

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 91
Place: Washington, D.C.
Date: December 3, 2024

HERITAGE REPORTING CORPORATION
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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:

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19 behalf of the Petitioners.

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25 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

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

Mr. Glasgow.

ORAL ARGUMENT OF JOSHUA S. GLASGOW

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

6 I welcome the Court's questions.

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

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

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

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

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

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

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

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

20 MR. GLASGOW: I 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?

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? The
5 D.C. Circuit espoused a historical commingling
6 theory, and you want us to say that's not
7 enough.

8 Give me -- what's the affirmative
9 thing we say so that we encompass your -- your
10 beginning point in response to Justice Thomas
11 that it's not that we're rejecting commingling?
12 What are we rejecting?

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

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

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

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

1 saying that merely commingling is what throws
2 you out of the courtroom?

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

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

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

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

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

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

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

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

21 What extent should that inform us?

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

25 JUSTICE GORSUCH: Why? Let me just

1 push back on that for a second.

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

10 MR. GLASGOW: For two primary reasons.

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

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

1 government.

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

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

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

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

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

1 you said it's easy in the mine run of cases to
2 look and see, but I'm not sure why it's easy.
3 What am I looking for?

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

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

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

21 To the extent you really had to dig
22 for additional judicial gloss, I might say it's
23 something like causation: The reason I gave you
24 Item A is because I received Item B and vice
25 versa. But I think that sort of deep analysis

1 really isn't required here.

2 JUSTICE KAGAN: So --

3 JUSTICE JACKSON: Can I ask you -- oh.

4 I guess I'm wondering why your argument hinges
5 on "exchange for." I see those words in the
6 statute, and I could imagine a world in which
7 they are accounted for at the moment of
8 liquidation, that we have the property and it's
9 exchanged for cash 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
22 are getting at is the requirement of
23 identifiable property. And you're right, that
24 if we talk about property being present
25 somewhere or being owned in the present day,

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

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

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

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas?

8 Justice Alito?

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

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

1 think Congress did make a real effort to tighten
2 that language.

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

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

23 MR. GLASGOW: I don't think so, but I
24 will say that I'm cautious given the procedural
25 history of this case. We have been litigating

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

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

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

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

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

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

12 MR. GLASGOW: That's exactly right.

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

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

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

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

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

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

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

17 JUSTICE SOTOMAYOR: Mm-hmm.

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

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

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

25 CHIEF JUSTICE ROBERTS: Justice Kagan?

1 Justice Gorsuch?

2 Justice Kavanaugh?

3 Justice Barrett?

4 Justice Jackson?

5 Thank you, counsel.

6 MR. GLASGOW: Thank you.

7 CHIEF JUSTICE ROBERTS: Mr. Joshi.

8 ORAL ARGUMENT OF SOPAN JOSHI

9 FOR THE UNITED STATES, AS AMICUS CURIAE,

10 SUPPORTING THE PETITIONERS

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

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

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

1 as if the original property had been lost or
2 destroyed.

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

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

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

21 I think my light went off, so --

22 JUSTICE THOMAS: So Justice Kagan
23 asked Petitioner whether or not this now is a
24 roadmap to avoid FSIA claims by commingling or
25 having it in a general account.

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

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

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

23 But I don't think it's -- it's that
24 odd that a statute meant to be jurisdictional
25 and the expropriation exception in particular,

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

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

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

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

20 As this Court has observed, we are the
21 only country that even has an expropriation
22 exception that would recognize these sorts of
23 takings claims, which otherwise would be barred
24 by traditional principles like act of state and
25 such. We -- we think we're in conformity with

1 international law, but it is a small departure
2 from the restrictive theory.

3 But it is a small departure from the
4 restrictive theory, and if that small departure
5 becomes what this Court called in Helmerich a
6 radical departure, we do risk retaliatory or
7 reciprocal actions against us.

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

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

1 JUSTICE GORSUCH: Mr. --

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

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

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

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

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

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

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

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

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

24 MR. JOSHI: I -- I hope we're not.
25 And I'm -- I'm not saying that that's going to

1 happen. I'm saying it risks its happening.

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

10 JUSTICE KAGAN: But just going 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.

10 As this Court recognized in Helmerich,
11 Section 1330 in the FSIA makes it
12 jurisdictional.

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

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

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

22 JUSTICE GORSUCH: Do you resist that?

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

25 JUSTICE GORSUCH: I know you don't

1 want us to reach that.

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

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

6 MR. JOSHI: No --

7 JUSTICE GORSUCH: And, if so, why?

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

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

1 on that.

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

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

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

9 (Laughter.)

10 CHIEF JUSTICE ROBERTS: Justice Kagan?

11 JUSTICE KAVANAUGH: You can push back
12 now. Oop. Oop, sorry. Is it my turn?

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

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

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

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

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

23 I think *Verlinden* is a great example
24 of that. There, the legislative history spoke
25 only about American plaintiffs, American rights,

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

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

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

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

1 to show a lack of tracing.

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

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

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

24 MR. JOSHI: I --

25 JUSTICE KAVANAUGH: I mean, extending

1 this further would seem to really push us into
2 non-compliance with international norms and law,
3 I would think.

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

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

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

16 JUSTICE KAVANAUGH: Yeah. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

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

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

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

14 (Laughter.)

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

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

1 MR. JOSHI: Maybe, maybe not. I think
2 it might be fair to say that you exchanged, you
3 know, \$20,000 worth of that beach house for the
4 car. And I gather Respondents here are -- are
5 seeking only as much as the value of their
6 property.

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

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

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

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

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

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

1 could read. We're just trying to get the -- the
2 right definition in context given the background
3 of this statute.

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

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

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

23 JUSTICE BARRETT: Okay. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

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

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

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

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

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

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

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

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

1 expropriated property, it says that property --

2 JUSTICE JACKSON: Yeah.

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

6 JUSTICE JACKSON: Right.

7 MR. JOSHI: And so --

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

10 MR. JOSHI: Right.

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

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

15 JUSTICE JACKSON: Exchanged for,
16 correct.

17 MR. JOSHI: -- for such property.

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

22 MR. JOSHI: Right.

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

1 it -- and maybe I'm wrong?

2 MR. JOSHI: No.

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

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

10 JUSTICE JACKSON: Right.

11 MR. JOSHI: And at that point, then no
12 property, whether it's in the United States or
13 not, could be deemed to have been exchanged for
14 the original property. It's as if the original
15 property had been lost or destroyed, 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 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 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. This
8 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 the -- the country's general -- general
24 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 in
5 most cases that the appropriated property is not
6 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 KAGAN: Counsel --

19 MR. DVORETZKY: That --

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

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

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

13 JUSTICE KAGAN: Yes and no. It's --
14 it's an example to sort of suggest -- I mean, a
15 country's never going to pay, you know, under
16 the expropriation exception, which Congress
17 passed, presumably to do something.

18 MR. DVORETZKY: Right.

19 JUSTICE KAGAN: Like even if a country
20 set up an expropriation fund, all that money is
21 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 under this
14 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.

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

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

25 JUSTICE JACKSON: Yeah, but you'd have

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

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

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

19 And I don't see it as that. And I'm
20 -- and I'm 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. And
14 -- and that is, again, because Hungary's bank
15 accounts were increased by X dollars of value as
16 a result of the expropriated property being put
17 in there. Hungary, therefore, has that much
18 more.

19 JUSTICE JACKSON: And 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 is 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 is
21 commingled, we know that it's there because the
22 account value is increased by the amount of that
23 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: -- did need to
4 account for those. So no other country in the
5 world has an expropriation exception to begin
6 with, right?

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

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

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

1 cause all those ramifications?

2 MR. DVORETZKY: So two points, Justice
3 Kavanaugh. 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
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 testimony, which -- which I'm happy to
20 address, but if I could also just finish the
21 point to your earlier question.

22 JUSTICE KAVANAUGH: Keep going, yeah.

23 MR. DVORETZKY: In addition to giving
24 this exception some meaning, it is already a
25 narrow exception in light of Philipp. That

1 already significantly cuts down the class of
2 claims that can be brought.

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

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

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

25 And Katzenbach took the dollar value

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

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

16 So the equitable rule actually did
17 allow, even in the commingling situation, for
18 liability to be established.

19 Beyond that, though, the equitable
20 rules, as --

21 JUSTICE SOTOMAYOR: Would you repeat
22 that again?

23 MR. DVORETZKY: Sure. This is from
24 *St. Louis versus Spiller*. When "trust funds are
25 mingled with others, the beneficiary may assert

1 an equitable lien upon the mingled mass to the
2 extent of his contribution thereto."

3 And -- and so, even --

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

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

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

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

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

23 Does that bear on the question?

24 MR. DVORETZKY: So I -- my fundamental
25 point would be I don't think that the tracing

1 rules should apply here. If you did look at
2 them, then you should look at them through the
3 lens of that language that I was quoting from
4 Spiller.

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

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

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

22 And so Congress wasn't invoking these
23 equitable principles in this -- in the -- in the
24 FSIA. The tracing rules don't provide the
25 answer here.

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

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

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

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

23 MR. DVORETZKY: Good.

24 JUSTICE SOTOMAYOR: Just a
25 hypothetical, okay? If we say that you have --

1 you -- the historical commingling theory's not
2 enough, that you need in some way to identify
3 the property, does your complaint survive, or do
4 we just reverse and order dismissal?

5 MR. DVORETZKY: So our complaint
6 survives.

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

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

14 And so the issue -- the issue here --

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

22 Every passing year, I have a flood of
23 money going out, I have a flood of money coming
24 in. It's an interesting concept that that \$100
25 that my mother put in that account the day I was

1 born, that a piece of it is still there 60 years
2 or 70 years or 80 years later. It's a fiction
3 that takes quite an imagination.

4 MR. DVORETZKY: So -- so two points,
5 Justice Sotomayor.

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

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

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

25 Now you could say: Oh, no, you spent

1 your summer associate salary on tuition. That's
2 gone. But --

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

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

12 JUSTICE SOTOMAYOR: I gave you a
13 different hypothetical.

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

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

23 Yes, this Court has referred to
24 foreign sovereign immunity as jurisdictional,
25 but it's an odd kind of jurisdictional inquiry.

1 Jurisdiction -- subject matter jurisdiction
2 generally can't be waived by statute.

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

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

15 MR. DVORETZKY: Correct. Once they --
16 once they dispute -- once --

17 JUSTICE GORSUCH: So whatever --
18 whatever that standard is, you acknowledge that
19 you bear the burden of production to meet it?

20 MR. DVORETZKY: Once they dispute our
21 factual allegations as to that, yes, then the
22 burden shifts to us in order to show that, in
23 fact, our property --

24 JUSTICE GORSUCH: And they -- they --
25 they say under a proper standard, there is no

1 exchange here, and you'd -- under their
2 standard, you'd have to meet that, if -- if the
3 Court were to adopt their view of what an
4 exchange means?

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

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

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

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

25 Would you have any hope of satisfying

1 your burden of production on remand?

2 MR. DVORETZKY: We -- we would. And I
3 would think that we would be able to get
4 jurisdictional discovery into that inquiry if
5 that were the standard that the Court were to
6 adopt here.

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

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

23 JUSTICE KAVANAUGH: What would --

24 MR. DVORETZKY: -- this Court set.

25 JUSTICE KAVANAUGH: -- that

1 jurisdictional discovery look like?

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

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

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

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

1 deposited into.

2 And so if this Court were to require
3 us to somehow trace the flow of that dollar from
4 1944 to today, we would get -- we would need
5 that kind of evidence to know this property was
6 deposited into this bank account and then trace
7 the flow of that bank account through the years.

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

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

24 MR. DVORETZKY: I think it -- it
25 depends what standard the Court were to adopt.

1 I -- again, I think the right standard here
2 would not require this sort of tracing because
3 when we're talking about money, it just doesn't
4 make sense to ask where a particular dollar
5 went, when all dollars are fungible.

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

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Justice Thomas?

12 Justice Alito? Anything further?

13 Justice Kagan?

14 JUSTICE KAVANAUGH: Just one thing.
15 In that discovery, are you deposing officials
16 from Hungarian government too?

17 MR. DVORETZKY: Potentially, yes.

18 JUSTICE JACKSON: Just one --

19 CHIEF JUSTICE ROBERTS: Justice
20 Jackson?

21 JUSTICE JACKSON: Just one
22 clarification. Is the exchange in your argument
23 at the point of the liquidation or the
24 withdrawal? At some point, you were saying
25 withdrawal is when the exchange is occurring.

1 MR. DVORETZKY: Both.

2 JUSTICE JACKSON: Both.

3 MR. DVORETZKY: There are multiple
4 exchanges that occur in the chain.

5 JUSTICE JACKSON: Thanks.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 MR. DVORETZKY: Thank you.

9 CHIEF JUSTICE ROBERTS: Rebuttal,
10 Mr. Glasgow?

11 REBUTTAL ARGUMENT OF JOSHUA S. GLASGOW

12 ON BEHALF OF THE PETITIONERS

13 MR. GLASGOW: Thank you, Your Honor.

14 I'd like to make just three brief
15 points. First, jurisdictional discovery did
16 occur in this case back in the summer of 2019.
17 We submitted declarations explaining that
18 tracing was impossible. The Respondents engaged
19 in some discovery. The district court imposed a
20 deadline to file a motion to compel, and they
21 elected not to do so.

22 Second, there were some questions
23 about what specifically outraged Congress in
24 Sabbatino. And there is some historical context
25 necessary to understand that. At the time

1 Sabbatino -- the second Hickenlooper amendment
2 was passed, prior to the FSIA, Congress presumed
3 that assets would be in the United States for
4 such a claim to proceed because there was no
5 mechanism to establish in personam jurisdiction
6 over foreign states. And so some asset had to
7 be present in the jurisdiction of the district
8 court in order to -- to proceed with those
9 claims. And the -- the sort of catch phrase
10 that Senator Hickenlooper used during those
11 debates was that the United States would become
12 a thieves' market unless the second Hickenlooper
13 amendment was passed.

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

1 this trial court based that authority on the
2 proposition that every dollar the United States
3 spent in the past 80 years was given in return
4 for personal property taken from a few interned
5 individuals. The United States would be
6 outraged and affronted by such a decision.

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

17 We ask that this Court reverse. Thank
18 you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 The case is submitted.

22 (Whereupon, at 11:29 a.m., the case
23 was submitted.)

24

25

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