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

BRIEF OF *AMICI CURIAE* PROFESSORS OF LAW IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of law (listed in Appendix A) with expertise in the Foreign Sovereign Immunities Act, civil litigation, federal common law, and the federal courts. They have a professional and academic interest in the proper treatment of these issues by U.S. courts.

SUMMARY OF THE ARGUMENT

In the Foreign Sovereign Immunities Act (FSIA), Congress codified when foreign sovereign immunity does not apply in U.S. courts. 28 U.S.C. §§ 1602, *et seq*. When a case proceeds under the FSIA, foreign states and their instrumentalities "shall be liable . . . to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606. In this case and others, the Ninth Circuit has departed from this simple command.

To treat foreign-sovereign defendants the same as private individuals (including foreign nationals), federal courts must apply the same law to foreign-sovereign defendants and private individuals. Sometimes that law is state law. As this Court stated in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983): "[W]here state law provides a rule of liability

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."

To determine which state (or other nonfederal) law applies, this Court held that a federal court sitting in diversity must follow the forum state's choice of law approach. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). So, for example, had this same case been filed against a *private* Spanish museum, a federal court in California would follow California's choice of law rules. To effectuate Congress's command in the FSIA, therefore, federal courts in FSIA cases should apply the choice of law rules of the forum state.

The Ninth Circuit, however, deviated from Congress's direction and created a federal common-law rule for choice of law. This approach is wrong. It is inconsistent with the FSIA's command to assign liability to foreign-sovereign defendants to the same extent as private individuals in like circumstances. It is inconsistent with this Court's precedent on federal common law, and it is inconsistent with important structural values that inform this Court's decisions on choice of law.

ARGUMENT

I. The Foreign Sovereign Immunities Act Incorporates Forum-State Choice Of Law Rules.

The FSIA includes the straightforward instruction to assign liability symmetrically to foreign sovereign defendants and private individuals. When the determination of liability of a private individual

requires a federal court to look to state choice of law rules under *Klaxon*, then a federal court should do the same for a foreign-sovereign defendant in like circumstances. This approach is consistent with the text of the FSIA, and nothing about potential foreign-affairs interests changes the result. The Ninth Circuit, however, applies a federal common-law rule that is derived from the Restatement (Second) of Conflict of Laws (hereinafter "Restatement"). *See*, *e.g.*, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017); *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991).

The Ninth Circuit's rule is inconsistent with Congress's command in the FSIA that a foreign sovereign defendant is liable to the same extent as a private individual under like circumstances.

A. The Ninth Circuit's Approach Is Inconsistent With The Text Of The Statute.

The FSIA provides 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 touchstone of statutory interpretation is the text of the statute. *See, e.g.*, *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020); *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010) ("We begin with [FSIA's] text"). The plain meaning of Section 1606 is that the same law should apply to foreign-sovereign defendants as to private-individual defendants in like circumstances.

Both this Court and Congress have acknowledged that the language of Section 1606 addresses the choice

of the substantive law to be applied.[2] As this Court explained: "The language and history of the FSIA clearly establish that the Act was not intended to affect the substantive law determining the liability of a foreign state or instrumentality, or the attribution of liability among instrumentalities of a foreign state." *First Nat'l City Bank*, 462 U.S. at 620. The House Report accompanying the FSIA was similarly clear: "The bill is not intended to affect the substantive law of liability." H.R. REP. NO. 94–1487, at 12 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6610.

Indeed, Section 1606 must reach the substantive law to be applied, because applying different substantive law will frequently affect the extent of liability. Such application did so in this case, where the defendant's liability (or nonliability) was determined by the law chosen under the Restatement's approach rather than the law that would have been chosen under California's approach. *See Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 961 (9th Cir. 2017). And it could do so in many other cases filed in states that do not follow the Restatement. *See*, *e.g.*, Symeon C. Symeonides, *Choice of Law in the American Courts in 2019: Thirty-Third Annual Survey*, 68 AM. J. COMP. L. 235 (2020)

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[2] The other Courts of Appeals to address this question have reached the same result as well. *See*, *e.g.*, *Barkanic v. Gen. Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991); *Oveissi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009); *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 n.8 (6th Cir. 2009).

(collecting state choice of law approaches, many of which deviate from the Restatement).

The key question, then, is what is the "extent" of liability of a private individual under like circumstances? When a federal court hears a state-law claim in a case arising under diversity jurisdiction (including a claim by a U.S. citizen against a foreign citizen), this Court has made clear that the federal court should apply the choice of law rule of the forum state. *See Klaxon*, 313 U.S. at 496.[3] So had this lawsuit been filed against a private Spanish museum, there would be no doubt that the federal court would follow *Klaxon* and apply California choice of law rules.

Klaxon was the law at the time the FSIA was adopted, and it is the law today. Therefore, Congress's command that foreign states are liable to the same extent as private parties in like circumstances means that, in a case such as this one, the federal court in California should apply California's choice of law rules. The mere fact that the painting ended up in a collection managed by a *state-owned* foundation should not change the extent of liability when Congress has said otherwise.

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[3] The same result would obtain under many other bases of jurisdiction, *see*, *e.g.*, *Griffin v. McCoach*, 313 U.S. 498 (1941) (applying forum-state choice of law in a statutory interpleader case decided on the same day as *Klaxon*); *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 920 (9th Cir. 1999) (applying state choice of law in a case under the Warsaw Convention), but this brief discusses diversity-of-citizenship jurisdiction because it presents the most "like circumstances" to cases such as this one.

B. Any Potential Foreign Affairs Interests In This Case Do Not Change The Result.

Although cases arising under the FSIA may implicate the foreign relations of the United States, a mere mention of foreign relations should not be treated as an invitation to create federal common law. *See*, *e.g.*, Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1577–78 (1992). *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979) (suggesting that uniform federal common law is not justified by "generalized pleas for uniformity").

More specifically, this Court has made clear that the *Klaxon* rule gives no quarter to concerns of foreign affairs. In *Day & Zimmermann v. Challoner*, 423 U.S. 3 (1975) (per curiam), plaintiffs sued the manufacturer of a howitzer round for death and personal injury resulting from its premature explosion during U.S. military operations in Cambodia. The foreign-affairs concerns raised by a suit arising out of U.S. military operations in an overseas conflict are unambiguous. Yet, not only did this Court call for the application of the forum-state choice of law rule, but it did so in a short *per curiam* reversal. *Id*. "A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.* at 4. Notably, Congress adopted the FSIA one year after *Day & Zimmermann*, supporting the notion that the FSIA was adopted against this backdrop, with no

indication that it intended to depart from the *Klaxon* rule.

Importantly, this case does not involve the application of federal substantive law in the first instance. There is no contention in this case that any federal substantive law applies. The only question is the method (state or federal) by which the federal court should choose among nonfederal laws. Congress has answered this question: Because a federal court adjudicating a claim against a private individual under like circumstances would have followed forum-state choice of law, a federal court in a FSIA case should do the same.

It is for Congress and the President to determine how the foreign affairs interests raised by actions against foreign states should be addressed. *See*, *e.g.*, *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 146 (2014) ("Argentina and the United States urge us to consider the worrisome international-relations consequences of siding with the lower court. . . . These apprehensions are better directed to that branch of government with authority to amend the [Foreign Sovereign Immunities] Act."). If Congress had wanted federal courts exercising jurisdiction under the FSIA to apply a federal choice of law rule to determine the applicable law, Congress could have done so. Congress decided instead to rely on the rule announced in *Klaxon* and reaffirmed in *Day & Zimmerman* so that foreign states would be treated the same as private parties and the applicable law would not vary depending on whether the suit was brought in state or federal court.

II. The Ninth Circuit's Approach Is Inconsistent With This Court's Precedent On Federal Common Law.

The Ninth Circuit's rule is also inconsistent with this Court's precedent on when federal courts can appropriately apply federal common law.

As this Court recently reminded, "[j]udicial lawmaking in the form of federal common law plays a necessarily modest role under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States." *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713, 717 (2020). Federal common law in specialized areas survived *Erie*'s admonition that "[t]here is no federal general common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1936), "[b]ut before federal judges may claim a new area for common lawmaking, strict conditions must be satisfied." *Rodriguez*, 140 S. Ct. at 717. *See also United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Clearfield Tr. Co. v. United States*, 318 U.S. 363 (1943).

Among its virtues, *Klaxon*'s decision to follow forum-state choice of law rules maintains the modest role of federal common law and reserves regulatory authority to the states. Rather than asking federal judges to develop a federal choice of law regime, *Klaxon* tells federal judges to repair to the choice of law rules of the forum state.

Once it is decided that state law will provide the substantive law (as it was in this case), there is no uniquely federal interest in the choice of law. There may be a federal interest justifying the application of

uniform *federal* substantive law in the first instance. But in cases raising state law claims, there is no special federal interest in the choice among state laws that would justify federal judicial lawmaking.[4]

It is especially problematic for a federal court to make federal common law that displaces a congressional command calling for a contrary result. *See supra* Section I.A; *infra* Section III.B. *Cf. City of Milwaukee v. Ill. & Mich.*, 451 U.S. 304, 313–14 (1981) ("We have always recognized that federal common law is subject to the paramount authority of Congress. It is resorted to [i]n absence of an applicable Act of Congress, and because the Court is compelled to consider federal questions which cannot be answered from federal statutes alone. Federal common law is a necessary expedient . . . .") (internal quotation marks and citations omitted). Yet the Ninth Circuit did exactly that, adopting federal common law despite contrary direction from Congress.

[4] Again, the mere presence of foreign affairs interests does not require the application of federal common law. Even the Ninth Circuit's approach will result in federal courts applying state law in some cases. Moreover, as noted above, federal courts routinely apply state choice of law rules in cases that could be said to implicate foreign affairs. *See Day & Zimmermann*, 423 U.S. at 4.

III. The Ninth Circuit's Approach Undermines Important Structural Values.

Federalism, the separation of powers, and the twin aims of *Erie* further support the reliance on state choice of law rules in FSIA cases.

A. Federalism

Erie, announced that "[t]here is no federal general common law." 304 U.S. at 78. The Court's reasoning was deeply connected to federalism, explaining that the expansive role for federal law under *Swift v. Tyson,* 41 U.S. 1 (1842), was an "invasion of the authority of the state, and, to that extent, a denial of its independence." 304 U.S. at 79 (internal quotation marks omitted). *See also Boyle v. United Techs. Corp.*, 487 U.S. 500, 517 (1988) (Brennan, J., dissenting) ("*Erie* was deeply rooted in notions of federalism, and is most seriously implicated when, as here, federal judges displace the state law that would ordinarily govern with their own rules of federal common law.").

This federalism interest extends to issues of choice of law.[5] Choice of law rules are expressions of substantive policies. *See*, *e.g.*, Russell J. Weintraub, *The Erie Doctrine and State Conflict of Laws Rules*, 39 IND. L.J. 228, 242 (1964) ("[T]he choice-of-law rules of a state are important expressions of its domestic policy."); *see also Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Watson v. Emp. Liab. Assurance Corp.*,

[5] Indeed, in *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), this Court expressly looked to state law for the content of the federal common law of preclusion in diversity cases.

348 U.S. 66 (1954); *Alaska Packers Ass'n v. Indus. Accident Comm'n*, 294 U.S. 532 (1935). This Court recognized as much in its seminal decision on choice of law in federal court. In *Klaxon*, this Court explained that a federal court's application of forum-state choice of law rules is intimately connected with the state's ability to make policy via choice of law:

> Whatever lack of uniformity this may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, 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. Subject only to review by this Court on any federal question that may arise, Delaware is free to determine whether a given matter is to be governed by the law of the forum or some other law. This Court's views are not the decisive factor in determining the applicable conflicts rule. And the proper function of the Delaware federal court is to ascertain what the state law is, not what it ought to be.

313 U.S. at 496–97 (internal citations omitted).

The Ninth Circuit's federal common-law rule thwarts the local policies of forum states, which properly determine whether a case should be governed by their own law or the law of another jurisdiction.

B. Separation Of Powers

The Ninth Circuit's decision to make federal common law also implicates the separation of powers.

The limited role of federal common law is a corollary of the limited power of federal courts to make law. "Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts." *Atherton v. F.D.I.C.*, 519 U.S. 213, 218 (1997) (internal quotation marks omitted). This is not to say that federal courts should never make law, but only that their lawmaking should be limited to "few and restricted" topics. *See O'Melveny & Myers v. F.D.I.C*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963)).

The separation of powers questions implicated by federal common law are even more pressing when there is a federal statute on point. Indeed, given that "federal common law is 'subject to the paramount authority of Congress,'" *City of Milwaukee*, 451 U.S. at 313 (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)), federal common law *contradicting* a statutory command—as it does in this case—is a particularly troubling affront to the separation of powers. As this Court explained four decades ago, "Our commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *Id.* at 315 (internal quotation marks omitted).

C. The Twin Aims Of *Erie*

As this Court explained in *Hanna v. Plumer*, the decision in *Erie* furthers twin aims: "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Choice of law implicates forum shopping because if state and federal courts in the same state applied different choice of law rules, parties would have an incentive to shop for different substantive law. Likewise, choice of law implicates inequitable administration because if state and federal courts in the same state applied different choice of law rules, parties would be treated differently depending on whether they had access to a federal forum.

The twin aims of *Erie* are also implicated when federal courts apply different choice of law rules depending on the basis of federal jurisdiction, as the Ninth Circuit did in this case. If the choice of law rule (and therefore the substantive law) depended on the basis of federal jurisdiction, parties would have the incentive to "shop" among bases of jurisdiction. Plaintiffs might, for example, select among potential defendants depending on whether they would qualify as agencies or instrumentalities of foreign states. 28 U.S.C. § 1603(b). Defendants, too, might press arguments about their "agency or instrumentality" status in order to change the substantive law being applied. And, in cases like this one, fencers of stolen artworks would have an incentive to sell public collections to protect their ill-gotten gains. The ability to affect the choice of law in some but not all cases

would thus result in the forum shopping and inequitable administration that *Erie* sought to avoid.

To further the interests of federalism and separation of powers, and to avoid the evils of forum shopping and inequitable administration of law, this Court need only follow Congress's guidance in the FSIA to apply the choice of law rules of the forum state.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to reverse the decision below.

November 22, 2021

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