No. 20-1566

In the Supreme Court of the United States

DAVID CASSIRER, ET AL., PETITIONERS

v.

THYSSEN-BORNEMISZA COLLECTION FOUNDATION

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a federal court hearing a state-law claim against a foreign instrumentality pursuant to an exception to immunity under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1605, should apply the forum State's choice-of-law rule or use federal common-law to select the law providing the rule of decision.

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INTEREST OF THE UNITED STATES

This case concerns whether courts should apply state or federal choice-of-law rules to select the law governing liability in suits coming within an exception to a foreign state's immunity under the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), and 1602 *et seq.* The interpretation of the FSIA has implications for the treatment of the United States in foreign courts and for its relations with other sovereigns. At this Court's invitation, the government participated at an earlier stage in this case. See U.S. Br., *Kingdom of Spain* v. *Cassirer*, No. 10-786 (May 27, 2011). Accordingly, the United States has a substantial interest in this case.

STATEMENT

1. The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1441(d), 1602 *et seq.*, provides the sole basis for jurisdiction in a civil suit in state or federal court against a "foreign state," which the Act defines to include "an agency or instrumentality of a foreign state." 28 U.S.C. 1603(a); see *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 & n.3 (1989). Under the FSIA, a foreign state is immune from the jurisdiction of a U.S. court in a civil action unless the claim against it comes within one of the limited exceptions to immunity described in 28 U.S.C. 1605-1607. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in federal district court, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state where service has been made in accordance with the FSIA's provisions. 28 U.S.C. 1330(b). Where one of the exceptions to immunity set out in Section 1605 or 1607 applies, "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.

2. The question presented is a straightforward issue of law, but it arises in a case with a long and complicated procedural history. Petitioner Claude Cassirer brought this action against the Thyssen-Bornemisza Collection Foundation (Foundation), an instrumentality of the Kingdom of Spain and respondent before this Court. See Pet. App. B1. Petitioner sought to recover a paint-

ing that had been confiscated from his Jewish grandmother by the Nazi government. See *ibid.*[1]

a. Petitioner's grandmother, Lilly Cassirer Neubauer, owned a painting by Camille Pissarro entitled *Rue St. Honoré, apres midi, effet de pluie*. Pet. App. B1. After years of intensifying persecution of German Jews by the Nazis, Neubauer determined in 1939 that she had no choice but to leave Germany. *Id.* at B2. Neubauer was required to obtain permission from the Nazi government both to leave the country and to take any belongings with her. See *id.* at B2-B3.

In order for Neubauer and her husband to obtain exist visas, she was forced to transfer the Pissarro painting to Jakob Scheidwimmer, a Nazi art appraiser. Pet. App. B2. He demanded that she surrender the painting in exchange for approximately $360, to be paid into a blocked bank account that Neubauer could not access. *Ibid.* Scheidwimmer subsequently traded the painting to another dealer, from whom it was confiscated by the Gestapo and sold at auction to an unknown purchaser in 1943. *Id.* at B3. After a series of intervening sales, the painting was purchased by Baron Hans Heinrich Thyssen-Bornemisza, a prominent Swiss private collector. *Id.* at B3-B5. In 1993, Bornemisza sold his entire art collection, including the Pissarro painting, to the Foundation. *Id.* at B12. The Spanish government gave over $300 million to the Foundation to purchase the Bornemisza collection and provided the Foundation

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[1] The original plaintiff, Claude Cassirer, died while this litigation was pending; his children, David and Ava Cassirer, and the United Jewish Federation of San Diego County succeeded to his claims and were substituted as the plaintiffs. See Pet. App. C11 n.5. For purposes of this brief, the government refers to Claude Cassirer as the petitioner.

with the Villahermosa Palace in Madrid for use as a museum. *Id.* at B10, B12, C10-C11.

b. After the war, Neubauer sought restitution of the painting. Pet. App. C51. In 1958, when the location of the painting was still unknown, Neubauer reached a settlement agreement with the Government of the German Federal Republic to receive monetary compensation for the painting's value. *Id.* at C9. In 2000, petitioner discovered that the painting was on display at the Thyssen-Bornemisza Museum in Madrid. *Id.* at C11. After Spain denied Cassirer's petition for return of the painting, petitioner commenced this action against Spain and the Foundation in the United States District Court for the Central District of California, seeking return of the painting. *Ibid.* The complaint asserted property-law claims for constructive trust, conversion, and possession of the painting, and sought a declaration under the Declaratory Judgment Act, 28 U.S.C. 2201 (2012), that petitioner owns the painting and has a right to its immediate return. 461 F. Supp. 2d 1157, 1177-1178; Compl. 14-15.

To establish subject-matter jurisdiction over the suit, petitioner invoked the FSIA's expropriation exception to a foreign state's immunity under Section 1605(a)(3). See 28 U.S.C. 1330(a). The expropriation exception provides that a "foreign state shall not be immune from the jurisdiction of" a state or federal court in any case "in which rights in property taken in violation of international law are in issue" and there is a specified commercial nexus to the United States. 28 U.S.C. 1605(a); see *Federal Republic of Ger.* v. *Philipp*, 141 S. Ct. 703, 709 (2021). Petitioner did not allege that either the Foundation or the Government of Spain had themselves taken the Pissarro painting in violation of international

law; he alleged only that they had purchased the painting decades after its unlawful seizure by the Nazi government. See 616 F.3d 1019, 1031-1032 (en banc). But petitioner contended that the expropriation exception applied because the painting had been confiscated from Neubauer by the Nazi government in violation of international law. See *ibid.*

The Foundation and Spain moved to dismiss on multiple grounds, including for lack of subject-matter jurisdiction. The district court denied the defendants' motion, determining that it had subject-matter jurisdiction under the FSIA's expropriation exception to foreign sovereign immunity. 461 F. Supp. 2d at 1178. A divided panel of the court of appeals affirmed in part and reversed in part. 580 F.3d 1048, 1064. The court of appeals granted a petition for rehearing en banc, and the en banc court affirmed in part, holding that Cassirer's suit came within the FSIA's expropriation exception. 616 F.3d at 1024, 1037. This Court denied a petition for a writ of certiorari. 564 U.S. 1037.[2]

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[2] At the Court's invitation, the United States filed an amicus brief advising the Court of its view that petitioner's claims against the Foundation fell within the FSIA's expropriation exception and that review by this Court was not warranted. U.S. Br. 7-22, *Cassirer*, *supra* (No. 10-786). This Court subsequently held in a case addressing the taking of property by the Nazi regime that a foreign state's expropriation of its own citizen's property does not qualify as a "tak[ing] in violation of international law" under Section 1605(a)(3). See *Philipp*, 141 S. Ct. at 710, 715. The Court left open the argument that the plaintiffs in that case were not German nationals at the time of the taking and therefore that the expropriation of their property did violate international law. *Id.* at 715. In this case, the district court found that Neubauer had been deprived of her German citizenship by the time the Nazis confiscated the painting in 1939. 461 F. Supp. 2d at 1165; see *ibid.* (recognizing that an ex-

c. On remand, the district court dismissed Spain as a defendant pursuant to the parties' stipulation. Pet. App. D4 n.6. After a dispute about the statute of limitations, see 737 F.3d 613, 617-619, the case proceeded in district court. The court held that, pursuant to circuit precedent, federal common law provides the choice-of-law rules for selecting which jurisdiction's law governs the determination of liability. Pet. App. D5. Applying what it determined to be the appropriate federal common-law choice-of-law rule, based on the Restatement (Second) of Conflict of Laws, the court held that Spanish law supplies the rule of decision. *Id.* at D5-D7. In the alternative, the court applied California's choice-of-law rules and concluded that those rules also lead to the application of Spanish law. *Id.* at D5, D7-D11. Finally, the court determined that the Foundation is the lawful owner of the painting because the Foundation acquired it by acquisitive prescription, a Spanish-law doctrine akin to adverse possession. *Id.* at D11-D19.

The court of appeals reversed and remanded. Pet. App. C6-C61. As relevant here, the court of appeals agreed with the district court that, under circuit precedent, "when jurisdiction is based on the FSIA, 'federal common law applies to the choice of law rule determination.'" *Id.* at C19 (quoting *Schoenberg* v. *Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991)); see *id.* at C19-C20. The court of appeals also agreed

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propriation of the property of a foreign state's own citizen does not fall within FSIA's expropriation exception). The court of appeals affirmed on that basis. See 616 F.3d at 1023 & n.2, 1037. The Foundation has not challenged that factual determination, nor has it disputed that the Nazis took the painting in violation of international law. See *id.* at 1023 n.2; see also U.S. Br. 4, *Cassirer*, *supra* (No. 10-786).

that under what it determined to be the applicable federal common-law rules, Spanish law governs the liability determination. *Id.* at C20-C26. But the court concluded that a genuine issue of material fact existed as to whether the Foundation knew that the painting was stolen at the time that it acquired it; the court determined that if the Foundation had such knowledge, the Foundation was an accessory after the fact under Spanish law and could not have acquired ownership through acquisitive prescription. See *id.* at C26-C45. The court therefore remanded for further proceedings on that question. See *id.* at C45, C61. The court of appeals did not address whether the district court was correct in determining that Spanish law would apply under California's choice-of-law rules. See *id.* at C20 n.9.

d. After a bench trial, the district court found that, at the time it purchased the painting, the Foundation lacked actual knowledge that the painting was stolen. See Pet. App. A2, B28. Accordingly, the court determined that the Foundation was the lawful owner of the painting under Spanish law. *Id.* at B34.

The court of appeals affirmed. Pet. App. A1-A9. It declined to reconsider its prior rulings, including its holding that Spanish law governs petitioner's substantive claims, and found no clear error in the district court's factual determinations. See *ibid.*

SUMMARY OF ARGUMENT

In FSIA suits raising claims not based on federal law, choice-of-law questions are governed by state law, not federal common law.

A. The FSIA sets out a uniform body of federal law concerning the amenability of foreign sovereigns to suit in the United States. But aside from specific exceptions not implicated here, it does not alter the substantive law

of liability. The FSIA specifically provides that, once a court determines that a foreign state is amenable to suit under the FSIA, 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. Both federal and state courts hearing claims not governed by federal law, like those at issue here, against private individuals would apply state choice-of-law rules to select the rule of decision. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). And because using different choice-of-law rules can sometimes lead to the selection of a different rule of decision that would affect the existence of and extent of liability, the only way to ensure that a foreign state is held liable "in the same manner and to the same extent as a private individual," as required by 28 U.S.C. 1606, is to apply state choice-of-law rules.

This Court has previously interpreted the identical "same manner and to the same extent" requirement in the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346, 2671 *et seq.*, to support using a State's choice-of-law principles to select the rule of decision on liability. See *Richards* v. *United States*, 369 U.S. 1, 11-13 (1962). Both the Court's analysis in that case, and the fact that Congress chose to incorporate the same requirement into the FSIA against the backdrop of that decision, strongly support reaching the same result here.

That result is particularly reasonable because a State's choice-of-law rules, like other aspects of a State's law, reflect a State's substantive policy choices. Accordingly, Congress's decision generally to defer to a State's substantive policy choices in claims against those foreign sovereigns it determined should be amenable to suit applies to the entirety of a State's law.

B. Beyond Section 1606, which itself suffices to resolve this case, where a claim is based in state law, that law normally encompasses the State's choice-of-law principles. In legislating against that backdrop, Congress would have expected that, where it left the resolution of a particular claim to state law, that law would include the State's choice-of-law rules, absent a contrary indication.

C. Using a State's choice-of-law rules to select the substantive law that governs state-law claims also comports with this Court's precedents establishing that federal courts should not engage in common-lawmaking unless doing so is necessary to protect uniquely federal interests. While the FSIA reflects a strong interest in uniformity as to a foreign state's amenability to suit, that interest does not extend to the substantive law of liability in cases, like this one, where the FSIA instructs that an exception to immunity applies and where the question of ultimate liability is governed by state law. Accordingly, the selection of choice-of-law rules for determining liability on such claims under the FSIA generally does not implicate uniquely federal interests. And, although the ultimate selection or application of a particular rule of decision in a specific case involving a foreign sovereign could raise foreign-relations concerns, the best way to address such concerns, if they were to arise, is to apply doctrines that specifically protect the federal government's authority over foreign affairs. Developing and applying federal choice-of-law rules across the board is unnecessary to avoid interference with foreign relations in a particular case.

D. That conclusion comports with the holdings of four courts of appeals. The Ninth Circuit is alone in holding to the contrary, but its scant analysis fails to

engage with Section 1606 and offers no persuasive reason to develop federal common-law choice-of-law rules.

Respondent's arguments are likewise unavailing. Respondent focuses on the differences in treatment between a foreign state and a private individual specified by the FSIA, but those specific features of the FSIA only illustrate that where Congress intended a foreign state to be treated differently than a private individual, it said so explicitly. They do not undermine Congress's unequivocal requirement that a foreign state be treated like a private individual on the subject relevant here: the manner and extent of liability.

Respondent also focuses on the FSIA's emphasis on uniformity. But the FSIA provides uniformity on the threshold immunity determination, not on the substantive law governing suits against a foreign sovereign. Congress specifically declined to create uniform substantive law governing liability, generally allowing preexisting law to govern the substance of claims against a foreign state made amenable to suit. In any event, because different state laws indisputably govern the substance of a liability determination, respondent cannot explain why applying state rather than federal choice-of-law rules would result in meaningfully less uniformity. And applying state choice-of-law rules ensures uniformity between private defendants and foreign states, in the manner specifically required by Congress.

Finally, respondent is mistaken in contending that Section 1606's equal treatment requirement does not apply to cases based on the FSIA's expropriation exception because such cases do not arise in "like circumstances" to suits against private parties. The act of expropriation by the Nazi regime justifies application of the exception to respondent's immunity in this case, but

nothing about the substance of the liability determination turns on the fact that immunity is based on such an act, particularly because the expropriation doesn't implicate respondent. In any event, Section 1606 requires "like" circumstances, not identical circumstances, 28 U.S.C. 1606, and the substantive claim of wrongful possession of petitioner's property has ready analogies in cases against private parties involving stolen property. Accordingly, Section 1606's command of equal treatment applies here.

ARGUMENT

STATE CHOICE-OF-LAW RULES GOVERN THE SELECTION OF THE LAW THAT PROVIDES THE RULE OF DECISION IN AN FSIA SUIT BASED ON STATE-LAW CLAIMS

A. Section 1606 Of The FSIA Requires The Application Of State Choice-Of-Law Rules In These Circumstances

1. The FSIA sets forth "comprehensive rules governing sovereign immunity." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 496 (1983) (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) (House Report)).[3] Because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States," *id.* at 493, Congress deemed it critical to enact "'a uniform body of law' concerning the amenability of a foreign sovereign to suit in United States courts." *First Nat'l City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 n.11 (1983) (quoting House Report 32). The FSIA's sovereign-immunity standards and service-of-process requirements thus establish the exclusive

[3] The Senate report on the bill that became the FSIA is substantially identical to the House Report. See S. Rep. No. 1310, 94th Cong., 2d Sess. (1976).

standards, as a matter of federal law, for determining whether a suit against a foreign state may be maintained in the United States. 28 U.S.C. 1605, 1607, 1608.

The FSIA, however, was "not intended to affect the substantive law of liability." *First Nat'l City Bank*, 462 U.S. at 620 (quoting House Report 12). Section 1606 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. Accordingly, once jurisdiction is established, the FSIA generally functions as a "pass-through" to the substantive law that would govern suits between private individuals. *Oveissi* v. *Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009) (citation omitted); see *Jam* v. *International Fin. Corp.*, 139 S. Ct. 759, 768 (2019) (explaining that "'same as' provisions" "dot the statute books, and federal and state courts commonly read them to mandate ongoing equal treatment of two groups or objects"). "[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances." *First Nat'l City Bank*, 462 U.S. at 622 n.11. Cf. 28 U.S.C. 1605A, 1605B (provisions enacted in 2008 and 2016 creating federal causes of action for certain terrorism-related claims).[4]

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[4] Where courts refer to state-law- claims, or to cases where state law provides the rule of liability, they are referring to claims where no federal law provides the rule of decision. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 78 (1938). Where, as here, the challenged conduct

Where Congress wanted to depart from the equal treatment principle, it said so explicitly. See 28 U.S.C. 1606 (providing that a foreign state "shall not be liable for punitive damages," even where an individual under like circumstances would be so liable).

2. Applying Section 1606 here suffices to resolve this case. Section 1606 specifically provides that where Section 1605 or 1607 creates an exception to immunity for a particular "claim for relief," "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. A "foreign state" includes an "instrumentality of a foreign state," and therefore includes respondent. See 28 U.S.C. 1603(a). And this case has proceeded under an exception to immunity found in "section 1605," 28 U.S.C. 1606, namely the expropriation exception in Section 1605(a)(3), see 616 F.3d 1019, 1037; Pet. App. C55.

Petitioner has asserted property-law claims for conversion, constructive trust, and possession (also known as replevin) against respondent, treating the painting as stolen property for purposes of those claims, and has sought a declaration of those state-law rights under the Declaratory Judgment Act, 28 U.S.C. 2201 (2012). 461 F. Supp. 2d 1157, 1178; Compl. 14-15. If the respondent were a private individual, the district court would apply the forum State's (here, California's) choice-of-law rules to select the applicable law. See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Petitioner contends (Pet. 17; Pet. Br. 13) that California choice-of-law rules would lead to the application of California law, which provides that a good-faith purchaser cannot

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has a foreign component, the determination of liability on such a claim may, of course, be governed by foreign law.

acquire good title to stolen property. See Pet. App. B20; 862 F.3d 951, 960; *Crocker Nat'l Bank* v. *Byrne & McDonnell*, 173 P. 752, 754 (Cal. 1918). It is undisputed at this stage, by contrast, that the application of federal common-law choice-of-law rules results in the application of Spanish law, which allowed respondent to acquire title to the stolen painting by acquisitive prescription, making respondent rather than petitioner its lawful owner. See Pet. App. A2, C20.

Accordingly, if federal common-law rules govern this suit, respondent could "be liable," 28 U.S.C. 1606, in a different manner and to a different extent than a private individual under like circumstances. In fact, assuming that California's choice-of-law rules would lead to the selection of California law here (a question that the court of appeals left open, Pet. App. C20 n.9, and on which the United States takes no position), and that petitioner's view of the correct result under California law is sound, adopting federal common-law choice-of-law rules would mean that respondent is *not* liable, while a private party in like circumstances *would be* liable. Applying California choice-of-law rules to this suit would then be the only way to hold respondent "liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606.

Regardless of whether the selection of choice-of-law rules would ultimately make a difference in this case, the governing substantive law selected under federal common-law choice-of-law rules and state choice-of-law rules could diverge in some instances. And using a different rule of decision could make the foreign state liable in a different "manner" or to a different "extent" than a private individual. 28 U.S.C. 1606. For that reason, using the same choice-of-law rules in suits against

foreign states that would be applied against private defendants is the only way to "ensure identity of liability" between a foreign state and a private individual. *Barkanic* v. *General Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 960 (2d Cir. 1991); see, *e.g.*, *Oveissi*, 573 F.3d at 841 (explaining that "the goal of applying identical substantive laws to foreign states and private individuals 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") (quoting *Barkanic*, 923 F.2d at 959-960) (brackets and ellipsis omitted).[5]

Confirming that analysis, the Court has previously held that the application of a State's choice-of-law rules best effectuates a statutory requirement that another sovereign—the United States—be treated "in the same manner and to the same extent as a private individual under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962) (citation omitted); see *id.* at 11-12. In *Richards*, the Court considered choice of law under the FTCA. The FTCA waives the United States' immunity from suit in some cases involving injuries caused by the negligence of government employees acting within the scope of their employment. See 28 U.S.C. 1346(b)(1). The FTCA—unlike the FSIA—specifies that the governing law is "the law of the place where the

[5] To ensure the identity of liability between private individuals and foreign states, federal choice-of-law rules would govern FSIA suits based on substantive federal law, to the extent a choice of law is required—for instance between domestic federal law and foreign law—because federal choice-of-law rules would apply in such cases against private defendants. See, *e.g.*, 28 U.S.C. 1605(b) (providing an exception to immunity for certain suits to enforce maritime liens); *Lauritzen* v. *Larsen*, 345 U.S. 571, 582-592 (1953) (selecting among U.S., Danish, and Cuban law in maritime tort suit).

act or omission occurred." *Ibid.* Based on that provision, the petitioners in *Richards* contended that there was no need to apply choice-of-law rules at all because the internal law of the State "'where the act or omission occurred'" would always provide the rule of decision. See 369 U.S. at 5 (citation omitted). The Court disagreed, interpreting "'the law of the place'" to encompass a State's "whole law (including choice-of-law rules) of the place where the negligence occurred," *id.* at 2-3 (citation omitted); see *id.* at 11-13. That interpretation, the Court emphasized, would best give effect to the FTCA's separate requirement that the United States be liable "in the same manner and to the same extent as a private individual under like circumstances," 28 U.S.C. 2674, because applying the whole law of a State "enables the federal courts to treat the United States as a 'private individual under like circumstances,' and thus is consistent with the Act considered as a whole." *Richards*, 369 U.S. at 11 (quoting 28 U.S.C. 2674).

Effectuating the FSIA's identical "same manner and to the same extent" requirement, 28 U.S.C. 1606, likewise requires application of a State's choice-of-law rules. Indeed, the analysis is even more straightforward because the FSIA, unlike the FTCA, is silent about the governing law in cases raising state-law claims. In *Richards*, there was some tension between the "same manner" and "same extent" requirement and Congress's specification that the law where the negligent act occurred should govern, because applying state choice-of-law principles would ensure equal treatment between the United States and a private individual in like circumstances only "where the forum State is the same as the one in which the act or omission occurred." See 369 U.S. at 12. No such tension obtains here.

Moreover, Congress enacted the FSIA after the *Richards* decision, specifically adopting an identical "same manner" and "same extent" requirement after this Court had relied on it to incorporate state choice-of-law rules into the FTCA. See 122 Cong. Rec. 17,468 (1976) (explaining Section 1606, then numbered Section 1605(c), "is based upon 28 U.S.C. 2674"). Use of the FTCA's language incorporates this Court's interpretation of that language to require the application of a State's whole law, including its choice-of-law rules. See *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019) ("When a statutory term is obviously transplanted from another legal source, it brings the old soil with it.") (citation and internal quotation marks omitted).

3. Section 1606's specification that a foreign state should be held liable in the same manner and to the same extent as a private individual reflects its judgment that, where state law applies (and unless otherwise specified), it should generally apply in full, rather than being displaced in whole or in part based solely on the involvement of a foreign government. A state's conflict-of-law rules are as "definitely a part of the law as any other branch of the state's law." Restatement (Second) of Conflict of Laws § 5 cmt. a, at 9 (1971); see *id.* § 2, at 2; *A.I. Trade Fin., Inc.* v. *Petra Int'l Banking Corp.*, 62 F.3d 1454, 1464 (D.C. Cir. 1995) ("A choice-of-law rule is no less a rule of state law than any other[.]"). And the general Congressional determination in Section 1606 that state law should govern also applies to a State's choice-of-law principles, which reflect a State's "local policies" about how to settle competing interests where a case has a significant relationship to more than one jurisdiction. *Klaxon*, 313 U.S. at 496; see *Richards*, 369 U.S. at 12-13 (rejecting an interpretation of the FTCA

that would "prevent the federal courts from implementing" a State's "policy in choice-of-law rules," including its decision about how "to take into account the interests of the State having significant contact with the parties to the litigation"). A State's substantive law may, for example, reflect a determination that, quite apart from any limitations under federal law, there are territorial limits on the law's application under state law. Cf. *Coca-Cola Co.* v. *Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) (interpreting the state antitrust statute to apply only to injuries that occur within the state, not those "that occurred in other states"); *State Sur. Co.* v. *Lensing*, 249 N.W.2d 608, 612 (Iowa 1977) (holding that a state bond statute does not apply to "out-of-state transactions"). Its approach to conflicts of law more broadly warrants comparable treatment.

B. Application Of State Choice-Of-Law Rules Comports With The Normal Treatment Of State Law Applied By Federal Courts

Beyond Section 1606's "same manner" and "same extent" requirement, the application of state law normally includes state choice-of-law principles, and at the very least nothing in the FSIA directs a contrary approach. Under this Court's decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), a federal court applies all of a State's substantive rules in applying that State's law. *Id.* at 78; see Henry J. Friendly, *In Praise of* Erie—*And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 408 n.122 (1964) (explaining that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law") (citation omitted); 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4520, at 892, 896 (2016). And under this Court's decision in *Klaxon*,

a State's choice-of-law rules are substantive for purposes of *Erie*, see *Klaxon*, 313 U.S. at 496, meaning that, absent a contrary federal law or constitutional limit, see pp. 21-22, *infra*, state law applied by federal courts includes the State's choice-of-law rules.

Given that backdrop, Congress would have expected that, unless it provided to the contrary when it enacted the FSIA in 1976, the application of state law would include the State's choice-of-law rules. That is especially so because the year before Congress enacted the FSIA, this Court reaffirmed the *Klaxon* rule that the forum State's choice-of-law rules apply in a suit between private parties based on a death that occurred in Cambodia. *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 3 (1975) (per curiam).[6]

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[6] These background principles were brought to Congress's attention during the FSIA's drafting process. The State Department, which helped draft the FSIA's language, prepared a section-by-section analysis for the 1973 version of the bill, which did not contain the "same manner" and "same extent" requirement that was later added before the FSIA's enactment. See *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 2-13 (1973). The analysis stated:

> [W]hether state or federal law is to be applied will depend on the nature of the issue before the court. Under the *Erie* doctrine state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal. On the other hand, federal law will be applied if the issue is a federal matter. Under the [bill,] issues concerning sovereign immunity, of course, will be determined by federal law.

Id. at 47. That explanation does not appear in the section-by-section analysis of the 1976 bill that was ultimately enacted as the FSIA, and the 1976 House Report expressly disclaimed reliance on the 1973 analysis, explaining that it "should not be consulted in

C. The Presence Of A Foreign State As A Defendant In An FSIA Suit Does Not Justify The Creation Of Federal Common-Law To Govern Choice Of Law

Applying a State's choice-of-law rules also comports with the principle that federal courts should not create federal common law to displace state-created rules in the absence of strong justifications. See *Rodriguez* v. *FDIC*, 140 S. Ct. 713, 718 (2020) (emphasizing "the care federal courts should exercise before taking up an invitation to try their hand at common lawmaking"). "[C]ases in which judicial creation of a special federal rule would be justified" are "'few and restricted,'" *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 87 (1994) (citation omitted), and creating a federal rule "must be necessary to protect uniquely federal interests." *Rodriguez*, 140 S. Ct. at 717 (citation and internal quotation marks omitted).

Creating federal common law can be appropriate for matters concerning "relationships with other countries." *Atherton* v. *FDIC*, 519 U.S. 213, 226 (1997); see, *e.g.*, *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 425-426 (1964) (fashioning federal common-law Act of State doctrine limiting the authority of U.S. courts to determine the validity of the public acts of a foreign sovereign). But the selection of a choice-of-law rule under the FSIA for state-law-based claims does not usually implicate foreign policy concerns. Congress has determined that applying state law is generally appropriate

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interpreting the current bill and its provisions," and "no inferences should be drawn from differences" between the 1973 and the 1976 section-by-section analyses. House Report 12. But the State Department's 1973 section-by-section analysis does reflect an understanding that state substantive law normally includes state choice-of-law rules.

in resolving the substance of a dispute with a foreign state, see p. 12, *supra*, and there is no reason to expect that state choice-of-law principles ordinarily pose a greater threat to foreign relations than other state-law principles providing a rule of decision as to the rights and liabilities of the parties.

The ultimate selection of state law to govern a claim under the FSIA could, however, have implications for foreign relations or other distinct federal interests in particular cases. And there could be instances in which a State's choice-of-law rules were hostile to or improperly dismissive of a foreign state's interests—especially its interests in regulating certain matters within its own territory—that state law should not control. But those concerns are best addressed by applying limits on the application of state law derived from the Constitution, applicable treaties or statutes, international comity, the Act of State doctrine, or other sources reflecting distinctly federal interests—rather than displacing state choice-of-law rules across the board.

The federal government's exclusive constitutional authority over foreign affairs limits the application of a State's law to foreign conduct where the state law conflicts with the Nation's foreign policy or interferes in an area of exclusively federal control. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 413-427 (2003); *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 372-388 (2000); *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). More generally, the Constitution limits a State's ability "to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state." *Lauritzen* v. *Larsen*, 345 U.S. 571, 590-591 (1953). Other constitutional provisions provide additional limits. See *Allstate Ins. Co.* v. *Hague*, 449

U.S. 302, 304 (1981) (recognizing that the Due Process Clause and the Full Faith and Credit Clause of the Constitution limit a State's ability to select a particular law under its choice-of-law analysis); *Healy* v. *The Beer Inst.*, 491 U.S. 324, 336 (1989) (recognizing Commerce Clause constraints on a State's ability to regulate activity that occurs outside its borders); *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 821 (1985) (explaining that the Constitution does not permit a State to "take a transaction with little or no relationship to the forum and apply the law of the forum"). In light of those safeguards, concerns about foreign relations in the context of international conflict-of-law problems "limit the scope and reach of state law" in certain instances, but "they ordinarily do not supply a conflicts rule or a uniform rule of substantive law to be followed by state courts or by federal courts sitting in diversity." See Eugene F. Scoles & Peter Hay, *Conflict of Laws* § 3.56, at 149 (1982).

Relying on rules that limit the scope and reach of state law in particular instances, rather than adopting a federal choice-of-law rule across the board, is also appropriate because a result that is problematic from the perspective of comity could obtain in some circumstances regardless of whether state law or federal common-law governs the choice of law. Cf. *Day & Zimmermann*, 423 U.S at 4 (rejecting lower courts' use of federal choice-of-law rules to select Texas law over Cambodian law for a suit involving a death in Cambodia based on the lower courts' view that it should be "effectuating the laws and policies of the United States"). Moreover, it appears likely, as respondent itself has recognized, that the application of federal and state choice-of-law principles would lead to the same result in the great majority

of cases. See Br. in Opp. 16 (explaining that "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") (emphasis omitted); see also *id.* at 12-23. For those reasons, the prophylactic of adopting federal common law to govern the choice-of-law analysis in suits under the FSIA as a categorical matter is neither necessary nor particularly well-tailored to the specific concern about an application of domestic law in a manner that is unfair to a foreign sovereign or that may otherwise interfere with the United States's conduct of foreign affairs.

D. The Reasons Advanced By Respondents And The Court Of Appeals For Developing A Federal Common-Law Rule Lack Merit

Interpreting the FSIA to apply the forum State's choice-of-law rules where state law provides the rule of decision comports with the holdings of the Second, Fifth, Sixth, and D.C. Circuits. *Barkanic*, 923 F.2d at 959-960; *Northrop Grumman Ship Sys., Inc.* v. *Ministry of Def. of the Republic of Venez.*, 575 F.3d 491, 498 (5th Cir. 2009); *O'Bryan* v. *Holy See*, 556 F.3d 361, 381 n.8 (6th Cir.), cert. denied, 558 U.S. 819 (2009); *Oveissi*, 573 F.3d at 841. The Ninth Circuit stands alone in requiring federal courts to develop and apply federal common-law choice-of-law rules. The Ninth Circuit has identified no persuasive reason to adopt its approach.

In *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000 (1987), the Ninth Circuit stated that "[i]n the absence of specific statutory guidance, [it] prefer[s] to resort to the federal common law for a choice-of-law rule." *Id.* at 1003. But the FSIA does provide specific statutory guidance, see 28 U.S.C. 1606; pp. 12-15, *supra*. And the Ninth Circuit's "prefer[ence]," *Harris*, 820 F.2d at 1003, does not comport with this Court's more demand-

ing standards for creating federal common law. See p. 20, *supra*.[7]

In the decision below, the Ninth Circuit relied on its prior decision in *Schoenberg* v. *Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (1991). See Pet. App. C19. But that decision is no more persuasive, concluding that federal common law applies simply because "jurisdiction in this case is based on FSIA, not diversity." *Schoenberg*, 930 F.2d at 782. The Ninth Circuit's focus on the basis for a court's subject-matter jurisdiction was mistaken. As a leading treatise explains, "the law to be applied is not selected by reference to the basis of the court's subject matter jurisdiction"; rather it "turns upon the source or genesis of the right or issue being adjudicated." *Federal Practice and Procedure* § 4520, at 896; see p. 18, *supra*. The Ninth Circuit has not attempted to explain why a State's choice-of-law rules should not apply to claims based on state law, merely because the FSIA provides the jurisdictional basis for the suit.[8]

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[7] In *Harris*, the Ninth Circuit also rejected a rule that the place where the act or omission occurred determines the choice of law as it does under the FTCA, because the FSIA lacks the FTCA's requirement that "the law of the place where the act or omission occurred" should govern. 820 F.2d at 1003; see *id.* at 1002-1003. The Ninth Circuit's decision in *Harris*, however, did not explain why applying the choice-of-law rules of the *forum* State would not be warranted to effectuate the principle that a foreign state must be held liable in the "same manner and to the same extent" as a private individual, particularly because applying that rule would result in an identity of treatment more often than under the FTCA. See p. 16, *supra*; *Richards*, 369 U.S. at 12.

[8] Before the FSIA's enactment, the federal diversity statute provided the jurisdictional basis for suits against foreign states. 28 U.S.C. 1332(a)(2) (1970). The public law that enacted the FSIA broke out the jurisdictional basis for suits against foreign states into

Rather than defending the Ninth Circuit's unpersuasive reasoning, respondent makes three different arguments. None provides a sound reason to adopt a federal rule for the choice-of-law inquiry. First, respondent contends that Congress "inten[ded]" foreign sovereigns "*not* to be treated merely as a private individual." Br. in Opp. 24-25. In particular, respondent notes that the FSIA vests original jurisdiction in district courts in all cases where a foreign state is a party, 28 U.S.C. 1330(a), and that it prohibits jury trials, 28 U.S.C. 1441(d). See Br. in Opp. 25. While respondent is correct that the FSIA treats a foreign state differently than a private individual in certain specific respects, including access to federal court and the mode of trial, the FSIA is just as clear that, as to the extent of liability, "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; see House Report 22 (explaining that "Section 1606 makes clear that if the foreign state, political subdivision, agency or instrumentality is not entitled to immunity from jurisdiction, liability exists as it would for a private party under like circumstances"). Respondent has not identified any specific exception to the FSIA's mandate of equal treatment in making liability determinations that would encompass the choice-of-law determination. Cf. 28 U.S.C. 1606 (prohibiting the award of punitive damages in cases against a foreign

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a separate provision of the U.S. Code. FSIA § 2(a), 90 Stat. 2891; see 28 U.S.C. 1330(a), and in so doing deleted as "superfluous" the "similar jurisdictional basis" in the diversity statute. House Report 14. The House Report gives no indication that the provision for the "similar" jurisdictional basis in the FSIA would work a substantive change of the sort the Ninth Circuit's interpretation would have brought about. See *ibid.*

state). Accordingly, Section 1606's unambiguous language governs on the question at issue here.

Nor is there anything incongruous about Congress's decision to treat foreign states differently than private parties for some purposes but in the same manner as private parties for others. Notably, the FTCA also treats the United States differently from private defendants in some respects, providing for exclusive jurisdiction in the federal courts, prohibiting jury trials, and prescribing exceptions to liability. See, *e.g.*, 28 U.S.C. 1346(b), 2402, 2680; *Richards*, 369 U.S. at 13-14 & n.28 (citing FTCA provisions under which "the liability of the United States is not coextensive with that of a private person under state law"). But those differences do not require the application of "independent federal [conflict-of-law] rule[s]," or undercut the statute's "same manner" and "same extent" requirement as to the extent of the United States' liability. *Richards*, 369 U.S. at 13. Indeed, in the FTCA, just as in the FSIA, Congress was "specific" where it intended departures from state law, and those departures "contain[] no direct or indirect modification of the principles controlling application of choice-of-law rules." *Id.* at 14.

Second, respondent contends that federal conflict-of-law rules should apply because a "primary purpose[]" of the FSIA is "the need for national uniform standards in actions involving sovereign entities." Br. in Opp. 25. That argument misconstrues the FSIA, which reflects Congress's judgment that the "body of law concerning the *amenability* of a foreign sovereign to suit in United States courts" must be "uniform," *First Nat'l City Bank*, 462 U.S. at 622 n.11 (emphasis added; citation and internal quotation marks omitted), while choosing to treat non-immune foreign states like private parties as to

liability in most circumstances, see 28 U.S.C. 1606. Nor is there anything unusual in such a determination. A central purpose of the Warsaw Convention, for instance, was to foster uniformity in the liability regimes related to international air travel, but because the Convention left some questions to domestic law, the governing law for those questions would be "the local law identified by the forum under its choice-of-law rules or approaches." *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U.S. 155, 170 (1999).

In any event, respondent has not explained how using federal common-law choice-of-law rules would meaningfully foster uniformity in an area where the substance of liability is indisputably governed by potentially disparate state law—or by foreign law if choice-of-law principles called for applying foreign law. And respondent's approach would undermine uniformity where Congress has expressly required it—between foreign states and private parties. See pp. 12-15, *supra*.

Respondent also contends that vertical uniformity is irrelevant because "Congress intended for [FSIA] cases to be litigated *exclusively* in federal, not state, court." Br. in Opp. 26 n.16. To the contrary, Congress made the federal courts' jurisdiction concurrent rather than exclusive. See 28 U.S.C. 1330(a); *Verlinden*, 461 U.S. at 489, 491 n.16; see also House Report 13 (explaining that plaintiffs "will have an election whether to proceed in Federal court or in a court of a State"). Notably, at the time Congress enacted the FSIA, some suits against foreign sovereigns had proceeded in state court and the rule of decision in those cases was governed by state choice-of-law rules. See, *e.g.*, *J. Zeevi & Sons, Ltd.* v. *Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 172 (N.Y.) (applying New York's choice-of-law rules), cert.

denied, 423 U.S. 866 (1975); see also *Verlinden*, 461 U.S. at 491 n.16. Accordingly, Congress's decision to allow suits against foreign sovereigns to proceed in state court illustrates Congress's acceptance of the forum State's state-law principles in resolving FSIA suits.

Third, respondent contends that Section 1606 does not apply to FSIA cases that proceed under Section 1605(a)(3)'s expropriation exception to immunity, because Section 1605(a)(3) provides an exception to the foreign state's immunity for its public acts and "a private individual cannot commit a public, sovereign act." Br. in Opp. 26-29. Respondent is correct that the FSIA's expropriation exception "permits the exercise of jurisdiction over some public acts of expropriation." *Federal Republic of Ger.* v. *Philipp*, 141 S. Ct. 703, 713 (2021). But Section 1605(a)(3) addresses the applicable exception to the foreign state's immunity from suit, whereas Section 1606 speaks to the substantive liability determination. And "the jurisdictional inquiry" in FSIA cases often "does not overlap with the elements of a plaintiff's claims," such as where a plaintiff asserts "a simple common-law claim of conversion, restitution, or breach of contract, the merits of which do not involve the merits of international law." *Bolivarian Republic of Venez.* v. *Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1323-1324 (2017). Here, petitioner asserts claims for conversion, constructive trust, and possession of the painting, see 461 F. Supp. 2d at 1178; Compl. 14-15, which can be brought against private individuals.

More fundamentally, respondent reads the "like circumstances" requirement in Section 1606 too narrowly. As this Court has explained in interpreting the identical language in the FTCA, the words "'like circumstances' do not restrict a court's inquiry to *the same circum-*

stances, but require it to look further afield." *United States* v. *Olson*, 546 U.S. 43, 46 (2005) (emphasis added; citation omitted); see *Indian Towing Co.* v. *United States*, 350 U.S. 61, 64-65 (1955). Accordingly, although the conduct of a sovereign will often be distinct in significant ways from that of a private party, the requirement of like treatment applies when an "analogy" to the sovereign's conduct can be identified. *Olson*, 546 U.S. at 47.

Here, an analogy is available: although private citizens cannot take property in violation of international law, they can take property in violation of other laws. Cf. *Olson*, 546 U.S. at 47 ("Private individuals, who do not operate lighthouses, nonetheless may create a relationship with third parties that is similar to the relationship between a lighthouse operator and a ship dependent on the lighthouse's beacon."). Moreover, private individuals can hold property stolen by a third party. That analogy is particularly apt in this case because, for jurisdictional purposes, petitioner has asserted that Germany, not respondent, expropriated—stole—the painting in violation of international law. See 616 F.3d at 1031-1032. Petitioner seeks to hold respondent liable based on its subsequent acquisition of the painting, in the same manner and to the same extent that petitioner alleges a private individual who obtained the painting would be liable. Accordingly, there is no justification for disregarding Section 1606's equal treatment requirement in this case.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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* The Solicitor General is recused in this case.