("CORA") declared her the rightful owner. Having no other information about its existence, the court assumed the Painting had been destroyed or lost during the War. But the Painting was neither destroyed nor lost. It was intact, in a private art collection in the United States.

The record shows that, unbeknownst to Lilly, the Painting was transferred from Germany to California in 1951. As Nazi contraband, such an export violated U.S. Military Law,[1] and any sale of the Painting should have been "null and void."

In July 1951, the Painting was acquired by Beverly Hills, California gallery owner Franz ("Frank") Perls from "Herr Urban" of Munich, Germany, and sold to collector Sidney Brody in Los Angeles. Jt. App. 44a, 50a, 51a, 63a. But not long after, Brody returned the Painting to Perls in Beverly Hills (*Cassirer v. Thyssen-Bornemisza Collection Foundation*, No. 2:05-cv-03459 (C.D. Cal., filed May 10, 2005), Dkt. 377 at 54, ¶¶ 18–19; *id.*, Dkt. 456-26), and Perls then consigned the Painting to the Knoedler Gallery in New York City. Knoedler sold the Painting in May 1952 to St. Louis collector Sydney Shoenberg for his private collection. Jt. App. 46a; *Cassirer*, No.

---

[1] U.S. Military Law declared "null and void" any transfer of works of art "under duress or other wrongful Nazi takings" that were effected without a "duly issued license or authorization;" the law further prohibited "the acquisition, receipt, dealing in, selling, transfer, and export" of such property," including "any transfer, contract or other arrangement" "with the intent to defeat or evade" "the restitution of any [such] property to its rightful owner." 12 Fed. Reg. 2189, 2196 (Apr. 3, 1947) (amending Title 10, Subtitle A, Part 3, by adding Military Law No. 52 as § 3.15, (*Cassirer III*, No. 15-55550, Dkt. 24-10)).

2:05-cv-03459, Dkt 377 at 55, ¶¶ 21–22; *id.*, Dkt. 413-1.

In 1976, following Shoenberg's death, the Stephen Hahn Gallery in New York City undertook to sell the Painting on consignment. In October 1976, Baron Hans Heinrich von Thyssen-Bornemisza, the scion of the Thyssen Steel dynasty in Germany, purchased the Painting at Hahn's Manhattan gallery. *Cassirer*, No. 2:05-cv-03459, Dkt 377 at 54, ¶ 26; Jt. App. 51a. Accordingly, following 25 years in the United States the Painting was shipped to the Baron's residence in Switzerland.

In 1993, the Baron established the Respondent Thyssen-Bornemisza Collection Foundation jointly with the Kingdom of Spain. He sold the Painting, together with much of his art collection, to TBC for $350 million. Spain provided the funds for the acquisition and furnished a palace in Madrid to house the collection. Pet. App. C at 10; 862 F.3d at 957.

Lilly's grandson, Claude Cassirer, survived the Holocaust and became a United States citizen in 1947. He started in New York City and moved to Cleveland, where he worked as a professional photographer. He retired to San Diego, California, in 1980, where he lived with his wife Beverly until his death in 2010. Beverly remained in San Diego until she passed away in February 2020, a week short of her 100th birthday.

Through the years, Claude, armed only with the haunting black and white photo of the Painting hanging over the sofa in Lilly's parlor, attempted, with the assistance of friends and associates, to locate the Painting. Finally, in December 1999, Claude

learned from a client that she had discovered the Painting was listed in a catalogue of the TBC collection.[2]

Claude promptly notified Spain and TBC that he was Lilly's sole heir and requested that they return the Painting. In May 2001, Claude's attorneys formally petitioned Spain's Minister for Education, Culture and Sports (who was also the chair of the board of the TBC Foundation) to return the Painting. They also diligently pursued diplomatic channels to convince Spain to return the Painting.

B. Procedural History

Having been unsuccessful with his formal petition and diplomatic efforts, Claude Cassirer turned to the courts. He sued Spain and TBC under the Foreign Sovereign Immunities Act ("FSIA"), in the District Court for the Central District of California. The Complaint was filed on May 10, 2005. Having lived in California for 25 years, Mr. Cassirer alleged common law claims under the law of California for conversion, unlawful possession of personal property, and imposition of a constructive

---

[2] In a decision that was not appealed, the district court rejected TBC's laches defense, finding "the Plaintiffs' delay in filing suit was not unfair or unreasonable, and that the balance of equities favors Plaintiffs. Indeed, the Cassirers moved quickly to enforce their rights." Pet. App. B at 33. It noted that Lilly and the other parties to the restitution proceeding in Germany "*all* believed that the Painting had been lost or destroyed during the war," and it was reasonable for Claude Cassirer to rely on that belief." *Id.* "[O]nce Claude Cassirer learned that the Painting was not lost or destroyed, he acted promptly by filing a Petition with the Kingdom of Spain and TBC in 2001, and then, after that Petition was denied, an action in this Court in 2005." *Id.*

trust, and sought return of the Painting, as well as damages.

2006–2010—Litigation over FSIA Jurisdiction

In 2006, the district court denied motions to dismiss by defendants Spain and TBC. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1178–79 (C.D. Cal. 2006). The court rejected their arguments that the FSIA's expropriation exception, 28 U.S.C. §1605(a)(3), did not apply. It held that the Nazis had taken the Painting in violation of international law and that TBC engaged in substantial commercial activity in the United States at a level to sustain jurisdiction under the statute. *Id*. at 1170–76. The district court also rejected the Defendants' "domestic takings" argument, because the Nazis confiscated the Painting well after they had stripped Lilly of her German citizenship. *Id.* at 1165–66. Further, the court rejected Defendants' argument that the "expropriation exception" to immunity under the FSIA did not apply to them because it was Germany, not Spain, that expropriated the Painting in violation of international law. *Id*. at 1163.

In 2009 and 2010, the Ninth Circuit (first by a three-judge panel, *Cassirer v. Kingdom of Spain*, 580 F.3d 1048 (9th Cir. 2009), and then *en banc, Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1032 (9th Cir. 2010) ("*Cassirer I*") upheld the district court's FSIA jurisdiction under the expropriation exception. It held the Painting was stolen from Lilly by Germany in violation of international law,[3] and that TBC had

[3] The Ninth Circuit found: "In 1939 Lilly decided she had no choice but to leave Germany. By that time—as the district court

engaged in substantial commercial activities in the United States.[4] The Ninth Circuit also rejected the Defendants' argument that they were not covered by § 1605(a)(3) because Germany, not Spain, expropriated the Painting in violation of international law. *Cassirer I*, 616 F.3d at 1031–32 ("[W]e conclude that §1605(a)(3) does not require that the foreign

---

judicially noticed—German Jews had been deprived of their civil rights, including their German citizenship; their property was being 'Aryanized'; and the Kristallnacht pogroms had taken place throughout the country." *Cassirer I*, 616 F.3d at 1023. "The district court's determination that Lilly was no longer regarded by Germany as a German citizen is not challenged on appeal." *Id.* at 1023 n.2. Consequently, this Court's decision in *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021) does not affect this case.

[4] The Ninth Circuit cited a portion of the district court's findings that TBC engaged in numerous "commercial activities in the United States." *Cassirer I,* 616 F.3d at 1032. These included selling posters and books and licensing reproductions of images; shipping gift shop items to purchasers in the U.S., including posters of the Cassirers' Painting, to residents in the Central District of California and elsewhere in the United States; sending press releases, brochures, and general information to U.S. tourism offices, including one mentioning the Painting by name; sending its Museum bulletin throughout the world, including to 55 U.S. cities, two of which are in the Central District of California; and a long list of others. *Id. See also Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1172–76 (C.D. Cal. 2006).

TBC also participated in filming a program at the museum showcasing the Painting that was featured on Iberia Airlines flights to and from the United States. "As a result, several tens—if not hundreds—of thousands of airline passengers viewed the Pissarro presentation on at least 200 flights between the United States, which no doubt serves as a powerful marketing tool to entice U.S. tourists aboard these Iberia flights to visit the Foundation's museum while visiting Spain." *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1174 (C.D. Cal. 2006).

state against whom suit is brought be the foreign state that took the property in violation of international law"). This Court denied Defendants' petition for certiorari on this issue. *See Kingdom of Spain v. Estate of Claude Cassirer*, 564 U.S. 1037 (2011); 2011 WL 2135028 (Brief of the United States as Amicus Curiae in support of the Cassirers).

2010–2013—Litigation Over Statute of Limitations

On remand after FSIA jurisdiction was established, the district court granted TBC's motion to dismiss because the case had been brought after expiration of California's three-year statute of limitations for replevin actions.[5] The court held that California's newly enacted six-year limitations period for "an action for the specific recovery of a work of fine art brought against a museum, gallery, auctioneer, or dealer," was an unconstitutional infringement of U.S. foreign policy.

On appeal of this decision in 2013, the Ninth Circuit reversed and rejected TBC's arguments, holding that California's six-year limitations period was not preempted by U.S. foreign policy, and did not violate TBC's First Amendment rights. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 737 F.3d 613, 621 (9th Cir. 2013) ("*Cassirer II*").

---

[5] Also at that time, the parties stipulated to dismiss the Kingdom of Spain as a defendant with the understanding that TBC would not contest its status as an "agency or instrumentality" of Spain under the FSIA. *Id.* at 1163–64.

2015–2017—Litigation over Choice of Law and Substantive Rulings

In June 2015, on cross-motions for summary judgment, the district court awarded ownership of the Painting to TBC and dismissed the Cassirers' claims. Pet. App. D at 20; *Cassirer v. Thyssen-Bornemisza Collection Found.*, 153 F. Supp. 3d 1148, 1168 (C.D. Cal. 2015). The court first addressed choice of law. In applying federal common law choice of law principles (as Ninth Circuit precedent required), it found that Spanish substantive law applied. Pet. App. D at 7; 153 F. Supp. 3d at 1155. The court then upheld TBC's defense under Spanish substantive law that TBC had acquired lawful ownership of the Painting by adverse possession (or "acquisitive prescription") for a period of six years. Pet. App. D. at 11; 153 F. Supp. 3d at 1160.

The district court alternatively considered California's choice of law standard. Pet. App. D at 7; 153 F. Supp. 3d at 1155. That standard requires that the court "carefully evaluates and compares the nature and strength of the interest of each jurisdiction in 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." Pet. App. D at 7; 153 F. Supp. 3d at 1156 (*quoting Kearny v. Salomon Smith Barney, Inc.*, 39 Cal. 4th 95, 107–08 (Cal. 2006)).

Petitioners argued that California's interests far outweighed those of Spain, including because California: follows the ancient common law rule that a thief can never transfer good title; rejects adverse possession for personal property; and has a statute providing that claims against museums holding

stolen art begins to run only upon "actual discovery," precluding the defense of acquisitive prescription. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 2:05-cv-03459, Dkt. 251 at 1–2, 18–20, 36. In addition, California's choice of law framework requires consideration of "all" interests, including those of United States law and diplomatic agreements such as the Washington Principles and Terezin Declaration, which seek to resolve looted property disputes based on their merits and are inconsistent with Spain's general acquisitive prescription rule when applied to the special case of Nazi looted art. *Id.* at 16, 30, 45–48.[6]

---

[6] The sources of U.S. and international law and policy favoring return of property looted by the German Nazi regime to its rightful owners, and calling for owners' claims to be resolved on their merits, included: (1) The HEAR Act, described herein at 15; (2) U.S. Military Law 52, described herein at 3; (3) the European Convention on Human Rights, Protocol 1, Article 1, which precludes an interpretation of Spanish law that vests title in TBC after six years of bad faith possession; (4) April 13, 1949 Letter from Jack B. Tate, Acting Legal Advisor, Department of State, stating U.S. government policy "to undo the forced transfers and restitute identifiable property to the victims of Nazi persecution wrongfully deprived of such property" and "with respect to claims asserted in the United States for restitution of such property, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials," quoted in *Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 210 F.2d 375, 376 (2d Cir. 1954); (5) Terezin Declaration on Holocaust Era Assets and Related Issues, U.S. DEP'T OF STATE (June 30, 2009) ("Terezin Declaration"), https://www.state.gov/prague-holocaust-era-assets-conference-terezin-declaration/, and Washington Conference Principles on

The district court found, however, that Spain's interest "would be substantially more impaired." Pet. App. D at 9; 153 F. Supp. 3d at 1158. It cited Spain's "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 title and ownership of that property are certain." Pet. App. D at 10; *id.* at 1159.

Since it was undisputed that TBC possessed the Painting for six years before Claude Cassirer made a claim, the court granted summary judgment

---

Nazi-Confiscated Art ("Washington Principles"), U.S. DEP'T OF STATE (Dec. 3, 1998), https://www.state.gov/washington-conference-principles-on-nazi-confiscated-art/, which comprise federal policies that charge participating countries (including the United States and Spain) with the responsibility of ensuring that Nations remedy—not perpetuate—the injustices of the Nazi regime, including by protecting victims from wrongful property dispossession. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 754 F.3d 712, 721 (9th Cir. 2014) (describing the Washington Principles and Terezin Declaration as federal policy); (6) the Parliamentary Assembly of the Council of Europe, Resolution 1205 of November 5, 1999, calling for the restitution of looted Jewish cultural property; (7) the Vilnius Forum on Holocaust Era Looted Cultural Assets, Declaration of October 5, 2000, asking "all governments to undertake every reasonable effort to achieve the restitution of cultural assets during the Holocaust era to the original owners or their heirs"; and (8) the European Parliament Resolution of December 2003, calling on Member states, including Spain, to "be mindful that the return of art objects looted as part of a crime against humanity to rightful claimants is a matter of general interest for the purposes of Article1 of Protocol 1 to the European Convention of Human Rights."

awarding possession to TBC. Pet. App. D at 12, 19; *id.* at 1160, 1168.

The Cassirers appealed once again to the Ninth Circuit. As to choice of law, they argued that California law, not federal common law, should apply. They further argued that proper application of California choice of law rules would lead to application of California substantive law, which would dictate return of the Painting. Alternatively, Petitioners argued that proper application of the Ninth Circuit's federal common law test likewise required application of California substantive law.

The Ninth Circuit decided the case, however, without undertaking a choice of law analysis under California law, despite recognizing that California substantive law would require return of the Painting:

> Under California law, thieves cannot pass good title to anyone, including a good faith purchaser. *Crocker Nat'l Bank v. Byrne & McDonnell*, 178 Cal. 329, 332, 173 P. 752 (1918). This is also the general rule at common law. *See Kingdom of Spain*, 616 F.3d at 1030, n.14 (quoting Marilyn E. Phelan, *Scope of Due Diligence Investigation in Obtaining Title to Valuable Artwork*, 23 SEATTLE U. L. REV. 631, 633–34 (2000)) ("One who purchases, no matter how innocently, from a thief, or all subsequent purchasers from a thief, acquires no title in the property. Title always remains with the true owner."). This notion traces its lineage to Roman law (*nemo dat quod non habet*, meaning "no one gives what he does not have").

> But the application of our choice of law jurisprudence requires that we not apply such familiar rules, under the circumstances of this case. As we shall see, Spain's property laws will determine whether the Painting has passed to TBC via acquisitive prescription.

Pet. App. C at 18–19, *Cassirer III*, 862 F.3d at 960–61 (footnote omitted).

When the Ninth Circuit went on to address choice of law, its entire discussion was comprised of the following two sentences:

> This Court has held 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 (Second) of Conflict of Laws." *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991) (citations omitted).

Pet. App. C at 19; *Cassirer III*, 862 F.3d at 961.

The Ninth Circuit then applied its self-created federal common law approach to the choice of law question that is at issue in this appeal. It held that Spanish substantive law applied. In doing so, the court placed heavy emphasis on § 246 of the Second Restatement of Conflict of Laws, which "indicates that Spain has the 'dominant interest' in determining whether the Painting was transferred to TBC via acquisitive prescription because the Painting was bought in Spain and has remained in Spain." Pet. App. C at 25; *Cassirer III*, 862 F.3d at 964.

Ultimately, the Ninth Circuit reversed the award of summary judgment to TBC because it found the district court had incorrectly interpreted and applied Spanish law. It ruled that the Cassirers' evidence had created a genuine issue of material fact as to whether TBC was an "encubridor"—roughly, an accessory after the fact to the Nazis' theft of the Painting. Pet. App. C at 61; *Cassirer III*, 862 F.3d at 981.

Under Spanish law, if TBC (or the Baron) had "actual knowledge" (which can be satisfied by willful blindness) that the Painting was stolen, they would be an "encubridor," and the holding period required for acquisitive prescription would be twenty-six years, not six. Pet. App. C at 30; *Cassirer III*, 862 F.3d at 966. That would defeat TBC's claim of title to the Painting, since it had held it for far less than twenty-six years prior to the Cassirers' claim. *Id.*

The Ninth Circuit accordingly remanded the case for trial on whether the Baron and TBC were an encubridor. Pet. App. C at 61; *Cassirer III*, 862 F.3d at 981. TBC again sought certiorari review, which this Court denied. *Thyssen-Bornemisza Collection Found. v. Cassirer*, 138 S. Ct. 1992 (2018).

2015–2017—Application of HEAR Act

Despite the Ninth Circuit's 2013 decision requiring application of California's six-year limitations period for claims against museums by the rightful owners of stolen art, TBC continued to argue that the statute violated its due process rights.

All statute of limitations issues were finally resolved, however, when Congress enacted the Holocaust Expropriated Art Recovery Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524 (2016) (the

"HEAR Act"). The HEAR Act established a national six-year limitations period from the date of the plaintiff's "actual discovery" for claims seeking recovery of Nazi-looted artworks. *Id.* § 5(a). The Act expressly applied to any case "pending in any court on the date of enactment." *Id.* § 5(d)(1). As part of its *Cassirer III* decision, the Ninth Circuit applied the HEAR Act to hold that this action was timely filed. Pet. App. C at 16–17; 862 F.3d at 959–60.

In addition, the HEAR Act expressly decreed that claims for Nazi looted artworks may be pursued "Notwithstanding . . . any defense at law relating to the passage of time." HEAR Act, § 5(a). Based on this provision, Petitioners argued that the literal language of the HEAR Act foreclosed TBC's prescription defense altogether, because acquisitive prescription is a defense "relating to the passage of time." Pet. App. C at 26; *Cassirer III*, 862 F.3d at 964. The Ninth Circuit found, however, that the Act "does not alter the choice of law analysis." Pet. App. C at 26; *Cassirer III*, 862 F.3d at 964.

2018–2019—Trial on Whether TBC and the Baron Were Encubridores Under Spanish Law

In December 2018, the district court finally held a one-day bench trial, limited to the question whether the Baron or TBC were a "encubridor" under Spanish law.

On April 30, 2019, the district court issued findings of fact and conclusions of law. Pet. App. B. It found that the Baron had not purchased the Painting in good faith and therefore did not pass good title to TBC under the laws of Switzerland, where the Baron resided, because he "had actual and concrete

reasons for suspicion" that the Painting was stolen property, and took no steps to determine its true provenance, even though he "would have recognized the suspicious circumstances."[7] Pet. App. B at 21–25. Yet the Court concluded that these facts did not constitute "actual knowledge" that the Painting was stolen under the Court's interpretation of Spanish law. Pet. App. B at 29.

Similarly, TBC had all of the same knowledge and reasons to suspect the Painting was stolen (and more), but the district court concluded TBC's failure to investigate "may have been irresponsible," but "it certainly was not criminal."[8] *Id.*

---

[7] The Baron purchased the Painting notwithstanding that no information was provided about its provenance between 1899 and 1976, including the entire Nazi era from 1933 to 1945. Jt. App. 90a. Nor was there any explanation of how the Painting came to leave France (where it was created) or Germany (as the Cassirer Gallery's partial label on the verso showed it had been at the family's renowned art gallery in Berlin). Jt. App. 95a. Further, the Cassirer Gallery is listed by TBC in its publications concerning the provenances of at least 20 other paintings in its collection, so the gallery and its labels were clearly known to the Baron and TBC's curators. Jt. App. 104a.

[8] When Spain and TBC purchased Baron's collection, they investigated the Baron's title to several paintings, but not the Pissarro. Spain "conducted no investigation of the Painting's provenance or title" because "the Baron had acquired the Painting prior to 1980." Pet. App. B at 11. "The Kingdom of Spain and its counsel were aware, however, that if the Baron had acquired any of artworks (including the Painting) in "bad faith," or, in other words, if he "knew or should have known of the lacking right of the transferor," ownership could not have been acquired by him. *Cassirer v. Thyssen-Bornemisza Collection Found.*, No. 2:05-cv-03459, Dkt. 458-11 at 3. In such a case, "[t]he rightful owner keeps his rights at all times to claim recovery of the object." *Id.* The Kingdom of Spain presumed the

Accordingly, the district court dismissed the case and ordered that TBC could keep the stolen Painting. Pet. App. B at 20–30, 34.[9]

On the case's fourth trip to the Ninth Circuit, the judgment was affirmed, essentially for the reasons stated by the district court. Pet. App. A; *Cassirer IV*, 824 F. App'x 452 (9th Cir. 2020). Petitioners timely filed a Petition for Panel Rehearing or Rehearing En Banc, which raised the choice of law issues. It was denied on December 7, 2020. Pet. App. E.

Petitioners filed their Petition for Writ of Certiorari on May 6, 2021, and it was granted on September 30, 2021.

SUMMARY OF ARGUMENT

Petitioners' lawsuit asserts state law claims, brought in accordance with the FSIA. At trial, the district court applied binding Ninth Circuit precedent in which the court of appeals had held that in FSIA cases "federal common law" must be used to determine the source of substantive law to adjudicate state law claims. Here, application of the Ninth Circuit's self-created FSIA choice of law rule resulted in the application of Spanish law, which was the dispositive factor in the district court's judgment in favor of Respondent, an instrumentality of the Kingdom of Spain.

Baron acted in good faith. Pet. App. B. at 11 (Spain's attorney, Fernando J. Perez de la Sota, testified: "we simply had no reason to believe otherwise."). However, as the district court found, that assumption was incorrect; the Baron did not possess the Painting in good faith. Pet. App. B at 21–25.

[9] The trial and appellate judgments under review here applied the Ninth Circuit's 2017 choice of law decision.

The Ninth Circuit's FSIA choice of law rule is contrary to the plain text of the FSIA, which provides: "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. Its rule is also incompatible with this Court's decisions concerning federal common law, with the Rules of Decision Act, and with the ordinary rules federal courts employ when making choice of law determinations in cases asserting state law causes of action.

Having been rejected by every other federal court of appeals to weigh in because it is clearly wrong, the Ninth Circuit's FSIA choice of law rule should be overturned by this Court, the judgment vacated, and the case remanded for further proceedings.

ARGUMENT

I. The Language of Section 1606 of the FSIA Manifests Congress's Intent to Prescribe State Law Choice of Law Rules in FSIA Cases Asserting State Law Claims

When interpreting a federal statute, this Court has made clear that its responsibility is to discern Congress's intent, and then honor that intent by employing the best reading of the statute consistent with it. *See*, *e.g.*, *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

As with any statute, the Court begins its inquiries concerning the FSIA with the text. *See Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) ("We begin with [the FSIA's] text"); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197

(2007) ("We begin, as always, with the text of the statute.").

Section 1606 of the FSIA provides: "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances . . . ." This language is most logically read as manifesting Congress's intent that state law should be the source for deciding choice of law in FSIA cases.

A lawsuit identical to Petitioners' except asserted against, say, a private Spanish art dealer, would be heard either in a state court, or in federal court on the basis of diversity jurisdiction. In the former circumstance, state law would supply the choice of law principles. In the latter, state choice of law principles also would apply. *See Klaxon Co. v. Stentor Elec. Mfg. Co.,* 313 U.S. 487 (1941). Thus, with respect to choice of law, the only way the foreign state can be "liable in the same manner and to the same extent as a private individual under like circumstances" is to use the law of the forum state as the source of choice of law principles.

This reading of the FSIA is supported by the fact that the Second, Fifth, Sixth and D.C. Circuits agree that the law of the forum state governs the choice of law analysis for state law claims brought under the FSIA. As the Second Circuit has explained:

> [W]e must infer from the statutory language a choice of law analysis that best effectuates Congress' overall intent. Of particular significance in this regard is language providing that '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 . . . . The goal of applying identical substantive laws to foreign states and private individuals, however, cannot be achieved unless a federal court utilizes the same choice of law analysis in FSIA cases as it would apply if all the parties to the action were private.

Barkanic v. General Admin. of Civil Aviation of the People's Republic of China, 923 F.2d 957, 959–60 (2d Cir. 1991); *id.* at 961 ("we conclude that the FSIA requires courts to apply the choice of law rules of the forum state . . ."); *see also Northrop Grumman Ship Sys., Inc. v. Ministry of Def. of the Republic of Venezuela*, 575 F.3d 491, 498 (5th Cir. 2009) ("Because this case arises under the FSIA, we apply the choice-of-law rules of the forum state."); *O'Bryan v. Holy See,* 556 F.3d 361, 381 n.8 (6th Cir. 2009) ("in FSIA cases, we use the forum state's choice of law rules to resolve 'all issues,' except jurisdictional ones" (citations omitted)); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) ("We thus agree with the Second Circuit that applying the forum state's choice-of-law principles, rather than constructing a set of federal common law principles, better effectuates Congress' intent that foreign states be 'liable in the same manner and to the same extent as a private individual' in FSIA actions" (quoting 28 U.S.C. § 1606)).

Commentators too recognize that the FSIA's "key language with respect to choice of law issues is its provision [Section 1606] that 'the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.'"

ERNESTO J. SANCHEZ, THE FOREIGN SOVEREIGN IMMUNITIES ACT DESKBOOK, AMERICAN BAR ASSOCIATION 300 (2013); *id*. ("The type of suit between private parties most analogous to an FSIA case . . . is one brought under federal courts' diversity jurisdiction").

II. Any Ambiguity Should Be Resolved in Favor of Applying State Choice of Law

Although Petitioners believe that Section 1606 is clear and manifests Congress's intent that state law is the proper source for choice of law to apply in FSIA cases, there are additional compelling reasons to conclude that was Congress's intent.

A. Congress Is Presumed to Legislate Aware of This Court's Decisions, Including Its Limitations on the Creation of Federal Common Law

As with all federal statutes, Congress is presumed to have drafted and enacted the FSIA having in mind this Court's decisions. *See*, *e.g.*, *United States v. Wells*, 519 U.S. 482, 495 (1997) ("[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents"); *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 648 (2010) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.").

This Court made clear for decades prior to the FSIA's enactment that instances where there is need and authority for federal common law are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Those instances generally fall into two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests,"

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964); and those in which Congress has given the courts the power to develop substantive law, *Wheeldin,* 373 U.S. at 652. *See also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *Rodriguez v. Federal Deposit Ins. Corp*, 140 S. Ct. 713, 717 (2018) ("there is 'no federal general common law,'" and "common lawmaking must be 'necessary to protect uniquely federal interests.'").[10]

When the Ninth Circuit first created the FSIA choice of law rule that it ultimately employed in this case, the Ninth Circuit did not even acknowledge this important line of cases. *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782–83 (9th Cir. 1991). Instead, the Ninth Circuit turned this Court's approach to federal common law on its head, explaining: "[i]n the absence of specific statutory guidance, we prefer to resort to the federal common law for a choice-of-law rule." *Harris*, 820 F.2d at 1003. Claiming "this avenue is not closed to us," the Ninth Circuit cited a few court of appeals decisions—but, notably, *not a single decision by this Court* concerning federal common law. *Id.*

Had the Ninth Circuit considered this Court's decisions concerning federal common law, it would have recognized that "[t]he vesting of jurisdiction in

---

[10] Like this Court, Congress recognizes that even "[c]ontroversies directly affecting the operations of federal programs, although governed by federal law, do not inevitably require resort to uniform federal rules." *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727–28 (1979); *see also Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 691–92 (2006).

the federal courts does not in and of itself give rise to authority to formulate federal common law," *Texas Industries*, 451 U.S. at 640–41, and that FSIA choice of law does not fit within any of the "few and restricted" domains of federal common law.[11]

Although the Ninth Circuit ignored this Court's precedents limiting the creation and use of federal common law, Congress is presumed to have legislated with these constraints in mind. Applying that presumption to the FSIA casts serious doubt on the Ninth Circuit's FSIA choice of law rule. *See* THE FOREIGN SOVEREIGN IMMUNITIES ACT DESKBOOK at 301 (noting this Court's admonition to apply federal common law in "only a 'few and restricted' instances," and "the flaw in the Ninth Circuit's approach").[12]

---

[11] "Federal statutes may explicitly or implicitly authorize the creation of federal common law," Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 822 (2008), but FSIA does neither. Moreover, the Ninth Circuit's FSIA choice of law rule does not fit within any recognizable body of federal common law of procedure. *See id*. at 822–32 (describing doctrines illustrating procedural common law). The Ninth Circuit appears to have disregarded the important principle that "Congress can confer common lawmaking power on federal judges, but federal judges cannot confer such power on themselves." *Id*. at 837.

[12] The Ninth Circuit's FSIA choice of law rule also runs counter to the FSIA's "overall structure," *Republic of Austria v. Altmann*, 541 U.S. 677, 698 (2004), designed, in significant part, to narrow federal common law by displacing aspects of it with a statute. By seeking to create new federal common law and extend it into an area where there is already "readymade" law, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 740 (1979), the Ninth Circuit's rule misreads FSIA and "bypass[es] its design." *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 715 (2021).

B. Congress Enacted the FSIA Subject to the Rules of Decision Act

Originally part of the Judiciary Act of 1789, the Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

The Act is an "explicit command given to [federal courts] by Congress to apply State law in cases purporting to enforce the law of a State," *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 102 (1945), and "appears to be a severe restriction on lawmaking by federal courts." Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 28 (1985).

Given the "explicit command" of the Rules of Decision Act, nothing in the language of the FSIA indicates that Congress intended federal courts to develop a new regime of federal common law as the source for choice of law in FSIA cases where the underlying substantive claims arose under state law—or in the words of *Guaranty Trust*, where the claims "purport[] to enforce the law of a State." The Ninth Circuit, however, failed to even consider the Rules of Decision Act when it adopted its FSIA choice of law rule.

C. The Absence of Developed, Relevant Federal Common Law Further Reinforces That Congress Intended State Law to Apply

When the Ninth Circuit first adopted its FSIA choice of law rule in *Harris*, 820 F.2d 1000, there was no applicable federal common law as to choice of law in existence. The court, therefore, set out to create it, seizing on the Restatement (Second) of Conflict of Laws as a "starting point for applying federal common law in this area," *id*. at 1003, without mentioning or citing any decision by this Court.

Moreover, the Ninth Circuit initially adopted the Restatement as its version of federal common law without considering whether the Restatement, which had been published 16 years earlier, in 1971, was an appropriate source of legal principles for FSIA cases. Since then, the court of appeals has neither elaborated on the content of its FSIA choice of law rule, nor considered the fitness of the 50-year old Restatement for contemporary FSIA disputes in a vastly changed world. *See also Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part) ("modern Restatements . . . are of questionable value, and must be used with caution. The object of the original Restatements was 'to present an orderly statement of the general common law.' Restatement of Conflict of Laws, Introduction, p. viii (1934). Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.").

Even apart from those omissions, the fact that the court of appeals had to fashion an entirely new

common law rule should have been a warning it was headed in the wrong direction. Indeed, in *Harris* the court was not even sure what the FSIA requires, explaining: "We do not disagree with the district court's choice [to apply state law], we simply are not persuaded that the FSIA requires a court to choose as did the district court." *Harris*, 820 F.2d at 1003. Nevertheless, based on its "prefer[ence] to resort to the federal common law for a choice-of-law rule," the Ninth Circuit adopted the FSIA choice of law rule before the Court today. *Id.* As shown in Sections II.A. and D., however, federal common law is not a matter to be addressed based on a federal court's mere "preference" when constitutional, statutory, and institutional constraints all counsel against it.

Illustrating the pitfalls of mandating the application of undeveloped federal common law, the Ninth Circuit's venture in common lawmaking for FSIA choice of law has gone badly. *Harris* and *Schoenberg* were both wrongful death actions arising from airplane crashes, which did little to flesh out the contours of "federal common law" for choice of law in FSIA case. *See Harris*, 820 F.3d at 1003–04; *Schoenberg*, 930 F.2d at 782–83. Here, the Ninth Circuit's FSIA choice of law rule led the district court to engage in a free-wheeling interpretation of various Restatement elements, with highly questionable results.[13]

---

[13] According to the Ninth Circuit: "In addition to considering any specific jurisdiction-selecting rule, a court is supposed to apply the Section 6 factors to decide which state has the most significant relationship to the case. These factors are: (a) the needs of the interstate and international systems, (b) the

For example, the lower courts gave virtually no weight to: California's laws and policies protecting its citizens' property rights with respect to stolen property in general and stolen works of fine art in particular; or U.S. law and policy and international agreements relating specifically to Nazi looted art that are inconsistent with Spain's broadly applicable adverse possession rules. At the same time, the courts gave undue consideration to Spain's financial investment in the Thyssen-Bornemisza Museum. The courts' related observation that the Painting had been held in Spain for more than 20 years overlooked that for 14 of those years, the Cassirers (whose family title in the Painting dated back to 1900) were actively seeking its return, as well as the 25 years that the Painting—which was tantamount to contraband under U.S. Military law—had spent in California and the United States. Pet. App. D at 6; *see also* THE FOREIGN SOVEREIGN IMMUNITIES ACT DESKBOOK at 303 (questioning Ninth Circuit's reliance on Section 6 of the Restatement (Second) of Conflict of Laws as "the appropriate federal common law choice of law regime.").

As this Court has long recognized, absent strong countervailing considerations, "the prudent course" is to "adopt the readymade body of state law," not to venture into judicial lawmaking via new rules of federal common law in uncharted areas. *See United*

---

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." *Cassirer III*, 862 F.3d at 962.

States v. Kimbell Foods, Inc., 440 U.S. 715, 740 (1979). The Ninth Circuit erred in eschewing that "prudent course" for choice of law analyses in FSIA cases asserting state law claims.

D. Courts Should Not Presume That Congress Intended to Displace State Choice of Law Rules

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), the Court repudiated the "oft-challenged doctrine of *Swift v. Tyson*," and made clear "[t]here is no federal general common law."

Three years later, in *Klaxon,* 313 U.S. 487 (1941), the Court held that the *Erie* principle "extends to the field of conflict of laws," explaining "[a]ny other ruling would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based." *Id.* at 496. As for "[w]hatever lack of uniformity this may produce between federal courts in different states," the Court observed that is "attributable to our federal system, which leaves to a state . . . the right to pursue local policies diverging from those of its neighbors. It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Id.*

Four years later, in *Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99 (1945), the Court explained that *Erie*'s intent "was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same . . . as it would be if tried in a State court. The nub of the policy that underlies *Erie R.R. Co. v. Tompkins* is that for the same transaction

the accident of suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result." *Id.* at 109. With diversity jurisdiction, "Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law." *Id.* at 112; *see also Hanna v. Plumer*, 380 U.S. 460, 467 (1965) ("The *Erie* rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in federal court.").

Following these cases, but more than a decade before the FSIA was enacted, the Court observed that, despite the power of Congress to enact "a federal conflict-of-laws rule independent of the States' development of such rules, we should not . . . assume that it has it has done so." *Richards v. United States*, 369 U.S. 1, 13 (1962). "Congress has been specific in those instances where it intended the federal courts to depart completely from state law." *Id.* Here, as in *Richards*, which concerned the Federal Tort Claims Act, "there is nothing" in the text, or "in the legislative history that even remotely supports the argument that Congress did not intend state conflict rules to apply . . . ." *Id.* at 14. Likewise in the FSIA, because Congress knows how to be "specific" when it intends "the federal courts to depart completely from state law," *id.* at 13, the absence of such specific direction means that state law should be applied on choice of law questions.

E. Federalism and the Doctrine of Constitutional Avoidance Further Undermine the Ninth Circuit's Approach

The Ninth Circuit's FSIA choice of law rule raises additional questions which cast further doubt on the notion that Congress did not intend for state law to provide the source of law for choice of law in FSIA cases. For example, under the Ninth Circuit's view, should federal common law also supply choice of law for cases proceeding in state courts? If the Ninth Circuit was purporting to abide by congressional intent, what is that intent? FSIA governs both federal and state cases against foreign sovereigns. *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (FSIA's "preamble states that 'henceforth' both federal and state courts should decide claims of sovereign immunity in conformity with the Act's principles. 28 U.S.C. §1602."). Is it the Ninth Circuit's view that Congress intended one choice of law rule for state cases, and another for federal cases? One would expect to find evidence of such an unusual rule had that been Congress's directive.

Requiring state courts to apply federal common law to determine choice of law in FSIA cases would raise thorny legal questions, including a collision of federalism principles with the proposition that "States can no more override" at least certain "judicial rules validly fashioned than they can override Acts of Congress." *Wilburn Boat Co. v. Fireman's Fund Ins.*

Co., 348 U.S. 310, 314 (1955).[14] In this context, it is particularly appropriate to use the doctrine of constitutional avoidance as "an interpretive tool", *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009), "for choosing between competing plausible interpretations of a provision," *McFadden v. United States*, 576 U.S. 186, 197 (2015) (citation omitted), to avoid interpretations of statues that might render them invalid. Here, the interpretation of the FSIA adopted by the Second, Fifth, Sixth and D.C. Circuits sidesteps the complications invited by the Ninth Circuit's rule.

III. Respondent's Defense of the Ninth Circuit's FSIA Choice of Law Rule Is Unavailing

Because the Ninth Circuit adopted federal common law as its choice of law rule in FSIA cases without meaningfully engaging the text of Section 1606,[15] Respondent is left to offer its own justifications. *See* Brief In Opposition at 24–26. But Respondent's explanations are not in the least convincing.

In opposing review by this Court, Respondent defended the use of federal common law by claiming there are "numerous statements in the FSIA" requiring that a sovereign be treated differently than

---

[14] "According to standard theory, federal common law is a species of federal law, which state courts must apply by virtue of the command of the Supremacy Clause." Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 586 n.8 (2006).

[15] *See Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1003–04 (9th Cir. 1987); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782–83 (9th Cir. 1991).

a private defendant. Brief in Opposition at 24. While "numerous" may be an overstatement (there are a few), the existence of those examples misses the point of Section 1606. That provision must be read in the context of the entire statute, and consistent with the canon of statutory interpretation governing the relationship of specific and more general provisions. *See*, *e.g.*, *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.").

Here, Section 1606 instructs that sovereigns shall be treated like private defendants in like circumstances, except where the FSIA provides otherwise. For instance, sovereigns are not subject to jury trials notwithstanding Section 1606, because the FSIA expressly provides there shall be no jury trials. 28 U.S.C. § 1330. Similarly, Section 1606 itself contains a proviso that limits punitive damages against foreign states. However, there is no comparable, more specific provision that would alter Section 1606's general application to choice of law.

Respondent next argued in opposing the petition that Section 1606 cannot mean what it says because one of the FSIA's "primary purposes" was "to address the need for national uniform standards in actions involving sovereign entities." Brief in Opposition at 25 (*citing First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba,* 462 U.S. 611, 622 n. 11 (1983) ("*Bancec*")). However, Congress's primary

concern with respect to uniformity in the FSIA is to ensure uniform application of exceptions to immunity. *Bank of New York v. Yugoimport*, 745 F.3d 599, 609 n.8 (2d Cir. 2014) (The FSIA "provides foreign states and their instrumentalities access to federal courts only to ensure uniform application of the doctrine of sovereign immunity."). But once a plaintiff shows that an exception is applicable, "where state law provides a rule of liability governing private individuals, the FSIA requires application of that rule to foreign states in like circumstances." *Bancec*, 462 U.S. at 622 n.11.

Congress undoubtedly sought some measure of uniformity with the FSIA, but it explicitly rejected the idea of imposing uniformity at the expense of all other considerations. On the contrary, the FSIA permits the application of State substantive law to sovereign defendants, despite the fact that the substantive laws of the fifty States differ far more from each other than do the States' choice of law rules. Under Respondent's interpretation, Congress should have preempted the States' laws of torts and contracts to apply instead some "uniform" federal substantive common law to govern such claims. Of course, Congress did not do so.[16]

---

[16] Respondent's extolling of "uniformity" to justify the Ninth Circuit's foray into judicial lawmaking resembles the pervasive pre-*Erie* mindset "stimulated by the attractive vision of a uniform body of federal law." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 103 (1945); *see also Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 75 (1938) ("In attempting to promote uniformity of law throughout the United States, the doctrine [of *Swift v. Tyson*] had prevented uniformity in the administration of the law of the state.").

Moreover, as discussed above, Respondent is mistaken in concluding that use of "federal common law" with respect to choice of law for the FSIA would create "uniformity." There is simply no already-established federal common law for deciding choice of law in FSIA cases that can be readily and consistently deployed by all federal courts. Instead, that common law would itself be subject to development, and therefore to disagreement, among the lower courts. That is hardly a recipe for uniformity—and there is no basis for believing it is what Congress had in mind for the FSIA.

Respondent's third argument against a plain reading of Section 1606 seizes on the last three words of the provision: "under like circumstances." Specifically, Respondent contends that while "like circumstances" may exist when the commercial activity exception applies, because a private party cannot engage in "expropriation" there can never be "like circumstances" under which a private party can be compared to a sovereign defendant sued under the expropriation exception. Brief in Opposition at 26–27. But this argument proves too much. Respondent is claiming that Congress intended Section 1606 to apply to one category of FSIA claims (those based on the commercial activity exception), but not apply to an entire other category (those based on the expropriation exception). There is not a scintilla of evidence in the text of Section 1606, or elsewhere in the FSIA, to support Respondent's reading of the statute. One would "expect more than simple statutory silence" if Congress intended such an inconsistent approach to apply to the different exceptions to immunity which Congress established in the parallel subsections of Section 1605(a) of the

FSIA. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 984 (2017).[17]

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

CONCLUSION

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

---

[17] Respondent's interpretation also ignores that the expropriation exception in Section 1605(a)(3) includes an express commercial nexus requirement in order for it to apply to foreign states and instrumentalities. Here, the lower courts found TBC "engages in commercial activities in the United States" including "some that encourage Americans to visit the museum where the Pissarro is featured, and some that relate to the painting itself." *Cassirer I*, 616 F.3d at 1032, 1033–34.

November 2021

Respectfully submitted,

SCOTT E. GANT
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

LAURA W. BRILL
NICHOLAS DAUM
Kendall Brill & Kelly LLP
10100 Santa Monica Blvd.
Los Angeles, CA 90067
(310) 556-2700

DAVID BOIES
Counsel of Record
BOIES SCHILLER FLEXNER LLP
333 Main Street
Armonk, NY 10504
(914) 749-8200

DAVID A. BARRETT
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, NY 10001
(212) 446-2300

STEPHEN N. ZACK
ANDREW S. BRENNER
ROSSANA BAEZA
BOIES SCHILLER FLEXNER LLP
100 SE Second Street
Suite 2800
Miami, FL 33131
(305) 539-8400

Attorneys for Petitioners