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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DAVID CASSIRER, ET AL.,)

4 Petitioners,)

5 v.) No. 20-1566

6 THYSSEN-BORNEMISZA COLLECTION)

7 FOUNDATION,)

8 Respondent.)

9 - - - - -

10 Washington, D.C.

11 Tuesday, January 18, 2022

12

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

16

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19 the Petitioners.

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25 on behalf of the Respondent.

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

2 (11:25 a.m.)

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

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

8 MR. BOIES: I am, Your Honor.

9 CHIEF JUSTICE ROBERTS: You may
10 proceed.

11 ORAL ARGUMENT OF DAVID BOIES

12 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

11 MR. BOIES: If the --

12 JUSTICE THOMAS: I mean, these --

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

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: There are
25 certainly situations where a foreign

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

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

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

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

20 MR. BOIES: The FSIA --

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

1 situation that could be replicated by a private
2 citizen.

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

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

12 MR. BOIES: Well --

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

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

25 Once you have a violation, then the

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

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

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

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

23 JUSTICE SOTOMAYOR: That's what I
24 understood.

25 With respect to Justice Roberts'

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

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

12 MR. BOIES: I --

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

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

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

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

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

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

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

17 JUSTICE SOTOMAYOR: Thank you,
18 counsel.

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

24 What would -- what would happen under
25 1606 in that situation? 1606 says that the

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

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

7 MR. BOIES: That, of course, is not
8 this case, but I think that 1606's language
9 would suggest that the state could not have a
10 rule that discriminated against the foreign
11 state. So I think that to the extent that the
12 state tried to have a rule that would
13 discriminate against a foreign state, the --
14 1606 would preclude that.

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

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

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

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

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

13 MR. BOIES: Yes.

14 JUSTICE ALITO: And you highlight
15 1606. Why do you do that?

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

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

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

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

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

1 choice-of-law issues.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 CHIEF JUSTICE ROBERTS: Justice
7 Thomas?

8 JUSTICE THOMAS: No, nothing further.

9 CHIEF JUSTICE ROBERTS: Justice
10 Breyer?

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

15 MR. BOIES: Yes.

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

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

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

16 Am I right or wrong?

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

24 CHIEF JUSTICE ROBERTS: Justice Alito?
25 No?

1 Justice Sotomayor?

2 JUSTICE SOTOMAYOR: No. Thank you.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Gorsuch?

5 Justice Barrett?

6 Thank you, Mr. Boies.

7 MR. BOIES: Thank you.

8 CHIEF JUSTICE ROBERTS: Ms. Hansford.

9 ORAL ARGUMENT OF MASHA G. HANSFORD

10 FOR THE UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING THE PETITIONERS

12 MS. HANSFORD: Mr. Chief Justice, and

13 may it please the Court:

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

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

1 decision for Petitioners' property claims.

2 Section 1606 requires the same treatment in a
3 case against a foreign state.

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

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

11 I welcome the Court's questions.

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

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

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

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

14 And, in fact, of the leading
15 decisions, the two decisions in the Second
16 Circuit, Karaha Bodas and Barkanic, and the
17 Oveissi decision in the D.C. Circuit actually
18 used state choice-of-law rules to select
19 foreign law. And, somewhat ironically, the
20 leading case in the Ninth Circuit, the
21 Schoenfeld decision, used federal choice-of-law
22 rules to select California over Mexican law,
23 and in that case, it was actually the foreign
24 instrumentality that was arguing for state
25 choice-of-law rules.

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

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

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

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

25 MS. HANSFORD: No, Mr. Chief Justice,

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

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

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

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

1 reasoning of the Klaxon decision goes to that.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 JUSTICE ALITO: Well, in light of that

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

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

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

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

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

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

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

18 CHIEF JUSTICE ROBERTS: Justice
19 Thomas?

20 JUSTICE THOMAS: No.

21 CHIEF JUSTICE ROBERTS: Justice
22 Breyer?

23 Justice Alito?

24 Justice Sotomayor, anything further?

25 JUSTICE SOTOMAYOR: No. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 Justice -- Justice Barrett? No?

3 Thank you, counsel.

4 Mr. Stauber.

5 ORAL ARGUMENT OF THADDEUS J. STAUBER

6 ON BEHALF OF THE RESPONDENT

7 MR. STAUBER: Mr. Chief Justice, and

8 may it please the Court:

9 Nothing in the Foreign Sovereign

10 Immunity Act or its foreign affairs origins

11 mandates that federal courts sitting in

12 judgment of a foreign state's private or public

13 acts must employ a forum's choice-of-law test

14 where the forum has little or no connection to

15 the claims or the basis for jurisdiction and

16 the test ignores the federal and foreign

17 concerns that underpin the FSIA.

18 In the absence of an explicit

19 statement, Congress did not intend that

20 California's choice-of-law test should

21 determine the substantive law to apply to a

22 foreign state alleged to have committed a wrong

23 within its own borders. But for Mr. Cassirer's

24 retirement to San Diego, California would have

25 no interest in this case.

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

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

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

25 Section 1606 relates to the

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

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

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

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

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

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

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

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

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

17 MR. STAUBER: Correct. The underlying
18 claim --

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

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

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

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

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

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

1 to be treated differently.

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

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

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

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

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

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

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

19 MR. STAUBER: Yes.

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

22 MR. STAUBER: Yes.

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

1 MR. STAUBER: Yes.

2 JUSTICE BREYER: Conversion, I think.

3 MR. STAUBER: Yes.

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

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

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

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

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

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

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

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

25 So our approach actually brings

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

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

18 This case was originally filed in
19 2005. We didn't get to the choice-of-law
20 question until 2015. So --

21 JUSTICE ALITO: If --

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

1 does, the benefit of due process.

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

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

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

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

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

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

18 JUSTICE ALITO: Where are we going to
19 find it?

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

23 JUSTICE ALITO: Why?

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

1 JUSTICE ALITO: Why?

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

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

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

19 JUSTICE ALITO: Well, why are we in --

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

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

25 MR. STAUBER: It involves, I think, a

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

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

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

19 And it seems to me that at some point,
20 1606 sort of says, okay, you've gotten the
21 advantage of being a foreign sovereign in our
22 treatment in -- in -- in our courts, but no
23 more. Now that you've gotten down to this
24 level, we're going to treat you like a private
25 party.

1 MR. STAUBER: Correct.

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

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

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

13 CHIEF JUSTICE ROBERTS: Sure.

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

25 JUSTICE KAGAN: And where do you get

1 that --

2 MR. STAUBER: -- that distinction
3 behind.

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

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

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

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

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

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

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

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

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

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

25 We submit, Your Honors, that the

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

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

18 MR. STAUBER: They --

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

1 MR. STAUBER: You can take it into --

2 CHIEF JUSTICE ROBERTS: Just a
3 starting point, in other words.

4 MR. STAUBER: You -- you can take it
5 into account, Your Honor. We're not saying you
6 can't take it into account, but we're saying
7 that you need to, in order to provide
8 predictability and uniformity, which is one of
9 the tenets of the Foreign Sovereign Immunity
10 Act for the foreign, they need to know once
11 they're haled into the U.S. court whether
12 they're haled in in Arizona, in Iowa, in
13 Michigan or Kentucky, that they're going to be
14 treated fairly and they're going to be treated
15 the same.

16 To find that out 10, 12, 15 years
17 later after the litigation has been going on
18 undercuts the very policies of the Foreign
19 Sovereign Immunity Act.

20 CHIEF JUSTICE ROBERTS: Well, I think
21 it's pretty fair at that stage to tell them
22 you're going to be treated the same as a
23 private party when it comes to the question of
24 choice of law. Now maybe you've got a special
25 argument about your -- based on your foreign

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, you know

1 --

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

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

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

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

25 JUSTICE GORSUCH: Counsel, you -- you

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

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

11 Wanted to give you an opportunity to
12 respond.

13 MR. STAUBER: I appreciate that, Your
14 Honor.

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

19 The question of --

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

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

25 JUSTICE GORSUCH: And then -- then it

1 usually isn't in play.

2 MR. STAUBER: Yeah.

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. STAUBER: Well --

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

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

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

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

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

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

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

25 And by forcing a federal court to use

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

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

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

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

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

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

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

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

22 MR. STAUBER: I'm not --

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

1 law can hurt you, correct?

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

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

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

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

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

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

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

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

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

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

25 MR. STAUBER: We don't think anything

1 would preclude us, Your Honor.

2 JUSTICE SOTOMAYOR: All right. Thank
3 you, counsel.

4 CHIEF JUSTICE ROBERTS: Justice
5 Thomas?

6 Justice Breyer?

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

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

20 CHIEF JUSTICE ROBERTS: Justice Alito?
21 Anything further, Justice Sotomayor?

22 JUSTICE SOTOMAYOR: No. Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan?
24 Justice Gorsuch?
25 Justice Barrett?

1 Thank you, counsel.

2 MR. STAUBER: Thank you.

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

5 REBUTTAL ARGUMENT OF DAVID BOIES

6 ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

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

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

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

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13,18 Cassirer's ^[1] 31:23 cause ^[1] 15:15 caused ^[1] 37:7 causes ^[1] 62:22 certain ^[1] 9:19 certainly ^[2] 5:25 14:2 change ^[2] 9:8 51:7 check ^[1] 26:16 CHIEF ^[39] 3:3,9,13 5:24 6:18,21 7:7,13 16:5 17:6,9 18:24 19:3,8,12 22:5,25 23:16 25:10 30:18,21 31:1,7 43:12 44:2,13 48:8,19 49:2,20 50:25 51:3 54:10 61:4,20,23 62:3,7 64:13 Chief's ^[1] 9:3 choice ^[39] 12:1 16:14,17,22 22:10 23:20 24:13 27:2 33:7 36:17,21 38:25 41:6,8 44:7,8,10 48:5,20,21 49:24 50:2 54:2,21,22,24 55:1,15,16 57:1 58:10 62:17,21 choice-of-law ^[83] 4:1,5,7,20 10:20,23 11:5,20 13:16 14:1,6,14,20 15:1,8 16:3,10 17:4,23 18:15 19:25 20:7,21 21:5,7,13,18,21,25 22:20,24 23:17,19,24 25:13 26:9,10,13 28:4 30:1,10,12 31:13,20 32:13 33:2,20 34:9 39:12,17 40:19 41:15 42:13,14,17 43:11 44:3 45:7,25 47:9,16,23 48:15 50:7 51:23 52:2 54:3,5 55:22,23 56:5,8,13 57:19,22 58:4 59:7,13 60:2,14 61:18 63:6 64:3 choose ^[2] 57:11 60:1 chooses ^[1] 60:21 chose ^[1] 50:19 chosen ^[1] 48:21 Circuit ^[15] 8:17,21 18:11 21:12,16,17,20 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