

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

REPUBLIC OF HUNGARY, ET AL.,)
 Petitioners,)
 v.) No. 23-867
ROSALIE SIMON, ET AL.,)
 Respondents.)

Pages: 1 through 92
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10 Washington, D.C.

11 Tuesday, December 3, 2024

12

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

16

17 APPEARANCES:

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19 behalf of the Petitioners.

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23 Petitioners.

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25 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 23-867, Hungary versus Simon.

Mr. Glasgow.

ORAL ARGUMENT OF JOSHUA S. GLASGOW

ON BEHALF OF THE PETITIONERS

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

Hungary and its national railway, MAV, are immune from suit under the Foreign Sovereign Immunities Act unless the expropriation exception applies, and a key phrase in that exception is "exchanged for." There's no dispute that "to exchange" means to give one thing in return for another. Accordingly, domestic courts have jurisdiction over this case only if some present-day asset having a commercial nexus with the United States was given in return for items taken from 14 individuals in 1944.

Respondents have not even attempted to make that showing. Instead, they rest their case on the theory that all fungible assets of

1 Hungary, its agencies, and its instrumentalities
2 were given in return for those specific items
3 taken more than six decades before this case was
4 filed. That's simply inconsistent with ordinary
5 meaning.

6 And while this case can be decided on
7 text alone, history and context confirm the
8 limited scope of the expropriation exception.
9 It arose from congressional opposition to a
10 particular decision of this Court, the Sabbatino
11 decision, which concerned identifiable and
12 traceable property. When Congress enacted the
13 FSIA, it intended to codify the restrictive view
14 of foreign sovereign immunity, not to work a
15 radical transformation of international law.

16 But the commingling theory would do
17 just that. It would undermine important limits
18 in other provisions of the statute and would
19 require U.S. courts to decide claims having no
20 real connection to this country.

21 The D.C. Circuit substantively erred
22 in adopting the commingling theory, and it
23 committed two procedural errors. It imposed a
24 burden of production on sovereign defendants
25 rather than the proponents of jurisdiction, and

1 it declined to ask whether Respondents'
2 allegations made out a valid claim to
3 jurisdiction.

4 The D.C. Circuit's opinion should be
5 reversed, and this case should be dismissed.

6 I welcome the Court's questions.

7 JUSTICE THOMAS: What was -- and --
8 and under your theory, what would Respondent
9 have to show in order to make out jurisdiction
10 using -- employing the commingling theory?

11 MR. GLASGOW: I think there are
12 several types of evidence that a plaintiff could
13 use to establish an exchange even after
14 commingling.

15 So, first, there's the type of
16 mathematical evidence, the most obvious example
17 being a withdrawal from a commingled account
18 that could not have occurred but for a deposit
19 of tainted funds given the prior balance.

20 Second, you can imagine direct
21 evidence, instructions to an accountant to run
22 illegal proceeds through the books of a company
23 before depositing them into a personal account.

24 And, third, you can imagine indirect
25 evidence. You might have an atypical deposit of

1 a specific amount into an account, followed
2 shortly thereafter by a withdrawal in the same
3 amount.

4 Under those circumstances, a fact
5 finder might be able to conclude that an
6 exchange has occurred using ordinary meaning.
7 But simply showing that funds entered into the
8 general revenues of an entire nation that, you
9 know, contain billions of dollars, followed by
10 untold numbers of transactions following that
11 deposit, simply isn't consistent with the plain
12 text.

13 CHIEF JUSTICE ROBERTS: What if
14 there's -- the country has an account that is
15 95 percent composed of funds from appropriated
16 property, 5 percent isn't? Is your argument
17 still the same? And -- and the entity in the
18 United States spends less than 5 percent of the
19 proceedings.

20 MR. GLASGOW: I -- I think there are
21 close questions, but, in -- in those
22 circumstances, maybe a fact finder could say
23 it's at least as likely as not that tainted
24 funds are involved.

25 And -- and the details would matter,

1 temporal proximity, as I said, whether there's
2 either direct or indirect evidence, but,
3 potentially, those types of claims could
4 qualify, yes.

5 CHIEF JUSTICE ROBERTS: So it doesn't
6 matter -- commingling doesn't mean that it's
7 some taint from property that is -- is -- funds
8 that are not from appropriation? That can't be
9 the entire rule?

10 MR. GLASGOW: Right. We're not
11 suggesting that commingling is fatal. In the
12 vast majority of cases, commingling will make it
13 impossible to trace funds. But the ultimate
14 question is -- is simply whether, in ordinary
15 meaning, somebody would refer to the subsequent
16 withdrawal as being exchanged for the initial
17 deposit.

18 JUSTICE KAGAN: And doesn't this
19 provide a roadmap to any country that wants to
20 expropriate property? In other words, just sell
21 the property, put it into your national
22 treasury, insulate yourself from all claims for
23 all time?

24 MR. GLASGOW: I think this Court was
25 clear in Altmann that the FSIA was not intended

1 to direct or incentivize other nations in the
2 ordering of their affairs. It's not a
3 substantive --

4 JUSTICE KAGAN: Well, I -- I was just
5 sort of suggesting that Congress wouldn't have
6 wanted to write a provision that has no meaning.
7 And, under your theory, I think that there would
8 be precious little meaning to this because it
9 really just, you know, gives foreign countries
10 an easy way to expropriate property and make
11 sure there's no accountability for that
12 expropriation.

13 MR. GLASGOW: I'd make three points in
14 response.

15 First, the FSIA doesn't make
16 expropriation unlawful. Other forums may be
17 available where an unlawful taking could be
18 litigated or perhaps settled through
19 international espousal.

20 Second, Congress knew that these types
21 of claims would be rare. It was informed when
22 it passed the second Hickenlooper amendment that
23 it would apply to a tiny fraction of
24 expropriation claims around the world. The --
25 the Congress was attempting to overrule

1 Sabbatino, not to establish a broad new type of
2 claim that would work, again, a radical
3 transformation of international law.

4 And, third, regardless of what this
5 Court decides in terms of the commingling
6 theory, foreign nations can avoid U.S. courts
7 regardless. A foreign nation could expropriate
8 property, segregate it, and keep those proceeds
9 out of the United States and thereby avoid the
10 commingling theory even if it were adopted.

11 JUSTICE BARRETT: Counsel, on that
12 point about other fora, what about this case?
13 Is there another forum in which the plaintiffs
14 could pursue their claims?

15 MR. GLASGOW: Yes. The parties
16 litigated extensively whether Hungary provided
17 an alternative forum. The district court's 2017
18 decision goes through that analysis. The
19 district court found that Hungary was an
20 available forum.

21 JUSTICE BARRETT: Was or was not?

22 MR. GLASGOW: Was an available forum.
23 The D.C. Circuit reversed that decision because
24 it concluded that exhaustion was not required
25 and that the district court abused its

1 discretion in weighing the various forum
2 non-conveniens factors. But it didn't overturn
3 that core finding that these claims could have
4 been brought in Hungary. And, certainly, I'll
5 acknowledge that Hungary has a European civil
6 legal system that differs in many respects from
7 the American system, but that doesn't make a
8 forum unavailable.

9 There's also the traditional method of
10 espousal, bilateral settlement agreements.
11 Hungary's entered into multiple such agreements,
12 including with the United States regarding World
13 War II era claims. That treaty is in the record
14 at Docket 22-5.

15 JUSTICE BARRETT: Let me ask you a
16 question about jurisdiction. If sovereign
17 immunity is a jurisdictional question, how come
18 you concede in your brief at page 43 that
19 Hungary would bear the burden of persuasion on
20 that point?

21 MR. GLASGOW: We didn't --

22 JUSTICE BARRETT: The Solicitor
23 General doesn't think so.

24 MR. GLASGOW: That's right. And we
25 certainly don't have any objection to the Court

1 reaching the Solicitor General's argument. But
2 we didn't preserve that issue. We didn't argue
3 it before the D.C. Circuit. And so it was -- it
4 was unavailable for us to argue here.

5 JUSTICE GORSUCH: Who -- who do you
6 think is right about that? Often, in domestic
7 sovereign immunity cases, the plaintiff bears
8 the burden. But, at least as I've explored the
9 pre-FSIA case law, it was the foreign state that
10 bore the burden in foreign sovereign immunity
11 cases. Help me.

12 MR. GLASGOW: I think it makes some
13 sense for there to be some sort of initial
14 burden on a foreign state to establish that it
15 is a foreign.

16 JUSTICE GORSUCH: I got that, but I'm
17 not talking about the burden of production.
18 We're talking about the burden of persuasion.
19 And as I -- as I read -- am I wrong about that,
20 that the -- the pre-FSIA cases did place the
21 burden of persuasion on the foreign entity?

22 MR. GLASGOW: I -- I don't know the
23 answer to that question --

24 JUSTICE GORSUCH: Fair enough.

25 MR. GLASGOW: -- having not made the

1 argument.

2 JUSTICE GORSUCH: Fair enough. Okay.
3 Thank you.

4 JUSTICE SOTOMAYOR: Could I ask a
5 question going back to something that the Chief
6 Justice asked you. How do we write this?

7 The D.C. Circuit espoused a historical
8 commingling theory, and you want us to say
9 that's not enough. Give me -- what's the
10 affirmative thing we say so that we encompass
11 your -- your beginning point in response to
12 Justice Thomas that it's not that we're
13 rejecting commingling? What are we rejecting?

14 MR. GLASGOW: I think what the Court
15 should reject is commingling without more.
16 Commingling is an obstacle to establishing that
17 an exchange has occurred.

18 JUSTICE SOTOMAYOR: So what's the
19 "more?" Is it tracing?

20 MR. GLASGOW: Yeah. There -- the
21 parties have provided numerous synonyms for
22 exchange: "return for," "consideration for."

23 JUSTICE SOTOMAYOR: Well, but that's
24 what I want to hear from you, which is: Which
25 is the clearest and -- and more -- most succinct

1 way to articulate the concept so that we're not
2 saying that merely commingling is what throws
3 you out of the courtroom?

4 MR. GLASGOW: I -- I think the rule is
5 that to establish an exchange, the item at the
6 beginning and the item at the end of the
7 proposed transaction have to be given in return
8 for one another.

9 And -- and I recognize that "return"
10 is a synonym for "exchange," and potentially
11 more judicial gloss could be placed on the
12 phrase. But, typically, when I'm saying that I
13 give Item A in return for Item B, I'm seeing --
14 I'm saying that I -- I gave Item A for the
15 reason that I received Item B. There's some
16 real and substantial connection between those
17 two things.

18 JUSTICE SOTOMAYOR: Now you're not
19 using the word "tracing." Why?

20 MR. GLASGOW: "Trace" in this context
21 means to connect, so you have to establish a
22 real and substantial connection at -- at -- at a
23 bare minimum.

24 JUSTICE SOTOMAYOR: Do we have to go
25 to either of the two additional questions you

1 presented to us?

2 MR. GLASGOW: No, the Court doesn't
3 have to address those issues. There's a number
4 of decisional paths that are available. And
5 perhaps the easiest one is to say that the facts
6 as alleged here or even based upon the evidence
7 submitted by Respondents does not establish that
8 interest payments made in 2005 were exchanged
9 for the items taken in 1944.

10 Certainly, the other two issues are
11 presented, and the Court could reach its
12 ultimate conclusion by way of either or both,
13 but perhaps the easiest way to do it is to
14 simply say that this theory fails under any
15 standard.

16 JUSTICE GORSUCH: Mr. Glasgow, in
17 your -- in your exchange with Justice Sotomayor,
18 you mentioned the word "tracing," but -- but we
19 kind of dance around that. There -- there's a
20 rich case law about tracing when a fiduciary
21 takes funds.

22 What extent should that inform us?

23 MR. GLASGOW: I think the common law
24 doctrines regarding tracing are of limited value
25 here because whatever --

1 JUSTICE GORSUCH: Why? Let me just
2 push back on that for a second.

3 Both sides lean awful heavily on the
4 word "exchange," and you've got your dictionary,
5 they've got theirs. That's great. But why
6 should we ignore that body of case law that's
7 been developed over a very long period of time
8 to deal with this kind of problem? Why wouldn't
9 we assume that Congress meant to adopt or at
10 least reference it?

11 MR. GLASGOW: For two primary reasons.

12 First, you have to look at the
13 statutory text. We have to start with that
14 text. And I don't think there's any real
15 dispute about what the ordinary meaning is.
16 Those trust law rules are not based on an
17 ordinary meaning of "exchange."

18 And, second, I think many -- and it
19 depends on which specific rules we're talking
20 about, but many of the traditional common law
21 rules regarding fiduciary duties, for example,
22 are legal fictions. You'll find any number of
23 cases describing them as such. And the
24 jurisdiction of the federal courts should not be
25 expanded by way of legal fiction. That's simply

1 not permissible under our structure of
2 government.

3 JUSTICE BARRETT: Let me return to
4 Justice Sotomayor's question to you. What's the
5 test? It's not tracing. You know, you said
6 "real and substantial connection," but that
7 doesn't really seem connected to "exchange."

8 So give me something to hold onto
9 that -- that does bear some relationship to the
10 text if you don't want to pull from traditional
11 fiduciary law.

12 MR. GLASGOW: I think you can use the
13 ordinary meaning that Respondents have posited,
14 that you have to say that the item at the end of
15 the transaction was given in return for the item
16 at the beginning of the transaction.

17 And that's -- obviously, there are --
18 there are edge cases that you can imagine, but,
19 in the vast majority of cases, that's a simple
20 test that -- that ordinary language is -- is
21 fully capable of handling.

22 JUSTICE BARRETT: Is it turning on
23 intent when you say you give something for
24 something else? Like I'm intending to use the
25 pot of money that I expropriated in order to

1 obtain this? Is it -- I -- I don't understand
2 how -- you said it's easy in the mine run of
3 cases to look and see, but I'm not sure why it's
4 easy. What am I looking for?

5 MR. GLASGOW: Yeah. So I think the --
6 in the vast majority of cases, an exchange is --
7 is simple and obvious, a swap. One person gives
8 one thing and receives another in return. And
9 that's -- that's the type of thing that Congress
10 was looking at.

11 You know, in the Sabbatino case, of
12 course, there's the -- the shipload of sugar
13 given in return for a bill of lading that's
14 negotiated for a -- a specific and identifiable
15 pot of cash. Those are the kind of core cases
16 that Congress was thinking about.

17 Certainly, you can imagine more
18 difficult cases, but this isn't one of them.
19 I'm providing substantial connection as -- as a
20 bare minimum. I think that it probably is not a
21 matter of intent.

22 To the extent you really had to dig
23 for additional judicial gloss, I might say it's
24 something like causation: The reason I gave you
25 Item A is because I received Item B and vice

1 versa. But I think that sort of deep analysis
2 really isn't required here.

3 JUSTICE JACKSON: Can I ask you --

4 JUSTICE KAGAN: So --

5 JUSTICE JACKSON: Oh. I guess I'm
6 wondering why your argument hinges on "exchange
7 for." I see those words in the statute, and I
8 could imagine a world in which they are
9 accounted for at the moment of liquidation, that
10 we have the property and it's exchanged for cash
11 and there we are.

12 But it would seem to me that your
13 argument for -- for some sort of tracing
14 requirement comes from other language in the
15 statute, which is the idea here, very plainly
16 expressed, that you have to have property that
17 is owned or is present in the United States.

18 So we have to know that whatever was
19 previously expropriated or exchanged still
20 exists. The statute says it has to be owned in
21 order to be the jurisdictional hook for -- so
22 I'm just curious as to whether or not you ever
23 thought of it in those terms and -- and -- and
24 why we care so much about "exchanged."

25 MR. GLASGOW: Yes. Certainly, that

1 type of transaction is what Congress was getting
2 at. And -- and the statute is written in
3 present tense terms. But, here, Respondents
4 have alleged an indirect connection. And our
5 argument isn't that an indirect connection can
6 never qualify for this.

7 JUSTICE JACKSON: No, but it has to be
8 traced. I mean, my point is, in order for you
9 to know that what is -- you know, the property
10 at issue is owned or is present, we have to find
11 the connection between the original
12 expropriation and what they're pointing to
13 today.

14 And the problem I think you're saying
15 with the commingling theory is that unless you
16 can make such a connection, we don't know that
17 what is happening right now is the
18 expropriation.

19 Do you understand what I'm saying?

20 MR. GLASGOW: Yeah.

21 JUSTICE JACKSON: And -- and that, to
22 me, doesn't -- doesn't have anything to do,
23 really, with the words "exchanged for."

24 MR. GLASGOW: I -- I think what you're
25 getting at is the requirement of identifiable

1 property. And you're right that if we talk
2 about property being present somewhere or being
3 owned in the present day, that requires you to
4 specifically identify something in particular,
5 not assets in general.

6 So I think that's the important part
7 of the statute when it comes to the requirement
8 that some present-day property be identifiable.

9 The "exchanged for" provides the
10 requirement of traceability, of connecting Item
11 A and Item B.

12 JUSTICE KAGAN: I take it -- please.

13 JUSTICE ALITO: No.

14 JUSTICE KAGAN: Yeah, I -- I -- I take
15 it that the long time frame of this case then is
16 irrelevant to you. In other words, let's
17 suppose that this legal regime existed right
18 after World War II ended and these plaintiffs
19 brought their suit, you know, a year later, a
20 year after the events occurred, or two years,
21 whatever it would have been.

22 Same answer?

23 MR. GLASGOW: I think that the time
24 frame is relevant because it affects a number of
25 transactions that have occurred in the interim.

1 JUSTICE KAGAN: Well, this is a
2 national treasury. Presumably, transactions are
3 occurring every day in many -- you know -- you
4 know, there -- it's constantly churning.

5 MR. GLASGOW: Yes. I -- I'd agree in
6 that context that even the passage of a year or
7 two, with thousands or millions of transactions,
8 would probably make property untraceable.

9 JUSTICE KAGAN: And is it odd that --
10 that your rule would set up a distinction
11 between sort of two kinds of expropriated
12 property? I mean, we had a case here a few
13 years ago involving Nazi-expropriated art, which
14 presumably is difficult to exchange. So there
15 you are, and you just have these paintings,
16 and -- and you don't have this commingling
17 issue.

18 But suppose that, you know, another
19 Jewish family had their wealth in diamonds, and
20 that's perfectly easy to exchange. I mean, is
21 it weird that these cases would come out
22 differently just depending on the nature of the
23 expropriated property and how easy it is for a
24 country to commingle it?

25 MR. GLASGOW: No. I think that the

1 burden a plaintiff is going to bear will always
2 depend on the specific facts of the case. What
3 really is at issue here is the conversion to
4 fungible assets, and, in most cases, conversion
5 to a fungible asset that's then commingled with
6 other fungible assets will make tracing
7 impossible. That's just the nature of the
8 statutory language.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito?

13 JUSTICE ALITO: I want to explore the
14 question -- why you resist the argument that we
15 should look to well-established tracing rules
16 from the law of trusts in this situation. Isn't
17 it true that the -- the Hickenlooper amendment
18 itself spoke of claims "based upon or traced
19 through confiscated property?" And if the
20 intent of the FSIA is to -- was to incorporate
21 the Hickenlooper amendment, isn't that a strong
22 argument in favor of tracing?

23 MR. GLASGOW: Yes. I think that when
24 Congress passed the FSIA, it tightened that
25 language. "Exchanged for," I think, carries

1 forward the concept of traceability because it
2 requires a connection. But, certainly, if I
3 were in Respondents' shoes, I would rather be
4 arguing "based upon" than "exchanged for." So I
5 think Congress did make a real effort to tighten
6 that language.

7 The phrase "property exchanged for
8 such property" even by legislative standards is
9 an awkward phrase. Congress didn't say
10 "proceeds" or something similar. And I -- I --
11 I'm not resisting analogies to other contexts in
12 which tracing was required. I specifically
13 would resist the notion that you can apply
14 tracing rules that apply -- legal fictions will
15 presume that the ill-gotten gains were retained.
16 Those sort of things can't be used to expand the
17 jurisdiction of the Court.

18 JUSTICE ALITO: Well, I recognize that
19 the -- the situations are quite different when
20 you're talking about the -- the situation that
21 is addressed by the -- the law of trusts and the
22 situation where a sovereign nation has a
23 treasury with billions, trillions of dollars in
24 it. But, still, do you -- do you think that you
25 would be in danger of losing this case if those

1 tracing rules were applied?

2 MR. GLASGOW: I don't think so, but I
3 will say that I'm cautious given the procedural
4 history of this case. We have been litigating
5 this for 14 years. The case was here once
6 before. Following the remand in Philipp, the
7 theory of the case changed from takings from
8 Hungarians to takings from non-Hungarians.

9 So my concern is that leaving open
10 that sort of legal fiction theory would permit
11 again another change in the theory of this case
12 and further litigation, which effectively robs
13 Hungary of immunity from suit.

14 JUSTICE ALITO: What -- what is the
15 total value of the property that is at issue in
16 this case?

17 MR. GLASGOW: It's not entirely clear.
18 In the complaint, plaintiffs allege it's in
19 excess of \$5 million. There were fairly similar
20 claims asserted in the Abelesz case in the
21 Seventh Circuit, in which the plaintiffs claimed
22 more specifically that it would run in the tens
23 of billions of dollars.

24 Class claims, especially with interest
25 going back 80 years, could be so large as to be

1 economically destabilizing, as the district
2 court expressed.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 JUSTICE SOTOMAYOR: Justice Kagan's
7 questions suggest that having a viable cause of
8 action for the victims, which I hope they do,
9 and you explained to Justice Barrett you believe
10 they do in Hungary, is a consideration we should
11 have under this statute.

12 But I -- I take it that, from your
13 whole presentation in your briefing and this
14 afternoon, that the issue is really whether the
15 U.S. should be that forum, correct?

16 MR. GLASGOW: That's exactly right.

17 JUSTICE SOTOMAYOR: And that the issue
18 that's -- that we're -- when you say we're bound
19 by the statutory language, is that to have a
20 presence in the U.S. for an act that happened in
21 Hungary 80 -- 60 or 80 years ago, that the
22 property that was taken or exchanged has to be
23 present in the United States, correct?

24 MR. GLASGOW: As to Hungary, that's
25 correct.

1 JUSTICE SOTOMAYOR: As -- as to
2 Hungary. Generally speaking, when a statute
3 says you are required to return stolen property
4 or any property exchanged for that stolen
5 property, if I stole the car and sold it for
6 \$20,000 in cash, I don't have to trace where
7 that \$20,000 is. My obligation at the end of
8 the case is pay me the \$20,000. I don't care
9 where you got it -- you get it from. If you
10 lost that 20, but you have another bank account
11 with another 20, you still have to pay me
12 \$20,000.

13 MR. GLASGOW: As a matter of -- of
14 substantive law, when you have a claim against a
15 person, that's correct. But --

16 JUSTICE SOTOMAYOR: When we're talking
17 about a fungible, an item that has been rendered
18 fungible, correct?

19 MR. GLASGOW: Well, liability is in
20 personam in a typical --

21 JUSTICE SOTOMAYOR: Mm-hmm.

22 MR. GLASGOW: -- civil case, so
23 you're -- you're not actually looking at any
24 specific res under those circumstance.

25 Here, there is a requirement that you

1 look to specific property.

2 JUSTICE SOTOMAYOR: That's the point,
3 isn't it? All right. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?
5 Justice Gorsuch?
6 Justice Kavanaugh?
7 Justice Barrett?
8 Justice Jackson?
9 Thank you, counsel.

10 MR. GLASGOW: Thank you.

11 CHIEF JUSTICE ROBERTS: Mr. Joshi.

12 ORAL ARGUMENT OF SOPAN JOSHI
13 FOR THE UNITED STATES, AS AMICUS CURIAE,
14 SUPPORTING THE PETITIONERS

15 MR. JOSHI: Mr. Chief Justice, and may
16 it please the Court:

17 We don't think the commingling theory
18 is supported by the FSIA's text. It says words
19 like "that property," "such property,"
20 "exchanged for." These call to mind specific
21 identifiable property and transactions.

22 And, as a general matter, when you
23 sell property and put the cash in a large
24 undifferentiated account with a lot of
25 withdrawals and deposits coming in and going

1 out, that money has lost its distinct identity
2 as having been exchanged for the original
3 property. And, in that circumstance, you can't
4 satisfy the FSIA's jurisdictional hook, the same
5 as if the original property had been lost or
6 destroyed.

7 I think Respondents' contrary view
8 really is about tainted accounts, but the
9 statutory text, I think, focuses on tainted
10 property, not tainted accounts.

11 I don't want to lose sight of the
12 third question presented on the burden shifting.
13 In the United States' view, that is more
14 important than the commingling theory because it
15 affects every FSIA case, you know, the
16 commercial activity tort, immovable property,
17 and the like.

18 This Court has often said that the
19 party invoking federal jurisdiction bears the
20 burden of establishing it. And Congress in
21 Section 1330 expressly made the FSIA's
22 exceptions jurisdictional. You put two and two
23 together, it means that the plaintiffs should
24 have the burden.

25 I think my light went off, so --

1 JUSTICE THOMAS: So Justice Kagan
2 asked Petitioner whether or not this now is a
3 roadmap to avoid FSIA claims by commingling or
4 having it in a general account.

5 It sounds as though you're willing to
6 concede that from your opening statement, that
7 once it's in an account like that, it's off
8 limits to FSIA claims.

9 MR. JOSHI: Presumptively, yes. There
10 may be unusual facts, and, as my friend noted,
11 it might be you could identify someone who says,
12 hey, here's the proceeds from this expropriated
13 property, please go launder it through the
14 treasury for a day and out. But, absent
15 something unusual like that, yes.

16 But I don't think that that's too
17 unusual given the -- the statutory text. As
18 this Court recognized in Altmann, the FSIA is a
19 jurisdictional statute. It is not intended to
20 shape their conduct -- that was this Court's
21 words -- not intended to shape the conduct of
22 foreign sovereigns. And sometimes that
23 principle, as in Altmann, applied neutrally,
24 results in a plaintiff-friendly ruling.
25 Sometimes, as here, I think it results in a

1 defendant-friendly ruling.

2 But I don't think it's -- it's that
3 odd that a statute meant to be jurisdictional
4 and the expropriation exception in particular,
5 intended to be and recognized by this Court as a
6 small departure from the restrictive theory of
7 sovereign immunity, would not cover a lot of
8 cases that are beyond where Sabbatino as a
9 touchstone would -- you know, would indicate
10 that it applies.

11 JUSTICE KAVANAUGH: One of the
12 important things, I think, with making sure we
13 don't read it too expansively is friction with
14 other countries and, if other countries adopted
15 a similar expropriation and commingling theory,
16 the effects it would have on the United States.

17 Can you explain both of those and how
18 the United States is looking at both of those
19 issues with respect to the issue in this case?

20 MR. JOSHI: Yeah. I -- I think that's
21 exactly right. We are concerned about that. Of
22 course, I -- I don't want to over-claim here.
23 It's just a risk that that could happen.

24 As this Court has observed, we are the
25 only country that even has an expropriation

1 exception that would recognize these sorts of
2 takings claims, which otherwise would be barred
3 by traditional principles like act of state and
4 such. We -- we think we're in conformity with
5 international law, but it is a small departure
6 from the restrictive theory, and if that small
7 departure becomes what this Court called in
8 Helmerich a radical departure, we do risk
9 retaliatory or reciprocal actions against us.

10 As we point out in our brief, at any
11 given time, we face thousands of lawsuits
12 overseas, some of which involve our commercial
13 activities, of course, but there's no reason
14 why, if other countries adopted an -- an
15 exception like this, that they wouldn't start
16 bringing, effectively, takings claims in those
17 overseas fora, and that would just multiply
18 greatly the number of lawsuits that we would
19 have to contend with.

20 And so we think -- and this Court, I
21 think, has said in -- in Philipp, for example,
22 that the expropriation exception really was
23 intended to capture Sabbatino and Sabbatino-like
24 cases. So we're not saying it's got to be
25 exactly like Sabbatino. It might be, you

1 know -- but it's got to be in the neighborhood
2 of Sabbatino.

3 JUSTICE GORSUCH: Mr. --

4 JUSTICE ALITO: It takes a -- it -- it
5 takes quite a bit of force to overcome the
6 inertia of non-enactment of legislation by
7 Congress. And Congress was obviously upset
8 enough about Sabbatino to enact the Hickenlooper
9 amendment.

10 And -- and you think that what
11 Congress thought was: Wow, we're really upset
12 about this because, on these particular facts,
13 this very unusual set of facts, in that
14 situation, there should be the possibility of
15 a -- of a lawsuit in the United States, but, in
16 the vast majority of instances in which the
17 property of U.S. nationals is expropriated
18 overseas, we don't -- we don't want to do
19 anything about that? Is that -- is that
20 plausible?

21 MR. JOSHI: Well, it -- it was pointed
22 out, as my friend noted, that the -- the second
23 Hickenlooper amendment as drafted was going to
24 cover only a very, very small fraction of
25 expropriation claims.

1 And, remember, under the restrictive
2 theory, no expropriation claims against a
3 foreign sovereign can be entertained in the
4 courts of another sovereign.

5 So the second Hickenlooper amendment
6 was targeted, and, I mean, I -- I wasn't alive
7 during the -- the events of Sabbatino, but, as I
8 understand it, it was an outrage that Cuba would
9 expropriate American-owned sugar, sell it
10 overseas, and the money was sitting right there
11 in New York and, under the restrictive theory,
12 you couldn't touch it.

13 JUSTICE ALITO: I mean, they -- they
14 were upset because -- because the sugar was in
15 New York and this was identifiable, but they
16 didn't care about all the other property owned
17 by U.S. nationals in Cuba that was expropriated.

18 I -- I'm totally -- I -- I -- I don't
19 understand your argument about retaliation.

20 You think that if lawsuits are brought
21 in the United States based on the expropriation,
22 let's say, of the property of U.S. nationals
23 abroad, then foreign countries are going to
24 entertain suits based on the expropriation in
25 this country of the property of their nationals?

1 Is the United States going around
2 expropriating the property of foreign nationals?

3 MR. JOSHI: I -- I hope we're not.

4 And I'm -- I'm not saying that that's going to
5 happen. I'm saying it risks its happening.

6 And this Court has recognized that the
7 expropriation exception is a departure from the
8 restrictive theory. And the larger that
9 departure becomes -- it's not intended to be a
10 big departure, but, if this Court interprets it
11 in a way that makes it a very large departure,
12 it does risk -- it does risk undermining our
13 conformity --

14 JUSTICE KAGAN: But -- but just going
15 back --

16 MR. JOSHI: -- with international law.

17 JUSTICE KAGAN: -- to Justice Alito's
18 question and what we think Congress wanted here,
19 I -- I mean, it was true that in the Sabbatino
20 case the money was sitting in an escrow account,
21 but -- but Congress would not have been just as
22 upset if, instead of establishing an escrow
23 account, Cuba had put it into a general account?

24 MR. JOSHI: I'm sure Congress would
25 have been just as upset, but Congress is also

1 thinking about international law and conformity
2 with it. And I think the best way to read the
3 second Hickenlooper amendment and the FSIA is as
4 reflecting that compromise. They want to
5 address particularly egregious claims that
6 satisfy certain criteria which are strict, but,
7 at the same time, they want to obey
8 international law and conform to it.

9 JUSTICE KAGAN: What do you think -- a
10 number of my colleagues have suggested that
11 common law rules that are used particularly in
12 the trust area, that they might have some
13 relevance here.

14 Suppose we said -- just suppose -- I
15 mean, you can tell me whether you think they
16 should. But -- but, if they do, how would they
17 work here? Would they actually have any effect
18 in a case like this one, where the assets are
19 being put into a general treasury account or,
20 you know, some big account where there are
21 transactions all the time?

22 MR. JOSHI: Yeah. It seems really
23 hard in a case like this that any of these
24 common law or even statutory tracing rules that
25 have been developed in other areas of law

1 would -- would work, but -- but I don't know
2 that for sure.

3 I will say our test that --

4 JUSTICE KAGAN: You don't know that
5 for sure, meaning how could they work?

6 MR. JOSHI: Well, for example,
7 there -- there is -- one of the tracing theories
8 under the statutes, under the -- the civil and
9 criminal forfeiture statutes, some courts of
10 appeals have adopted what they call a last-out
11 approach. So, if tainted funds are commingled
12 with clean funds and then there are a lot of
13 transactions, you assume that the tainted funds
14 are the last thing to leave the account.

15 And you can imagine why the United
16 States sometimes likes that approach. It's
17 because we can always find the account. And
18 then, if we need to have forfeiture, we don't
19 need to worry about what's been spent as long as
20 the money remains in the account.

21 So you could think of it that way. Of
22 course, that wouldn't help in the FSIA context
23 because then that last-out would leave that
24 money in the treasury in Hungary.

25 So some courts of appeals have adopted

1 a first-out. That's unlikely to help here
2 because there probably have been so many
3 transactions over the decades, but that's
4 another approach.

5 So, as far as I know, there's not
6 going to be an approach that would work here.
7 But we would caution the Court against adopting
8 any of these approaches here. We would ask the
9 Court to leave that question open.

10 The test that we've proposed for what
11 "exchange for" means, in answer to some of the
12 questions here, is on page 15 of our brief:
13 whether the exchanged-for property retains its
14 distinct identity.

15 And I think that's a test that you can
16 look at and say: It -- was this the property
17 actually exchanged for it, or is it simply -- is
18 it tainted property or is it a tainted account?
19 And we think the statute focuses on tainted
20 property.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 With respect to the first question
24 presented, are these -- are there significant
25 respects in which your position departs from

1 that of the Petitioners?

2 MR. JOSHI: I don't believe so. I
3 think we're -- I think we're similarly situated.

4 CHIEF JUSTICE ROBERTS: Thank you.

5 Justice Thomas?

6 Justice Alito?

7 Justice Sotomayor?

8 JUSTICE SOTOMAYOR: Do we have to
9 reach your other two questions? I know you want
10 us to.

11 MR. JOSHI: Yes.

12 JUSTICE SOTOMAYOR: But do we need to?

13 MR. JOSHI: I think you do need to
14 reach at least the third question presented on
15 the burden shifting because it really is, in our
16 view, intertwined with the first question.

17 As we point out at the -- at -- in the
18 last two pages of our brief, whether you accept
19 or reject the commingling theory, the burden's
20 going to matter. So, for example, if you --

21 JUSTICE SOTOMAYOR: I don't know why
22 we would in this case. Respondents acknowledge
23 in their brief the practical impossibility of
24 tracing in this particular case. So wouldn't
25 our holding that you need some sort of

1 connection or -- be enough in this case?

2 MR. JOSHI: It might be. I know -- I
3 know Respondents have acknowledged that. Of
4 course, that was in a brief in opposition in
5 which you granted cert and then, by hypothesis,
6 will have ruled against them.

7 So they wouldn't be estopped from at
8 least attempting to make a showing with respect
9 to particular property. And the burden might
10 matter then. It's also going to matter for a
11 lot of other cases, as you -- as you can
12 appreciate. And --

13 JUSTICE SOTOMAYOR: All right. Thank
14 you, counsel. I --

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE GORSUCH: I -- I have a hard
17 time seeing why we'd have to answer the -- the
18 third question, Mr. Joshi.

19 Petitioner hasn't disputed that it
20 bears the burden here, number one.

21 Number two, you make the argument but
22 do so on the last page of your brief, two pages.
23 And you don't discuss any of the pre-FSIA case
24 law that seems to suggest that the foreign
25 sovereign bears the burden of persuasion. You

1 just cite domestic rules, which I understand
2 you're quite correct about, but you don't tangle
3 with it -- the complexity of the FSIA or its
4 history.

5 So why would we reach that question?

6 MR. JOSHI: So let me address each of
7 those. I -- I think you should reach it for --

8 JUSTICE GORSUCH: I know you want us
9 to, but I don't see why we have to.

10 MR. JOSHI: I think you have to --

11 JUSTICE GORSUCH: And --

12 MR. JOSHI: -- because, as you pointed
13 out in your colloquy with my friend, it is
14 jurisdictional. And this is the key difference.
15 I --

16 JUSTICE GORSUCH: Well, this is the
17 burden of -- of who -- who bears the burden, and
18 they haven't contested that they bear the burden
19 at least here.

20 Now maybe on -- on remand they can
21 raise that, but it -- it hasn't been presented
22 to us by the parties, only you, and -- and you
23 give us pretty thin gruel to work with.

24 MR. JOSHI: So we are word-limited in
25 our briefs. We would have loved to have spent

1 more time on it.

2 JUSTICE GORSUCH: You can always use
3 them wisely too.

4 (Laughter.)

5 MR. JOSHI: Fair -- fair point. But
6 let -- let me just -- let me just offer this to
7 you. Given that you granted cert, we think you
8 should get the question and answer it correctly.

9 Now I appreciate the fact that --

10 JUSTICE GORSUCH: Do you have any
11 response to the pre-FSIA case law?

12 MR. JOSHI: Yeah. Yeah. So I think
13 I -- I'm not going to dispute that you're right
14 that that's how it -- it might have operated
15 before, but that's when foreign sovereign
16 immunity was, in fact, viewed solely as a
17 defense. As this Court recognized in Helmerich,
18 Section 1330 in the FSIA makes it
19 jurisdictional.

20 JUSTICE GORSUCH: I know. We just
21 haven't tangled with that yet ever. Okay. All
22 right. I -- I -- I've got it.

23 MR. JOSHI: Yeah. And --

24 JUSTICE GORSUCH: Back to the tracing.
25 Why wouldn't -- why wouldn't we look to common

1 law principles of tracing in trust law,
2 fiduciary duty law, to analyze these kinds of
3 questions?

4 MR. JOSHI: So, again, I don't
5 think --

6 JUSTICE GORSUCH: Do you resist that?

7 MR. JOSHI: -- I don't think you
8 should reach --

9 JUSTICE GORSUCH: I know you don't
10 want us to reach that.

11 MR. JOSHI: Yeah. That's right.

12 JUSTICE GORSUCH: All right. But --
13 but I'm asking you, if we were to reach it,
14 what's wrong with that? Do you resist that?

15 MR. JOSHI: No --

16 JUSTICE GORSUCH: And, if so, why?

17 MR. JOSHI: There may well be
18 principles of that kind of tracing that might
19 work here. The -- the only caution I would say
20 is, one, the purposes of the FSIA and foreign
21 sovereign immunity are different from trust law
22 or equitable liens or criminal or civil
23 forfeiture or money laundering or all of the
24 other examples that employ those kinds of
25 tracing rules. So any tracing rule that might

1 be borrowed from those contexts would have to
2 take into account those purposes.

3 And then the second is that
4 international law itself has a sort of common
5 law that has developed over the centuries, and
6 that may have something to say about this as
7 well. And I think those are really complicated
8 issues that nobody has briefed, and that is why
9 we would urge the Court not to -- not to weight
10 in on that.

11 JUSTICE GORSUCH: Sounds like good
12 advice all around. Thank you.

13 MR. JOSHI: Well, Justice Gorsuch, if
14 I could just push back one little bit, I think
15 you --

16 JUSTICE GORSUCH: I think you've
17 pushed back enough. Thank you.

18 (Laughter.)

19 CHIEF JUSTICE ROBERTS: Justice Kagan?

20 JUSTICE KAVANAUGH: You can -- you can
21 push back now. Sorry. Yeah. Is it my turn,
22 Justice?

23 You can push back now and explain.
24 You -- you obviously want to say more about the
25 burden issue, so have at it.

1 MR. JOSHI: The -- the -- the -- the
2 only real point I -- I wanted to say is that if
3 you didn't have, say, the House report and all
4 you had was the statute, I think it would be
5 pretty clear. In Samantar, I think this Court
6 encountered a very similar proposition. The
7 pre-FSIA history often treated state officials
8 and actors and individuals as partaking of the
9 sovereign immunity and they too could enjoy
10 immunity.

11 But, in Samantar, you looked at it and
12 you said, look, the FSIA has displaced what came
13 before it. Although we interpret the text in
14 light of that history, the clear text always
15 takes precedence over whatever background rules
16 might have applied beforehand. And the FSIA
17 here says foreign sovereign and instrumentality,
18 it's not defined to include individuals;
19 therefore, the individuals do not partake of
20 that sovereign immunity. There might be some
21 common law that they might be able to partake of
22 but not FSIA immunity under the text.

23 And, in that case, obviously, that was
24 another instance where this principle wound up
25 being plaintiff-friendly in that case because

1 the defendant couldn't invoke FSIA immunity. I
2 think, in this case, it would, you know, happen
3 to work the other way.

4 And so I think Samantar is a good
5 example of where this Court has really
6 privileged FSIA's text over the background
7 history and certainly over legislative history.

8 I think Verlinden is a great example
9 of that. There, the legislative history spoke
10 only about American plaintiffs, American rights,
11 violations of Americans' human rights. And yet
12 the Court looked at it in Verlinden and said,
13 look, we know that's what the legislative
14 history says, but the statute is not limited to
15 domestic plaintiffs. Therefore, this foreign
16 plaintiff is allowed to sue.

17 Again, you're privileging the text of
18 the FSIA where it's clear. And we think, here,
19 1330 expressly makes it jurisdictional, and that
20 has consequences, one of which is that the party
21 invoking jurisdiction has to bear the burden of
22 establishing it.

23 JUSTICE KAVANAUGH: And you say in the
24 brief, even if we reject commingling and require
25 some kind of traceability, if the burden's on

1 the sovereign to show lack of traceability,
2 that's going to be -- I think you used a burden
3 that could be effectively impossible for the
4 sovereign to meet in cases like this.

5 MR. JOSHI: I think that's right. And
6 that's certainly how the D.C. Circuit understood
7 what it was doing in this case, that -- and it
8 expressly said both in the decision below, I
9 think, and definitely in its 2016 decision in
10 this case that Petitioners would bear the burden
11 to show a lack of tracing.

12 And, you know, when -- when many
13 decades have passed, one would think that,
14 especially given the purposes and the narrow
15 departure from the restrictive theory that the
16 expropriation exception is intended to
17 effectuate, that where the property has
18 essentially been lost, where it's lost its
19 distinct identity, that all that means is that
20 there isn't a U.S. forum available anymore. It
21 doesn't let the sovereign off the hook. It just
22 means there's not a forum here to hear those
23 claims.

24 And it would be, I think, quite
25 perverse to flip it around and say, as soon as

1 it's lost its distinct identity, at that point,
2 when nobody can prove it one way or the other,
3 at that point, U.S. courts are wide open to hear
4 these claims that we --

5 JUSTICE KAVANAUGH: And you said
6 earlier you think that this is all in compliance
7 with international law, but it's got to be at
8 the outer -- outer boundaries of that, right?

9 MR. JOSHI: I --

10 JUSTICE KAVANAUGH: I mean, extending
11 this further would seem to really push us into
12 non-compliance with international norms and law,
13 I would think.

14 MR. JOSHI: It would -- it would
15 seriously risk undermining our conformity with
16 international law. It's a point this Court
17 recognized in *Helmerich and Philipp*, and I think
18 it applies here as well.

19 JUSTICE KAVANAUGH: And then, last, on
20 the -- Justice Alito asked the question about
21 suits against the United States. I assume those
22 would be backward-looking suits for things that
23 happened long ago.

24 MR. JOSHI: Yeah. I would assume so,
25 yeah.

1 JUSTICE KAVANAUGH: Yeah. Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Barrett?

4 JUSTICE BARRETT: Mr. Joshi, I want to
5 ask you about the word "exchange." So, you
6 know, the statute says "any property exchanged
7 for such property is present in the United
8 States." And you agree, everyone agrees, that
9 this doesn't apply to just the first
10 transaction.

11 And I want to preface this by saying
12 that this isn't a hostile question. I'm really
13 just asking because I want to understand it. I
14 understand the good reasons for that, sort of
15 like everyone says, well, of course, it has to
16 because, otherwise, you know, it would be
17 impossible or -- or foreign sovereigns could
18 evade jurisdiction in the United States.

19 But just how do I think about the word
20 "exchanged" then? Because I was thinking about
21 it as we're sitting here, as I was reading the
22 briefs, I mean, let's imagine that I steal
23 Justice Gorsuch's car.

24 (Laughter.)

25 JUSTICE BARRETT: Purely hypothetical.

1 And I take the car and I sell it for the cash.
2 Well, I've made that exchange, and so that --
3 that -- that clearly, under the ordinary meaning
4 of the word, qualifies, right? Then I take the
5 cash and I buy a painting. I bet on the right
6 painter. It appreciates in value. Twenty years
7 later, I sell it, and then I buy a beach house.

8 Would we really say that I've
9 exchanged Justice Gorsuch's car for the beach
10 house?

11 MR. JOSHI: Maybe, maybe not. I think
12 it might be fair to say that you exchanged, you
13 know, \$20,000 worth of that beach house for the
14 car. And I gather Respondents here are -- are
15 seeking only as much as the value of their
16 property.

17 JUSTICE BARRETT: Well, let me -- let
18 me clarify. Let's just -- in this hypothetical
19 world, let's -- let's -- we're not talking about
20 commingling any of my own cash. Let's just say
21 it's all just one to one because what I'm --
22 what I'm thinking about and what I'm trying to
23 figure out is why any of that is an exchange
24 once we go beyond the first step.

25 MR. JOSHI: You're right. And I think

1 it would be reasonable and it's certainly a
2 reasonable definition of "exchanged" to think
3 that it's just the first step and not the second
4 or third or subsequent steps.

5 I think we believe that Congress at
6 least -- it -- it may not cover infinite steps,
7 but we believe it covers more than one simply
8 because of Sabbatino. In Sabbatino, the sugar
9 was taken, it was sold overseas, I think in --
10 in Europe, and then the money was given to a
11 broker. That money then changed hands to -- to
12 a corporation, which went to a receiver, which
13 eventually went to an escrow account. And you
14 might say, well, it's the same cash, but
15 probably it was cash exchanged for notes,
16 exchanged for other kinds of transfers or sight
17 drafts or something like that.

18 And so I think, because Sabbatino
19 involved arguably multiple exchanges, we think
20 it's -- it's best to read this as also involving
21 multiple exchanges. That's the same reason why
22 property exchanged for property, in a lot of
23 areas of the law, doesn't include sales, but we
24 think, because Sabbatino involved a sale, that
25 Congress probably meant this to involve sales as

1 well, but, at the same time, we shouldn't go
2 much beyond Sabbatino, which really is the
3 touchstone, and this Court has recognized that,
4 and I think all parties sort of recognize that.
5 That is the touchstone of claims Congress was
6 trying to reach.

7 And so we do think it's important to
8 adopt the -- the right definitions, and those
9 definitions in this context are narrow. We just
10 don't think they are the narrowest ones you
11 could read. We're just trying to get the -- the
12 right definition in context given the background
13 of this statute.

14 JUSTICE BARRETT: So, but for
15 Sabbatino, you would say, well, maybe that is
16 the best meaning of the words, that you're just
17 looking for the -- looking at the exchange and
18 not the continual changes down the line?

19 MR. JOSHI: We might well say that. I
20 mean, there is Abramski, which I -- I know has
21 not been the -- the greatest precedent to cite
22 sometimes, but that does say that even when
23 you've got a sale, a straw purchaser doesn't
24 vitiate the fact that the first person has sold
25 to the third person. And so there might be some

1 sort of principle like that that --

2 JUSTICE BARRETT: Mm-hmm.

3 MR. JOSHI: -- that would -- that
4 might apply here. I don't know.

5 But -- but we think, given Sabbatino
6 and the history, that it does encompass at least
7 more than one, maybe not as many as Your Honor
8 suggested, in a -- in a long chain of
9 transactions.

10 JUSTICE BARRETT: Okay. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Jackson?

13 JUSTICE JACKSON: So Justice Barrett's
14 hypothetical and questions make me again wonder
15 whether "exchange" is really the term that's
16 doing the work here and whether you need it at
17 all to make the argument that I thought you were
18 making.

19 MR. JOSHI: I --

20 JUSTICE JACKSON: I see your argument
21 as being that property that has been commingled
22 to the extent that it no longer retains its
23 identifiable nature doesn't satisfy the statute
24 because the statute requires property that is
25 owned or is present as the jurisdictional hook.

1 And so, if it's been commingled and we don't
2 identify it anymore as what it was when it was
3 expropriated, we can't know, I thought you said,
4 whether or not it is owned or is present.

5 That sort of conceptualization of this
6 doesn't hinge on the exchange, and, in fact, the
7 exchange could have happened way back at step
8 one. It's now liquidated, and it's the
9 liquidation that makes it commingle-able such
10 that it loses its identity. But that's all
11 "exchange" does for us. I don't understand this
12 to be an argument that relies on a definition of
13 "exchange" really.

14 MR. JOSHI: So I would certainly love
15 to agree with you, but I think, in fairness,
16 both of them do some work here.

17 So, as far as the "is" goes, my
18 understanding of Respondents' claim is that
19 there is actual money here in the United States
20 from which Hungary, the sovereign, made the bond
21 payments. And so they point to that money and
22 they say that's owned by Hungary, it literally
23 is here present in the United States in
24 connection with Hungary's commercial activity.

25 And then they -- so then you say:

1 Well, what is that money? Was that money
2 actually exchanged for the goods that were taken
3 from the survivors or was it not?

4 JUSTICE JACKSON: But I don't know why
5 you ask that question. Why isn't it just can
6 you trace that money back to the beginning?
7 It -- it's -- it's -- it -- how it got here,
8 whether it was exchanged one to one or whatever,
9 it doesn't seem to me to be doing the work.
10 It's just what you're pointing to today, can you
11 trace it to what happened 75 years ago, right?

12 MR. JOSHI: Well, but the -- but the
13 statute doesn't say trace, right? It says
14 either the expropriated property, it says that
15 property --

16 JUSTICE JACKSON: Yeah.

17 MR. JOSHI: -- or any property
18 exchanged for such property. "Such" refers back
19 to "that," so the property that was taken.

20 JUSTICE JACKSON: Right.

21 MR. JOSHI: And so --

22 JUSTICE JACKSON: So liquidation on
23 day one, right?

24 MR. JOSHI: Right.

25 JUSTICE JACKSON: They take the

1 property, they sell it. We have money.

2 MR. JOSHI: And that would qualify as
3 any property exchanged --

4 JUSTICE JACKSON: Exchanged for,
5 correct.

6 MR. JOSHI: -- for such property.

7 JUSTICE JACKSON: First step,
8 exchanged for. So then the money goes into
9 either a separate account or a commingled
10 account.

11 MR. JOSHI: Right.

12 JUSTICE JACKSON: And then, once it's
13 in a commingled account, I understood the United
14 States' argument to be that unless you can trace
15 it -- and maybe I'm wrong?

16 MR. JOSHI: No.

17 JUSTICE JACKSON: Trace it to the
18 money they're pointing to today, you don't
19 satisfy the statute?

20 MR. JOSHI: That's basically right. I
21 mean, once -- once that -- once that cash is in
22 a large account and there's lots of deposits and
23 withdrawals, it loses its distinct identity.

24 JUSTICE JACKSON: Right.

25 MR. JOSHI: And, at that point, then

1 no property, whether it's in the United States
2 or not, could be deemed to have been exchanged
3 for the original property. It's as if the
4 original property had been lost or destroyed,
5 and so --

6 JUSTICE JACKSON: I guess I -- thank
7 you. I mean, I -- I guess my only point is, if
8 the original property is lost or destroyed,
9 the -- the exchange was still made originally.
10 We identified the exchange, and then it's lost
11 or destroyed. The problem is we can't trace it
12 to what you're pointing to today, right?

13 MR. JOSHI: I -- I think we're saying
14 the same thing. I think --

15 JUSTICE JACKSON: Right.

16 MR. JOSHI: -- they're equivalent.
17 But -- but the --

18 JUSTICE JACKSON: Yeah.

19 MR. JOSHI: -- the notion of tracing
20 has to come from the word "exchanged for." I
21 think that's --

22 JUSTICE JACKSON: Thank you.

23 MR. JOSHI: -- the way to get there.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Dvoretzky.

2 ORAL ARGUMENT OF SHAY DVORETZKY

3 ON BEHALF OF THE RESPONDENTS

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

6 Hungary and MAV lack immunity for
7 stealing Respondents' property during the
8 Holocaust.

9 First, the expropriation exception
10 applies when a foreign state or instrumentality
11 possesses the expropriated property or any
12 property exchanged for such property with the
13 required commercial nexus with the U.S.

14 Hungary and MAV stole Respondents'
15 property while forcing them on to cattle cars.
16 When Hungary and MAV liquidated Respondents'
17 property, they exchanged that property for
18 money. And when money is commingled, a
19 withdrawal from commingled funds is an exchange
20 for earlier deposits.

21 So, when Hungary used commingled funds
22 to pay interest and buy equipment in the United
23 States, it put into the United States property
24 that had been exchanged for the expropriated
25 property. For MAV, an instrumentality, the

1 analysis is even simpler. The property doesn't
2 have to be in the U.S. MAV deposited money
3 exchanged for Respondents' property into funds
4 it continues to hold, and that satisfies the
5 exception given MAV's commercial activity here.

6 Second, Hungary would nullify the
7 expropriation exception by limiting it to barter
8 economies and inept regimes, hardly the threats
9 that Congress targeted. The expropriation
10 exception is already limited because it requires
11 that the taking violate the international law of
12 expropriation, which doesn't reach domestic
13 takings.

14 Moreover, this case is the rare case
15 where the historical record shows the
16 defendants' practice of liquidating and
17 commingling.

18 I'd like to briefly address the two
19 tests that I heard Mr. Joshi and Mr. Glasgow
20 propose. The government proposes a test whether
21 property retains its distinct identity. But,
22 because money is fungible, as soon as it -- it
23 is commingled, at that point, it loses its
24 distinct identity. So, under the government's
25 test, commingling would be a roadmap for

1 escaping the FSIA's jurisdictional hook.

2 Mr. Glasgow argued the item at the
3 beginning and the end have to be given in return
4 for one another. That's exactly what happens
5 when you have a series of exchanges involving
6 money.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: You know, that's
9 understandable, but, if the account is one for
10 one, you reduce the property to funds and you
11 hold that fund into a -- a marked account,
12 that's understandable. But, when you put the
13 funds in an undifferentiated or general account,
14 how do you say that that -- the funds in that
15 account are all exchanged for the property?

16 MR. DVORETZKY: Justice Thomas, I
17 think the answer to that has to do with the
18 fungibility of money. When somebody deposits
19 money in a bank, they get an IOU, in effect, a
20 credit.

21 JUSTICE THOMAS: Yeah.

22 MR. DVORETZKY: A -- a withdrawal is
23 then an exchange of that IOU for money in the
24 bank, but it's not -- they're not getting the
25 same money. They're not getting the same bills.

1 The money has worked its way through the banking
2 system. The bank has lent it, has used it, has
3 done whatever with it.

4 But they're getting money back for the
5 IOU. The account always has more money in it
6 than it would have had but for that initial
7 exchange, setting aside the possibility of
8 bankruptcy or the account zeroing out somehow.
9 The account always has more money in it. And,
10 therefore, when there's a withdrawal later in
11 time, that withdrawal can be understood as being
12 an exchange for the expropriated funds that were
13 put in in the first place.

14 JUSTICE THOMAS: But the funds are not
15 simply from that exchange. You could have
16 Justice Barrett's funds from Justice Gorsuch's
17 car, you could have people's retirement accounts
18 in that general fund, and the funds from the
19 property. So it's not merely the exchanged
20 property -- the funds from the exchanged
21 property.

22 MR. DVORETZKY: That is, of course,
23 the nature of commingling, that when you put the
24 expropriated funds in with other funds, you have
25 both there, but, because the funds don't have a

1 distinct identity because money is fungible,
2 when you take the money out, you can -- it -- it
3 is perfectly natural to understand that you are
4 taking out -- funds that are attributable to the
5 funds that were there before.

6 JUSTICE THOMAS: Well, how would
7 you -- how would you distinguish a -- a -- an
8 account that is solely -- let's say that
9 someone, Hungary, set up a -- an account, a
10 stolen prune account, and you could trace it.
11 How does that -- how would that be different
12 from a general account?

13 MR. DVORETZKY: I do think that if you
14 had a segregated account, if you had a -- a
15 Holocaust theft fund account --

16 JUSTICE THOMAS: Yeah.

17 MR. DVORETZKY: -- that was totally
18 segregated from any other general funds that the
19 defendant had, that would be a different
20 situation. You'd be able to say those funds are
21 just in this one place.

22 But, as soon as they are commingled,
23 at that point, you can no longer differentiate
24 the illicit funds from the funds that were there
25 before. And the law recognizes this in a number

1 of different areas. This is why, for example,
2 in the in rem cases, in a civil asset forfeiture
3 proceeding, a district court doesn't lose in rem
4 jurisdiction just because forfeited money is
5 deposited in a bank, enters the banking system,
6 and in a sense leaves the jurisdiction where the
7 money was seized.

8 In the money-laundering cases, as
9 the -- the Fourth Circuit, for example,
10 recognized in the Moore case, when -- that --
11 that's talking about monetary transactions in
12 criminally-derived property. The government
13 doesn't bear the burden to prove that no
14 untainted funds were used after illicit funds
15 are commingled with other funds.

16 CHIEF JUSTICE ROBERTS: Counsel --

17 JUSTICE JACKSON: But the in rem
18 and -- oh.

19 CHIEF JUSTICE ROBERTS: -- at the end
20 of the day, you're really just asking us to
21 over -- to throw out the general rule that
22 sovereigns can't be sued for appropriations of
23 this sort, right? I mean, once you say
24 commingling counts, well, then everything's --
25 everything's pretty much fair game, except for

1 the rare possibility that's been mentioned that
2 they happen to have an account that's, you know,
3 appropriated funds in a particular instance.

4 It seems to me that -- is there -- is
5 there anything wrong with it? In other words,
6 we know that from Sabbatino and the second
7 Hickenlooper amendment that Congress had in mind
8 a much narrower exception than that. So, other
9 than curious, bizarre situations of accounting,
10 like the one when they have a separate account
11 for appropriated property, this is really just
12 throwing out the whole sovereign immunity
13 principles under which the rest of the world
14 operates?

15 MR. DVORETZKY: I -- I don't think
16 that's quite right, Mr. Chief Justice.

17 Congress passed the expropriation
18 exception over the Executive's opposition,
19 knowing that that was a departure from
20 international law.

21 It did so in response to Sabbatino,
22 but it wasn't -- the language that it passed
23 wasn't limited to the facts of Sabbatino.
24 Congress enacted broad language. Sabbatino
25 itself involved fungible property. The Court

1 there recognized traceability problems.
2 Congress knew that but enacted the broad
3 language anyway.

4 CHIEF JUSTICE ROBERTS: Well, but --
5 sorry to interrupt, but it seems to me you're
6 just agreeing with me that that's what will
7 happen under your theory.

8 MR. DVORETZKY: So no. I also think
9 there are significant guardrails to our theory.
10 One is the guardrail that this Court put up in
11 Philipps in interpreting the expropriation
12 exception requiring that you're only talking
13 about domestic takings. And so -- I -- I'm
14 sorry, the domestic takings rule applies. And
15 so a foreign country can't be sued for takings
16 from its own citizens. That's already one
17 limitation.

18 In addition to that, though,
19 plaintiffs actually have to be able to -- to --
20 to show liquidation and commingling. Usually,
21 when somebody's property is stolen, at that
22 point, they don't know what happened to it.
23 This is the rare case, the Holocaust is the rare
24 case, where there is extensive documentation of
25 what Hungary's practice was.

1 And we put that documentation before
2 the district court. Hungary did not rebut it.
3 That's why the -- the district court relied on
4 three key sources that we put in: the Hungarian
5 Constitutional Court decision from 1993, a
6 manuscript about the Holocaust in Hungary
7 written by one of Hungary's own experts, and
8 archives from the U.S. Holocaust Museum. All
9 three of those sources established that Hungary
10 had a practice of not just expropriating but
11 then also liquidating the property, melting it
12 down, commingling it with state funds, including
13 in -- in the -- in the -- the country's
14 general -- general accounts.

15 CHIEF JUSTICE ROBERTS: Well, you
16 think in most --

17 MR. DVORETZKY: And so this is the
18 rare --

19 CHIEF JUSTICE ROBERTS: -- you think
20 in most cases that the appropriated property is
21 not commingled with the general funds?

22 MR. DVORETZKY: It would have to be
23 established. And, again, typically, a plaintiff
24 is not going to know that. This is a case
25 where -- because the Holocaust is a unique

1 situation, where we actually do have
2 documentation. A plaintiff can't just go into
3 court and say: My property was taken, I have no
4 idea what happened to it, but I think it was
5 probably commingled, so, therefore, the
6 sovereign -- the sovereign immunity doesn't
7 apply.

8 JUSTICE JACKSON: Counsel --

9 MR. DVORETZKY: That --

10 JUSTICE KAGAN: The example you gave,
11 Mr. Dvoretzky, you said, you know, unless a
12 country were stupid enough to establish a
13 Holocaust expropriation fund, but I'm
14 wondering -- wondering whether, even if a
15 country did establish a Holocaust expropriation
16 fund, whether that would be good enough under
17 the Petitioners' theory, because, you know,
18 there were 500,000 victims of the Hungarian
19 Holocaust. So there are a lot of money, you
20 know, from different people going into that
21 fund. So that's all commingled. So, even in
22 that case, it seems the Petitioner would say the
23 country is off the hook.

24 MR. DVORETZKY: So, again, I -- I -- I
25 think there -- there's no reason to think

1 that -- that Hungary actually had this kind of a
2 Holocaust theft fund. So I think that --

3 JUSTICE KAGAN: Yes, I know. It's --
4 it's -- it's -- it's an example to sort of
5 suggest -- I -- I mean, a country's never going
6 to pay, you know, under the expropriation
7 exception, which Congress passed presumably to
8 do something.

9 MR. DVORETZKY: Right.

10 JUSTICE KAGAN: Like, even if a
11 country set up an expropriation fund, all that
12 money is commingled too.

13 MR. DVORETZKY: Right. It -- it is --
14 it's certainly commingled with the country's
15 overall asset -- asset base, sure.

16 JUSTICE KAGAN: Even if it's not.

17 MR. DVORETZKY: Yeah. Yeah.

18 JUSTICE JACKSON: Counsel, can I ask
19 you -- because I -- I guess I'm still stuck on
20 whether or not the tracing requirement is
21 inherent in the nature of the nexus that is
22 necessary for jurisdiction here, so let me ask
23 you a hypothetical.

24 Suppose Hungary obtained expropriated
25 art and then it brought it into, you know, its

1 museum somewhere and then lost track of it, lost
2 it. We just can't find it. It never sold it.
3 It never exchanged it. It just disappeared.

4 Would there be jurisdiction to sue
5 under this statute in your view?

6 MR. DVORETZKY: So I think we have to
7 distinguish under the statute between Hungary
8 and the instrumentality. For the
9 instrumentality, the nexus requirement does not
10 require that the property be present in the
11 United States.

12 JUSTICE JACKSON: Okay.

13 MR. DVORETZKY: The instrumentality
14 has to have the property or property exchanged
15 for it, and it has to engage in commercial
16 activity in the United States.

17 JUSTICE JACKSON: Okay.

18 MR. DVORETZKY: In your hypothetical,
19 where we don't know, however, that either the
20 instrumentality or the country still even has
21 the property --

22 JUSTICE JACKSON: Right.

23 MR. DVORETZKY: -- if that can't be
24 established, then I think the expropriation
25 exception probably would not be satisfied in

1 that situation.

2 JUSTICE JACKSON: And it's because the
3 property, as far as we know in terms of facts on
4 the ground right now, doesn't exist. It's not
5 present. It isn't there. So that suggests to
6 me that this really is about identifiable
7 property that is presently either in the United
8 States or with the foreign instrumentality that
9 is doing work with the United States, right?

10 MR. DVORETZKY: I -- I -- I do think,
11 for the instrumentality question, it would be
12 tricky because the statutory language talks
13 about the property being owned by an agency or
14 instrumentality. I can own things and not know
15 where they are. You can own something and lose
16 it. And so --

17 JUSTICE JACKSON: Yeah, but you'd have
18 to you -- someone would have to establish that
19 it is still owned by you, right? That it -- it
20 still exists, correct? We have to know where it
21 is in order to determine -- we have to know what
22 it is, right, or that you own it?

23 MR. DVORETZKY: I suppose you could
24 have a situation where I have title to
25 something, but I don't know where the thing is

1 that I have title to. You would say that I
2 still own the lost item. I guess that's a step
3 removed from your art hypothetical.

4 JUSTICE JACKSON: I guess what I'm
5 trying to figure out is whether or not you are
6 reading this as a statute that allows for suit
7 against any foreign country that previously
8 expropriated, whether we can figure out where
9 their property -- that particular property is or
10 not. And I don't see it as that, and I'm -- I'm
11 worried about that.

12 MR. DVORETZKY: So -- so I don't think
13 it's that. And, again, I don't think that's
14 this case because, given --

15 JUSTICE JACKSON: No, it's not --

16 MR. DVORETZKY: Yeah.

17 JUSTICE JACKSON: -- this case, but
18 don't we have to have some means of determining
19 where this thing is in order to satisfy the
20 nexus requirement of this statute? Because,
21 other than that, you would have a situation in
22 which all that needed to be proved, I guess, is
23 that at one point 75 years ago, this property
24 was taken by this country or, you know -- and
25 there we are. Unless you can show that they

1 currently -- it is in the United States or is
2 owned by the company today -- or by the foreign
3 state today, I don't know how you satisfy this
4 jurisdictional hook and I don't know how you
5 prove that without some sort of tracing.

6 MR. DVORETZKY: So I think you do have
7 to show that it is either in the United States
8 or is owned today --

9 JUSTICE JACKSON: Okay.

10 MR. DVORETZKY: -- by -- by the
11 instrumentality.

12 JUSTICE JACKSON: Okay.

13 MR. DVORETZKY: I think that comes
14 from the statute.

15 JUSTICE JACKSON: Okay.

16 MR. DVORETZKY: As for tracing, I
17 think, in the context of money, which, again, is
18 fungible, whatever tracing requirement there
19 might be is satisfied by the -- the very fact of
20 commingling. And this takes me back to some of
21 the earlier discussion with the Chief Justice
22 and with Justice Thomas. What --

23 JUSTICE JACKSON: So you're saying
24 that every dollar from -- for 75 years that was
25 in the bank accounts of Hungary counts for the

1 purpose of knowing that that's where this money
2 is?

3 MR. DVORETZKY: For -- for purposes of
4 establishing the jurisdictional hook, yes,
5 and -- and that is, again, because Hungary's
6 bank accounts were increased by X dollars of
7 value as a result of the expropriated property
8 being put in there. Hungary, therefore, has
9 that much more.

10 JUSTICE JACKSON: But, if it was a
11 painting in the museum that -- it went in, was
12 commingled with the other art, we can't exactly
13 figure out which one it is or we don't know, you
14 would say no jurisdiction? We have to know that
15 they have the painting, it's -- that there it
16 is, right?

17 MR. DVORETZKY: Well, I -- again, I
18 think that's different in two respects. One is
19 that the painting's not fungible, so you've got
20 to identify that particular painting. Dollars
21 are fungible. It doesn't matter whether I give
22 you \$10 or whether I give you two fives; it's
23 the same thing. That's one distinction.

24 The other distinction is, again, so
25 it's a -- it's an unusual situation that you're

1 positing, Justice Jackson, because even -- the
2 painting goes into the art museum. Let's say we
3 have security cameras around the art museum. We
4 know it never left. Nobody ever took it out.
5 But we can't find it in the museum. I don't
6 know, it's behind a couch somewhere. It's in
7 the basement. Would you say that it is still
8 there? I -- I think you would.

9 But, again, that's far removed from
10 this case, where we're dealing with fungible
11 property, and the key point is, once the money
12 is commingled, we know that it's there because
13 the account value is increased by the amount of
14 that money.

15 JUSTICE KAVANAUGH: Can I ask about
16 the foreign policy implications? Because I
17 think we --

18 MR. DVORETZKY: Sure.

19 JUSTICE KAVANAUGH: -- need to account
20 for those. So no other country in the world has
21 an expropriation exception to begin with, right?

22 MR. DVORETZKY: That's right. And
23 Congress was aware of that when it passed this
24 one.

25 JUSTICE KAVANAUGH: But doesn't that

1 fact and the out of compliance with
2 international law -- suppose we have a choice,
3 you can interpret the exception more narrowly or
4 more broadly. More broadly pushes us further
5 out of compliance with international law -- this
6 is what the Solicitor General says -- furthers
7 friction with foreign countries because we can
8 forget, it's a big deal to hale a foreign
9 country into U.S. court, and also increases the
10 risk of reciprocal actions against the United
11 States in foreign countries abroad.

12 So, you know, do we assume Congress
13 meant to do all that, or, you know, is it, as
14 the Solicitor General says, more prudent to
15 choose the narrower interpretation of it so as
16 not to cause all those ramifications?

17 MR. DVORETZKY: So two points, Justice
18 Kavanaugh.

19 One, I think you should assume that
20 Congress intended to do something when it passed
21 the expropriation exception. And, as Justice
22 Kagan's question --

23 JUSTICE KAVANAUGH: But -- but even
24 just doing the narrow -- Sabbatino is doing
25 something.

1 MR. DVORETZKY: It's doing very, very
2 little.

3 JUSTICE KAVANAUGH: Okay. But it's
4 something. And -- and they said -- and they
5 recognized that it was narrow, that it was
6 recognized at the time, but -- and keep going,
7 though.

8 MR. DVORETZKY: Well, so I -- I think
9 you may be referring to the Katzenbach
10 legislative history --

11 JUSTICE KAVANAUGH: Mm-hmm.

12 MR. DVORETZKY: -- testimony, which --
13 which I'm happy to address, but if I could also
14 just finish the point to your earlier question?

15 JUSTICE KAVANAUGH: Keep going, yeah.

16 MR. DVORETZKY: In addition to giving
17 this exception some meaning, it is already a
18 narrow exception in light of Philipp. That
19 already significantly cuts down the class of
20 claims that can be brought.

21 And, again, as I was saying earlier,
22 you have to actually establish commingling and
23 liquidation, which is not something that you're
24 typically going to be able to do. So these are
25 not claims that can be easily brought, but this

1 is the rare case in which they can.

2 With -- with respect to what Congress
3 knew when it was passing the second -- the
4 Hickenlooper amendment, I think, Justice
5 Kavanaugh, that you were referring to the -- the
6 Katzenbach testimony. The Katzenbach testimony,
7 first, was against the amendment. The -- the
8 Executive opposed even what it potentially
9 viewed as a narrow expropriation exception.

10 But, beyond that -- so there's a --
11 there's a figure in the legislative history
12 that -- in which Katzenbach said only 1 percent
13 of expropriated money would be at stake. That
14 was based on there having been 19 lawsuits on an
15 expropriation theory. That's actually a
16 surprisingly high number given that there was no
17 expropriation exception at the time.

18 And Katzenbach took the dollar value
19 of those lawsuits divided by an estimate of the
20 total amount of expropriated money from -- from
21 U.S. citizens and came up with that 1 percent
22 figure. That doesn't tell us what the scope of
23 this exception in the language that Congress
24 actually enacted is doing.

25 There were some questions that came up

1 earlier about tracing and whether that is a body
2 of law to look to here. I don't think it is,
3 but I think, even if you do, first of all, the
4 general rule in St. Louis versus Spiller is that
5 "when trust funds are mingled with others, the
6 beneficiary may assert an equitable lien upon
7 the mingled mass to the extent of his
8 contribution thereto."

9 So the equitable rule actually did
10 allow even in the commingling situation for
11 liability to be established.

12 Beyond that, though, the equitable
13 rules, as --

14 JUSTICE SOTOMAYOR: I'm sorry, would
15 you repeat that again?

16 MR. DVORETZKY: Sure. This is from
17 St. Louis versus Spiller. When "trust funds are
18 mingled with others, the beneficiary may assert
19 an equitable lien upon the mingled mass to the
20 extent of his contribution thereto."

21 And -- and so, even --

22 JUSTICE SOTOMAYOR: Thank you,
23 counsel.

24 MR. DVORETZKY: -- even in the trust
25 fund, the general rule is that when there are

1 commingled funds, there can be liability still
2 established. Commingling doesn't defeat that.
3 The -- the --

4 JUSTICE BARRETT: But isn't that about
5 liability again? You know, so that's kind of
6 going back -- maybe it was Justice Thomas
7 before. I can't remember who.

8 But is there a difference between
9 jurisdiction and liability? Because I don't
10 think anybody would deny that Hungary, even if
11 it commingled all these funds, still would owe
12 the money.

13 But the question here is a little bit
14 different, right? It's is the money present for
15 jurisdictional purposes.

16 Does that bear on -- the question?

17 MR. DVORETZKY: So I -- I -- my
18 fundamental point would be I don't think that
19 the tracing rules should apply here. If you did
20 look at them, then you should look at them
21 through the lens of that language that I was
22 quoting from Spiller.

23 But the reason I think the tracing
24 rules don't apply here, those are really rules
25 that come out of equity cases.

1 So, when this -- not to turn this into
2 an ERISA case, but, in ERISA, Congress
3 specifically said -- in Section 502(a)(3), it
4 referred to equitable relief. And so, in cases
5 like Great West and Sereboff and Montanile, this
6 Court had to delve into these archaic
7 distinctions in equity about what kind of
8 tracing was required in particular
9 circumstances.

10 That's not what Congress did when it
11 passed this jurisdictional provision in the FSIA
12 which codifies the common law. The FSIA comes
13 from common law. We know that from cases like
14 Samantar.

15 And so Congress wasn't invoking these
16 equitable principles in this -- in -- in -- in
17 the -- in the FSIA. The tracing rules don't
18 provide the answer here.

19 JUSTICE BARRETT: Mr. Dvoretzky, can I
20 ask you just a question about other cases in
21 this area? So we have the Second Circuit case
22 and the D.C. Circuit case on this question.

23 Is this commingling theory been used
24 under the expropriation exception before, in
25 other cases before -- besides the two that

1 created the split here?

2 MR. DVORETZKY: Not that I'm aware.

3 So, in terms of the international -- the foreign
4 relations consequences of reading the
5 expropriation exception our way, there has not
6 been a flood of cases that have been brought.
7 I'm not aware of other cases besides -- besides
8 those two and some other Holocaust -- Holocaust
9 litigation.

10 JUSTICE SOTOMAYOR: If -- if we accept
11 the plaintiffs' theory -- or Petitioners' theory
12 or the government's theory, they -- at least the
13 government said there's no difference between
14 the two. If we say -- and I'm not suggesting
15 you're losing.

16 MR. DVORETZKY: Good.

17 JUSTICE SOTOMAYOR: Just a
18 hypothetical, okay? If we say that you have --
19 you -- the historical commingling theory's not
20 enough, that you need in some way to identify
21 the property, does your complaint survive, or do
22 we just reverse and order dismissal?

23 MR. DVORETZKY: So our complaint
24 survives.

25 JUSTICE SOTOMAYOR: That's -- then we

1 do have to reach the who bears the burden of
2 proof, correct?

3 MR. DVORETZKY: Well, I don't think
4 you do on this record because of the evidence
5 that we have already put in that Hungary has not
6 tried to refute.

7 And so the issue -- the issue here --

8 JUSTICE SOTOMAYOR: That's my whole
9 point. It is very hard to imagine, if I have a
10 bank account, that I put a hundred dollars in it
11 today and after 80 years -- I'm not quite 80,
12 I'm 70 -- but, after 70 years, that that same
13 hundred remains in that account under any
14 theory.

15 Every passing year, I have a flood of
16 money going out, I have a flood of money coming
17 in. It's an interesting concept that that \$100
18 that my mother put in that account the day I was
19 born, that a piece of it is still there 60 years
20 or 70 years or 80 years later. It's a fiction
21 that takes quite an imagination.

22 MR. DVORETZKY: So -- so two points,
23 Justice Sotomayor.

24 One, Hungary could have tried to
25 refute but didn't liquidation and commingling in

1 the first place. They didn't dispute -- they
2 didn't dispute that. And that is something that
3 a foreign sovereign could -- could disagree --

4 JUSTICE SOTOMAYOR: Let's assume that
5 they -- they took that 5 million -- billion,
6 million dollars and put it in. What they came
7 in and said: You can't trace that money now.
8 There's been so much money that's come in and
9 gone out over 80 years, there's no way to say
10 that any of that remains.

11 MR. DVORETZKY: Let me -- let me try
12 this. Not quite 80 years, but I think that if I
13 had not been a summer associate during law
14 school, if I had chosen to take the summer off,
15 I would have deposited less money back then and,
16 as a result, I would have less money in my bank
17 accounts today.

18 Now you could say: Oh, no, you spent
19 your summer associate salary on tuition. That's
20 gone. But -- but --

21 JUSTICE SOTOMAYOR: All right. So
22 let's get that to the bottom line. You're
23 saying to me that we have to -- that this
24 case -- the end of this case depends on us
25 reaching the question of the burden of -- who

1 bears the burden of pleading this?

2 MR. DVORETZKY: I don't think it does.
3 First, if the commingling theory is valid, as we
4 argue that it is --

5 JUSTICE SOTOMAYOR: I -- I gave you a
6 different hypothetical.

7 MR. DVORETZKY: If the commingling
8 theory is not valid, do you need to reach the
9 burden shifting -- burden shifting?

10 At that point, I would still say that
11 you don't because of the unrebutted facts in
12 this record. But, if you do reach the
13 burden-shifting theory -- burden-shifting
14 argument, the burden of persuasion there ought
15 to be on the defendants, on the foreign state.

16 Yes, this Court has referred to
17 foreign sovereign immunity as jurisdictional,
18 but it's an odd kind of jurisdictional inquiry.
19 Jurisdiction -- subject matter jurisdiction
20 generally can't be waived by statute.

21 Subject matter jurisdiction here can
22 be waived. As a matter of litigation strategy,
23 Hungary has -- as Justice Gorsuch pointed out,
24 Hungary has said that it bears the burden of
25 persuasion. And Hungary in this situation is

1 the party with superior access to the
2 information. It has extensive records of what
3 it did with expropriated property.

4 JUSTICE SOTOMAYOR: Thank you.

5 JUSTICE GORSUCH: Mr. Dvoretzky, you
6 don't dispute, though, that you bear the burden
7 of production at this stage of showing an
8 exchange, correct?

9 MR. DVORETZKY: Correct. Once they --

10 JUSTICE GORSUCH: So whatever --

11 MR. DVORETZKY: -- once they
12 dispute -- once --

13 JUSTICE GORSUCH: -- whatever that
14 standard is, you acknowledge that you bear the
15 burden of production to meet it?

16 MR. DVORETZKY: Once they dispute our
17 factual allegations as to that, yes, then the
18 burden shifts to us in order to show that, in
19 fact, our property --

20 JUSTICE GORSUCH: And they -- they --
21 they say under a proper standard, there is no
22 exchange here, and you'd -- under their
23 standard, you'd have to meet that, if -- if the
24 Court were to adopt their view of what an
25 exchange means?

1 MR. DVORETZKY: I think that's right.

2 JUSTICE GORSUCH: Okay. So, really,
3 the burden of persuasion question isn't before
4 us in that sense. It's really who bears the
5 burden of -- what the burden of persuasion --
6 sorry, the burden of production is with respect
7 to an exchange?

8 MR. DVORETZKY: Right. And -- and I
9 think that's often true in burden cases, that at
10 the end of the day, once you have both sides'
11 evidence in the case, unless it is perfectly in
12 equipoise, which it very, very rarely will be,
13 the Court is just going to weigh the two sides'
14 evidence and decide by a preponderance who's
15 right.

16 JUSTICE BARRETT: Does the case die,
17 though? Let -- let's just -- I'll follow
18 Justice Sotomayor's hypothetical. Just
19 hypothetical, let's imagine that we adopted the
20 United States' view.

21 Would you have any hope of satisfying
22 your burden of production on remand?

23 MR. DVORETZKY: We -- we would. And I
24 would think that we would be able to get
25 jurisdictional discovery into that inquiry if

1 that were the standard that the Court were to
2 adopt here.

3 The way this case proceeded below,
4 again, Hungary's only argument, Hungary didn't
5 dispute expropriation and it didn't make an
6 argument about the fact of liquidation or
7 commingling. It only said, well, it's
8 impossible to trace. And the way this case was
9 litigated was about whether there was a tracing
10 requirement.

11 If this Court require -- if this Court
12 concludes that Hungary's or the United States'
13 standard is the correct one -- and, again,
14 Hungary has the information about what happened
15 to the property and about its bank accounts --
16 we would at that point be entitled to
17 jurisdictional discovery below to try to
18 establish whatever standard this Court --

19 JUSTICE KAVANAUGH: What would --

20 MR. DVORETZKY: -- sets forth.

21 JUSTICE KAVANAUGH: -- that
22 jurisdictional discovery look like?

23 MR. DVORETZKY: So, for starters, it
24 would involve discovery into Hungary's records
25 of what happened in the Holocaust. We allege at

1 some length in our complaint that Hungary has
2 extensive records of the expropriation of
3 property and -- and how it -- what happened to
4 it after it was expropriated. We would want to
5 get access to those records, which we have tried
6 to get but been unsuccessful in doing so. We
7 would also --

8 JUSTICE KAGAN: I don't understand how
9 that would help you. I mean, you know, they
10 have records and they say yes, we took all of
11 these people's money and -- and other assets,
12 and the money we put in bank accounts, and the
13 assets we sold and we put the proceeds in bank
14 accounts, and then we spent it.

15 I mean, that's what you're going to
16 find out 70 years later, right?

17 MR. DVORETZKY: Well, and -- and,
18 Justice Kagan, the records are actually, I
19 think, a little bit more detailed than that. We
20 already know and have put in the record evidence
21 of particular bank accounts that the money was
22 deposited into.

23 And so, if this Court were to require
24 us to somehow trace the flow of that dollar from
25 1944 to today, we would get -- we would need

1 that kind of evidence to know this property was
2 deposited into this bank account and then trace
3 the flow of that bank account through the years.

4 I don't think that is the standard
5 that the -- the -- the statutory language
6 requires because, again, I think the commingling
7 theory is valid. Money is fungible. All the
8 arguments we've been talking about about the
9 nature of exchange in this context. But, if the
10 Court were to disagree, we'd be entitled to
11 discovery to try to figure out exactly where the
12 dollar went from account to account.

13 JUSTICE ALITO: Unless the account
14 into which the money was placed was the sort of
15 unlikely special account that was discussed
16 earlier, the -- you know, the Holocaust
17 expropriation account, I don't understand how
18 that would -- the kind of discovery you're
19 talking about would help you.

20 MR. DVORETZKY: I -- I think it -- it
21 depends what standard the Court were to adopt.
22 I -- I -- again, I think the right standard here
23 would not require this sort of tracing because,
24 when we're talking about money, it just doesn't
25 make sense to ask where a particular dollar went

1 when all dollars are fungible.

2 But, if the Court were to come up with
3 that kind of a standard, we ought to be entitled
4 to an opportunity to prove it.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito, anything further?

9 Justice Kagan?

10 JUSTICE KAVANAUGH: Just one thing.
11 In that discovery, are you deposing officials
12 from the Hungarian government too?

13 MR. DVORETZKY: Potentially, yes.

14 JUSTICE JACKSON: Just one --

15 CHIEF JUSTICE ROBERTS: Justice
16 Jackson?

17 JUSTICE JACKSON: Just one
18 clarification. Is the exchange in your argument
19 at the point of the liquidation or the
20 withdrawal? At some point, you were saying
21 withdrawal is when the exchange is occurring.

22 MR. DVORETZKY: Both.

23 JUSTICE JACKSON: Both?

24 MR. DVORETZKY: Both. There are
25 multiple exchanges that occur in the chain.

1 JUSTICE JACKSON: Thanks.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 MR. DVORETZKY: Thank you.

5 CHIEF JUSTICE ROBERTS: Rebuttal,
6 Mr. Glasgow?

7 REBUTTAL ARGUMENT OF JOSHUA S. GLASGOW
8 ON BEHALF OF THE PETITIONERS

9 MR. GLASGOW: Thank you, Your Honor.
10 I'd like to make just three brief points.

11 First, jurisdictional discovery did
12 occur in this case back in the summer of 2019.
13 We submitted declarations explaining that
14 tracing was impossible. The Respondents engaged
15 in some discovery. The district court imposed a
16 deadline to file a motion to compel, and they
17 elected not to do so.

18 Second, there were some questions
19 about what specifically outraged Congress in
20 Sabbatino. And there's some historical context
21 necessary to understand that. At the time
22 Sabbatino -- the second Hickenlooper amendment
23 was passed, prior to the FSIA, Congress presumed
24 that assets would be in the United States for
25 such a claim to proceed because there was no

1 mechanism to establish in personam jurisdiction
2 over foreign states, and so some asset had to be
3 present in the jurisdiction of the district
4 court in order to -- to proceed with those
5 claims. And the -- the sort of catchphrase that
6 Senator Hickenlooper used during those debates
7 was that the United States would become a
8 thieves' market unless the second Hickenlooper
9 amendment was passed.

10 And then, finally, I know the parties
11 have made a number of analogies in this case,
12 and I recognize no analogy is perfectly apt, but
13 if I can offer one more, hewing as closely as I
14 can to the facts of this case. Imagine that a
15 trial court in a European capital city declared
16 that it had the authority to adjudicate claims
17 for the internment of Japanese Americans during
18 World War II, claims that could result in a
19 judgment against the United States in the
20 billions of dollars and permit attachment of
21 U.S. property abroad. And imagine further that
22 this trial court based that authority on the
23 proposition that every dollar the United States
24 spent in the past 80 years was given in return
25 for personal property taken from a few interned

1 individuals. The United States would be
2 outraged and affronted by such a decision.

3 When Congress passed the FSIA, it knew
4 that exercising jurisdiction over foreign
5 sovereigns creates international friction.
6 That's why it focused on commercial activities
7 consistent with the restrictive view of foreign
8 sovereign immunity, and that's why it imposed a
9 commercial nexus requirement in the
10 expropriation exception. The commingling theory
11 effectively reads that most important part of
12 the exception out of the statute. We ask that
13 this Court reverse.

14 Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 The case is submitted.

18 (Whereupon, at 11:29 a.m., the case
19 was submitted.)

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