

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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9
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:

18 JOSHUA S. GLASGOW, ESQUIRE, Buffalo, New York; on
19 behalf of the Petitioners.

20 SOPAN JOSHI, Assistant to the Solicitor General,
21 Department of Justice, Washington, D.C.; for the
22 United States, as amicus curiae, supporting the
23 Petitioners.

24 SHAY DVORETZKY, ESQUIRE, Washington, D.C.; on behalf
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 think there are close
21 questions, but, in -- in those circumstances,
22 maybe a fact finder could say it's at least as
23 likely as not that tainted funds are involved.

24 And the details would matter, temporal
25 proximity, as I said, whether there's either

1 direct or indirect evidence, but, potentially,
2 those types of claims could qualify, yes.

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

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

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

22 MR. GLASGOW: I think this Court was
23 clear in Altmann that the FSIA was not intended
24 to direct or incentivize other nations in the
25 ordering of their affairs. It's not a

1 substantive --

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

11 MR. GLASGOW: I'd make three points in
12 response.

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

18 Second, Congress knew that these types
19 of claims would be rare. It was informed when
20 it passed the second Hickenlooper amendment that
21 it would apply to a tiny fraction of
22 expropriation claims around the world. The
23 Congress was attempting to overrule Sabbatino,
24 not to establish a broad new type of claim that
25 would work, again, a radical transformation of

1 international law.

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

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

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

19 JUSTICE BARRETT: Was or was not?

20 MR. GLASGOW: Was an available forum.
21 The D.C. Circuit reversed that decision because
22 it concluded that exhaustion was not required
23 and that the district court abused its
24 discretion in weighing the various forum
25 non-conveniens factors. But it didn't overturn

1 that core finding that these claims could have
2 been brought in Hungary. And, certainly, I'll
3 acknowledge that Hungary has a European civil
4 legal system that differs in many respects from
5 the American system, but that doesn't make a
6 forum unavailable.

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

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

19 MR. GLASGOW: We didn't --

20 JUSTICE BARRETT: The Solicitor
21 General doesn't think so.

22 MR. GLASGOW: That's right. And we
23 certainly don't have any objection to the Court
24 reaching the Solicitor General's argument. But
25 we didn't preserve that issue. We didn't argue

1 it before the D.C. Circuit. And so it was -- it
2 was unavailable for us to argue here.

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

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

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

20 MR. GLASGOW: I -- I don't know the
21 answer to that question --

22 JUSTICE GORSUCH: Fair enough.

23 MR. GLASGOW: -- having not made the
24 argument.

25 JUSTICE GORSUCH: Fair enough. Okay.

1 Thank you.

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

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

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

16 JUSTICE SOTOMAYOR: So what's the
17 "more?" Is it tracing?

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

21 JUSTICE SOTOMAYOR: Well, but that's
22 what I want to hear from you, which is: Which
23 is the clearest and -- and more -- most succinct
24 way to articulate the concept so that we're not
25 saying that merely commingling is what throws

1 you out of the courtroom?

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

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

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

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

22 JUSTICE SOTOMAYOR: Do we have to go
23 to either of the two additional questions you
24 presented to us?

25 MR. GLASGOW: No, the Court doesn't

1 have to address those issues. There's a number
2 of decisional paths that are available. And
3 perhaps the easiest one is to say that the facts
4 as alleged here or even based upon the evidence
5 submitted by Respondents does not establish that
6 interest payments made in 2005 were exchanged
7 for the items taken in 1944.

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

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

20 What extent should that inform us?

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

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

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

9 MR. GLASGOW: For two primary reasons.

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

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

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

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

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

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

20 JUSTICE BARRETT: Is it turning on
21 intent when you say you give something for
22 something else? Like I'm intending to use the
23 pot of money that I expropriated in order to
24 obtain this? Is it -- I don't understand how --
25 you said it's easy in the mine run of cases to

1 look and see, but I'm not sure why it's easy.

2 What am I looking for?

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

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

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

20 To the extent you really had to dig
21 for additional judicial gloss, I might say it's
22 something like causation: The reason I gave you
23 Item A is because I received Item B and vice
24 versa. But I think that sort of deep analysis
25 really isn't required here.

1 JUSTICE JACKSON: Can I ask you --

2 JUSTICE KAGAN: So --

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

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

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

23 MR. GLASGOW: Yes. Certainly, that
24 type of transaction is what Congress was getting
25 at. And -- and the statute is written in

1 present tense terms. But, here, Respondents
2 have alleged an indirect connection. And our
3 argument isn't that an indirect connection can
4 never qualify for this.

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

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

17 Do you understand what I'm saying?
18 And -- and that, to me, doesn't -- doesn't have
19 anything to do, really, with the words
20 "exchanged for."

21 MR. GLASGOW: I -- I think what you're
22 getting at is the requirement of identifiable
23 property. And you're right that if we talk
24 about property being present somewhere or being
25 owned in the present day, that requires you to

1 specifically identify something in particular,
2 not assets in general.

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

6 The "exchanged for" provides the
7 requirement of traceability, of connecting Item
8 A and Item B.

9 JUSTICE KAGAN: I take it -- please.

10 JUSTICE ALITO: No.

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

19 Same answer?

20 MR. GLASGOW: I think that the time
21 frame is relevant because it affects a number of
22 transactions that have occurred in the interim.

23 JUSTICE KAGAN: Well, this is a
24 national treasury. Presumably, transactions are
25 occurring every day in many -- you know -- you

1 know, there -- it's constantly churning.

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

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

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

22 MR. GLASGOW: No. I think that the
23 burden a plaintiff is going to bear will always
24 depend on the specific facts of the case. What
25 really is at issue here is the conversion to

1 fungible assets, and, in most cases, conversion
2 to a fungible asset that's then commingled with
3 other fungible assets will make tracing
4 impossible. That's just the nature of the
5 statutory language.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas?

9 Justice Alito?

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

20 MR. GLASGOW: Yes. I think that when
21 Congress passed the FSIA, it tightened that
22 language. "Exchanged for," I think, carries
23 forward the concept of traceability because it
24 requires a connection. But, certainly, if I
25 were in Respondents' shoes, I would rather be

1 arguing "based upon" than "exchanged for." So I
2 think Congress did make a real effort to tighten
3 that language.

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

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

24 MR. GLASGOW: I don't think so, but I
25 will say that I'm cautious given the procedural

1 history of this case. We have been litigating
2 this for 14 years. The case was here once
3 before. Following the remand in Philipp, the
4 theory of the case changed from takings from
5 Hungarians to takings from non-Hungarians.

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

11 JUSTICE ALITO: What is the total
12 value of the property that is at issue in this
13 case?

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

21 Class claims, especially with interest
22 going back 80 years, could be so large as to be
23 economically destabilizing, as the district
24 court expressed.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

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

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

13 MR. GLASGOW: That's exactly right.

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

21 MR. GLASGOW: As to Hungary, that's
22 correct.

23 JUSTICE SOTOMAYOR: As -- as to
24 Hungary. Generally speaking, when a statute
25 says you are required to return stolen property

1 or any property exchanged for that stolen
2 property, if I stole a car and sold it for
3 \$20,000 in cash, I don't have to trace where
4 that \$20,000 is. My obligation at the end of
5 the case is pay me the \$20,000. I don't care
6 where you got it -- you get it from. If you
7 lost that 20, but you have another bank account
8 with another 20, you still have to pay me
9 \$20,000.

10 MR. GLASGOW: As a matter of -- of
11 substantive law, when you have a claim against a
12 person, that's correct. But --

13 JUSTICE SOTOMAYOR: When we're talking
14 about a fungible, an item that has been rendered
15 fungible, correct?

16 MR. GLASGOW: Well, liability is in
17 personam in a typical --

18 JUSTICE SOTOMAYOR: Mm-hmm.

19 MR. GLASGOW: -- civil case, so
20 you're -- you're not actually looking at any
21 specific res under those circumstance.

22 Here, there is a requirement that you
23 look to specific property.

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

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?
4 Justice Barrett?
5 Justice Jackson?
6 Thank you, counsel.

7 MR. GLASGOW: Thank you.

8 CHIEF JUSTICE ROBERTS: Mr. Joshi.

9 ORAL ARGUMENT OF SOPAN JOSHI
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING THE PETITIONERS

12 MR. JOSHI: Mr. Chief Justice, and may
13 it please the Court:

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

19 And, as a general matter, when you
20 sell property and put the cash in a large
21 undifferentiated account with a lot of
22 withdrawals and deposits coming in and going
23 out, that money has lost its distinct identity
24 as having been exchanged for the original
25 property. And, in that circumstance, you can't

1 satisfy the FSIA's jurisdictional hook, the same
2 as if the original property had been lost or
3 destroyed.

4 I think Respondents' contrary view
5 really is about tainted accounts, but the
6 statutory text, I think, focuses on tainted
7 property, not tainted accounts.

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

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

22 I think my light went off, so --

23 JUSTICE THOMAS: So Justice Kagan
24 asked Petitioner whether or not this now is a
25 roadmap to avoid FSIA claims by commingling or

1 having it in a general account.

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

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

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

24 But I don't think it's -- it's that
25 odd that a statute meant to be jurisdictional

1 and the expropriation exception in particular,
2 intended to be and recognized by this Court as a
3 small departure from the restrictive theory of
4 sovereign immunity, would not cover a lot of
5 cases that are beyond where Sabbatino as a
6 touchstone would -- you know, would indicate
7 that it applies.

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

14 Can you explain both of those and how
15 the United States is looking at both of those
16 issues with respect to the issue in this case?

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

21 As this Court has observed, we are the
22 only country that even has an expropriation
23 exception that would recognize these sorts of
24 takings claims, which otherwise would be barred
25 by traditional principles like act of state and

1 such. We -- we think we're in conformity with
2 international law, but it is a small departure
3 from the restrictive theory, and if that small
4 departure becomes what this Court called in
5 Helmerich a radical departure, we do risk
6 retaliatory or reciprocal actions against us.

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

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

25 JUSTICE GORSUCH: Mr. --

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

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

16 MR. JOSHI: Well, it -- it was pointed
17 out, as my friend noted, that the -- the second
18 Hickenlooper amendment as drafted was going to
19 cover only a very, very small fraction of
20 expropriation claims.

21 And, remember, under the restrictive
22 theory, no expropriation claims against a
23 foreign sovereign can be entertained in the
24 courts of another sovereign.

25 So the second Hickenlooper amendment

1 was targeted, and, I mean, I -- I wasn't alive
2 during the events of Sabbatino, but, as I
3 understand it, it was an outrage that Cuba would
4 expropriate American-owned sugar, sell it
5 overseas, and the money was sitting right there
6 in New York and, under the restrictive theory,
7 you couldn't touch it.

8 JUSTICE ALITO: I mean, they were
9 upset because -- because the sugar was in New
10 York and this was identifiable, but they didn't
11 care about all the other property owned by U.S.
12 nationals in Cuba that was expropriated.

13 I -- I'm totally -- I -- I don't
14 understand your argument about retaliation.

15 You think that if lawsuits are brought
16 in the United States based on the expropriation,
17 let's say, of the property of U.S. nationals
18 abroad, then foreign countries are going to
19 entertain suits based on the expropriation in
20 this country of the property of their nationals?

21 Is the United States going around
22 expropriating the property of foreign nationals?

23 MR. JOSHI: I -- I hope we're not.
24 And I'm -- I'm not saying that that's going to
25 happen. I'm saying it risks its happening.

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

9 JUSTICE KAGAN: But -- but just going
10 back --

11 MR. JOSHI: -- with international law.

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

19 MR. JOSHI: I'm sure Congress would
20 have been just as upset, but Congress is also
21 thinking about international law and conformity
22 with it. And I think the best way to read the
23 second Hickenlooper amendment and the FSIA is as
24 reflecting that compromise. They want to
25 address particularly egregious claims that

1 satisfy certain criteria which are strict, but,
2 at the same time, they want to obey
3 international law and conform to it.

4 JUSTICE KAGAN: What do you think -- a
5 number of my colleagues have suggested that
6 common law rules that are used particularly in
7 the trust area, that they might have some
8 relevance here.

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

17 MR. JOSHI: Yeah. It seems really
18 hard in a case like this that any of these
19 common law or even statutory tracing rules that
20 have been developed in other areas of law
21 would -- would work, but -- but I don't know
22 that for sure.

23 I will say our test that --

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

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

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

16 So you could think of it that way. Of
17 course, that wouldn't help in the FSIA context
18 because then that last-out would leave that
19 money in the treasury in Hungary.

20 So some courts of appeals have adopted
21 a first-out. That's unlikely to help here
22 because there probably have been so many
23 transactions over the decades, but that's
24 another approach.

25 So, as far as I know, there's not

1 going to be an approach that would work here.
2 But we would caution the Court against adopting
3 any of these approaches here. We would ask the
4 Court to leave that question open.

5 The test that we've proposed for what
6 "exchange for" means, in answer to some of the
7 questions here, is on page 15 of our brief:
8 whether the exchanged-for property retains its
9 distinct identity.

10 And I think that's a test that you can
11 look at and say: It -- was this the property
12 actually exchanged for it, or is it simply -- is
13 it tainted property or is it a tainted account?
14 And we think the statute focuses on tainted
15 property.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 With respect to the first question
19 presented, are these -- are there significant
20 respects in which your position departs from
21 that of the Petitioners?

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

24 CHIEF JUSTICE ROBERTS: Thank you.

25 Justice Thomas?

1 Justice Alito?

2 Justice Sotomayor?

3 JUSTICE SOTOMAYOR: Do we have to
4 reach your other two questions? I know you want
5 us to.

6 MR. JOSHI: Yes.

7 JUSTICE SOTOMAYOR: But do we need to?

8 MR. JOSHI: I think you do need to
9 reach at least the third question presented on
10 the burden shifting because it really is, in our
11 view, intertwined with the first question.

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

16 JUSTICE SOTOMAYOR: I don't know why
17 we would in this case. Respondents acknowledge
18 in their brief the practical impossibility of
19 tracing in this particular case. So wouldn't
20 our holding that you need some sort of
21 connection or -- be enough in this case?

22 MR. JOSHI: It might be. I know -- I
23 know Respondents have acknowledged that. Of
24 course, that was in a brief in opposition in
25 which you granted cert and then, by hypothesis,

1 will have ruled against them.

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

8 JUSTICE SOTOMAYOR: All right. Thank
9 you, counsel. I --

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE GORSUCH: I have a hard time
12 seeing why we'd have to answer the -- the third
13 question, Mr. Joshi.

14 Petitioner hasn't disputed that it
15 bears the burden here, number one.

16 Number two, you make the argument but
17 do so on the last page of your brief, two pages.
18 And you don't discuss any of the pre-FSIA case
19 law that seems to suggest that the foreign
20 sovereign bears the burden of persuasion. You
21 just cite domestic rules, which I understand
22 you're quite correct about, but you don't tangle
23 with the complexity of the FSIA or its history.

24 So why would we reach that question?

25 MR. JOSHI: So let me address each of

1 those. I -- I think you should reach it for --

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

4 MR. JOSHI: I think you have to
5 because, as you pointed out in your colloquy
6 with my friend, it is jurisdictional. And this
7 is the key difference. I --

8 JUSTICE GORSUCH: Well, this is the
9 burden of -- of who -- who bears the burden, and
10 they haven't contested that they bear the burden
11 at least here.

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

16 MR. JOSHI: So we are word-limited in
17 our briefs. We would have loved to have spent
18 more time on it.

19 JUSTICE GORSUCH: You can always use
20 them wisely too.

21 (Laughter.)

22 MR. JOSHI: A fair -- fair point. But
23 let -- let me just -- let me just offer this to
24 you. Given that you granted cert, we think you
25 should get the question and answer it correctly.

1 Now I appreciate the fact that --

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

4 MR. JOSHI: Yeah. Yeah. So I think
5 I -- I'm not going to dispute that you're right
6 that that's how it -- it might have operated
7 before, but that's when foreign sovereign
8 immunity was, in fact, viewed solely as a
9 defense. As this Court recognized in Helmerich,
10 Section 1330 in the FSIA makes it
11 jurisdictional.

12 JUSTICE GORSUCH: I know. We just
13 haven't tangled with that yet ever. Okay. All
14 right. I've got it.

15 Back to the tracing. Why wouldn't --
16 why wouldn't we look to common law principles of
17 tracing in trust law, fiduciary duty law, to
18 analyze these kinds of questions?

19 MR. JOSHI: So, again, I don't
20 think --

21 JUSTICE GORSUCH: Do you resist that?

22 MR. JOSHI: -- I don't think you
23 should reach --

24 JUSTICE GORSUCH: I know you don't
25 want us to reach that.

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

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

5 MR. JOSHI: No --

6 JUSTICE GORSUCH: And, if so, why?

7 MR. JOSHI: There may well be
8 principles of -- of that kind of tracing that
9 might work here. The -- the only caution I
10 would say is, one, the purposes of the FSIA and
11 foreign sovereign immunity are different from
12 trust law or equitable liens or criminal or
13 civil forfeiture or money laundering or all of
14 the other examples that employ those kinds of
15 tracing rules. So any tracing rule that might
16 be borrowed from those contexts would have to
17 take into account those purposes.

18 And then the second is that
19 international law itself has a sort of common
20 law that has developed over the centuries, and
21 that may have something to say about this as
22 well. And I think those are really complicated
23 issues that nobody has briefed, and that is why
24 we would urge the Court not to -- not to weigh
25 in on that.

1 JUSTICE GORSUCH: Sounds like good
2 advice all around. Thank you.

3 MR. JOSHI: Well, Justice Gorsuch, if
4 I could just push back one little bit, I think
5 you --

6 JUSTICE GORSUCH: I think you've
7 pushed back enough. Thank you.

8 (Laughter.)

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAVANAUGH: You can push back
11 now. Sorry. Is it my turn?

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

15 MR. JOSHI: The -- the -- the -- the
16 only real point I -- I wanted to say is that if
17 you didn't have, say, the House report and all
18 you had was the statute, I think it would be
19 pretty clear. In *Samantar*, I think this Court
20 encountered a very similar proposition. The
21 pre-FSIA history often treated state officials
22 and actors and individuals as partaking of the
23 sovereign immunity and they too could enjoy
24 immunity.

25 But, in *Samantar*, you looked at it and

1 you said, look, the FSIA has displaced what came
2 before it. Although we interpret the text in
3 light of that history, the clear text always
4 takes precedence over whatever background rules
5 might have applied beforehand. And the FSIA
6 here says foreign sovereign and instrumentality,
7 it's not defined to include individuals;
8 therefore, the individuals do not partake of
9 that sovereign immunity. There might be some
10 common law that they might be able to partake of
11 but not FSIA immunity under the text.

12 And, in that case, obviously, that was
13 another instance where this principle wound up
14 being plaintiff-friendly in that case because
15 the defendant couldn't invoke FSIA immunity. I
16 think, in this case, it would, you know, happen
17 to work the other way.

18 And so I think Samantar is a good
19 example of where this Court has really
20 privileged FSIA's text over the background
21 history and certainly over legislative history.

22 I think Verlinden is a great example
23 of that. There, the legislative history spoke
24 only about American plaintiffs, American rights,
25 violations of Americans' human rights. And yet

1 the Court looked at it in Verlinden and said,
2 look, we know that's what the legislative
3 history says, but the statute is not limited to
4 domestic plaintiffs. Therefore, this foreign
5 plaintiff is allowed to sue.

6 Again, you're privileging the text of
7 the FSIA where it's clear. And we think, here,
8 1330 expressly makes it jurisdictional, and that
9 has consequences, one of which is that the party
10 invoking jurisdiction has to bear the burden of
11 establishing it.

12 JUSTICE KAVANAUGH: And you say in the
13 brief, even if we reject commingling and require
14 some kind of traceability, if the burden's on
15 the sovereign to show lack of traceability,
16 that's going to be -- I think you used a burden
17 that could be effectively impossible for the
18 sovereign to meet in cases like this.

19 MR. JOSHI: I think that's right. And
20 that's certainly how the D.C. Circuit understood
21 what it was doing in this case, that -- and it
22 expressly said both in the decision below, I
23 think, and definitely in its 2016 decision in
24 this case that Petitioners would bear the burden
25 to show a lack of tracing.

1 And, you know, when -- when many
2 decades have passed, one would think that,
3 especially given the purposes and the narrow
4 departure from the restrictive theory that the
5 expropriation exception is intended to
6 effectuate, that where the property has
7 essentially been lost, where it's lost its
8 distinct identity, that all that means is that
9 there isn't a U.S. forum available anymore. It
10 doesn't let the sovereign off the hook. It just
11 means there's not a forum here to hear those
12 claims.

13 And it would be, I think, quite
14 perverse to flip it around and say, as soon as
15 it's lost its distinct identity, at that point,
16 when nobody can prove it one way or the other,
17 at that point, U.S. courts are wide open to hear
18 these claims that we --

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

23 MR. JOSHI: I --

24 JUSTICE KAVANAUGH: I mean, extending
25 this further would seem to really push us into

1 non-compliance with international norms and law,
2 I would think.

3 MR. JOSHI: It would -- it would
4 seriously risk undermining our conformity with
5 international law. It's a point this Court
6 recognized in Helmerich and Philipp, and I think
7 it applies here as well.

8 JUSTICE KAVANAUGH: And then, last, on
9 the -- Justice Alito asked the question about
10 suits against the United States. I assume those
11 would be backward-looking suits for things that
12 happened long ago.

13 MR. JOSHI: Yeah. I would assume so,
14 yeah.

15 JUSTICE KAVANAUGH: Yeah. Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: Mr. Joshi, I want to
19 ask you about the word "exchange." So, you
20 know, the statute says "any property exchanged
21 for such property" is present in the United
22 States. And you agree, everyone agrees, that
23 this doesn't apply to just the first
24 transaction.

25 And I want to preface this by saying

1 that this isn't a hostile question. I'm really
2 just asking because I want to understand it. I
3 understand the good reasons for that, sort of
4 like everyone says, well, of course, it has to
5 because, otherwise, you know, it would be
6 impossible or -- or foreign sovereigns could
7 evade jurisdiction in the United States.

8 But just how do I think about the word
9 "exchanged" then? Because I was thinking about
10 it as we're sitting here, as I was reading the
11 briefs, I mean, let's imagine that I steal
12 Justice Gorsuch's car.

13 (Laughter.)

14 JUSTICE BARRETT: Purely hypothetical.
15 And I take the car and I sell it for the cash.
16 Well, I've made that exchange, and so that --
17 that clearly, under the ordinary meaning of the
18 word, qualifies, right? Then I take the cash
19 and I buy a painting. I bet on the right
20 painter. It appreciates in value. Twenty years
21 later, I sell it, and then I buy a beach house.

22 Would we really say that I've
23 exchanged Justice Gorsuch's car for the beach
24 house?

25 MR. JOSHI: Maybe, maybe not. I think

1 it might be fair to say that you exchanged, you
2 know, \$20,000 worth of that beach house for the
3 car. And I gather Respondents here are -- are
4 seeking only as much as the value of their
5 property.

6 JUSTICE BARRETT: Well, let me -- let
7 me clarify. Let's just -- in this hypothetical
8 world, let's -- let's -- we're not talking about
9 commingling any of my own cash. Let's just say
10 it's all just one to one because what I'm --
11 what I'm thinking about and what I'm trying to
12 figure out is why any of that is an exchange
13 once we go beyond the first step.

14 MR. JOSHI: You're right. And I think
15 it would be reasonable and it's certainly a
16 reasonable definition of "exchanged" to think
17 that it's just the first step and not the second
18 or third or subsequent steps.

19 I think we believe that Congress at
20 least -- it -- it may not cover infinite steps,
21 but we believe it covers more than one simply
22 because of Sabbatino. In Sabbatino, the sugar
23 was taken, it was sold overseas, I think in --
24 in Europe, and then the money was given to a
25 broker. That money then changed hands to -- to

1 a corporation, which went to a receiver, which
2 eventually went to an escrow account. And you
3 might say, well, it's the same cash, but
4 probably it was cash exchanged for notes,
5 exchanged for other kinds of transfers or sight
6 drafts or something like that.

7 And so I think, because Sabbatino
8 involved arguably multiple exchanges, we think
9 it's -- it's best to read this as also involving
10 multiple exchanges. That's the same reason why
11 property exchanged for property, in a lot of
12 areas of the law, doesn't include sales, but we
13 think, because Sabbatino involved a sale, that
14 Congress probably meant this to involve sales as
15 well, but, at the same time, we shouldn't go
16 much beyond Sabbatino, which really is the
17 touchstone, and this Court has recognized that,
18 and I think all parties sort of recognize that.
19 That is the touchstone of claims Congress was
20 trying to reach.

21 And so we do think it's important to
22 adopt the -- the right definitions, and those
23 definitions in this context are narrow. We just
24 don't think they are the narrowest ones you
25 could read. We're just trying to get the -- the

1 right definition in context given the background
2 of this statute.

3 JUSTICE BARRETT: So, but for
4 Sabbatino, you would say, well, maybe that is
5 the best meaning of the words, that you're just
6 looking for the -- looking at the exchange and
7 not the continual changes down the line?

8 MR. JOSHI: We might well say that. I
9 mean, there is Abramski, which I -- I know has
10 not been the -- the greatest precedent to cite
11 sometimes, but that does say that even when
12 you've got a sale, a straw purchaser doesn't
13 vitiate the fact that the first person has sold
14 to the third person. And so there might be some
15 sort of principle like that that -- that
16 would -- that might apply here. I don't know.

17 But -- but we think, given Sabbatino
18 and the history, that it does encompass at least
19 more than one, maybe not as many as Your Honor
20 suggested, in a -- in a long chain of
21 transactions.

22 JUSTICE BARRETT: Okay. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So Justice Barrett's

1 hypothetical and questions make me again wonder
2 whether "exchange" is really the term that's
3 doing the work here and whether you need it at
4 all to make the argument that I thought you were
5 making.

6 I see your argument as being that
7 property that has been commingled to the extent
8 that it no longer retains its identifiable
9 nature doesn't satisfy the statute because the
10 statute requires property that is owned or is
11 present as the jurisdictional hook. And so, if
12 it's been commingled and we don't identify it
13 anymore as what it was when it was expropriated,
14 we can't know, I thought you said, whether or
15 not it is owned or is present.

16 That sort of conceptualization of this
17 doesn't hinge on the exchange, and, in fact, the
18 exchange could have happened way back at step
19 one. It's now liquidated, and it's the
20 liquidation that makes it commingle-able such
21 that it loses its identity. But that's all
22 "exchange" does for us. I don't understand this
23 to be an argument that relies on a definition of
24 "exchange" really.

25 MR. JOSHI: So I would certainly love

1 to agree with you, but I think, in fairness,
2 both of them do some work here.

3 So, as far as the "is" goes, my
4 understanding of Respondents' claim is that
5 there is actual money here in the United States
6 from which Hungary, the sovereign, made the bond
7 payments. And so they point to that money and
8 they say that's owned by Hungary, it literally
9 is here present in the United States in
10 connection with Hungary's commercial activity.

11 And then they -- so then you say:
12 Well, what is that money? Was that money
13 actually exchanged for the goods that were taken
14 from the survivors or was it not?

15 JUSTICE JACKSON: But I don't know why
16 you ask that question. Why isn't it just can
17 you trace that money back to the beginning?
18 It -- it's -- it's -- how it got here, whether
19 it was exchanged one to one or whatever, it
20 doesn't seem to me to be doing the work. It's
21 just what you're pointing to today, can you
22 trace it to what happened 75 years ago, right?

23 MR. JOSHI: But the -- but the statute
24 doesn't say trace, right? It says either the
25 expropriated property, it says that property --

1 JUSTICE JACKSON: Yeah.

2 MR. JOSHI: -- or any property
3 exchanged for such property. "Such" refers back
4 to "that," so the property that was taken.

5 JUSTICE JACKSON: Right.

6 MR. JOSHI: And so --

7 JUSTICE JACKSON: So liquidation on
8 day one, right?

9 MR. JOSHI: Right.

10 JUSTICE JACKSON: They take the
11 property, they sell it. We have money.

12 MR. JOSHI: And that would qualify as
13 any property exchanged --

14 JUSTICE JACKSON: Exchanged for,
15 correct.

16 MR. JOSHI: -- for such property.

17 JUSTICE JACKSON: First step,
18 exchanged for. So then the money goes into
19 either a separate account or a commingled
20 account.

21 MR. JOSHI: Right.

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

1 MR. JOSHI: No.

2 JUSTICE JACKSON: Trace it to the
3 money they're pointing to today, you don't
4 satisfy the statute?

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

9 JUSTICE JACKSON: Right.

10 MR. JOSHI: And, at that point, then
11 no property, whether it's in the United States
12 or not, could be deemed to have been exchanged
13 for the original property. It's as if the
14 original property had been lost or destroyed,
15 and so --

16 JUSTICE JACKSON: I guess I -- thank
17 you. I mean, I guess my only point is, if the
18 original property is lost or destroyed, the --
19 the exchange was still made originally. We
20 identified the exchange, and then it's lost or
21 destroyed. The problem is we can't trace it to
22 what you're pointing to today, right?

23 MR. JOSHI: I think we're saying the
24 same thing. I think --

25 JUSTICE JACKSON: Right.

1 MR. JOSHI: -- they're equivalent.

2 But -- but the --

3 JUSTICE JACKSON: Yeah.

4 MR. JOSHI: -- the notion of tracing
5 has to come from the word "exchanged for." I
6 think that's --

7 JUSTICE JACKSON: Thank you.

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Dvoretzky.

12 ORAL ARGUMENT OF SHAY DVORETZKY

13 ON BEHALF OF THE RESPONDENTS

14 MR. DVORETZKY: Mr. Chief Justice, and
15 may it please the Court:

16 Hungary and MAV lack immunity for
17 stealing Respondents' property during the
18 Holocaust.

19 First, the expropriation exception
20 applies when a foreign state or instrumentality
21 possesses the expropriated property or any
22 property exchanged for such property with the
23 required commercial nexus with the U.S.

24 Hungary and MAV stole Respondents'
25 property while forcing them on to cattle cars.

1 When Hungary and MAV liquidated Respondents'
2 property, they exchanged that property for
3 money. And when money is commingled, a
4 withdrawal from commingled funds is an exchange
5 for earlier deposits.

6 So, when Hungary used commingled funds
7 to pay interest and buy equipment in the United
8 States, it put into the United States property
9 that had been exchanged for the expropriated
10 property. For MAV, an instrumentality, the
11 analysis is even simpler. The property doesn't
12 have to be in the U.S. MAV deposited money
13 exchanged for Respondents' property into funds
14 it continues to hold, and that satisfies the
15 exception given MAV's commercial activity here.

16 Second, Hungary would nullify the
17 expropriation exception by limiting it to barter
18 economies and inept regimes, hardly the threats
19 that Congress targeted. The expropriation
20 exception is already limited because it requires
21 that the taking violate the international law of
22 expropriation, which doesn't reach domestic
23 takings.

24 Moreover, this case is the rare case
25 where the historical record shows the

1 defendants' practice of liquidating and
2 commingling.

3 I'd like to briefly address the two
4 tests that I heard Mr. Joshi and Mr. Glasgow
5 propose. The government proposes a test whether
6 property retains its distinct identity. But,
7 because money is fungible, as soon as it is
8 commingled, at that point, it loses its distinct
9 identity. So, under the government's test,
10 commingling would be a roadmap for escaping the
11 FSIA's jurisdictional hook.

12 Mr. Glasgow argued the item at the
13 beginning and the end have to be given in return
14 for one another. That's exactly what happens
15 when you have a series of exchanges involving
16 money.

17 I welcome the Court's questions.

18 JUSTICE THOMAS: You know, that's
19 understandable, but, if the account is one for
20 one, you reduce the property to funds and you
21 hold that fund into a -- a marked account,
22 that's understandable. But, when you put the
23 funds in an undifferentiated or general account,
24 how do you say that that -- the funds in that
25 account are all exchanged for the property?

1 MR. DVORETZKY: Justice Thomas, I
2 think the answer to that has to do with the
3 fungibility of money. When somebody deposits
4 money in a bank, they get an IOU, in effect, a
5 credit.

6 JUSTICE THOMAS: Yeah.

7 MR. DVORETZKY: A withdrawal is then
8 an exchange of that IOU for money in the bank,
9 but it's not -- they're not getting the same
10 money. They're not getting the same bills. The
11 money has worked its way through the banking
12 system. The bank has lent it, has used it, has
13 done whatever with it.

14 But they're getting money back for the
15 IOU. The account always has more money in it
16 than it would have had but for that initial
17 exchange, setting aside the possibility of
18 bankruptcy or the account zeroing out somehow.
19 The account always has more money in it. And,
20 therefore, when there's a withdrawal later in
21 time, that withdrawal can be understood as being
22 an exchange for the expropriated funds that were
23 put in in the first place.

24 JUSTICE THOMAS: But the funds are not
25 simply from that exchange. You could have

1 Justice Barrett's funds from Justice Gorsuch's
2 car, you could have people's retirement accounts
3 in that general fund, and the funds from the
4 property. So it's not merely the exchanged
5 property -- the funds from the exchanged
6 property.

7 MR. DVORETZKY: That is, of course,
8 the nature of commingling, that when you put the
9 expropriated funds in with other funds, you have
10 both there, but, because the funds don't have a
11 distinct identity because money is fungible,
12 when you take the money out, you can -- it is
13 perfectly natural to understand that you are
14 taking out funds that are attributable to the
15 funds that were there before.

16 JUSTICE THOMAS: Well, how would
17 you -- how would you distinguish a -- a -- an
18 account that is solely -- let's say that
19 someone, Hungary, set up a -- an account, a
20 stolen prune account, and you could trace it.
21 How does that -- how would that be different
22 from a general account?

23 MR. DVORETZKY: I do think that if you
24 had a segregated account, if you had a -- a
25 Holocaust theft fund account --

1 JUSTICE THOMAS: Yeah.

2 MR. DVORETZKY: -- that was totally
3 segregated from any other general funds that the
4 defendant had, that would be a different
5 situation. You'd be able to say those funds are
6 just in this one place.

7 But, as soon as they are commingled,
8 at that point, you can no longer differentiate
9 the illicit funds from the funds that were there
10 before. And the law recognizes this in a number
11 of different areas. This is why, for example,
12 in the in rem cases, in a civil asset forfeiture
13 proceeding, a district court doesn't lose in rem
14 jurisdiction just because forfeited money is
15 deposited in a bank, enters the banking system,
16 and in a sense leaves the jurisdiction where the
17 money was seized.

18 In the money-laundering cases, as
19 the -- the Fourth Circuit, for example,
20 recognized in the Moore case, when -- that's
21 talking about monetary transactions in
22 criminally-derived property. The government
23 doesn't bear the burden to prove that no
24 untainted funds were used after illicit funds
25 are commingled with other funds.

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE JACKSON: But the in rem
3 and -- oh.

4 CHIEF JUSTICE ROBERTS: -- at the end
5 of the day, you're really just asking us to
6 over -- to throw out the general rule that
7 sovereigns can't be sued for appropriations of
8 this sort, right? I mean, once you say
9 commingling counts, well, then everything's --
10 everything's pretty much fair game, except for
11 the rare possibility that's been mentioned that
12 they happen to have an account that's, you know,
13 appropriated funds in a particular instance.

14 It seems to me that -- is there -- is
15 there anything wrong with it? In other words,
16 we know that from Sabbatino and the second
17 Hickenlooper amendment that Congress had in mind
18 a much narrower exception than that. So, other
19 than curious, bizarre situations of accounting,
20 like the one when they have a separate account
21 for appropriated property, this is really just
22 throwing out the whole sovereign immunity
23 principles under which the rest of the world
24 operates?

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

1 quite right, Mr. Chief Justice.

2 Congress passed the expropriation
3 exception over the Executive's opposition,
4 knowing that that was a departure from
5 international law.

6 It did so in response to Sabbatino,
7 but it wasn't -- the language that it passed
8 wasn't limited to the facts of Sabbatino.
9 Congress enacted broad language. Sabbatino
10 itself involved fungible property. The Court
11 there recognized traceability problems.
12 Congress knew that but enacted the broad
13 language anyway.

14 CHIEF JUSTICE ROBERTS: Well, but --
15 sorry to interrupt, but it seems to me you're
16 just agreeing with me that that's what will
17 happen under your theory.

18 MR. DVORETZKY: So no. I also think
19 there are significant guardrails to our theory.
20 One is the guardrail that this Court put up in
21 Philipps in interpreting the expropriation
22 exception requiring that you're only talking
23 about domestic takings. And so -- I'm sorry,
24 the domestic takings rule applies. And so a
25 foreign country can't be sued for takings from

1 its own citizens. That's already one
2 limitation.

3 In addition to that, though,
4 plaintiffs actually have to be able to -- to --
5 to show liquidation and commingling. Usually,
6 when somebody's property is stolen, at that
7 point, they don't know what happened to it.
8 This is the rare case, the Holocaust is the rare
9 case, where there is extensive documentation of
10 what Hungary's practice was.

11 And we put that documentation before
12 the district court. Hungary did not rebut it.
13 That's why the -- the district court relied on
14 three key sources that we put in: the Hungarian
15 Constitutional Court decision from 1993, a
16 manuscript about the Holocaust in Hungary
17 written by one of Hungary's own experts, and
18 archives from the U.S. Holocaust Museum. All
19 three of those sources established that Hungary
20 had a practice of not just expropriating but
21 then also liquidating the property, melting it
22 down, commingling it with state funds, including
23 in -- in -- in the -- the country's general --
24 general accounts.

25 CHIEF JUSTICE ROBERTS: Well, you

1 think in most --

2 MR. DVORETZKY: And so this is the
3 rare --

4 CHIEF JUSTICE ROBERTS: -- you think
5 in most cases that the appropriated property is
6 not commingled with the general funds?

7 MR. DVORETZKY: It would have to be
8 established. And, again, typically, a plaintiff
9 is not going to know that. This is a case
10 where -- because the Holocaust is a unique
11 situation, where we actually do have
12 documentation. A plaintiff can't just go into
13 court and say: My property was taken, I have no
14 idea what happened to it, but I think it was
15 probably commingled, so, therefore, the
16 sovereign -- the sovereign immunity doesn't
17 apply.

18 JUSTICE JACKSON: Counsel --

19 MR. DVORETZKY: That --

20 JUSTICE KAGAN: The example you gave,
21 Mr. Dvoretzky, you said, you know, unless a
22 country were stupid enough to establish a
23 Holocaust expropriation fund, but I'm
24 whethering -- wondering whether, even if a
25 country did establish a Holocaust expropriation

1 fund, whether that would be good enough under
2 the Petitioners' theory, because, you know,
3 there were 500,000 victims of the Hungarian
4 Holocaust. So there, a lot of money, you know,
5 from different people going into that fund. So
6 that's all commingled. So, even in that case,
7 it seems the Petitioner would say the country is
8 off the hook.

9 MR. DVORETZKY: So, again, I -- I
10 think that there's no reason to think that --
11 that Hungary actually had this kind of a
12 Holocaust theft fund. So I think that --

13 JUSTICE KAGAN: Yes, I know. It's --
14 it's an example to sort of suggest -- I -- I
15 mean, a country's never going to pay, you know,
16 under the expropriation exception, which
17 Congress passed presumably to do something.

18 MR. DVORETZKY: Right.

19 JUSTICE KAGAN: Like, even if a
20 country set up an expropriation fund, all that
21 money is commingled too.

22 MR. DVORETZKY: Right. It -- it is --
23 it's certainly commingled with the country's
24 overall asset -- asset base, sure.

25 JUSTICE KAGAN: Even if it's not.

1 MR. DVORETZKY: Yeah. Yeah.

2 JUSTICE JACKSON: Counsel, can I ask
3 you -- because I guess I'm still stuck on
4 whether or not the tracing requirement is
5 inherent in the nature of the nexus that is
6 necessary for jurisdiction here, so let me ask
7 you a hypothetical.

8 Suppose Hungary obtained expropriated
9 art and then it brought it into, you know, its
10 museum somewhere and then lost track of it, lost
11 it. We just can't find it. It never sold it.
12 It never exchanged it. It just disappeared.

13 Would there be jurisdiction to sue
14 under this statute in your view?

15 MR. DVORETZKY: So I think we have to
16 distinguish under the statute between Hungary
17 and the instrumentality. For the
18 instrumentality, the nexus requirement does not
19 require that the property be present in the
20 United States.

21 JUSTICE JACKSON: Okay.

22 MR. DVORETZKY: The instrumentality
23 has to have the property or property exchanged
24 for it, and it has to engage in commercial
25 activity in the United States.

1 JUSTICE JACKSON: Okay.

2 MR. DVORETZKY: In your hypothetical,
3 where we don't know, however, that either the
4 instrumentality or the country still even has
5 the property --

6 JUSTICE JACKSON: Right.

7 MR. DVORETZKY: -- if that can't be
8 established, then I think the expropriation
9 exception probably would not be satisfied in
10 that situation.

11 JUSTICE JACKSON: And it's because the
12 property, as far as we know in terms of facts on
13 the ground right now, doesn't exist. It's not
14 present. It isn't there. So that suggests to
15 me that this really is about identifiable
16 property that is presently either in the United
17 States or with the foreign instrumentality that
18 is doing work with the United States, right?

19 MR. DVORETZKY: I -- I do think, for
20 the instrumentality question, it would be tricky
21 because the statutory language talks about the
22 property being owned by an agency or
23 instrumentality. I can own things and not know
24 where they are. You can own something and lose
25 it. And so --

1 JUSTICE JACKSON: Yeah, but you'd have
2 to -- someone would have to establish that it is
3 still owned by you, right? That it -- it still
4 exists, correct? We have to know where it is in
5 order to determine -- we have to know what it
6 is, right, or that you own it?

7 MR. DVORETZKY: I suppose you could
8 have a situation where I have title to
9 something, but I don't know where the thing is
10 that I have title to. You would say that I
11 still own the lost item. I guess that's a step
12 removed from your art hypothetical.

13 JUSTICE JACKSON: I guess what I'm
14 trying to figure out is whether or not you are
15 reading this as a statute that allows for suit
16 against any foreign country that previously
17 expropriated, whether we can figure out where
18 their property -- that particular property is or
19 not. And I don't see it as that, and I'm -- I'm
20 worried about that.

21 MR. DVORETZKY: So -- so I don't think
22 it's that. And, again, I don't think that's
23 this case because, given --

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

25 MR. DVORETZKY: Yeah.

1 JUSTICE JACKSON: -- this case, but
2 don't we have to have some means of determining
3 where this thing is in order to satisfy the
4 nexus requirement of this statute? Because,
5 other than that, you would have a situation in
6 which all that needed to be proved, I guess, is
7 that at one point 75 years ago, this property
8 was taken by this country or, you know -- and
9 there we are. Unless you can show that they
10 currently -- it is in the United States or is
11 owned by the company today -- or by the foreign
12 state today, I don't know how you satisfy this
13 jurisdictional hook and I don't know how you
14 prove that without some sort of tracing.

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

18 JUSTICE JACKSON: Okay.

19 MR. DVORETZKY: -- by -- by the
20 instrumentality.

21 JUSTICE JACKSON: Okay.

22 MR. DVORETZKY: That comes from the
23 statute.

24 JUSTICE JACKSON: Okay.

25 MR. DVORETZKY: As for tracing, I

1 think, in the context of money, which, again, is
2 fungible, whatever tracing requirement there
3 might be is satisfied by the -- the very fact of
4 commingling. And this takes me back to some of
5 the earlier discussion with the Chief Justice
6 and with Justice Thomas.

7 JUSTICE JACKSON: So you're saying
8 that every dollar from -- for 75 years that was
9 in the bank accounts of Hungary counts for the
10 purpose of knowing that that's where this money
11 is?

12 MR. DVORETZKY: For -- for purposes of
13 establishing the jurisdictional hook, yes,
14 and -- and that is, again, because Hungary's
15 bank accounts were increased by X dollars of
16 value as a result of the expropriated property
17 being put in there. Hungary, therefore, has
18 that much more.

19 JUSTICE JACKSON: But, if it was a
20 painting in the museum that went in, was
21 commingled with the other art, we can't exactly
22 figure out which one it is or we don't know, you
23 would say no jurisdiction? We have to know that
24 they have the painting, it's -- that there it
25 is, right?

1 MR. DVORETZKY: Well, again, I think
2 that's different in two respects. One is that
3 the painting's not fungible, so you've got to
4 identify that particular painting. Dollars are
5 fungible. It doesn't matter whether I give you
6 \$10 or whether I give you two fives; it's the
7 same thing. That's one distinction.

8 The other distinction is, again, so
9 it's a -- it's an unusual situation that you're
10 positing, Justice Jackson, because even -- the
11 painting goes into the art museum. Let's say we
12 have security cameras around the art museum. We
13 know it never left. Nobody ever took it out.
14 But we can't find it in the museum. I don't
15 know, it's behind a couch somewhere. It's in
16 the basement. Would you say that it is still
17 there? I -- I think you would.

18 But, again, that's far removed from
19 this case, where we're dealing with fungible
20 property, and the key point is, once the money
21 is commingled, we know that it's there because
22 the account value is increased by the amount of
23 that money.

24 JUSTICE KAVANAUGH: Can I ask about
25 the foreign policy implications? Because I

1 think we --

2 MR. DVORETZKY: Sure.

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

6 MR. DVORETZKY: That's right. And
7 Congress was aware of that when it passed this
8 one.

9 JUSTICE KAVANAUGH: But doesn't that
10 fact and the out of compliance with
11 international law -- suppose we have a choice,
12 you can interpret the exception more narrowly or
13 more broadly. More broadly pushes us further
14 out of compliance with international law -- this
15 is what the Solicitor General says -- furthers
16 friction with foreign countries because we can
17 forget, it's a big deal to hale a foreign
18 country into a U.S. court, and also increases
19 the risk of reciprocal actions against the
20 United States in foreign countries abroad.

21 So, you know, do we assume Congress
22 meant to do all that, or, you know, is it, as
23 the Solicitor General says, more prudent to
24 choose the narrower interpretation of it so as
25 not to cause all those ramifications?

1 MR. DVORETZKY: So two points, Justice
2 Kavanaugh.

3 One, I think you should assume that
4 Congress intended to do something when it passed
5 the expropriation exception. And, as Justice
6 Kagan's question --

7 JUSTICE KAVANAUGH: But -- but even
8 just doing the narrow -- Sabbatino is doing
9 something.

10 MR. DVORETZKY: It's doing very, very
11 little.

12 JUSTICE KAVANAUGH: Okay. But it's
13 something. And -- and they said -- and they
14 recognized that it was narrow, that it was
15 recognized at the time, but -- and keep going,
16 though.

17 MR. DVORETZKY: Well, so I think you
18 may be referring to the Katzenbach legislative
19 history --

20 JUSTICE KAVANAUGH: Mm-hmm.

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

24 JUSTICE KAVANAUGH: Keep going, yeah.

25 MR. DVORETZKY: In addition to giving

1 this exception some meaning, it is already a
2 narrow exception in light of Philipp. That
3 already significantly cuts down the class of
4 claims that can be brought.

5 And, again, as I was saying earlier,
6 you have to actually establish commingling and
7 liquidation, which is not something that you're
8 typically going to be able to do. So these are
9 not claims that can be easily brought, but this
10 is the rare case in which they can.

11 With -- with respect to what Congress
12 knew when it was passing the second Sabbatino --
13 the Hickenlooper amendment, I think, Justice
14 Kavanaugh, that you were referring to the -- the
15 Katzenbach testimony. The Katzenbach testimony,
16 first, was against the amendment. The -- the
17 Executive opposed even what it potentially
18 viewed as a narrow expropriation exception.

19 But, beyond that -- so there's a --
20 there's a figure in the legislative history
21 that -- in which Katzenbach said only 1 percent
22 of expropriated money would be at stake. That
23 was based on there having been 19 lawsuits on an
24 expropriation theory. That's actually a
25 surprisingly high number given that there was no

1 expropriation exception at the time.

2 And Katzenbach took the dollar value
3 of those lawsuits divided by an estimate of the
4 total amount of expropriated money from -- from
5 U.S. citizens and came up with that 1 percent
6 figure. That doesn't tell us what the scope of
7 this exception in the language that Congress
8 actually enacted is doing.

9 There were some questions that came up
10 earlier about tracing and whether that is a body
11 of law to look to here. I don't think it is,
12 but I think, even if you do, first of all, the
13 general rule in St. Louis versus Spiller is that
14 "when trust funds are mingled with others, the
15 beneficiary may assert an equitable lien upon
16 the mingled mass to the extent of his
17 contribution thereto."

18 So the equitable rule actually did
19 allow even in the commingling situation for
20 liability to be established.

21 Beyond that, though, the equitable
22 rules, as --

23 JUSTICE SOTOMAYOR: I'm sorry, would
24 you repeat that again?

25 MR. DVORETZKY: Sure. This is from

1 St. Louis versus Spiller. When "trust funds are
2 mingled with others, the beneficiary may assert
3 an equitable lien upon the mingled mass to the
4 extent of his contribution thereto."

5 And -- and so, even --

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 MR. DVORETZKY: -- even in the trust
9 fund, the general rule is that when there are
10 commingled funds, there can be liability still
11 established. Commingling doesn't defeat that.
12 The -- the --

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

17 But is there a difference between
18 jurisdiction and liability? Because I don't
19 think anybody would deny that Hungary, even if
20 it commingled all these funds, still would owe
21 the money.

22 But the question here is a little bit
23 different, right? It's is the money present for
24 jurisdictional purposes.

25 Does that bear on the question?

1 MR. DVORETZKY: So I -- my fundamental
2 point would be I don't think that the tracing
3 rules should apply here. If you did look at
4 them, then you should look at them through the
5 lens of that language that I was quoting from
6 Spiller.

7 But the reason I think the tracing
8 rules don't apply here, those are really rules
9 that come out of equity cases.

10 So, when this -- not to turn this into
11 an ERISA case, but, in ERISA, Congress
12 specifically said -- in Section 502(a)(3), it
13 referred to equitable relief. And so, in cases
14 like Great West and Sereboff and Montanile, this
15 Court had to delve into these archaic
16 distinctions in equity about what kind of
17 tracing was required in particular
18 circumstances.

19 That's not what Congress did when it
20 passed this jurisdictional provision in the FSIA
21 which codifies the common law. The FSIA comes
22 from common law. We know that from cases like
23 Samantar.

24 And so Congress wasn't invoking these
25 equitable principles in this -- in the -- in the

1 FSIA. The tracing rules don't provide the
2 answer here.

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

7 Has this commingling theory been used
8 under the expropriation exception before, in
9 other cases before -- besides the two that
10 created the split here?

11 MR. DVORETZKY: Not that I'm aware.
12 So, in terms of the international consequence --
13 the foreign relations consequences of reading
14 the expropriation exception our way, there has
15 not been a flood of cases that have been
16 brought. I'm not aware of other cases
17 besides -- besides those two and some other
18 Holocaust -- Holocaust litigation.

19 JUSTICE SOTOMAYOR: If -- if we accept
20 the plaintiffs' theory -- or Petitioners' theory
21 or the government's theory, they -- at least the
22 government said there's no difference between
23 the two. If we say -- and I'm not suggesting
24 you're losing.

25 MR. DVORETZKY: Good.

1 JUSTICE SOTOMAYOR: Just a
2 hypothetical, okay? If we say that you have --
3 you -- the historical commingling theory's not
4 enough, that you need in some way to identify
5 the property, does your complaint survive, or do
6 we just reverse and order dismissal?

7 MR. DVORETZKY: So our complaint
8 survives.

9 JUSTICE SOTOMAYOR: That's -- then we
10 do have to reach the who bears the burden of
11 proof, correct?

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

16 And so the issue -- the issue here --

17 JUSTICE SOTOMAYOR: That's my whole
18 point. It is very hard to imagine, if I have a
19 bank account, that I put a hundred dollars in it
20 today and after 80 years -- I'm not quite 80,
21 I'm 70 -- but, after 70 years, that that same
22 hundred remains in that account under any
23 theory.

24 Every passing year, I have a flood of
25 money going out, I have a flood of money coming

1 in. It's an interesting concept that that \$100
2 that my mother put in that account the day I was
3 born, that a piece of it is still there 60 years
4 or 70 years or 80 years later. It's a fiction
5 that takes quite an imagination.

6 MR. DVORETZKY: So -- so two points,
7 Justice Sotomayor.

8 One, Hungary could have tried to
9 refute but didn't liquidation and commingling in
10 the first place. They didn't dispute -- they
11 didn't dispute that. And that is something that
12 a foreign sovereign could -- could disagree --

13 JUSTICE SOTOMAYOR: Let's assume that
14 they -- they took that 5 million -- billion,
15 million dollars and put it in. What they came
16 in and said: You can't trace that money now.
17 There's been so much money that's come in and
18 gone out over 80 years, there's no way to say
19 that any of that remains.

20 MR. DVORETZKY: Let me -- let me try
21 this. Not quite 80 years, but I think that if I
22 had not been a summer associate during law
23 school, if I had chosen to take the summer off,
24 I would have deposited less money back then and,
25 as a result, I would have less money in my bank

1 accounts today.

2 Now you could say: Oh, no, you spent
3 your summer associate salary on tuition. That's
4 gone. But --

5 JUSTICE SOTOMAYOR: All right. So
6 let's get to the bottom line. You're saying to
7 me that we have to -- that this case -- the end
8 of this case depends on us reaching the question
9 of the burden of -- who bears the burden of
10 pleading this?

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

14 JUSTICE SOTOMAYOR: I gave you a
15 different hypothetical.

16 MR. DVORETZKY: If the commingling
17 theory is not valid, do you need to reach the
18 burden shifting -- burden shifting?

19 At that point, I would still say that
20 you don't because of the unrebutted facts in
21 this record. But, if you do reach the
22 burden-shifting theory -- burden-shifting
23 argument, the burden of persuasion there ought
24 to be on the defendants, on the foreign state.

25 Yes, this Court has referred to

1 foreign sovereign immunity as jurisdictional,
2 but it's an odd kind of jurisdictional inquiry.
3 Jurisdiction -- subject matter jurisdiction
4 generally can't be waived by statute.

5 Subject matter jurisdiction here can
6 be waived. As a matter of litigation strategy,
7 Hungary has -- as Justice Gorsuch pointed out,
8 Hungary has said that it bears the burden of
9 persuasion. And Hungary in this situation is
10 the party with superior access to the
11 information. It has extensive records of what
12 it did with expropriated property.

13 JUSTICE GORSUCH: Mr. Dvoretzky, you
14 don't dispute, though, that you bear the burden
15 of production at this stage of showing an
16 exchange, correct?

17 MR. DVORETZKY: Correct. Once they --

18 JUSTICE GORSUCH: So whatever --

19 MR. DVORETZKY: -- once they
20 dispute -- once --

21 JUSTICE GORSUCH: -- whatever that
22 standard is, you acknowledge that you bear the
23 burden of production to meet it?

24 MR. DVORETZKY: Once they dispute our
25 factual allegations as to that, yes, then the

1 burden shifts to us in order to show that, in
2 fact, our property --

3 JUSTICE GORSUCH: And they -- they --
4 they say under a proper standard, there is no
5 exchange here, and you'd -- under their
6 standard, you'd have to meet that, if -- if the
7 Court were to adopt their view of what an
8 exchange means?

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

10 JUSTICE GORSUCH: Okay. So, really,
11 the burden of persuasion question isn't before
12 us in that sense. It's really who bears the
13 burden of -- what the burden of persuasion --
14 sorry, the burden of production is with respect
15 to an exchange?

16 MR. DVORETZKY: Right. And I think
17 that's often true in burden cases, that at the
18 end of the day, once you have both sides'
19 evidence in the case, unless it is perfectly in
20 equipoise, which it very, very rarely will be,
21 the Court is just going to weigh the two sides'
22 evidence and decide by a preponderance who's
23 right.

24 JUSTICE BARRETT: Does the case die,
25 though? Let -- let's just -- I'll follow

1 Justice Sotomayor's hypothetical. Just
2 hypothetical, let's imagine that we adopted the
3 United States' view.

4 Would you have any hope of satisfying
5 your burden of production on remand?

6 MR. DVORETZKY: We -- we would. And I
7 would think that we would be able to get
8 jurisdictional discovery into that inquiry if
9 that were the standard that the Court were to
10 adopt here.

11 The way this case proceeded below,
12 again, Hungary's only argument, Hungary didn't
13 dispute expropriation and it didn't make an
14 argument about the fact of liquidation or
15 commingling. It only said, well, it's
16 impossible to trace. And the way this case was
17 litigated was about whether there was a tracing
18 requirement.

19 If this Court required -- if this
20 Court concludes that Hungary's or the United
21 States' standard is the correct one -- and,
22 again, Hungary has the information about what
23 happened to the property and about its bank
24 accounts -- we would at that point be entitled
25 to jurisdictional discovery below to try to

1 establish whatever standard this Court --

2 JUSTICE KAVANAUGH: What would --

3 MR. DVORETZKY: -- sets forth.

4 JUSTICE KAVANAUGH: -- that

5 jurisdictional discovery look like?

6 MR. DVORETZKY: So, for starters, it
7 would involve discovery into Hungary's records
8 of what happened in the Holocaust. We allege at
9 some length in our complaint that Hungary has
10 extensive records of the expropriation of
11 property and -- and how it -- what happened to
12 it after it was expropriated. We would want to
13 get access to those records, which we have tried
14 to get but been unsuccessful in doing so. We
15 would also --

16 JUSTICE KAGAN: I don't understand how
17 that would help you. I mean, you know, they
18 have records and they say yes, we took all of
19 these people's money and -- and other assets,
20 and the money we put in bank accounts, and the
21 assets we sold and we put the proceeds in bank
22 accounts, and then we spent it.

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

25 MR. DVORETZKY: Well, and -- and,

1 Justice Kagan, the records are actually, I
2 think, a little bit more detailed than that. We
3 already know and have put in the record evidence
4 of particular bank accounts that the money was
5 deposited into.

6 And so, if this Court were to require
7 us to somehow trace the flow of that dollar from
8 1944 to today, we would get -- we would need
9 that kind of evidence to know this property was
10 deposited into this bank account and then trace
11 the flow of that bank account through the years.

12 I don't think that is the standard
13 that the -- the -- the statutory language
14 requires because, again, I think the commingling
15 theory is valid. Money is fungible. All the
16 arguments we've been talking about about the
17 nature of exchange in this context. But, if the
18 Court were to disagree, we'd be entitled to
19 discovery to try to figure out exactly where the
20 dollar went from account to account.

21 JUSTICE ALITO: Unless the account
22 into which the money was placed was the sort of
23 unlikely special account that was discussed
24 earlier, the -- you know, the Holocaust
25 expropriation account, I don't understand how

1 that would -- the kind of discovery you're
2 talking about would help you.

3 MR. DVORETZKY: I think it -- it
4 depends what standard the Court were to adopt.
5 I -- again, I think the right standard here
6 would not require this sort of tracing because,
7 when we're talking about money, it just doesn't
8 make sense to ask where a particular dollar went
9 when all dollars are fungible.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 Justice Alito, anything further?

17 Justice Kagan?

18 JUSTICE KAVANAUGH: Just one thing.
19 In that discovery, are you deposing officials
20 from the Hungarian government too?

21 MR. DVORETZKY: Potentially, yes.

22 JUSTICE JACKSON: Just one --

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: Just one

1 clarification. Is the exchange in your argument
2 at the point of the liquidation or the
3 withdrawal? At some point, you were saying
4 withdrawal is when the exchange is occurring.

5 MR. DVORETZKY: Both.

6 JUSTICE JACKSON: Both?

7 MR. DVORETZKY: Both. There are
8 multiple exchanges that occur in the chain.

9 JUSTICE JACKSON: Thanks.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 MR. DVORETZKY: Thank you.

13 CHIEF JUSTICE ROBERTS: Rebuttal,
14 Mr. Glasgow?

15 REBUTTAL ARGUMENT OF JOSHUA S. GLASGOW

16 ON BEHALF OF THE PETITIONERS

17 MR. GLASGOW: Thank you, Your Honor.

18 I'd like to make just three brief points.

19 First, jurisdictional discovery did
20 occur in this case back in the summer of 2019.
21 We submitted declarations explaining that
22 tracing was impossible. The Respondents engaged
23 in some discovery. The district court imposed a
24 deadline to file a motion to compel, and they
25 elected not to do so.

1 Second, there were some questions
2 about what specifically outraged Congress in
3 Sabbatino. And there's some historical context
4 necessary to understand that. At the time
5 Sabbatino -- the second Hickenlooper amendment
6 was passed, prior to the FSIA, Congress presumed
7 that assets would be in the United States for
8 such a claim to proceed because there was no
9 mechanism to establish in personam jurisdiction
10 over foreign states, and so some asset had to be
11 present in the jurisdiction of the district
12 court in order to -- to proceed with those
13 claims. And the -- the sort of catchphrase that
14 Senator Hickenlooper used during those debates
15 was that the United States would become a
16 thieves' market unless the second Hickenlooper
17 amendment was passed.

18 And then, finally, I know the parties
19 have made a number of analogies in this case,
20 and I recognize no analogy is perfectly apt, but
21 if I can offer one more, hewing as closely as I
22 can to the facts of this case. Imagine that a
23 trial court in a European capital city declared
24 that it had the authority to adjudicate claims
25 for the internment of Japanese Americans during

1 World War II, claims that could result in a
2 judgment against the United States in the
3 billions of dollars and permit attachment of
4 U.S. property abroad. And imagine further that
5 this trial court based that authority on the
6 proposition that every dollar the United States
7 spent in the past 80 years was given in return
8 for personal property taken from a few interned
9 individuals. The United States would be
10 outraged and affronted by such a decision.

11 When Congress passed the FSIA, it knew
12 that exercising jurisdiction over foreign
13 sovereigns creates international friction.
14 That's why it focused on commercial activities
15 consistent with the restrictive view of foreign
16 sovereign immunity, and that's why it imposed a
17 commercial nexus requirement in the
18 expropriation exception. The commingling theory
19 effectively reads that most important part of
20 the exception out of the statute. We ask that
21 this Court reverse.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 11:29 a.m., the case
2 was submitted.)
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