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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Washington, D.C.

Tuesday, January 18, 2022

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:25 a.m.

APPEARANCES:

DAVID BOIES, ESQUIRE, Armonk, New York; on behalf of the Petitioners.

MASHA G. HANSFORD, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioners.

THADDEUS J. STAUBER, ESQUIRE, Los Angeles, California; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:25 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 20-1566, Cassirer versus Thyssen-Bornemisza.

Mr. Boies, I understand you're participating remotely.

MR. BOIES: I am, Your Honor.

CHIEF JUSTICE ROBERTS: You may proceed.

ORAL ARGUMENT OF DAVID BOIES

ON BEHALF OF THE PETITIONERS

MR. BOIES: Thank you, Mr. Chief Justice, and may it please the Court:

I begin with three simple propositions. First, Respondent is a foreign state not entitled to immunity under Section 1605 of the FSIA.

Second, Section 1606 of that Act provides that as to any claim for relief, such a foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

Third, if the Respondent were a private museum and every other circumstance

were exactly the same, California choice-of-law rules would apply.

It necessarily follows from these three propositions, none of which is disputed, that California choice-of-law rules must apply to the Respondent. Any other rule would permit courts to apply different choice-of-law rules and thereby different substantive rules to foreign states than would be applied to private parties, resulting in the Respondent not being liable in the same manner and to the same extent as a private museum under like circumstances.

As discussed in our brief, even in the absence of such a clear direction from Congress, this Court should not interpret the FSIA as intending federal common law law-making. And 20 years of experience with four circuits interpreting Section 1606 as written and applying state choice-of-law rules strongly suggest that Respondent's speculation about problems that might arise is unfounded.

But what is dispositive is that in the FSIA, Congress struck a comprehensive balance as to how claims against foreign states should

be adjudicated. Even if possible problems with that balance were to exist, it would be for Congress to address them.

I am pleased to respond to any questions the Court may have.

JUSTICE THOMAS: Mr. Boies, if we think that the district court and the court of appeals did, in fact, apply Spanish law, would have applied Spanish law in the exact same way to a private person, wouldn't you lose?

MR. BOIES: If the --

JUSTICE THOMAS: I mean, these --

MR. BOIES: If my third -- if my third proposition were wrong, that is, if the Respondent being a private museum would have had federal common law applied to it, then I think the Court is right. That is, if the FSIA intended that state law be displaced even for private parties and that that were the structure of the FSIA, then it would be applied to both the museum as well as the private museum. I would agree with that, Your Honor.

JUSTICE THOMAS: Thank you.

CHIEF JUSTICE ROBERTS: There are certainly situations where a foreign

sovereign -- the -- the analogy that you're going -- supposed to be treated like a private citizen, you know, absolutely makes no sense. I mean, what if the issue is something to do with how you're managing your army? How are you treated like a private citizen in a situation like that? Whether or not you're properly denied asylum to somebody, how are you treated like a private citizen there?

It -- it strikes me that your -- your -- your case pushes that principle pretty far, and I'm not sure it is -- it makes that much sense across the board.

MR. BOIES: Well, Your Honor, questions of how -- how the state is managing its army or asylum would not come up in an FSIA action.

CHIEF JUSTICE ROBERTS: Well, that seems to me to be --

MR. BOIES: The FSIA --

CHIEF JUSTICE ROBERTS: -- that -- that seems to me to be avoiding the -- the question a little bit. I'm sure you can imagine better than I can cases that would come up in that context that might not be a

situation that could be replicated by a private citizen.

MR. BOIES: Your -- Your Honor, I -- I'm not sure I agree with that because you have to have commercial activity to start with. And so --

CHIEF JUSTICE ROBERTS: All right. Well, then what if a -- what if a private citizen, you know, expropriated property a way that a sovereign could but a way a private citizen can't? I mean -- I mean --

MR. BOIES: Well --

CHIEF JUSTICE ROBERTS: -- if the -- if the foreign -- if the foreign sovereign engaged in that activity, there would be no private citizen analogue.

MR. BOIES: The -- the private citizen analogue here under state law is conversion. And the -- the question is whether the private party or the foreign state is holding property improperly. There is an expropriation issue that was settled below which held that this was expropriation in violation of international law.

Once you have a violation, then the

FSIA kicks in, but it only kicks in with respect to commercial activities. It doesn't kick in with respect to the army or the asylum or anything else.

So you're only treating the foreign state as being liable in the same manner to the same extent under like circumstances where the foreign state is acting like a private individual, i.e., engaged in commercial activity.

JUSTICE SOTOMAYOR: Mr. Boies, I have two questions, one related to Justice Thomas's point. I believe the district court said that both California law and federal common law would adopt Spanish law. Why is it that we're here if you lose under both?

MR. BOIES: Because the Ninth Circuit did not reach that issue of -- of California law, which we think was erroneous. We did appeal that finding, but because of the way the Ninth Circuit decided the issue of federal common law, it never reached that issue.

JUSTICE SOTOMAYOR: That's what I understood.

With respect to Justice Roberts'

question -- and I'll ask the Solicitor General this -- it -- it seemed to have accepted the Chief's presumption that there were some international acts that would give rise to federal questions.

And -- and I think the U.S. is suggesting that the way to address those issues is not to change this rule about conflicts of law but to address those problems with other -- with other doctrines, like the act-of-state doctrine, correct? Do you have a --

MR. BOIES: I --

JUSTICE SOTOMAYOR: -- different position than they do on that issue?

MR. BOIES: I -- I don't think I have a different position. I think I have a somewhat elaborated position.

With respect to the FSIA, the FSIA carves out certain provisions, for example, like punitive damages, that are going to be special for state actors, for foreign states.

Our position is that, here, where the statute has not carved out those kind of exceptions, if you're dealing with commercial activity, state law ought -- ought to apply.

We don't think that there will be situations in which there would be a special rule for the foreign state than for the private actors.

There might be situations in which, under act of state or comity or any of a variety of other provisions, the Court might limit what a private party could get just as it might limit what a state party could get based on considerations of comity and international law and the like.

But I think the command of Section 1606 is that whatever rules are going to be applied to a private party should be applied to the foreign state when it's acting in its commercial activities.

JUSTICE SOTOMAYOR: Thank you, counsel.

JUSTICE ALITO: What would happen if the choice-of-law rule of a jurisdiction took into account the fact that the defendant is an instrumentality of a foreign state, as I think some choice-of-law regimes do?

What would -- what would happen under 1606 in that situation? 1606 says that the

foreign state shall be liable in the same manner and to the same extent as a private individual under the circumstances.

Does that mean that -- that that jurisdiction's choice-of-law rule would be partially abrogated by 1606?

MR. BOIES: That, of course, is not this case, but I think that 1606's language would suggest that the state could not have a rule that discriminated against the foreign state. So I think that to the extent that the state tried to have a rule that would discriminate against a foreign state, the -- 1606 would preclude that.

JUSTICE ALITO: Well, this would actually be something that works in favor of the foreign state or at least it could be. But doesn't that difficulty suggest that 1606 really should not come into the picture until after the choice-of-law decision has been made?

MR. BOIES: I don't think so -- I don't think so, Your Honor, because, if it -- if it comes into effect only after the decision is made, you cannot have the state being held to the same manner and extent of liability.

You would have a separate choice of law that would be created that would direct to perhaps a separate rule of decision. And that would mean that the state would not be subject to the same liability to the same extent under exactly the same circumstances.

So I don't think that could be consistent with -- with Section 1606.

JUSTICE ALITO: Well, there's another statutory provision that could lead to a victory on your part, and you do mention it, the Rules of Decision Act, but you downplay it.

MR. BOIES: Yes.

JUSTICE ALITO: And you highlight 1606. Why do you do that?

MR. BOIES: Just because we -- we do emphasize the Rule of Decision, and I -- I don't mean to downplay it, Your Honor. But we concentrate on 1606 because it is such, in our view, a clear statutory command of Congress and one that they thought a lot about.

The FSIA was -- was a decade in its making, and it was a comprehensive, as this Court has said on a number of occasions, resolution of issues. And the balance that

they struck, which was a balance between the litigant against the state and the rights of the foreign state, is something that -- where it was as clear as we think it is in 1606, that that was the right thing to emphasize.

But we do -- we do rely on the Rules of Decision and -- and -- and, in addition, on the fact that when Congress enacted the FSIA, it did so in light of background principles of federalism, background principles of the strong presumption against creating federal common law, the context of the Richards case, where this Court relied on the same language in the Federal Tort Claims Act as was later used in the FSIA to reject an attempt to avoid state choice-of-law rules, even where there was, I would suggest, in the Richards case, a more plausible basis to do so than exists here.

So we -- we think that when the Congress enacted the FSIA against all of those backgrounds, even in the absence of such a clear congressional command as exists in 1606, the right interpretation of the FSIA would be that it did not indicate an intent to deviate from the use of state law and state

choice-of-law issues.

And, certainly, this case -- this -- this Court has never interpreted a -- a statute from Congress as silently intended to separate state substantive rules from state choice-of-law rules.

JUSTICE KAGAN: Mr. Boies, some significant part of your argument seems to rely on a view that there's federal common law on one side but only on one side, and I'm wondering whether that's right.

Isn't there federal common law on both sides here? You know, the Klaxon rule, which says look to state choice-of-law rules, that is itself a rule of federal common law, isn't it?

MR. BOIES: I would have -- I would have said Klaxon was -- was a decision to hold that the federal courts were compelled on grounds of federalism to apply state choice-of-law provisions.

I don't think that this is a situation where there's federal common law on -- on both -- on both sides.

JUSTICE KAGAN: Well, I guess what I'm suggesting is that Klaxon points to using state

choice-of-law rules, but, in doing so, it is itself an exercise of federal common law. That pointing to state common law rules is a federal common law rule.

MR. BOIES: I would -- I would put it differently with respect, Your Honor, that -- that what Klaxon is holding is that the state choice-of-law rules apply.

Now that is a federal decision, but I don't think it is a federal decision based on federal common law. I think it is a -- a federal decision based on the fact that under Klaxon and under Erie, there is not a -- a federal common law that applies when the underlying action is a state cause of action.

JUSTICE BARRETT: Mr. Boies, is it based on the Rules of Decision Act? Klaxon, I mean.

MR. BOIES: I don't -- I don't -- I don't believe that Klaxon is primarily based on the Rules of Decision Act. I think it is predominantly based on the constitutional and federalism grounds that underlie the Erie case.

And I think that Klaxon, as I read it, was simply the recognition by the Court that

for the same reason that the federal courts were required to apply state rules of decision, they were required to apply state choice-of-law rules.

CHIEF JUSTICE ROBERTS: Well, Mr. Boies, as I understand it, Klaxon has been subject to some criticism. And why does it make sense, if there is a federal interest in a state case, as there may be when you get to what the -- after deciding the choice-of-law question, why does it make sense that the federal court is restricted in assessing the application of that principle to the merits and not on the question of choice of law?

MR. BOIES: I -- I -- I think that the constraint on the federal court would be the same with respect to merits and choice of law, Your Honor. I'm not -- I'm not suggesting that it would be different.

I -- I believe that the -- the constraint on the federal court is the same for both choice of law and the underlying rules of decision and that the -- and that this Court has been pretty consistent in not separating those two.

I think Klaxon should be read as the Court saying that just as Erie required an application of state rules of decision, it also required the adoption of state choice-of-law provisions.

CHIEF JUSTICE ROBERTS: Justice Thomas?

JUSTICE THOMAS: No, nothing further.

CHIEF JUSTICE ROBERTS: Justice Breyer?

JUSTICE BREYER: Just to see if I understand this. Your -- your client is suing for conversion the things under California law. So we imagine --

MR. BOIES: Yes.

JUSTICE BREYER: -- your client, Mr. Smith, and Mr. Smith is suing a private bank in Spain. And you'd say, well, what law would apply? And the answer would be, well, he'd be in a diversity -- he would have to bring a diversity action if he were in federal court in California. And they would apply -- first, we look to California's choice-of-law rules, and we're going to get into an argument about that. Would California, in fact, apply Spanish law or

would it apply California law? But the first thing we say is, what law would California apply?

On the other hand, if your client were suing basically under federal law, suppose it had something to do with a bank account or something, and then it's an arising-under case, so we imagine Mr. Smith suing the bank, and it's federal law because that's his basic claim, his underlying claim. And so then we would do what the Ninth Circuit did and say, well, it's a federal claim, he'd be in federal court, arising under, and we look to what the federal courts would apply, what's their choice-of-law doctrine.

Am I right or wrong?

MR. BOIES: I -- I think you're exactly right. Our -- our position is that the -- Mr. Smith's case against the private bank should come out the same way as our case against the state actor, recognizing that the state actor here is engaged in commercial activity.

CHIEF JUSTICE ROBERTS: Justice Alito? No?

Justice Sotomayor?

JUSTICE SOTOMAYOR: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Barrett?

Thank you, Mr. Boies.

MR. BOIES: Thank you.

CHIEF JUSTICE ROBERTS: Ms. Hansford.

ORAL ARGUMENT OF MASHA G. HANSFORD

FOR THE UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE PETITIONERS

MS. HANSFORD: Mr. Chief Justice, and may it please the Court:

Rather than creating an independent liability standard for FSIA cases, Congress directed that a foreign state should be liable in the same manner and to the same extent as a private individual under like circumstances. That language provides a clear answer to the question presented.

As Justice Breyer indicated in his last question, if every fact in this case were the same, but the foundation were a private art gallery, everyone agrees that a court would use state choice-of-law rules to select the rule of

decision for Petitioners' property claims. Section 1606 requires the same treatment in a case against a foreign state.

And that result comports with first principles. Unless federal law provides otherwise or Congress directly specified, state choice-of-law rules normally apply.

But, here, first principles are just icing. The clear language of Section 1606 easily resolves this case.

I welcome the Court's questions.

JUSTICE THOMAS: But you seem to suggest in your brief that if the interests of the foreign sovereign have not taken in -- taken -- if they're dismissed -- if we are -- if the -- that approach is too dismissive of those interests, we should look to other sources.

MS. HANSFORD: We don't think there's any problem across the board in applying state choice-of-law rules. I think, in a particular case, the -- once the law is selected, the application of a particular law could raise issues of such interest to foreign policy that that is a basis for creating federal common law

on that particular issue, and the act-of-state doctrine is the perfect example of that, what the Court did in Sabbatino. But we do not think that that applies across the board for choice-of-law rules.

And while Respondent in their brief suggests that using state choice-of-law rules somehow fails to give sufficient weight to foreign policy concerns, we just don't think that is correct. We think that in the 30 years that this has been the rule in the Second Circuit, we're not aware of any concerning decisions at the choice-of-law level.

And, in fact, of the leading decisions, the two decisions in the Second Circuit, Karaha Bodas and Barkanic, and the Oveissi decision in the D.C. Circuit actually used state choice-of-law rules to select foreign law. And, somewhat ironically, the leading case in the Ninth Circuit, the Schoenfeld decision, used federal choice-of-law rules to select California over Mexican law, and in that case, it was actually the foreign instrumentality that was arguing for state choice-of-law rules.

So I think the idea that there is something inherently in tension with foreign policy concerns of using the normal framework is just not borne out in practice.

CHIEF JUSTICE ROBERTS: Well, that's -- I have to say it does surprise me for -- that the representative of the federal government can't envision a situation where it may be contrary to their foreign policy to apply a particular state's choice of law.

Now I -- I understand that may be unusual, but you seem to think that the -- that the federal policy is always going to be to apply the foreign law and -- and, you know, citing those cases where they did, contrary to the -- their own state law, as examples about why this is consistent with the federal government.

But is it really just impossible to imagine a case where the state choice-of-law issue, not the substantive law, would itself be one that infringed upon federal policy to such an extent that you would want to apply a different choice-of-law rule?

MS. HANSFORD: No, Mr. Chief Justice,

it is not impossible to imagine. And I -- I can give you an example, but, before I do, I just want to note that that issue can arise at any stage. It can arise as to any merits rule. Once law is selected, the application of a particular law could infringe on foreign policy concerns. And we don't think, and I think nobody has suggested, that that is a reason to create substantive federal law of liability under the FSIA instead of using state rules.

So we think that if that situation were to arise, it hasn't so far, but if it were to arise, those normal principles would -- would kick in and would take care of that. And so, to give you an example --

CHIEF JUSTICE ROBERTS: Even at the choice-of-law stage?

MS. HANSFORD: Yes, even at the choice-of-law stage. Our -- our basic submission is that choice of law is really no different than any other aspect of state law. And because Congress has made the judgment to defer to states' policy judgments in general, there's no reason to carve out choice-of-law principles from that. And I think that the

reasoning of the Klaxon decision goes to that.

I think the most closely analogous context is really the Richards decision under the FTCA, and I think that is a way to avoid those difficult questions that -- that you were raising, Justice Kagan.

Instead of looking all the way to Erie and Klaxon, look at what the Court did in Richards. And, there, the Court said that the FTCA, because Congress has shown an interest in tying matters so closely to state policy judgments, we'd really need a pretty specific indication to think that choice of law would be treated differently in this type of interstitial legislation. And a --

JUSTICE KAGAN: Ms. -- Ms. Hansford -- I'm sorry. Were you -- I mean, I'm not sure my question matters at all. In fact, I suspect it doesn't. But I guess I -- I would like to know, what do you think Klaxon is? Is it a constitutional decision? Is it a statutory decision in the way Justice Barrett suggested? Or is it, in fact, a federal common law rule?

MS. HANSFORD: It -- Klaxon may be a federal common law rule itself, but I don't

think that means that it empowers courts to create federal common law. I think it does the opposite.

So I -- I -- I -- I think that those two points come apart, and that may be why it doesn't ultimately matter to this case even if we're looking at it in terms of first principles.

JUSTICE BREYER: To go back to the Chief Justice's self-interest, imagine a state, let's say California or make up a state, call it Allachusetts or something, and it has a choice-of-law rule which is under no circumstances will a court ever give any weight whatsoever to the rule of Myanmar, okay? That's their rule.

And that might interfere with the policy that underlies this, and maybe it would be preempted. I don't know what the ground would be exactly. It's sort of like there was a case, you know, out of Massachusetts. But that could be, I think, the kind of thing that would raise a question.

MS. HANSFORD: Absolutely, Justice Breyer, and that's exactly where we think those

principles we lay out at pages 21 through 22 of our brief would come in. So how that would be analyzed is, does that law represent Massachusetts creating foreign policy in a way that is preempted either by something specific or some sort of field preemption? And it would be very much the Garamendi-Zschernig line of cases, and it would apply the same way to a choice-of-law rule.

Because this is a choice-of-law rule, there's also the additional layer that there would be the due process type of analysis if that choice-of-law rule was used to apply Massachusetts law to something that doesn't have a sufficient connection. So you have that additional check. But just in the same way that you would apply that to a substantive rule down the line in an FSIA case, you would apply it here.

And one other point on that is a lot of these foreign policy types of considerations could come up in a case against a private entity as well. If the foundation were a private gallery, I think a lot of the same foreign policy considerations would come up.

And so there's really no silver bullet here of creating FSIA-specific choice of law because the same issues would come up in a case against a private entity located abroad.

JUSTICE ALITO: Would you be less comfortable with the position you're taking if at some point in the future the Court were to say that federal law cannot preempt state law simply based on federal interests that are not embodied in a statutory provision that actually conflict with state law?

MS. HANSFORD: I -- I think, if this Court were to substantially narrow preemption, I -- I -- I guess that that would be an argument for reading 1606 a little bit differently.

I think the way the FSIA was drafted against the background of preemption principles as they -- as they exist, but I think another way to think about 1606 in that circumstance would be as a matter of federal law, specifying that you're looking to state law principles, except to the extent that -- that 1606 superimposes a layer on top of that, so I think there would be that way of going about it.

JUSTICE ALITO: Could I ask you the question that I asked Mr. Boies about what would happen in a situation where a jurisdiction's choice-of-law rule treats an instrumentality of a foreign state differently from a private individual, what -- or a private entity. What would happen in that situation?

MS. HANSFORD: I agree with Mr. Boies that Section 1606 essentially says look at the law that applies to the private entity or the private individual and apply that law to the foreign sovereign.

So I think that's the normal operation of it. I think that's generally how it's understood in the FTCA context, which has the same provision that if the law does draw a distinction between public and private, you normally -- you look as -- as a general matter.

Now I will note that it's possible that there could be some particular sensitivity, some extra FSIA principle that would operate against that in a particular case if there was really a sensitivity involved, but I think that is the import of the plain text.

JUSTICE ALITO: Well, in light of that

complication, why isn't it simpler to analyze this case just under the Rules of Decision Act?

MS. HANSFORD: You could analyze it under the Rules of Decision Act, Justice Alito. I think, because the Rules of Decision Act says unless law provides otherwise, and we think that Section 1606 does provide otherwise, and we think that this equal treatment principle is the preeminent principle here, we think that that's the most direct way to get there.

JUSTICE ALITO: Well, do you think there's some problem with analyzing it under the -- under the Rules of Decision Act? What -- what is the problem? Is the problem the opinion in Klaxon? Can't Klaxon easily be understood as simply based on the Rules of Decision Act?

MS. HANSFORD: I -- I -- I think the -- the problem is just that by its own terms, the Rules of Decision Act doesn't seem to apply when there is an on-point statutory provision. And we think that Congress could alter the provision that --

JUSTICE ALITO: Well, I understand. But the premise of this is that 1606 may not

come into play until the choice-of-law question has been decided.

MS. HANSFORD: And -- and -- and I would push back on that point, Justice Alito. I think that that does not work as a matter of statutory text, but I also think the Court has already crossed that bridge in the Richards decision because it did interpret the identical same manner and to the same extent principle as applying at the choice-of-law stage and, in fact, as the primary reason for incorporating state choice-of-law principles so that that question that Justice Thomas asked, I do think Richards is an answer to that, as well as just the textual principle that you can't impose liability in the same manner if you're using fundamentally different rules.

CHIEF JUSTICE ROBERTS: Justice Thomas?

JUSTICE THOMAS: No.

CHIEF JUSTICE ROBERTS: Justice Breyer?

Justice Alito?

Justice Sotomayor, anything further?

JUSTICE SOTOMAYOR: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?
Justice -- Justice Barrett? No?
Thank you, counsel.
Mr. Stauber.

ORAL ARGUMENT OF THADDEUS J. STAUBER
ON BEHALF OF THE RESPONDENT

MR. STAUBER: Mr. Chief Justice, and may it please the Court:

Nothing in the Foreign Sovereign Immunity Act or its foreign affairs origins mandates that federal courts sitting in judgment of a foreign state's private or public acts must employ a forum's choice-of-law test where the forum has little or no connection to the claims or the basis for jurisdiction and the test ignores the federal and foreign concerns that underpin the FSIA.

In the absence of an explicit statement, Congress did not intend that California's choice-of-law test should determine the substantive law to apply to a foreign state alleged to have committed a wrong within its own borders. But for Mr. Cassirer's retirement to San Diego, California would have no interest in this case.

As this Court in Verlinden tells us, the FSIA arises out of Congress and the executive's shared goals of normalizing relations among nations during the Cold War and bringing the U.S. in line with international law norms, as recognized by this Court in Philipp v. Hungary -- Germany.

To achieve these goals, the FSIA establishes a federal regime that is intended to ensure fair and uniform treatment regardless of where in the United States a foreign state is held. Because it implicates foreign relations, the choice-of-law analysis fits comfortably within a discrete recognized federal common law enclave, one that does not intrude into an area of traditional state interests.

Once federal common law determines the proper substantive law, that law is applied to the foreign state in the same manner and to the same extent as a private party under like circumstances. The foreign state doesn't get any special treatment in the Court's liability analysis.

Section 1606 relates to the

application of substantive law, not to the choice-of-law test, the precursor to the liability analysis that determines which substantive law to apply.

Klaxon recognizes that federal courts exercising diversity jurisdiction must apply the forum's choice of law, but FSIA cases do not arise under diversity jurisdiction.

Moreover, Klaxon's stated goal of deterring plaintiffs from shopping for a more favorable forum by taking their state law claims across the street to a federal court is not relevant as Congress wanted FSIA cases to be litigated in federal courts.

I would be happy to address any questions that the Court may have.

JUSTICE THOMAS: Counsel, I don't quite understand how the sovereign can be treated in the same manner as a private individual if you apply different choice-of-law rules.

MR. STAUBER: Well, Your Honor, in the context of a private party, a private party is before the court in diversity. A foreign sovereign is not before the court on diversity

but, as Verlinden tells us, is more before the court akin to a federal question.

Therefore, to put the private party and the foreign sovereign in a like circumstance, we actually have to put the private party in a forum or more -- more akin to a forum question in order to get them into a like circumstance. And in that case, federal common law would apply the choice-of-law test, not a forum states.

JUSTICE KAGAN: I guess I don't understand the premise of your answer. I mean, you -- you seem to be suggesting that we should understand this as a federal question case. But these are not federal question claims. These are state claims.

MR. STAUBER: Correct. The underlying claim --

JUSTICE KAGAN: So why should we think of it as like a federal question when this -- this suit is not based on federal law?

MR. STAUBER: Because this -- but for the Foreign Sovereign Immunity Act, the foreign state would not be before the United States federal courts.

The underlying claim may be a California state claim, it may be in this case a Spanish foreign claim, which is why, as we were -- the Court was discussing earlier, you have to always see it through the lens of the foreign state and the fact and the manner and the treatment in which it was brought and haled before this Court.

Only in that context can then you have a like circumstance where the plaintiff is likewise not on diversity before the court but in some question that brought it before the court addressing a particular concern.

JUSTICE KAGAN: That seems to be treating the foreign state in a way that it's -- it's really the opposite of the -- of the way the FSIA instructs in 1606 because what I take 1606 to essentially be saying is, once you've decided that the sovereign immunity doctrines of -- of the FSIA don't apply, the foreign state really isn't very special.

And -- and -- and your answer to Justice Thomas was essentially to say: Yes, even once sovereign immunity does not apply, the foreign state is extremely special and has

to be treated differently.

MR. STAUBER: No, the -- the foreign state needs to be treated in a fair and balanced manner. It does not get extra special treatment with respect to the liability which may befall it.

As in this case we heard earlier, if, in fact, Spanish law applies, the private party in Spain would also under these facts either have retained the painting or lost the painting because the substantive law would have applied to the same.

JUSTICE KAGAN: Right. But you're saying that even though the sovereign immunity threshold has been met, there is no sovereign immunity here, still, the foreign state gets different treatment with respect to choice of law. And I'm saying, why?

MR. STAUBER: No, we're not saying that the foreign state gets any different treatment with respect to the choice of law. We're saying that in order for you to put the like circumstance together, the private party would not be before -- the Spanish private party would not be before the U.S. courts on

diversity grounds because the foreign state is not here on diversity grounds.

Now you're going to have to run a whole lot of traps to get a private Spanish party before a U.S. court when the property is not in the United States, when the act which caused the wrong or the loss of the property or the commercial act didn't occur in the United States. We submit diversity would probably never work to get the private party here. But, aside from that, the like circumstance is not based on diversity.

JUSTICE BREYER: Well, so let's follow through what you say. I see what -- I think I see it. It says the foreign state, Spain, shall be liable in the same manner and to the same extent as a private individual under like circumstances.

MR. STAUBER: Yes.

JUSTICE BREYER: Your view is the like circumstance is you're in a federal court.

MR. STAUBER: Yes.

JUSTICE BREYER: Okay. Here, they happen to be suing under California law for -- property law.

MR. STAUBER: Yes.

JUSTICE BREYER: Conversion, I think.

MR. STAUBER: Yes.

JUSTICE BREYER: Okay? Fine. Now let's see. So we pretend that we are in a federal court suing for conversion. How do we get into federal court? I mean, it's sort of interesting. I mean, is it supposed to be an arising-under case? Do we pretend it's arising under? Maybe we should pretend it's a -- a bank conversion case, in which case maybe the law of the Vatican applies. I don't know.

I mean, how do we do this? It sounds a little complicated, your view. At least the opposite view is simple. You say what it was. It was a -- it's a state claim. State claims belong here in -- under these circumstances, under diversity jurisdiction, and so we apply California law. Okay?

But what is your view? We don't even know what the claim is supposed to be.

MR. STAUBER: Your Honor, we would -- your -- Justice, we would submit that our view is actually the simpler view because, if you have a uniform federal common law choice test

that will apply in all of the federal circuits and therefore apply in all of the 50 states, then you will not end up with a disparity of treatment for a foreign state regardless of where it appears.

JUSTICE BREYER: Okay. My only problem with that is I can't think of any private individual who would be treated that way.

MR. STAUBER: Yes, Your Honor. You would be treated -- Justice, you would be treated differently on your choice-of-law test in particular on a state forum with bias towards the private party if you were in Kentucky or if you were in Michigan.

And at the present time, the choice-of-law test by forum, the majority use the Restatement, which is used by the federal common law approach. And we can never forget that the underpinning reason for the Foreign Sovereign Immunity Act was to take both the executive branch and the courts out of the ad hoc basis of disparate treatment of foreign sovereigns on a case-by-case basis.

So our approach actually brings

predictability, uniformity, and prevents the hostile outcomes, which we submit you do not actually have a resolution for because, as this Court, most recently in Philipp v. Germany and in Simon v. Hungary, passed on the question if international comity is an available affirmative defense. And, in fact, as the Turkish government recently learned in the Washington, D.C., courts, international comity was not available to it.

This case, we would submit, is a test case for you in the study that after-the-fact stepping in by the United States or by the -- or by the courts later in a case to remedy what could be a constitutional violation or an overreach of a state in its territorial interests does not work.

This case was originally filed in 2005. We didn't get to the choice-of-law question until 2015. So --

JUSTICE ALITO: If --

MR. STAUBER: -- the foreign state has been in litigation for 10 years, no longer has international comity available to it. And foreign states do not enjoy, as a private party

does, the benefit of due process.

JUSTICE ALITO: If this is to be decided under federal law, federal common law, who is going to decide that and on what basis?

MR. STAUBER: If this is to be decided under federal common law choice of law?

JUSTICE ALITO: Yeah, federal common law choice of law.

MR. STAUBER: It -- it will be, as happened here, the district court, which had jurisdiction under the Foreign Sovereign Immunity Act and applying it as it did.

JUSTICE ALITO: No, I mean, what is going to be the substance of this federal common law choice-of-law principle?

MR. STAUBER: What is going to be the substance?

JUSTICE ALITO: Where are we going to find it?

MR. STAUBER: Ah. We will find it where we now find it. We find it in the Restatement.

JUSTICE ALITO: Why?

MR. STAUBER: Because that is where the federal courts have decided to look.

JUSTICE ALITO: Why?

MR. STAUBER: Because those are the principles which take into consideration the international relations which underpin the Foreign Sovereign Immunity Act. As we --

JUSTICE ALITO: Well, what if -- I mean, what if the -- the Ninth Circuit says we're going to look at the -- at the Second Restatement, and another circuit says we're going to look at the First Restatement, and another circuit says we don't like either of those, we're going to develop our own choice-of-law rules? Would we have to decide what the choice-of-law rule was?

MR. STAUBER: I think that is where this Court is very well positioned to set forth uniform choice-of-law rules under federal common law --

JUSTICE ALITO: Well, why are we in --

MR. STAUBER: -- and the Foreign Sovereign --

JUSTICE ALITO: -- a position to do that? That involves very -- it involves serious policy questions, doesn't it?

MR. STAUBER: It involves, I think, a

very straightforward application, as this Court did most recently in Philipp v. Germany, where it looked to the guiding international norms, it looked to the conflicts of law, it looked to the Restatement to define the definition of a violation of international law.

That is something that this Court is -- is well positioned to do, to provide the guidance to all the federal circuits as to the application and use of the federal common law choice-of-law test.

CHIEF JUSTICE ROBERTS: It seems to me that you're seeking the benefit of the fact that your -- or your client is, that it is a foreign sovereign, sort of at every different stage of the analysis, before you can get hauled -- haled into court and how you can be treated at different stages.

And it seems to me that at some point, 1606 sort of says, okay, you've gotten the advantage of being a foreign sovereign in our treatment in -- in -- in our courts, but no more. Now that you've gotten down to this level, we're going to treat you like a private party.

MR. STAUBER: Correct.

CHIEF JUSTICE ROBERTS: And that should extend to choice-of-law issues at that point as at -- as any other.

MR. STAUBER: We would submit that it doesn't trigger until actually you get to the substantive law, which is the choice of law. Not -- I'm sorry, not the choice of law, but, actually, the substantive law that applies.

The choice of law and the substantive applicable law are not necessarily one and the same. They may be --

CHIEF JUSTICE ROBERTS: Sure.

MR. STAUBER: -- in Klaxon. They may be in diversity. But that is not for which we do sit. And, therefore, the overarching policy that drove the Foreign Sovereign Immunity Act in 1976 was -- was, in fact, that a foreign state -- we're not asking for special treatment. We're not asking for different treatment. Once we're before the courts, we're asking for fair and balanced treatment, but always acknowledging the fact that we are a foreign state. And we never leave --

JUSTICE KAGAN: And where do you get

that --

MR. STAUBER: -- that distinction behind.

JUSTICE KAGAN: -- where do you get that from? Where do you draw the line? And you say, well, 1606 doesn't kick in until after the choice-of-law question. Where do you get that from? Is it from the words of 1606? Is it from some idea of legislative history? Is it from some idea of good foreign relations policy? Where is it coming from?

MR. STAUBER: I would say, Your Honor -- Justice, it's coming from all of those. I mean, first of all, the Foreign Sovereign Immunity Act, when Congress drafted it in its legislative history, it speaks ultimately in its adoption not to Klaxon. It, in fact, removes the foreign sovereign from diversity. It could have simply added to 1332 and included these types of claims. It did not. It -- it created 1330, which is not based on diversity.

I would submit it's in the language itself. The language does not state that you use a state forum's choice-of-law test. It

simply states that you treat the -- the private party and the foreign state as to its liability in saying --

JUSTICE KAGAN: Right, but you're not going to be liable in the same manner and to the same extent as a private individual if two different sets of law are used.

MR. STAUBER: That's correct, Your Honor, but they're not going to be treated as -- in the same manner and the same as a private party if they're now shifted over to a diversity setting, which wasn't the basis of jurisdiction in the first place.

The Rules of Decision came up as a -- as a question that was in the -- in the Court's interest, and I want to point out that the Rules of Decision does not actually apply here because, under the Rules of Decision, they're based on diversity. We are not sitting here in diversity. The Rules of Decision were passed in 1908. They -- they precede the Foreign Sovereign Immunity Act of 1970 -- 1976.

I also want to point out that the Foreign Sovereign Immunity Act, as this Court in Verlinden tells us, applies to both U.S.

citizens and non-U.S. citizens. In that scenario, as we know from the Holy See case in the Sixth Circuit, you may have a situation where you have a class action. And class actions are starting to arise in this expropriation context. And in a class action, in this -- from this Court in Schutt, we know that each individual plaintiff is subject to a separate choice-of-law test.

So what will happen here in this scenario is you would have in -- in any one of the cases that are coming up in which a plaintiff is a foreign citizen that this Court takes jurisdiction under the Foreign Sovereign Immunity Act, you would have a state's choice-of-law test applying to decide what the substantive law is to, for example, a Spanish citizen who's filed a case against the Kingdom of Spain. Or, in the case that is proceeding now before the District Court of Columbia in Simon v. Hungary, you would have a Hungarian citizen who is a member of the class, and their choice-of-law test would be based on D.C. as to their case against the Hungarian state.

We submit, Your Honors, that the

foreign relations concerns that drove the creation of the Foreign Sovereign Immunity Act are the same foreign relations concerns that continue to drive its application today. And the use of a state law forum choice of test is not called for, required, or mandated by Congress or by the statute.

CHIEF JUSTICE ROBERTS: Can't the various considerations that you've been talking about be applied fully at the liability stage? Why -- why is it necessary that -- is it -- is it the only way you can protect the foreign interests if the federal government, for example, has that interest is at the choice-of-law stage? Can't you -- can't those be taken into account when you get to the substantive law?

MR. STAUBER: They --

CHIEF JUSTICE ROBERTS: I mean, if there's some problem with the state choice of law because the choice they've chosen is one that prejudices foreign sovereigns in a way that's contrary, as our federal government would say, to the national interest, why can't you take that into account at that point?

MR. STAUBER: You can take it into --
CHIEF JUSTICE ROBERTS: Just a starting point, in other words.
MR. STAUBER: You -- you can take it into account, Your Honor. We're not saying you can't take it into account, but we're saying that you need to, in order to provide predictability and uniformity, which is one of the tenets of the Foreign Sovereign Immunity Act for the foreign, they need to know once they're haled into the U.S. court whether they're haled in in Arizona, in Iowa, in Michigan or Kentucky, that they're going to be treated fairly and they're going to be treated the same.
To find that out 10, 12, 15 years later after the litigation has been going on undercuts the very policies of the Foreign Sovereign Immunity Act.
CHIEF JUSTICE ROBERTS: Well, I think it's pretty fair at that stage to tell them you're going to be treated the same as a private party when it comes to the question of choice of law. Now maybe you've got a special argument about your -- based on your foreign

status, and you can raise that when you get to the point and say, okay, choice of law is this, and you say, well, here's why it doesn't protect our interests, and maybe you get Ms. Hansford's client to come in and agree with it. I just don't know why that has to take place at the choice-of-law stage.

MR. STAUBER: Because you -- you would end up with a different outcome, disparate treatment to the foreign state, if it was haled into a different state.

If this case had proceeded in New York, where Mr. Cassirer first moved to when he came to the United States, we would have a different outcome. If this case proceeded in Ohio when he moved there in the 1950s, we would have a different outcome.

But for the fact that Mr. Cassirer chose to retire to California, we now have a -- a third different outcome. That is not consistent with the concerns that were addressed -- needing to be addressed under the Foreign Sovereign Immunity Act, and we would submit --

CHIEF JUSTICE ROBERTS: Well, you know

--

MR. STAUBER: -- one line of 1606 --

CHIEF JUSTICE ROBERTS: -- welcome -- welcome to the United States. That's how the courts work. And a private citizen of the United States moves from New York to Ohio, the law that applies to him is going to change as well.

And we're dealing with a law that says you apply this -- the law to -- to -- to the foreign sovereign as if a private party. And the alternative is what we have said is an unusual situation where you're asking the courts to devise their own body of law that's going to apply in this situation.

MR. STAUBER: We don't think we're asking the court to devise its own body of law. We think we're simply asking the court to -- the federal court which is sitting within a unique federal enclave of foreign affairs where it is precisely strong and well-reasoned to sit in to -- to create a uniform application choice-of-law test to apply to every foreign state.

JUSTICE GORSUCH: Counsel, you -- you

suggest that if -- if you should lose on -- on the choice-of-law question that there are, in fact, constitutional constraints in this case that would prohibit the application of California law.

Your friends on the other side say those arguments have been waived, this litigation's been going on long enough, and we shouldn't take those up or allow those to be presented on remand.

Wanted to give you an opportunity to respond.

MR. STAUBER: I appreciate that, Your Honor.

We do not think those -- those questions have been -- been waived at all, Your Honor. As we articulated earlier, due process is a question that is always at play.

The question of --

JUSTICE GORSUCH: Well, I mean, due process is always in play until you fail to raise the argument.

MR. STAUBER: Well, we did raise the argument.

JUSTICE GORSUCH: And then -- then it

usually isn't in play.

MR. STAUBER: Yeah.

JUSTICE GORSUCH: So at what -- was it in play? Was it preserved below? What have -- what have you got for me on that?

MR. STAUBER: Sure. We would submit it was -- it was preserved below. We have consistently argued and presented to the Court the due process concerns about the application of a California statute which would divest the foreign sovereign's agency or instrumentality of the property right which was already vested at the time this case was brought if you end up applying California law.

And it's not until that application of foreign -- of California law comes into place that you have the constitutional due process violation that needs to be raised.

JUSTICE GORSUCH: How long has this case been going on and -- and --

MR. STAUBER: This case, Your Honor, started in 2005, and it has been going on now for 15 years, which is why we submit it is precisely a case that is ripe for this Court to affirm the Ninth Circuit's application of

the -- in this particular case, the federal common law choice and, in particular, since it landed both under the California choice-of-law test and under the federal common law choice-of-law test at the same result, we do think that in either way, this Court can affirm the -- the Ninth Circuit's decision.

JUSTICE GORSUCH: I guess I'm just wondering if -- if -- if I were to think that the Chief Justice's line of questioning has some force and that the state law should be the default, but there might be some constitutional backstop arguments and if I have serious doubts about whether those constitutional backstop arguments have -- have been presented, whether it might be time to call this one to a close.

MR. STAUBER: Call which one? The case itself to a close?

JUSTICE GORSUCH: The case, yeah. I mean, 15 years, 16, whatever, 17 years it's been? On choice of law, we haven't gotten past choice of law? Did you want to -- or, no --

MR. STAUBER: We did -- well, we did get past choice of law, Your Honor, in 2015 with the -- with the motion for summary

judgment when the choice of law was decided and then we did a full trial on the merits. And based on a full trial on the merits, the Court determined that the --

JUSTICE GORSUCH: I appreciate that, but here we are back at the starting gate potentially, right? I mean --

MR. STAUBER: Well --

JUSTICE GORSUCH: -- we would have this case start all over again in some ways.

MR. STAUBER: Well, in some ways, we -- we would, which is why we think this is not a case -- because it would have gone both to the Thyssen-Bornemisza under California choice of law and under federal common law choice of law, but the trial court, which did examine the issue and whose factual findings are due deference, did find that Spanish law should apply to the ultimate outcome.

So I would share this Court's concern that, yes, I think you bring this case to a close either under the California choice-of-law test or the federal common law choice-of-law test, but I do think it is time to bring the case to a close.

JUSTICE ALITO: Well, this is not the issue before us, but what -- can -- can you state in a simple -- in simple terms what is the arguably relevant difference between California -- California's choice-of-law rule and the Restatement?

MR. STAUBER: Yes. California's choice-of-law rule test does not take into consideration the very federal and international concerns which are taken into consideration under the federal common law.

In other words, in this particular case, California's choice-of-law test does not take into consideration the Terezin Declaration or the Washington Principles or the Holocaust Era Art Restitution Act of 2016.

It does not take into consideration those national policies which formulate the United States' position that these court -- these cases should be brought to a fair and just resolution through some sort of negotiation or alternative resolution in respect for the laws of all states, not just the United States.

And by forcing a federal court to use

the state law choice, you are in effect handcuffing that federal court judge who is attempting to administer their case in a fair and balanced way to take into consideration these competing interests which are at play in extraordinary expropriation cases.

JUSTICE BREYER: So you agree then -- you -- you agree with the district -- that the district court was wrong? You agree with your opposing counsel that the district court, in saying that California would choose Spanish law, you both think he's wrong?

MR. STAUBER: No. I think the district court was right in its application --

JUSTICE BREYER: When it comes to the same law, Spanish law, what are all these differences you're talking about?

MR. STAUBER: No. What -- I am saying that in applying the California choice-of-law test, the district court applied it correctly and landed at the result that under the California choice-of-law test, Spanish law applies.

It also applied the federal approach correctly and landed at Spanish law. What I'm

saying is that by man- -- by this Court mandating or allowing it to proceed in 50 different states under 50 different choice-of-law tests, you will be telling a federal court judge -- 700 different federal court judges that when cases involving the expropriation exception, cases which by definition include international concerns in our relations among nations, that you are forced to use that forum choice law test which may not, in particular, in Kentucky, in Michigan, or in any one of the states that doesn't currently use the Restatement, you may not take those federal international concerns into consideration.

JUSTICE SOTOMAYOR: Counsel, going -- I'm too much a practical person for this argument that you're raising. If California law and federal law, you say, both correctly point to the application of Spanish law, what are you afraid of?

MR. STAUBER: I'm not --

JUSTICE SOTOMAYOR: They're -- you're afraid of something. You're afraid that they're right, that some aspect of California

law can hurt you, correct?

MR. STAUBER: No, Your Honor, I -- I would beg to differ with that. And if I've given that impression, I am not doing my job as an advocate. We welcome an analysis if that's what this Court so thinks is necessary under the California choice-of-law test because, as we said earlier, the district court did it correctly with respect to its factual deference and its application of law. And so --

JUSTICE SOTOMAYOR: Now I understood from the briefing by everyone that, in most circumstances, federal and state choice-of-law provisions would come out the same way. Am I correct on that assumption?

MR. STAUBER: In this particular circumstance, it would. In 27 states which use the Restatement, we -- we -- we think it would.

But the problem is that in this -- we -- when you take this case and you bring this case forward, it speaks to the -- the entire Federal Circuit. And our concern being expressed here is not for our particular case at hand but the implications for foreign sovereigns who are haled into jurisdictions

which don't use the Restatement, may choose to use a fed -- a state law choice-of-law test that is biased.

JUSTICE SOTOMAYOR: And that may raise constitutional claims, as the Petitioner and the SG stated, correct?

MR. STAUBER: It raises constitutional claims. It raises international comity claims.

JUSTICE SOTOMAYOR: But you're not claiming that any of those are raised here?

MR. STAUBER: At the present time, it would be -- if the court decided, that is, the Ninth Circuit decided, to apply California's choice-of-law test in a way that applied California law, we would submit that would be a constitutional violation. It would be an extraterritorial reach of California state law, which California state has no interest in this case but for an individual, in this case a U.S. citizen, but in another case, it could be a non-U.S. citizen who chooses to move to Alabama or Florida or anywhere else for that matter.

JUSTICE SOTOMAYOR: And what would preclude you from raising that argument?

MR. STAUBER: We don't think anything

would preclude us, Your Honor.

JUSTICE SOTOMAYOR: All right. Thank you, counsel.

CHIEF JUSTICE ROBERTS: Justice Thomas?

Justice Breyer?

JUSTICE BREYER: Can everyone agree that this is a beautiful painting?

MR. STAUBER: Yes, it is, Your Honor. It's a very, very beautiful painting. And we take, with all due grace and respect, this Court's attention to this particular case. And that is why we are not advocating necessarily for one outcome or the other. We are advocating for a fair and balanced treatment of the foreign state in this particular circumstance and when it comes to the application of a choice-of-law test under the Foreign Sovereign Immunity Act.

CHIEF JUSTICE ROBERTS: Justice Alito?

Anything further, Justice Sotomayor?

JUSTICE SOTOMAYOR: No. Thank you.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Barrett?

Thank you, counsel.

MR. STAUBER: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Boies, do you have rebuttal?

REBUTTAL ARGUMENT OF DAVID BOIES

ON BEHALF OF THE PETITIONERS

MR. BOIES: Yes. Thank you, Mr. Chief Justice.

First, let me just clarify, we disagree that the Rules of Decision Act only applies to diversity cases. On page 13 of our reply brief, we indicate some authority to the contrary.

The basic point I want to make is that the Respondent cites no case and we are aware of none where this Court has separated state choice of law from state rule of decision. Whether it is viewed under the Rule of Decision Act, whether it's viewed under the Klaxon decision, this Court has repeatedly declined to separate state choice of law from state rule of decision where state causes of action were involved.

In this particular case, Congress has been clear in Section -- Section 1606 that the

state actors should be liable in the same manner to the same extent as the private party under like circumstances.

There's no way, I respectfully suggest, that you can read that language and say that you can have different choice-of-law rules apply when a state actor is involved than when a private museum's involved. A private museum could face exactly the same lawsuit as this public museum could face based on exactly the same painting and exactly the same circumstances.

And the command of 1606 is that that ought to be -- the same rule ought to be applied. Whether it is a good rule or a bad rule is not -- is for Congress to decide. The arguments Respondent make -- and they're fundamentally arguments that 1606 should've been drafted differently. We think it was drafted the right way, but whether it's right or wrong, that is the way Congress adopted it.

We've also -- and I said this at the beginning. We've had 20 years of experience, including in the Sixth Circuit, which is the circuit with Michigan and Kentucky that

Respondent's counsel mentions, where the court has interpreted 1606 consistent with its language and applied state choice-of-law rules. We haven't had any problems in those states -- those situations.

So the issues we think from a policy standpoint are -- are just speculation that are not consistent with what the historical experience has been.

But whether or not it is a good idea or a bad idea, we think 1606 is -- is -- is clear on its face.

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

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