

CASSIRER’S FALLOUT: THE FALSE DICHOTOMY OF
HUMAN RIGHTS AND UNIFORMITY IN FSIA CHOICE-
OF-LAW

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I. INTRODUCTION

While state choice-of-law (COL) rules may allow certain plaintiffs to skirt the federal presumption against extraterritoriality,¹ federal common law (FCL) will likely be friendlier to human rights plaintiffs in cases arising under the Foreign Sovereign Immunities Act (FSIA).

Although the Court declared the legal issue ‘prosaic’ when it found the opposite in *Cassirer v. Thyssen-Bornemisza Collection Found.*, the legal issue is anything but ‘prosaic.’² The *Cassirer* litigation before the Supreme Court this term³ settled a thirty-year-old circuit split on FSIA COL: the 9th Circuit applied FCL, the 2nd Circuit applied state law, and—contrary to the Supreme Court’s errant assertion—most other

1. William S. Dodge, *Presumptions Against Extraterritoriality in State Law*, 53 U.C. DAVIS L. REV. 1389, 1399 n. 59, and 1401 (2020) (1399: “There are no federal conflict-of-laws rules that limit the application of federal statutes by giving priority to foreign law This is in sharp contrast to state statutes, to which state conflicts rules are often applied after the scope of a state provision has been determined”; note 59, detailing the FSIA circuit split described in this annotation in the context of the presumption against extraterritoriality; 1401: “Courts applying state law, by contrast, may rely on state conflicts rules to supplement — or even to replace — rules of statutory interpretation in determining when state law applies extraterritorially.”).

2. *Cassirer v. Thyssen-Bornemisza Collection Found.*, 2022 U.S. LEXIS 2097, 6 (2022).

3. Transcript of Oral Argument, *David Cassirer v. Thyssen-Bornemisza Foundation*, (2022) (No. 20-1566); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 55 (2021) (granting cert.). *See also*, *Cassirer v. Thyssen-Bornemisza Collection Found.*, 824 Fed. Appx. 452 (9th Cir. 2020) (9th Circuit Appeals affirms District Court’s use of FCL COL to find Spanish law and finds any District Court error in applying Spanish law to be harmless, three years after reversing the District Court’s summary judgment in favor of the defendants in 862 F.3d 951 (9th Cir. 2017)).

circuits avoided a “true conflict” between U.S. and foreign law.⁴ The 2nd Circuit’s approach is alleged to be kinder to human rights plaintiffs.⁵ However, given the widespread contacts and property interests that foreign sovereigns maintain across the United States,⁶ the application of state law to choice-of-law leaves foreign sovereign defendants at greater risk of unexpected exposure to state law compared with their private-sector counterparts, who have the option of incorporating U.S. subsidiaries to insulate themselves from liability.⁷

II. *CASSIRER* AND THE UNDERLYING CIRCUIT SPLIT

In theory, FCL COL should have applied in *Cassirer*, but it is not wholly unreasonable that the current split between the 9th Circuit, which applies FCL and decided *Cassirer*, and the 2nd Circuit, which applies state law, was resolved the other way.

4. *Infra*, notes 27-38. The Court is flatly incorrect in its assertion, *supra* note 2 at 10, that “The Ninth Circuit stands alone in using a federal choice-of-law rule to pick the applicable substantive law [and that] [a]ll other Courts of Appeals to have addressed the issue apply the choice-of-law rule of the forum State.”

5. See, e.g., David J. Bederman, *Dead Man’s Hand: Reshuffling Foreign Sovereign Immunities in U.S. Human Rights Litigation*, 25 GA. J. INT’L & COMP. L. 255, 269 (1995/96) (“One solution could be to duck back into domestic law, using the choice of law cue in [*Lin v. Republic of China*—the author refers to forum state choice-of-law rules] and apply home-grown rules of attribution”); David E. Seidelson, *Conflict of Laws: The Foreign Sovereign Immunities Act: Whose Conflicts Law? Whose Local Law?*, 58 Brook. L. Rev. 427, 450 (1992) (indicating that state interests in preserving life can weigh in a state law COL analysis: “It’s true, of course, that a state’s interest in conduct regulation, an interest aimed at protecting and preserving human life, must be afforded a high priority”); Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033, 2034 (2013) (opining generally on foreign sovereign immunity and human rights: “There is a growing tension between the foreign state immunity doctrine and the right to court access”).

6. See, e.g., Konrad Putzier, *That Suburban Home Buyer Could Be a Foreign Government*, WALL ST. J., (Apr. 13, 2021) <https://www.wsj.com/articles/that-suburban-home-buyer-could-be-a-foreign-government-11618306380> (detailing the extensive U.S. real estate holdings and interests owned by instrumentalities of foreign governments).

7. See, Linda J. Silberman, *Goodyear and Nicastró: Observations from a Transnational and Comparative Perspective*, 63 SC L. REV. 591, 613 and *Id.* at n. 139 (2012) (613: “Another open issue with respect to doing business jurisdiction relates to when a multinational corporation that has subsidiaries located in the United States will be regarded as itself doing business in the United States”; note 139: “Although the presence of a subsidiary alone does not establish the parent corporation’s presence in the state, see *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998), the interrelationship of business activities between the corporation may be sufficient to make the subsidiary subject to jurisdiction, see *Gelfand v. Tanner Motor Tours, Ltd.* 385 F.2d 116, 120-21 (2d Cir. 1967)”).

This term, the Supreme Court in *Cassirer v. Thyssen-Bornemisza Collection Foundation* considered “whether a federal court hearing state law claims brought under the FSIA must apply the forum state’s COL rules to determine what substantive law governs the claims at issue, or whether it may apply federal common law.”⁸ David Cassirer seeks to recover Camille Pissaro’s 1897 painting, *Rue Saint-Honoré, dans l’après-midi. Effet de pluie* from the Thyssen-Bornemisza Collection Foundation after the Nazis forced Cassirer’s great grandmother to exchange the painting for an exit visa in 1939.⁹ In 1993, following several transfers in title, Baron Thyssen-Bornemisza resold the painting to Spain, along with 750 other pieces of art, for \$327 million. Seven years later, in 2000, the Cassirers found the painting on display at the Thyssen-Bornemisza museum in Madrid, setting off extensive litigation.¹⁰ California COL, along with California substantive law, would prevent a good-faith purchaser such as the Baron or Spain from acquiring good title to stolen property, while FCL COL, pointing to Spanish substantive law, would allow Thyssen-Bornemisza to retain title of the art in question because the Baron and the Foundation lacked knowledge that the painting was stolen.¹¹

Although the Supreme Court labeled the 9th Circuit’s approach “minimally reasoned,”¹² it did not discuss the bevy of 9th Circuit reasoning on-point and instead breathed COL into the text of FSIA § 1606.¹³ Contrary to the Court’s reading of § 1606, both the 2nd and 9th Circuits previously recognized that the FSIA is not on-point regarding COL.¹⁴ Further, in cases arising under the FSIA by way of

8. Brief for Petitioner at i, *Cassirer v. Thyssen-Bornemisza Collection Found.*, (No. 20-1566) 2021 WL 540478.

9. Michelle Young, *For decades, a Jewish family has sought the return of their beloved painting – can the Supreme Court make that happen?*, FORWARD (Jan. 17, 2022) <https://forward.com/culture/art/480822/camille-pissarro-cassirer-jewish-family-nazi-looted-art-supreme-court/>.

10. *Cassirer v. Kingdom of Spain*, 461 F. Supp. 2d 1157, 1161 (C.D. Cal. 2006).

11. Brief for Petitioner, *Cassirer v. Thyssen-Bornemisza Collection Found.*, (No. 20-1566) 2021 WL 5404788.

12. *Cassirer*, *supra* note 2, at 9.

13. *Id.* at 12 (“Section 1606 also dictates the selection of a choice-of-law rule”).

14. *Barkan v. General Admin. of Civil Aviation of Peoples Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) (“*Accord Harris*, [cited, *infra*] . . . the FSIA does not contain an express choice of law provision.”); *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000 at 1003 (9th Cir. 1987) (“In the absence of specific statutory guidance, . . .”).

§1330,¹⁵ unlike diversity by way of §1332 as the Court appeared to assume was the operative allegory in *Cassirer*,¹⁶ COL is not bound up in the rights of the litigants. This is because FSIA §1604 provides for immunity not merely from jurisdiction but also from suit,¹⁷ which includes pre-liability immunity from exposure to substantive law.¹⁸ Further, §1330 makes FSIA COL inherently interstate in its scope, as in other areas of foreign relations law determined to be enclaves of particular FCL.¹⁹ The overwhelming federal interest in maintaining

15. In *re* TMI Litigation Cases Consol. II, 940 F.2d 832, 848 n. 12 and 850 (3d Cir. 1991) (“In so holding, the [*Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480 (1983)] Court reaffirmed the *Osborn* rule that a statute which merely confers federal jurisdiction cannot constitute the federal law under which an action arises. . . . however, [] where jurisdictional provisions of an Act constitute one part of a comprehensive scheme and do not “merely concern access to the federal courts,” there is no constitutional infirmity”).

16. *Compare* *Harris v. Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987) (“[the *Klaxon* rule] cannot be invoked here because ever since the FSIA was enacted, federal courts no longer have diversity jurisdiction over foreign states as defendants”) and *Cassirer*, *supra* note 2, at 13 (applying the *Klaxon* rule because a hypothetical similarly-situated private museum would be subject to the *Klaxon* rule, and with it, state COL).

17. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int’l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017) (observing that the “basic objective” of foreign sovereign immunity is “to free a foreign sovereign from *suit*”).

18. *Funk v. Belneftekhim*, 861 F.3d 354, 364 (2d Cir. 2017) (“In such circumstances, “appeal from final judgment cannot repair the damage that is caused by requiring the defendant to litigate” [citing *Rein v. Socialist People’s Libyan Arab Jamahiriyah*]. Indeed, striking a claim of foreign sovereign immunity is the functional equivalent of denying such an assertion on its merits, and *Rein* held that the latter decision constitutes an appealable collateral order.”). The overlap between jurisdiction and merits, where the FSIA provides more than mere jurisdiction, mirrors Justice Douglas’ interpretation of §301(a) of the Labor Management Relations Act of 1947 in *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957) (“Federal interpretation of the federal law will govern, not state law. . . . Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights”).

19. Several of the cases *Kimbell* cites to in demonstrating appropriate enclaves of federal common law “solicitous of those federal interest” are in the sphere of foreign affairs, *United States v. Kimbell Foods*, 440 U.S. 715, 728 n. 23 (1979); *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (fashioning federal common law to effectuate a statute implementing the same treaty that formed the gravamen of the suit in the marquee federalism and federal interest in foreign affairs case, *Missouri v. Holland*, 242 U.S. 416 (1920); statute is: Migratory Bird Conservation Act of 1929, 45 Stat. 1222 70 P.L. 770, 45 Stat. 1222, 70 Cong. Ch. 257); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204, 209 (1946) (applying “settled” state law to effectuate a federal statute taxing an aircraft propeller plant in wartime because “Congress, in

uniform scheme of foreign policy²⁰ and lack of “relationships predicated on state law”²¹ between foreign sovereigns and the U.S. signal overriding federal interest in formulating FCL in COL. In brief, Spain lacks any special relationship with California, predicated on California law, that would be disrupted by this case, and there is nothing innately superior about California COL as opposed to FCL.

In other words, foreign sovereigns are manifestly unlike corporate defendants because foreign sovereigns are exposed to suit in virtually every individual U.S. forum. Yet, unlike the *Cassirer* Court’s hypothetical private museum,²² they cannot insulate themselves from forum-shopping plaintiffs like foreign corporations can post-*Nicaastro*, through the incorporation of U.S. subsidiaries.²³ Moreover, there may

permitting [concurrent] local taxation of the real property, *made it impossible* to apply the law with uniform tax consequences in each State and locality” [emphasis added]; *United States v. County of Allegheny*, 322 U.S. 174 (1944) (applying federal law to interpret a contract, thereby striking down a state tax on federal property, here a munitions plant in wartime).

20. As evidenced in the FSIA by §1441’s removal provision, which provides for removal similar to “red carpet removal” under CAFA. *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1099 (9th Cir. 1990) (“section 1441(d) requires, in the case of a removal by a foreign sovereign, that the federal court initially exercise jurisdiction over claims against co-defendants even if such claims could not otherwise be heard in federal court”). Also, *Compare* the relationship between 28 USC 1332 (certification) and 1453 (removal) in CAFA and 1605 and 1441 in the FSIA. This conclusion is not novel. *See, e.g.*, Ernest Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. OF INT’L L. 365, 508-09 (2002) (“I am willing to contemplate the development of federal common law rules to limit state choice of law in cases raising international issues [provided such] rules are tied closely . . . to specific concerns about preserving political branch control over foreign policy [and, as in *Kimbell*,] apply state rules unless those rules pose a significant conflict with specific federal interests”). *See also*, Erwin Chemernsky, FEDERAL JURISDICTION § 6.2.1, at 371 (5th ed. 2007) (“the Court balances the need for federal uniformity and for special rules to protect federal interests against the disruption that will come from creating new legal rules”), *cited in*, Ernest Young, *Preemption and Federal Common Law*, 83 NOTRE DAME L. REV. 1639, 1646 (2008) (also citing *Kimbell Foods* at 728-29: “Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law”).

21. *United States v. Kimbell Foods*, 440 U.S. 715, 728-29 (1979).

22. *Supra* note 16.

23. Cf. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981) (“In order to ensure that the choice of law is neither arbitrary nor fundamentally unfair . . . the Court has invalidated the choice of law of a State which has had no significant contact or

not be any due process protections whatsoever against the assertion of personal jurisdiction over foreign sovereigns.²⁴ Therefore, abandoning the comprehensive scheme of the FSIA to import the *Klaxon* rule of COL in diversity (applying the COL rules of the state in which the federal court in question sits) would undercut *Klaxon*'s goal of discouraging forum-shopping because plaintiffs could in effect use the threat of attachment to pull a sovereign that is potentially still immune under §1604 into the law of a particularly friendly state.²⁵ The 9th

significant aggregation of contacts, creating state interests, with the parties and the occurrence or transaction”, *citing*, *Alaska Packers Assn.*, 294 U.S. 532 (1935)). The minimum contacts-esque analysis in 1605 ensures significant contacts with the United States as a whole—not any particular state—and thus poses a problem where a foreign sovereign cannot reasonably expect to be subject to the laws of any one state in particular even once immunity is waived. Compare this situation to that of the private-sector litigant in, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), especially at 875 (“Nicastro has not established that J. McIntyre engaged in conduct purposefully directed at New Jersey”).

24. *See generally*, *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393 (2d Cir. 2009) (holding that foreign sovereigns are not “persons” within the meaning of the fifth amendment and are therefore not entitled to due process protections against the assertion of personal jurisdiction); *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002) (holding the same). Note, though, that this statement only applies to foreign *sovereigns*, not necessarily their instrumentalities, provided those instrumentalities are not agents or alter egos of the sovereign. *See, e.g.*, *Gater Assets Ltd. v. Moldovagaz*, 2 F.4th 42, 49 (2d Cir. 2021) (“only the sovereign itself and its “alter egos” are not “persons.” Agencies and instrumentalities of foreign sovereigns retain their status as “separate legal person[s]”); *GSS Group Ltd. v. Nat’l Port Authority*, 680 F.3d 805, 815 (D.C. Cir. 2012) (“Whenever a foreign sovereign controls an instrumentality to such a degree that a principal-agent relationship arises between them, the instrumentality receives the same due process protection as the sovereign: none”).

25. Many of the FSIA’s drafters thought they were avoiding exactly this issue by affixing venue primarily in DDC or at the instrumentality’s primary place of business; however, practice did not follow that assumption. Jurisdiction of U.S. Courts against Foreign States, June 4, 1976 House Hearings, Testimony of Cecil Olmstead, p.82 (“the bill’s venue provisions in section 5 on where suit may be brought could be read to require that, where jurisdiction is based only on the waiver of sovereign immunity by a foreign state or political subdivision thereof, venue would lie only in the District of Columbia”); H. Rpt. 94-1487, “Jurisdiction of U.S. Courts in Suits Against Foreign States,” Sept. 9, 1976 (“(3) If the action is brought against an agency or instrumentality of a foreign state, as defined in the new section 1603(b) in the bill, it may be brought in the judicial district where the agency or instrumentality is licensed to do business or is doing business. This provision is based on 28 U.S.C. 1391(c). (4) If the action is brought against a foreign state or political subdivision, it may be brought in the U.S. District Court for the District of Columbia. It is in the District of Columbia that foreign states have diplomatic representatives and where it may be easiest for them to

Circuit's approach adopted precisely this position,²⁶ and discouraged a forum-shopping plaintiff (Cassirer, who could have sued in Ohio, California, New York, and potentially Missouri) from forcing Spain to litigate the entire case under California law.

Some 2nd Circuit judges had become disgruntled with their Circuit's standard of applying state COL to "best effectuate . . . Congress' overall intent" in passing the FSIA,²⁷ labeling it a "Syrtis bog" of "lurking legal chaos" resulting "in the inconsistent application of law."²⁸ Other circuits appeared to agree. The 8th Circuit has upheld the 9th Circuit/*Schoenberg* FCL approach.²⁹ The 6th and 11th Circuits adopted the 9th Circuit's *Harris/Schoenberg* standard trans-substantively, e.g. in *Copyright*, that FCL "applies to COL determinations in cases based on federal question jurisdiction."³⁰ Yet in FSIA cases, the 6th

defend"). *See also*, "Immunities of Foreign States", hearings before the Subcommittee on Claims and Governmental Relations, Committee on Judiciary, House, June 7, 1973 (93rd Congress), Statement of Mr. Brower at p.25 ("Venue is affixed principally in the District of Columbia").

26. *Harris* cites to *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786 (2d Cir. 1980), a case that post-*Republic of Aus. v. Altmann*, 541 U.S. 677 (2004) (holding that the FSIA applied retroactively) would have been decided under the FSIA without different reasoning or result. *Vintero Sales*, in turn, cites to *Hinderlider* and announces that, "[t]he availability of a federal choice of law rule in a case like this . . . is supported by *Clearfield Trust Co. v. United States*".

27. *Barkanic*, 923 F.2d at 959 and 961.

28. *In re Air Disaster at Lockerbie Scot.*, 928 F.2d 1267, 1276 (2d Cir. 1991). *See also*, *A.A.M. v. J.L.R.C.*, 840 F. Supp. 2d 624, 633 (E.D.N.Y. 2012) (throwing hands to the wind and equating *Barkanic* to the 2nd Restatement on Conflict of Laws after labeling the doctrine "unsettled": "New York's choice of law rule is for all practical purposes identical to the one set forth in the Restatement (Second)"); *Specht v. Netscape Commun. Corp.*, 150 F. Supp. 2d 585, 590 n. 7 (S.D.N.Y. 2001) (also equating *Barkanic* to the 2nd Restatement approach: "The federal common law choice-of-law rule is to apply the law of the jurisdiction having the greatest interest in the litigation. *In re Koreag, Controle et Revision S.A.*, 961 F.2d 341, 350 (2d Cir. 1992) [a bankruptcy case citing to *Vintero Sales Corp.*, *supra* note 26, but discerning no difference between federal common law and New York COL]. This formulation mirrors the New York 'center of gravity' test, which also focuses on which state has the strongest connection to the litigation").

29. *Dumont v. Saskatchewan Gov't Ins.* (SGI), 258 F.3d 880, 885-86 (8th Cir. 2001).

30. *Bennett v. AOL LLC*, 2007 U.S. Dist. LEXIS 104630, 17 n.6 (E.D. Mich., 2007). For 11th Circuit (not quoted): *See, e.g.*, *Chau Kieu Nguyen v. JP Morgan Chase Bank, NA*, 709 F.3d 1342, 1345 (11th Cir. 2013) ("Under 12 U.S.C. § 632, the court applies the choice-of-law principles of the federal common law", *citing*, *Vintero Sales Corp.* and *Schoenberg*); *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indem. Ass'n (Lux.)*, 62 F.3d 1356, 1363 and corresponding n. 13 (11th Cir. 1995) (finding an

and 11th Circuits adopt the 2nd Circuit's state law approach.³¹ The 7th Circuit, while nominally finding no "true conflict,"³² has treated COL for FSIA plaintiffs differently from plaintiffs in diversity.³³ The 4th Circuit has applied FCL principles to COL in FSIA cases in "a method which mirrors—but is distinct from—the 'federal common law' approach."³⁴ The 3rd Circuit has stated in prominent paragraphs that

Alabama direct action statute procedural rather than substantive, in text declaring "We recognize that characterizing direct action statutes as either procedural or substantive is problematic, particularly in the context of admiralty jurisdiction" then in FN 13, "The Restatement (Second) of Conflict of Laws § 122 cmt. b (1971), suggests that rather than classifying issues as "procedural" or "substantive," courts should directly face whether the forum's rule should be applied", citing *Schoenberg*).

31. *O'Bryan v. Holy See*, 556 F.3d 361, 372 and 381 n. 8 (6th Cir. 2009). n. 8 ("[I]n FSIA cases, we use the forum state's choice of law rules to resolve 'all issues,' except jurisdictional ones").

32. A practice the 6th and 11th Circuits also maintain. 6th Circuit: *DRFP L.L.C. v. Republica Bolivariana De Venez.*, 151 F. Supp. 3d 809, 818-19 (S.D. Ohio, 2015) ("It is true that the limitations periods under Swiss and Venezuelan laws are potentially shorter than that under Ohio law. The Court has previously determined that Ohio's statute of limitations applies to Skye's claim [given a threshold determination of Ohio choice of laws using the Second Restatement] and it declines to find differently now"). 7th Circuit: *Vargas v. Air Fr. Freighter*, 2003 U.S. Dist. LEXIS 4524 (N.D. Ill., 2003) ("[b]oth parties rely exclusively on cases decided under Illinois law [and] Illinois and federal law look to the Restatement (Second) of Conflict of Laws"). 11th Circuit: *Basulto v. Republic of Cuba*, 2005 U.S. Dist. LEXIS 48556, 16 n. 9 (S.D. Fl., 2005) (avoiding the issue altogether: "The Court need not resolve this question because under either federal common law or Florida law, the choice of law rules relative to a tort claim are the same").

33. *In re Aircrash Disaster near Roselawn*, 948 F. Supp. 747, 753-55 (N.D. Ill. 1996) (allowing a departure from the "most significant relationship test" for diversity plaintiffs in order to comport with state law COL, but not for FSIA plaintiffs, for which it equated the FCL and state law tests to the "most significant relationship test").

34. *Kumar v. Republic of Sudan*, 2015 U.S. Dist. LEXIS 31395, 10 (E.D. Va., 2015), *citing*, *Estate of Heiser v. Islamic Republic of Iran* ("Heiser II"), 659 F. Supp. 2d 20, 24 (D.D.C. 2009). *Heiser II*, in turn, applies "general principles of tort law—an approach that in effect looks no different from one that explicitly applies federal common law" in a terrorism exception case. This decision also leans on a citation to *Bettis v. Islamic Republic of Iran*, 315 F.3d 333, 354 (D.C. Cir., 2003) (containing the deeply problematic assertion: "28 U.S.C. § 1606 [] in effect instructs federal judges to find the relevant law, not to make it"). *See also*, *Rux v. Republic of Sudan*, 495 F. Supp. 2d 541, 558 (E.D. Va., 2007) (applying the test traditionally sounding in maritime tort, derived from *Lauritzen v. Larsen*, 345 U.S. 571, 583-592 (1953): "We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them[.]: 1. *Place of the Wrongful Act*. . . 2. *Law of the Flag*. . . 3. *Allegiance or Domicile of the Injured*. . . 4. *Allegiance of the Defendant Shipowner*. . . 5. *Place of Contract*. . . 6. *Inaccessibility of Foreign Forum*. . . 7. *The Law of the Forum*"). The appellate

it applies the 2nd Circuit standard—but then in subsequent paragraphs has ruled based on FCL COL, citing to 9th Circuit case law.³⁵ The 1st and 10th Circuits have either dismissed cases³⁶ or simply defaulted to state COL,³⁷ avoiding a “rabbit hole searching for a conflict that has not yet been identified.”³⁸ Yet the Court in *Cassirer*, citing only to case law from the 2nd, 5th, 6th, and DC circuits, declared that “[a]ll other Courts of Appeals to have addressed [FSIA COL besides the 9th Circuit] apply the choice-of-law rule of the forum state.”³⁹

III. WHO BENEFITS FROM THE 2ND CIRCUIT’S APPROACH?

The benefits of the *Cassirer* ruling will accrue primarily to institutional investors, like *NML Capital*,⁴⁰ who can best avail themselves of the resulting forum-shopping, and not human rights plaintiffs.

court upheld this section of the decision, dismissing as moot the appellants’ claim that a federal cause of action preempted their state law claims and proffering at the end of a lengthy analysis of mootness, *Rux v. Republic of the Sudan*, 410 Fed. Appx. 581, 587 (4th Cir. 2011) (“we assume, without deciding, the preemption of those claims [by FSIA 1605(A)] and thus affirm the district court’s dismissal of them”).

35. *Pittston Co. v. Allianz Ins. Co.*, 795 F. Supp. 678, 682 and 689 (Dist. Ct. N.J. 1992) (682: “federal choice-of-law rules should be applied to some of the insurance policies because of their alleged “maritime” nature, which it is contended makes claims related to those policies subject to the admiralty jurisdiction of the federal courts”; 689: “the jurisdictional, and consequently, the choice-of-law, determination is inextricably intertwined with the interpretation of the policies”). *See also*, *In Re Texas Transmission Corp.*, 870 F. Supp. 1293, 1338 (E.D. Pa., 1992) (nominally applying the *Barkanic* standard but then explicitly applying FCL COL and citing to *Schoenberg* in deciding between Texas and PA COL).

36. *E.g.*, *Shinya Imamura v. GE*, 371 F. Supp. 3d. 1, 13 (Mass. Dist. Ct. 2019). Affirmed at the Circuit level in, 957 F.3d 98 (*forum-non* dismissal because complex “choice of law and foreign law questions . . . would significantly burden the Court”).

37. 1st Circuit: *Universal Trading & Inv. Co. v. Bureau for Representing Ukrainian Interests in Int’l & Foreign Courts*, 898 F. Sup. 2d 301, 318 (Mass. Dist. Ct. 2012) (deciding to “forgo an independent analysis”); *Cutcliffe v. Univ. of Ulster*, 2013 U.S. Dist. LEXIS 81336, 37 (Maine Dist. Ct. 2013) (“assuming that Maine law applies to resolve threshold choice-of-law issues”). 10th Circuit: *Falcon Invs., Inc. v. Republic of Venez.*, 2001 U.S. Dist. LEXIS 6941 (Dist. Kans., 2001) (“[f]ortunately, the court need not undertake a thorough conflicts of law analysis, for neither party has presented to the court the issue of applying foreign law in this matter”).

38. *Villoldo v. Ruz*, 2015 U.S. Dist. LEXIS 174268, 24 (Mass. Dist. Ct. 2015) (discarding a suggestion filed by the U.S. to consider the 2nd Circuit’s approach to COL).

39. *Cassirer*, *supra* note 2, at 10.

40. *Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134 (2014) (permitting extraterritorial discovery to find Argentine assets abroad).

An individual victim of a human rights violation, oftentimes of lower income status and representing a class,⁴¹ will not have the ability to forum-shop between New York, Ohio, and California in order to find a jurisdiction with favorable COL rules.⁴² New York, where the Baron bought the painting and where the painting appears to have remained from 1952-76, appears to be the U.S. forum with the greatest relation to the dispute. In California, by contrast, the painting only remained for a short period of time.⁴³ However, in New York, there would have been some risks for Cassirer that a court applying New York COL rules would have deferred to the laches defense established by *Bakalar v. Vavra*,⁴⁴ as opposed to the six-year statute of limitations set forth by the HEAR Act of 2016.⁴⁵ In California, though, the odds that Cassirer's claim was time-barred—or that he would have to litigate under Spanish law—were lower. Moreover, unless it incorporated a subsidiary, if Spain were a corporate defendant, it would probably have minimum contacts in New York but not in California. Few human rights plaintiffs have the resources, time, or multiple residences across the United States necessary for a forum-shopping strategy.

Further, the state common law approach, with a diversity allegory, does not favor class action plaintiffs because state COL reduces the likelihood of certification when plaintiffs come from multiple jurisdictions,⁴⁶ allowing state-owned enterprise defendants to scatter

41. Beth van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. Chicago Legal Forum 279, 279 (2003) (“victims of human rights violations have increasingly utilized Federal Rule of Civil Procedure 23”), but also noting the choice-of-law risk to human rights classes where state law is at issue, at 338 (“Because the substantive law applied in these cases is primarily federal and international law, and because members of the class may be overseas, it is unlikely that human rights class actions will present the kinds of conflicts of law questions that plague other mass tort class actions and threaten commonality (not to mention predominance) [citing, at n. 342, a case finding plaintiffs’ state law claims not amenable to class treatment]”).

42. Of this forum-shopping concern, Chief Justice Roberts remarked: “welcome to the United States. That’s how the courts work”. Transcript of Oral Argument, *David Cassirer v. Thyssen-Bornemisza Foundation*, 51 (2022) (No. 20-1566).

43. *Supra* note 9.

44. *Bakalar v. Vavra*, 550 F. Supp. 2d 548 (S.D.N.Y. 2008) (applying Swiss substantive law but New York laches).

45. Holocaust Expropriated Art Recovery Act of 2016, 22 USC §1621. *See also*, Simon J. Frankel, *The HEAR Act and Laches after Three Years*, 55 N.C. J. INT’L L. 441 (examining the interaction, or lack thereof, between laches doctrine and the HEAR Act in New York and federal courts).

46. *Supra* note 33, *In re Aircrash Disaster near Roselawn*. *See also*, Linda J. Silberman, *The Role of Choice of Law in National Class Actions*, 156 PENN. L. REV. 2001, 2002-05

human rights plaintiffs with COL determinations, like birdshot through a flock. Plaintiffs of disparate origin bringing state law claims increase the risk that the defense will convince the court that the different states' substantive laws are so divergent as to prevent certification.⁴⁷ Thus, under the COL regime decided upon in *Cassirer*, there is a dis-incentive for plaintiffs to identify other human rights victims to consolidate a class with, at least inasmuch as they would be seeking out state law, which is common for human rights plaintiffs in FSIA litigation.⁴⁸ This dis-incentive, in turn, undercuts judicial management and invites circuit splits with far-reaching foreign policy consequences. Under FCL COL on the other hand, certification should be easier because COL would be less complex.⁴⁹

State COL regimes also tend towards the parochial, advantaging the institutional investors at home, as opposed to foreign human rights plaintiffs. California's COL rules, for example, do not account for international agreements, international law, acts of Congress like the Holocaust Era Art Restitution Act of 2016,⁵⁰ or potential

(2008) (describing the difficulties posed in class certification by disparate state laws in multi-jurisdictional classes).

47. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (reversing the Kansas Supreme Court's application of Kansas law to all plaintiff class members). *See also*, Linda Silberman, *Choice of Law in National Class Actions: Should CAFA Make a Difference?*, 14 ROGER WILLMS. U. L. REV. 54 (2009) (noting that applying state choice-of-law under CAFA would not assuage any forum-shopping caused by this aforementioned *Phillips* problem of disparate law applicable to different plaintiffs), in particular at n. 15 (comparing Professor Silberman's views to those of Professor Nagareda); Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 NYU LAW REVIEW 97, 165 (2009) ("In areas in which state law continues to hold sway, however, . . . the major stumbling block for class certification consists [of] a need for courts to perform a choice-of-law analysis").

48. *Supra* note 1. Too, state law, especially regarding damages or liability for torts or similar, can according to some courts "pass through" the FSIA, into the courtroom. *See, e.g.*, *Pescatore v. Pan American World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996) (applying "pass through" logic to reach state law on damages in litigation resulting from the Lockerbie terrorist bombing). *But see*, *B.F. Goodrich v. Betkoski*, 112 F.3d 88, 90-91 (2d Cir. 1997) (clarifying the court's use of federal common law in contrast to *Pescatore*: "As we noted in *Pescatore*, when determining whether to fashion a special federal rule, we consider "(1) whether the issue requires 'a nationally uniform body of law'; (2) 'whether application of state law would frustrate specific objectives of the federal program[]'; and (3) whether 'a federal rule would disrupt commercial relationships predicated on state law.'" [quoting, *United States v. Kimbell Foods*]).

49. *Id. Compare*, Silberman *supra* note 46, 2027-34 (ascertaining the correct federal choice rule in class actions).

50. Transcript of Oral Argument, *David Cassirer v. Thyssen-Bornemisza Foundation*, 56 (2022) (No. 20-1566).

extraterritorial application.⁵¹ In addition, New York, allows for forum- and law-selection clauses to pull the parties in to New York substantive law, perhaps even absent any contact with the forum.⁵² This advantages institutional investors who conclude such contracts, but has the opposite effect on personal injury and human rights plaintiffs who are on the other end of the bargaining power disparity in contract negotiations. Though not at issue in *Cassirer*, New York's stance towards forum-selection clauses is critical to understanding the 2nd Circuit's true motivations in deviating from precedent to adopt state COL in FSIA cases. The 2nd Circuit's approach allows claims under the FSIA that have no business coming into New York, to be heard under New York law.

EM Ltd. v. Republic of Argentina (2d Cir. 2010)⁵³ and *Republic of Argentina v. NML Capital*⁵⁴ illustrate the types of plaintiffs that the 2nd Circuit approach favors, and *Cassirer* has now endorsed. In *EM Ltd.*, several related vulture funds sought to recoup losses incurred speculating on low-rated Argentine bonds and other financial products.⁵⁵ In 2001, Argentina defaulted on \$81.8 billion of sovereign debt, the largest default in in history, which was caused by an extended recession, artificially inflated currency, and the lack of a lender of last resort that could provide dollars to cover Argentine liabilities.⁵⁶ Because Argentina did not have solvency issues except in the months immediately following the default, most investors accepted haircuts,

51. Transcript of Oral Argument, *David Cassirer v. Thyssen-Bornemisza Foundation*, 60 (2022) (No. 20-1566); *supra* note 2.

52. *Brooke Group v. JCH Syndicate* 488, 87 N.Y.2d 530, 534 (Ct. App. 1996).

53. *EM Ltd. v. Republic of Arg.*, 389 Fed. Appx. 38 (2d Cir. 2010). A critical distinction between *Cassirer* and *EM Ltd.* is that *EM* relates to attachment. State law is widely viewed as applying in attachment and execution proceedings to a greater degree than elsewhere in the FSIA. *See*, *Rubin v. Islamic Republic of Iran*, 456 F. Supp. 2d 228, 231 n.3 (Dist. Mass. 2006) (distinguishing *Verlinden*): "Rule 69 primarily directs the courts to apply state law procedures for execution and attachment, with the proviso that federal *statutes* govern to the extent they are applicable."

54. *Supra* note 40.

55. Graciela Kaminsky and Sergio L. Schmukler, *Emerging Market Instability: Do Sovereign Ratings Affect Country Risk and Stock Returns?*, 175, in *WORLD BANK ECONOMIC REVIEW* Vol. 16, No. 2 (2002). Argentina's highest credit ratings, BB, Ba3, or BB, were junk ratings. Inés Bustillo, Daniel E. Perrotti, and Helvia Velloso writing on behalf of CEPAL/ECLAC, *Sovereign credit ratings in Latin America and the Caribbean*, U.N. Doc. LC/TS.2018/107 (2018) at 15.

56. *See generally*, J.F. HORNBECK, CONG. RSCH. SERV., R41029, *ARGENTINA'S DEFAULTED SOVEREIGN DEBT: DEALING WITH THE "HOLDOUTS"* (2013) (Describing the economic circumstances in Argentina that gave rise to the NML Capital and EM Ltd. litigation).

making off far better than they would have in a bankruptcy had Argentina been a private-sector actor. However, NML Capital refused the haircut, and began a campaign of attachment designed to embarrass Argentina into paying the full value “owed.” For example, NML Capital managed to impound an Argentine naval vessel in Ghana, and nearly managed to seize Argentina’s presidential plane.⁵⁷ This campaign of attachment, similar to hostage-taking, is emblematic of what state COL allows for.

After the Supreme Court in *NML Capital* upheld extraterritorial discovery so that NML Capital could find where Argentina was hiding attachable assets,⁵⁸ the 2nd Circuit Court of Appeals in *EM Ltd.* decided *sua sponte*⁵⁹ to apply New York COL provisions to reach state law on attachment, based on what it termed an implicit requirement in the FSIA. In ascertaining what is “implicitly required,” it performed no analysis of the FSIA itself, nor did it refer to legislative history, instead relying exclusively upon two decisions—both taken at the 2nd Circuit and never reviewed at the Supreme Court.⁶⁰ The Supreme Court opted to deny certiorari⁶¹ in *EM Ltd.* despite having granted it in the related

57. Republic of Argentina v. NML Capital, Ltd., 128 HARV. L. REV. 381 (2014).

58. *Supra* note 40.

59. The Court of Appeals could have reconsidered the COL issue without overturning the holding of the District Court. The District Court decision in *EM Ltd.* did not provide a direct citation to explain whether or why New York COL rules applied, *EM Ltd. v. Republic of Arg.*, 2009 U.S. Dist. LEXIS 74184, 21 (S.D.N.Y. 2009) (declaring first that, “New York’s choice-of-law rules, which govern in this context, require the court to first determine whether there is an actual conflict between the laws of New York and Argentina”, and only *then* including an ambiguous citation to *Karaha Bodas Co.*, 313 F.3d 70 at 85, cited note 57). Further, the decision goes on to announce that New York and Argentine law both allowed for attachment and execution: *Id.* at 28, “Like Argentine law, New York law would therefore permit the attachment of these funds”.

60. *EM Ltd. v. Republic of Arg.*, 389 Fed. Appx. 38, 41-42 (2d Cir. 2010): “[T]he FSIA implicitly requires courts to apply the choice of law provisions of the forum state with respect to all issues governed by state substantive law.” (citing *Barkanic v. Gen. Admin. of Civil Aviation of the People’s Republic of China*, 923 F.2d 957, 959 (2d Cir. 1991) and *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 85 (2d Cir. 2002)). *Barkanic* never resulted in cert.; The Indonesian government’s petition for certiorari in *Karaha Bodas Co.*, which did not directly address COL as the contract at issue contained a choice-of-law clause (Brief requesting Cert. for Petitioner (Indonesia), 2003 WL 23189496, 6: “Each PSC contains a choice-of-law provision designating that Indonesian law governs the contract”) was denied, *Ministry of Fin. of Republic of Indonesia v. Karaha Bodas Co.*, 539 U.S. 904 (2003).

61. Republic of Argentina v. EM Ltd., 562 U.S. 1217 (2011), denying petition for cert.

NML Capital litigation, and despite a compelling brief written on behalf of Argentina urging the adoption of federal common law to keep FSIA jurisprudence consonant with Supreme Court precedent.⁶²

Extending the 2nd Circuit's approach nationwide would allow institutional U.S. investors a broader field of forums in which to shop, and a broader selection of developing states to target through hostage-taking asset attachment. It would not make FSIA litigation any friendlier to class actions, remedies originating in international law, or indigent plaintiffs.

IV. CONCLUSION

Perhaps because of jurisprudence on the presumption against extraterritoriality and the types of claims that can arise under the FSIA, there is a mistaken perception that state COL will allow human rights plaintiffs to make an "end run" of sovereign immunity. Not only is the 2nd Circuit and Supreme Court's approach not a correct reflection of the FSIA's effect on COL, but it also would result in greater offensive advantages for institutional investors, who are increasingly shielded from liability⁶³ when they commit or sponsor human rights violations abroad.

62. Petition for writ of certiorari, *Republic of Argentina v. EM Ltd.*, 2010 WL 4314345, 15-18 ("In *Banco*, this Court described the circumstances in which the federal interest in uniformity in international relations and FSIA immunity determinations dictates that a federal court exercising jurisdiction under the FSIA apply federal common law instead of forum law, both as the choice of law rule and the substantive rule of decision. The *Banco* Court rejected the argument that 28 U.S.C. § 1606's language "the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances" required the application "of the law of the forum ... including its conflict principles" to the issue in dispute. 462 U.S. at 622 n.11").

63. *See, e.g.*, *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (holding that Nestle, which had aided and abetted child slavery in the Ivory Coast, was not liable under the Alien Tort Statute).