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 FOR RESPONDENT

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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 ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in part at 28 U.S.C. §§ 1330, 1391(f), 1602-1611), 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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STATEMENT

1. Lilly Cassirer Neubauer, grandmother of the original plaintiff, Claude Cassirer, inherited *Rue Saint-Honoré, après-midi, effet de pluie*, oil on canvas, 81 x 65 cm (1897) by Camille Pissarro (the "Painting"), in 1926. Pet. App. B2. As a Jew, Ms. Neubauer was subjected to increasing persecution in Germany after the Nazis seized power. *Ibid.* In 1939, in order for Ms. Neubauer and her second husband to obtain exit visas to flee Germany, Ms. Neubauer was forced to transfer the Painting to a Nazi art appraiser. *Ibid.* In 1943, the Painting was sold at auction to an unknown buyer. *Id.* at B3. After the war, Ms. Neubauer and another claimant sought restitution of the Painting, or if it could not be found, compensation. *Ibid.* In 1958, after ten years of litigation, Ms. Neubauer settled her claim for monetary compensation with the German government in exchange for the Painting's agreed-upon 1956 value. *Ibid.*

Unbeknownst to the settling parties, the Painting arrived in the United States in 1951 and subsequently was owned by a number of American collectors, most of whom were Jewish. *Id.* at B3-B4. In July 1951, the Painting was sold to collector Sydney Brody in Los Angeles through art dealers M. Knoedler & Co. in New York and the Frank Perls Gallery in Beverly Hills. *Ibid.* Before selling the Painting to Mr. Brody, the dealers investigated whether there were war-time claims relating to the Painting; they found none. *Ibid.* Less than a year later, in May 1952, Sydney Shoenberg, an art collector in St. Louis, purchased the Painting in a documented sale from M. Knoedler & Co.,

on consignment from the Frank Perls Gallery. Pet. App. B4. Mr. Shoenberg's ownership of the Painting was noted in publicly available materials and articles. *Ibid.*

In 1975 or 1976, the Painting was sent on consignment to the Stephen Hahn Gallery in New York City, a prominent gallery specializing in Impressionist and Modern Art. *Ibid.* On November 18, 1976, Baron Hans-Heinrich Thyssen-Bornemisza of Lugano, Switzerland (the "Baron") purchased the Painting in a documented sale for $300,000 (which included a $25,000 commission to be paid to the Stephen Hahn Gallery). *Id.* at B5. The district court found that the Baron paid fair market value for the Painting. *Id.* at B5-B6. There was no claim that the Painting—or the other three artworks acquired by the Baron from the Stephen Hahn Gallery at the same time—had been looted by the Nazis. Except when it was publicly exhibited elsewhere, the Painting was maintained as part of the Thyssen-Bornemisza Collection at the Villa Favorita in Switzerland until 1992. *Id.* at B9. The Painting was identified in numerous publications and was exhibited frequently all around the world while part of the Baron's collection. *Ibid.*

In 1988, the Baron, through a trust ("Favorita"), agreed to loan a large portion of his collection to the Kingdom of Spain ("Spain") for approximately nine years. *Id.* at B9-B10. As part of the agreement, Spain created the Thyssen-Bornemisza Collection Foundation (the "Foundation") to "maintain, conserve, publicly exhibit, and promote" the 787 loaned artworks, including the Painting. *Id.* at B10. Spain also agreed

to display the loaned artworks at the Villahermosa Palace in Madrid, which would be restored and designed for its new purpose as the Thyssen-Bornemisza Museum (the "Museum"). Pet. App. B10. As required for the loan, Favorita expressly warranted to Spain that it "owns the [p]aintings [being loaned] and is entitled to lend the [p]aintings." *Ibid.* Spain received legal opinions from lawyers in Bermuda, the United Kingdom, and Switzerland confirming that Favorita had the authority to enter into and perform the loan agreement. *Ibid.*

On October 10, 1992, the Museum opened to the public with the Painting on display. *Id.* at B12. The following year, the Spanish cabinet passed Real Decreto-Ley 11/1993, authorizing the Spanish government to enter into a contract that would allow the Foundation to purchase 775 of the loaned artworks, including the Painting, for approximately $338 million.[1] *Ibid.* As part of the acquisition agreement, Favorita represented and warranted to the Foundation that it was the "legal owner" of the artworks and that the Foundation would become "the absolute beneficial owner" of the purchased artworks, including the Painting. *Id.* at B14. Although they "had a sound basis" for "assuming that the Baron acted in good faith," Spain and the Foundation conducted independent title investigations. *Id.* at B15-B16, B29. "[A]fter careful consideration of various options" for determining title, *id.* at B28, Spain and the Foundation focused on: (1) the most "iconic" artworks, (2) recent

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[1] The district court found this price to be reasonable. Pet. App. B12-14.

acquisitions that had not been examined prior to the loan agreement, (3) artworks that came into the Baron's ownership after 1980, such that the Baron's ownership under a theory of adverse possession, might be challenged, and (4) artworks subject to a "pledge" or security to ensure Favorita's performance. Pet. App. B14-B15. Spain funded the entire purchase with public funds. *Id.* at B12. The Foundation has received no claims against any artwork in its collection, other than the Painting. *Id.* at B17.

2. Between 1958 and 1999, neither Ms. Neubauer nor Mr. Cassirer made any attempt to locate the Painting. *Id*. at B19, D3. Mr. Cassirer became a U.S. citizen in 1947; he lived in New York and Ohio before retiring to California in 1980. Petitioners' Brief ("Brief") 5. In 2001, approximately one year after learning that the Painting was on public display at the Museum, Mr. Cassirer demanded that the Foundation give him the Painting. Pet. App. B20. In 2005, Mr. Cassirer filed suit against the Foundation and Spain in the U.S. District Court of the Central District of California, asserting that the FSIA's expropriation exception provided subject matter jurisdiction.[2] *Ibid.* The complaint did not assert that the Foundation (or Spain) took the Painting in violation of international law, but that the Nazi's seizure of the Painting in 1939 was the unlawful taking that allowed a court to exercise subject matter jurisdiction over a different

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[2] From 1980 to the time of his death in 2010, Mr. Cassirer was a resident of California. Pet. App. D4. The current plaintiffs are David Cassirer, the Estate of Ava Cassirer, and the Jewish Federation of San Diego County ("Petitioners").

sovereign (Spain), and its agency or instrumentality (the Foundation).

The Foundation and Spain moved to dismiss. The district court denied the motion, determining that the expropriation exception applied to provide subject matter jurisdiction over Spain and the Foundation. 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 Petitioners' suit came within the FSIA's expropriation exception. 616 F.3d at 1024, 1037. This Court denied the Foundation's petition for a writ of certiorari, which posited whether the expropriation exception allowed a court to strip a foreign sovereign of its presumptive sovereign immunity where the taking was committed by a different sovereign. 564 U.S. 1037.

On remand, the district court dismissed Spain as a defendant pursuant to the parties' stipulation, because the expropriation exception could not apply to permit jurisdiction over a sovereign where the claimed property was not located in the United States. Pet. App. D4 n.6. The Foundation then moved to dismiss on the ground that the 1958 settlement agreement with Germany barred this case from continuing. The district court denied the motion, determining that the settlement agreement did not preclude future attempts to obtain possession of the Painting. Shortly thereafter, the parties cross-moved for summary judgment (or adjudication) on the proper choice of law and its application.

In an abundance of caution, the district court conducted two separate choice-of-law analyses: one applying federal common law—which follows the Restatement [(Second) of Conflict of Laws (1969) (the "Restatement")—and one applying California's "governmental interests" test. Pet. App. D5. After a lengthy analysis, the court determined that *both* tests mandated the application of Spanish substantive law. *Id.* at D5-D11. That included, as relevant here, the application of Spanish law to the Foundation's ownership theories of valid conveyance (the 1993 purchase) and "acquisitive prescription," more commonly known in U.S. courts as adverse possession. *Id.* at D11-D20.

> Spain's adverse possession laws regarding "movable property" require that the possessor: (1) possess the property for the statutory period, i.e. three years if in "good faith" ("ordinary adverse possession") or six years if in "bad faith" ("extraordinary adverse possession") (Spanish Code Article 1955); (2) possess the property as owner (Article 1941), and (3) possess the property publicly, peacefully, and without interruption (Articles 1941-1948).

Pet. App. C11-C12. Because (1) the Foundation possessed the Painting and represented to the public that it was the owner since June 21, 1993, *see id.* at D12; (2) the Foundation's possession was public, peaceful, and without interruption until at least May 3, 2001, *see id.* at D12-D13; and (3) the interruption occurred more than six years later—almost two years *after* the six-year period to satisfy extraordinary

adverse possession had run, Pet. App. D13-D14, the court recognized the Foundation as the owner of the Painting. The court also rejected Petitioners' claim that the Foundation was an accessory to the Holocaust. *Id*. at D15-D17.

On appeal, the court of appeals reaffirmed its long-standing rule that the Restatement alone determines the appropriate choice of law where jurisdiction is predicated on the FSIA. *Id*. at C19-C20. The FSIA does not contain an express choice-of-law provision. Like all federal courts of appeal, the Ninth Circuit recognizes the general rule that "[i]n a diversity case, a federal court must apply the choice-of-law rules of the state in which the action was filed." *Sims Snowboards, Inc. v. Kelly*, 863 F.2d 643, 645 (9th Cir. 1988). But where an exception to the FSIA applies to strip a sovereign entity of its immunity, the Ninth Circuit holds that federal common law provides the choice-of-law test because diversity *does not* provide the basis for jurisdiction. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991).

Applying the Restatement, the Ninth Circuit held that Spanish law must be applied, as recognized by the district court. Pet. App. C20-C26. (The court of appeals did not review the district court's determination that California's choice-of-law test mandates the application of Spanish law.) On appeal, Petitioners raised a new argument: that the Foundation was an accessory-after-the-fact to the Holocaust (under an 1870 superseded Spanish penal code provision) and that this allegation tolled application of extraordinary acquisitive prescription's

six-year period. If the Foundation knowingly received stolen property when it purchased the Baron's collection, Petitioners asserted, then Mr. Cassirer's demand for the Painting came before, not after, the Painting's ownership vested in the Foundation. Electing to consider this waived argument, the court of appeals determined that there was an issue of material fact as to whether the Foundation had actual knowledge of Germany's 1939 taking when it acquired the Painting. Pet. App. C26-C50. The court of appeals thus reversed and remanded. *Id.* at C61.

The Foundation sought *en banc* review and Spain filed a brief *amicus curiae* explaining how the court of appeals erred by: (1) applying the 1870 penal definition of accessory, rather than the 1973 penal code definition which was in effect at the time of the Foundation's purchase and prescriptive ownership, and (2) finding that Petitioners' new *allegations* of accessory liability could toll the vesting of the Foundation's ownership under principles of acquisitive prescription, even though the statute of limitations for criminal accessory liability had long since expired. No. 15-55550, Dkt. 136-1. After *en banc* review was denied, the Foundation sought review from this Court. This Court denied the petition. *Thyssen-Bornemisza Collection Found. v. Cassirer*, 138 S. Ct. 1992 (2018).

After a bench trial with testimony from numerous experts, including the written and in-person testimony of a Spanish lawyer personally involved in the 1993 purchase, the district court determined that there was no evidence that the Foundation had any knowledge of—or was willfully blind to—the Painting's wartime

taking when it purchased the 775 artworks, including the Painting, from the Baron. Pet. App. B26-B30. Accordingly, the district court recognized the Foundation as the owner of the Painting under Spanish law. *Id.* at B30. The court of appeals examined and rejected Petitioners' claim that the Foundation had actual knowledge of (or was willfully blind to) the theft prior to Mr. Cassirer's 2001 claim. *Id.* at A1-A9. Finding no error in the district court's factual determinations and declining to revisit its prior determination that Petitioners' claims are governed by Spanish law, the court of appeals unanimously affirmed. *Ibid.*

SUMMARY OF ARGUMENT

The question presented identifies a split among the courts of appeal over whether federal courts should apply federal common law's choice-of-law test (as advocated by the Ninth Circuit) or the forum's choice-of-law test (as advocated by the Second and D.C. Circuits and followed by the Fifth and Sixth Circuits) in cases where an exception to the FSIA permits a court to strip a foreign sovereign of its presumptive sovereign immunity.[3] Petitioners and *amici* advocate that this Court adopt the forum's choice-of-law test, thereby subjecting a non-immune sovereign to diversity jurisdiction and its attendant limitations.

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[3] Except where the juridical distinction is relevant, the terms "foreign state" and "sovereign" encompass both the foreign sovereign *and* its agencies or instrumentalities. 28 U.S.C. § 1603(a).

It is well-recognized, however, that where, as here, a case involves uniquely federal interests—including national and foreign policy, relationships with other nations, and the proper interpretation of an act that "necessarily raises questions of substantive federal law," *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983)—the application of federal common law is not only reasonable, it is necessary. The use of federal common law aligns with Congress's decision to amend Section 1332(a) to bar courts from exercising diversity jurisdiction over foreign states and limit, under Section 1606, the circumstances under which non-immune foreign states may be treated like private parties. Moreover, Section 1606's instruction that a non-immune sovereign be liable "in the same manner and to the same extent" as a private party was followed by the lower courts in this case: the Spanish laws that were applied in examining the Foundation's liability (as well as the defenses available to the Foundation as the possessor) are identical to those that would apply to a private party.

Section 1330—the sole basis for exercising jurisdiction over a foreign state—is similar to Section 1331's federal question jurisdiction, as both provide jurisdiction where issues and questions of federal law govern a court's analysis. Because federal common law's choice-of-law test would apply where jurisdiction is based on *federal questions*, it should apply here, where jurisdiction necessarily requires analysis of *federal law*.

Petitioners and the non-governmental *amici* advocate for application of the forum's choice-of-law

test for one simple reason: they believe that the federal common law choice-of-law test is more likely to recommend the application of *foreign* law and they want California law to apply. There is no evidence, however, that the two tests led to divergent results in the past, and because most states adopted the Restatement in whole or in part—the same test advocated by federal common law—most states would ultimately apply the same rule of decision, regardless whether they apply federal common law or the forum choice-of-law test. To be sure, several states do not follow the Restatement, with some expressly favoring the application of the forum's law. But that encourages forum shopping. Use of federal common law's choice-of-law test avoids this concern, encouraging uniformity of decision—one of the primary aims of the FSIA. H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12 (1976) ("House Report") (recognizing "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences").

In any event, the forum choice-of-law test does not solve Petitioners' problem. The federal and international laws and policies they assert *must* be considered in order to reach the proper choice-of-law result are *irrelevant* to California's governmental interests test, which directs courts to examine only the governmental interests of the states' whose laws conflict. National and international interests *are* important factors in the federal common law choice-of-law test, which already recognizes that Spanish law must apply to determine the Painting's ownership. Beyond this misplaced argument, Petitioners offer no basis or theory—much less evidence or law—to poke a

single hole in the district court's well-reasoned determinations that both federal common law's *and* California's choice-of-law tests *mandate* the application of Spanish law. Lastly, the application of California law in this case would violate well-established constitutional limiting principles and the Foundation's due process rights would be violated if California law could strip the Foundation of its vested property rights in the Painting.

At the end of the day, the answer to the question presented may come down to two very distinct interpretations of the FSIA. If the FSIA focuses solely on the initial determination of immunity, subjecting a non-immune foreign state subject to the same diversity jurisdiction-based treatment allotted for a *private* party under *any* circumstance, thereby elevating state procedural concerns over federal and foreign affairs interests, then the forum choice-of-law test has appeal.

But if the FSIA is a broader, more comprehensive statute, one that: (1) contemplates the application of *federal law* at numerous stages of the litigation, (2) directs that foreign sovereigns should be subjected to *uniform treatment*, (3) acknowledges that foreign sovereigns are entitled to respect—even where not immune, (4) asserts that a foreign state and private individual should be *treated the same where jurisdiction is based on the invocation or continuing application of federal law*, and (5) recognizes that Section 1330 is analogous to Section 1331— not Section 1332—, and (6) acknowledges there are limitations where "like circumstances" can allow for the liability of a foreign state and a private individual to be examined

in "same manner and to the same extent," then the answer is different. Application of federal common law's choice-of-law test—which ensures that the same test is applied regardless of the sovereign or the forum *and* aligns with the choice-of-law test employed by federal courts exercising federal question jurisdiction—is necessary.

The United States acknowledges that "it appears likely," that the application of the choice-of-law tests employed by the Restatement, and most fora "would lead to the same result in the great majority of cases," U.S. Brief at 22-23, begging the question of whether this Court's intervention is still necessary. But if it is this Court's intention to mandate the application of a single choice-of-law test, that test should take into account the forum law-centric bias inherent in certain states' choice-of-law tests—a bias that may not only lead to results that are inconsistent with the majority of states, but one that may be "hostile or improperly dismissive of a foreign state's law." *Id.* at 21. Only by using federal common law's choice-of-law test in an objective gatekeeping function can parties—and foreign states—have confidence that the rule of decision determination is based on a balancing of relevant interests regardless where the case is filed and without a state's law adding an improper and unrelated thumb on the scale.

ARGUMENT

I. Only Federal Common Law's Choice-of-law Test Aligns with Congress's Goals in Enacting the FSIA

Petitioners acknowledge that the FSIA does not contain a provision addressing the choice-of-law test to be employed where, as here, jurisdiction is premised on a court's finding that one of the FSIA's exceptions applies. Petitioners contend however, that Congress's intention is nonetheless implied by the language of Section 1606, which provides, in pertinent part, that

> 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. This language, Petitioners contend, establishes that Congress intended that state law "should be the source for deciding choice of law in FSIA cases." Brief 20. According to Petitioners, because federal courts apply the forum choice-of-law test in an action against a *private* foreign party where diversity provides jurisdiction, federal courts should apply the same diversity-based forum choice-of-law test where a foreign sovereign is a defendant because that would align with Section 1606's statement that "a 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.

But the proper interpretation of the FSIA is rarely straightforward, and Petitioners' analogy proves too simplistic. The premise, indeed Petitioners' entire proposition—that Congress intended to subject a non-immune foreign sovereign to diversity jurisdiction–ignores: (1) the plain language of Section 1606 itself; (2) Congress's intentional removal of actions against foreign states from Section 1332 (diversity jurisdiction); (3) Section 1606's intentionally limiting language; (4) the inherent similarities between Section 1330 (FSIA jurisdiction) and Section 1331 (federal question jurisdiction); (5) the long-recognized need for federal common law where foreign policy may be implicated; (6) that Congress enacted the FSIA to promote uniformity in actions against foreign states; (7) that the Restatement considers federal and international laws and policies, which do not factor into forum choice-of-law tests, (8) that the application of federal common law discourages forum-shopping and the disparate application of state law, (9) that purportedly analogous statutes—the Federal Tort Claims Act and the Rules of Decision Act—are readily distinguishable and offer no guidance, and (10) that the application of federal common law does not implicate any federalism concerns.

A. The Plain Reading of the Section 1606 Supports the Application of Federal Common Law

Section 1606's directive was followed in this case because the Foundation's liability was examined in "the same manner and to the same extent as a private individual." After applying the Restatement to find

that Spanish law applied to Petitioners' claims, the Foundation's liability was examined "in the same manner and to the same extent as a private individual under like circumstances." In applying Spanish law, the Foundation was subject to the same requirements for vesting title as a private party in Spain. Had there been any evidence to suggest that the Foundation had "actual knowledge" that the Painting had been stolen, it would have been liable in the same manner and to the same extent that a Spanish court would hold a private individual liable.

The United States contends that if federal common law's choice-of-law test is applied, then the Foundation "could 'be liable' in a *different* manner and to a *different* extent than a private individual under like circumstances," because the Foundation is not liable under Spanish law, whereas a private party "under like circumstances," might be. U.S. Brief 14 (citation omitted) (emphasis added). In other words, the United States suggests that because we *now* know that the application of Spanish law leads to the determination that the Foundation is the Painting's owner, Section 1606's "liability in the same manner and to the same extent as a private party under like circumstances" condition was not followed. *Ibid*.

The United State is mistaken. First, the United States miscomprehends the purpose and function of Section 1606 when it suggests that Section 1606 is *outcome* driven. Nothing in Section 1606 suggests that a sovereign's potential or actual liability under different fora's laws should factor into the choice-of-law test determination. Rather, Section 1606 simply

instructs that once the substantive law is determined, the sovereign does not get special treatment (for example, access to sovereign-status defenses like sovereign immunity) that could preclude it from being "liable in the same manner and to the same extent as a private individual."

Second, if a private party's liability was examined "under like circumstances"—here, the private individual's ownership in the Painting vested through extraordinary acquisitive prescription and there was no evidence that the private individual had actual knowledge of (or was willfully blind to) the theft—then the result (that the private party is the owner under Spanish law) would be the *same*. *See* pp. 8-9, *supra*. This means that the United States' assertion the application of Spanish law would lead to a private party's liability being examined "in a different manner and to a different extent," U.S. Brief 14, is simply incorrect. Stripped of its sovereign immunity, the Foundation's liability *was* examined in the "same manner and to the same extent" as a private party "under like circumstances," as a plain reading of Section 1606 requires.

B. Congress Intentionally Removed from Section 1332 All Actions Brought Against Foreign Sovereigns

Before 1976—and with the exception of certain specialized areas of law—federal courts exercised subject matter jurisdiction in one of two situations: (1) where the case calls for an analysis of a federal question, *see* 28 U.S.C. § 1331, or (2) where there is diversity among the parties and the value of the

"matter in controversy" exceeds a certain threshold, 28 U.S.C. § 1332. Before the FSIA's enactment, Section 1332(a) included the following language:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and cost, and is between—
>
> (1) citizens of different States;
> (2) citizens of a State, and *foreign states* or citizens or subjects thereof; and
> (3) citizens of different States and in which *foreign states* or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a) (1970) (emphasis added). In other words, diversity jurisdiction specifically encompassed actions brought by U.S. citizens against a foreign state. When Congress enacted the FSIA, it created Section 1330, which explicitly addresses the jurisdictional basis and limitations for actions brought against foreign states. Relevant here, Section 1330(a) provides:

> The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

28 U.S.C. § 1330 (1976). At the same time, Congress amended Section 1332, specifically striking the two subsections that provided jurisdiction where a foreign state is a defendant:

> (2) citizens of a State, and *foreign states* or citizens or subjects thereof; and
> (3) citizens of different States and in which *foreign states* or citizens or subjects thereof are additional parties.

28 U.S.C. § 1332(a) (1970) (emphasis added). The following three subsections were substituted in their place:

> (2) citizens of a State and citizens or subjects of a foreign state;
> (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Pub. L. No. 94-583, 90 Stat. 289; 28 U.S.C. § 1332(a) (1977). In amending the scope of diversity jurisdiction, Congress did not remove only those actions where the sovereign state was found immune. Nor did it include, in Section 1330, a statement providing that where a foreign sovereign is not immune, it is functionally subjected to diversity jurisdiction and its attendant tests. If it had done either, one could reasonably assume that Congress intended that a non-immune sovereign should be treated exactly like any other private party subject to diversity jurisdiction—such

that it could "be liable in the same manner and to the same extent as a private individual," full stop. But Congress did not so limit its amendment.

Instead, it removed from Section 1332(a) *all* actions brought against a foreign state. And there can be little doubt that Congress's value-judgment that actions against foreign states cannot and should not be treated as premised on diversity jurisdiction—under any circumstance—was intentional. The House Report accompanying the amendment explains:

> Section 3 of the bill amends those provisions of 28 U.S.C. 1332 which relate to diversity jurisdiction of U.S. district courts over foreign states. Since jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous. The amendment deletes references to "foreign states" now found in paragraphs (2) and (3) of 28 U.S.C. 1332(a), and adds a new paragraph (4) to provide for diversity jurisdiction in actions brought by a foreign state as plaintiff.

House Report 14. Congress made express its intention that non-immune foreign states should *not* be subject to diversity jurisdiction or, it follows, diversity jurisdiction's choice-of-law test.

C. Petitioners' Interpretation Ignores Important Language in Section 1606

That Congress intentionally narrowed the construct through which a foreign state's liability can determined is supported by the language of Section 1606 itself.

When Congress included the language that a foreign state "shall be liable in the same manner and to the same extent as a private individual" it did not do so without limitation. If Congress had ended the sentence with this statement, inserting a "." after "individual," Section 1606 might be harder to square with Congress's clear objective in ensuring that foreign states are not subject to whims of the state laws and procedures. But Congress did not end its instruction there.

Rather, Congress specifically limited the scope of a foreign state's liability—and the context in which it can be considered—by adding the caveat that a foreign state should be treated like a private party only "*under like circumstances*." 28 U.S.C. § 1606. In other words, only where the "circumstances" "under" which the foreign state's liability should be examined are "like" those of a private party can a foreign state "be liable in the same manner and to the same extent as a private individual." *See, e.g., Elliot Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 17 F.3d 616, 629-630 (3d Cir. 1994) (qualifying clause in statute is applied to the immediately preceding phrase). The impact of Congress's inclusion of this caveat—and its impact on the question presented—is even more apparent when looking at the FSIA's primary purpose.

The FSIA was enacted to codify the "restrictive" principle of sovereign immunity, such that a foreign state's immunity is generally "restricted" to actions involving a foreign state's public or sovereign acts, but withheld from its commercial or private acts. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480,

486-489 (1983); House Report 7. The most important of the FSIA's enumerated exceptions—the commercial activity exception, 28 U.S.C. § 1605(a)(2)—provides that a foreign sovereign may be stripped of is presumptive sovereign immunity where it is alleged to have engaged in *commercial* activities. It follows that where the dispute centers on a sovereign's private, commercial activity, there may be "like circumstances" under which either a foreign state or a private individual can be held liable. This makes sense because a sovereign, agreeing to participate in (and be bound by) contracts for commercial goods or services, is acting like a private, not a sovereign, party. And it is the participation in these same commercial acts that is the "like circumstances" under which the liability of a foreign state *and* an individual can be examined. But when addressing a foreign state's *public* acts—acts that involve the exercise of "powers peculiar to sovereigns"—a foreign state cannot be liable "in the same manner and to the same extent as a private individual under like circumstances" because a private individual cannot commit a public, sovereign act.

The United States discounts this argument because it was Germany that the committed the sovereign act—the taking in violation of international law—while the Foundation is alleged only to be the knowing holder of stolen property, a role a private party can assume. U.S. Brief 29. But this sidesteps the larger issue—that there cannot be "like circumstances" where a court is examining a foreign state's liability for its sovereign acts. This action is an outlier; rarely is a foreign sovereign stripped of its presumptive sovereign immunity for the unlawful actions of another

sovereign. In most actions brought under the expropriation exception, the sovereign alleged to have expropriated the property is also the defendant. *See, e.g., Fischer v. Magyar Államvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015); *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934 (D.C. Cir. 2008). Had one of these courts been required to examine Section 1606, there could be no "like circumstances" with a private individual to support the simplistic interpretation advocated by the United States.

D. Section 1330's "Federal Law" Jurisdiction Is Analogous to Section 1331's "Federal Question" Jurisdiction

Where jurisdiction exists under Section 1331, federal common law applies to determine the choice of law in an action involving private parties. *See, e.g., Singletary v. United Parcel Serv., Inc.*, 828 F.3d 342, 351 (5th Cir. 2016) (recognizing that a court must "apply federal common law choice of law principles when [it] exercise[s] federal question jurisdiction over a case." (citation and internal quotation marks omitted); *Barkanic v. Gen. Admin. of Civ. Aviation of the People's Republic of China*, 923 F.2d 957, 961 (2d Cir. 1991) ("Where jurisdiction is based on the existence of a federal question … we have not hesitated to apply a federal common law choice-of-law analysis."). Thus, if jurisdiction in this case was premised on Section 1331, there is no question that a court would apply federal common law's choice-of-law test.

As explained in greater detail below, Section 1330 jurisdiction is analogous to (and closely aligned with) Section 1331 jurisdiction—not with Section 1332

jurisdiction. For this reason, the "under like circumstances" requirement of Section 1606 is best effectuated by using federal common law as is done where jurisdiction is premised on 1330. In this way, in *all* actions where the application and interpretation of federal law plays a significant role in a court's analysis—and liability of parties to those actions, be they private or sovereign—can be examined under "like circumstances."

As noted above, Congress's removal of actions against foreign states from Section 1332 was not done in a vacuum, but was accomplished in tandem with its creation of Section 1330, an additional and limited jurisdictional category setting forth when federal courts can exercise jurisdiction over foreign states. And while a separate category, Section 1330 jurisdiction has more in common with—and is more analogous to—federal question jurisdiction, than diversity, as recognized by this Court. *Verlinden*, in fact, discusses the outsized role that "federal law" plays in the adjudication of *any* action brought under the FSIA. There, Verlinden B.V., a Dutch corporation, entered into a contract with the Nigerian government for the purchase of 240,000 metric tons of cement. 461 U.S. at 482. After the Central Bank of Nigeria, an agency or instrumentality, failed to obtain the requisite letter and took actions inconsistent with the contract, Verlinden sued in the Southern District of New York. *Id.* at 483. The district court granted the bank's motion to dismiss for lack of subject matter jurisdiction, finding that none of the FSIA's exceptions applied to permit jurisdiction. *Id.* at 484-485.

The Second Circuit affirmed the judgment but on different grounds, holding that the FSIA exceeded Article III's scope. *Verlinden B.V. v. Cent. Bank of Nigeria*, 647 F.2d 320, 325-330 (2d Cir. 1981). Specifically, it determined that neither the diversity clause, federal question jurisdiction, nor the so-called "arising under" clause of Article III[4]—was sufficiently broad to support jurisdiction over actions by foreign plaintiffs against foreign states. *Ibid.* Finding that Congress lacked the authority to grant federal courts jurisdiction in such a case, the Second Circuit affirmed the district court's dismissal. *Id.* at 330. This Court granted review and reversed.

In its decision, this Court, after examining the history and structure of the FSIA, rejected the Second Circuit's determination. It recognized that: (1) the FSIA is not merely jurisdictional, but a comprehensive and broad statutory framework governing assertions of sovereign immunity, *Verlinden*, 461 U.S. at 493-494; (2) in enacting the FSIA, "congress expressly exercised its power to regulate foreign commerce, along with other specified Article I powers," *id.* at 496; and (3) actions under the FSIA require courts to apply "a body of substantive federal law," *id.* at 497.[5] Given

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[4] The "arising under" clause provides: "The judicial Power [of the United States] shall extend to all Cases … arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const., art. III, § 2, cl. 1.

[5] The FSIA is not merely a jurisdictional "pass-through," as some lower courts might suggest, *Oviessi v. Islamic Republic of Iran*, 573 F.3d 835, 841 (D.C. Cir. 2009), because "the jurisdictional

these three factors, this Court concluded that an action against a foreign sovereign invoking the FSIA "'arises under' federal law, within the meaning of Article III." *Ibid.* Because cases invoking the FSIA "arise under" federal law, Congress had the authority to grant federal courts jurisdiction when it created Section 1330. *Ibid.*

In the course of its analysis, this Court compared the "arising under" Clause of Article III with Section 1331, noting their similarities. *Id.* at 494-495. This Court recognized that Section 1330 jurisdiction is closely tied to federal question jurisdiction, noting that "a suit against a foreign state under this Act necessarily raises questions of substantive federal law at the very outset, and hence clearly 'arises under' federal law, as that term is used in Article III." *Verlinden*, 461 U.S. at 493.

Because Section 1330 jurisdiction, the provision conferring jurisdiction in this case and which "necessarily raises questions of substantive federal law," is analogous to Section 1331 (federal question) jurisdiction, federal common law should apply where Section 1330 provides jurisdiction. Thus, even though claimants may allege "garden variety" state law claims, the action is, from start to finish, *governed by federal law*, and therefore federal common law's choice-of-law test should apply. That federal law governs almost every aspect of *if and how* the case can progress is not simply because the case is in federal court or implicates

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provisions of the Act are simply one part of [the FSIA's] comprehensive scheme," *Verlinden*, 461 U.S. at 496-497.

federal laws—it is because the FSIA mandates it through a series of unique and express *federal* requirements. This shared basis of "federal law" jurisdiction creates the "like circumstances" under which a foreign state "may be liable in the same manner and to the same extent as a private individual."

In sum, because diversity *cannot* provide a basis for exercising jurisdiction over a foreign state, a foreign state cannot "be liable in the same manner and to the same extent as a private individual" if a court applies the forum choice-of-law test. Only if a court applies federal common law—as it would in an action against an individual where jurisdiction is premised on a federal question—can a foreign sovereign "be liable in the same manner and to the same extent as a private individual *under like circumstances*."

E. Application of Federal Common Law Is Appropriate Where the Resolution of the Claims Involves Unique Federal Interests and Could Implicate Foreign Policy Concerns

Petitioners acknowledge that there are occasions where the development of federal common law is clearly appropriate, including where it is "necessary to protect *uniquely federal* interests." Brief 22-23 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (emphasis added)). They contend, however, that because "instances where there is need and authority for federal common law are 'few and restricted,'" federal common law should not apply here. *Id.* at 22 (quoting *Wheeldin v. Wheeler*, 373 U.S. 647,

651 (1963)). Not so. In light of the FSIA's "comprehensive framework" of federal law governing actions against foreign states, *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992), this Court's recognition that "international disputes implicating the conflicting rights of States or … relations with foreign nations," *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), and the numerous federal policies and acts relating specifically to Holocaust-era claims, discussed at length in this case and by *amici*, there can be little doubt that this is case involves "uniquely federal interests."

It is beyond dispute that the creation of federal common law may be appropriate for matters concerning "relationships with other countries." *Atherton v. FDIC*, 519 U.S. 213, 226 (1997); *see also Sabbatino*, 376 U.S. at 425-426 (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); Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 839 (2008) ("State law cannot govern federal procedure—just as the Court has held that it cannot govern admiralty, interstate disputes, certain cases involving the rights and obligations of the federal government, and certain matters of foreign affairs.").

The United States' response to this concern is unpersuasive because the United States acknowledges the possibility—if not likelihood—that the choice-of-law rule under the FSIA may implicate foreign policy:

> 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.

U.S. Brief 21.[6] The United States' response is also unsatisfying, asserting that "hostile" or "improperly dismissive" forum rules implicating foreign policy may be ameliorated:

> 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.

Ibid. Put another way, it is the United States' position that, rather than apply a uniform choice-of-law test that the majority of *states* have already adopted in whole, it is preferable that in the significant number of states that have not adopted the Restatement in whole or in part, courts should simply conduct an additional,

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[6] It is difficult to conceive of an action in a U.S. court where a foreign sovereign is stripped of its sovereign immunity for its actions—particularly if those acts are *sovereign* and/or the court seeks to regulate conduct or pass judgment on events that took place within the foreign sovereign's territory—and foreign policy concerns *are not* implicated.

case-by-case analysis to examine whether the forum state's choice-of-law rules are "hostile to or improperly dismissive of a foreign state's interests in regulating certain matters within its own territory" and therefore "should not control," even if the forum's choice-of-law test recommends otherwise. That is not a workable solution. Injecting a second level of review—one that is separate from both a choice-of-law test *and* an examination of foreign state liability—only increases, rather than reduces, "the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497. This is the opposite of what Congress intended.

Finally, as the Foundation has learned over sixteen years of litigation in this case, courts often are dismissive of the impact of "applicable treaties or statutes, international comity, the Act of State doctrine, [and] other sources reflecting distinctly federal interests." U.S. Brief 21. In fact, not all courts recognize that such considerations or defenses are available where jurisdiction is premised on the FSIA. *See, e.g., Usoyan v. Republic of Turkey*, 6 F.4th 31, 49 (D.C. Cir. 2021) (reasserting, notwithstanding this Court's decision in *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703 (2021), that international comity cannot "override" the FSIA's "sole and exclusive standards").

F. Congress Enacted the FSIA to Promote Uniformity in Actions Against Foreign States

The FSIA was enacted to promote uniformity among actions involving foreign sovereigns. The Second

Circuit's decision in *Barkanic* that Petitioners and the United States champion acknowledged this goal, but did not believe Congress intended to achieve "uniformity of decision" by applying different choice-of-law standards to foreign defendants and private parties. 923 F.2d at 960 n.3.[7] Nothing in the FSIA, however, promotes the concept of subjecting sovereigns to the whims of the state law. Indeed, it is for this reason that federal courts were vested with original jurisdiction over these cases. The FSIA's legislative history notes that "uniformity in decision … is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign

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[7] As the United States notes, a statement deep in the FSIA's legislative history asserted that "Under the *Erie* [*Railroad v. Tompkins*, 304 U.S. 64 (1938)] doctrine, state substantive law, including choice of law rules, will be applied if the issue before the court is non-federal." *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcommon. On Claims and Governmental Relations of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 2-13 at 47 (1973). H.R. 3493, a precursor to the FSIA, was withdrawn that same year. Two years later, H.R. 11315 was introduced. That bill was further revised and enacted in 1976, as the FSIA. Although the section-by-section analysis of H.R. 11315 is considerably more robust, the newer bill's analysis includes *no* reference to *Erie* or choice of law. Moreover, H.R. 11315's Section-By-Section analysis contains an introductory admonition that its "analysis *supersedes* the section-by-section analysis that accompanied the earlier version of the bill in the 93rd Congress"—H.R. 3493—and that the "*prior analysis should not be consulted* in interpreting the current bill and its provisions." *Id.* at 12 (emphasis added). That analysis notes that "no inferences should be drawn from differences between" H.R. 3493 and H.R. 11315, *id.*, but the implications of those differences—most notably, that references to *Erie* were intentionally discarded—are inescapable.

relations consequences." House Report 12. Subjecting sovereigns to different state procedural laws depending on where they are sued does not promote uniformity; it promotes disparate treatment and forum shopping. In fact, treating a non-immune sovereign like a private party subject to diversity jurisdiction ignores *Verlinden*'s admonition that "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States, and the primacy of federal concerns is evident." *Verlinden*, 461 U.S. at 493.

The United States asserts that the FSIA's interest in uniformity is limited solely to the threshold analysis of whether (or not) a foreign sovereign is amenable to suit in the United States. U.S. Brief 26. But that is not so. The FSIA' legislative history explains clearly that

> Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states. Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.

House Report 12-13; *see also id.* at 13 (recognizing that actions "tried by a court without a jury tend to promote uniformity in decision where foreign sovereigns are involved"); *id.* at 32 (noting the importance of providing foreign states with ability to remove an action to federal court, "[i]n view of the potential sensitivity of actions against foreign states and the importance of

developing a uniform body of law"). Neither the language of the FSIA nor its legislative history warrants such a narrow reading of Congress's uniformity goals, as recognized by courts around the country, including this Court. *See, e.g., Verlinden*, 461 U.S. at 489 (quoting House Report at 32); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venezuela*, 863 F.3d 96, 99-100 (2d Cir. 2017) (noting "Congress's stated goals of promoting comity with other sovereigns and ensuring the United States' consistency of approach with respect to federal courts' interactions with foreign sovereigns"); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 207 (3d Cir. 2003).

The United States further discounts the FSIA's "emphasis on uniformity" by suggesting that the Foundation "cannot explain why applying state rather than federal choice-of-law rules would result in meaningfully less uniformity." U.S. Brief 10. But that too is incorrect, as the government's argument ignores entirely the fact that two states (Michigan and Kentucky) employ choice-of-law tests that explicitly favor the application of their forum's law, Brief in Opposition ("BIO") 14 n.7, and ten others continue to employ the traditional *lex loci delicti* test, which requires application of the law of the jurisdiction where the injury occurs without consultation of the parties' or the competing states' interests, *id*. at 12. While the facts of this particular case—as applied to either the Restatement or California's choice-of-law test—mandate the application of Spanish law, it is conceivable that an action brought in Michigan, Kentucky, or a *lex loci delicti* jurisdiction could very well lead to application of a law not favored by the

Restatement's test, resulting in "meaningfully less uniformity" than would application of federal common law.

The United States acknowledges that, "[w]here Congress wanted to depart from the equal treatment principle [—integral to the FSIA—] it said so explicitly." U.S. Brief 13. The Foundation agrees. For this reason, the FSIA allows courts to examine a non-immune foreign state's substantive liability under *state law*. In that way, a foreign state defendant is treated like a private individual defendant. But a choice-of-law test is not a liability determination. Had Congress intended the FSIA to "depart from the equal treatment principle" to examine pre-liability issues like the proper choice-of-law test, it would have said so "explicitly." *Lauritzen v. Larsen*, 345 U.S. 571, 591 (1953) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum.").

G. Only Federal Common Law's Choice-of-law Test Contemplates Consideration of the Federal and International Laws, Policies, and Agreements On Which Petitioners and Their Amici Focus

Petitioners complain that federal common law's choice-of-law test "led the district court to engage in a free-wheeling interpretation of various Restatement elements, with highly questionable results." Brief 27. That Petitioners' disagree with the lengthy analyses conducted by both the district court and the court of appeals does not render those courts' determinations

"highly questionable." Moreover, as even the United States acknowledges "[i]t is undisputed at this stage … that the application of federal common law results in the application of Spanish law, which allowed [the Foundation] to acquire title to the stolen painting by acquisitive prescription, making [the Foundation] rather than petitioner[s] its lawful owner." U.S. Brief 14. Thus, the lower courts' finding that, if Spanish law applies, the Foundation is the owner of the Painting is not under review or subject to challenge.

Petitioners fault the lower courts for giving "virtually no weight" to (1) "California's laws and policies protecting its citizens' property rights with respect to stolen property in general and stolen works of art in particular," or (2) "U.S. law and policy and international agreements relating specifically to Nazi looted art that are inconsistent with Spain's broadly applicable adverse possession." Brief 28. As to the first point, as this Court can easily confirm, both lower courts discussed *at length* California's laws and policies, as well as their limitations, before determining that Spain had the more significant relationship with the parties and action, as required by the Restatement, Pet. App. C20-C26, D5-D7; *and* the district court recognized that Spain's governmental interests would be more impaired than those of California if Spain's laws were not applied, *Id*. at D7-D11. But as to the second point, Petitioners' argument weighs *strongly against* the application of California's choice-of-law test.

It is not disputed that federal common law directs courts to consider national and international laws and

policies as part of their choice-of-law analysis. *Id.* at C20-C26, D5-D6 (quoting Section 6 of the Restatement, which includes among the factors to consider in the choice-of-law analysis: "the needs of the *interstate and international systems*," "the relevant policies of *other interested states* and the *relative interests of those states in the determination of the particular issue*," and "the basic policies underlying the *particular field of law*") (emphases added).

But the "U.S. law and policy and international agreements relating specifically to Nazi looted art" that Petitioners and *amici* reference as important do *not* factor into California's governmental interest test. That test contains three considerations:

> [First] whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction's interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state, and then ultimately applies the law of the state whose interest would be the more impaired if its law were not applied.

Pet. App. D7 (quoting *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 922 (Cal. 2006) (internal quotations and citations omitted)). Absent is a reference to national, international, or *any* other interest, law or policy beyond those of the states whose laws are in conflict.[8]

Petitioners assert otherwise, ignoring *Kearney* and boldly stating that California's choice-of-law test "requires consideration of 'all' interests, including those of United States law and diplomatic agreements such as the Washington Principles and Terezin Declaration[.]" Brief 11 (emphasis added). Petitioners cite no legal authority for this proposition, instead referencing only their own Motion for Summary Adjudication. *Ibid*. (citing 2:05-cv-03459, Dkt. 251 16, 30, 45-48). But neither the referenced motion, which is only twenty-six pages, nor the reply supports this statement, as Petitioners did not advance this argument before the district court and therefore did not marshal any (non-existent) supporting authority there either. Following the district court's denial of that motion, Petitioners claimed on appeal that "United States law/policy is also relevant to the choice of law analysis," with citation to the intermediate court of appeals decision in *Stonewall Surplus Lines Insurance Co. v. Johnson Controls, Inc.*, 17 Cal. Rptr. 2d 713 (Cal.

[8] Foreign policy "is not an area of 'traditional state responsibility'" that can be controlled or governed by California or its law. *Von Saher v. Norton Simon Museum of Arts at Pasadena*, 592 F.3d 954, 965 (9th Cir. 2010) (quoting *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419 n.11 (2003)).

Ct. App. 1993). No. 15-55550, Dkt. 23 at 45.[9] But Petitioners misrepresented then—and continue to misrepresent now—the holding and relevance of that case.

In *Stonewall Surplus*, the court was asked to determine whether California or Wisconsin law should govern an insurance indemnity claim. In the context of applying California's governmental interest test, that court noted that the "forum must consider all the foreign and domestic elements and interests involved in the case to determine the applicable rule." 17 Cal. Rptr. 2d at 718. But the context of the claim—and the court's analysis—make clear that the words "foreign and domestic" were simply formal terms, as the only "interests involved" were those of California (domestic) and Wisconsin (foreign). The intended meaning of "foreign and domestic" is even more apparent in *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967)—the California Supreme Court decision that *Stonewall Surplus* applied. *Reich* involved a California wrongful death action, following a car accident in Missouri, brought by the decedents' heirs who were living in Ohio at the time of the accident. *Id.* at 728. The court noted—and without citation—that "[a]s the forum we must consider all of the foreign and domestic elements and interests involved in this case to determine the rule applicable." *Id.* at 730. But read in context, the

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[9] Petitioners' reply brief in the court of appeals included a single citation to *Stonewall Surplus*, No. 15-55550, Dkt. 90 at 50, but discussed the application of national and international policies *only* within the context of the *Restatement*, *id.* at 42-44.

clear—and limited—scope of this statement is unmistakable:

> As the forum we must consider all of the foreign and domestic elements and interests involved in this case to determine the rule applicable. Three states are involved. Ohio is where plaintiffs and their decedents resided before the accident and where the decedents' estates are being administered. Missouri is the place of the wrong. California is the place where defendant resides and is the forum.

Id., *see also id.* at 729 ("The forum must search to find the proper law to apply based upon the interests of the litigants and the *involved* states.") (emphasis added). Neither *Stonewall Surplus* nor *Reich* supports Petitioners' expansive interpretation of California's governmental interest test to consider interests expressed in federal law and policy or international agreements. Indeed, no court has adopted Petitioners' self-serving mischaracterization.

In sum, the national laws and policies and international agreements that Petitioners and *amici* emphatically claim are so imperative to the determination of the proper choice-of-law determination are *wholly irrelevant* to California's choice-of-law test. Demands that "the choice-of-law analysis in this case must take into account the entirety of consistent federal policy favoring the restitution of Nazi-confiscated art to its rightful owners," 1939 Society Brief 14, are served *only* with the application of federal common law.

H. Use of Federal Common Law Avoids Forum Shopping and Reduces the Potential for the Disparate Application of State Law

If courts are permitted to use their forum's choice-of-law test, claimants will be encouraged to file suit in a forum where they perceive that the choice-of-law test will lead to the application of more favorable law, even if that state's law's connection to the case is limited. Petitioners acknowledge that if Mr. Cassirer "had been living in New York, Houston, Cleveland, or Washington, D.C., when he brought this action, the federal courts in those cities would have applied state choice-of-law rules." Pet. Reply 1; *see also id*. at 11 n.2. This highlights the very limited—and largely random—role that a forum can play in the choice-of-law game. Given that a foreign sovereign can be haled into a U.S. court decades after an injury that was caused by a *different sovereign*, application of the *forum*'s choice-of-law test would give the sovereign little if any confidence that the FSIA will be applied uniformly or that its sovereignty will be respected, raising the potential for "adverse foreign relations consequences," an issue Congress affirmatively sought to avoid. House Report 12-13.

The district court recognized the inherent unfairness of affording the forum's law too much weight because, but for Mr. Cassirer's retirement to San Diego, California would have *no interest* in this case:

> If Spain's interest in the application of its law were subordinated to California's interest, it

> would rest solely on the fortuitous decision of Lilly's successor-in-interest to move to California long after the Painting was unlawfully taken by the Nazis and the fact that he happened to reside there at the time the Foundation took possession of the Painting. Subjecting a defendant within Spain to a different rule of law based on the unpredictable choice of residence of a successor-in-interest would significantly undermine Spain's interest in certainty of title.

Pet. App. D10. It is troubling that had Mr. Cassirer retired to Michigan or Kentucky, for example, the forum's preference for its own laws could result in application of the law of a state with demonstrably less interest in the case. Alternatively, had he retired to New Mexico, a state where tort actions "are governed by the law of the place where the wrong occurred," *Terrazas v. Garland & Loman, Inc.*, 142 P.3d 374, 377 (N.M. Ct. App. 2006), or Florida, where state courts apply the Restatement, *Bishop v. Fla. Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980), there is little doubt that the forum *and* the federal common law tests would warrant the same result. Because there is a real possibility that different choice-of-law tests could lead to different results, thereby encouraging potential claimants to forum shop, the goal of uniformity of decision is best served by mandating the use of federal common law's choice-of-law test in *all* FSIA-based cases.[10]

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[10] The United States cites *Erie* as support for the proposition that "a federal court applies all of a State's substantive rules in applying that State's law." U.S. Brief 18 (citing 304 U.S. at 78).

I. The FSIA and FTCA Are Readily Distinguishable, Providing Limited Support for the Application of the Forum's Choice-of-law Test

Petitioners and the United States assert that the Court's choice-of-law analysis in this case should be guided by a statute that has no relevance to foreign sovereigns or foreign policy. Brief 30; U.S. Brief 15-18. They argue that because the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671 *et seq.*, contains a "same manner and to the same extent" requirement and this Court determined that the forum choice-of-law test should apply to FTCA-based cases, this Court should engraft a comparable forum choice-of-law test onto the FSIA too. U.S. Brief 15 (citing *Richards v. United States*, 369 U.S. 1, 6 (1962)); *see also* Brief 30. The statutes, however, are readily distinguishable.

First, the FTCA contains a provision specifying that the governing law is "the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1). As noted by the United States, this Court held that this "law of the place" language encompasses a State's "whole law (including choice-of-law rules) of the place where the negligence occurred[.]" U.S. Brief 16 (quoting *Richards*, 369 U.S. at 2-3). Thus, application of the forum's choice-of-law test "enables the federal courts to

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Although that decision predates the FSIA by decades, is predicated on diversity jurisdiction, *and* did not involve a foreign sovereign, *Erie*'s acknowledged twin goals—"discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), are furthered *only* with the application of federal common law's choice-of-law test.

treat the United States as a 'private individual under like circumstances,' and thus is consistent with the Act as a whole." *Richards*, 369 U.S. at 11 (quoting 28 U.S.C. § 2674). But unlike the FTCA, the FSIA does not contain "law of the place" language that would warrant application of a state's "whole law (including choice-of-law rules)[.]" *Id.* at 2-3.[11]

Moreover, if the FTCA's "law of the place where the act or omission occurred" language *was* incorporated (without specific reference) into the FSIA, as the United States contends, U.S. Brief 17, then that provision must be read with the "same manner and to the same extent" language to favor the application of *Spanish* law. It is the Foundation's public purchase of the Painting, in Spain, and the vesting of the Painting's title, in Spain, no later than June 21, 1999, that are the "acts" that caused Petitioners' injury. Mr. Cassirer's failure to bring a claim—much less notify museums, Pissarro experts, or the public of his claim to the

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[11] The United States acknowledges "tension" in *Richards* because applying state choice-of-law principles would ensure equal treatment between the U.S. government and a private individual under like circumstances only "where the forum State is the same as the one in which the act or omission occurred," U.S. Brief 16 (quoting 369 U.S. at 12), but that "no such tension obtains here," *id.* This Court is not being asked, however, to fashion a rule just for this case, but for all cases brought under the FSIA. And the FSIA specifically contemplates that claimants may seek to hold a foreign sovereign liable for acts or omissions that occur *inside* the United States. *See, e.g.*, 28 U.S.C. § 1605(a)(2) (permitting jurisdiction where the "action is based upon a commercial activity carried on in the United States by the foreign state"). Thus, with the United States' analogy to the FTCA, the "tension" identified in *Richards* remains.

Painting—when he lived in New York, or later in Ohio, or for the first thirty years as a California resident, is not the "omission" that could warrant application of the laws of one of those states. As "the law of the place where the act or omission occurred," is Spain, nothing in the FTCA—or its loose analogies to the FSIA—warrant application of any state's choice-of-law test, much less California's.[12]

Further, Congress did not intend for the FSIA to subject foreign states—acting either in their private or public (sovereign) capacity—to the same liability that the U.S government faces in U.S. courts. Rather, Congress intended to subject foreign states to the same treatment in United States courts that the United States government receives in *foreign* courts. *See* House Report 8 (stating that the "restrictive" principle of sovereign immunity "is regularly applied against the United States in suits against the U.S. Government in foreign courts"); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587 (9th Cir. 1983), *cert. denied*, 469 U.S. 880 (1984).

This Court has consistently recognized the important relevance of international law in cases where jurisdiction is premised on the application of an FSIA exception. *See, e.g, Philipp*, 141 S. Ct. at 709-712 (relying on international law—which "customarily concerns relations among sovereign states, not relations between states and individuals"—and the

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[12] This Court recognized that the FTCA's foreign country exception "bars all claims based on injury suffered in a foreign country," specifically to avoid the application of otherwise-applicable foreign law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

appropriate Restatement for guidance in actions brought against foreign sovereigns in U.S. courts); *Permanent Mission of India to United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007) (noting this Court's consistent practice of interpreting the FSIA in keeping with "international law at the time of the FSIA's enactment" and looking to the appropriate Restatement for guidance). As highlighted in *Philipp* and *Permanent Mission*, the FSIA is not a statute fashioned to address domestic claims against the United States (like the FTCA), but rather a comprehensive statute incorporating sovereign-focused international laws and rooted in decades of evolving and restrictive foreign policy. Thus, the FTCA provides little relevant guidance here.

J. The Rules of Decision Act Does Not Apply Where, As Here, Jurisdiction is Not Premised on Diversity and "Acts of Congress" Displace the General Application of State Law

Petitioners contend that the Rules of Decision Act mandates the application of a forum's choice-of-law test. Brief 25. As noted by Petitioners and recognized by this Court, "the Rules of Decision 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[.]" *Ibid*. (quoting *Guaranty Tr. Co. of N.Y. v. York*, 326 U.S. 99, 102 (1945)). The Foundation does not dispute that, under the Rules of Decision Act, a federal court must apply state law in deciding the merits of a diversity case. *See, e.g., Miller v. Davis*, 507 F.2d 308, 312 (6th Cir. 1974). But, as explained at

length, this Court's jurisdiction *is not* premised on diversity. And where jurisdiction is *not* premised on diversity, the Rules of Decision Act has no relevance. *See, e.g., Milwaukee Towne Corp. v. Loew's, Inc.,* 200 F.2d 17, 20 (7th Cir. 1952), *cert. denied*, 345 U.S. 909 (1953).

Moreover, the language of the Rules of Decision Act itself precludes its application here. It allows that state law shall apply "*except* where the Constitution or treaties of the United States *or Acts of Congress otherwise require or provide*[.]" 28 U.S.C. § 1652 (emphasis added). Finally, when the Rules of Decision Act was created in 1789, foreign sovereign immunity was absolute. *The Schooner Exch. v. McFaddon*, 7 Cranch (11 U.S.) 116, 137 (1812). And because *Guaranty Trust* was decided more than thirty years before the FSIA was enacted *and* did not involve a sovereign (foreign or domestic) it is inapposite.

Because the FSIA is an act of Congress that specifically limits and regulates the application of state law in actions brought against foreign states, the Rules of Decision Act is of little consequence here.

K. Petitioners' Federalism Concerns Are Illusory and Overstated

Petitioners posit that Congress could not have intended federal common law's choice-of-law test to apply in FSIA actions because of the "collision" of state and federal principles that would result where an FSIA action is brought in a state court. Brief 31. This scenario, however, is fanciful. No state court decision in the country has wrestled with—or even

considered—the "thorny" question of what choice of law to apply in an FSIA action. But this is hardly surprising, because, as this Court recognized, "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 states." *Verlinden*, 461 U.S. at 497.

But even if an action did proceed in state court *and* the court was charged with conducting a choice-of-law test, Petitioner's parade-of-horribles concern is unavailing. State courts can—and do—apply federal common law where it governs the analysis. *See, e.g.*, *Paulos v. FCH1, LLC*, 456 P.3d 589, 591 (Nev. 2020) (looking to federal common to determine the preclusive effect of a federal judgment); *Norfolk S. R.R. Co. v. Hartry*, 837 S.E.2d 303, 306-307 (Ga. 2019) (recognizing that the plaintiffs' Federal Employer's Liability Act claims are governed by federal common law). And there can be little doubt that state courts are capable of applying federal common law, should a choice-of-law test be required in the future, because the majority of states have already adopted the federal common law test—the Restatement—as the forum's choice-of-law test, in whole or in part. BIO 12-15.

II. Aside from Being Premature and Unrelated to the Question Presented, Petitioners' Assertion that California's Choice-of-law Test Would Mandate the Application of California Law Is Incorrect

Petitioners and *amici* advocate for the application of California's choice-of-law test based on their

theory—rejected by the district court—that application of a forum's choice-of-law test is more likely to lead to the application of that forum's substantive law. But neither Petitioners nor *amici* offer any authority recognizing, much less suggesting, that the Restatement's test is more likely to recommend the application of foreign law.

For example, in *Barkanic*, the Second Circuit applied New York's choice-of-law test (which is based, in part on the Restatement) to find that Chinese law—not New York law—must apply. 923 F.3d at 963. In *Oviessi*, the D.C. Circuit applied the forum choice-of-law test (which is based in part on the Restatement) to find that French law must apply. 573 F.3d at 842-843. The D.C. Circuit made the observation that the outcome would have been the same had it applied the Restatement. *Id.* at 841 n.2. And even in this case, the district court, after conducting two independent analyses, recognized that the Restatement *and* California's "governmental interests" tests lead to the same result. Pet. App. D5-D11.

One can conceive of a hypothetical where a district court in Kentucky or Michigan relies so heavily on that forum's preference for its own law that it ignores the more "significant relationship" between the parties, the subject matter, and the events that the court rejects the application of foreign law that courts applying the Restatement would recognize as proper. But that is not the case here, where can be little doubt that California's choice-of-law test mandates Spanish law.

> Although California has a fundamental interest in protecting its residents and specifically has an

interest in protecting its residents claiming to be rightful owners of stolen art, that interest is far less significant where the original victim did not reside in California, where the unlawful taking did not occur within its borders, and where the defendant and the entity from which the defendant purchased the property were not located in California. Moreover, California's interest in the application of its laws related to adverse possession of personal property (or lack thereof) is not as strong as Spain's interest, given that neither a California statute nor case law expressly prohibits a party from obtaining ownership of personal property through adverse possession. In contrast, Spain has enacted laws, as part of its Civil Code, that specifically and clearly govern adverse possession of movable property. Furthermore, although the California Legislature's 2010 amendment to California Code of Civil Procedure § 338 is certainly relevant to demonstrate California's interest in protecting "rightful owners" of stolen art … the California Legislature did not create a new claim for relief or attempt to statutorily restrict the Court's choice of substantive law in this area. Instead, the California Legislature merely expressed its interest in eliminating inequitable procedural obstacles to recovery of fine art by extending the statute of limitations for claims seeking such recovery. Unlike a statute of limitations, the law of adverse possession does not present a procedural obstacle, but rather concerns the merits of an aggrieved party's claim.

Pet. App. D11. Consideration of the federal laws and policies trumpeted by *amici* are not relevant to California's choice-of-law test, *see* pp. 27-30, *supra*. But even if they were, they do not overcome Spain's stronger interests in this case. In fact, this Court recently recognized that they do not support application of the forum's law in this or any U.S. court.

> The[se] statutes do promote restitution for the victims of the Holocaust, but they generally encourage redressing those injuries outside of public court systems. The [Holocaust Expropriated Art Recovery Act of 2016 ("HEAR Act"), 130 Stat. 1524] for example, states that "the use of alternative dispute resolution" mechanisms will "yield just and fair resolutions in a more efficient and predictable manner" than litigation in court.

Philipp, 141 S. Ct. at 715 (discussing the HEAR Act, the Holocaust Victims Redress Act of 1998, 112 Stat. 15, and the Justice for Uncompensated Survivors Today Act of 2017, Pub. L. 115-171, 132 Stat. 1288).

III. The Application of California Law Would Conflict with Long-Recognized Constitutional Limiting Principles and Violate the Foundation's Due Process Rights

1. Both the federal government's exclusive authority to act in the realm of foreign affairs *and* Constitutional limiting principles are intended to preclude the application of state law where that law conflicts (or interferes) with foreign policy and/or the

connections between the controversy and the forum are "slight." U.S. Brief 21-22. As explained previously by the United States

> Where, as here, the injury occurred abroad, the FSIA and constitutional principles limiting the power of the states might independently prevent a U.S. state from applying its domestic law. Even in the domestic context, several constitutional provisions limit a state's ability to project its substantive law extraterritorially. These limitations also restrict a court's ability to apply the forum state's law to extraterritorial conduct pursuant to choice-of-law analysis. Projection by a state of its legal norms onto foreign nations when the relevant actions occur abroad could present even greater problems of extraterritoriality, disuniformity, and interference with United States foreign policy.

Brief for United States as *Amicus Curiae* Supporting Plaintiffs-Appellees, *Kilburn v. Islamic Republic of Iran*, No. 03-7117, 2004 WL 502018 (D.C. Cir. March 9, 2004) at 21 (internal citations omitted); *see also BMW of N. America, Inc. v. Gore*, 517 U.S. 559, 572 (1996); *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). Such principles restrict a court's ability to apply the forum state's law to extraterritorial conduct pursuant to a choice-of-law analysis.[13] *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 816-817 (1985). Thus, to the

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[13] Indeed, the United States brief asserts that "[w]here, as here, the challenged conduct has a foreign component, the determination of liability on such a claim may, of course, be governed by foreign law." U.S. Brief 12-13 n.4.

extent that California's choice-of-law test *could* be interpreted to favor California law over Spanish law, that determination would conflict with long-recognized principles that disfavor the extraterritorial application of a state's laws to injuries that occurred abroad. *See, e.g, Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

2. The application of California law also raises constitutional due process concerns.[14] The district court recognized the Foundation's ownership under Spanish adverse possession laws because: (1) the Foundation possessed the Painting and represented to the public that it was the owner, since June 21, 1993, Pet. App. D12; (2) the Foundation's possession was public, peaceful, and without interruption, *id.* at D12-D13; and (3) the Foundation's possession was not interrupted until Mr. Cassirer's claim on May 3, 2001, long after the Foundation's ownership vested on June 21, 1999, *id.* at D13-D14. In other words, by the time Mr. Cassirer made a claim to the Painting, the Foundation's ownership of the Painting had already vested.

The Fourteenth Amendment's Due Process Clause provides that "[n]o State shall … deprive any person of life, liberty or property without due process or law."

[14] Courts recognize that a sovereign's agencies or instrumentalities, like the Foundation, are juridically distinct from the sovereign and entitled to due process rights. *See, e.g., Williams v. Romarm S.A.*, 116 F. Supp. 3d 631, 636 (D. Md. 2015) (*quoting First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626-627 (1983)).

U.S. Const. amend XIV, § 1. It "forbids the government to infringe … 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). If a court applied California law to find that Mr. Cassirer's 2001 claim could divest the Foundation of its ownership that vested in 1999, the Foundation's due process rights would be trampled.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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