

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 REPUBLIC OF HUNGARY, ET AL.,)
4 Petitioners,)
5 v.) No. 18-1447
6 ROSALIE SIMON, ET AL.,)
7 Respondents.)
8 - - - - -

9
10 Washington, D.C.
11 Monday, December 7, 2020

12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16
17 APPEARANCES:

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 18-1447,
5 Republic of Hungary versus Simon.

6 Mr. Silbert.

7 ORAL ARGUMENT OF GREGORY SILBERT

8 ON BEHALF OF THE PETITIONERS

9 MR. SILBERT: Mr. Chief Justice, and
10 may it please the Court:

11 Comity-based abstention proceeds from
12 a simple premise that this Court has recognized
13 since 1885. When a complaint alleges that
14 foreign parties harmed other foreign parties in
15 a foreign country, a federal court can decline
16 jurisdiction in favor of a foreign tribunal.

17 In this case, plaintiffs allege that
18 Hungary took property from Hungarians in Hungary
19 during World War II. The United States long ago
20 settled its claims against Hungary for wartime
21 property confiscations, yet plaintiffs ask an
22 American court to apply American law and impose
23 economy-crushing liability on another sovereign
24 nation for conduct in the sovereign's own
25 territory that harmed its own nationals more

1 than 75 years ago.

2 If the shoe were on the other foot and
3 the United States faced analogous claims in a
4 foreign nation's court, the comity grounds for
5 dismissal would be clear and undeniable. Those
6 grounds are every bit as strong when the United
7 States orders Hungary to submit to the
8 jurisdiction of an American court.

9 If these same plaintiffs had sued
10 private defendants for aiding and abetting the
11 same property confiscations, their claims could
12 be dismissed because of the risk of
13 international friction. Plaintiffs say this
14 case can't be dismissed only because they sued
15 sovereign defendants under the Foreign Sovereign
16 Immunities Act.

17 But for three reasons that can't be
18 right. First, the FSIA's plain text tells us
19 that it concerns only sovereign immunity from
20 jurisdiction. It has no effect on
21 non-jurisdictional prudential doctrines like
22 comity-based abstention.

23 Second, the FSIA says that when
24 sovereign defendants lack sovereign immunity,
25 they should be treated the same as private

1 defendants, not worse than private defendants.

2 And, finally, the FSIA undisputedly
3 leaves in place other prudential grounds for
4 declining jurisdiction, like forum non
5 conveniens, and there is no textual or other
6 basis to treat comity any differently.

7 CHIEF JUSTICE ROBERTS: Mr. Silbert, I
8 want to pick up on that very last thing you said
9 but look at it from a different perspective.

10 What independent role do you think
11 international comity plays, given the fact that
12 you already have whether unchallenged forum non
13 convenience grounds and act of state grounds,
14 what is the independent significance of
15 international comity?

16 MR. SILBERT: The -- the international
17 comity doctrine applies in different
18 circumstances than FNC and act of state, and it
19 -- it serves different interests.

20 The -- the forum non doctrine, in
21 particular, ultimately serves objectives of
22 convenience and the practicalities of
23 litigation. The -- the interests served by the
24 international comity doctrine are -- are quite
25 different. They go to the --

1 CHIEF JUSTICE ROBERTS: Well, you
2 talked about, you know, this case involves
3 Hungarian citizens suing Hungary for events in
4 Hungary. Those sound like considerations a
5 court would take into account under forum non
6 conveniens.

7 MR. SILBERT: They -- they might be,
8 Your Honor, but the -- the D.C. Circuit held in
9 this case that the FNC doctrine does not apply.
10 We think the international comity doctrine
11 clearly does apply.

12 And even if they did happen to apply
13 in the same cases, they do serve different
14 objectives because the comity doctrine is not
15 ultimately about questions of convenience or
16 practicality. It's about the -- the dignitary
17 interests that each sovereign has when it has a
18 competing claim to jurisdiction.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Yes, thank you, Mr.
23 Chief Justice.

24 Counsel, I had just perhaps a somewhat
25 preliminary question and a bit different from

1 the Chief. If we come out -- if we reverse in
2 the following case, in Germany's,
3 hypothetically, what should we do with your
4 case?

5 MR. SILBERT: Well, Your Honor, you --
6 you could then hold that there is no
7 jurisdiction in this case and vacate the -- the
8 D.C. Circuit's decision. You also could go on
9 to decide the comity question, as this Court's
10 decision in Sinochem and in Levin against
11 Commerce Energy made clear.

12 And under the circumstances, I think
13 it would be useful if this Court did go forward
14 and -- and reach the comity issue because that
15 is a question that has divided the lower courts,
16 and there is substantial confusion about when
17 comity applies and how it applies. And I think
18 the lower courts would benefit from guidance
19 from this Court.

20 JUSTICE THOMAS: So, if we do not
21 think -- for example, if I don't think that
22 comity existed pre-1976, do you think we have
23 the authority to just create comit -- a doctrine
24 such as that?

25 MR. SILBERT: I think you -- you have

1 the authority to do it, Your Honor. I -- I
2 understand that this -- this Court has not
3 created common law doctrines like that very much
4 recently.

5 I do think it's clear that the comity
6 defense that we're asserting did exist prior to
7 the enactment of the FSIA. It's -- it's
8 discussed explicitly in *The Belgenland*. It's
9 discussed in *Canada Malting*. Justice -- Justice
10 Scalia's dissenting opinion in *Hartford Fire*
11 discusses the doctrine at length. Justice
12 Breyer's concurring opinion in *Kiobel* and
13 Justice Sotomayor's dissenting opinion in *Jesner*
14 all talk about the --

15 JUSTICE THOMAS: But wouldn't that
16 take us just -- excuse me, I'm sorry, timing, I
17 just want to get this in -- wouldn't that get us
18 back to where we were pre-FSIA and on -- having
19 these decided on a case-by-case basis?

20 MR. SILBERT: It -- it wouldn't, Your
21 Honor. The -- the problem with the -- the
22 pre-FSIA regime was that sovereign immunity
23 determinations were left to the executive, and
24 the executive was subjected to political or
25 diplomatic pressure in individual cases.

1 The comity doctrine that we're
2 asserting is easy for courts to apply, and it
3 demands nothing from the executive. The courts
4 start by asking a simple question: Does this
5 complaint allege that foreign parties harmed
6 other foreign parties?

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 MR. SILBERT: And --

10 JUSTICE THOMAS: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Breyer.

13 JUSTICE BREYER: I'd like to -- to
14 pick up on that last question. One, as the
15 Chief, I think, brought up, how do we know that
16 comity is a separate doctrine rather than, say,
17 a -- a motivating principle underlying a bunch
18 of other doctrines, like foreign non conveniens
19 and -- and exhaustion and sovereign immunity and
20 abstention?

21 And if we -- if it is a separate
22 doctrine, what exactly does it consist of? Do
23 you prefer the Ninth Circuit, which has five
24 factors? I -- Estreicher and Lee are good
25 international law professors, suggest four

1 factors. And maybe you have some other factors.

2 MR. SILBERT: Well, I -- I think, Your
3 -- Your Honor, first is -- is correct that
4 principles of comity find expression in a number
5 of different doctrines of U.S. law, including
6 sovereign immunity and act of state.

7 There is a separate and distinct
8 comity-based abstention doctrine that this Court
9 recognized as far back as *The Belgenland*, and
10 it's clear that the application of that doctrine
11 did not depend on factors of convenience or --
12 or practicality because the -- this Court in
13 1885 said that courts look to motives of
14 international comity. And -- and it's -- and --
15 and those principles are simply different than
16 the ones -- the interests that FNC serves.

17 As to how to apply the doctrine,
18 again, I -- I think, first, the Court should ask
19 is this a case alleging that a foreign party
20 harmed another foreign party? And if it is,
21 then I think a comity-based abstention may be
22 available. And I think the Court should then
23 ask the question that you asked, Justice Breyer,
24 in -- in your concurring opinion in *Kiobel*, and,
25 that is, is there nonetheless a distinct

1 American interest in the controversy that would
2 justify the assertion of jurisdiction?

3 And if there is -- I'm sorry, Justice
4 Breyer, were you asking a question?

5 JUSTICE BREYER: No, no, no.

6 MR. SILBERT: Okay. So if -- I think,
7 again, in a -- in a case where a foreigner harms
8 another foreigner, there -- there is a comity
9 interest that may warrant abstention, and the
10 Court then asks: Is there a distinct American
11 interest that would justify asserting
12 jurisdiction here?

13 If there is, then a court may exercise
14 jurisdiction. But, in this case, where there
15 isn't, a court should decline jurisdiction and
16 abstain so that the sovereign that has the
17 paramount interest in the controversy can
18 address it under the framework of its own legal
19 system.

20 CHIEF JUSTICE ROBERTS: Justice Alito.

21 JUSTICE ALITO: Section 1606 on which
22 you rely makes a foreign state "liable in the
23 same manner and to the same extent as a private
24 individual under like circumstances."

25 The -- your friend on the other side

1 says this concerns substantive liability rather
2 than threshold federal common law defenses.

3 Why isn't that a -- a reading that's
4 more faithful to the statutory text?

5 MR. SILBERT: So two answers, Justice
6 Alito. First, we -- we think we would win on
7 the statutory text even if Section 1606 were not
8 in the statute, just based on the language of
9 1605, but I do think that Section 1606 helps us.

10 And it helps us because it refers not
11 only to the extent of liability but also the
12 manner of liability. And so, for example, if a
13 private defendant would not be subjected to
14 class action liability in a U.S. court, then a
15 sovereign defendant should not be subjected to
16 class action liability in a U.S. court because
17 that is a -- the same manner of liability.

18 And I would also note that my friend
19 has no textual explanation for why the forum non
20 conveniens doctrine survived the enactment of
21 the FSIA because, like comity-based abstention,
22 FNC is another common law doctrine that permits
23 a court to decline jurisdiction.

24 And so, if -- if that doctrine
25 survives, then I think -- I think comity-based

1 abstention also must survive.

2 JUSTICE ALITO: One other question.
3 If we were to rule, hypothetically, and this is
4 just hypothetical, that -- in favor of Germany
5 on the jurisdictional issue, wouldn't the
6 plaintiffs in this case still have an argument
7 based on their claim of denaturalization?

8 MR. SILBERT: I -- I don't think so,
9 Your Honor. I think, if that argument had
10 merit, then it would apply in -- in every case
11 where the -- the plaintiffs in the next case
12 would assert that there is jurisdiction.

13 In other words, if -- if the -- if the
14 domestic takings rule does not apply in
15 instances of genocide, then I believe the -- the
16 argument that my friend makes that the
17 plaintiffs here were stateless persons would
18 apply in every such case, so --

19 JUSTICE ALITO: All right. Thank you.

20 CHIEF JUSTICE ROBERTS: Justice --

21 JUSTICE ALITO: Thank you, counsel.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor.

24 JUSTICE SOTOMAYOR: Counsel --
25 counsel, I -- I don't understand how if in the

1 following case hypothetically we were to decide
2 there's no jurisdiction, what power would we
3 have, essentially, to give an advisory opinion
4 on this international comity doctrine? I
5 thought no jurisdiction meant just that, that we
6 don't have the power to decide anything?

7 MR. SILBERT: Well, Justice Sotomayor,
8 this Court held in -- in Sinochem and -- and
9 again in -- in Levin that a court can dismiss on
10 threshold comity grounds without first
11 determining that it has subject matter
12 jurisdiction. That was the --

13 JUSTICE SOTOMAYOR: I thought that --
14 counsel, I understand that principle, but this
15 is something different. We have already decided
16 we have no -- we would have already decided we
17 have no jurisdiction, so having made that
18 decision, how would this become nothing more
19 than an advisory opinion?

20 MR. SILBERT: I -- I think, Justice
21 Sotomayor, you certainly could then hold that
22 you have no jurisdiction in this case and vacate
23 the court of appeals' decision.

24 JUSTICE SOTOMAYOR: One final --

25 MR. SILBERT: I --

1 JUSTICE SOTOMAYOR: -- one final
2 point. As I read the record below, it appeared
3 that this prudential international comity
4 doctrine was not really the focus of your
5 argument in briefing.

6 It seemed to me that the focus was on
7 the -- that Respondents have to exhaust their
8 remedy. This -- what you've raised before us
9 seems like a very different tact.

10 MR. SILBERT: Well, I think, in the
11 circumstances of -- of this case, Justice
12 Sotomayor, they -- they amount to the same
13 thing. Our point is that because of principles
14 of comity, these plaintiffs should first assert
15 their claims in a Hungarian court and have --
16 because they first asserted them in an American
17 court, the American court should decline
18 jurisdiction and the case should proceed
19 originally in Hungary.

20 I think whether you call that an
21 abstention principle or an -- an exhaustion
22 principle, the point is that Hungary should have
23 the first opportunity to address these claims.

24 JUSTICE SOTOMAYOR: But you did use
25 the word "exhaustion." Thank you, counsel.

1 CHIEF JUSTICE ROBERTS: Justice Kagan.

2 JUSTICE KAGAN: Mr. Silbert, you've
3 referred a couple of times now to the historical
4 basis of the comity doctrine. There's an amicus
5 brief by Professors Dodge and Gardner that takes
6 you on on that and that says that all the
7 various cases that you've cited fall into one of
8 two categories: some are immunity cases and
9 some are forum non conveniens cases, and that
10 there's really no historical basis for this
11 separate international comity.

12 So I think I'd like you to respond to
13 -- to that brief.

14 MR. SILBERT: Well, if you -- if you
15 look at The Belgenland, Justice Kagan, which was
16 this Court's decision in -- in 1885, it says two
17 things that directly refute that position by
18 Professor Dodge and Professor Gardner.

19 First, it says expressly that courts
20 decline jurisdiction in cases between foreigners
21 out of motives of both convenience and
22 international comity. So those are -- those are
23 two separate doctrines.

24 But even more to the point, it says
25 that in some cases, before exercising

1 jurisdiction in cases involving foreign
2 interests, federal courts would seek the consent
3 of the consul of the foreign nation with a
4 competing claim to jurisdiction.

5 And, clearly, that foreign consul was
6 not providing an opinion about matters relating
7 to the convenience of the parties. What the
8 foreign consul was -- was telling the -- the
9 courts was whether exercising jurisdiction in a
10 U.S. court would be an affront to the dignity of
11 the other nation with a competing claim to
12 jurisdiction. That is a comity interest, not a
13 forum non conveniens interest.

14 JUSTICE KAGAN: You're pointing me to
15 Belgenland as your best case? That's the one I
16 should read?

17 MR. SILBERT: I -- I think The
18 Belgenland is clear on that subject. We've also
19 cited two district court cases.

20 JUSTICE KAGAN: Okay. If I could just
21 go on.

22 MR. SILBERT: Please, Justice.

23 JUSTICE KAGAN: You said you're not --
24 we're not going back to the old immunity
25 doctrine, the one that was supposed to have been

1 displaced by the FSIA, because that was
2 executive-driven. But I would think the fact
3 that it was executive-driven would cut the other
4 way. At least the executives knew something
5 about foreign affairs and were politically
6 accountable.

7 And -- and it seems like much of the
8 unhappiness about that doctrine had to do with
9 the fact that it was a kind of kitchen sink
10 approach and nobody could predict it. And isn't
11 that what you're asking us to replicate?

12 MR. SILBERT: We're not, Justice
13 Kagan. We're -- we're not asking federal courts
14 to make any kind of foreign policy judgment.
15 What -- what we're asking the courts to do is to
16 do what this Court did in *Sosa*, in *Kiobel*, in
17 *Jesner*, in *RJR Nabisco*, in *Empagran*, and a
18 number of other cases, and that's simply
19 recognize that when a lawsuit asserts claims by
20 a foreigner against another foreigner,
21 especially for conduct in a foreign country,
22 there is a risk of international friction, and
23 --

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 JUSTICE KAGAN: Thank you,
2 Mr. Silbert.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch.

5 JUSTICE GORSUCH: Counsel, that's
6 exactly where I wanted to -- to go, which is,
7 you know, prior to the FSIA, we -- we did have
8 what this Court has described as bedlam in a
9 multifactor balancing test on the convenience of
10 the parties as one thing but also international
11 friction and -- and a sense about foreign --
12 foreign dignity and all that, which, as Justice
13 Kagan pointed out, was channeled through the
14 State Department.

15 And, here, you're asking us to do it
16 directly. And I -- I -- I guess I'm still
17 struggling with what's the difference between
18 the regime you'd have us create and the regime
19 that Congress clearly wished to displace because
20 it was producing "bedlam"?

21 MR. SILBERT: Well, in the -- in the
22 regime that Congress displaced, the executive
23 was forced to make foreign policy judgments.

24 In -- in the regime that we are
25 proposing, the courts would avoid making foreign

1 policy judgments by recognizing --

2 JUSTICE GORSUCH: Counsel, I thought
3 you said we should be concerned about friction,
4 for example.

5 MR. SILBERT: Well -- well, I think
6 you -- I think the courts can recognize the
7 kinds of cases that would cause international
8 friction --

9 JUSTICE GORSUCH: Isn't that a foreign
10 policy judgment?

11 MR. SILBERT: It -- it's not, Justice
12 Gorsuch. I think my friend is asking you to
13 make --

14 JUSTICE GORSUCH: All right. Let --
15 let's say -- let's say I disagree with you, that
16 sounds to me like a foreign policy judgment.
17 Then what?

18 MR. SILBERT: Well, if -- if a court
19 accepted jurisdiction in this case and extended
20 U.S. or D.C. common law to apply in an
21 international context to regulate the conduct of
22 foreigners or foreign sovereigns harming other
23 foreigners in a foreign country, that is a
24 foreign policy judgment. So --

25 JUSTICE GORSUCH: Okay.

1 MR. SILBERT: -- if -- if you think my
2 rule is a foreign --

3 JUSTICE GORSUCH: I agree with that.
4 So -- so let me -- what do we do on a separate
5 but related matter, which is normally we assume
6 that when -- when -- when Congress dictates that
7 we shall hear certain classes of cases, that we
8 have a duty to hear those certain classes of
9 cases, and we can't decide not to do it just
10 because it would be inconvenient to us.

11 MR. SILBERT: Well, that -- that is
12 the general rule, Justice Gorsuch, and this --
13 this Court has recognized discrete exceptions,
14 and one of the exceptions, as -- as set out in
15 Canada Malting and in The Belgenland, is that
16 courts have discretion to decline to hear
17 controversies between foreigners.

18 JUSTICE GORSUCH: Thank you.

19 MR. SILBERT: And then we -- yes.

20 CHIEF JUSTICE ROBERTS: Justice
21 Kavanaugh.

22 JUSTICE KAVANAUGH: Thank you, Chief
23 Justice.

24 And good morning, Mr. Silbert. On
25 your point that it's easy for courts to apply

1 this, I hear you giving us something of a bright
2 line, that if it's foreign defendants who
3 injured foreign plaintiffs in a foreign country,
4 then abstain. Is that accurate?

5 MR. SILBERT: I think, if there are no
6 other relevant facts and circumstances, then
7 yes, Justice Kavanaugh.

8 JUSTICE KAVANAUGH: Okay. Well, what
9 could be other relevant facts and circumstances?

10 MR. SILBERT: Well, let's say, for
11 example, the controversy concerns a discrete
12 piece of artwork and that piece of artwork is
13 hanging in a gallery in Washington, D.C., and
14 let's say if the -- if the possessor of that
15 piece of artwork gives it back to the wrong
16 party, that U.S. party could become liable.
17 Then a -- and then there would be an interest in
18 -- in a U.S. court hearing the dispute, and
19 maybe that interest is -- is sufficient to
20 override the foreign interest.

21 JUSTICE KAVANAUGH: How do you see
22 this playing out in the Hungary courts?

23 MR. SILBERT: Well, the -- the
24 plaintiffs would file a civil action, as they
25 would in any normal case. Hungary has waived by

1 constitutional amendment any statute of
2 limitations to these claims. They would file
3 claims under, we believe, the Hungarian Code of
4 1959, which was the first codified law in
5 Hungary and which applies to causes of action
6 that accrued before its enactment.

7 The claims would be Hungarian versions
8 that are similar to the claims they've asserted
9 here, like for property loss or unjust
10 enrichment. And -- and they would go forward
11 and -- and litigate their claims like any
12 Hungarian plaintiff.

13 JUSTICE KAVANAUGH: And you say in
14 your reply brief, if they think they were
15 treated unfairly in the Hungarian courts, they
16 could go to the European Court of Human Rights.
17 Is that accurate?

18 MR. SILBERT: That is accurate,
19 Justice Kavanaugh. If there was a violation of
20 the -- the rules set out in the European
21 Convention of Human Rights, like the rule under
22 Article 6 to a fair trial by an -- an impartial
23 tribunal, then the plaintiffs, after exhausting
24 Hungarian remedies, could apply for relief to
25 the European Court of Human Rights.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett.

4 JUSTICE BARRETT: Good morning,
5 Mr. Silbert. So you told Justice Sotomayor,
6 when she asked you about the distinction between
7 exhaustion and the comity doctrine that we're
8 talking about this morning, that whether you
9 call it abstention or exhaustion, it means you
10 go to Hungary first, that they're functionally
11 the same thing here or they're very closely
12 related.

13 But, if these plaintiffs had exhausted
14 in Hungary first, I gather from your answer to
15 Justice Kavanaugh that they still could not come
16 here, that the doctrine of international comity
17 that you propose would still be a bar, is that
18 correct?

19 MR. SILBERT: Well, I -- I think they
20 -- they could come here and -- and seek relief
21 like any plaintiff who had litigated in a
22 foreign court could. And whether the U.S.
23 courts would -- would recognize the foreign
24 judgment would be controlled by the principles
25 set out in the Restatement for -- of Foreign

1 Relations Law at Sections 483 to 484; in other
2 words, the same principles would apply in this
3 case as would apply in -- in any case where a --
4 a foreign court had rendered a judgment.

5 JUSTICE BARRETT: But that's a little
6 bit of a different question, right? That's the
7 question about the preclusive effect and whether
8 any preclusive doctrines would themselves bar
9 the plaintiffs from seeking relief here?

10 MR. SILBERT: Well, I -- I -- I -- I
11 think that, yes, it -- it ultimately comes down
12 to a question of preclusion, but if the -- we
13 believe the plaintiffs should first bring these
14 claims in Hungary. If they did, and if they
15 exhausted all available Hungarian remedies and
16 they came back here and it turned out that they
17 were denied relief on grounds that were somehow
18 illegitimate for reasons of -- if the Hungarian
19 remedies turned out to be a sham or a fraud,
20 then I think they could try to reopen these
21 claims in the United States courts.

22 JUSTICE BARRETT: But why would that
23 be? Because it seems that all of the concerns
24 you're identifying, like the foreign-cubed
25 nature of this suit, would still apply even if

1 they had exhausted their claims in Hungary
2 first?

3 MR. SILBERT: Well, I think it's
4 appropriate for a U.S. court to ask in this
5 context, as it does in other abstention
6 contexts, whether there are available remedies
7 in the alternative forum.

8 And I -- I think that plaintiffs
9 should first seek relief from Hungarian courts,
10 so you could call that an exhaustion principle,
11 but once they do, if it turns out that Hungarian
12 courts were not actually available, they -- they
13 could then press their claims in the United
14 States. I think that should be a high bar, and
15 it is a high bar under the Restatement, but I
16 don't -- I don't think it's impossible in this
17 case any more than any case involving a foreign
18 judgment.

19 JUSTICE BARRETT: Thank you, Mr.
20 Silbert.

21 CHIEF JUSTICE ROBERTS: A minute to
22 wrap up, Mr. Silbert.

23 MR. SILBERT: Thank you, Mr. Chief
24 Justice.

25 I -- I'd like to emphasize two reasons

1 why I think you should be skeptical of the
2 arguments made by my friend on the other side.

3 First, my friend's position creates
4 the anomalous result that it's easier to sue
5 foreign sovereigns for conduct in their own
6 territory than it is to sue private defendants
7 for foreign conduct. And that should be a big
8 red flag. If a -- if a case against private
9 defendants causes too much international
10 friction, that problem only gets worse when
11 foreign sovereigns are named as defendants.

12 Second, my friend never owns up to the
13 reciprocity implications of her position. The
14 treatment of foreign sovereigns by U.S. courts
15 suggests that the United States can be treated
16 the same way by foreign courts.

17 So, if my friend is right that this
18 case must proceed against Hungary, then
19 analogous suits against the United States must
20 also proceed in foreign nations' courts. That
21 is not what Congress intended.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Snyder.

25

1 ORAL ARGUMENT OF BENJAMIN W. SNYDER
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONERS

4 MR. SNYDER: Mr. Chief Justice, and
5 may it please the Court:

6 For well over a century, this Court
7 has recognized that when an American court
8 encounters a case that raises serious foreign
9 relations concerns, the Court may abstain from
10 the exercise of jurisdiction as a matter of
11 international comity if it determines that the
12 case would be better heard in a foreign forum.

13 Nothing in the Foreign Sovereign
14 Immunities Act forecloses courts from applying
15 that case-by-case abstention any more than it
16 forecloses courts from applying the similar
17 case-by-case analysis called for by the forum
18 non conveniens doctrine.

19 On the contrary, as Judge Katsas
20 correctly explained below, Section 1606 of the
21 FSIA requires that when foreign sovereigns can
22 be sued in American courts at all, they must be
23 treated no worse than private foreign defendants
24 facing equivalent claims.

25 Because private foreign defendants are

1 free to seek comity-based abstention,
2 Section 1606, therefore, requires that foreign
3 sovereign defendants must be free to do so as
4 well.

5 CHIEF JUSTICE ROBERTS: Mr. Snyder,
6 this question will not surprise you. You -- you
7 emphasize the significance of the international
8 relations context as a reason for international
9 comity, but your client, the United States, has
10 scrupulously avoided taking a position on what
11 the courts should do given the international
12 relations context.

13 This is the perfect time for you to
14 fill that void. Why -- why hasn't the
15 government told the courts what the foreign
16 relations impact on the United States is?

17 MR. SNYDER: Well, Your Honor, the
18 United States doesn't feel that it has
19 sufficient information about how the proceedings
20 would unfold in Hungary to take --

21 CHIEF JUSTICE ROBERTS: How -- how
22 long has the case been going on that you haven't
23 gotten that information yet?

24 MR. SNYDER: Your Honor, the case has
25 been going on for quite some time. I forget

1 when exactly the complaint was filed in the
2 case. We have the same information that the
3 Court has in terms of the party presentation and
4 the expert declarations submitted in the case.

5 CHIEF JUSTICE ROBERTS: Well, I'm sure
6 that's true, but you also have other resources,
7 like our embassies, other communications between
8 the two countries at the executive level.

9 MR. SNYDER: That's true, Your Honor.
10 The State Department simply doesn't feel that it
11 has sufficient information to provide the Court
12 with a recommendation.

13 CHIEF JUSTICE ROBERTS: Mr. Snyder,
14 surely they have as much information as they --
15 they need to make a decision. They just don't
16 want to make a decision.

17 MR. SNYDER: Your Honor, they -- they
18 have informed us that they don't have sufficient
19 information to -- to make a decision about that.

20 Our interest in this case, though, is
21 that, more broadly, we think that the
22 implications of the court of appeals' decision
23 would be detrimental to U.S. policy inasmuch as
24 the court of appeals said that courts may never
25 defer -- may never abstain on international

1 comity grounds, and the --

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Thomas.

5 JUSTICE THOMAS: Thank you, Mr. Chief
6 Justice.

7 Mr. Snyder, doesn't it seem that your
8 suggestion and Petitioners' suggestion takes us
9 right back to the case-by-case approach that
10 FSIA was supposed to remedy?

11 MR. SNYDER: Well, no, Your Honor.
12 Let me give that -- let me answer that in a
13 couple of ways.

14 The first is that if you look to the
15 text of the FSIA, I think it's very clear from
16 the text that what the FSIA was directed to
17 address was sovereign immunity specifically.

18 And the doctrine that we're talking
19 about here is neither an immunity nor is it only
20 for sovereigns. And this Court has repeatedly
21 recognized that in adopting the FSIA, Congress
22 was not intending to displace every other
23 doctrine.

24 So most closely analogous here, the
25 Court in *Samantar* recognized that the FSIA

1 doesn't displace the very similar doctrine of
2 official immunity. That remains subject to the
3 common law rules.

4 And we think the same thing is true
5 here. Congress did not in the text of the FSIA
6 seek to displace the international comity-based
7 abstention, and so that doctrine remains
8 available.

9 JUSTICE THOMAS: Does that abstention
10 predate FSIA?

11 MR. SNYDER: Yes, it does, Your Honor.
12 If you look back at *The Belgenland*, as my friend
13 said, the Court in *The Belgenland* specifically
14 noted that American courts have looked to the
15 views of foreign consuls in deciding whether to
16 -- to extend jurisdiction or to exercise
17 jurisdiction over cases between foreign parties
18 and that in doing so, it took account both of
19 questions of convenience and also questions of
20 international comity. So we think that those
21 are distinct strands.

22 JUSTICE THOMAS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer.

25 JUSTICE BREYER: Well, it's the same

1 question. One of the things Congress seemed to
2 be upset about and wanted to pass the FSIA was
3 contradictory information from State.

4 The American strawberry industry wants
5 to sue the country of Xanadu, run by a terrible
6 dictator, but, in Xanadu, our strawberry
7 industry is being sued by some Xanadu nationals,
8 and State wants to help our industry.

9 Now all I have to do is reverse the
10 situation and they'll want to help them in
11 opposite ways. So depending on who is being
12 sued where, you get a different result when you
13 ask State, is it immediately in our interest or
14 not and how is American industry being hurt or
15 helped? Is that something we should take into
16 account in comity?

17 MR. SNYDER: Your Honor, I think,
18 certainly, courts can take account of American
19 and foreign interests in come -- in -- in
20 applying the comity-based abstention doctrine.

21 I think one important difference
22 between comity-based abstention and sovereign
23 immunity that -- that helps to address some of
24 the concerns is, in our view, comity-based
25 abstention looks in particular to whether there

1 is an adequate forum in the other country.

2 And that's not something that
3 sovereign immunity would look to. So, to the
4 extent that Congress was concerned with ensuring
5 that plaintiffs, especially American plaintiffs,
6 would have a forum in which they could seek
7 redress and that they would not be denied that
8 forum based on political considerations, comity
9 accounts for that in a way that sovereign
10 immunity did not.

11 CHIEF JUSTICE ROBERTS: Justice --
12 Justice Alito.

13 JUSTICE ALITO: If this doctrine is
14 all about the effect on foreign relations, if I
15 were a district judge and I received a motion
16 asking me to abstain on comity grounds, my first
17 question would be, what does the government of
18 the United States think about the foreign
19 relations impact of this -- of this lawsuit?

20 So won't you be in the position of
21 having to answer that question every time this
22 doctrine is asserted?

23 MR. SNYDER: We don't think so, Your
24 Honor. We think that there are certainly
25 circumstances in which courts can make decisions

1 about whether to abstain without needing
2 participation from the United States Government.

3 There are certain considerations that
4 are cross-cutting that -- and that will always
5 apply. So, for example, the United States
6 certainly has more of an interest in
7 adjudicating claims brought by United States
8 citizens. The United States has more of an
9 interest in adjudicating claims that concern
10 conduct that occurred here in the United States.

11 JUSTICE ALITO: I mean, what if you --
12 what if the judge asked -- what if the -- the
13 State Department says, we don't think that this
14 raises foreign affairs concerns. Would that be
15 dispositive?

16 MR. SNYDER: I -- I think that that
17 should get substantial deference and might well
18 be dispositive, Your Honor, yes.

19 JUSTICE ALITO: I mean, there are
20 almost 700 district judges. You want every one
21 of them to assess whether a particular lawsuit
22 raises foreign relations concerns?

23 MR. SNYDER: Your Honor, we think that
24 it makes sense for the courts to be able to do
25 that. When this Court has expressed concern

1 about the capabilities of federal courts in
2 addressing foreign relations issues, the concern
3 has been primarily about courts creating tension
4 unintentionally.

5 This is a very different context. The
6 question here is whether courts may abstain from
7 the exercise of jurisdiction, and they will
8 rarely create unintentional international
9 friction by doing that.

10 So the question is just whether you
11 should completely foreclose them from doing so.
12 And we don't think that you should.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, I
17 understood that the FSIA was passed to remove
18 the pressure on the Department of State to
19 decide whether or not it would grant -- immunity
20 should be granted or not.

21 I, like my -- my predecessor
22 colleagues' questions indicate, don't know how
23 that pressure would stop in this situation, but
24 I also don't know why that judgment has all --
25 not already been made by Congress, meaning if we

1 accept the argument in Germany that
2 expropriation has to be -- as an international
3 norm, involve only expropriations of
4 non-nationals and not domestic people and we
5 dismiss that case, or if we rule the other way
6 and we say Congress intended for those suits to
7 be in the United States, that, yes, takings from
8 nationals could have a forum here, I'm not sure
9 how we can substitute -- the Court could
10 substitute its judgment for Congress.

11 MR. SNYDER: Well, Your Honor, we
12 don't think that the Court would be substituting
13 its judgment for Congress. Whenever the Court
14 applies an abstention doctrine, it is by -- it
15 is, by definition, determining that in a
16 circumstance where Congress in -- in the statute
17 allowed for jurisdiction, that the Court is --
18 is not going to exercise that jurisdiction.

19 So we don't think that -- that a court
20 should exercise jurisdiction -- or, excuse me,
21 abstain from jurisdiction under the
22 international comity doctrine on grounds that
23 would precisely replicate a judgment that
24 Congress has already made.

25 JUSTICE SOTOMAYOR: Why? So why

1 wouldn't the other doctrines that already exist,
2 like forum non conveniens, take care of
3 virtually any other consideration, would be --
4 be addressed?

5 Meaning the issue of foreign relations
6 tension is exactly what the FSIA was intended to
7 -- the judgment of Congress that in these
8 designated circumstances, those tensions should
9 not lead to immunity. But why should they lead
10 to abstention?

11 MR. SNYDER: Your Honor, I -- I think
12 the FSIA had a more specific purpose. And you
13 can see that from its text. It was about the
14 circumstances in which courts should apply
15 categorical immunity.

16 But the Court has recognized that that
17 didn't deal with every other comity-based
18 doctrine that preexisted the FSIA.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Kagan.

22 JUSTICE KAGAN: Mr. Snyder, you told
23 the Chief Justice that the State Department
24 didn't have enough information to make a
25 decision in this case. But, if the State

1 Department doesn't have that information, how
2 are courts to have it?

3 MR. SNYDER: Well, Your Honor, we
4 think that there is something of a difference
5 between the -- the scope of the decision that a
6 court makes and the scope of a -- of the
7 decision that the State Department makes.

8 When a court makes a decision about
9 whether to abstain in a particular case, the
10 court is -- is doing just that. It's making the
11 decision about that particular case based on the
12 evidence presented by the parties in that
13 particular case.

14 JUSTICE KAGAN: I mean, I would think
15 that it's -- that that's exactly what the State
16 Department would be doing here too. They'd be
17 looking at this particular case, the claims in
18 this case, the alternative forum that Hungary is
19 providing in this case, and they would make a
20 decision.

21 I mean, some might say that what's
22 going on here is that the State Department is
23 expecting the courts to do the difficult and
24 sensitive and some might say dirty work for you.

25 MR. SNYDER: I don't think that's

1 right, Your Honor. The -- the issue that the
2 State Department has in particularly indicated
3 that it doesn't feel it has enough information
4 to provide a recommendation on is how this case
5 would proceed in Hungary.

6 And that's a decision that courts
7 already make in the context of the forum non
8 conveniens doctrine. And -- and courts are well
9 suited to address the adequacy of an alternative
10 forum. We know that because, again, they --
11 they do that already in the forum non context.

12 JUSTICE KAGAN: Thanks. When I asked
13 Mr. Silbert about the historical basis of this
14 doctrine, he gave me the Belgenland case as his
15 principal case showing that this comity-based
16 doctrine that you're espousing, in fact, has
17 such a basis.

18 In your brief, you call Belgenland an
19 early example of forum non conveniens. So
20 what's your best case, best historical case for
21 this comity doctrine?

22 MR. SNYDER: Your Honor, I would say
23 the same thing, The Belgenland is the best case
24 on this. It is true that this Court has
25 described The Belgenland as a precursor of

1 modern forum non conveniens doctrine. But, if
2 you look at The Belgenland, it's describing a
3 whole swath of cases that involve different
4 considerations.

5 So relevant to modern forum non
6 conveniens doctrine, it talks about declining to
7 exercise jurisdiction on basis -- on the basis
8 of convenience, but it also says that courts do
9 so for international comity grounds. And --

10 JUSTICE KAGAN: Thank you, Mr. Snyder.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Mr. Snyder, I guess
14 I'm curious about this: Is -- is what you're
15 arguing for a broad-based comity abstention
16 doctrine or an exhaustion doctrine? In -- in
17 response to Justice Kagan, I believe you said
18 that the real confusion for the State Department
19 apparently lies in what remedies would be
20 available in Hungary.

21 That sounds like exhaustion. And
22 Mr. Silbert, in response to Justice Barrett,
23 indicated that after exhausting Hungarian
24 remedies, the plaintiffs would be free to come
25 to the United States subject only to preclusion

1 principles, which have nothing to do with
2 abstention and would apply in domestically
3 normal law.

4 So what -- what do you say to that?
5 Is -- is what you're arguing for really just an
6 exhaustion argument?

7 MR. SNYDER: No, we don't think it's
8 an exhaustion argument. I mean, we -- we think
9 there are similarities between the two, but, in
10 our view, it's appropriate for a court at the
11 front end to make a decision about whether it
12 would be appropriate to abstain based, in part,
13 on whether there is an adequate forum available
14 in the other context.

15 JUSTICE GORSUCH: Boy, that sure
16 sounds like exhaustion doctrine to me.

17 MR. SNYDER: Well, I --

18 JUSTICE GORSUCH: That's exactly what
19 courts do at the front end. They say, have you
20 exhausted your remedies elsewhere before we take
21 up your case? That is exhaustion.

22 MR. SNYDER: Your Honor, to be clear,
23 I'm not saying that the question is whether they
24 have already exhausted them. I'm saying that
25 the question is whether the remedies that would

1 be available elsewhere are adequate.

2 And so the --

3 JUSTICE GORSUCH: Yeah, that's -- we
4 do that all the time under the -- the -- the
5 rubric of exhaustion, counsel. Okay. Fine.

6 Let's say they have to exhaust. Why,
7 if -- if -- if Jewish victims of the Holocaust
8 were deemed non-citizens, stripped of their
9 citizenship at least in Germany, why should they
10 then have to go exhaust remedies elsewhere?

11 MR. SNYDER: Well, we haven't taken a
12 position on that, Your Honor, but let me point
13 -- point you to a case in which we have.
14 There's an amicus brief filed in this case by
15 SNCF, the French National Railroad, and that
16 amicus brief describes a case in the Seventh
17 Circuit in which the district court
18 appropriately dismissed claims that had been
19 brought against SN -- SNCF.

20 We think that was appropriate on
21 international comity grounds because the United
22 States has worked with France to establish an
23 administrative mechanism by which claimants who
24 lost property during World War II in France can
25 seek redress for those injuries and would --

1 JUSTICE GORSUCH: Thank you, counsel.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you, Chief
5 Justice.

6 Good morning, Mr. Snyder. Is it your
7 position that when a foreign defendant has
8 injured foreign parties in a foreign country
9 that abstention is necessarily appropriate?

10 MR. SNYDER: No, Your Honor. We have
11 not taken that bright-line approach.

12 JUSTICE KAVANAUGH: What else in that
13 circumstance should a court ask itself?

14 MR. SNYDER: Well, first, I'd say that
15 the court look in that circumstance to the
16 adequacy of the alternative forum.

17 JUSTICE KAVANAUGH: Okay. If the
18 alternative forum is adequate, anything else?

19 MR. SNYDER: I think, in that
20 circumstance, there would be a very strong case
21 for abstention.

22 JUSTICE KAVANAUGH: What could -- what
23 could defeat that?

24 MR. SNYDER: If the United States has
25 some strong interest in the subject matter --

1 JUSTICE KAVANAUGH: And how would a --
2 how would a district court determine that?

3 MR. SNYDER: So, for example, if the
4 property that were at issue were in the United
5 States, that might give the United States a
6 stronger interest. If there were some question
7 of the -- the ongoing negotiation of a treaty or
8 if there were some law that Congress had passed
9 expressing a particular interest in that subject
10 matter, that might well affect the decision.

11 JUSTICE KAVANAUGH: Is a district
12 court to do all that on its own or to seek the
13 guidance of the State Department in that
14 circumstance?

15 MR. SNYDER: Well, I think, Your
16 Honor, certainly, the Court should not foreclose
17 the possibility of the district court doing so
18 when the State Department provides input, but we
19 think that there may also be circumstances in
20 which a district court can do that without the
21 State Department's input.

22 There may be circumstances in which
23 there's a statute that expresses a particular
24 United States interest in the subject matter,
25 things along those lines, on which the district

1 court could base its decision.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett.

5 JUSTICE BARRETT: Counsel, the
6 doctrine that you're proposing of comity sounds
7 like a little bit of this and a little bit of
8 that. It -- it incorporates some concepts from
9 exhaustion and also sounds like forum non
10 conveniens. It also sounds like it incorporates
11 some of the same considerations of foreign
12 relations and friction with other countries that
13 are addressed by the Foreign Sovereign
14 Immunities Act itself.

15 So would it subsume the need for some
16 of these other doctrines? Like, what role would
17 forum non conveniens still play if we do adopt
18 the broader comity doctrine that you propose?

19 MR. SNYDER: So I wouldn't call it a
20 broader comity doctrine. I would say that it's
21 a distinct comity doctrine. Forum non
22 conveniens is focused specifically on the
23 litigants and -- and their convenience and the
24 convenience to witnesses, things along those
25 lines.

1 In an ordinary case, that makes sense,
2 but in a case that presents significant foreign
3 relations concerns, we don't think it makes
4 sense to give weight to the plaintiff's choice
5 of forum or the convenience of witnesses.
6 Instead, it makes sense to look to those --

7 JUSTICE BARRETT: But --

8 MR. SNYDER: -- the foreign nation's
9 --

10 JUSTICE BARRETT: -- can I interrupt
11 just for one moment? In this case, the foreign
12 country or one of its arms is one of the
13 litigants. So isn't it concerns -- aren't its
14 concerns taken into account in forum non
15 conveniens doctrine?

16 MR. SNYDER: No, Your Honor. The --
17 the considerations that forum non looks to are
18 -- are considerations of convenience. The --
19 the interest that international comity-based
20 abstention looks to is -- is more of the
21 sovereign dignitary interest in being able to
22 adjudicate claims that are -- are -- you know,
23 touch closely on that foreign sovereign's
24 territory or its acts in its own fora.

25 That's -- that's something that this

1 Court spoke to in the Pimentel case, for
2 example. We think those are just categorically
3 different.

4 JUSTICE BARRETT: Thank you, counsel.

5 CHIEF JUSTICE ROBERTS: A minute to
6 wrap up, Mr. Snyder.

7 MR. SNYDER: The policy of the United
8 States Government with respect to claims for
9 restitution or compensation by Holocaust
10 survivors and other victims of the Nazi era has
11 consistently been motivated by the twin
12 considerations of justice and urgency.

13 To that end, the United States has
14 advocated that concerned parties, foreign
15 governments, and non-governmental organizations
16 act to resolve matters of Holocaust-era
17 restitution and compensation justly through
18 dialogue, negotiation, and cooperation wherever
19 possible.

20 The potential availability of
21 comity-based abstention in United States courts
22 plays an important role in our diplomatic
23 efforts on that issue.

24 Accordingly, while the United States
25 takes no position on the appropriateness of

1 comity-based abstention in this particular case,
2 the Court should make clear that the FSIA does
3 not foreclose such abstention.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Ms. Harrington.

7 ORAL ARGUMENT OF SARAH E. HARRINGTON

8 ON BEHALF OF THE RESPONDENTS

9 MS. HARRINGTON: Thank you Mr. Chief
10 Justice, and may it please the Court:

11 I want to start by addressing the
12 United States' interest in having these types of
13 claims adjudicated in U.S. courts.

14 This country has a strong and
15 long-standing interest in directly helping
16 Holocaust victims seek justice. Today is Pearl
17 Harbor Day, and it marks 79 years exactly since
18 the U.S. was drawn into World War II.

19 The reason the atrocities at places
20 like Auschwitz were stopped and were exposed to
21 the world is due in large part to our soldiers
22 who sacrificed in the name of the United States.

23 This Court has held over and over that
24 our Constitution assigns responsibility for
25 foreign policy to the elected branches, not to

1 courts. And over the last 70 years, those
2 branches have repeatedly taken steps to make it
3 easier for plaintiffs to pursue Holocaust-era
4 claims like these in U.S. courts.

5 For example, more than two decades
6 before the FSIA was enacted, the executive
7 branch waived application of the act of state
8 doctrine in Holocaust-era expropriation cases,
9 explaining in the so-called Bernstein letter
10 that it sought to remove obstacles to courts'
11 jurisdiction to decide such claims on the
12 merits.

13 When Congress enacted the FSIA, it
14 made clear that U.S. courts have jurisdiction to
15 decide these types of claims. And Congress has
16 updated the FSIA and enacted other legislation
17 to make it easier for plaintiffs to pursue
18 Holocaust-era claims in U.S. courts.

19 Hungary and the U.S. now ask this
20 Court to recognize an abstention doctrine that
21 would permit courts to overrule Congress's
22 foreign policy determinations with no
23 involvement from the executive. Such a doctrine
24 runs afoul of separation of powers principles
25 and has no foundation in our legal history.

1 It would also undo the primary purpose
2 of the FSIA, which was to eliminate ad hoc
3 determinations about when courts should exercise
4 jurisdiction over foreign sovereigns based on
5 the foreign policy concerns of the moment.

6 Hungary wants courts to decide whether
7 these are the types of claims that should be
8 heard in U.S. courts, but Congress has already
9 decided that they are.

10 CHIEF JUSTICE ROBERTS: Counsel, we
11 said in the Verlinden case that the FSIA does
12 not appear to have affected the -- the doctrine
13 of forum non conveniens.

14 Now, if that's true, why has it
15 affected the doctrine of international comity?

16 MS. HARRINGTON: Well, Mr. Chief
17 Justice --

18 CHIEF JUSTICE ROBERTS: It does seem
19 that -- that your -- the theory of your argument
20 would sweep very broadly and call into question
21 not only forum non conveniens but the act of
22 state doctrine and other related theories.

23 MS. HARRINGTON: Sorry for the
24 interruption. Mr. Chief Justice, I have two
25 answers to that.

1 First is that we don't think there was
2 an independent doctrine of comity-based
3 abstention before the FSIA was enacted. The
4 three Petitioners in the United States have not
5 identified any case that wasn't either a foreign
6 -- foreign sovereign immunity case or a forum
7 non conveniens case.

8 But, second, to the extent that the
9 FSIA displaced any existing common law
10 doctrines, they were doctrines that were
11 directed to foreign sovereign immunity or things
12 like that.

13 So my friend, Mr. Silbert, describes
14 the comity inquiry as directed to the dignity
15 interests of the foreign sovereign. To the
16 extent that's different from a foreign sovereign
17 immunity inquiry -- it's hard to tell how it's
18 different -- but it would be -- would have been
19 subsumed by the FSIA.

20 In -- in contrast, the forum non
21 conveniens is a generally applicable common law
22 doctrine that survives. And, generally, when a
23 statute is enacted, we don't think that it
24 displaces generally applicable common law
25 doctrines that aren't directly sort of addressed

1 by the statute.

2 CHIEF JUSTICE ROBERTS: Counsel, your
3 -- your position is categorical. In other
4 words, you don't think the international comity
5 applies in any case.

6 And yet it's -- given the nature of
7 international relations, it's easy to envision
8 cases where it would seem particularly
9 inappropriate for United States courts to get
10 involved in litigation. I don't know if this is
11 one of them or -- or not.

12 I mean, is there room for any kind of
13 a safety valve under your theory where the
14 doctrine is -- while maybe not available in the
15 normal course, is appropriate in particularly
16 sensitive international relations cases?

17 MS. HARRINGTON: Mr. Chief Justice, I
18 think there are a number of safety valves that
19 already exist, including things like statute of
20 limitations, the act of state doctrine,
21 political question doctrine, forum non
22 conveniens.

23 In addition, we also have our fallback
24 argument that, if you disagree that there is no
25 doctrine of comity-based abstention that's

1 available, it should at least only be available
2 where the executive branch comes in and asks for
3 a specific case to be dismissed. That would
4 respect the constitutional assignment of foreign
5 policy authority to the elected branches and
6 would maintain political accountability for
7 those kinds of decisions.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Thomas.

11 JUSTICE THOMAS: Thank you, Mr. Chief
12 Justice.

13 Counsel, if we reverse in the --
14 again, this is a hypothetical -- if we were to
15 reverse in the Germany case, what should we do
16 with this case?

17 MS. HARRINGTON: I think you should
18 affirm in this case. I mean, I'd so, first off,
19 say I think you should not reverse in the
20 Germany case. I think there's a strong textual
21 argument that takings that are themselves acts
22 of genocide are covered by the expropriation
23 exception.

24 I also want to say there are -- there
25 are reasons maybe to view the facts alleged in

1 the Germany case differently from the facts
2 alleged in this case. In this case, the
3 plaintiffs allege that Hungary took every single
4 thing they owned, including things that were
5 necessary for survival, and that is more clearly
6 a genocidal type of taking perhaps than the
7 takings that are alleged in Germany.

8 But there are also these alternative
9 arguments that are available and that were
10 raised by us below, which is that the plaintiffs
11 -- you know, some of our plaintiffs were never
12 Hungarian nationals. They lived in occupied
13 territories and were never treated as
14 Hungarians. And so they should have an
15 opportunity to make their claim under whatever
16 rule this Court says applies under the
17 expropriation exception.

18 The other plaintiffs were certainly
19 not treated as Hungarian nationals or citizens.
20 They were stripped of all rights and privileges
21 of -- of nationality, and they should similarly
22 have a chance to make their claim.

23 JUSTICE THOMAS: Could you spend a few
24 -- a little bit of your time to explain whether
25 or not you preserved the genocidal taking

1 argument?

2 MS. HARRINGTON: We did. I mean, that
3 issue was decided in this case in the first
4 appeal in the D.C. Circuit. Hungary did not
5 raise it in its cert petition in this case.

6 But, of course, as you know, Germany
7 did, and you granted cert on that question.
8 It's a question that goes to subject matter
9 jurisdiction. And perhaps you're asking why we
10 chose to address it even though it's not one of
11 the questions presented in this case raised by
12 Hungary.

13 And that's because, as I said, we
14 think that considering that question in the
15 context of the facts of this case is clarifying,
16 and also it is a subject matter jurisdiction
17 question that Hungary has said it intends to
18 take advantage of if Germany prevails.

19 JUSTICE THOMAS: You -- in your
20 answers, you seem pretty firm that under F --
21 FSIA, you -- there's no room to create new
22 abstention doctrines. What's your view of a
23 court staying FSIA proceedings?

24 MS. HARRINGTON: Well, it would depend
25 on the basis for the -- for staying. I mean,

1 you know, as one of your colleagues has said,
2 there is generally an unflagging obligation to
3 exercise jurisdiction that's been given by
4 Congress.

5 There are some abstention doctrines
6 that will allow a court to stay damages actions
7 when there are, for example, pending proceedings
8 in another forum.

9 There's no such pending proceedings in
10 this case.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer.

14 JUSTICE BREYER: Thank you.

15 A group of victims of apartheid sue --
16 maybe they're from Botswana -- they sue the
17 South African government on a claim that fits
18 within this for taking their property, et
19 cetera.

20 South Africa says: You don't
21 understand. We don't have apartheid anymore.
22 And we have a system for dealing with it. It's
23 called the truth and reconciliation committee.

24 Please don't mess up what we're trying
25 to do, Judge, in New York. Dismiss the case or

1 use comity.

2 What's supposed to happen on your
3 theory?

4 MS. HARRINGTON: Well, I think we
5 could imagine in that case perhaps the State
6 Department would come in and say that --

7 JUSTICE BREYER: Okay. Okay, I see
8 what you're doing. You're taking some factors
9 and saying it doesn't zero exist. It exists,
10 but only a few things are allowed to appeal to
11 comity, is that right?

12 MS. HARRINGTON: No, Justice Breyer,
13 we think it doesn't exist. But we think, if the
14 Court disagrees with that, it should at least --

15 JUSTICE BREYER: Yeah, I got that
16 point, but the --

17 MS. HARRINGTON: Okay.

18 JUSTICE BREYER: -- but my question
19 is, fine, you think it don't exist -- doesn't
20 exist. So, when the people from Botswana sue on
21 apartheid the South African government and the
22 South African government says please don't do
23 this, you're going to mess up our Truth and
24 Reconciliation, the answer -- your first choice
25 is to say, too bad, we go ahead with the suit

1 anyway, is that right?

2 MS. HARRINGTON: Well, it's -- it's
3 right if all of the requirements of the FSIA are
4 met, and --

5 JUSTICE BREYER: Then there's your
6 second position. Your second position says,
7 well, maybe not sometimes. And that's where
8 deference to well-considered views of the
9 executive branch. That's one of them. You
10 agree with that one, right?

11 MS. HARRINGTON: Yes.

12 JUSTICE BREYER: Then you agree with
13 the general practice of other nations,
14 particularly the reciprocal practice of the
15 nation directly implicated?

16 MS. HARRINGTON: Justice Breyer, we
17 think that's a question for Congress or perhaps
18 the executive to make.

19 JUSTICE BREYER: So you say don't take
20 that?

21 MS. HARRINGTON: Of course --

22 JUSTICE BREYER: Even if every other
23 nation does it a different way, don't do it.
24 I'm just trying to get your position on this.

25 MS. HARRINGTON: No, because that --

1 JUSTICE BREYER: But what about the
2 third, applicable of U.S. statutes or treaties
3 that demonstrate a strong sovereign interest to
4 ignore or displace foreign sovereign acts or
5 interests in this situation?

6 MS. HARRINGTON: If claims have been
7 -- been displaced by Congress or the executive,
8 then the claims have been displaced. I just
9 want to make one point on the reciprocity point,
10 which is that the expropriation exception does
11 not exist anywhere else in the world in the
12 context of foreign sovereign immunity. And so
13 that sort of reciprocity risk is baked into the
14 statute intentionally by Congress.

15 JUSTICE BREYER: Hmm. Okay. Then
16 what I'm doing, I'm reading to you, as you know,
17 Professor Estreicher's four considerations that
18 would go into comity. And so it seems to me
19 that your -- at least your second choice is you
20 agree with some but not others.

21 MS. HARRINGTON: Right. I mean, our
22 -- our basic principle --

23 JUSTICE BREYER: Is that right?

24 MS. HARRINGTON: That's right, yes.
25 Our -- our basic principle is that those

1 professors are asking district courts to make
2 foreign policy determinations. That's not the
3 constitutional role of a district court.

4 I mean, under separation of powers
5 principles, those determinations are assigned to
6 our elected branches. Here, Congress has made
7 the comity-based decision about what types of
8 claims can be brought in U.S. courts.

9 In Verlinden --

10 JUSTICE BREYER: You would read that
11 statute as saying, well, South Africa, you're
12 trying to end the bitterness caused by
13 apartheid, but that's just too bad?

14 MS. HARRINGTON: I mean, if all of the
15 requirements --

16 JUSTICE BREYER: Is that right?

17 MS. HARRINGTON: -- of the FSIA are
18 satisfied, then yes.

19 JUSTICE BREYER: Yes. Okay.

20 MS. HARRINGTON: But, again, the
21 executive branch can come in and try to
22 intervene. They have not done so in this case.
23 They've been invited multiple times to express
24 their view about whether this case should be
25 dismissed, and -- including today, and they have

1 declined to do that.

2 It shouldn't be up to a district court
3 to make that foreign policy determination in the
4 absence of direction from the executive when
5 Congress has provided jurisdiction.

6 JUSTICE BREYER: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Alito.

8 JUSTICE ALITO: Counsel, I think you
9 really do have to choose between two
10 alternatives. Your primary argument is never,
11 this doctrine doesn't exist, there are no
12 circumstances in which a case could be dismissed
13 based on comity abstention.

14 And so, if there were a case at some
15 time in the future where going forward would
16 cause -- cause grave foreign policy problems,
17 your answer has to be that's just too bad.

18 MS. HARRINGTON: Well, Justice Alito
19 --

20 JUSTICE ALITO: Is that really your --
21 is that your argument?

22 MS. HARRINGTON: So I'd say two
23 things. First, as I mentioned to the Chief
24 Justice, there are a number of other doctrines
25 that will weed out lots of these cases, like

1 forum non conveniens, political question, act of
2 state, things like that.

3 But, second --

4 JUSTICE ALITO: Yeah, but there could
5 be cases that don't -- where -- that don't fall
6 within any of these doctrines that could have
7 very serious foreign policy implications. I --
8 I mean, your argument might be right, but you
9 have to -- either you have to say yes, even if
10 it means war, even if it means very serious
11 foreign policy problems, we want you to say
12 never.

13 Or you have your fallback argument,
14 which is, well, maybe if the State Department
15 comes in and says please do not go forward with
16 this, it will cause terrible international
17 repercussions. That's a fallback argument, but
18 that argument negates your primary argument that
19 this doctrine never existed and, therefore, it
20 doesn't exist at this time.

21 MS. HARRINGTON: Right. We think
22 Congress has already made these foreign policy
23 determinations and has taken into account comity
24 when it enacted the FSIA. As we explain in our
25 brief, Congress and the executive can step in

1 and settle certain categories of claims that
2 they think pose a sort of risk to foreign
3 policy. They haven't done that here.

4 And as a fallback -- and it is an
5 alternative argument because it would sort of
6 undermine our argument about comprehensiveness
7 and clarity of rules, but, as a backup argument,
8 we're saying, you know, if you're going to
9 dismiss a case based on foreign policy concerns,
10 it really shouldn't be a court, with all due
11 respect to courts, making that decision. It
12 should be an elected branch of government.

13 JUSTICE ALITO: Well, you know, there
14 is the do no harm principle. And the only issue
15 that is before us, assuming that -- that you
16 would prevail on the jurisdictional question, is
17 whether this doctrine should be -- whether we
18 should hold that this doctrine doesn't exist at
19 all, can never be invoked under any imaginable
20 circumstances.

21 It could be that this is just a very,
22 very narrow doctrine. All we would need to
23 decide is it does exist in some form.

24 MS. HARRINGTON: I mean, Justice
25 Alito, I think it would be helpful to provide

1 more guidance than that, precisely because the
2 FSIA was meant to get rid of this system where
3 you made these sort of case-by-case ad hoc
4 determinations based on the foreign policy
5 considerations of the moment.

6 It was intended to get rid of what
7 this Court has called the bedlam of these sort
8 of inconsistent rules and sort of, as I
9 mentioned, the ad hoc determination of whether
10 and when courts should exercise jurisdiction.

11 And so, if you're going to say
12 sometimes you can have comity-based abstention,
13 it would be helpful to have some guidance about
14 when that is. And I think the -- the factors
15 that Hungary and the United States have pointed
16 to, that's just a subset of factors that are
17 already accounted for in the forum non
18 conveniens doctrine. And those are the factors
19 that are already accounted for in the FSIA and
20 generally in the foreign sovereign immunity
21 doctrine.

22 JUSTICE ALITO: But, you know,
23 Congress could -- if Congress wants the answer
24 to be never, Congress could so provide, as it
25 has in -- in some statutes. Why should we take

1 the lead on that?

2 MS. HARRINGTON: Well, I think the
3 existence of the Foreign Sovereign Immunities
4 Act, which is a finally reticulated and
5 frequently updated statute, is a strong
6 indication that those are the rules that are
7 intended to ply -- to apply when you're asking
8 about when a court should exercise jurisdiction
9 over a foreign sovereign.

10 JUSTICE ALITO: Thank you, counsel.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor.

13 JUSTICE SOTOMAYOR: Counsel, I'd like
14 to follow up a little bit on Justice Alito's
15 question, but my simple question to you is,
16 again, hypothetically, if we were to rule that
17 there is no international expropriation --
18 customary international law for expropriation of
19 a national, do you also believe that we should
20 address this comity issue, notwithstanding that
21 we held there was no jurisdiction?

22 MS. HARRINGTON: I mean, I think you
23 would need to, because even if you think that
24 there's no jurisdiction under the theory that
25 these takings are genocidal and -- and,

1 therefore, violate international law, as I
2 mentioned earlier, the plaintiffs still should
3 have a right to make a case that they would fall
4 in under whatever rule you announce does apply.

5 So, as I mentioned, some of the
6 plaintiffs were never Hungarian nationals. They
7 lived in occupied territories. The rest of the
8 plaintiffs were certainly stripped of all of
9 their rights and privileges of nationality and
10 citizenship before they were kicked out of their
11 homes and forced into ghettos and then deported
12 to be murdered in the death camps.

13 JUSTICE SOTOMAYOR: All right. Then
14 one follow-up question to this. Assume that we
15 find a never answer to be inappropriate, because
16 we have at least two shipping cases, the
17 Carolina and the Infanta, in which the -- in
18 which 19th-century courts declined jurisdiction,
19 at least, in part, out of concern for commercial
20 relations between the U.S. and a foreign
21 sovereign. So it does suggest some equity
22 principles or -- or comity principles that have
23 guided courts in the common law.

24 So, if we never say never, how should
25 we write it --

1 MS. HARRINGTON: Well, Justice
2 Sotomayor --

3 JUSTICE SOTOMAYOR: -- to narrow it?
4 What -- what -- what sort of extremes do you
5 think might justify the use of that doctrine?

6 MS. HARRINGTON: I'm sorry for the
7 interruption. I would first say I think those
8 cases that you cite are really viewed as forum
9 non conveniens cases. Mr. Silbert says that
10 forum non conveniens, and Mr. Snyder said too,
11 is just directed to the convenience of the
12 parties. But there are also the public factors
13 that are -- have to be taken into consideration,
14 and those address the interests of the two
15 different court systems in hearing the case.

16 And so I think those cases are
17 examples of forum non conveniens cases, not
18 comity cases. But, if you're going to -- to
19 actually answer your question, you know, I think
20 what you would need is some indication from one
21 of the elected branches that there is actually a
22 foreign policy concern.

23 I don't think you can have a court
24 abstaining from exercising its jurisdiction
25 based on its own assessment of a foreign policy

1 concern.

2 JUSTICE SOTOMAYOR: Thank you,
3 counsel.

4 MS. HARRINGTON: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice Kagan.

6 JUSTICE KAGAN: Ms. Harrington, on
7 much the same subject, I mean, just think about
8 these cases particularly. The -- I think it's
9 not yours, but the Hungary case in the Seventh
10 Circuit, which involved very similar claims. It
11 had potential damages amounting to 40 percent of
12 Hungary's GDP. So this is a suit that could
13 essentially bankrupt a foreign nation.

14 Now that seems as though it's
15 screaming severe international friction. Why
16 shouldn't we be able to acknowledge something
17 like that?

18 MS. HARRINGTON: Well, Justice Kagan,
19 you know, I think any sort of speculation about
20 a damages amount that would be implicated in
21 this case is just that, it's pure speculation at
22 this point. No class has been certified. We
23 don't know how large the class would be if it
24 were certified.

25 And so I don't think a district court

1 at the very front end of the case should be
2 saying, well, maybe if there was a giant class
3 and they proved all their damages, it would be
4 too much money and, therefore, we should abstain
5 from exercising jurisdiction. That's just not
6 normally the way that kind of inquiry works.

7 And -- and, again, you know, if -- if
8 the United States thinks it's a problem, they
9 can come in and say so, as they have. I mean,
10 Hungary is very different from many of the other
11 axis/allied and axis abetting countries in that
12 it has never taken any steps to reach a
13 comprehensive settlement.

14 If you -- you have countries like
15 Germany, Switzerland, France, Austria who have
16 cooperated with the United States to create
17 these alternative fora to resolve these claims
18 on a global basis. And then --

19 JUSTICE KAGAN: That was going to be
20 my next question, Ms. Harrington, because the SG
21 tells us that, if we -- if we don't recognize
22 this kind of abstention, then the government is
23 going to be hampered in its efforts to encourage
24 the establishment of -- of redress and
25 compensation mechanisms for human rights

1 violations.

2 And in some countries, that has worked
3 to at least some extent. So what's your answer
4 to the Solicitor General's position on that
5 score? And do you really think that we can
6 treat Hungary differently because those efforts
7 have not succeeded as well?

8 MS. HARRINGTON: So this Court
9 explained in the Garamendi case that it was
10 actually the filing of class action lawsuits
11 related to Holocaust-era claims that spurred
12 those other countries to create these
13 alternative fora in cooperation with the United
14 States.

15 And so I think it's absolutely
16 backwards to say, well, we should just get rid
17 of all these things and that's going to actually
18 be the thing that motivates the remaining
19 countries to come to the table.

20 And in terms of whether we should
21 treat them differently, the United States treats
22 them differently. I mean, the United States
23 came into this case in the -- in the -- in the
24 district court uninvited and asked the district
25 court to dismiss the -- the Austrian-owned

1 company that was the other defendant precisely
2 because Austrian companies have come to the
3 table and created this alternative way to
4 resolve these -- these on a global base.

5 They didn't do the same for Hungary or
6 the Hungary-owned railroad. And so the United
7 States is obviously treating them differently in
8 that respect, and it's perfectly appropriate for
9 the Court to do so as well.

10 JUSTICE KAGAN: Will your position
11 leave private litigants in a better position
12 than sovereign litigants?

13 MS. HARRINGTON: It won't. I mean, I
14 don't think -- so the -- Hungary relies on these
15 couple of courts of appeals that in the last 15
16 years have recognized a doctrine of
17 international comity-based abstention. Those
18 cases came 30 years after the FSIA was enacted.

19 And in the two primary cases that they
20 rely on, the United States actually did come in
21 and specifically request that the cases be
22 dismissed. That's Ugarro-Benages and Mujica in
23 the Ninth Circuit; the first is in the Eleventh
24 Circuit. And the courts in those cases gave
25 dispositive weight to the United States' request

1 that those suits be dismissed based on foreign
2 policy concerns.

3 So it's just not true that it's easier
4 to sue foreign sovereigns than private
5 plaintiffs. In fact, the only Holocaust-era
6 class actions or most of them that have actually
7 reached a substantive result in the U.S. courts
8 have been against private companies.

9 JUSTICE KAGAN: Thank you, Ms.
10 Harrington.

11 CHIEF JUSTICE ROBERTS: Justice
12 Gorsuch.

13 JUSTICE GORSUCH: Good morning, Ms.
14 Harrington. I'd -- I'd like to address a
15 slightly different point that you've -- you've
16 alluded to a couple of times.

17 Normally, takings within a country are
18 -- are subject to domestic takings laws. You've
19 argued in this suit that the Holocaust and human
20 rights forms an exception to that rule, but
21 you've also pressed the point and alluded to it
22 today that, even if that rule were normally to
23 apply, it -- it wouldn't here because Germany
24 and perhaps Hungary stripped citizenship from
25 its Jewish victims during the Holocaust.

1 That's a very interesting argument,
2 but it's not developed much in this Court, and
3 I'm just curious why and -- and what -- what we
4 should do about it?

5 MS. HARRINGTON: It hasn't been
6 developed much -- much in this Court because
7 it's not actually the question that's presented.
8 It's not the basis that the -- that the D.C.
9 Circuit relied on in deciding the two cases.

10 So, you know, I think it -- it -- that
11 is an issue that would need to be resolved on
12 remand. I think that's the most appropriate way
13 to resolve it since it hasn't really been
14 briefed and wasn't squarely presented in
15 Germany's cert petition.

16 JUSTICE GORSUCH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh.

19 JUSTICE KAVANAUGH: Good morning, Ms.
20 Harrington. I think you agree that forum non
21 conveniens survives the FSIA, so I take from
22 that that the FSIA would not displace comity if
23 a comity doctrine exists and existed at the
24 time.

25 And you've made important arguments,

1 as have Professors Dodge and Gardner, that the
2 doctrine doesn't exist. And I understand those,
3 but put those aside for now.

4 If the doctrine does exist, then the
5 question's how to apply it. And I did not view
6 it necessarily, again, assuming it exists, as
7 requiring a case-by-case foreign policy or
8 international friction evaluation. In part for
9 reasons others have expressed, that would not be
10 predictable. It would be hard for courts to do
11 that, wouldn't necessarily be equitable, given
12 the number of courts who would be involved
13 hearing similarly situated plaintiffs.

14 Rather, I viewed the doctrine at least
15 as it's been articulated as reflecting a general
16 foreign policy concern, and then the question
17 becomes the particulars of the doctrine.

18 And I had understood the argument to
19 be that, if foreign defendants harm foreign
20 parties in a foreign country and remedies are
21 available in the foreign country, then American
22 courts should usually abstain.

23 So, again, if the doctrine exists,
24 what is the problem with that kind of fairly
25 bright-line principle that would not require a

1 case-by-case evaluation of foreign policy
2 interests?

3 MS. HARRINGTON: Well, Justice
4 Kavanaugh, any such doctrine was plainly
5 displaced by the FSIA. This Court held in
6 Verlinden that Congress intended in the FSIA to
7 grant U.S. courts jurisdiction over suits by
8 foreign plaintiffs against a foreign sovereign
9 based on domestic state law.

10 And the expropriation -- excuse me,
11 the expropriation exception that we're relying
12 on here expressly applies to conduct that
13 occurred abroad. It's principally directed to
14 nationalization of property and that has to
15 occur abroad. It also -- we think it also
16 applies here, where you have genocidal takings,
17 but there's no reason that those shouldn't --
18 shouldn't also be covered if they -- if they
19 happened abroad.

20 And so, to the extent any such
21 doctrine like that did exist, we think it was
22 plainly displaced by the FSIA --

23 JUSTICE KAVANAUGH: Well, if --

24 MS. HARRINGTON: -- and it -- and it
25 was not -- you know, it was sort of not a

1 consideration that was separate from foreign
2 sovereign immunity determinations that were made
3 at common law.

4 JUSTICE KAVANAUGH: But if such a
5 doctrine exists and the articulation I just
6 provided applied to private foreign defendants
7 as well, do you still have the same argument?

8 MS. HARRINGTON: Well, I mean, it
9 would depend on the context. You know, the --
10 Hungary relies on the ATS cases, but the -- what
11 the Court is doing in the ATS cases is just
12 fundamentally different from what it's being
13 asked to do here.

14 There, what the Court is doing is
15 asking whether there is jurisdiction, not making
16 a determination about whether courts should
17 abstain from exercising jurisdiction that
18 plainly exists.

19 And so the sort of separation of
20 powers and small fee conservative way that
21 courts should sort of wade into foreign policy
22 determinations points in the opposite direction
23 in the two types of cases.

24 Here, if a court says I'm going to
25 abstain from exercising jurisdiction, it's

1 countermanding foreign policy determinations
2 that Congress has already made.

3 In the ATS context, if a court says
4 I'm going to recognize this inferred cause of
5 action, it's kind of venturing out into a
6 foreign policy way -- in a foreign policy way --
7 excuse me -- in a way that Congress has not yet
8 done.

9 JUSTICE KAVANAUGH: But that would
10 lead if that -- by the way you just described
11 it, that would lead to a private defendant case
12 and the Court would abstain. In a national
13 country defendant case, the Court would not
14 abstain, which seems unusual.

15 MS. HARRINGTON: Well, it wouldn't be
16 an abstention, Justice Kavanaugh. There -- it
17 would be a determination that there is no
18 jurisdiction in the first place. And, you know,
19 that's a determination that's up to Congress to
20 make.

21 JUSTICE KAVANAUGH: Okay. I take that
22 point. Thank you very much, Ms. Harrington.

23 MS. HARRINGTON: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Barrett.

1 JUSTICE BARRETT: Good morning, Ms.
2 Harrington. I have a question about the nature
3 of this kind of comity doctrine especially as
4 compared to forum non conveniens. So everybody
5 agrees that forum non conveniens doctrine
6 survives the enactment of the FSIA, and I'm
7 wondering why in your view?

8 Is that because forum non conveniens
9 doctrine is a background principle that's
10 incorporated somehow into the statute itself, or
11 is that because courts retain the power to
12 develop it as a common law doctrine?

13 If the latter, why wouldn't they
14 retain the power to develop a doctrine of comity
15 like Hungary proposes here?

16 MS. HARRINGTON: So it's more the
17 latter. I mean, there's a general background
18 principle that statutes don't displace common
19 law -- you know, sort of generally applicable
20 common law doctrines unless there's some
21 indication in the statute itself that that's the
22 intent of the statute.

23 And so, for example, foreign sovereign
24 immunity everyone agrees was a common law
25 background doctrine -- excuse me, common law

1 doctrine that was displaced by the FSIA.

2 To the extent there was any separate
3 comity abstention doctrine, which we don't think
4 there was, but if you disagree we think it was
5 also subsumed within and displaced by the FSIA
6 because, as Mr. -- my friend Mr. Silbert
7 describes the comity-based inquiry, what the
8 Court is supposed to do is -- is think about the
9 dignity interests of the foreign sovereign.

10 It's really hard to see how that is
11 separate from the foreign sovereign immunity
12 doctrine in a way that the FSIA was not intended
13 to account for.

14 JUSTICE BARRETT: So your argument is
15 that courts may retain some authority to
16 recognize some of these abstention-based
17 doctrines, like forum non conveniens, but the
18 structure and the text of the FSIA preclude us
19 from doing so here?

20 MS. HARRINGTON: Yes. I mean, and --
21 and I would just add that the State Department,
22 when it transmitted the draft bill in 1973 to
23 Congress, it included a section-by-section
24 analysis. And in that it said we don't think
25 this would -- this would displace forum non

1 conveniens doctrine. So there is sort of a --
2 it was sort of baked into the enactment history
3 of the FSIA.

4 JUSTICE BARRETT: And let me ask you a
5 question about this citizenship point. You
6 know, you point out that some of the plaintiffs
7 in the suit below were not Hungarian nationals
8 and others have a claim to their citizenship
9 having been severed by the genocide.

10 Is that a claim that you raised below,
11 as Justice Gorsuch pointed out, it's not one
12 that's developed here, it wasn't part of the
13 QPA. Did you raise that below or develop it all
14 below and, if not, did you have to in order to
15 preserve it?

16 MS. HARRINGTON: We did raise it
17 below. And I'm afraid I don't have the exact
18 citation but it was raised in the briefing on
19 appeal.

20 JUSTICE BARRETT: Okay. Thanks,
21 counsel.

22 CHIEF JUSTICE ROBERTS: You have
23 several minutes to wrap up, Ms. Harrington.

24 MS. HARRINGTON: Okay. Thank you, Mr.
25 Chief Justice.

1 I just want to sort of linger for a
2 second on the separation of powers point. The
3 Constitution assigns authority over foreign
4 policy to the elected branches. Here Congress
5 has decided that this type of claim, this is a
6 -- sorry, this is the type of claim that U.S.
7 courts should hear. And the executive, even
8 after being invited multiple times to disagree
9 with respect to this specific case, has declined
10 to do that.

11 In these circumstances a court should
12 not be able to step in and disregard its
13 statutory jurisdiction based on its own
14 assessment of foreign policy concerns. That
15 scheme would raise serious separations of powers
16 concerns and would completely undermine the
17 central purpose of the FSIA, which was to
18 eliminate case-specific foreign policy concerns
19 from questions about when a court should
20 exercise jurisdiction over a foreign sovereign.

21 And just one final point. I would
22 like to just say another word on the other
23 question that you're considering this morning in
24 the Germany case. That question is whether a
25 taking that is itself genocide is a taking that

1 violates international law.

2 Under the plain and broad text of the
3 expropriation exception, it is. In considering
4 that question I really invite the Court to
5 consider the facts of this case which arise out
6 of the worst atrocities in human history.

7 Here Hungary took everything the
8 plaintiffs owned, including possessions
9 necessary to survive, such as shelter, clothing,
10 and medicine, and the undisputed purpose of
11 Hungary's takings was to bring about the
12 physical destruction of Jews in Hungary. That
13 is genocide.

14 And it is hard to imagine a more vivid
15 example of property takings that themselves
16 violate international law. Indeed, the only
17 U.S. interest that the Solicitor General's
18 office or the Department of Justice has
19 identified in this case in the ten years of
20 litigating it is the moral imperative to provide
21 victims of the holocaust with some relief in
22 their lifetime.

23 There's no way to read the text of the
24 expropriation exceptions as withholding
25 jurisdiction in this case and there is no room

1 in the FSIA's comprehensive scheme to allow
2 abstention based on international comity.

3 Thank you, Mr. Chief Justice.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Rebuttal, Mr. Silbert.

7 REBUTTAL ARGUMENT OF GREGORY SILBERT

8 ON BEHALF OF THE PETITIONERS

9 MR. SILBERT: Thank you, Mr. Chief
10 Justice, I -- I have three points.

11 First, I -- I did not hear my friend
12 give you any real workable limiting principle or
13 safety valve for her position. And I think that
14 colloquies with Justice Breyer and Justice Alito
15 brought that out.

16 The fact is, if you accept my friend's
17 interpretation of the FSIA, then U.S. courts not
18 only can but must hear cases alleging that
19 foreign sovereigns harmed other foreigners in
20 foreign countries.

21 There is no doubt that those cases
22 will be asserted here and some of them will be
23 highly problematic, like the South Africa hypo
24 that Justice Breyer proposed.

25 I -- I think foreign nations will be

1 understandably upset if U.S. courts adjudicate
2 foreign disputes where foreign interests
3 predominate and there is little, if any, U.S.
4 interest on the other side.

5 When U.S. courts decide cases like
6 that, they cause meaningful harm to
7 international relations and they expose the
8 United States to similar litigation in foreign
9 courts.

10 The second point: I think the text of
11 the FSIA just does not do the work that my
12 friend needs it to do. The expropriation
13 exception withdraws sovereign immunity from
14 jurisdiction. It doesn't do anything else.

15 The comity abstention doctrine that
16 we're asserting predates the FSIA by about 100
17 years. So the question is whether the FSIA
18 affirmatively displaced it, and -- and clearly
19 it did not.

20 If the FSIA actually displaced all
21 comity defenses in favor of a foreign sovereign,
22 as my friend proposes, then the act of state
23 doctrine would also be displaced. But this
24 Court held in *Altmann* that it isn't.

25 If Congress wanted to go further and

1 invite the kinds of foreign policy consequences
2 that will follow if U.S. courts are compelled to
3 hear cases like this one, then Congress can
4 certainly do that.

5 But that is not what Congress said in
6 the FSIA and the courts should not take on those
7 policy -- foreign policy risks on their own
8 without clear instructions from Congress and the
9 executive.

10 Last point: I think you should take
11 the reciprocity concerns in this case very
12 seriously, because it's an unfortunate fact, but
13 a -- a fact we all know, that the United States
14 Government has sometimes fallen short of the
15 ideals of justice that every nation should
16 aspire to meet.

17 And some people say that the United
18 States owes large outstanding debt for
19 injustices that were committed in this country.
20 That's a profoundly important question.

21 Maybe one day Congress will address it
22 or maybe one day it will come before this Court,
23 all right, that we can all agree that the
24 remedies for the worst injustices committed by
25 the United States in the United States should

1 not be decided by a Hungarian judge applying
2 Hungarian law from a courtroom in Budapest.

3 For the same reasons, the merits of
4 this case should not be decided by an American
5 judge applying American law in Washington, D.C.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. The case is submitted.

8 (Whereupon, at 11:21 a.m., the case
9 was submitted.)

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