SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DAVID CASSIRER, ET AL.,)

Petitioners,)

v.) No. 20-1566

THYSSEN-BORNEMISZA COLLECTION)

FOUNDATION,)

Respondent.)

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3 DAVID CASSIRER, ET AL.,)
4 Petitioners,)
5 v.) No. 20-1566
6 THYSSEN-BORNEMISZA COLLECTION)
7 FOUNDATION,)
8 Respondent.)
9 - - - - - - - - - - - - - - - - - -
10 Washington, D.C.
11 Tuesday, January 18, 2022
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 11:25 a.m.
16
17 APPEARANCES:
18 DAVID BOIES, ESQUIRE, Armonk, New York; on behalf of
19 the Petitioners.
20 MASHA G. HANSFORD, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting the
23 Petitioners.
24 THADDEUS J. STAUBER, ESQUIRE, Los Angeles, California;
25 on behalf of the Respondent.

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1 P R O C E E D I N G S
2 (11:25 a.m.)
3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 20-1566, Cassirer versus
5 Thyssen-Bornemisza.
6 Mr. Boies, I understand you're
7 participating remotely.
8 MR. BOIES: I am, Your Honor.
9 CHIEF JUSTICE ROBERTS: You may
10 proceed.
11 ORAL ARGUMENT OF DAVID BOIES
12 ON BEHALF OF THE PETITIONERS
13 MR. BOIES: Thank you, Mr. Chief
14 Justice, and may it please the Court:
15 I begin with three simple
16 propositions. First, Respondent is a foreign
17 state not entitled to immunity under
18 Section 1605 of the FSIA.
19 Second, Section 1606 of that Act
20 provides that as to any claim for relief, such
21 "a foreign state shall be liable in the same
22 manner and to the same extent as a private
23 individual under like circumstances."
24 Third, if the Respondent were a
25 private museum and every other circumstance

1 were exactly the same, California choice-of-law
2 rules would apply.
3 It necessarily follows from these
4 three propositions, none of which is disputed,
5 that California choice-of-law rules must apply
6 to the Respondent. Any other rule would permit
7 courts to apply different choice-of-law rules
8 and thereby different substantive rules to
9 foreign states than would be applied to private
10 parties, resulting in the Respondent not being
11 liable in the same manner and to the same
12 extent as a private museum under like
13 circumstances.
14 As discussed in our brief, even in the
15 absence of such a clear direction from
16 Congress, this Court should not interpret the
17 FSIA as intending federal common law
18 law-making. And 20 years of experience with
19 four circuits interpreting Section 1606 as
20 written and applying state choice-of-law rules
21 strongly suggest that Respondent's speculation
22 about problems that might arise is unfounded.
23 But what is dispositive is that in the
24 FSIA, Congress struck a comprehensive balance
25 as to how claims against foreign states should

1 be adjudicated. Even if possible problems with
2 that balance were to exist, it would be for
3 Congress to address them.
4 I am pleased to respond to any
5 questions the Court may have.
6 JUSTICE THOMAS: Mr. Boies, if we
7 think that the district court and the court of
8 appeals did, in fact, apply Spanish law, would
9 have applied Spanish law in the exact same way
10 to a private person, wouldn't you lose?
11 MR. BOIES: If the --
12 JUSTICE THOMAS: I mean, the -- these
13 --
14 MR. BOIES: If the -- if my -- if my
15 third proposition were wrong, that is, if the
16 Respondent being a private museum would have
17 had federal common law applied to it, then I
18 think the Court is right. That is, if the FSIA
19 intended that state law be displaced even for
20 private parties and that that were the
21 structure of the FSIA, then it would be applied
22 to both the museum as well as the private
23 museum. I would agree with that, Your Honor.
24 JUSTICE THOMAS: Thank you.
25 CHIEF JUSTICE ROBERTS: Well, there

1 are certainly situations where a foreign
2 sovereign -- the -- the analogy that you're
3 going -- supposed to be treated like a private
4 citizen, you know, absolutely makes no sense.
5 I mean, what if the issue is something to do
6 with how you're managing your army? How are
7 you treated like a private citizen in a
8 situation like that? Whether or not you're
9 properly denied asylum to somebody, how are you
10 treated like a private citizen there?
11 It -- it strikes me that your -- your
12 -- your case pushes that principle pretty far,
13 and I'm not sure it is -- it makes that much
14 sense across the board.
15 MR. BOIES: Well, Your Honor,
16 questions of how -- how the state is managing
17 its army or asylum would not come up in an FSIA
18 action.
19 CHIEF JUSTICE ROBERTS: Well, that
20 seems to me to be --
21 MR. BOIES: The FSIA --
22 CHIEF JUSTICE ROBERTS: -- that --
23 that seems to me to be avoiding the -- the
24 question a little bit. I'm sure you can
25 imagine better than I can cases that would come

1 up in that context that might not be a
2 situation that could be replicated by a private
3 citizen.
4 MR. BOIES: Your -- Your Honor, I --
5 I'm not sure I agree with that because you have
6 to have commercial activity to start with. And
7 so, if --
8 CHIEF JUSTICE ROBERTS: All right.
9 Well, then what if a -- what if a private
10 citizen, you know, expropriated property a way
11 that a sovereign could but a way a private
12 citizen can't? I mean -- I mean --
13 MR. BOIES: If -- if it's --
14 CHIEF JUSTICE ROBERTS: -- if the --
15 if the -- if the foreign -- if the foreign
16 sovereign engaged in that activity, there would
17 be no private citizen analogue.
18 MR. BOIES: The -- the private citizen
19 analogue here under state law is conversion.
20 And the -- the question is whether the private
21 party or the foreign state is holding property
22 improperly. There is an expropriation issue
23 that was settled below which held that this was
24 expropriation in violation of international
25 law.

1 Once you have a violation, then the
2 FSIA kicks in, but it only kicks in with
3 respect to commercial activities. It doesn't
4 kick in with respect to the army or the asylum
5 or anything else.
6 So you're only treating the foreign
7 state as being liable in the same manner to the
8 same extent under like circumstances where the
9 foreign state is acting like a private
10 individual, i.e., engaged in commercial
11 activity.
12 JUSTICE SOTOMAYOR: Mr. Boies, I have
13 two questions, one related to Justice Thomas's
14 point. I believe the district court said that
15 both California law and federal common law
16 would adopt Spanish law. Why is it that we're
17 here if you lose under both?
18 MR. BOIES: Because the Ninth Circuit
19 did not reach that issue of -- of California
20 law, which we think was erroneous. We did
21 appeal that finding, but because of the way the
22 Ninth Circuit decided the issue of federal
23 common law, it never reached that issue.
24 JUSTICE SOTOMAYOR: That's what I
25 understood.

1 With respect to Justice Roberts'
2 question -- and I'll ask the Solicitor General
3 this -- it -- it seemed to have accepted the
4 Chief's presumption that there were some
5 international acts that would give rise to
6 federal questions.
7 And -- and I think the U.S. is
8 suggesting that the way to address those issues
9 is not to change this rule about conflicts of
10 law but to address those problems with other --
11 with other doctrines, like the act-of-state
12 doctrine, correct? Do you have a --
13 MR. BOIES: I --
14 JUSTICE SOTOMAYOR: -- different
15 position than they do on that issue?
16 MR. BOIES: I -- I don't think I have
17 a different position. I -- I think I have a
18 somewhat elaborated position.
19 With respect to the FSIA, the FSIA
20 carves out certain provisions, for example,
21 like punitive damages, that are going to be
22 special for state actors, for foreign states.
23 Our position is that, here, where the
24 statute has not carved out those kind of
25 exceptions, if you're dealing with commercial

1 activity, state law ought -- ought to apply.
2 We don't think that there will be
3 situations in which there would be a special
4 rule for the foreign state than for the private
5 actors.
6 There might be situations in which,
7 under act of state or comity or any of a
8 variety of other provisions, the Court might
9 limit what a private party could get just as it
10 might limit what a state party could get based
11 on considerations of comity, international law,
12 and the like.
13 But I think the command of
14 Section 1606 is that whatever rules are going
15 to be applied to a private party should be
16 applied to the foreign state when it's acting
17 in its commercial activities.
18 JUSTICE SOTOMAYOR: Thank you,
19 counsel.
20 JUSTICE ALITO: What would happen if
21 the choice-of-law rule of a jurisdiction took
22 into account the fact that the defendant is an
23 instrumentality of a foreign state, as I think
24 some choice-of-law regimes do?
25 What would -- what would happen under

1 1606 in that situation? 1606 says that "the
2 foreign state shall be liable in the same
3 manner and to the same extent as a private
4 individual under the circumstances."
5 Does that mean that -- that that
6 jurisdiction's choice-of-law rule would be
7 partially abrogated by 1606?
8 MR. BOIES: That, of course, is not
9 this case, but I think that 1606's language
10 would suggest that the state could not have a
11 rule that discriminated against the foreign
12 state. So I think that to the extent that the
13 state tried to have a rule that would
14 discriminate against the foreign state, the --
15 1606 would preclude that.
16 JUSTICE ALITO: Well, this would
17 actually be something that works in favor of
18 the foreign state or at least it could be. But
19 doesn't that difficulty suggest that 1606
20 really should not come into the picture until
21 after the choice-of-law decision has been made?
22 Otherwise, you run into -- you -- you really
23 have --
24 MR. BOIES: I don't think so -- I
25 don't think so, Your Honor, because, if it --

1 if it comes into effect only after the decision
2 is made, you cannot have the state being held
3 to the same manner and extent of liability.
4 You would have a separate choice of
5 law that would be created that would direct to
6 perhaps a separate rule of decision. And that
7 would mean that the state would not be subject
8 to the same liability to the same extent under
9 exactly the same circumstances.
10 So I don't think that could be
11 consistent with -- with Section 1606.
12 JUSTICE ALITO: Well, there's another
13 statutory provision that could lead to a
14 victory on your part, and you do mention it,
15 the Rules of Decision Act, but you downplay it.
16 MR. BOIES: Yes.
17 JUSTICE ALITO: You highlight 1606.
18 Why do you do that?
19 MR. BOIES: Just because we -- we --
20 we do emphasize the Rule of Decision, and I --
21 I don't mean to downplay it, Your Honor. But
22 we concentrate on 1606 because it is such, in
23 our view, a clear statutory command of Congress
24 and one that they thought a lot about.
25 The FSIA was -- was a decade in its

1 making, and it was a comprehensive, as this
2 Court has said on a number of occasions,
3 resolution of issues. And the balance that
4 they struck, which was a balance between the
5 litigant against the state and the rights of
6 the foreign state, is something that -- where
7 it was as clear as we think it is in 1606, that
8 that was the right thing to emphasize.
9 But we -- we do -- we do rely on the
10 Rules of Decision and -- and -- and -- and, in
11 addition, on the fact that when Congress
12 enacted the FSIA, it did so in light of
13 background principles of federalism, background
14 principles of the strong presumption against
15 creating federal common law, the context of the
16 Richards case, where this Court relied on the
17 same language in the Federal Tort Claims Act as
18 was later used in the FSIA to reject an attempt
19 to avoid state choice-of-law rules, even where
20 there was, I would suggest, in the Richards
21 case, a more plausible basis to do so than
22 exists here.
23 So we -- we think that when the
24 Congress enacted the FSIA against all of those
25 backgrounds, even in the absence of such a

1 clear congressional command as exists in 1606,
2 the right interpretation of the FSIA would be
3 that it did not indicate an attempt to deviate
4 from the use of state law and state
5 choice-of-law issues.
6 And, certainly, this case -- this --
7 this Court has never interpreted a -- a statute
8 from Congress as silently intended to separate
9 state substantive rules from state
10 choice-of-law rules.
11 JUSTICE KAGAN: Mr. Boies, some
12 significant part of your argument seems to rely
13 on a view that there's federal common law on
14 one side but only on one side, and I'm
15 wondering whether that's right.
16 Isn't there federal common law on both
17 sides here? You know, the Klaxon rule, which
18 says look to state choice-of-law rules, that is
19 itself a rule of federal common law, isn't it?
20 MR. BOIES: I -- I would have -- I
21 would have said Klaxon was -- was a decision to
22 hold that the federal courts were compelled on
23 grounds of federalism to apply state
24 choice-of-law provisions.
25 I -- I don't think that this is a

1 situation where there's federal common law
2 on -- on both -- on both sides.
3 JUSTICE KAGAN: Well, it -- it -- I
4 guess what I'm suggesting is that Klaxon points
5 to using state choice-of-law rules, but, in
6 doing so, it is itself an exercise of federal
7 common law. That pointing to state common law
8 rules is a federal common law rule.
9 MR. BOIES: I -- I would -- I would
10 put it differently with respect, Your Honor,
11 that -- that -- that what Klaxon is holding is
12 that the state choice-of-law rules apply.
13 Now that is a federal decision, but I
14 don't think it is a federal decision based on
15 federal common law. I think it is a -- a
16 federal decision based on the fact that under
17 Klaxon and under Erie, there is not a -- a
18 federal common law that applies when the
19 underlying action is a state cause of action.
20 JUSTICE BARRETT: Mr. Boies, is it
21 based on the Rules of Decision Act? Klaxon, I
22 mean.
23 MR. BOIES: I -- I -- I don't -- I
24 don't -- I don't believe that Klaxon is
25 primarily based on the Rules of Decision Act.

1 I think it is predominantly based on the
2 constitutional and federalism grounds that
3 underlie the Erie case.
4 And I think that Klaxon, as I read it,
5 was simply the recognition by the Court that
6 for the same reason that the federal courts
7 were required to apply state rules of decision,
8 they were required to apply state choice-of-law
9 rules.
10 CHIEF JUSTICE ROBERTS: Well, Mr.
11 Boies, as I understand it, Klaxon has been
12 subject to some criticism. And why does it
13 make sense, if there is a federal interest in a
14 state case, as there may be when you get to
15 what the -- after deciding the choice-of-law
16 question, why does it make sense that the
17 federal court is restricted in assessing the
18 application of that principle to the merits and
19 not on the question of choice of law?
20 MR. BOIES: I -- I -- I think that the
21 constraint on the federal court would be the
22 same with respect to merits and choice of law,
23 Your Honor. I'm not -- I'm not suggesting that
24 it would be different.
25 I -- I believe that the -- the

1 constraint on the federal court is the same for
2 both choice of law and the underlying rules of
3 decision and that the -- and that this Court
4 has been pretty consistent in not separating
5 those two.
6 I think Klaxon should be read as the
7 Court saying that just as Erie required an
8 application of state rules of decision, it also
9 required the adoption of state choice-of-law
10 provisions.
11 CHIEF JUSTICE ROBERTS: Justice
12 Thomas?
13 JUSTICE THOMAS: No, nothing, Chief.
14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer?
16 JUSTICE BREYER: Just to see if I
17 understand this. Your -- your client is suing
18 for conversion the things under California law.
19 So we imagine --
20 MR. BOIES: Yes.
21 JUSTICE BREYER: -- your client, Mr.
22 Smith, and Mr. Smith is suing a private bank in
23 Spain. And you'd say, well, what law would
24 apply? And the answer would be, well, he'd be
25 in a diversity -- he would have to bring a

1 diversity action if he were in federal court in
2 California. And they would apply -- first, we
3 look to California's choice-of-law rules, and
4 we're going to get into an argument about that.
5 Would California, in fact, apply Spanish law or
6 would it apply California law? But the first
7 thing we say is, what law would California
8 apply?
9 On the other hand, if your client were
10 suing basically under federal law, suppose it
11 had something to do with a bank account or
12 something, and then it's an arising-under case,
13 so we imagine Mr. Smith suing the bank, and
14 it's federal law because that's his basic
15 claim, his underlying claim. And so then we
16 would do what the Ninth Circuit did and say,
17 well, it's a federal claim, he'd be in federal
18 court, arising under, and we look to what the
19 federal courts would apply, what's their
20 choice-of-law doctrine.
21 Am I right or wrong?
22 MR. BOIES: I -- I think you're
23 exactly right. Our -- our position is that Mr.
24 Smith's case against the private bank should
25 come out the same way as our case against the

1 state actor, recognizing that the state actor
2 here is engaged in commercial activity.
3 CHIEF JUSTICE ROBERTS: Justice Alito?
4 No?
5 Justice Sotomayor?
6 JUSTICE SOTOMAYOR: No. Thank you.
7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice Gorsuch?
9 Justice Barrett?
10 Thank you, Mr. Boies.
11 MR. BOIES: Thank you.
12 CHIEF JUSTICE ROBERTS: Ms. Hansford.
13 ORAL ARGUMENT OF MASHA G. HANSFORD
14 FOR THE UNITED STATES, AS AMICUS CURIAE,
15 SUPPORTING THE PETITIONERS
16 MS. HANSFORD: Mr. Chief Justice, and
17 may it please the Court:
18 Rather than creating an independent
19 liability standard for FSIA cases, Congress
20 directed that a foreign state should be liable
21 in the same manner and to the same extent as a
22 private individual under like circumstances.
23 That language provides a clear answer to the
24 question presented.
25 As Justice Breyer indicated in his

1 last question, if every fact in this case were
2 the same, but the foundation were a private art
3 gallery, everyone agrees that a court would use
4 state choice-of-law rules to select the rule of
5 decision for Petitioners' property claims.
6 Section 1606 requires the same treatment in a
7 case against a foreign state.
8 Now, that result comports with first
9 principles. Unless federal law provides
10 otherwise or Congress directly specified, state
11 choice-of-law rules normally apply.
12 But, here, first principles are just
13 icing. The clear language of Section 1606
14 easily resolves this case.
15 I welcome the Court's questions.
16 JUSTICE THOMAS: But you seem to
17 suggest in your brief that if the interests of
18 the foreign sovereign have not taking in --
19 taken -- if they're dismissed -- if we are --
20 if the -- that approach is too dismissive of
21 those interests, we should look to other
22 sources.
23 MS. HANSFORD: We don't think there's
24 any problem across the board in applying state
25 choice-of-law rules. I think, in a particular

1 case, there -- once the law is selected, the
2 application of a particular law could raise
3 issues of such interest to foreign policy that
4 that is a basis for creating federal common law
5 on that particular issue, and the act-of-state
6 doctrine is the perfect example of that, what
7 the Court did in Sabbatino. But we do not
8 think that that applies across the board for
9 choice-of-law rules.
10 And while Respondent in their brief
11 suggests that using state choice-of-law rules
12 somehow fails to give sufficient weight to
13 foreign policy concerns, we just don't think
14 that is correct. We think that in the 30 years
15 that this has been the rule in the Second
16 Circuit, we're not aware of any concerning
17 decisions at the choice-of-law level.
18 And, in fact, of the leading
19 decisions, the two decisions in the Second
20 Circuit, Karaha Bodas and Barkanic, and the
21 Oveissi decision in the D.C. Circuit actually
22 used state choice-of-law rules to select
23 foreign law. And, somewhat ironically, the
24 leading case in the Ninth Circuit, the
25 Schoenfeld decision, used federal choice-of-law

1 rules to select California over Mexican law,
2 and in that case, it was actually the foreign
3 instrumentality that was arguing for state
4 choice-of-law rules.
5 So I think the idea that there is
6 something inherently in tension with foreign
7 policy concerns of using the normal framework
8 is just not borne out in practice.
9 CHIEF JUSTICE ROBERTS: Well, that's
10 -- I have to say it does surprise me for --
11 that the representative of the federal
12 government can't envision a situation where it
13 may be contrary to their foreign policy to
14 apply a particular state's choice of law.
15 Now I -- I understand that may be
16 unusual, but you seem to think that the -- that
17 the federal policy is always going to be to
18 apply the foreign law and -- and, you know,
19 citing those cases where they did, contrary to
20 the -- their own state law, as examples about
21 why this is consistent with the federal
22 government.
23 But is it really just impossible to
24 imagine a case where the state choice-of-law
25 issue, not the substantive law, would itself be

1 one that infringed upon federal policy to such
2 an extent that you would want to apply a
3 different choice-of-law rule?
4 MS. HANSFORD: No, Mr. Chief Justice,
5 it is not impossible to imagine. And I -- I
6 can give you an example, but, before I do, I
7 just want to note that that issue can arise at
8 any stage. It can arise as to any merits rule.
9 Once law is selected, the application of a
10 particular law could infringe on foreign policy
11 concerns. And we don't think, and I think
12 nobody has suggested, that that is a reason to
13 create substantive federal law of liability
14 under the FSIA instead of using state rules.
15 So we think that if that situation
16 were to arise, it hasn't so far, but if it were
17 to arise, those normal principles would --
18 would kick in and would take care of that. And
19 so, to give you an example --
20 CHIEF JUSTICE ROBERTS: Even at the
21 choice-of-law stage?
22 MS. HANSFORD: Yes, even at the
23 choice-of-law stage. Our -- our basic
24 submission is that choice of law is really no
25 different than any other aspect of state law.

1 And because Congress has made the judgment to
2 defer to states' policy judgments in general,
3 there's no reason to carve out choice-of-law
4 principles from that. And I think that the
5 reasoning of the Klaxon decision goes to that.
6 I think the most closely analogous
7 context is really the Richards decision under
8 the FTCA, and I think that is a way to avoid
9 those difficult questions that -- that you were
10 raising, Justice Kagan.
11 Instead of looking all the way to Erie
12 and Klaxon, look at what the Court did in
13 Richards. And, there, the Court said that the
14 FTCA, because Congress has shown an interest in
15 tying matters so closely to state policy
16 judgments, we'd really need a pretty specific
17 indication to think that choice of law would be
18 treated differently in this type of
19 interstitial legislation. And a --
20 JUSTICE KAGAN: Ms. -- Ms. Hansford --
21 I'm sorry. Were you -- I mean, I'm not sure my
22 question matters at all. In fact, I suspect it
23 doesn't. But I guess I -- I would like to
24 know, what -- what do you think Klaxon is? Is
25 it a constitutional decision? Is it a

1 statutory decision in the way Justice Barrett
2 suggested? Or is it, in fact, a federal common
3 law rule?
4 MS. HANSFORD: It -- Klaxon may be a
5 federal common law rule itself, but I don't
6 think that means that it empowers courts to
7 create federal common law. I think it does the
8 opposite.
9 So I -- I -- I -- I think that those
10 two points come apart, and that may be why it
11 doesn't ultimately matter to this case even if
12 we're looking at it in terms of first
13 principles.
14 JUSTICE BREYER: To go back to the
15 Chief Justice just out of interest, imagine a
16 state, let's say California or make up a state,
17 call it Allachusetts or something, and it has a
18 choice-of-law rule which is "under no
19 circumstances will a court ever give any weight
20 whatsoever to the rule of Myanmar," okay?
21 That's their rule.
22 And that might interfere with the
23 policy that underlies this, and maybe it would
24 be preempted. I don't know what the ground
25 would be exactly. It's sort of like there was

1 a case, you know, out of Massachusetts. But
2 that could be, I -- I think, the kind of thing
3 that would raise a question.
4 MS. HANSFORD: Absolutely, Justice
5 Breyer, and that's exactly where we think those
6 principles we lay out at pages 21 through 22 of
7 our brief would come in. So how that would be
8 analyzed is, does that law represent
9 Massachusetts creating foreign policy in a way
10 that is preempted either by something specific
11 or some sort of field preemption? And it would
12 be very much the Garamendi-Zschernig line of
13 cases, and it would apply the same way to a
14 choice-of-law rule.
15 Because this is a choice-of-law rule,
16 there's also the additional layer that there
17 would be the due process type of analysis if
18 that choice-of-law rule was used to apply
19 Massachusetts law to something that doesn't
20 have a sufficient connection. So you have that
21 additional check. But just in the same way
22 that you would apply that to a substantive rule
23 down the line in an FSIA case, you would apply
24 it here.
25 And -- and one other point on that is

1 a lot of these foreign policy types of
2 considerations could come up in a case against
3 a private entity as well. If the foundation
4 were a private gallery, I think a lot of the
5 same foreign policy considerations would come
6 up.
7 And so there's really no silver bullet
8 here of creating FSIA-specific choice of law
9 because the same issues would come up in a case
10 against a private entity located abroad.
11 JUSTICE ALITO: Would you be less
12 comfortable with the position you're taking if
13 at some point in the future the Court were to
14 say that federal law cannot preempt state law
15 simply based on federal interests that are not
16 embodied in a statutory provision that actually
17 conflicts with state law?
18 MS. HANSFORD: I -- I think, if this
19 Court were to substantially narrow preemption,
20 I -- I -- I guess that that would be an
21 argument for reading 1606 a little bit
22 differently.
23 I think the way the FSIA was drafted
24 against the background of preemption principles
25 that they -- as they exist, but I think another

1 way to think about 1606 in that circumstance
2 would be as a matter of federal law, specifying
3 that you're looking to state law principles,
4 except to the extent that -- that 1606
5 superimposes a layer on top of that, so I think
6 there would be that way of going about it.
7 JUSTICE ALITO: Could I ask you the
8 question that I asked Mr. Boies about what
9 would happen in a situation where a
10 jurisdiction's choice-of-law rule treats an
11 instrumentality of a foreign state differently
12 from a private individual, what -- or a private
13 entity. What would happen in that situation?
14 MS. HANSFORD: I agree with Mr. Boies
15 that Section 1606 essentially says look at the
16 law that applies to the private entity or the
17 private individual and apply that law to the
18 foreign sovereign.
19 So I think that's the normal operation
20 of it. I think that's generally how it's
21 understood in the FTCA context, which has the
22 same provision that if -- if the law does draw
23 a distinction between public and private, you
24 normally -- you look as -- as a general matter.
25 Now I -- I will note that it's

1 possible that there could be some particular
2 sensitivity, some extra FSIA principle that
3 would operate against that in a particular case
4 if there was really a sensitivity involved, but
5 I think that is the import of the plain text.
6 JUSTICE ALITO: Well, in light of that
7 complication, why isn't it simpler to analyze
8 this case just under the Rules of Decision Act?
9 MS. HANSFORD: You could analyze it
10 under the Rules of Decision Act, Justice Alito.
11 I think, because the Rules of Decision Act says
12 unless law provides otherwise, and we think
13 that Section 1606 does provide otherwise, and
14 we think that this equal treatment principle is
15 the preeminent principle here, we think that
16 that's the most direct way to get there. We --
17 JUSTICE ALITO: Well, do you think
18 there's some problem with analyzing it under
19 the -- under the Rules of Decision Act? What
20 -- what is the problem? Is the problem the
21 opinion in Klaxon? Can't Klaxon easily be
22 understood as simply based on the Rules of
23 Decision Act?
24 MS. HANSFORD: I -- I -- I think
25 the -- the problem is just that by its own

1 terms, the Rules of Decision Act doesn't seem
2 to apply when there is an on-point statutory
3 provision. And we think that Congress could
4 alter this provision if --
5 JUSTICE ALITO: Well, I understand.
6 But the premise of this is that 1606 may not
7 come into play until the choice-of-law question
8 has been decided.
9 MS. HANSFORD: And -- and -- and I
10 would push back on that point, Justice Alito.
11 I think that that does not work as a matter of
12 statutory text, but I also think the Court has
13 already crossed that bridge in the Richards
14 decision because it did interpret the identical
15 same manner and to the same extent principle as
16 applying at the choice-of-law stage and, in
17 fact, as the primary reason for incorporating
18 state choice-of-law principles so that that
19 question that Justice Thomas asked, I do think
20 Richards is an answer to that, as well as just
21 the textual principle that you can't impose
22 liability in the same manner if you're using
23 fundamentally different rules.
24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 JUSTICE THOMAS: No.
2 CHIEF JUSTICE ROBERTS: Justice
3 Breyer?
4 Justice Alito?
5 Justice Sotomayor, anything further?
6 JUSTICE SOTOMAYOR: No. Thank you.
7 CHIEF JUSTICE ROBERTS: Justice Kagan?
8 Justice -- Justice Barrett? No?
9 Thank you, counsel.
10 MS. HANSFORD: Thank you.
11 CHIEF JUSTICE ROBERTS: Mr. Stauber.
12 ORAL ARGUMENT OF THADDEUS J. STAUBER
13 ON BEHALF OF THE RESPONDENT
14 MR. STAUBER: Mr. Chief Justice, and
15 may it please the Court:
16 Nothing in the Foreign Sovereign
17 Immunity Act or its foreign affairs origins
18 mandates that federal courts sitting in
19 judgment of a foreign state's private or public
20 acts must employ a forum's choice-of-law test
21 where the forum has little or no connection to
22 the claims or the basis for jurisdiction and
23 the test ignores the federal and foreign
24 concerns that underpin the FSIA.
25 In the absence of an explicit

1 statement, Congress did not intend that
2 California's choice-of-law test should
3 determine the substantive law to apply to a
4 foreign state alleged to have committed a wrong
5 within its own borders. But for Mr. Cassirer's
6 retirement to San Diego, California would have
7 no interest in this case.
8 As this Court in Verlinden tells us,
9 the FSIA arises out of Congress and the
10 executive's shared goals of normalizing
11 relations among nations during the Cold War and
12 bringing the U.S. in line with international
13 law norms, as recognized by this Court in
14 Philipp v. Hungary -- Germany.
15 To achieve these goals, the FSIA
16 establishes a federal regime that is intended
17 to ensure fair and uniform treatment regardless
18 of where in the United States a foreign state
19 is held. Because it implicates foreign
20 relations, the choice-of-law analysis fits
21 comfortably within a discrete recognized
22 federal common law enclave, one that does not
23 intrude into an area of traditional state
24 interest.
25 Once federal common law determines the

1 proper substantive law, that law is applied to
2 the foreign state "in the same manner and to
3 the same extent as a private party under like
4 circumstances." The foreign state doesn't get
5 any special treatment in the Court's liability
6 analysis.
7 Section 1606 relates to the
8 application of substantive law, not to the
9 choice-of-law test, the precursor to the
10 liability analysis that determines which
11 substantive law to apply.
12 Klaxon recognizes that federal courts
13 exercising diversity jurisdiction must apply
14 the forum's choice of law, but FSIA cases do
15 not arise under diversity jurisdiction.
16 Moreover, Klaxon's stated goal of
17 deterring plaintiffs from shopping for a more
18 favorable forum by taking their state law
19 claims across the street to a federal court is
20 not relevant as Congress wanted FSIA cases to
21 be litigated in federal courts.
22 I would be happy to address any
23 questions that the Court may have.
24 JUSTICE THOMAS: Counsel, I don't
25 quite understand how the sovereign that can be

1 treated in the same manner as a private
2 individual if you apply different choice-of-law
3 rules.
4 MR. STAUBER: Well, Your Honor, in the
5 context of a private party, a private party is
6 before the court in diversity. A foreign
7 sovereign is not before the court on diversity
8 but, as Verlinden tells us, is more before the
9 court akin to a federal question.
10 Therefore, to put the private party
11 and the foreign sovereign in a like
12 circumstance, we actually have to put the
13 private party in a foreign or more -- more akin
14 to a foreign question in order to get them into
15 a like circumstance. And in that case, federal
16 common law would apply the choice-of-law test,
17 not a forum state's.
18 JUSTICE KAGAN: I guess I don't
19 understand the premise of your answer. I mean,
20 you -- you seem to be suggesting that we should
21 understand this as a federal question case.
22 But these are not federal question claims.
23 These are state claims.
24 MR. STAUBER: Correct. The underlying
25 claim --

1 JUSTICE KAGAN: So why should we think
2 of it as like a federal question when this --
3 this suit is not based on federal law?
4 MR. STAUBER: Because this -- but for
5 the Foreign Sovereign Immunity Act, the foreign
6 state would not be before the United States
7 federal courts.
8 The underlying claim may be a
9 California state claim, it may be in this case
10 a Spanish foreign claim, which is why, as we
11 were -- the Court was discussing earlier, you
12 have to always see it through the lens of the
13 foreign state and the fact and the manner and
14 the treatment in which it was brought and haled
15 before this Court.
16 Only in that context can then you have
17 a like circumstance where the plaintiff is
18 likewise not on diversity before the court but
19 in some question that brought it before the
20 court addressing a particular concern.
21 JUSTICE KAGAN: Well, that seems to be
22 treating the foreign state in a way that it's
23 -- it's really the opposite of the -- of the
24 way the FSIA instructs in 1606 because what I
25 take 1606 to essentially be saying is, once

1 you've decided that the sovereign immunity
2 doctrines of -- of the FSIA don't apply, the
3 foreign state really isn't very special.
4 And -- and -- and your answer to
5 Justice Thomas was essentially to say: Yes,
6 even once sovereign immunity does not apply,
7 the foreign state is extremely special and has
8 to be treated differently.
9 MR. STAUBER: No, the -- the foreign
10 state needs to be treated in a fair and
11 balanced manner. It doesn't not get extra
12 special treatment with respect to the liability
13 which may befall it.
14 As in this case we heard earlier, if,
15 in fact, Spanish law applies, the private party
16 in Spain would also under these facts either
17 have retained the painting or lost the painting
18 because the substantive law would have applied
19 to the same. We --
20 JUSTICE KAGAN: Right. But you're
21 saying that even though the sovereign immunity
22 threshold has been met, there is no sovereign
23 immunity here, still, the foreign state gets
24 different treatment with respect to choice of
25 law. And I'm saying, why?

1 MR. STAUBER: No, we're not saying
2 that the foreign state gets any different
3 treatment with respect to the choice of law.
4 We're saying that in order for you to put the
5 like circumstance together, the private party
6 would not be before -- the Spanish private
7 party would not be before the U.S. courts on
8 diversity grounds because the foreign state is
9 not here on diversity grounds.
10 Now you're going to have to run a
11 whole lot of traps to get a private Spanish
12 party before a U.S. court when the property is
13 not in the United States, when the act which
14 caused the wrong or the loss of the property or
15 the commercial act didn't occur in the United
16 States. We submit diversity would probably
17 never work to get the private party here. But,
18 aside from that, the like circumstance is not
19 based on diversity.
20 JUSTICE BREYER: Well, so -- so let's
21 follow through what you say. I see what -- I
22 think I see it. It says: "the foreign state,"
23 Spain, "shall be liable in the same manner and
24 to the same extent as a private individual
25 under like circumstances."

1 MR. STAUBER: Yes.
2 JUSTICE BREYER: Your view is the like
3 circumstance is you're in a federal court.
4 MR. STAUBER: Yes.
5 JUSTICE BREYER: Okay. Here, they
6 happen to be suing under California law for --
7 property law.
8 MR. STAUBER: Yes.
9 JUSTICE BREYER: Conversion, I think.
10 MR. STAUBER: Yes.
11 JUSTICE BREYER: Okay? Fine. Now
12 let's see. So we pretend that we are in a
13 federal court suing for conversion. How do we
14 get into federal court? I mean, it's sort of
15 interesting. I mean, is it supposed to be an
16 arising-under case? Do we pretend it's arising
17 under? Maybe we should pretend it's a -- a
18 bank conversion case, in which case maybe the
19 law of the Vatican applies. I don't know.
20 I mean, how do we do this? It sounds
21 a little complicated, your view. At least the
22 opposite view is simple. You say what it was.
23 It was a -- it's a state claim. State claims
24 belong here in -- under these circumstances,
25 under diversity jurisdiction, and so we apply

1 California law. Okay?
2 But what is your view? We don't even
3 know what the claim is supposed to be.
4 MR. STAUBER: Your Honor, we would --
5 your -- Justice, we would submit that our view
6 is actually the simpler view because, if you
7 have a uniform federal common law choice of
8 test that will apply in all of the federal
9 circuits and therefore apply in all of the 50
10 states, then you will not end up with a
11 disparity of treatment for a foreign state
12 regardless of where it appears.
13 JUSTICE BREYER: Okay. My only
14 problem with that is I can't think of any
15 private individual who would be treated that
16 way.
17 MR. STAUBER: Who -- yes, Your Honor.
18 You would be treated -- Justice, you would be
19 treated differently on your choice-of-law test
20 in particular on a state forum with bias
21 towards the private party if you were in
22 Kentucky or if you were in Michigan.
23 And at the present time, the
24 choice-of-law test forums, the majority use the
25 Restatement, which is used by the federal

1 common law approach. And we can never forget
2 that the underpinning reason for the Foreign
3 Sovereign Immunity Act was to take both the
4 executive branch and the courts out of the ad
5 hoc basis of disparate treatment of foreign
6 sovereigns on a case-by-case basis.
7 So our approach actually brings
8 predictability, uniformity, and prevents the
9 hostile outcomes, which we submit you do not
10 actually have a resolution for because, as this
11 Court, most recently in Philipp v. Germany and
12 in Simon v. Hungary, passed on the question if
13 international comity is an available
14 affirmative defense. And, in fact, as the
15 Turkish government recently learned in the
16 Washington, D.C., courts, international comity
17 was not available to it.
18 This case, we would submit, is a test
19 case for you in the study that after-the-fact
20 stepping in by the United States or by the --
21 or by the courts later in a case to remedy what
22 could be a constitutional violation or an
23 overreach of a state in its territorial
24 interests does not work.
25 This case was originally filed in

1 2005. We didn't get to the choice-of-law
2 question until 2015. So --
3 JUSTICE ALITO: If --
4 MR. STAUBER: -- the foreign state has
5 been in litigation for 10 years, no longer has
6 international comity available to it. And
7 foreign states do not enjoy, as a private party
8 does, the benefit of due process.
9 JUSTICE ALITO: If this is to be
10 decided under federal law, federal common law,
11 who is going to decide that and on what basis?
12 MR. STAUBER: If this is to be decided
13 under federal common law choice of law?
14 JUSTICE ALITO: Yeah, federal common
15 law choice of law.
16 MR. STAUBER: It -- it will be, as
17 happened here, the district court, which had
18 jurisdiction under Foreign Sovereign Immunity
19 Act and applying it as it did.
20 JUSTICE ALITO: No, I mean, what is
21 going to be the substance of this federal
22 common law choice-of-law principle?
23 MR. STAUBER: What is going to be the
24 substance?
25 JUSTICE ALITO: Where are we going to

1 find it?

2 MR. STAUBER: Ah. We will find it

3 where we now find it. We find it in the

4 Restatement.

5 JUSTICE ALITO: Why?

6 MR. STAUBER: Because that is where

7 the federal courts have decided to look.

8 JUSTICE ALITO: Why?

9 MR. STAUBER: Because those are the

10 principles which take into consideration the

11 international relations which underpin the

12 Foreign Sovereign Immunity Act. As we --

13 JUSTICE ALITO: Well, what if -- I

14 mean, what if the -- the Ninth Circuit says

15 we're going to look at the -- at the Second

16 Restatement, and another circuit says we're

17 going to look at the First Restatement, and

18 another circuit says we don't like either of

19 those, we're going to develop our own

20 choice-of-law rules? Would we have to decide

21 what the choice-of-law rule was?

22 MR. STAUBER: I think that is where

23 this Court is very well positioned to set forth

24 a uniform choice-of-law rules under federal

25 common law --

1 JUSTICE ALITO: Well, why are we in --
2 MR. STAUBER: -- and the Foreign
3 Sovereign --
4 JUSTICE ALITO: -- a position to do
5 that? That involves very -- it involves
6 serious policy questions, doesn't it?
7 MR. STAUBER: It in-varies, I think, a
8 very straightforward application, as this Court
9 did most recently in Philipp v. Germany, where
10 it looked to the guiding international norms,
11 it looked to the conflicts of law, it looked to
12 the Restatement to define the definition of a
13 violation of international law.
14 That is something that this Court is
15 -- is well positioned to do, to provide the
16 guidance to all the federal circuits as to the
17 application and use of the federal common law
18 choice-of-law test.
19 CHIEF JUSTICE ROBERTS: It seems to me
20 that you're seeking the benefit of the fact
21 that your -- or your client is, that it is a
22 foreign sovereign, sort of at every different
23 stage of the analysis, before you can get
24 hauled -- haled into court and how you can be
25 treated at different stages.

1 And it seems to me that at some point,
2 1606 sort of says, okay, you've gotten the
3 advantage of being a foreign sovereign in our
4 treatment in -- in -- in our courts, but no
5 more. Now that you've gotten down to this
6 level, we're going to treat you like a private
7 party.
8 MR. STAUBER: Right.
9 CHIEF JUSTICE ROBERTS: And that
10 should extend to choice-of-law issues at that
11 point as an -- as any other.
12 MR. STAUBER: We would submit that it
13 doesn't trigger until actually you get to the
14 substantive law, which is the choice of law.
15 Not -- I'm sorry, not the choice of law, but,
16 actually, the substantive law that applies.
17 The choice of law and the substantive
18 applicable law are not necessarily one and the
19 same. They may be --
20 CHIEF JUSTICE ROBERTS: Sure.
21 MR. STAUBER: -- in Klaxon. They may
22 be in diversity. But that is not for which we
23 do sit. And, therefore, the overarching policy
24 that drove the Foreign Sovereign Immunity Act
25 in 1976 was -- was, in fact, that a foreign

1 state -- we're not asking for special
2 treatment. We're not asking for different
3 treatment. Once we're before the courts, we're
4 asking for fair and balanced treatment, but
5 always acknowledging the fact that we are a
6 foreign state. And we never leave --
7 JUSTICE KAGAN: And where do you get
8 that --
9 MR. STAUBER: -- that distinction
10 behind.
11 JUSTICE KAGAN: -- where do you get
12 that from? Where do you draw the line? And
13 you say, well, 1606 doesn't kick in until after
14 the choice-of-law question. Where do you get
15 that from? Is it from the words of 1606? Is
16 it from some idea of legislative history? Is
17 it from some idea of good foreign relations
18 policy? Where is it coming from?
19 MR. STAUBER: I would say, Your
20 Honor -- Justice, it's coming from all of
21 those. First of all, the Foreign Sovereign
22 Immunity Act, when Congress drafted it in its
23 legislative history, it speaks ultimately in
24 its adoption not to Klaxon. It, in fact,
25 removes the foreign sovereign from diversity.

1 It could have simply added to 1332 and included
2 these types of claims. It did not. It's -- it
3 created 1330, which is not based on diversity.
4 I would submit it's in the language
5 itself. The language does not state that you
6 use a state forum's choice-of-law test. It
7 simply states that you treat the -- the private
8 party and the foreign state as to its liability
9 the same --
10 JUSTICE KAGAN: Right, but you're not
11 going to be liable in the same manner and to
12 the same extent as a private individual if two
13 different sets of law are used.
14 MR. STAUBER: That's correct, Your
15 Honor, but they're not going to be treated as
16 -- as -- in the same manner and the same as a
17 private party if they're now shifted over to a
18 diversity setting, which wasn't the basis of
19 jurisdiction in the first place.
20 The Rules of Decision came up as a --
21 as a question that was in the -- in the Court's
22 interest, and I want to point out that the
23 Rules of Decision does not actually apply here
24 because, under the Rules of Decision, they're
25 based on diversity. We are not sitting here in

1 diversity. The Rules of Decision were passed
2 in 1908. They -- they precede the Foreign
3 Sovereign Immunity Act of 1970 -- 1976.
4 I also want to point out that the
5 Foreign Sovereign Immunity Act, as this Court
6 in Verlinden tells us, applies to both U.S.
7 citizens and non-U.S. citizens. In that
8 scenario, as we know from the Holy See case in
9 the Sixth Circuit, you may have a situation
10 where you have a class action. And class
11 actions are starting to arise in this
12 expropriation context. And in a class action,
13 in this -- from this Court in Shutts, we know
14 that each individual plaintiff is subject to a
15 separate choice-of-law test.
16 So what will happen here in this
17 scenario is you would have in -- in any one of
18 the cases that are coming up in which a
19 plaintiff is a foreign citizen but this Court
20 takes jurisdiction under the Foreign Sovereign
21 Immunity Act, you would have a state's
22 choice-of-law test applying to decide what the
23 substantive law is to, for example, a Spanish
24 citizen who's filed a case against the Kingdom
25 of Spain. Or, in the case that is proceeding

1 now before the District Court of Columbia in
2 Simon v. Hungary, you would have a Hungarian
3 citizen who is a member of the class, and their
4 choice-of-law test would be based on D.C. as to
5 their case against the Hungarian state.
6 We submit, Your Honors, that the
7 foreign relations concerns that drove the
8 creation of the Foreign Sovereign Immunity Act
9 are the same foreign relations concerns that
10 continue to drive its application today. And
11 the use of a state law forum choice of test is
12 not called for, required, or mandated by
13 Congress or by the statute.
14 CHIEF JUSTICE ROBERTS: Can't the
15 various considerations that you've been talking
16 about be applied fully at the liability stage?
17 Why -- why is it necessary that -- is it -- is
18 it the only way you can protect the foreign
19 interests if the federal government, for
20 example, has that interest is at the
21 choice-of-law stage? Can't -- can't those be
22 taken into account when you get to the
23 substantive law?
24 MR. STAUBER: They --
25 CHIEF JUSTICE ROBERTS: I mean, if

1 there's some problem with the state choice of
2 law because the choice they've chosen is one
3 that prejudices foreign sovereigns in a way
4 that's contrary, as our federal government
5 would say, to the national interest, why can't
6 you take that into account at that point?
7 MR. STAUBER: You can take it into --
8 CHIEF JUSTICE ROBERTS: Just a
9 starting point, in other words.
10 MR. STAUBER: Sure. You -- you -- you
11 can take it into account, Your Honor. We're
12 not saying you can't take it into account, but
13 we're saying that you need to, in order to
14 provide predictability and uniformity, which is
15 one of the tenets of the Foreign Sovereign
16 Immunity Act for the foreign, they need to know
17 once they're haled into the U.S. court whether
18 they're haled in in Arizona, in Iowa, in
19 Michigan or Kentucky, that they're going to be
20 treated fairly and they're going to be treated
21 the same.
22 To find that out 10, 12, 15 years
23 later after the litigation has been going on
24 undercuts the very policies of the Foreign
25 Sovereign Immunity Act.

1 CHIEF JUSTICE ROBERTS: Well, I think
2 it's pretty fair at that stage to tell them
3 you're going to be treated the same as a
4 private party when it comes to the question of
5 choice of law. Now maybe you've got a special
6 argument about your -- based on your foreign
7 status, and you can raise that when you get to
8 the point and say, okay, choice of law is this,
9 and you say, well, here's why it doesn't
10 protect our interests, and maybe you get Ms.
11 Hansford's client to come in and agree with it.
12 I just don't know why that has to take place at
13 the choice-of-law stage.
14 MR. STAUBER: Because you -- you would
15 end up with a different outcome, disparate
16 treatment to the foreign state, if it was haled
17 into a different state.
18 If this case had proceeded in New
19 York, where Mr. Cassirer first moved to when he
20 came to the United States, we would have a
21 different outcome. If this case proceeded in
22 Ohio when he moved there in the 1950s, we would
23 have a different outcome.
24 But for the fact that Mr. Cassirer
25 chose to retire to California, we now have a --

1 a third different outcome. That is not
2 consistent with the concerns that were
3 addressed -- need to being addressed under the
4 Foreign Sovereign Immunity Act, and we would
5 submit --
6 CHIEF JUSTICE ROBERTS: Well, I mean,
7 you know --
8 MR. STAUBER: -- one line in 1606 --
9 CHIEF JUSTICE ROBERTS: -- welcome --
10 welcome to the United States. That's how the
11 courts work. And a private citizen of the
12 United States moves from New York to Ohio, the
13 law that applies to him is going to change as
14 well.
15 And we're dealing with a law that says
16 you apply this -- the law to -- to -- to the
17 foreign sovereign as if a private party. And
18 the alternative is what we have said is an
19 unusual situation where you're asking the
20 courts to devise their own body of law that's
21 going to apply in this situation.
22 MR. STAUBER: We don't think we're
23 asking the court to devise its own body of law.
24 We think we're simply asking the court to --
25 the federal court which is sitting within a

1 unique federal enclave of foreign affairs where
2 it is precisely strong and well-reasoned to sit
3 in to -- to create a uniform application
4 choice-of-law test to apply to every foreign
5 state.
6 JUSTICE GORSUCH: Counsel, you -- you
7 suggest that if -- if you should lose on -- on
8 the choice-of-law question that there are, in
9 fact, constitutional constraints in this case
10 that would prohibit the application of
11 California law.
12 Your friends on the other side say
13 those arguments have been waived, this
14 litigation's been going on long enough, and we
15 shouldn't take those up or allow those to be
16 presented on remand.
17 Wanted to give you an opportunity to
18 respond.
19 MR. STAUBER: I appreciate that, Your
20 Honor.
21 We do not think those -- those
22 questions have been -- been waived at all, Your
23 Honor. As we articulated earlier, due process
24 is a question that is always at play.
25 The question of --

1 JUSTICE GORSUCH: Well, I mean, due
2 process is always in play until you fail to
3 raise the argument.
4 MR. STAUBER: Well, we did raise the
5 argument.
6 JUSTICE GORSUCH: And then -- then it
7 usually isn't in play.
8 MR. STAUBER: Yeah.
9 JUSTICE GORSUCH: So at what -- was it
10 in play? Was it preserved below? What have --
11 what have you got for me on that?
12 MR. STAUBER: Sure. We would submit
13 it was -- it was preserved below. We have
14 consistently argued and presented to the Court
15 the due process concerns about the application
16 of a California statute which would divest the
17 foreign sovereign's agency or instrumentality
18 of the property right which was already vested
19 at the time this case was brought if you end up
20 applying California law.
21 And it's not until that application of
22 foreign -- of California law comes into place
23 that you have the constitutional due process
24 violation that needs to be raised.
25 JUSTICE GORSUCH: How long has this

1 case been going on and -- and --
2 MR. STAUBER: This case, Your Honor,
3 started in 2005, and it has been going on now
4 for 15 years, which is why we submit it is
5 precisely a case that is ripe for this Court to
6 affirm the Ninth Circuit's application of
7 the -- in this particular case, the federal
8 common law choice and, in particular, since it
9 landed both under the California choice-of-law
10 test and under the federal common law
11 choice-of-law test at the same result, we do
12 think that in either way, this Court can affirm
13 the -- the Ninth Circuit's decision.
14 JUSTICE GORSUCH: I guess I'm just
15 wondering if -- if -- if I were to think that
16 the Chief Justice's line of questioning has
17 some force and that the state law should be the
18 default, but there might be some constitutional
19 backstop arguments and if I have serious doubts
20 about whether those constitutional backstop
21 arguments have -- have been presented, whether
22 it might be time to call this one to a close.
23 MR. STAUBER: Call which one? The
24 case itself as a close?
25 JUSTICE GORSUCH: The case, yeah. I

1 mean, 15 years, 16, whatever, 17 years it's
2 been?
3 MR. STAUBER: Yeah. Yeah.
4 JUSTICE GORSUCH: On choice of law, we
5 haven't gotten past choice of law? Did you
6 want to -- or those outset --
7 MR. STAUBER: We did -- well, we did
8 get past choice of law, Your Honor, in 2015
9 with the -- with the motion for summary
10 judgment is when the choice of law was decided
11 and then we did a full trial on the merits.
12 And based on a full trial on the merits, the
13 Court determined that the --
14 JUSTICE GORSUCH: I appreciate that,
15 but here we are back at the starting gate
16 potentially, right? I mean --
17 MR. STAUBER: Well --
18 JUSTICE GORSUCH: -- we would have
19 this case start all over again in some ways.
20 MR. STAUBER: Well, in some ways,
21 we -- we would, which is why we think this is
22 not a case -- because it would have gone both
23 to the Thyssen-Bornemisza under California
24 choice of law and under federal common law
25 choice of law, but the trial court, which did

1 examine the issue and whose factual findings
2 are due deference, did find that Spanish law
3 should apply to the ultimate outcome.
4 So I would share this Court's concern
5 that, yes, I think you bring this case to a
6 close either under the California choice-of-law
7 test or the federal common law choice-of-law
8 test, but I do think it is time to bring the
9 case to a close.
10 JUSTICE ALITO: Well, this is not the
11 issue before us, but what -- can -- can you
12 state in a simple -- in simple terms what is
13 the arguably relevant difference between
14 California -- the California's choice-of-law
15 rule and the Restatement?
16 MR. STAUBER: Yes. California's
17 choice-of-law rule test does not take into
18 consideration the very federal and
19 international concerns which are taken into
20 consideration under the federal common law.
21 In other words, in this particular
22 case, California's choice-of-law test does not
23 take into consideration the Terezin Declaration
24 or the Washington Principles or the Holocaust
25 Era Art Restitution Act of 2016.

1 It does not take into consideration
2 those national policies which formulate the
3 United States' position that these court --
4 these cases should be brought to a fair and
5 just resolution through some sort of
6 negotiation or alternative resolution in
7 respect for the laws of all states, not just
8 the United States.
9 And by forcing a federal court to use
10 the state law choice, you are in effect
11 handcuffing that federal court judge who is
12 attempting to administer their case in a fair
13 and balanced way to take into consideration
14 these competing interests which are at play in
15 extraordinary expropriation cases.
16 JUSTICE BREYER: So you agree then --
17 you -- you agree with the district -- that the
18 district court was wrong? You agree with your
19 opposing counsel that the district court, in
20 saying that California would choose Spanish
21 law, you both think he's wrong?
22 MR. STAUBER: No. I think the
23 district court was right in its application --
24 JUSTICE BREYER: When it comes to the
25 same law, Spanish law, what are all these

1 differences you're talking about?
2 MR. STAUBER: No. What -- I am saying
3 that in applying the California choice-of-law
4 test, the district court applied it correctly
5 and landed at the result that under the
6 California choice-of-law test, Spanish law
7 applies.
8 It also applied the federal approach
9 correctly and landed at Spanish law. What I'm
10 saying is that by man- -- by this Court
11 mandating or allowing it to proceed in 50
12 different states under 50 different
13 choice-of-law tests, you will be telling a
14 federal court judge -- 700 different federal
15 court judges that when cases involving the
16 expropriation exception, cases which by
17 definition include international concerns in
18 our relations among nations, that you are
19 forced to use that forum choice law test which
20 may not, in particular, in Kentucky, in
21 Michigan, or in any one of the states that
22 doesn't currently use the Restatement, you may
23 not take those federal international concerns
24 into consideration.
25 JUSTICE SOTOMAYOR: Counsel, I -- I --

1 going -- I'm too much a practical person for
2 this argument that you're raising. If
3 California law and federal law, you say, both
4 correctly point to the application of Spanish
5 law, what are you afraid of?
6 MR. STAUBER: We're not --
7 JUSTICE SOTOMAYOR: They're -- you're
8 afraid of something. You're afraid that
9 they're right, that some aspect of California
10 law can hurt you, correct?
11 MR. STAUBER: No, Your Honor, I -- I
12 would beg to differ with that. And if I've
13 given that impression, I am not doing my job as
14 an advocate. We welcome an analysis if that's
15 what this Court so thinks is necessary under
16 the California choice-of-law test because, as
17 we said earlier, the district court did it
18 correctly with respect to its factual deference
19 and its application of law. And so --
20 JUSTICE SOTOMAYOR: Now I understood
21 from the briefing by everyone that, in most
22 circumstances, federal and state choice-of-law
23 provisions would come out the same way. Am I
24 correct on that assumption?
25 MR. STAUBER: In this particular

1 circumstance, it would. In 27 states which use
2 the Restatement, we -- we -- we think it would.
3 But the problem is that in this -- we
4 -- when you take this case and you bring this
5 case forward, it speaks to the -- the entire
6 Federal Circuit. And our concern being
7 expressed here is not for our particular case
8 at hand but the implications for foreign
9 sovereigns who are haled into jurisdictions
10 which don't use the Restatement, may choose to
11 use a fed -- a state law choice-of-law test
12 that is biased.
13 JUSTICE SOTOMAYOR: And that may raise
14 constitutional claims, as the Petitioner and
15 the SG stated, correct?
16 MR. STAUBER: It raises constitutional
17 claims. It raises international comity claims.
18 JUSTICE SOTOMAYOR: But you're not
19 claiming that any of those are raised here?
20 MR. STAUBER: At the present time, it
21 would be -- if the court decided, that is, the
22 Ninth Circuit decided, to apply California's
23 choice-of-law test in a way that applied
24 California law, we would submit that would be a
25 constitutional violation. It would be an

1 extraterritorial reach of California state law,
2 which California state has no interest in this
3 case but for an individual, in this case a U.S.
4 citizen, but in another case, it could be a
5 non-U.S. citizen who chooses to move to Alabama
6 or Florida or anywhere else for that matter.
7 JUSTICE SOTOMAYOR: And what would
8 preclude you from raising that argument?
9 MR. STAUBER: We don't think anything
10 would preclude us, Your Honor.
11 JUSTICE SOTOMAYOR: All right. Thank
12 you, counsel.
13 JUSTICE THOMAS: Nothing, Chief.
14 CHIEF JUSTICE ROBERTS: Justice
15 Thomas?
16 Justice Breyer?
17 JUSTICE BREYER: Can everyone agree
18 that this is a beautiful painting?
19 MR. STAUBER: Yes, it is, Your Honor.
20 It's a very, very beautiful painting. And we
21 take, with all due grace and respect, this
22 Court's attention to this particular case. And
23 that is why we are not advocating necessarily
24 for one outcome or the other. We are
25 advocating for a fair and balanced treatment of

1 the foreign state in this particular
2 circumstance and when it comes to the
3 application of a choice-of-law test under the
4 Foreign Sovereign Immunity Act.
5 CHIEF JUSTICE ROBERTS: Justice Alito?
6 Anything further, Justice Sotomayor?
7 JUSTICE SOTOMAYOR: No. Thank you.
8 CHIEF JUSTICE ROBERTS: Justice Kagan?
9 Justice Gorsuch?
10 Justice Barrett?
11 Thank you, counsel.
12 MR. STAUBER: Thank you.
13 CHIEF JUSTICE ROBERTS: Mr. Boies, do
14 you have rebuttal?
15 REBUTTAL ARGUMENT OF DAVID BOIES
16 ON BEHALF OF THE PETITIONERS
17 MR. BOIES: Yes. Thank you, Mr. Chief
18 Justice.
19 First, let me just clarify, we
20 disagree that the Rules of Decision Act only
21 applies to diversity cases. On page 13 of our
22 reply brief, we indicate some authority to the
23 contrary.
24 The basic point I want to make is that
25 the Respondent cites no case and we are aware

1 of none where this Court has separated state
2 choice of law from state rule of decision.
3 Whether it is viewed under the Rule of Decision
4 Act, whether it's ruled under the Klaxon
5 decision, this Court has repeatedly declined to
6 separate state choice of law from state rule of
7 decision where state causes of action were
8 involved.
9 In this particular case, Congress has
10 been clear in Section -- Section 1606 that the
11 state actors should be liable in the same
12 manner to the same extent as the private party
13 under like circumstances.
14 There's no way, I respectfully
15 suggest, that you can read that language and
16 say that you can have different choice-of-law
17 rules apply when a state actor is involved than
18 when a private museum's involved. A private
19 museum could face exactly the same lawsuit as
20 this public museum could face based on exactly
21 the same painting and exactly the same
22 circumstances.
23 And the command of 1606 is that that
24 ought to be -- the same rule ought to be
25 applied. Whether it is a good rule or a bad

1 rule is -- is for Congress to decide. The
2 arguments Respondent make -- and there's
3 fundamentally arguments that 1606 should've
4 been drafted differently. We think it was
5 drafted the right way, but whether it's right
6 or wrong, that is the way Congress adopted it.
7 We've also -- and I said this at the
8 beginning. We've had 20 years of experience,
9 including in the Sixth Circuit, which is the
10 circuit with Michigan and Kentucky that
11 Respondent's counsel mentions, where the court
12 has interpreted 1606 consistent with its
13 language and applied state choice-of-law rules.
14 We haven't had any problems in those states --
15 those situations.
16 So the issues we think from a policy
17 standpoint are -- are just speculation that are
18 not consistent with what the historical
19 experience has been.
20 But whether or not it is a good idea
21 or a bad idea, we think 1606 is -- is -- is
22 clear on its face.
23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.
25

1 (Whereupon, at 12:29 p.m., the case
2 was submitted.)
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