

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 EXXON MOBIL CORPORATION,)
4 Petitioner,)
5 v.) No. 24-699
6 CORPORACIÓN CIMEX, S.A.)
7 (CUBA), ET AL.,)
8 Respondents.)
9 - - - - -

10
11 Washington, D.C.
12 Monday, February 23, 2026

13
14 The above-entitled matter came on for
15 oral argument before the Supreme Court of the
16 United States at 11:38 a.m.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	MORGAN L. RATNER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	CURTIS E. GANNON, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	35
9	ORAL ARGUMENT OF:	
10	JULES L. LOBEL, ESQ.	
11	On behalf of the Respondents	66
12	REBUTTAL ARGUMENT OF:	
13	MORGAN L. RATNER, ESQ.	
14	On behalf of the Petitioner	100
15		
16		
17		
18		
19		
20		
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22		
23		
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25		

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P R O C E E D I N G S

(11:38 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 24-699, Exxon Mobil corporation versus Corporación Cimex, et al. Mr. Ratner -- Ms. Ratner.

ORAL ARGUMENT OF MORGAN L. RATNER
ON BEHALF OF THE PETITIONER

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

If you read the Helms-Burton Act from front to back, you'll have one clear take-away, and it's the one already mentioned this morning, that the 1996 Congress wanted to put crushing diplomatic and economic pressure on the Cuban government. That includes by abrogating the sovereign immunity of Cuban instrumentalities in claims brought under Title III of that Act.

Now there's admittedly a high bar for abrogation, but this Court has said again and again that Congress doesn't need to use magic words to get there. It just needs to make its intent clear through what Kirtz called the sum total of its work, and it did that here.

1 Let me start with the most important
2 piece, Section 6082(a). Congress created a
3 cause of action and expressly applied that
4 cause of action to foreign instrumentalities.
5 That's a standard route to abrogation that this
6 Court has recognized in Kirtz, Kimel, Hibbs,
7 and Financial Oversight and Management Board.

8 Then Congress did three things to
9 confirm that that was its intent. First, we
10 know with absolute certainty that it wanted
11 claims and judgments against Cuban
12 instrumentalities because it repeatedly
13 discusses them, including at 6082(a)(7),
14 (c)(2), and (d). That was up for debate in
15 Kimel and Kirtz. It's not up for debate here.

16 Second, Congress emphasized that it
17 wanted fully effective remedies in U.S. courts,
18 including against governments. That's 6081(8)
19 and (11).

20 And, third, at the same time it
21 authorized suits against Cuban
22 instrumentalities, Congress also codified an
23 incredibly restrictive embargo cutting off
24 commerce between the United States and Cuba.

25 That combination makes no sense if

1 Congress had intended to rely on FSIA
2 exceptions that depend on commercial activity.

3 I welcome the Court's questions.

4 JUSTICE THOMAS: Are we to treat the
5 assertion of sovereignty the same here as we
6 did in Kirtz?

7 MS. RATNER: Well, Justice Thomas, to
8 the extent you mean is there a different test
9 for foreign sovereigns or other kinds of
10 sovereigns, we have not argued for a lower
11 test. I think, arguably, the sovereign
12 immunity asserted in suits involving states and
13 the federal government may be on even stronger
14 footing than the sovereign immunity of foreign
15 governments because, when it comes to foreign
16 governments, that's entirely a matter of comity
17 and grace.

18 But our point is simply that foreign
19 governments shouldn't be better off than all of
20 the other types of sovereigns, states, the
21 federal government, Indian tribes, and
22 territories in the case that --

23 JUSTICE THOMAS: If we accept your
24 argument, what would the interaction of Title
25 III and the FSIA look like?

1 MS. RATNER: So there are effectively
2 two ways to harmonize those two statutes here.
3 One is the way that we're advancing, which is
4 the FSIA is a general rule, and the
5 Helms-Burton Act is an additional specific
6 abrogation. The other way of harmonizing is
7 what Respondents have said, which is the
8 Helms-Burton Act provides the cause of action
9 and the FSIA provides any abrogation of
10 immunity.

11 And our point is simply it -- it is
12 not plausible to believe that Congress intended
13 the latter rather than the former. And we know
14 that for several reasons. I think the fact
15 that it simultaneously enacted the embargo is a
16 pretty glaring one. The Court often says
17 Congress doesn't enact meaningless statutes.
18 And the notion that it would circulate these
19 claims over to a separate immunity regime that
20 depends on commercial activity with the United
21 States while simultaneously banning commercial
22 activity in -- with the United States is a
23 pretty glaring neon sign.

24 JUSTICE SOTOMAYOR: Could we -- could
25 we stop at your first point? Because what

1 you're arguing is that the statute here
2 impliedly reversed FSIA's application, correct?

3 MS. RATNER: So no, Justice Sotomayor,
4 I don't think that's right. I'm happy to -- I
5 think we reached the level of clarity necessary
6 for that, but that's not how this Court
7 talks --

8 JUSTICE SOTOMAYOR: How do you do
9 that -- well, let's go to that.

10 MS. RATNER: Okay.

11 JUSTICE SOTOMAYOR: I mean, we do know
12 that in Kirtz there was no statute. It was
13 just how to read this statute, correct?

14 MS. RATNER: That statute in
15 conjunction with background principles that
16 required a clear statement.

17 JUSTICE SOTOMAYOR: Background
18 principles but not another statute. The idea
19 of irreconcilable conflict was present in Kirtz
20 itself, and the Court explained that if
21 Congress enacts a cause of action against a
22 governmental agency and there is no way to
23 bring that claim -- those were Kirtz's words --
24 against any government agency, then the cause
25 of action itself must abrogate sovereign

1 immunity.

2 But that's not the case here. In
3 fact, you've brought a case, a claim that still
4 survives against Cimex. And as I'm reading the
5 record, there's been so much investment in Cuba
6 even before the current president. Cimex
7 itself operates Western Unions on confiscated
8 property. There's over a hundred companies
9 since 2001 that have exported products to Cuba.
10 There's ongoing agricultural and other exports.

11 So this isn't a dead letter. If we
12 impose sovereign immunity principles here,
13 that's very different than Kirtz, isn't it?

14 MS. RATNER: Justice Sotomayor, let me
15 say a couple things about that.

16 First is we don't know if it's a dead
17 letter. Nobody has actually successfully made
18 a claim through yet. Our claim, after seven
19 years, with one of the largest and most diverse
20 claim, has not yet made it through.

21 But, more importantly, I don't think
22 Kirtz says you need to have a dead letter.
23 What Kirtz says is, if Congress defines a
24 claim, specifically applies it against a
25 government entity, and applying immunity in

1 that circumstance would negate claims Congress
2 wanted, then we think that's a pretty good sign
3 that that statute itself abrogates immunity.

4 JUSTICE SOTOMAYOR: You're --
5 you're -- you're going in a circle, counsel.

6 MS. RATNER: And --

7 JUSTICE SOTOMAYOR: You're trying to
8 read an intent into Congress by saying they
9 wanted a bigger claim than the one I could
10 have. But, if a claim is still possible, what
11 that means is that the two statutes, FSIA and
12 Title III, can be read harmoniously, which is
13 our charge, not to implicate repeal.

14 MS. RATNER: Justice Sotomayor, so let
15 me address the Kirtz point, and I do want to go
16 back to why this is not an implied repeal.

17 On Kirtz, again, I think it is
18 unequivocal that this would effectively negate
19 many, maybe most, maybe all of the claims that
20 Congress authorized. Kirtz did not rest on a
21 notion that 100 percent of the claims could
22 never come through --

23 JUSTICE KAGAN: Well, I think it --

24 MS. RATNER: And it --

25 JUSTICE KAGAN: -- sort of did,

1 Ms. Ratner. I mean, in Kirtz, in FMO -- OMB,
2 it was just true that if -- if read one way,
3 there was going to be a cause of action without
4 any ability to bring the suit.

5 And that was what in all those cases
6 seemed absurd, that -- why would there be a
7 cause of action if there's no way to bring a
8 suit? You give with one hand, you take away
9 with the other.

10 But, in this case, it's not for the
11 reason that Justice Sotomayor suggested. The
12 FSIA is this background law that it -- and it's
13 trans-substantive. It assumes that there are
14 going to be other causes of action all around
15 but that it is the thing that, it tells you,
16 for purposes of all those causes of action,
17 when are you immune and when are you not
18 immune, and, here, the FSIA sets up a series of
19 tests when you're immune, when you're not
20 immune.

21 And -- and -- and so why shouldn't we
22 just take that as, like, okay, it's the FSIA
23 that is the relevant statute here? The fact
24 that there's causes of action, of course,
25 there's a cause of action in the -- in -- in --

1 in Article III, as well as in many other
2 statutes, but we don't take that to be -- we
3 don't look to those causes of action for
4 purposes of deciding jurisdictional immunity
5 for foreign agencies.

6 MS. RATNER: So, Justice Kagan, let
7 me -- let me try to unpack two things from
8 there. First, I don't want to give up on the
9 Kirtz point because I do think, in Kimel, it
10 was not 100 percent superfluous. The state
11 defendants came in and argued there are state
12 statutory waiver schemes, so the existence of a
13 cause of action will not negate all claims
14 against states. This Court rejected that out
15 of hand. That's page 75 of Kimel on which
16 Kirtz was based.

17 But moving to the FSIA, the notion
18 that the FSIA is sort of a comprehensive scheme
19 here and something, Justice Sotomayor, that
20 you'd have to impliedly repeal, I think, is
21 inconsistent with the Court's 2009 decision in
22 *Beatty*.

23 And, there -- this is involving the
24 particular terrorism provisions as they relate
25 to the Republic of Iraq, and, there, the

1 situation was reversed. It was Congress
2 allowing the President to take -- to remove a
3 waiver of sovereign immunity, but the Court
4 there said this is a specific targeted rule at
5 a moment in time and a particular actor, and it
6 doesn't need to reference the FSIA to
7 supplement it.

8 JUSTICE KAGAN: Yeah. So I guess that
9 seems right that there could be statutes which
10 don't need -- you know, if -- if -- if -- if
11 this statute gave you a cause of action and
12 gave you jurisdiction under 1331, which it
13 might, and which also said, you know, there's
14 a -- there's -- there's an abrogation of
15 immunity, then I am totally with you. It
16 doesn't matter that the FSIA exists.

17 But, in fact, this statute does not do
18 the last thing. So -- so, in that world, it
19 seems as though, you know, Congress knows that
20 there's an FSIA around which provides the
21 jurisdictional immunity rules, and so, if -- if
22 Congress doesn't substitute in another statute
23 which does create a cause of action, it seems
24 to me the right way to read what it's doing is
25 to say we're providing a cause of action

1 subject to the rules we know exist about
2 jurisdictional immunity.

3 MS. RATNER: Justice Kagan, I think
4 there are two problems with that. One is
5 doctrinal and one is statutory. The doctrinal
6 problem is that just gets us back to a magic
7 words requirement that the Court has refused to
8 apply. And with respect --

9 JUSTICE KAGAN: No magic words. They
10 can abrogate statute -- they can abrogate
11 immunity in any words they want to, but they
12 have to abrogate immunity to replace the FSIA.

13 MS. RATNER: And the -- that is
14 exactly the question here. Has Congress
15 clearly abrogated immunity here, and we think,
16 through the sum total of its work, the answer
17 is yes. But I --

18 JUSTICE KAGAN: But a cause of action
19 doesn't abrogate immunity. It just doesn't.
20 There are causes of action all over the place
21 that rely on the FSIA as providing the
22 jurisdictional rules.

23 MS. RATNER: There are extremely few
24 causes of action that expressly apply to
25 foreign governments, foreign agencies and

1 instrumentalities. By our count, our petition
2 has them at page 30. There's one about
3 chemical weapons regulations, one about nuclear
4 weapons regulations, and one about certain drug
5 trafficking crimes. So that is, I think,
6 the -- the biggest universe --

7 JUSTICE KAGAN: I'm not even sure that
8 that's relevant if you're relying so much on
9 Kirtz and Kimel and so forth, where it was just
10 a broad cause of action. So you can't kind of
11 have it both ways there.

12 MS. RATNER: Justice Kagan, I am not
13 trying to have it both ways. What I am relying
14 on from Kirtz and Kimel is the notion that when
15 Congress expressly calls out this group of
16 defendants, that's when we think maybe it's
17 saying something on abrogation as well, and --

18 JUSTICE JACKSON: But how -- how --
19 how -- how can that be squared with the
20 language in the FSIA that says this is the
21 exclusive statute that tells you when you
22 abrogate?

23 I mean, the -- the problem I think --
24 and this is the point that Justice Sotomayor
25 was raising -- is that unless Title III speaks

1 to abrogation, I don't know how you overcome
2 the statute that says abrogation for foreign
3 governments, look here and apply this rule.

4 And you say, I think, from your
5 original statement: Well, you can overcome
6 that or ignore that because, in this case,
7 Congress created a cause of action, repeatedly
8 indicated that it wanted these kinds of suits
9 to be brought against the government, it wanted
10 fully effective remedies in court, and it
11 wanted embargoes.

12 I understood those to be the kind of
13 thrust of your argument. But I think it has
14 two problems. One is that it doesn't -- it
15 didn't speak directly to abrogation, and we
16 know that cause of action and abrogation are
17 two different things in light of a statute that
18 says look over here when you're looking for the
19 abrogation answer. So that's one problem.

20 And then the other problem is we had a
21 clear statement rule in the world of
22 jurisdiction and abrogation. So, if Congress
23 was relying on the kinds of things you're
24 talking about, I don't understand how they even
25 thought that that could possibly be enough to

1 displace the -- the -- the -- the statement in
2 the FSIA that says this is how you abrogate.

3 MS. RATNER: Justice Jackson, this
4 would unequivocally pass the clear statement
5 rule as applied to any other of the various
6 sovereigns I mentioned, and then the question
7 is are foreign sovereigns better off because
8 their immunity is put in a statute.

9 JUSTICE JACKSON: No, the question
10 is -- the question is does the Foreign
11 Sovereign Immunity Act apply to the other
12 sovereigns you mentioned. The answer is no.

13 MS. RATNER: It --

14 JUSTICE JACKSON: So, when we're in
15 the world of foreign sovereigns, we have a
16 special rule that Congress has carved out that
17 tells us this is how you determine whether
18 abrogation occurs for foreign sovereigns, and
19 the only question here is whether what Congress
20 does in Title III is enough to displace that
21 rule as opposed to we look at this and we think
22 Congress was setting up a cause of action in
23 Title III and relying on its long-established
24 preexisting rule for how you abrogate.

25 MS. RATNER: Justice Jackson, what

1 Congress did here would unequivocally be enough
2 for any other foreign sovereign, and so then
3 the question is, does the existence of the
4 FSIA --

5 JUSTICE JACKSON: For any other
6 foreign sovereign?

7 MS. RATNER: Excuse me, any other
8 governmental sovereign.

9 JUSTICE JACKSON: Right. And so my --

10 MS. RATNER: Then the question is does
11 it exist --

12 JUSTICE JACKSON: -- my -- is it
13 enough for any other foreign sovereign?

14 MS. RATNER: Does the existence of the
15 FSIA mean that we need an even clearer
16 statement, a clear statement above the clear
17 statement? And -- and just to go back --

18 JUSTICE SOTOMAYOR: No. The question
19 is can you harmonize the two statutes. I keep
20 going back to that point.

21 Look -- look at your Iraq question,
22 okay? There, the Court was looking at the FSIA
23 and the presidential provision, the EWSSA. And
24 what we read there was the FS -- FSIA has a
25 default waiver of Iraq's sovereign immunity.

1 The EWSSA permits the President "to
2 make inapplicable with respect to Iraq any
3 provision of law that applies to countries that
4 have supported terrorism."

5 The two are addressing exactly the
6 same thing and they're saying you can do one.
7 The President can do one. So that was clear.
8 We were trying to harmonize those two statutes
9 and said: Yes, the President has that power.

10 Here, the way to harmonize the two
11 statutes is to say it applies only to
12 commercial exceptions permitted by the FSIA,
13 and, as in Kirtz or unlike as in Kirtz, the two
14 statutes, if harmonized in that way, still make
15 this operative --

16 MS. RATNER: Justice Sotomayor --

17 JUSTICE SOTOMAYOR: -- still permit
18 suits against foreign sovereign entities who
19 engage in commercial activity.

20 MS. RATNER: -- that is a way to
21 harmonize them. I don't think it is a
22 plausible one. The other way to harmonize them
23 is by --

24 JUSTICE SOTOMAYOR: Once it is --
25 well, we go back to what's plausible. Here --

1 MS. RATNER: Well --

2 JUSTICE SOTOMAYOR: -- you have a suit
3 that has survived a motion to dismiss. We know
4 Western Union has business there. The suit is
5 against an entity that's doing business with
6 Western -- with Western Union.

7 There are ways. And there is money
8 flowing into -- even with the embargo, as
9 extreme as it is at the moment, there are still
10 many commercial investments going on in Cuba.

11 MS. RATNER: So, Justice Sotomayor,
12 the -- again, the question we're looking at is
13 1996, when Congress codifies an extremely
14 restrictive embargo in 6032(h).

15 It adds provisions preventing
16 circumvention in 6040, and it allows extremely
17 few exceptions for humanitarian links. And the
18 question is, should the statute be read to
19 allow causes of action only in the rare
20 circumstances where they can find a connection
21 to one of those humanitarian links. I think
22 that is an implausible way to harmonize the
23 statutes.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas?

2 Justice Alito?

3 JUSTICE ALITO: If Congress didn't
4 think that the FSIA applied to Helms-Burton
5 actions, why would it have amended the FSIA's
6 execution immunity rules for those cases?

7 MS. RATNER: So, Justice Alito, I
8 think 1611(c) is a little hard to understand.
9 It can either be read as a we don't think
10 there's a conflict here, but a
11 belt-and-suspenders, we want to avoid anything
12 thinking there is, or it can be read as
13 suggestive that with respect to execution
14 immunity, the FSIA provisions apply.

15 I think it has to be the former way
16 because elsewhere Congress expressly and
17 selectively incorporates FSIA provisions,
18 including in 6082(c)(2), and I think in
19 combination of that and (c)(1), where Congress
20 says we want to apply only the provisions of
21 Title 28 that apply in Section 1331 cases,
22 which does not include the FSIA.

23 When you read those in -- in
24 combination, I think that you can only read
25 1611(c) as kind of a belt-and-suspenders

1 provision.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

5 JUSTICE SOTOMAYOR: Your point is
6 statutory history. So do I. And I take
7 seriously the fact that the originals, both
8 Senate and House bills here under Title III,
9 included a waiver of the SIA -- FSIA.

10 And so it's not clear to me that when
11 Congress took it out why we would be putting
12 that waiver back in.

13 MS. RATNER: So, Justice Sotomayor, if
14 you really dig in on the legislative history, I
15 think it becomes clear that Congress did not
16 change its mind on whether to abrogate. It
17 changed its mind on whose immunity to abrogate.

18 So in February of '95, the bill's --

19 JUSTICE SOTOMAYOR: Why did it say
20 that directly? I know.

21 MS. RATNER: Well --

22 JUSTICE SOTOMAYOR: It -- but that's
23 assuming that -- it's clear that it took out
24 the Cuban government and substituted
25 subsidiaries and agencies, correct?

1 MS. RATNER: That's correct.

2 JUSTICE SOTOMAYOR: That's what you're
3 relying on?

4 MS. RATNER: Correct.

5 JUSTICE SOTOMAYOR: But that still
6 begs the question. The DOJ had made very clear
7 that abrogating sovereign immunity of the
8 government and its instrumentalities would be a
9 violation of -- of international law, correct?

10 MS. RATNER: That's correct.

11 JUSTICE SOTOMAYOR: All right? So it
12 took out any suggestion that it was abrogating
13 sovereign immunity, dropped it from both bills,
14 chopped -- dropped the federal government, but
15 kept foreign instrumentalities. But from that
16 history, why would I assume that it was
17 intending to keep -- to abrogate immunity?

18 MS. RATNER: Justice Sotomayor, that
19 is not the correct history. The history is,
20 February of '95, the original -- original bill
21 abrogates immunity under the FSIA for
22 governments themselves. Then there's an outcry
23 about various aspects of the bill. August of
24 '95, they take out that immunity provision, and
25 they add in this specific reference to claims

1 against agencies and instrumentalities --

2 JUSTICE SOTOMAYOR: But it doesn't
3 make --

4 MS. RATNER: -- and then after that --

5 JUSTICE SOTOMAYOR: -- to take it out,
6 to take out the waiver of FSIA, because FSIA
7 goes both to the government and to the agents
8 and instrumentalities, and the government's
9 letter was complaining about all of this being
10 in violation of international law.

11 MS. RATNER: So, Justice Sotomayor,
12 two quick things. One is the FSIA provision,
13 Section 1605, although it does cover both
14 foreign states and agencies and
15 instrumentalities, there's no specific existing
16 provisions carving out just agencies and
17 instrumentalities. So although I could write
18 that language for you, Congress did not have a
19 copy-and-paste job once it got rid of foreign
20 states.

21 And, second, if you are looking at
22 that legislative history, I do think you have
23 to look at the fact that the State Department,
24 two months after this amendment, continued to
25 say, well, now it applies to agencies and

1 instrumentality, sure; but it is still going
2 beyond the FSIA. That likely ground the bill
3 to a halt in the fall until Cuba shot two
4 planes out of the sky, and all of a sudden,
5 super-majorities of Congress passed and the
6 President signed this law within 17 days.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 Justice Gorsuch?

9 Justice Kavanaugh?

10 JUSTICE KAVANAUGH: The other side
11 says that you need to take account of the
12 provision that allows the President to,
13 essentially, have an on/off switch here. And
14 one of the amicus briefs talks about that at
15 some length.

16 In other words, it would be quite
17 extraordinary for Congress to allow billions of
18 dollars, tens of billions, hundreds of billions
19 of dollars, to be decided by an on/off switch
20 just at the President and there's really no
21 constraints on the President's ability to do
22 that in the statutory language, like national
23 interest and -- and transition to democracy in
24 Cuba.

25 And they say for that reason, we

1 shouldn't assume Congress intended to give that
2 huge power to the President; so, therefore,
3 choose the narrower, second option as you first
4 described them, I think, rather than the first
5 one. Do you want to respond to that?

6 MS. RATNER: Yes. So, Justice
7 Kavanaugh, I think it's exactly the opposite,
8 which is the whole reason we needed this
9 presidential fail-safe is because claims
10 against the Cuban government could be so
11 substantial that they would interfere with its
12 progress to democracy. And that's why there
13 are four separate suspension provisions
14 throughout this statute that give ways to
15 toggle on and off claims, including claims and
16 judgments against the Cuban government
17 specifically, as necessary to help
18 diplomatically toward a democratic Cuba.

19 And there's no reason to include those
20 if what we're talking about is a couple edge
21 cases that are linked on to some humanitarian
22 food exports. We -- then we don't have the
23 wave of claims against Cuban governments that
24 would cause a need for that kind of
25 presidential backstop.

1 JUSTICE KAVANAUGH: So you don't think
2 there's some kind of clear statement required
3 in connection with that? That's what they, I
4 think, are saying on page 47 and then the
5 amicus brief also.

6 MS. RATNER: I don't --

7 JUSTICE KAVANAUGH: In other words, we
8 would expect Congress to speak really clearly
9 if they're going to give the President so much
10 power and they --

11 MS. RATNER: I mean, first, I think
12 Congress probably thought it was putting on
13 more constraints. In fact, if you --

14 JUSTICE KAVANAUGH: National interest?

15 MS. RATNER: -- are looking at the
16 legislative history, the conference report said
17 we don't think in good faith the President
18 could actually impose the suspension. But
19 leaving that to the side --

20 JUSTICE KAVANAUGH: Well, it was in
21 place then, for -- from '96 to 2017, right?

22 MS. RATNER: It sure was. I think the
23 President and the -- and Congress probably had
24 differing views, but what they didn't have
25 differing views on was the importance of this

1 wave of claims against Cuban instrumentalities.
2 And that's why you need to have four different
3 suspension provisions, to toggle on and off for
4 all the diplomatic circumstances. You just
5 don't need that if we're talking about a couple
6 edge cases getting through.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

10 JUSTICE BARRETT: Ms. Ratner, do you
11 think the LIBERTAD Act abrogates sovereign
12 immunity for agencies and instrumentalities of
13 countries other than Cuba?

14 MS. RATNER: So we've stated in our
15 brief that the answer is probably yes, if that
16 question ever came up to the Court. We have
17 sort of a host of statutory indicia. Most of
18 them would apply to everyone, some apply only
19 to Cuban instrumentalities. I think there's
20 probably enough that Congress would have said
21 other nations who have instrumentalities that
22 are knowingly and intentionally trafficking in
23 the confiscated property, that they'd be on the
24 hook too.

25 But we don't think and the government

1 doesn't think the Court needs to answer that
2 question, given that some of the indicia are
3 Cuba-specific. And we've never seen a non-Cuba
4 --

5 JUSTICE BARRETT: Well, I mean, I
6 think the thing that's hard for you is that --
7 you know, you have a lot on this statute that
8 points to Cuba and that makes Cuba an
9 exception. I think it's a different question,
10 a slightly different question, whether the
11 statute is clear enough if you're talking about
12 other sovereigns. And so even though I agree
13 with you and the government that we wouldn't
14 have to answer that question directly, I think
15 it lurks in the background of deciding whether
16 this waiver or this abrogation is clear enough.

17 MS. RATNER: Yeah, Justice Barrett, I
18 don't think the 1996 Congress would have had
19 any qualms if other entities that were --
20 again, we're talking about instrumentalities,
21 so essentially state-controlled companies --
22 were partnering with Cuban state-controlled
23 companies, knowingly and intentionally
24 trafficking, that they would be swept in just
25 as private parties are.

1 But, again, if the Court does have
2 qualms about that, it's a purely hypothetical
3 circumstance at this point. So we don't see
4 any need to weigh in on it.

5 CHIEF JUSTICE ROBERTS: Justice
6 Jackson?

7 JUSTICE JACKSON: So it seems to me
8 that the thrust of your argument is that we
9 should look at this language in Title III and
10 -- and know that it is clear that Congress
11 meant to allow these claims and judgments to go
12 forward, because Congress wanted these claims
13 to proceed. The -- the political and foreign
14 policy circumstances were such that, you know,
15 it was sort of punishing Cuba for having
16 confiscated people's property.

17 And I see that, but how do you respond
18 to all of the evidence that we have that
19 indicates that that really wasn't -- in other
20 words, the claims process -- really wasn't the
21 primary thrust of this statute? This dovetails
22 with what we were talking about in the earlier
23 case, that when we see that what Congress was
24 trying to do was to isolate Cuba economically
25 by deterring third-party investment, then maybe

1 when it set up this cause of action, it really
2 was, like, I'm just going to let the regular
3 rules operate as to whether or not you can
4 actually bring a claim, because my focus -- I'm
5 impersonating Congress now -- my focus is on
6 this third-party investment problem that I'm
7 trying to solve.

8 You say yes, but you set up a cause of
9 action, so that must have meant that they also
10 intended to abrogate sovereign immunity. And I
11 guess I don't necessarily see why that's the
12 case.

13 MS. RATNER: So, Justice Jackson, the
14 thrust of our argument is not just that
15 Congress set up a cause of action. It is that
16 this is woven into the architecture of the
17 statute. When Congress talks about who would
18 be defendants, well, the only defendants it
19 calls out by name are foreign
20 instrumentalities. When it talks about
21 specific rules for claims, the only particular
22 claims it talks about are claims against Cuban
23 instrumentalities.

24 JUSTICE JACKSON: Right.

25 MS. RATNER: And when --

1 JUSTICE JACKSON: So it -- it
2 appreciated that claims could happen. I -- I'm
3 not faulting you or saying that that's not in
4 there.

5 What I'm asking you is whether it
6 intended for those claims to happen under the
7 circumstances that the FSIA would allow.

8 MS. RATNER: And I think the answer --
9 the two best pieces of evidence on that for why
10 the answer is no, one is the embargo we've
11 already talked about, especially the embargo as
12 codified in 1996.

13 And two is Section 6032. Excuse me,
14 Section 6082(c), which says apply the
15 provisions of Title 1 -- Title 28 that apply in
16 Section 1331 actions, general federal question
17 actions. That does not include the FSIA. So
18 --

19 JUSTICE JACKSON: All right. Let me
20 ask you one more and then I'm done with this
21 part.

22 How does allowing this flood of claims
23 to come in advance what I see as Congress's
24 primary purpose? I think you get a little bit
25 more mileage out of it if you're saying they

1 absolutely intended to abrogate sovereign
2 immunity with this cause of action,
3 notwithstanding the existence of the FSIA, and
4 they're not saying anything about that, because
5 we know that they were trying to deter
6 third-party investment and somehow this is
7 going to help that.

8 So tell me -- help me figure out how
9 allowing this flood of claims is actually aimed
10 at furthering Congress's primary purpose for
11 this statute.

12 MS. RATNER: Because the primary
13 purpose was not just third-party traffickers.
14 The other primary purpose, probably the primary
15 primary purpose, was the Cuban government
16 itself as the key culprit here.

17 And so preserving FSIA immunity would
18 give a Cuban instrumentality a pass when a
19 comparable private company would be on the hook
20 for a trafficking claim. And the Cuban -- the
21 Cuban company would get a pass by dint of its
22 relationship to the Cuban government. That is
23 hard to square with a --

24 JUSTICE JACKSON: Maybe. Maybe. I
25 mean, you know, there's -- there's foreign

1 policy implications. The --

2 MS. RATNER: Correct. But --

3 JUSTICE JACKSON: -- the U.S.
4 Government is -- is actually punishing Cuba,
5 but --

6 MS. RATNER: But, Justice Jackson,
7 this is a statute that a couple provisions
8 earlier has accused Cuba of "cold-blooded
9 murder." It is a couple provisions before
10 that, has said residential property is off
11 limits unless you're associated with the Cuban
12 government. Then we're going after your house
13 too. And so --

14 JUSTICE JACKSON: And your point is
15 that -- that -- that the statute is authorizing
16 private individuals like Exxon to be like an AG
17 to punish the Cuban government for that
18 conduct?

19 MS. RATNER: No, Justice Jackson. My
20 point is it is implausible that Congress would
21 have wanted a Cuban company to fare better than
22 a private trafficker given all of the other
23 statutory signals.

24 JUSTICE JACKSON: Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Mr. Gannon.

3 ORAL ARGUMENT OF CURTIS E. GANNON
4 FOR THE UNITED STATES, AS AMICUS CURIAE,
5 SUPPORTING THE PETITIONER

6 MR. GANNON: Mr. Chief Justice, and
7 may it please the Court:

8 Taken together, multiple provisions of
9 the LIBERTAD Act clearly show that Congress
10 abrogated the jurisdictional immunity of Cuban
11 agencies and instrumentalities without regard
12 to the Foreign Sovereign Immunities Act.

13 Apart from the definition of "person,"
14 other provisions clearly contemplate that Cuban
15 agencies and instrumentalities will be
16 defendants against whom judgments may be
17 obtained, but two more provisions particularly
18 establish that the FSIA does not generally
19 apply to Title III suits.

20 Section 6082(c)(1) makes it clear that
21 such suits are brought under 28 U.S.C. 1331
22 rather than the neighboring section that
23 supplies jurisdiction for suits under the FSIA
24 itself. And then 6082(c)(2) affirmatively
25 brings in a particular section of the otherwise

1 ousted FSIA.

2 The decision below would effectively
3 negate suits that Congress authorized, thereby
4 compromising a mechanism that Congress and the
5 Executive have concluded will promote U.S. and
6 national interests and a transition to
7 democracy in Cuba.

8 This Court should reverse that
9 decision. I welcome its questions.

10 JUSTICE THOMAS: Should we treat the
11 assertion of sovereign immunity here any
12 different from the assertion of sovereign
13 immunity in Kirtz?

14 MR. GANNON: I think that we take
15 comfort from the fact that we have a lot of
16 additional provisions. I -- I don't -- I'm not
17 quibbling at all with the idea there still
18 needs to be a clear statement.

19 And to the extent that Justice Jackson
20 was asking questions about the fact that we
21 have a statute here that makes this different,
22 we're not just talking about sort of a common
23 law background, we're trying to reconcile two
24 different statutory schemes, I would say the
25 point that I just made makes it clear that

1 Congress was displacing the FSIA as the
2 background rule here when it said that this is
3 an action that's going to arise under 1331.

4 The jurisdictional provisions of
5 this -- of -- jurisdictional immunity of the
6 FSIA goes through Section 1330. 1330 says that
7 jurisdiction exists when an exception to the --
8 to the FSIA has been satisfied.

9 And, here, Congress said that's not
10 the statute that governs this action.

11 JUSTICE THOMAS: Do you think these
12 two --

13 MR. GANNON: It says this is a federal
14 question of jurisdiction.

15 JUSTICE THOMAS: So do you think that
16 these two statutes can be reconciled?

17 MR. GANNON: I think that the -- I --
18 I think that the -- as my friend was just
19 saying, I wouldn't reconcile them by saying
20 that you need to go through both gates. I
21 understand that that's a -- a normal thing to
22 do when you're looking at two different
23 statutory schemes.

24 I think Congress has already made the
25 decision and said we want this not to be an

1 FSIA suit and -- and they did not want this to
2 be a Swiss cheese situation where there would
3 have to be some incidental overlap that would
4 allow you to get through one of the -- like the
5 commercial activities exception here.

6 JUSTICE SOTOMAYOR: I'm sorry.

7 MR. GANNON: I mean, with --

8 JUSTICE SOTOMAYOR: Can -- answer the
9 question. Could you go through both gates?

10 MR. GANNON: I -- I think --

11 JUSTICE SOTOMAYOR: Is it impossible
12 to go through both gates?

13 MR. GANNON: I think, in the vast
14 majority of suits, it probably is going to be
15 impossible.

16 JUSTICE SOTOMAYOR: I didn't say -- I
17 didn't ask that.

18 MR. GANNON: I -- I -- I --

19 JUSTICE SOTOMAYOR: There are still a
20 swath of cases.

21 MR. GANNON: -- I am not going to say
22 that there will never be a suit where -- where
23 the -- where the plaintiff could satisfy --

24 JUSTICE SOTOMAYOR: All right.

25 Could --

1 MR. GANNON: -- the commercial
2 activities exception, but I think that that's a
3 gross mismatch between what Congress was
4 targeting here, which is trafficking in all of
5 this expropriated property, especially when the
6 Cuban governmental entities are the main --
7 they -- the main culprits and beneficiaries of
8 that trafficking conduct which Congress wanted
9 to --

10 JUSTICE SOTOMAYOR: But the main --
11 the main culprit -- the main culprit was the
12 Cuban government, yet Congress dropped the
13 Cuban government as one of the potential
14 defendants, so I don't see how there was
15 congruity there.

16 Two amicus briefs, the foreign
17 sovereign immunity scholars and the foreign
18 international law scholars, raise the Charming
19 Betsy interpretation, canon of interpretation.
20 We know Charming Betsy was at the founding and
21 we know that Congress wanted to push the
22 boundaries of international law with -- with
23 Title III.

24 But Charming Betsy cautions us to try
25 to construe statutes not to violate

1 international law. Here, not only is it
2 pushing it to a private cause of action against
3 the Cuban government and its subsidiaries.
4 Justice Barrett has asked your -- the
5 Petitioner's counsel whether they could also
6 sue other countries' agencies and
7 instrumentalities, and she said yes.

8 What's your position on that?

9 MR. GANNON: Well, I -- I'm happy to
10 start with the third countries question, but I
11 also want to get back to talk about the
12 customary international law point that you were
13 making about Charming Betsy. And with respect
14 to third countries, Footnote 5 in our brief
15 doesn't take a position on this. I do think
16 that --

17 JUSTICE SOTOMAYOR: Isn't it the logic
18 of your position -- if you're saying that it --

19 MR. GANNON: I -- I --

20 JUSTICE SOTOMAYOR: -- abrogated the
21 FSIA, why would that abrogation -- because it
22 doesn't say it abrogates sovereign immunity
23 with respect just to Cuba.

24 MR. GANNON: It -- I think that
25 several of the provisions are Cuba-specific.

1 The ones that specific --

2 JUSTICE SOTOMAYOR: Several are but
3 not all of them.

4 MR. GANNON: I agree with that,
5 Justice Sotomayor. And I think that it is
6 clearer that there's an abrogation with respect
7 to Cuban agencies and instrumentalities, and I
8 think that that would be enough for the Court
9 in this case.

10 But, if you think that it's all or
11 nothing, then I would make two points that
12 would mitigate the potential risk associated
13 with that. First, to our knowledge, there's
14 not a single pending Title III case that brings
15 any claims against third-country agencies and
16 instrumentalities. And second --

17 JUSTICE SOTOMAYOR: Once we say it's
18 okay, even if we reserve the question?

19 MR. GANNON: They -- they make -- and
20 second --

21 JUSTICE SOTOMAYOR: You know that
22 we're inviting that litigation. But go ahead.

23 MR. GANNON: And I -- and my second
24 point is, to the extent that it looks like
25 that's going to be any sort of problem, then

1 the President has the suspension power and he
2 could suspend or partially suspend the right to
3 bring Title III actions if he thought that that
4 was going to create foreign policy problems.

5 And that also was part of my answer to
6 your question about the customary international
7 law point in Charming Betsy, which is that the
8 administration, the executive branch, was very
9 concerned about exactly those types of things
10 when this statute was -- when this bill was
11 being debated in 1995 and 1996.

12 And the State Department letter that
13 my friends on the other side quote specifically
14 said that the suits against agencies and
15 instrumentalities would go far beyond current
16 exemptions in the FSIA. The executive branch
17 was concerned about this.

18 And I think Congress's response to
19 that was to say we are going to exercise our
20 power to go beyond what the FSIA currently
21 allows. But, if you were to adopt the
22 Respondents' reading here, then that would not
23 be the case because it would not be able to go
24 beyond the FSIA if they also had to comply with
25 the FSIA.

1 And the one change that I think
2 Congress made after that point in the
3 legislative development that is relevant to
4 this is that at the executive branch's request,
5 they granted the President the suspension
6 power.

7 And the suspension power is a way for
8 the President to help manage whether he thinks
9 that the risk to foreign policy, offending
10 foreign sovereigns, the -- whether we're going
11 beyond what customary international law allows
12 is worth it with respect to the U.S. national
13 interest in expediting a transition --

14 JUSTICE KAVANAUGH: Which way does --

15 MR. GANNON: -- to democracy in Cuba.

16 JUSTICE KAVANAUGH: Which way does the
17 suspension power cut here? That's -- I'm
18 trying to figure that out because your rhetoric
19 and -- and Petitioner's counsel is Congress
20 really wanted to allow these suits and not to
21 have them subject to the gatekeeping of the
22 FSIA.

23 And yet Congress gave the President
24 unlimited power --

25 MR. GANNON: Well, I --

1 JUSTICE KAVANAUGH: -- to say no,
2 almost unlimited power to say no, which then
3 happened for the next 23 years. And that's
4 really just based on national interest.
5 Basically, it's completely up to the President.

6 MR. GANNON: I mean, to -- to be
7 clear, Justice Kavanaugh, I -- I do think it's
8 quite clear Congress gave the suspension power
9 to the President with those qualifications, and
10 so I don't think that there's something that we
11 need to sort of decline to think that Congress
12 gave him that power.

13 JUSTICE KAVANAUGH: No, I know -- I
14 know that --

15 MR. GANNON: And, secondly, I would
16 say that --

17 JUSTICE KAVANAUGH: Let me just
18 finish. I know they gave him that power. But
19 how does -- and this is my question -- just how
20 should that affect how we think about the FSIA?
21 Because it's not just, oh, Congress wanted
22 these suits tomorrow.

23 MR. GANNON: Well, I -- I -- I think
24 it suggests that they recognized that they were
25 going past what the FSIA would otherwise allow

1 and that, therefore, there was a need to have
2 this extra potential governor on the speed of
3 the process, but they were very clear that they
4 wanted it not just to be U.S. national
5 interests. They actually changed the phrasing
6 of what the executive branch requested, as --
7 as -- as explained in the conference report and
8 some of the -- some of the floor statements
9 associated with the adoption of the final bill,
10 to say that they wanted it to be U.S. national
11 interests and it had to promote expedition of a
12 transition to democracy in Cuba.

13 JUSTICE KAVANAUGH: That's a hundred
14 percent in the discretion of the president, a
15 hundred percent.

16 MR. GANNON: That is -- that is his
17 determination to make. He reports it to
18 Congress. And that's -- that's the power that
19 he has to suspend this. But I think that
20 that's because what --

21 JUSTICE KAVANAUGH: So this
22 transitions us back -- the statute, when you
23 put the presidential suspension part into it,
24 really transitions back to the -- the pre-FSIA
25 when it's just up to the President.

1 MR. GANNON: Well, I mean, I -- I
2 think that --

3 JUSTICE KAVANAUGH: Which might be the
4 right answer here. I'm not saying it's not the
5 right answer.

6 MR. GANNON: I think what Congress has
7 done is Congress has actually sort of created a
8 default rule here, which is that these causes
9 of action will proceed. These will be
10 appropriate defendants, and the FSIA is not at
11 all throwing the dice.

12 JUSTICE KAVANAUGH: You keep on
13 floating that it's totally up to the President
14 whether these claims can proceed?

15 MR. GANNON: The President ultimately
16 has --

17 JUSTICE KAVANAUGH: Right?

18 MR. GANNON: -- the ability to --

19 JUSTICE KAVANAUGH: Isn't that right?

20 MR. GANNON: Yes. Ultimately has the
21 ability to decide that because -- if he is
22 doing it for the purposes that the LIBERTAD Act
23 was intended to promote, which is encouraging a
24 transition to Cuba. To the extent that these
25 types of trafficking lawsuits are a problem, if

1 it's because they're lawsuits against third
2 countries --

3 JUSTICE KAVANAUGH: Do you think
4 that's judicially reviewable? I mean, this is
5 getting in the weeds, but since you're putting
6 so much weight on that second clause, do you
7 think a court could review that, his
8 determination that it was expedited --

9 MR. GANNON: I would not expect that
10 to be judicially reviewable. It's something
11 that he needs to refer --

12 JUSTICE KAVANAUGH: That's fine.

13 MR. GANNON: -- to Congress. I think
14 that -- that there is political accountability
15 associated with that and that -- but that
16 Congress recognized that this is going to be a
17 situation that had been evolving for decades,
18 that it had taken them decades to get from
19 the -- from the Foreign Claims Settlement
20 Commission to this, and they -- but they wanted
21 this to go as fast as it could, with the
22 President able to make judgments according to
23 the way circumstances developed.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Justice Thomas, anything further?

2 JUSTICE ALITO: What are the practical
3 implications of the interesting question in
4 this case? Unless Cuban instrumentalities have
5 property in the United States against which a
6 judgment could be executed, what difference
7 does all of this make as a practical matter?

8 MR. GANNON: I think that's a -- an
9 excellent question, Justice Alito, and as a
10 practical matter, that might even -- that sort
11 of obviates the need to even answer the
12 question about 1610 and 1611(c). If Cimex
13 doesn't have any assets in the United States,
14 then -- then the execution immunity question
15 that you were asking sort of drops out.

16 But that doesn't mean that there isn't
17 value to having a judgment. And there's
18 nothing anomalous about having the exceptions
19 to attach execution and attachment immunity be
20 narrower than the -- than the exception to
21 jurisdictional immunity. The Court observed
22 that in NML Capital. And in some suits, it
23 literally is the case that the plaintiff simply
24 can't collect on a judgment that it got
25 consistent with an exception to jurisdictional

1 immunity under the FSIA unless there's a waiver
2 of the defendant.

3 And -- but that doesn't mean that
4 there isn't value to having a judgment. It
5 could be taken to courts in other countries.
6 To the extent that -- that this goes beyond
7 what customary international law allows, those
8 other countries may be less likely to enforce
9 depending upon what the situation is.

10 But, you know, I think that a company
11 like Exxon that had, you know, tens of -- \$70
12 million expropriated in 1960, and you see a lot
13 of suits that come here occasionally where --
14 where long-lived corporations and others have
15 investments that they want to vindicate. They
16 get a judgment. It may take decades for them
17 to find property in an appropriate case where
18 they can try to attach, but that doesn't mean
19 that they don't think that there's some value
20 beyond just having a certified claim from the
21 foreign claims settlement --

22 JUSTICE ALITO: Yeah. Perhaps I
23 should have asked this of Ms. Ratner and she
24 can address it or not as she chooses when she
25 gets up for rebuttal.

1 But, I mean, I assume Exxon has some
2 financial reason for doing this. And it's kind
3 of beyond me what the value of this judgment is
4 going to be. If it can't be executed in the
5 United States, which seems likely, and its
6 value is dependent on registering it in a
7 foreign country and trying to execute it there
8 when the Helms-Burton Act goes beyond
9 international law, that really seems like a
10 long shot, but I'm probably missing something.

11 MR. GANNON: I -- I mean, it -- it --
12 it might be a long shot, but, as I said,
13 that's -- that's not at all anomalous under the
14 FSIA. The way -- the way it is designed, it is
15 often the case that somebody can get a judgment
16 and there -- there is literally not an
17 applicable exception to execution immunity that
18 is -- that is satisfied merely because they
19 already had gotten through the gate of --

20 JUSTICE ALITO: Thank you.

21 MR. GANNON: -- jurisdictional
22 immunity.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 JUSTICE SOTOMAYOR: Do you see 6082(c)

1 as a -- as a jurisdictional provision?

2 MR. GANNON: I -- yes, I think that
3 it's -- it's -- it points us to 1331 as the
4 basis for jurisdiction and --

5 JUSTICE SOTOMAYOR: But it doesn't.
6 It says procedure -- but this section is
7 labeled "procedural requirements," not
8 jurisdictional. And the first subsection
9 states that "the rules of the courts of the
10 U.S. apply to actions under this subsection to
11 the same extent as such provisions and rules
12 apply to any other action brought under
13 Section 1331."

14 So it's only talking about procedures.
15 It's not talking about jurisdiction.

16 MR. GANNON: I think what it is saying
17 is that all the provisions of Title 28 apply as
18 if it is a federal question jurisdiction action
19 like any other, and it uses the word "other."

20 JUSTICE SOTOMAYOR: All the
21 procedures.

22 MR. GANNON: And I think there's no
23 way to read the word "other" there without
24 making it say that this too is an action under
25 1331, which means that this is not an FSIA suit

1 under 1330; it's a federal question
2 jurisdiction suit.

3 There's also a separate, you know,
4 amount-in-controversy requirement.

5 JUSTICE SOTOMAYOR: So we're still
6 back to the original question, was the intent
7 to repeal the FSIA? But that doesn't tell us
8 that that was its intent.

9 MR. GANNON: I think because it's
10 pointing to the jurisdictional provision of the
11 FSIA --

12 JUSTICE SOTOMAYOR: No, it's
13 pointing -- it's pointing to procedural
14 requirements of 1331.

15 MR. GANNON: But I think that that
16 reads out the word "other." If you wanted to
17 just say we're going to treat this as if it is
18 a 1331 action and use those procedures, we're
19 going to borrow those the way it borrows other
20 provisions from the FSIA, the very next
21 subsection borrows its service-of-process rule,
22 says use the rules, service shall be made in
23 accordance with Section 1608. They feel like
24 they have to go grab a provision of the FSIA
25 and pull it in and make it applicable.

1 Here, they said Title 28's rules apply
2 here, like it's a 1331 suit, like -- like other
3 1331 suits. It doesn't say it's like it's a
4 1331 suit. It says it is another 1331 suit.
5 And so I think that the only way to read that
6 is, if it's under 1331, it's not under 1330.

7 They could have said 1330 or 1331.
8 They could have said depending on which
9 defendant you have. If it's against a foreign
10 sovereign, you would want it to be a 1330 suit.
11 If it's against one of the -- if it's against
12 the cruise ships from the first case this
13 morning, it's a federal question jurisdiction
14 case. They didn't say that. They said it's
15 1331.

16 And -- and -- and I think that the
17 combination of these two provisions back to
18 back -- I -- I take the point that the -- the
19 heading is "procedural requirements," but that
20 it -- they're telling us building-block things
21 about the case, which is where do you get
22 jurisdiction and how do you get service of
23 process and, hence, personal jurisdiction.

24 And so I -- I -- I do think that that
25 shows that Congress was making the

1 jurisdictional decision here, not just the
2 liability-creating decision, as Justice Kagan
3 was previously asking.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: Well, I don't know. I
6 mean, it seems to me you're asking us to do
7 something very unusual here, which is to take a
8 statute which does create a cause of action and
9 a cause of action directly against foreign
10 sovereigns, but to say that just because you've
11 created a cause of action against foreign
12 sovereigns, you're also abrogating immunity
13 when you know that there's a Foreign
14 Sovereignty Immunities Act that is in charge of
15 the immunity question, if you will.

16 And it raises the question -- you
17 know, this is not a magic words test. It's,
18 like, it could have done it in a thousand
19 different ways, but why didn't -- rather than
20 this very peculiar, you know, reference to
21 1331, which it's pretty unclear what it means.

22 But why didn't Congress just say,
23 like, we're -- you know, we're displacing the
24 FSIA with respect to this, so we're abrogating
25 sovereign immunity? Or just give some

1 indication that that's what it meant to do,
2 other than create a cause of action, which is a
3 completely different question in the foreign
4 sovereign immunity context?

5 MR. GANNON: I think that it did both.
6 I mean, I -- I -- I -- I just have to go back
7 to what I -- what I said in my intro, what I
8 just said in response to Justice Sotomayor.

9 I think the only way to read
10 6082(c)(1) and (c)(2) is to say that Congress
11 here was speaking to questions of subject
12 matter and personal jurisdiction with respect
13 to foreign sovereigns.

14 And that's the -- that's the reason, I
15 mean, they -- if they wanted it to just be
16 about other defendants, like the cruise lines
17 --

18 JUSTICE KAGAN: Yeah.

19 MR. GANNON: -- then -- then they --
20 they don't need to be --

21 JUSTICE KAGAN: So you're really
22 saying it really hinges on those two little --

23 MR. GANNON: Those are the best --

24 JUSTICE KAGAN: Yeah.

25 MR. GANNON: -- indications we have

1 that Congress is actually talking about it in
2 the jurisdictional sense.

3 JUSTICE KAGAN: Yeah. So you're not
4 making a -- a point about, like --

5 MR. GANNON: But -- but we have all
6 the other confirmatory provisions that my
7 friend is relying upon.

8 JUSTICE KAGAN: You're -- you're
9 not -- but you're not -- you're not saying, oh,
10 you know, like, Kirtz definitely controls this
11 because, whenever you have a cause of action
12 against a government, that answers your
13 question? You're not saying that?

14 MR. GANNON: That is -- that is
15 correct. I think we're -- we're asking for
16 Kirtz plus. We think that -- we think that the
17 cause of action language, I don't want to
18 minimize the importance of it, I think that the
19 fact that -- that -- that -- that the 1996
20 Congress used the same words that were -- were
21 able to waive federal sovereign immunity when
22 they were talking about foreign
23 instrumentalities and agencies, I think that --
24 that -- that -- that is -- that is a compelling
25 indication, but I think here it is important

1 that we also have specific references to Cuban
2 government agencies and instrumentalities all
3 over the statute and we have --

4 JUSTICE KAGAN: And --

5 MR. GANNON: -- these provisions
6 talking about what I'm calling --

7 JUSTICE KAGAN: Got it.

8 MR. GANNON: -- an ouster of the
9 jurisdictional portion of the FSIA.

10 JUSTICE KAGAN: If I could take you
11 back to Justice Alito's question, and let's
12 assume that I think that this execution
13 immunity provisions in the FSIA really
14 continue, you know, that there's no reason to
15 think that they didn't continue on. And,
16 indeed, the fact that this statute amended them
17 a little bit makes clear that Congress thought
18 that they were going to continue.

19 So then the point is to -- then what
20 you're asking us to do is to read the statute
21 in a highly unusual way in order to abrogate
22 sovereign immunity in cases in which, even
23 putting aside the practical issues that Justice
24 Alito was talking about, there are -- there are
25 legal bars to collecting on your judgment

1 against a foreign sovereign.

2 So, like, why would Congress have done
3 that?

4 MR. GANNON: I -- I mean, you -- you
5 could ask the same thing with respect to other
6 parts of the FSIA's immunity exceptions that
7 aren't echoed in -- in the attachment
8 exceptions. As the Court said in *NML Capital*,
9 it's a smaller set of exceptions for execution
10 and attachment immunity than it is for
11 jurisdictional immunity.

12 And since then, it's the -- the
13 mismatch has actually grown. 1605B, a new
14 provision that Congress added in 2016,
15 literally has no parallel in execution
16 immunity. And so you -- you have a waiver of
17 jurisdictional immunity with respect to acts of
18 international terror in the United States, and
19 there's no corresponding waiver on attachment
20 and execution immunity. And so I --

21 JUSTICE KAGAN: Yeah, I mean, I guess
22 one -- one aspect of this is if -- if -- if
23 sort of the thrust of the argument, and I know,
24 you know, you're trying to hook it into these
25 technical provisions, but if the thrust of the

1 argument is Congress was really concerned about
2 this -- this problem and it really wanted to go
3 after these agencies and instrumentalities
4 because weren't they the ultimate bad guys
5 here, I mean, if that's really what Congress
6 was trying to do, it -- it -- it -- it
7 proceeded in a very odd fashion because you're
8 not going to get anything from them anyway
9 given that the execution immunity exists.

10 MR. GANNON: Well, take -- take --
11 take out the execution immunity. There's still
12 going to be the basic --

13 JUSTICE KAGAN: Well, take it out?
14 That's like -- that was the question.

15 MR. GANNON: Well, no, I -- I'm --
16 well, no, but my -- my point, Justice Kagan,
17 was going to be back to what you alluded to I
18 thought as the practical considerations that
19 Justice Alito raised, which is that Congress
20 knew there were not going to be very many Cuban
21 assets in the United States anyway. Now we
22 have -- we have some blocked assets the federal
23 government has been holding for decades and
24 maybe --

25 JUSTICE KAGAN: But, again, it's not

1 just the practical thing that I'm saying. What
2 Congress did not do was to touch executive
3 immunity, execution immunity provisions, that
4 we're putting aside the practical concerns,
5 we're going to prevent as a legal matter these
6 agencies from having to cough up.

7 MR. GANNON: I -- I -- I think that
8 1611(c) is ambiguous about whether they were
9 displacing 1610 or not. I think, as my friend
10 pointed out, notwithstanding clauses often
11 create this type of ambiguity, whether they're
12 going to be -- whether there's a negative
13 implication or whether they're just belt and
14 suspenders.

15 JUSTICE KAGAN: Yeah, I don't buy that
16 one.

17 MR. GANNON: And so we -- we -- we
18 haven't taken a position on that. But, as I'm
19 saying, I think that it is quite --

20 JUSTICE KAGAN: The choice.

21 MR. GANNON: -- it is quite common for
22 there to be a mismatch between these two types
23 of provisions. And I don't think when Congress
24 was saying that it wanted these types of
25 lawsuits to proceed and they wanted them to be

1 a tool for foreign policy, that even if at the
2 end of the day there wasn't going to be
3 collection against actual Cuban property that
4 was already in the United States, Cuban
5 governmental property that was already in the
6 United States, that doesn't mean that there
7 isn't some power to having a federal judgment
8 that says, look, Cuba is actually -- people are
9 trafficking in this expropriated property,
10 there should be treble damages. This is
11 something that people should be held
12 accountable for. We haven't forgotten this.
13 These are U.S. nationals whose property was
14 wrongly expropriated. We want there to be
15 something done about it and we want there to be
16 the poison pill that my colleague talked about
17 earlier that would deter --

18 JUSTICE KAGAN: Thank you.

19 MR. GANNON: -- others from
20 cooperating with the Cuban government.

21 CHIEF JUSTICE ROBERTS: Justice
22 Gorsuch?

23 Justice Kavanaugh?

24 Justice Barrett?

25 Justice Jackson?

1 JUSTICE JACKSON: Yeah. I guess I'm
2 just trying to puzzle through why, where you
3 landed with Justice Kavanaugh, that Congress
4 wanted to go back to the pre-FSIA world in this
5 particular context such that the President was
6 controlling when these suits go forward and
7 when they don't.

8 I guess I don't understand why that
9 doesn't put the onus on Congress even more so
10 to be clear about its intentions in doing that
11 in light of our clear statement rule.

12 I mean, it's -- it -- like, that's a
13 huge thing. That's not just we want these
14 individual suits to go forward. I hear you
15 saying no, what they were really trying to
16 accomplish here was to repudiate in this
17 particular circumstance the reason why the FSIA
18 was put into place, which was to prevent this
19 ad hoc, you know, President deciding when and
20 when not to let these suits to go forward.

21 So, if Congress was really doing that,
22 why wouldn't they have said it? Wouldn't --
23 wouldn't we expect that they had to have said
24 it in order to satisfy our clear statement
25 rule?

1 MR. GANNON: I -- I -- I think that
2 what Congress did is -- is essentially exactly
3 what they did in the Beaty case that Justice
4 Sotomayor was reading before -- from before,
5 which is to say the default rule here is no
6 sovereign immunity in this context. We are
7 adding a waiver, an abrogation of sovereign
8 immunity for these specific circumstances, it's
9 a narrow and --

10 JUSTICE JACKSON: Okay. But, first of
11 all -- first of all, they didn't say that.
12 They -- they didn't -- those words aren't in
13 the statute, but that's what you're --

14 MR. GANNON: Well, that's -- that's --
15 that's the whole first half of my argument.

16 JUSTICE JACKSON: Yes. You're --
17 you're -- you're -- I appreciate, I just want
18 to be clear, they didn't say that. You're
19 implying that they did that from saying we want
20 these claims to go forward, right?

21 MR. GANNON: Yes. And then I'm saying
22 that the waiver power on the back end --

23 JUSTICE JACKSON: Yeah.

24 MR. GANNON: -- is something that --
25 that -- that provides a couple of different

1 functions. One is that it ensures that these
2 aren't something that's actually going to slow
3 down a transition to democracy in Cuba, make
4 it -- make it counter-productive; and, two, it
5 makes it possible for the President to -- to
6 put back in this narrow category of cases the
7 protections of sovereign immunity that for six
8 months at a time, I mean, he can only suspend
9 the ability to bring new lawsuits. He can't
10 actually just cancel out lawsuits.

11 JUSTICE JACKSON: I understand. But
12 we don't need to put --

13 MR. GANNON: Once the lawsuit is
14 filed, this is not the same as the pre-1942
15 regime.

16 JUSTICE JACKSON: I -- I don't -- I
17 understand. But we don't need to put it back
18 in if the FSIA is doing its work to begin with
19 on the front end, and that's the question in
20 this case. So it's a -- it's just a little
21 odd, I think, to --

22 MR. GANNON: But I --

23 JUSTICE JACKSON: I think that a lot
24 of these arguments are really just trying to
25 get around the fact that what the U.S.

1 Government did in this Title III action is
2 pretty extraordinary in general, and we would
3 have expected that if they were creating a
4 cause of action like this, they would have
5 addressed the -- the sovereign immunity
6 question.

7 And in the absence of any statement
8 about sovereign immunity, the question is, did
9 they intend for the FSIA to be operating or did
10 they intend that by not talking about sovereign
11 immunity, we would read this statute to
12 necessarily mean that sovereign immunity is
13 abrogated?

14 And it seems to me the second is more
15 implausible. I know -- I know what Ms. Ratner
16 said, but it seems to me that the kind of
17 natural way of looking at this is that when
18 Congress was silent in Title III about
19 abrogation of sovereign immunity against the
20 backdrop of a statute that governs how you
21 abrogate sovereign immunity, that it was
22 intending to allow that statute to operate.
23 And if it wasn't, we would have expected them
24 to say that.

25 MR. GANNON: Well -- and -- and we

1 have several different provisions that are,
2 like, pulling individual provisions out of the
3 FSIA and incorporating them here. They're
4 doing -- they're -- they're doing all that. We
5 know that Congress was legislating against the
6 FSIA. We know the executive branch had raised
7 concerns about going beyond the FSIA.

8 I think that the suspension power is a
9 way to ameliorate those concerns, those
10 international law concerns, and I think that
11 what it indicates is that Congress understood
12 that this was indeed strong medicine.

13 The poison pill that my colleague
14 referred to earlier today is strong medicine,
15 and if it -- if it is so strong that it might
16 kill the patient, the President should be able
17 to use his ability to evaluate foreign policy
18 and -- and -- and -- and what's going to happen
19 in Cuba in order to decide we're going to pull
20 back a little on it for six months at a time.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Mr. Lobel?

25 ORAL ARGUMENT OF JULES L. LOBEL

1 ON BEHALF OF THE RESPONDENTS

2 MR. LOBEL: Mr. Chief Justice, and may
3 it please the Court:

4 Section 1604 of the Foreign
5 Sovereignty Immunities Act provides that
6 foreign state instrumentalities shall be immune
7 in U.S. courts unless one of the exceptions in
8 1605 to 1607 are met. Nothing in Title III's
9 text abrogates that immunity. Title III's
10 cause of action is not inconsistent with that
11 restrictive non-absolute immunity. Congress
12 considered whether to create another exception
13 to immunity and decided not to when the object
14 -- executive objected.

15 This Court should not read in an
16 exception where Congress did not enact one.
17 Rather, the Court must harmonize the two
18 statutes, if there is any way possible to do
19 so. And here it is obvious that it's possible.
20 Title III allows lawsuits against foreign
21 instrumentalities where one of the FSIA's
22 exceptions are met.

23 Petitioner therefore pivots to a
24 practical argument that because of the
25 embargo's heavy restrictions on trade with

1 Cuba, few Title III suits could succeed. That
2 policy argument can't substitute for the
3 absence of an explicit textual abrogation or an
4 irreconcilable conflict between the two
5 statutes.

6 But, moreover, Petitioner's factual
7 premise is just wrong. Helms-Burton gave the
8 President the power to ease the embargo. And
9 there are now 70 general licenses that have
10 resulted in \$8 billion of exports from the
11 United States, billions of dollars in
12 remittances, and millions of travelers flowing
13 to Cuba in the last two decades.

14 Finally, Petitioner concedes that
15 under Title III's text, if there is abrogation
16 for Cuban entities, there is abrogation for all
17 the instrumentalities of all countries that
18 trade with Cuba.

19 I welcome the Court's questions.

20 JUSTICE THOMAS: Could you give an
21 example of an action that -- Title III action
22 that could be brought consistent with an
23 exception under FSIA?

24 MR. LOBEL: Sure. There are now 50
25 Cuban importers that import millions of dollars

1 of goods from the United States, grains,
2 chickens, all sorts of goods under general
3 licenses. They enter into a contract with an
4 American exporter. The American exporter ships
5 the goods. The Cuban importer pays the money
6 to the exporter. That is a direct effect.

7 All of those Cuban importers could be
8 sued if they're using expropriated property.
9 The ports, the docks, as we heard this morning,
10 the airports, the warehouses, their offices,
11 all of those are likely to be on expropriated
12 property. That's one.

13 Second, the case you heard this
14 morning, Havana -- when the cruise ships went
15 into the docks in Havana, there were six Cuban
16 instrumentalities that either owned or operated
17 those docks. Havana Docks could have sued any
18 one of those.

19 And there are innumerable cases. But
20 the key point is that Helms-Burton gave the
21 President the power to expand or contract the
22 embargo. And various presidents have used that
23 to either ease the embargo or expand it.

24 And you cannot fix in time whether or
25 not this was going to happen in 1995, 1996, or

1 now. There has been enormous expansion of
2 trade with Cuba, and that expansion allows for
3 the possibilities of many suits.

4 But back to Justice Sotomayor's
5 question before, I don't think this Court can
6 evaluate how many suits there would be, whether
7 it's too few, whether it's too many, what to do
8 about it if it's too few. That's the job of
9 Congress.

10 This Court's job is to evaluate the
11 text and see if there's an irreconcilable
12 conflict. And as I think in their answer --

13 JUSTICE GORSUCH: Mr. Lobel, on
14 that -- I'm sorry to interrupt, but you keep
15 mentioning irreconcilable conflict. And I
16 think Ms. Ratner might respond, well, my duty
17 is to show a clear abrogation of sovereign
18 immunity, not that there -- that there is some
19 way to reconcile these two statutes. That only
20 comes in when we get to implied repeals under
21 our case law, *Carcieri versus Salazar*.

22 And we're not dealing with, she would
23 say, an implied repeal here. We're dealing
24 with an express repeal. And she has evidence,
25 and you may find that insufficient or -- or

1 adequate, but -- and we can have that argument,
2 but I -- I think what she would resist, you --
3 your suggestion that she has to show a
4 super-super-clear abrogation, not only show
5 that Congress abrogated sovereign immunity, but
6 that it also made clear it's intention to
7 displace the FSIA.

8 Thoughts?

9 MR. LOBEL: Well, there are two
10 statutes. So they have to make clear -- they
11 have to -- you have to reconcile the two
12 statutes. But --

13 JUSTICE GORSUCH: Well, no, not -- not
14 necessarily. Carcieri says you have to
15 reconcile them when there -- when one is an
16 implied repeal.

17 MR. LOBEL: Right.

18 JUSTICE GORSUCH: And, again, I think
19 her argument would be I'm not arguing about --
20 well, she would say that too, of course,
21 because she wouldn't give up anything. Fair
22 enough.

23 MR. LOBEL: But --

24 JUSTICE GORSUCH: But I think she'd
25 say my primary argument is that there's an

1 express repeal. And so yes, in other
2 circumstances, you go to the FSIA, but here,
3 why couldn't Congress, for example -- I mean, I
4 think we've talked about it in Title III -- if
5 it had said we abrogate sovereign immunity,
6 nobody would be talking about trying to
7 reconcile that with the FSIA, right? We --

8 MR. LOBEL: Correct.

9 JUSTICE GORSUCH: -- just wouldn't be
10 taking it. We would be taking the statute on
11 its own terms. And she's saying that's
12 essentially what happened here.

13 Now you may disagree with that, but
14 this reconciling of things really is kind of
15 the side show, isn't it?

16 MR. LOBEL: You're right that I
17 disagree with it. There is undisputably no
18 express repeal.

19 JUSTICE GORSUCH: Oh, fair enough. I
20 --I -- I don't --

21 MR. LOBEL: Undisputedly. Without
22 question.

23 JUSTICE GORSUCH: You'd agree with me,
24 though, that if it -- if it were an express
25 repeal --

1 MR. LOBEL: If there were an express
2 repeal --

3 JUSTICE GORSUCH: -- we wouldn't be
4 talking about reconciling --

5 MR. LOBEL: Correct. Correct.

6 JUSTICE GORSUCH: Okay. All right.

7 MR. LOBEL: If there wasn't -- and
8 what Kirtz said about an express repeal is if
9 the statute said in so many words that it was
10 stripping sovereign immunity --

11 JUSTICE GORSUCH: And that's the real
12 question before us, isn't it?

13 MR. LOBEL: But that's not here.

14 JUSTICE GORSUCH: Okay. No, I
15 understand that point.

16 MR. LOBEL: If that's the real
17 question, we win un- -- undeniably. There is
18 no express appeal that anybody could read --

19 JUSTICE GORSUCH: I -- I think it --

20 MR. LOBEL: -- in the statute.

21 JUSTICE GORSUCH: -- would probably be
22 deniable by -- by Ms. Ratner at least.

23 MR. LOBEL: Okay. Yes, I'll agree
24 with that.

25 JUSTICE GORSUCH: And -- and by the

1 U.S. government it turns out, too.

2 MR. LOBEL: And maybe the U.S.
3 government.

4 JUSTICE GORSUCH: So I --

5 MR. LOBEL: But hopefully none of --
6 none of the Justices.

7 (Laughter.)

8 JUSTICE GORSUCH: Right. Exactly.
9 Let's talk about that, though. And I
10 understand that toggling on-and-off switch by
11 -- by the President can cut both ways. But one
12 way in which it could cut against you,
13 potentially, is why would Congress have put
14 that in there except for if it thought that the
15 FSIA didn't apply and it was kind of reverting
16 to the old world in which courts would ask the
17 State Department whether or not a suit should
18 proceed as a matter of comit and grace?

19 MR. LOBEL: One, it's not -- they
20 didn't put it in there because the FSIA -- they
21 thought the FSIA applied. This statute --

22 JUSTICE GORSUCH: I agree with you.

23 MR. LOBEL: -- Title III violated
24 international law, extended U.S. jurisdiction
25 in many controversial ways. And the President,

1 Secretary of State Warren Christopher, said the
2 statute in general, Title III in general,
3 should not be enacted because of the very cases
4 that you saw -- that you saw -- the very case
5 you saw this morning.

6 But, again, they could sue if the
7 Foreign Sovereign Immunities doesn't -- Act
8 doesn't apply, they can sue Russian airlines,
9 they can sue Chinese airlines, they could sue
10 Qatari airlines, they could sue any --

11 JUSTICE GORSUCH: Mr. Lobel, if I
12 might --

13 MR. LOBEL: Yeah.

14 JUSTICE GORSUCH: -- redirect you to
15 the question.

16 MR. LOBEL: Okay. I'm sorry.

17 JUSTICE GORSUCH: Yeah. Why would --
18 why would Congress of put that toggle switch
19 in, giving the President the opportunity to
20 turn on and off liability, if it weren't
21 concerned that there would be Charming Betsy
22 international law possible concerns and that it
23 was essentially saying, isn't it kind of an
24 acknowledgment we're not doing the FSIA; we're
25 kind of do go the old regime, the ancient

1 regime, where the State Department tells us
2 whether or not a suit should proceed?

3 MR. LOBEL: Two responses. One is
4 they were worried about private -- suits going
5 on -- suits against --

6 JUSTICE GORSUCH: Private entities.

7 MR. LOBEL: -- not instrumentalities
8 but private parties all around the world.

9 JUSTICE GORSUCH: I -- I take that
10 point.

11 MR. LOBEL: And that was -- that's why
12 they wanted the President to have the right,
13 not to suspend the FSIA, but to suspend the
14 cause of action generally. They didn't say you
15 can suspend the cause of action against foreign
16 instrumentalities or -- they said you can
17 suspend the cause of action because the cause
18 of action itself was very controversial.

19 And, second, they didn't want the
20 President to toggle on and off on -- on
21 immunity. They just said the President can
22 suspend the cause of action, but they didn't
23 say anything about whether the President --

24 JUSTICE KAVANAUGH: But the effect --

25 MR. LOBEL: -- could override

1 immunity.

2 JUSTICE KAVANAUGH: -- the effect is
3 the same. I mean, looking at the structure of
4 the statute, to pick up on Justice Gorsuch's
5 questions, the President has a huge role in
6 this statute.

7 And -- and I -- so that's looking at
8 the text. And then you look at the real world
9 of what has happened since the enactment of the
10 statute and the President's been front and
11 center every six months for 23 years, right?

12 MR. LOBEL: Right.

13 JUSTICE KAVANAUGH: And that effect
14 was those suits couldn't forward. And the
15 question I think I have, looking at that and
16 looking at the real world, is similar to
17 Justice Gorsuch's, but it seems like it would
18 be odd to put the President front and center
19 and then on top of that, the FSIA, as opposed
20 to the whole idea was Charming Betsy,
21 international law, Cuba, the President is the
22 person in our constitutional structure who can
23 weigh all that as to Cuba. And the President
24 is going to have the power. And that's how
25 it's operated and we don't go through this FSIA

1 alternative that Congress had previously
2 enacted.

3 So that's one way to look at it.

4 MR. LOBEL: The President textually is
5 given the power to suspend the cause of action.
6 The text says nothing about the President's
7 power to suspend immunity.

8 Now, of course --

9 JUSTICE KAVANAUGH: Well, what's the
10 difference between those two things --

11 MR. LOBEL: The difference --

12 JUSTICE KAVANAUGH: -- in practice?

13 MR. LOBEL: The difference is, in
14 practice, is that you cannot suspend the cause
15 of action. You could suspend the cause of
16 action, nobody can be sued.

17 JUSTICE KAVANAUGH: Right.

18 MR. LOBEL: If you don't --

19 JUSTICE KAGAN: Including private
20 parties.

21 MR. LOBEL: Including private parties.

22 JUSTICE KAGAN: So this is a
23 suspension that doesn't just have to deal with
24 foreign sovereigns.

25 MR. LOBEL: Exactly.

1 JUSTICE KAGAN: This suspension goes
2 way wider than that.

3 MR. LOBEL: Correct.

4 JUSTICE KAGAN: So it's not clear that
5 it had anything to do with FSIA rules.

6 MR. LOBEL: I don't think it did. It
7 had to do with the fact that the cause of
8 action itself was very controversial.

9 JUSTICE SOTOMAYOR: And the -- and the
10 amount of resources against which attachment
11 could occur is vastly greater against private
12 entities, right?

13 MR. LOBEL: Correct. That's why the
14 private entities were sued.

15 JUSTICE SOTOMAYOR: Because more of
16 them, including other foreign governments, have
17 more in property in the U.S., correct?

18 MR. LOBEL: No question about that.
19 The fact that --

20 JUSTICE SOTOMAYOR: So the suspension,
21 given what Justice Alito pointed out to, which
22 is there's going to be very little assets of
23 Cuban agency or the Cuban government in the
24 U.S. Most of the assets are going to be in the
25 private lawsuits.

1 MR. LOBEL: Correct. But back to
2 Justice Gorsuch's question, because I think
3 it's central --

4 JUSTICE ALITO: Before you do that, I
5 don't want to interrupt the chain of -- of
6 questioning, but I thought you told me -- at
7 least -- well, you didn't tell me -- but I
8 thought you told us that the receipt by a U.S.
9 importer of money from a Cuban instrumentality
10 would fall within the commercial activity
11 exception of the FSIA.

12 MR. LOBEL: Correct. By a U.S.
13 exporter of goods to Cuba --

14 JUSTICE ALITO: A U.S. exporter.

15 MR. LOBEL: -- and they would receive
16 money back in the United States.

17 JUSTICE ALITO: Yeah. Okay. But then
18 you just, you know, two minutes ago, one minute
19 ago you said there would be very little
20 property here to be executed on.

21 MR. LOBEL: Oh, no. If it was against
22 a Cuban entity. If it's against a Cuban,
23 entity, they couldn't execute --

24 JUSTICE ALITO: Okay.

25 MR. LOBEL: -- but it would fall

1 within the FSIA's commercial exception because
2 it would be clearly a direct effect.

3 But back to Justice Kavanaugh, they --
4 the text gives the President the power to
5 suspend the cause of action against anybody;
6 private entities, cruise lines, Cuban entities,
7 or any third -- and third-country's entities.

8 It does not give the President --

9 JUSTICE KAVANAUGH: So it's even
10 broader. I mean --

11 MR. LOBEL: Yeah. But it does not
12 give the President the power to suspend
13 immunity or to override immunity. What the
14 President could do is say: No suits can be
15 brought.

16 The President does not have the power
17 to say that once suits are brought, and if they
18 are brought against a foreign government
19 entity, I'm suspending the FSIA.

20 JUSTICE KAVANAUGH: That's a fair
21 point. I just think it's structurally trying
22 to figure out how this fits together is why I'm
23 asking these questions.

24 MR. LOBEL: Well, but that's the way
25 to harm -- the provision allows for the

1 suspension of the cause of action, but doesn't
2 give the President any power whatsoever about
3 an immunity except --

4 JUSTICE JACKSON: And the point --

5 MR. LOBEL: -- to prevent these causes
6 of action.

7 JUSTICE ALITO: Because -- because --

8 JUSTICE JACKSON: And the point I was
9 making with the SG is that if it did, if the
10 Congress's intention was to give that -- the
11 President a toggle switch with respect to
12 sovereign immunity, wouldn't we have expected
13 to see that in the statute? Because that's
14 like an extraordinary thing.

15 MR. LOBEL: Exactly, Your Honor. And
16 as Justice Jackson alludes to, Congress made a
17 considered, comprehensive determination that we
18 didn't want the President to be doing this
19 because it led to all sorts of bad things. I
20 mean, all sorts of --

21 JUSTICE ALITO: This --

22 JUSTICE JACKSON: That was the whole
23 point of the FSIA to begin with, correct?

24 MR. LOBEL: Yeah.

25 JUSTICE KAVANAUGH: Why do you think

1 the presidential provision is in there, given
2 the FSIA?

3 MR. LOBEL: Because -- because Title
4 III itself was incredibly controversial. And
5 the President argued, not just that the foreign
6 sovereign immunities exception should not be
7 in, but Title III shouldn't be in.

8 And, actually, Warren Christopher, the
9 Secretary of State, made his -- sent a letter
10 to the House on September 20th, excoriating
11 Title III. It's bad for this reason. It's bad
12 for that reason.

13 He didn't mention one reason, foreign
14 sovereign immunity. And that's because they
15 knew they took out the exception.

16 JUSTICE BARRETT: Well, maybe that's
17 also because, you know, the Cuba -- Cuba and
18 its instrumentalities were the most culpable.
19 I mean, so if you're going to go after the
20 private entities because that's where the money
21 is, but maybe -- maybe Congress and the
22 executive weren't as concerned about the
23 sovereign immunity question when they were
24 talking about Cuba.

25 MR. LOBEL: Right. But -- but the

1 question isn't Cuba's culpability. As the
2 argument has shown, what Congress was
3 interested in was deterring trade and
4 transactions with Cuba.

5 And if you look at the findings,
6 6081(5), (6), (7), (11), it's all about
7 deterring third countries from entering into
8 joint ventures and entering into trade with
9 Cuba. And so that's what -- but I don't think,
10 in any event --

11 JUSTICE BARRETT: Yeah, because it
12 didn't want Cuba to continue to profiteer and
13 make money off of the property that it had
14 expropriated.

15 MR. LOBEL: Correct.

16 JUSTICE BARRETT: Yeah.

17 MR. LOBEL: But that says nothing
18 about sovereign immunity.

19 JUSTICE BARRETT: Yeah. I'm not --
20 well, I'm not fighting with you about that
21 point. I'm just saying that I don't think this
22 whole reliance on the Christopher statement to
23 the House does that much for you, but anyway.

24 MR. LOBEL: Well, no. I'm just -- I
25 used the Christopher statement only to rebut

1 the argument that Congress still must have
2 thought that the President still thought that
3 there was an abrogation of immunity.

4 The fact that Christopher never
5 mentioned that three months later after they
6 took out the exception meant that the President
7 no longer thought there was an abrogation of
8 immunity and, therefore, didn't argue against
9 it at that point.

10 JUSTICE ALITO: Just to be clear where
11 we stand, you've made some statements during
12 your argument that seem to me to suggest that
13 you think that the mere fact that Congress did
14 not say expressly that it was abrogating
15 sovereign immunity is sufficient, that's the
16 end of it? We don't need to look any further
17 than that; is that your argument?

18 MR. LOBEL: No.

19 JUSTICE ALITO: Okay.

20 So then the question is what we can
21 infer from what we see in this statute,
22 right --

23 MR. LOBEL: I don't think so.

24 JUSTICE ALITO: -- in the relevant
25 context?

1 MR. LOBEL: No, I don't think it's
2 what you can infer. I think there's two ways
3 you said in Kirtz and FOMB that you can
4 abrogate immunity and that you can abrogate the
5 FSIA; either some express language, which you
6 don't have, or providing a cause of action
7 against a government entities -- in this case
8 it will be foreign government entities -- which
9 would be rendered a dead letter, which would be
10 rendered meaningless.

11 JUSTICE ALITO: Well, that's an
12 interesting reading of Kirtz, but there's
13 nothing in the opinion that talks to that.

14 MR. LOBEL: Well, certainly there's
15 something in FOMB that Kirtz relies on.

16 JUSTICE ALITO: Kirtz itself doesn't
17 say anything about that, does it?

18 MR. LOBEL: It says "negate." And I
19 think that reading Kirtz in any other way would
20 both be inconsistent with your precedent and
21 would leave this Court in all of those
22 situations down -- down a path of determining
23 what's not a dead letter? Is it like in the
24 expropriation exception, is it that there are
25 1 percent of claims that can succeed? How are

1 you going to determine that?

2 JUSTICE ALITO: Well, if we knew that
3 Congress thought that the immunity conferred by
4 the Foreign Sovereignty Immunities Act would
5 wipe out 99.999 percent of the potential claims
6 that could be asserted under Helms-Burton,
7 wouldn't it be a fair inference that it did not
8 intend to -- to preserve the foreign sovereign
9 immunities immunity?

10 MR. LOBEL: I think that the text
11 governs because you can't determine whether it
12 would knock out 99.99 percent.

13 JUSTICE ALITO: Well, what's the
14 difference between 100 and 99.9 or whatever? I
15 mean, in the case of 100, you're inferring,
16 they wouldn't have -- they wouldn't have
17 created a cause of action against a -- an
18 instrument -- a foreign government
19 instrumentality, if it was a dead letter. It's
20 an inference.

21 And I don't understand why the
22 inference stops the minute you can find one in
23 a million claims that might get through.

24 MR. LOBEL: Even if I agreed with you
25 that -- that you can make that inference,

1 that's not the case here. There are many
2 claims --

3 JUSTICE GORSUCH: Well, first of all
4 do you agree with Justice Alito?

5 MR. LOBEL: I do not. I do not.

6 JUSTICE GORSUCH: So we can only make
7 that inference if 100 percent of cases are
8 limiting --

9 MR. LOBEL: If you look at the statute
10 and you look at the FSIA and you look at Title
11 III --

12 JUSTICE GORSUCH: No, no, no. I'm
13 asking -- forget about the FSIA. We've dealt
14 with that.

15 MR. LOBEL: Um-hum.

16 JUSTICE GORSUCH: We're just dealing
17 with, what's required to abrogate sovereign
18 immunity? And you're saying: Okay, you can
19 either use the magic words, or you can create a
20 cause of action that would completely be
21 useless otherwise.

22 MR. LOBEL: Correct.

23 JUSTICE GORSUCH: Zero percent of
24 cases.

25 MR. LOBEL: That's right.

1 JUSTICE GORSUCH: You agree with those
2 two things?

3 MR. LOBEL: I do.

4 JUSTICE GORSUCH: But, once we get to
5 99.9 percent of cases, you say that same
6 inference is unavailable.

7 MR. LOBEL: Because I think it's
8 impossible to tell, looking at the statutes,
9 how many -- not in -- not in this case, but
10 more generally, whether or not -- how many
11 cases are too few, whether or not they're going
12 to succeed.

13 If you could say we know for certain
14 that 99.9 percent of all the cases are going to
15 fail, maybe then.

16 JUSTICE GORSUCH: All right.

17 MR. LOBEL: But you'll never know for
18 certain.

19 JUSTICE GORSUCH: Okay, okay, okay.
20 So now we're at 99.

21 MR. LOBEL: Right.

22 JUSTICE GORSUCH: Okay. How about 90?

23 MR. LOBEL: That's exactly my point.
24 That is at the --

25 JUSTICE GORSUCH: No, but you conceded

1 99.

2 MR. LOBEL: No, no. That -- that's
3 why I didn't concede 99.

4 JUSTICE GORSUCH: Well, you didn't at
5 first.

6 MR. LOBEL: I said maybe.

7 JUSTICE GORSUCH: Oh, maybe.

8 MR. LOBEL: Maybe.

9 JUSTICE GORSUCH: Oh, maybe. Okay.
10 All right.

11 (Laughter.)

12 MR. LOBEL: But the reason that I
13 don't want to concede 99 is because then you'd
14 say what about 90? And the answer to that is
15 the answer that Justice Scalia gave in the NML
16 case. If you think that too many cases are
17 being excluded, go to Congress. Get Congress
18 to enact a new statute.

19 JUSTICE GORSUCH: Well, then we're --

20 MR. LOBEL: Don't amend this statute.

21 JUSTICE GORSUCH: Then we're magic
22 words, right?

23 MR. LOBEL: No.

24 JUSTICE JACKSON: It --

25 MR. LOBEL: I can give -- I can give

1 you an example where the FSIA -- Congress could
2 provide a cause of action without explicitly
3 abrogating the FSIA and it should be abrogated
4 under Kirtz.

5 Let's say there was a spate of
6 automobile accidents in some country or some
7 reason in the -- region of the world where all
8 the instrumentalities -- all the automobile
9 accidents were caused by foreign
10 instrumentalities, and Congress enacted a
11 statute, there was some ether going around in
12 the Congress, and they forgot that the FSIA
13 existed, which clearly isn't here. They were
14 staring the FSIA in the face.

15 But let's say they said there will be
16 a cause of action for any American national
17 injured in an automobile accident that occurs
18 in another country. That would be barred by
19 1605 -- 16 -- that would be barred by the
20 FSIA's tort exception because it requires that
21 the tort occur in the United States.

22 JUSTICE JACKSON: Mr. Lobel, isn't the
23 real reason why we have to keep the Kirtz
24 avenue narrow is because, if you don't do that,
25 you end up end-running Congress's intentions

1 with respect to enacting the FSIA? That we
2 have a statute that Congress, as Justice Kagan
3 said at the beginning, thought about the
4 universe of claims that could be brought
5 against foreign governments, said we don't want
6 this being done in an ad hoc fashion anymore,
7 so we're going to create a statute that lays
8 out what we, the Court, has said subsequently
9 is the exclusive way in which you get to sue a
10 foreign government.

11 Kirtz comes along and we see this kind
12 of one circumstance in which we might conceive
13 of an exception to application of the statute
14 that Congress has created for this purpose, and
15 it is this dead letter, you know, if you have a
16 cause of action, but there's no way you could
17 ever, you know, abrogate sovereign immunity --
18 or a cause of action against a government, but
19 you could never recover. Then you go, okay,
20 that really does have to be interpreted as a
21 situation in which Congress did intend for
22 sovereign immunity to be abrogated,
23 notwithstanding the FSIA.

24 But, if you get broader than that, if
25 we're in 99 percent of the cases, 97 percent,

1 96, then you could have a rule operating
2 outside of the FSIA to do the very thing that
3 Congress didn't want the FSIA -- or didn't want
4 to have happen, which is why it enacted the
5 FSIA. So this exception has to be, like,
6 really tiny or else we don't give effect to
7 Congress's expressed intent to have the FSIA be
8 the exclusive avenue for abrogating sovereign
9 immunity.

10 MR. LOBEL: Exactly, Your Honor.
11 Exactly.

12 JUSTICE ALITO: Well, the FSIA may --
13 may have been the exclusive avenue when the
14 FSIA was enacted. But the Congress that
15 enacted the FSIA does not have the right to
16 control what later Congresses do.

17 MR. LOBEL: Correct.

18 JUSTICE ALITO: So I don't know where
19 that --

20 JUSTICE JACKSON: And that's why --

21 JUSTICE ALITO: I don't know where
22 that -- I don't -- I --

23 JUSTICE JACKSON: -- that's why we --
24 that's Justice Gorsuch's point, right? Later
25 Congresses can say with respect to each statute

1 this -- don't apply the FSIA here. And they
2 can say that. But what -- what's happening
3 here is that we are now implying that later
4 Congresses intended that. But that -- that
5 language doesn't appear in this statute, but
6 we're having a two-hour argument as to whether
7 or not we should interpret it, and -- and I
8 don't understand that.

9 MR. LOBEL: Right. And it's not
10 any --

11 CHIEF JUSTICE ROBERTS: Justice --

12 MR. LOBEL: -- magic words. They just
13 need to --

14 CHIEF JUSTICE ROBERTS: I think
15 Justice Alito had a question.

16 MR. LOBEL: Oh, sure.

17 JUSTICE ALITO: That's all right. Go
18 ahead.

19 CHIEF JUSTICE ROBERTS: Okay.

20 MR. LOBEL: Well, just one last point.

21 They claim that you can harmonize the
22 statute, the two statutes, by reading a tiny
23 exception into the FSIA. And I agree with
24 Justice Jackson that once you start reading
25 that tiny exception in, it -- it will expand.

1 The camel's tent -- nose will be under the
2 tent.

3 But that does not harmonize these two
4 statutes. The rule that specific can -- can
5 override a general in this context doesn't
6 apply when there's an implied repeal question.
7 Their reading of the statute is that you have a
8 narrow exception, a narrow repeal of the FSIA
9 and that's still an implied repeal.

10 As this Court said in Home Builders,
11 it doesn't matter whether you call it an
12 exception, an amendment, an implied amendment;
13 it's still an implied repeal.

14 And it contradicts the FSIA. The FSIA
15 1604, paragraph 16 -- Section 1604, says
16 foreign states shall be immune unless one of
17 the exceptions apply. They want to read the
18 statute exactly how, Justice Alito, you didn't
19 allow them to -- to read the statute in Home
20 Builders. Just add another exception. Just
21 add another criteria which is not in the
22 statute.

23 JUSTICE ALITO: In 1996, were -- in
24 1996, were there instrumentalities of the Cuban
25 government that were engaging in commercial

1 activity in the United States?

2 MR. LOBEL: There definitely were.

3 You don't have to take my word for it.

4 Secretary -- the Under Secretary of State Peter

5 Tarnoff testified before the Senate committee

6 dealing with this exact statute, the

7 Helms-Burton Act, and said, in many respects,

8 the trade with Cuba is substantial.

9 And he was right. There were \$65

10 million of medicines and medical supplies. Not

11 just humanitarian goods. Medicines, medical

12 supplies. There were 20 -- over 20,000

13 travelers in 1993, 50,000 travelers in 1994.

14 And there were a quarter of a billion dollars

15 according to Exxon's testimony -- exhibits in

16 the district court of remittances going to

17 Cuban entities in 1994, and as the court of

18 appeals held here, those remittances could be

19 the basis of lawsuits under Title III.

20 And I don't think you can fix it to

21 1995/1996 in any event because the statute

22 gives the President the power to expand trade

23 with Cuba. And so whatever the case was in

24 1995, given that Congress gave the President

25 the power to expand trade, they must have

1 anticipated that trade might be expanded.

2 In fact, in Section 112 of the
3 statute, it explicitly anticipates that the
4 remittance policy will be expanded.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Justice Thomas, anything further?

8 JUSTICE THOMAS: Just so I'm clear,
9 pre-FSIA, could Title III work as it's written?

10 MR. LOBEL: Pre-FSIA?

11 JUSTICE THOMAS: Yeah.

12 MR. LOBEL: It could because pre-FSIA,
13 1952 to 1976, it could because there was a
14 restrictive regime of immunity, which wouldn't
15 have rendered Title III suits meaningless.

16 Prior to 1952, it probably wouldn't --
17 it probably meets the Kirtz -- the Kirtz
18 exception.

19 JUSTICE THOMAS: So this is basically
20 a statutory case?

21 MR. LOBEL: It is clearly a statutory
22 case. You've got to interpret these two
23 statutes harmoniously.

24 CHIEF JUSTICE ROBERTS: Justice Alito?
25 Justice Sotomayor?

1 JUSTICE SOTOMAYOR: Under Kirtz's
2 language, you either have an express waiver
3 or -- but a -- but a implied waiver of
4 sovereign immunity that is "unmistakably clear"
5 in the language of the statute?

6 And then what Kirtz says to -- when
7 there's a cause of action against a government
8 on a claim, it has to be clear enough to
9 effectively "negate a claim Congress has
10 clearly authorized," correct?

11 MR. LOBEL: Mm-hmm.

12 JUSTICE SOTOMAYOR: You're relying on
13 the negation question?

14 MR. LOBEL: Correct.

15 JUSTICE SOTOMAYOR: And my colleague
16 said, well, doesn't the amount of the
17 negation -- how much is enough? And the point
18 is, however, you're saying we don't know how
19 much, but there's a meaningful amount, correct?

20 MR. LOBEL: Correct.

21 JUSTICE SOTOMAYOR: This is not
22 1 percent.

23 MR. LOBEL: It's not 1 percent. In
24 any event, it was a hypothetical question.

25 JUSTICE SOTOMAYOR: Right.

1 MR. LOBEL: But, here, there are
2 hundreds of claims, thousands of claims
3 probably, that could be brought.

4 JUSTICE SOTOMAYOR: And if you go as
5 far as Petitioner wants, there's hundreds of,
6 maybe thousands of claims against foreign
7 governments and foreign entities, correct?

8 MR. LOBEL: Yes. The statute says --
9 doesn't say Cuban -- claims against Cuban
10 entities. It says any instrumentality of a
11 foreign state -- of a foreign state. That's
12 the statute.

13 JUSTICE SOTOMAYOR: So we could be
14 expanding this even more?

15 MR. LOBEL: Correct.

16 JUSTICE SOTOMAYOR: Thank you.

17 MR. LOBEL: You would be allowing
18 plaintiffs to sue every instrumentality in the
19 world that does any trade with Cuba.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 Justice Gorsuch, anything?

22 Justice Kavanaugh?

23 Justice Barrett?

24 Justice Jackson?

25 Thank you, counsel.

1 MR. LOBEL: Thank you.

2 CHIEF JUSTICE ROBERTS: Rebuttal,
3 Ms. -- Ms. Ratner?

4 REBUTTAL ARGUMENT OF MORGAN L. RATNER
5 ON BEHALF OF THE PETITIONER

6 MS. RATNER: Thank you. Four points.

7 First, Justice Alito, to your question
8 about why this practically matters. The first
9 is yes, there are not significant assets of
10 Cuban instrumentalities in the United States.
11 We have the ability to seek those assets
12 worldwide, which is pretty standard fare in
13 dealing with international judgments.

14 The second is that Exxon is a company
15 that plays the long game. We've had this claim
16 for over 60 years now and so there may be
17 changes in the future that affect what assets
18 we can recover on.

19 Second point, I hate to complicate the
20 presidential suspension authority further, but
21 I do want to be clear that there are two
22 suspension authorities that are specific to the
23 Cuban government -- excuse me, to Cuban
24 instrumentalities that 6064(a) and 6082(d), so
25 this can't be dismissed as just potentially

1 suspensions relating to private entities'
2 claims.

3 Third point, I think the food and
4 medicine importer -- importer examples really
5 underscore the extreme mismatch here of a
6 Congress that shut down commerce and allowed a
7 few humanitarian examples, food imports,
8 family-oriented remittances, medicine imports,
9 and now under Respondent's theory, those are
10 the only hook. Those are the only claims that
11 you can bring against Cuban instrumentalities
12 are the very thing that Congress decided to
13 have a little more solicitude for.

14 I think that creates an incredible
15 mismatch with what they were trying to do here.

16 Finally, I -- I'd want to underscore
17 we are not asking for this Court to have some
18 broad rule that once a sovereign is covered by
19 a cause of action, that's enough.

20 Again, we have pointed to all of these
21 overlapping provisions. This is the express
22 and only defendant called out. There are rules
23 specific to these claims and judgments. There
24 are multiple overlapping suspension
25 authorities.

1 And there are jurisdictional
2 provisions that take this claim out of the
3 FSIA. So that is the sum total. And that is
4 enough for a background statute like the FSIA,
5 just as it would be enough for a background
6 constitutional or common law immunity
7 protection. Thank you.

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

10 (Whereupon, at 1:10 p.m., the case was
11 submitted.)

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Official - Subject to Final Review

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1	7 [1] 84:6 70 [1] 68:9 75 [1] 12:15	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1] 87:24 agricultural [1] 9:10 ahead [2] 41:22 94:18 aimed [1] 33:9 airlines [3] 75:8,9,10 airports [1] 69:10 alito [33] 21:2,3,7 22:2 48:2,9 49:22 50:20 57:24 59:19 79:21 80:4,14,17, 24 82:7,21 85:10,19,24 86:11,16 87: 2,13 88:4 93:12,18,21 94:15,17 95: 18,23 97:24 alito's [1] 57:11 allow [9] 20:19 25:17 30:11 32:7 38:4 43:20 44:25 65:22 95:19
2	90 [2] 89:22 90:14 95 [3] 22:18 23:20,24 96 [2] 27:21 93:1 97 [1] 92:25 99 [5] 89:20 90:1,3,13 92:25 99.9 [3] 87:14 89:5,14 99.99 [1] 87:12 99.999 [1] 87:5	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1] 87:24 agricultural [1] 9:10 ahead [2] 41:22 94:18 aimed [1] 33:9 airlines [3] 75:8,9,10 airports [1] 69:10 alito [33] 21:2,3,7 22:2 48:2,9 49:22 50:20 57:24 59:19 79:21 80:4,14,17, 24 82:7,21 85:10,19,24 86:11,16 87: 2,13 88:4 93:12,18,21 94:15,17 95: 18,23 97:24 alito's [1] 57:11 allow [9] 20:19 25:17 30:11 32:7 38:4 43:20 44:25 65:22 95:19
3	ability [6] 11:4 25:21 46:18,21 64:9 66: 17 able [4] 42:23 47:22 56:21 66:16 above [1] 18:16 abrogate [20] 8:25 14:10,10,12,19 15: 22 17:2,24 22:16,17 23:17 31:10 33: 1 57:21 65:21 72:5 86:4,4 88:17 92: 17 abrogated [7] 14:15 35:10 40:20 65: 13 71:5 91:3 92:22 abrogates [5] 10:3 23:21 28:11 40:22 67:9 abrogating [7] 23:7,12 54:12,24 85:14 91:3 93:8 abrogation [23] 7:6,9 13:14 15:17 16: 1,2,15,16,19,22 17:18 29:16 40:21 41:6 63:7 65:19 68:3,15,16 70:17 71: 4 85:3,7 absence [2] 65:7 68:3 absolutely [1] 33:1 absurd [1] 11:6 accept [1] 6:23 accident [1] 91:17 accidents [2] 91:6,9 accomplish [1] 62:16 accordance [1] 52:23 according [2] 47:22 96:15 account [1] 25:11 accountability [1] 47:14 accountable [1] 61:12 accused [1] 34:8 acknowledgment [1] 75:24 act [13] 7:5,8 17:11 28:11 35:9,12 46:	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1] 87:24 agricultural [1] 9:10 ahead [2] 41:22 94:18 aimed [1] 33:9 airlines [3] 75:8,9,10 airports [1] 69:10 alito [33] 21:2,3,7 22:2 48:2,9 49:22 50:20 57:24 59:19 79:21 80:4,14,17, 24 82:7,21 85:10,19,24 86:11,16 87: 2,13 88:4 93:12,18,21 94:15,17 95: 18,23 97:24 alito's [1] 57:11 allow [9] 20:19 25:17 30:11 32:7 38:4 43:20 44:25 65:22 95:19
4	7 [1] 84:6 70 [1] 68:9 75 [1] 12:15	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1] 87:24 agricultural [1] 9:10 ahead [2] 41:22 94:18 aimed [1] 33:9 airlines [3] 75:8,9,10 airports [1] 69:10 alito [33] 21:2,3,7 22:2 48:2,9 49:22 50:20 57:24 59:19 79:21 80:4,14,17, 24 82:7,21 85:10,19,24 86:11,16 87: 2,13 88:4 93:12,18,21 94:15,17 95: 18,23 97:24 alito's [1] 57:11 allow [9] 20:19 25:17 30:11 32:7 38:4 43:20 44:25 65:22 95:19
5	90 [2] 89:22 90:14 95 [3] 22:18 23:20,24 96 [2] 27:21 93:1 97 [1] 92:25 99 [5] 89:20 90:1,3,13 92:25 99.9 [3] 87:14 89:5,14 99.99 [1] 87:12 99.999 [1] 87:5	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1] 87:24 agricultural [1] 9:10 ahead [2] 41:22 94:18 aimed [1] 33:9 airlines [3] 75:8,9,10 airports [1] 69:10 alito [33] 21:2,3,7 22:2 48:2,9 49:22 50:20 57:24 59:19 79:21 80:4,14,17, 24 82:7,21 85:10,19,24 86:11,16 87: 2,13 88:4 93:12,18,21 94:15,17 95: 18,23 97:24 alito's [1] 57:11 allow [9] 20:19 25:17 30:11 32:7 38:4 43:20 44:25 65:22 95:19
6	ability [6] 11:4 25:21 46:18,21 64:9 66: 17 able [4] 42:23 47:22 56:21 66:16 above [1] 18:16 abrogate [20] 8:25 14:10,10,12,19 15: 22 17:2,24 22:16,17 23:17 31:10 33: 1 57:21 65:21 72:5 86:4,4 88:17 92: 17 abrogated [7] 14:15 35:10 40:20 65: 13 71:5 91:3 92:22 abrogates [5] 10:3 23:21 28:11 40:22 67:9 abrogating [7] 23:7,12 54:12,24 85:14 91:3 93:8 abrogation [23] 7:6,9 13:14 15:17 16: 1,2,15,16,19,22 17:18 29:16 40:21 41:6 63:7 65:19 68:3,15,16 70:17 71: 4 85:3,7 absence [2] 65:7 68:3 absolutely [1] 33:1 absurd [1] 11:6 accept [1] 6:23 accident [1] 91:17 accidents [2] 91:6,9 accomplish [1] 62:16 accordance [1] 52:23 according [2] 47:22 96:15 account [1] 25:11 accountability [1] 47:14 accountable [1] 61:12 accused [1] 34:8 acknowledgment [1] 75:24 act [13] 7:5,8 17:11 28:11 35:9,12 46:	22 50:8 54:14 67:5 75:7 87:4 96:7 action [65] 7:8 8:21,25 11:3,7,14,16, 24,25 12:3,13 13:11,23,25 14:18,20, 24 15:10 16:7,16 17:22 20:19 31:1,9, 15 33:2 37:3,10 40:2 46:9 51:12,18, 24 52:18 54:8,9,11 55:2 56:11,17 65: 1,4 67:10 68:21,21 76:14,15,17,18, 22 78:5,15,16 79:8 81:5 82:1,6 86:6 87:17 88:20 91:2,16 92:16,18 98:7 actions [5] 21:5 32:16,17 42:3 51:10 activities [2] 38:5 39:2 activity [6] 6:2 7:20,22 19:19 80:10 96: 1 actor [1] 13:5 acts [1] 58:17 actual [1] 61:3 actually [13] 9:17 27:18 31:4 33:9 34: 4 45:5 46:7 56:1 58:13 61:8 64:2,10 83:8 ad [2] 62:19 92:6 add [3] 23:25 95:20,21 added [1] 58:14 adding [1] 63:7 additional [2] 7:5 36:16 address [2] 10:15 49:24 addressed [1] 65:5 addressing [1] 19:5 adds [1] 20:15 adequate [1] 71:1 administration [1] 42:8 adopt [1] 42:21 adoption [1] 45:9 advance [1] 32:23 advancing [1] 7:3 affect [1] 44:20 affirmatively [1] 35:24 ag [1] 34:16 agencies [18] 12:5 14:25 22:25 24:1, 14,16,25 28:12 35:11,15 40:6 41:7, 15 42:14 56:23 57:2 59:3 60:6 agency [3] 8:22,24 79:23 agents [1] 24:7 ago [2] 80:18,19 agree [8] 29:12 41:4 72:23 73:23 74: 22 88:4 89:1 94:23 agreed [1

<p>allowing [3] 13:2 32:22 33:9 allows [8] 20:16 25:12 42:21 43:11 49:7 67:20 70:2 81:25 alluded [1] 59:17 alludes [1] 82:16 almost [1] 44:2 already [5] 32:11 37:24 50:19 61:4,5 alternative [1] 78:1 although [2] 24:13,17 ambiguity [1] 60:11 ambiguous [1] 60:8 ameliorate [1] 66:9 amend [1] 90:20 amended [2] 21:5 57:16 amendment [3] 24:24 95:12,12 american [3] 69:4,4 91:16 amicus [4] 25:14 27:5 35:4 39:16 amount [3] 79:10 98:16,19 amount-in-controversy [1] 52:4 ancient [1] 75:25 anomalous [2] 48:18 50:13 another [7] 8:18 13:22 53:4 67:12 91:18 95:20,21 answer [16] 14:16 16:19 17:12 28:15 29:1,14 32:8,10 38:8 42:5 46:4,5 48:11 70:12 90:14,15 answers [1] 56:12 anticipated [1] 97:1 anticipates [1] 97:3 anybody [2] 73:18 81:5 anyway [3] 59:8,21 84:23 apart [1] 35:13 appeal [1] 73:18 appeals [1] 96:18 appear [1] 94:5 applicable [2] 50:17 52:25 application [2] 8:2 92:13 applied [3] 17:5 21:4 74:21 applies [4] 9:24 19:3,11 24:25 apply [21] 14:8,24 16:3 17:11 21:14,20,21 28:18,18 32:14,15 35:19 51:10,12,17 53:1 74:15 75:8 94:1 95:6,17 applying [1] 9:25 appreciate [1] 63:17 appreciated [1] 32:2 appropriate [2] 46:10 49:17 architecture [1] 31:16 aren't [3] 58:7 63:12 64:2 arguably [1] 6:11 argue [1] 85:8 argued [3] 6:10 12:11 83:5 arguing [2] 8:1 71:19 argument [19] 6:24 16:13 30:8 31:14 35:3 58:23 59:1 63:15 66:25 67:24 68:2 71:1,19,25 84:2 85:1,12,17 94:6 arguments [1] 64:24 arise [1] 37:3 around [5] 11:14 13:20 64:25 76:8 91:11</p>	<p>article [1] 12:1 aside [2] 57:23 60:4 aspect [1] 58:22 aspects [1] 23:23 asserted [2] 6:12 87:6 assertion [3] 6:5 36:11,12 assets [5] 48:13 59:21,22 79:22,24 associated [4] 34:11 41:12 45:9 47:15 assume [4] 23:16 26:1 50:1 57:12 assumes [1] 11:13 assuming [1] 22:23 attach [2] 48:19 49:18 attachment [5] 48:19 58:7,10,19 79:10 august [1] 23:23 authorized [3] 10:20 36:3 98:10 authorizing [1] 34:15 automobile [3] 91:6,8,17 avenue [3] 91:24 93:8,13 avoid [1] 21:11 away [1] 11:8</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back [24] 10:16 14:6 18:17,20 19:25 22:12 40:11 45:22,24 52:6 53:17,18 55:6 57:11 59:17 62:4 63:22 64:6,17 66:20 70:4 80:1,16 81:3 backdrop [1] 65:20 background [6] 8:15,17 11:12 29:15 36:23 37:2 backstop [1] 26:25 bad [4] 59:4 82:19 83:11,11 banning [1] 7:21 barred [2] 91:18,19 barrett [10] 28:9,10 29:5,17 40:4 61:24 83:16 84:11,16,19 bars [1] 57:25 based [2] 12:16 44:4 basic [1] 59:12 basically [2] 44:5 97:19 basis [2] 51:4 96:19 beaty [2] 12:22 63:3 becomes [1] 22:15 begin [2] 64:18 82:23 beginning [1] 92:3 begs [1] 23:6 behalf [1] 67:1 believe [1] 7:12 below [1] 36:2 belt [1] 60:13 belt-and-suspenders [2] 21:11,25 beneficiaries [1] 39:7 best [2] 32:9 55:23 betsy [7] 39:19,20,24 40:13 42:7 75:21 77:20 better [3] 6:19 17:7 34:21 between [5] 39:3 60:22 68:4 78:10 87:14 beyond [10] 25:2 42:15,20,24 43:11</p>	<p>49:6,20 50:3,8 66:7 bigger [1] 10:9 biggest [1] 15:6 bill [5] 23:20,23 25:2 42:10 45:9 billion [2] 68:10 96:14 billions [4] 25:17,18,18 68:11 bills [2] 22:8 23:13 bill's [1] 22:18 bit [2] 32:24 57:17 blocked [1] 59:22 borrow [1] 52:19 borrow [2] 52:19,21 both [12] 15:11,13 22:7 23:13 24:7,13 37:20 38:9,12 55:5 74:11 86:20 boundaries [1] 39:22 branch [4] 42:8,16 45:6 66:6 branch's [1] 43:4 brief [3] 27:5 28:15 40:14 briefs [2] 25:14 39:16 bring [6] 8:23 11:4,7 31:4 42:3 64:9 brings [2] 35:25 41:14 broad [1] 15:10 broader [2] 81:10 92:24 brought [9] 9:3 16:9 35:21 51:12 68:22 81:15,17,18 92:4 builders [2] 95:10,20 building-block [1] 53:20 business [2] 20:4,5 buy [1] 60:15</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>c)(1 [1] 21:19 c)(2 [1] 55:10 call [1] 95:11 calling [1] 57:6 calls [2] 15:15 31:19 came [2] 12:11 28:16 camel's [1] 95:1 cancel [1] 64:10 cannot [2] 69:24 78:14 canon [1] 39:19 capital [2] 48:22 58:8 carcieri [2] 70:21 71:14 carved [1] 17:16 carving [1] 24:16 case [30] 6:22 9:2,3 11:10 16:6 30:23 31:12 41:9,14 42:23 48:4,23 49:17 50:15 53:12,14,21 63:3 64:20 69:13 70:21 75:4 86:7 87:15 88:1 89:9 90:16 96:23 97:20,22 cases [17] 11:5 21:6,21 26:21 28:6 38:20 57:22 64:6 69:19 75:3 88:7,24 89:5,11,14 90:16 92:25 category [1] 64:6 cause [48] 7:8 8:21,24 11:3,7,25 12:13 13:11,23,25 14:18 15:10 16:7,16 17:22 26:24 31:1,8,15 33:2 40:2 54:8,9,11 55:2 56:11,17 65:4 67:10 76:14,15,17,17,22 78:5,14,15 79:7 81:5 82:</p>
---	---	---

<p>1 86:6 87:17 88:20 91:2,16 92:16,18 98:7 caused [1] 91:9 causes [9] 11:14,16,24 12:3 14:20,24 20:19 46:8 82:5 cautions [1] 39:24 center [2] 77:11,18 central [1] 80:3 certain [3] 15:4 89:13,18 certainly [1] 86:14 certified [1] 49:20 chain [1] 80:5 change [2] 22:16 43:1 changed [2] 22:17 45:5 charge [2] 10:13 54:14 charming [7] 39:18,20,24 40:13 42:7 75:21 77:20 cheese [1] 38:2 chemical [1] 15:3 chickens [1] 69:2 chief [18] 20:24 22:3 25:7 28:8 30:5 34:25 35:6 47:24 50:23 54:4 61:21 66:22 67:2 94:11,14,19 97:5,24 chinese [1] 75:9 choice [1] 60:20 choose [1] 26:3 chooses [1] 49:24 chopped [1] 23:14 christopher [5] 75:1 83:8 84:22,25 85:4 cimex [3] 9:4,6 48:12 circle [1] 10:5 circulate [1] 7:18 circumstance [4] 10:1 30:3 62:17 92:12 circumstances [7] 20:20 28:4 30:14 32:7 47:23 63:8 72:2 circumvention [1] 20:16 claim [14] 8:23 9:3,18,18,20,24 10:9,10 31:4 33:20 49:20 94:21 98:8,9 claims [31] 7:19 10:1,19,21 12:13 23:25 26:9,15,15,23 28:1 30:11,12,20 31:21,22,22 32:2,6,22 33:9 41:15 46:14 47:19 49:21 63:20 86:25 87:5,23 88:2 92:4 clarity [1] 8:5 clause [1] 47:6 clauses [1] 60:10 clear [33] 8:16 16:21 17:4 18:16,16 19:7 22:10,15,23 23:6 27:2 29:11,16 30:10 35:20 36:18,25 44:7,8 45:3 57:17 62:10,11,24 63:18 70:17 71:6,10 79:4 85:10 97:8 98:4,8 clearer [2] 18:15 41:6 clearly [8] 14:15 27:8 35:9,14 81:2 91:13 97:21 98:10 codified [1] 32:12 codifies [1] 20:13 cold-blooded [1] 34:8</p>	<p>colleague [3] 61:16 66:13 98:15 collect [1] 48:24 collecting [1] 57:25 collection [1] 61:3 combination [3] 21:19,24 53:17 come [3] 10:22 32:23 49:13 comes [3] 6:15 70:20 92:11 comfort [1] 36:15 comit [1] 74:18 comity [1] 6:16 commercial [11] 6:2 7:20,21 19:12,19 20:10 38:5 39:1 80:10 81:1 95:25 commission [1] 47:20 committee [1] 96:5 common [2] 36:22 60:21 companies [3] 9:8 29:21,23 company [4] 33:19,21 34:21 49:10 comparable [1] 33:19 compelling [1] 56:24 complaining [1] 24:9 completely [3] 44:5 55:3 88:20 comply [1] 42:24 comprehensive [2] 12:18 82:17 compromising [1] 36:4 concede [2] 90:3,13 conceded [1] 89:25 concedes [1] 68:14 conceive [1] 92:12 concerned [5] 42:9,17 59:1 75:21 83:22 concerns [5] 60:4 66:7,9,10 75:22 concluded [1] 36:5 conduct [2] 34:18 39:8 conference [2] 27:16 45:7 conferred [1] 87:3 confirmatory [1] 56:6 confiscated [3] 9:7 28:23 30:16 conflict [5] 8:19 21:10 68:4 70:12,15 congresses [3] 93:16,25 94:4 congress's [6] 32:23 33:10 42:18 82:10 91:25 93:7 congruity [1] 39:15 conjunction [1] 8:15 connection [2] 20:20 27:3 considerations [1] 59:18 considered [2] 67:12 82:17 consistent [2] 48:25 68:22 constitutional [1] 77:22 constraints [2] 25:21 27:13 construe [1] 39:25 contemplate [1] 35:14 context [5] 55:4 62:5 63:6 85:25 95:5 continue [4] 57:14,15,18 84:12 continued [1] 24:24 contract [2] 69:3,21 contradicts [1] 95:14 control [1] 93:16 controlling [1] 62:6 controls [1] 56:10</p>	<p>controversial [4] 74:25 76:18 79:8 83:4 cooperating [1] 61:20 copy-and-paste [1] 24:19 corporations [1] 49:14 correct [26] 8:2,13 22:25 23:1,4,9,10,19 34:2 56:15 72:8 73:5,5 79:3,13,17 80:1,12 82:23 84:15 88:22 93:17 98:10,14,19,20 corresponding [1] 58:19 cough [1] 60:6 couldn't [3] 72:3 77:14 80:23 counsel [9] 10:5 20:25 35:1 40:5 43:19 47:25 50:24 66:23 97:6 count [1] 15:1 counter-productive [1] 64:4 countries [9] 19:3 28:13 40:10,14 47:2 49:5,8 68:17 84:7 countries' [1] 40:6 country [3] 50:7 91:6,18 couple [6] 9:15 26:20 28:5 34:7,9 63:25 course [3] 11:24 71:20 78:8 court [26] 7:16 8:6,20 12:14 13:3 14:7 16:10 18:22 28:16 29:1 30:1 35:7 36:8 41:8 47:7 48:21 58:8 67:3,15,17 70:5 86:21 92:8 95:10 96:16,17 courts [4] 49:5 51:9 67:7 74:16 court's [4] 6:3 12:21 68:19 70:10 cover [1] 24:13 create [8] 13:23 42:4 54:8 55:2 60:11 67:12 88:19 92:7 created [5] 16:7 46:7 54:11 87:17 92:14 creating [1] 65:3 crimes [1] 15:5 criteria [1] 95:21 cruise [4] 53:12 55:16 69:14 81:6 cuba [36] 9:5,9 20:10 25:3,24 26:18 28:13 29:8,8 30:15,24 34:4,8 36:7 40:23 43:15 45:12 46:24 61:8 64:3 66:19 68:1,13,18 70:2 77:21,23 80:13 83:17,17,24 84:4,9,12 96:8,23 cuban [42] 22:24 26:10,16,23 28:1,19 29:22 31:22 33:15,18,20,21,22 34:11,17,21 35:10,14 39:6,12,13 40:3 41:7 48:4 57:1 59:20 61:3,4,20 68:16,25 69:5,7,15 79:23,23 80:9,22,22 81:6 95:24 96:17 cuba's [1] 84:1 cuba-specific [2] 29:3 40:25 culpability [1] 84:1 culpable [1] 83:18 culprit [3] 33:16 39:11,11 culprits [1] 39:7 curiae [1] 35:4 current [2] 9:6 42:15 currently [1] 42:20 curtis [1] 35:3</p>
--	---	---

<p>customary [4] 40:12 42:6 43:11 49:7 cut [3] 43:17 74:11,12</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>damages [1] 61:10 day [1] 61:2 days [1] 25:6 dead [7] 9:11,16,22 86:9,23 87:19 92:15 deal [1] 78:23 dealing [4] 70:22,23 88:16 96:6 dealt [1] 88:13 debated [1] 42:11 decades [5] 47:17,18 49:16 59:23 68:13 decide [2] 46:21 66:19 decided [2] 25:19 67:13 deciding [3] 12:4 29:15 62:19 decision [6] 12:21 36:2,9 37:25 54:1,2 decline [1] 44:11 default [3] 18:25 46:8 63:5 defendant [2] 49:2 53:9 defendants [8] 12:11 15:16 31:18,18 35:16 39:14 46:10 55:16 defines [1] 9:23 definitely [2] 56:10 96:2 definition [1] 35:13 democracy [6] 25:23 26:12 36:7 43:15 45:12 64:3 democratic [1] 26:18 deniable [1] 73:22 department [4] 24:23 42:12 74:17 76:1 depend [1] 6:2 dependent [1] 50:6 depending [2] 49:9 53:8 depends [1] 7:20 described [1] 26:4 designed [1] 50:14 deter [2] 33:5 61:17 determination [3] 45:17 47:8 82:17 determine [3] 17:17 87:1,11 determining [1] 86:22 deterring [3] 30:25 84:3,7 developed [1] 47:23 development [1] 43:3 dice [1] 46:11 difference [5] 48:6 78:10,11,13 87:14 different [14] 6:8 9:13 16:17 28:2 29:9,10 36:12,21,24 37:22 54:19 55:3 63:25 66:1 differing [2] 27:24,25 dig [1] 22:14 dint [1] 33:21 diplomatic [1] 28:4 diplomatically [1] 26:18 direct [2] 69:6 81:2 directly [4] 16:15 22:20 29:14 54:9 disagree [2] 72:13,17</p>	<p>discretion [1] 45:14 dismiss [1] 20:3 displace [3] 17:1,20 71:7 displacing [3] 37:1 54:23 60:9 district [1] 96:16 diverse [1] 9:19 docks [4] 69:9,15,17,17 doctrinal [2] 14:5,5 doing [11] 13:24 20:5 46:22 50:2 62:10,21 64:18 66:4,4 75:24 82:18 doj [1] 23:6 dollars [5] 25:18,19 68:11,25 96:14 done [6] 32:20 46:7 54:18 58:2 61:15 92:6 dovetails [1] 30:21 down [3] 64:3 86:22,22 dropped [3] 23:13,14 39:12 drops [1] 48:15 drug [1] 15:4 during [1] 85:11 duty [1] 70:16</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [1] 93:25 earlier [4] 30:22 34:8 61:17 66:14 ease [2] 68:8 69:23 echoed [1] 58:7 economically [1] 30:24 edge [2] 26:20 28:6 effect [6] 69:6 76:24 77:2,13 81:2 93:6 effective [1] 16:10 effectively [4] 7:1 10:18 36:2 98:9 either [6] 21:9 69:16,23 86:5 88:19 98:2 elsewhere [1] 21:16 embargo [8] 7:15 20:8,14 32:10,11 68:8 69:22,23 embargoes [1] 16:11 embargo's [1] 67:25 enact [3] 7:17 67:16 90:18 enacted [7] 7:15 75:3 78:2 91:10 93:4,14,15 enacting [1] 92:1 enactment [1] 77:9 enacts [1] 8:21 encouraging [1] 46:23 end [5] 61:2 63:22 64:19 85:16 91:25 end-running [1] 91:25 enforce [1] 49:8 engage [1] 19:19 engaging [1] 95:25 enormous [1] 70:1 enough [12] 16:25 17:20 18:1,13 28:20 29:11,16 41:8 71:22 72:19 98:8,17 ensures [1] 64:1 enter [1] 69:3 entering [2] 84:7,8</p>	<p>entirely [1] 6:16 entities [14] 19:18 29:19 39:6 68:16 76:6 79:12,14 81:6,6,7 83:20 86:7,8 96:17 entity [5] 9:25 20:5 80:22,23 81:19 especially [2] 32:11 39:5 essentially [5] 25:13 29:21 63:2 72:12 75:23 establish [1] 35:18 ether [1] 91:11 evaluate [3] 66:17 70:6,10 even [15] 6:13 9:6 15:7 16:24 18:15 20:8 29:12 41:18 48:10,11 57:22 61:1 62:9 81:9 87:24 event [3] 84:10 96:21 98:24 everyone [1] 28:18 evidence [3] 30:18 32:9 70:24 evolving [1] 47:17 ewssa [2] 18:23 19:1 exact [1] 96:6 exactly [12] 14:14 19:5 26:7 42:9 63:2 74:8 78:25 82:15 89:23 93:10,11 95:18 example [3] 68:21 72:3 91:1 excellent [1] 48:9 except [2] 74:14 82:3 exception [25] 29:9 37:7 38:5 39:2 48:20,25 50:17 67:12,16 68:23 80:11 81:1 83:6,15 85:6 86:24 91:20 92:13 93:5 94:23,25 95:8,12,20 97:18 exceptions [10] 6:2 19:12 20:17 48:18 58:6,8,9 67:7,22 95:17 excluded [1] 90:17 exclusive [4] 15:21 92:9 93:8,13 excoriating [1] 83:10 excuse [2] 18:7 32:13 execute [2] 50:7 80:23 executed [3] 48:6 50:4 80:20 execution [12] 21:6,13 48:14,19 50:17 57:12 58:9,15,20 59:9,11 60:3 executive [9] 36:5 42:8,16 43:4 45:6 60:2 66:6 67:14 83:22 exemptions [1] 42:16 exercise [1] 42:19 exhibits [1] 96:15 exist [2] 14:1 18:11 existed [1] 91:13 existence [4] 12:12 18:3,14 33:3 existing [1] 24:15 exists [3] 13:16 37:7 59:9 expand [5] 69:21,23 94:25 96:22,25 expanded [2] 97:1,4 expansion [2] 70:1,2 expect [3] 27:8 47:9 62:23 expected [3] 65:3,23 82:12 expedited [1] 47:8 expediting [1] 43:13 expedition [1] 45:11 explained [2] 8:20 45:7</p>
--	---	---

<p>explicit [1] 68:3 explicitly [2] 91:2 97:3 exported [1] 9:9 exporter [5] 69:4,4,6 80:13,14 exports [3] 9:10 26:22 68:10 express [9] 70:24 72:1,18,24 73:1,8, 18 86:5 98:2 expressed [1] 93:7 expressly [4] 14:24 15:15 21:16 85:14 expropriated [7] 39:5 49:12 61:9,14 69:8,11 84:14 expropriation [1] 86:24 extended [1] 74:24 extent [6] 6:8 36:19 41:24 46:24 49:6 51:11 extra [1] 45:2 extraordinary [3] 25:17 65:2 82:14 extreme [1] 20:9 extremely [3] 14:23 20:13,16 exxon [3] 34:16 49:11 50:1 exxon's [1] 96:15</p>	<p>flood [2] 32:22 33:9 floor [1] 45:8 flowing [2] 20:8 68:12 fmo [1] 11:1 focus [2] 31:4,5 fomb [2] 86:3,15 food [1] 26:22 footing [1] 6:14 footnote [1] 40:14 foreign [59] 6:9,14,15,18 12:5 14:25, 25 16:2 17:7,10,15,18 18:2,6,13 19: 18 23:15 24:14,19 30:13 31:19 33:25 35:12 39:16,17 42:4 43:9,10 47:19 49:21 50:7 53:9 54:9,11,13 55:3,13 56:22 58:1 61:1 66:17 67:4,6,20 75:7 76:15 78:24 79:16 81:18 83:5,13 86: 8 87:4,8,18 91:9 92:5,10 95:16 forget [1] 88:13 forgot [1] 91:12 forgotten [1] 61:12 former [2] 7:13 21:15 forth [1] 15:9 forward [6] 30:12 62:6,14,20 63:20 77: 14 founding [1] 39:20 four [2] 26:13 28:2 friend [3] 37:18 56:7 60:9 friends [1] 42:13 front [3] 64:19 77:10,18 fs [1] 18:24 fsia's [6] 8:2 21:5 58:6 67:21 81:1 91: 20 fully [1] 16:10 functions [1] 64:1 further [3] 48:1 85:16 97:7 furthering [1] 33:10</p>	<p>given [7] 29:2 34:22 59:9 78:5 79:21 83:1 96:24 gives [2] 81:4 96:22 giving [1] 75:19 glaring [2] 7:16,23 goods [5] 69:1,2,5 80:13 96:11 gorsuch [40] 25:8 61:22 70:13 71:13, 18,24 72:9,19,23 73:3,6,11,14,19,21, 25 74:4,8,22 75:11,14,17 76:6,9 88:3, 6,12,16,23 89:1,4,16,19,22,25 90:4,7, 9,19,21 gorsuch's [4] 77:4,17 80:2 93:24 got [4] 24:19 48:24 57:7 97:22 gotten [1] 50:19 government [37] 6:13,21 8:24 9:25 16: 9 22:24 23:8,14 24:7 26:10,16 28:25 29:13 33:15,22 34:4,12,17 39:12,13 40:3 56:12 57:2 59:23 61:20 65:1 74: 1,3 79:23 81:18 86:7,8 87:18 92:10, 18 95:25 98:7 governmental [4] 8:22 18:8 39:6 61:5 governments [9] 6:15,16,19 14:25 16: 3 23:22 26:23 79:16 92:5 government's [1] 24:8 governor [1] 45:2 governs [3] 37:10 65:20 87:11 grab [1] 52:24 grace [2] 6:17 74:18 grains [1] 69:1 granted [1] 43:5 greater [1] 79:11 gross [1] 39:3 ground [1] 25:2 group [1] 15:15 grown [1] 58:13 guess [5] 13:8 31:11 58:21 62:1,8 guys [1] 59:4</p>
F		
<p>face [1] 91:14 fact [17] 7:14 9:3 11:23 13:17 22:7 24: 23 27:13 36:15,20 56:19 57:16 64:25 79:7,19 85:4,13 97:2 factual [1] 68:6 fail [1] 89:15 fail-safe [1] 26:9 fair [4] 71:21 72:19 81:20 87:7 faith [1] 27:17 fall [3] 25:3 80:10,25 far [1] 42:15 fare [1] 34:21 fashion [2] 59:7 92:6 fast [1] 47:21 faulting [1] 32:3 february [2] 22:18 23:20 federal [11] 6:13,21 23:14 32:16 37:13 51:18 52:1 53:13 56:21 59:22 61:7 feel [1] 52:23 few [6] 14:23 20:17 68:1 70:7,8 89:11 fighting [1] 84:20 figure [3] 33:8 43:18 81:22 filed [1] 64:14 final [1] 45:9 finally [1] 68:14 financial [1] 50:2 find [4] 20:20 49:17 70:25 87:22 findings [1] 84:5 fine [1] 47:12 finish [1] 44:18 first [14] 7:25 9:16 12:8 26:3,4 27:11 41:13 51:8 53:12 63:10,11,15 88:3 90:5 fits [1] 81:22 fix [2] 69:24 96:20 floating [1] 46:13</p>	<p style="text-align: center;">G</p> <p>gannon [61] 35:2,3,6 36:14 37:13,17 38:7,10,13,18,21 39:1 40:9,19,24 41: 4,19,23 43:15,25 44:6,15,23 45:16 46:1,6,15,18,20 47:9,13 48:8 50:11, 21 51:2,16,22 52:9,15 55:5,19,23,25 56:5,14 57:5,8 58:4 59:10,15 60:7,17, 21 61:19 63:1,14,21,24 64:13,22 65: 25 gate [1] 50:19 gatekeeping [1] 43:21 gates [3] 37:20 38:9,12 gave [10] 13:11,12 43:23 44:8,12,18 68:7 69:20 90:15 96:24 general [8] 7:4 32:16 65:2 68:9 69:2 75:2,2 95:5 generally [3] 35:18 76:14 89:10 gets [2] 14:6 49:25 getting [2] 28:6 47:5 give [16] 11:8 12:8 26:1,14 27:9 33:18 54:25 68:20 71:21 81:8,12 82:2,10 90:25,25 93:6</p>	<p style="text-align: center;">H</p> <p>half [1] 63:15 halt [1] 25:3 hand [2] 11:8 12:15 happen [5] 32:2,6 66:18 69:25 93:4 happened [3] 44:3 72:12 77:9 happening [1] 94:2 happy [2] 8:4 40:9 hard [3] 21:8 29:6 33:23 harm [1] 81:25 harmoniously [2] 10:12 97:23 harmonize [10] 7:2 18:19 19:8,10,21, 22 20:22 67:17 94:21 95:3 harmonized [1] 19:14 harmonizing [1] 7:6 havana [3] 69:14,15,17 heading [1] 53:19 hear [1] 62:14 heard [2] 69:9,13 heavy [1] 67:25 held [2] 61:11 96:18</p>

<p> helms-burton [8] 7:5,8 21:4 50:8 68:7 69:20 87:6 96:7 help [4] 26:17 33:7,8 43:8 hence [1] 53:23 highly [1] 57:21 hinges [1] 55:22 history [7] 22:6,14 23:16,19,19 24:22 27:16 hoc [2] 62:19 92:6 holding [1] 59:23 home [2] 95:10,19 honor [2] 82:15 93:10 hook [3] 28:24 33:19 58:24 hopefully [1] 74:5 host [1] 28:17 house [4] 22:8 34:12 83:10 84:23 however [1] 98:18 huge [3] 26:2 62:13 77:5 humanitarian [4] 20:17,21 26:21 96: 11 hundred [3] 9:8 45:13,15 hundreds [1] 25:18 hypothetical [2] 30:2 98:24 </p> <hr/> <p style="text-align: center;">I</p> <hr/> <p> idea [3] 8:18 36:17 77:20 ignore [1] 16:6 iii [27] 6:25 10:12 12:1 15:25 17:20,23 22:8 30:9 35:19 39:23 41:14 42:3 65: 1,18 67:20 68:1,21 72:4 74:23 75:2 83:4,7,11 88:11 96:19 97:9,15 iii's [3] 67:8,9 68:15 immune [6] 11:17,18,19,20 67:6 95:16 immunities [7] 35:12 54:14 67:5 75:7 83:6 87:4,9 immunity [99] 6:12,14 7:10,19 9:1,12, 25 10:3 12:4 13:3,15,21 14:2,11,12, 15,19 17:8,11 18:25 21:6,14 22:17 23:7,13,17,21,24 28:12 31:10 33:2, 17 35:10 36:11,13 37:5 39:17 40:22, 48:14,19,21 49:1 50:17,22 54:12,15, 25 55:4 56:21 57:13,22 58:6,10,11, 16,17,20 59:9,11 60:3,3 63:6,8 64:7 65:5,8,11,12,19,21 67:9,11,13 70:18 71:5 72:5 73:10 76:21 77:1 78:7 81: 13,13 82:3,12 83:14,23 84:18 85:3,8, 15 86:4 87:3,9 88:18 92:17,22 93:9 97:14 98:4 impersonating [1] 31:5 implausible [3] 20:22 34:20 65:15 implicate [1] 10:13 implication [1] 60:13 implications [2] 34:1 48:3 implied [9] 10:16 70:20,23 71:16 95:6, 9,12,13 98:3 impliedly [2] 8:2 12:20 implying [2] 63:19 94:3 import [1] 68:25 importance [2] 27:25 56:18 </p>	<p> important [1] 56:25 importantly [1] 9:21 importer [2] 69:5 80:9 importers [2] 68:25 69:7 impose [2] 9:12 27:18 impossible [3] 38:11,15 89:8 inapplicable [1] 19:2 incidental [1] 38:3 include [3] 21:22 26:19 32:17 included [1] 22:9 including [5] 21:18 26:15 78:19,21 79: 16 inconsistent [3] 12:21 67:10 86:20 incorporates [1] 21:17 incorporating [1] 66:3 incredibly [1] 83:4 indeed [2] 57:16 66:12 indian [1] 6:21 indicated [1] 16:8 indicates [2] 30:19 66:11 indication [2] 55:1 56:25 indications [1] 55:25 indicia [2] 28:17 29:2 individual [2] 62:14 66:2 individuals [1] 34:16 infer [2] 85:21 86:2 inference [6] 87:7,20,22,25 88:7 89:6 inferring [1] 87:15 injured [1] 91:17 innumerable [1] 69:19 instrument [1] 87:18 instrumentalities [35] 15:1 23:8,15 24: 1,8,15,17 25:1 28:1,12,19,21 29:20 31:20,23 35:11,15 40:7 41:7,16 42: 15 48:4 56:23 57:2 59:3 67:6,21 68: 17 69:16 76:7,16 83:18 91:8,10 95: 24 instrumentality [3] 33:18 80:9 87:19 insufficient [1] 70:25 intend [4] 65:9,10 87:8 92:21 intended [8] 6:1 7:12 26:1 31:10 32:6 33:1 46:23 94:4 intending [2] 23:17 65:22 intent [4] 10:8 52:6,8 93:7 intention [2] 71:6 82:10 intentionally [2] 28:22 29:23 intentions [2] 62:10 91:25 interaction [1] 6:24 interest [4] 25:23 27:14 43:13 44:4 interested [1] 84:3 interesting [2] 48:3 86:12 interests [3] 36:6 45:5,11 interfere [1] 26:11 international [15] 23:9 24:10 39:18,22 40:1,12 42:6 43:11 49:7 50:9 58:18 66:10 74:24 75:22 77:21 interpret [2] 94:7 97:22 interpretation [2] 39:19,19 interpreted [1] 92:20 </p>	<p> interrupt [2] 70:14 80:5 intro [1] 55:7 investment [4] 9:5 30:25 31:6 33:6 investments [2] 20:10 49:15 inviting [1] 41:22 involving [2] 6:12 12:23 iraq [3] 12:25 18:21 19:2 iraq's [1] 18:25 irreconcilable [4] 8:19 68:4 70:11,15 isn't [13] 9:11,13 40:17 46:19 48:16 49:4 61:7 72:15 73:12 75:23 84:1 91: 13,22 isolate [1] 30:24 issues [1] 57:23 itself [10] 8:20,25 9:7 10:3 33:16 35: 24 76:18 79:8 83:4 86:16 </p> <hr/> <p style="text-align: center;">J</p> <hr/> <p> jackson [39] 15:18 17:3,9,14,25 18:5, 9,12 30:6,7 31:13,24 32:1,19 33:24 34:3,6,14,19,24 36:19 61:25 62:1 63: 10,16,23 64:11,16,23 66:21 82:4,8, 16,22 90:24 91:22 93:20,23 94:24 job [3] 24:19 70:8,10 joint [1] 84:8 judgment [9] 48:6,17,24 49:4,16 50:3, 15 57:25 61:7 judgments [4] 26:16 30:11 35:16 47: 22 judicially [2] 47:4,10 jules [1] 66:25 jurisdiction [14] 13:12 16:22 35:23 37: 7,14 51:4,15,18 52:2 53:13,22,23 55: 12 74:24 jurisdictional [18] 12:4 13:21 14:2,22 35:10 37:4,5 48:21,25 50:21 51:1,8 52:10 54:1 56:2 57:9 58:11,17 justices [1] 74:6 </p> <hr/> <p style="text-align: center;">K</p> <hr/> <p> kagan [33] 10:23,25 12:6 13:8 14:3,9, 18 15:7,12 25:7 54:2,4,5 55:18,21,24 56:3,8 57:4,7,10 58:21 59:13,16,25 60:15,20 61:18 78:19,22 79:1,4 92:2 kavanaugh [34] 25:9,10 26:7 27:1,7, 14,20 28:7 43:14,16 44:1,7,13,17 45: 13,21 46:3,12,17,19 47:3,12 61:23 62:3 76:24 77:2,13 78:9,12,17 81:3,9, 20 82:25 keep [5] 18:19 23:17 46:12 70:14 91: 23 kept [1] 23:15 key [2] 33:16 69:20 kill [1] 66:16 kimel [4] 12:9,15 15:9,14 kind [12] 15:10 16:12 21:25 26:24 27: 2 50:2 65:16 72:14 74:15 75:23,25 92:11 </p>
---	--	--

<p>kinds [3] 6:9 16:8,23 kirtz [31] 6:6 8:12,19 9:13,22,23 10:15,17,20 11:1 12:9,16 15:9,14 19:13,13 36:13 56:10,16 73:8 86:3,12,15,16,19 91:4,23 92:11 97:17,17 98:6 kirtz's [2] 8:23 98:1 knock [1] 87:12 knowingly [2] 28:22 29:23 knowledge [1] 41:13 knows [1] 13:19</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>labeled [1] 51:7 landed [1] 62:3 language [9] 15:20 24:18 25:22 30:9 56:17 86:5 94:5 98:2,5 largest [1] 9:19 last [3] 13:18 68:13 94:20 later [4] 85:5 93:16,24 94:3 latter [1] 7:13 laughter [2] 74:7 90:11 law [19] 11:12 19:3 23:9 24:10 25:6 36:23 39:18,22 40:1,12 42:7 43:11 49:7 50:9 66:10 70:21 74:24 75:22 77:21 lawsuit [1] 64:13 lawsuits [8] 46:25 47:1 60:25 64:9,10 67:20 79:25 96:19 lays [1] 92:7 least [2] 73:22 80:7 leave [1] 86:21 leaving [1] 27:19 led [1] 82:19 legal [2] 57:25 60:5 legislating [1] 66:5 legislative [4] 22:14 24:22 27:16 43:3 length [1] 25:15 less [1] 49:8 letter [10] 9:11,17,22 24:9 42:12 83:9 86:9,23 87:19 92:15 level [1] 8:5 liability [1] 75:20 liability-creating [1] 54:2 libertad [3] 28:11 35:9 46:22 licenses [2] 68:9 69:3 light [2] 16:17 62:11 likely [4] 25:2 49:8 50:5 69:11 limiting [1] 88:8 limits [1] 34:11 lines [2] 55:16 81:6 linked [1] 26:21 links [2] 20:17,21 literally [3] 48:23 50:16 58:15 litigation [1] 41:22 little [8] 21:8 32:24 55:22 57:17 64:20 66:20 79:22 80:19 lobel [94] 66:24,25 67:2 68:24 70:13 71:9,17,23 72:8,16,21 73:1,5,7,13,16,20,23 74:2,5,19,23 75:11,13,16 76:3,</p>	<p>7,11,25 77:12 78:4,11,13,18,21,25 79:3,6,13,18 80:1,12,15,21,25 81:11,24 82:5,15,24 83:3,25 84:15,17,24 85:18,23 86:1,14,18 87:10,24 88:5,9,15,22,25 89:3,7,17,21,23 90:2,6,8,12,20,23,25 91:22 93:10,17 94:9,12,16,20 96:2 97:10,12,21 98:11,14,20,23 logic [1] 40:17 long [2] 50:10,12 longer [1] 85:7 long-established [1] 17:23 long-lived [1] 49:14 look [17] 6:25 12:3 16:3,18 17:21 18:21,21 24:23 30:9 61:8 77:8 78:3 84:5 85:16 88:9,10,10 looking [12] 16:18 18:22 20:12 24:21 27:15 37:22 65:17 77:3,7,15,16 89:8 looks [1] 41:24 lot [4] 29:7 36:15 49:12 64:23 lower [1] 6:10 lurks [1] 29:15</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made [11] 9:17,20 23:6 36:25 37:24 43:2 52:22 71:6 82:16 83:9 85:11 magic [6] 14:6,9 54:17 88:19 90:21 94:12 main [5] 39:6,7,10,11,11 majority [1] 38:14 manage [1] 43:8 many [14] 10:19 12:1 20:10 59:20 70:3,6,7 73:9 74:25 88:1 89:9,10 90:16 96:7 matter [8] 6:16 13:16 48:7,10 55:12 60:5 74:18 95:11 mean [33] 6:8 8:11 11:1 15:23 18:15 27:11 29:5 33:25 38:7 44:6 46:1 47:4 48:16 49:3,18 50:1,11 54:6 55:6,15 58:4,21 59:5 61:6 62:12 64:8 65:12 72:3 77:3 81:10 82:20 83:19 87:15 meaningful [1] 98:19 meaningless [3] 7:17 86:10 97:15 means [3] 10:11 51:25 54:21 meant [4] 30:11 31:9 55:1 85:6 mechanism [1] 36:4 medical [2] 96:10,11 medicine [2] 66:12,14 medicines [2] 96:10,11 meets [1] 97:17 mention [1] 83:13 mentioned [3] 17:6,12 85:5 mentioning [1] 70:15 mere [1] 85:13 merely [1] 50:18 met [2] 67:8,22 might [10] 13:13 46:3 48:10 50:12 66:15 70:16 75:12 87:23 92:12 97:1 mileage [1] 32:25 million [3] 49:12 87:23 96:10</p>	<p>millions [2] 68:12,25 mind [2] 22:16,17 minimize [1] 56:18 minute [2] 80:18 87:22 minutes [1] 80:18 mismatch [3] 39:3 58:13 60:22 missing [1] 50:10 mitigate [1] 41:12 mm-hmm [1] 98:11 moment [2] 13:5 20:9 money [6] 20:7 69:5 80:9,16 83:20 84:13 months [5] 24:24 64:8 66:20 77:11 85:5 moreover [1] 68:6 morning [4] 53:13 69:9,14 75:5 most [5] 9:19 10:19 28:17 79:24 83:18 motion [1] 20:3 moving [1] 12:17 ms [53] 6:7 7:1 8:3,10,14 9:14 10:6,14,24 11:1 12:6 14:3,13,23 15:12 17:3,13,25 18:7,10,14 19:16,20 20:1,11 21:7 22:13,21 23:1,4,10,18 24:4,11 26:6 27:6,11,15,22 28:10,14 29:17 31:13,25 32:8 33:12 34:2,6,19 49:23 65:15 70:16 73:22 much [7] 9:5 15:8 27:9 47:6 84:23 98:17,19 multiple [1] 35:8 murder [1] 34:9 must [5] 8:25 31:9 67:17 85:1 96:25</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>name [1] 31:19 narrow [5] 63:9 64:6 91:24 95:8,8 narrower [2] 26:3 48:20 national [8] 25:22 27:14 36:6 43:12 44:4 45:4,10 91:16 nationals [1] 61:13 nations [1] 28:21 natural [1] 65:17 necessarily [3] 31:11 65:12 71:14 necessary [2] 8:5 26:17 need [18] 9:22 13:6,10 18:15 25:11 26:24 28:2,5 30:4 37:20 44:11 45:1 48:11 55:20 64:12,17 85:16 94:13 needed [1] 26:8 needs [3] 29:1 36:18 47:11 negate [6] 10:1,18 12:13 36:3 86:18 98:9 negation [2] 98:13,17 negative [1] 60:12 neighboring [1] 35:22 neon [1] 7:23 never [6] 10:22 29:3 38:22 85:4 89:17 92:19 new [3] 58:13 64:9 90:18 next [2] 44:3 52:20</p>
--	--	--

<p>nml [3] 48:22 58:8 90:15 nobody [3] 9:17 72:6 78:16 non-absolute [1] 67:11 non-cuba [1] 29:3 none [2] 74:5,6 normal [1] 37:21 nose [1] 95:1 nothing [6] 41:11 48:18 67:8 78:6 84:17 86:13 notion [4] 7:18 10:21 12:17 15:14 notwithstanding [3] 33:3 60:10 92:23 nuclear [1] 15:3</p>	<p>option [1] 26:3 oral [2] 35:3 66:25 order [3] 57:21 62:24 66:19 original [4] 16:5 23:20,20 52:6 originals [1] 22:7 other [44] 6:9,20 7:6 9:10 11:9,14 12:1 16:20 17:5,11 18:2,5,7,13 19:22 25:10,16 27:7 28:13,21 29:12,19 30:19 33:14 34:22 35:14 40:6 42:13 49:5,8 51:12,19,19,23 52:16,19 53:2 55:2,16 56:6 58:5 72:1 79:16 86:19 others [2] 49:14 61:19 otherwise [3] 35:25 44:25 88:21 ousted [1] 36:1 ouster [1] 57:8 out [30] 12:14 15:15 17:16 22:11,23 23:12,24 24:5,6,16 25:4 31:19 32:25 33:8 43:18 48:15 52:16 59:11,13 60:10 64:10 66:2 74:1 79:21 81:22 83:15 85:6 87:5,12 92:8 outcry [1] 23:22 outside [1] 93:2 over [6] 7:19 9:8 14:20 16:18 57:3 96:12 overcome [2] 16:1,5 overlap [1] 38:3 override [3] 76:25 81:13 95:5 own [1] 72:11 owned [1] 69:16</p>	<p>person [2] 35:13 77:22 personal [2] 53:23 55:12 peter [1] 96:4 petition [1] 15:1 petitioner [3] 35:5 67:23 68:14 petitioner's [3] 40:5 43:19 68:6 phrasing [1] 45:5 pick [1] 77:4 pieces [1] 32:9 pill [2] 61:16 66:13 pivots [1] 67:23 place [3] 14:20 27:21 62:18 plaintiff [2] 38:23 48:23 planes [1] 25:4 plausible [3] 7:12 19:22,25 please [2] 35:7 67:3 plus [1] 56:16 point [33] 6:18 7:11,25 10:15 12:9 15:24 18:20 22:5 30:3 34:14,20 36:25 40:12 41:24 42:7 43:2 53:18 56:4 57:19 59:16 69:20 73:15 76:10 81:21 82:4,8,23 84:21 85:9 89:23 93:24 94:20 98:17 pointed [2] 60:10 79:21 pointing [3] 52:10,13,13 points [3] 29:8 41:11 51:3 poison [2] 61:16 66:13 policy [8] 30:14 34:1 42:4 43:9 61:1 66:17 68:2 97:4 political [2] 30:13 47:14 portion [1] 57:9 ports [1] 69:9 position [4] 40:8,15,18 60:18 possibilities [1] 70:3 possible [5] 10:10 64:5 67:18,19 75:22 possibly [1] 16:25 potential [4] 39:13 41:12 45:2 87:5 potentially [1] 74:13 power [28] 19:9 26:2 27:10 42:1,20 43:6,7,17,24 44:2,8,12,18 45:18 61:7 63:22 66:8 68:8 69:21 77:24 78:5,7 81:4,12,16 82:2 96:22,25 practical [8] 48:2,7,10 57:23 59:18 60:1,4 67:24 practice [2] 78:12,14 pre-1942 [1] 64:14 precedent [1] 86:20 preexisting [1] 17:24 pre-fsia [5] 45:24 62:4 97:9,10,12 premise [1] 68:7 present [1] 8:19 preserve [1] 87:8 preserving [1] 33:17 president [54] 9:6 13:2 19:1,7,9 25:6,12,20 26:2 27:9,17,23 42:1 43:5,8,23 44:5,9 45:14,25 46:13,15 47:22 62:5,19 64:5 66:16 68:8 69:21 74:11,25 75:19 76:12,20,21,23 77:5,18,21,23</p>
<p style="text-align: center;">O</p> <hr/> <p>object [1] 67:13 objected [1] 67:14 observed [1] 48:21 obtained [1] 35:17 obviates [1] 48:11 obvious [1] 67:19 occasionally [1] 49:13 occur [2] 79:11 91:21 occurs [2] 17:18 91:17 odd [3] 59:7 64:21 77:18 offending [1] 43:9 offices [1] 69:10 often [3] 7:16 50:15 60:10 okay [20] 8:10 11:22 18:22 41:18 63:10 73:6,14,23 75:16 80:17,24 85:19 88:18 89:19,19,19,22 90:9 92:19 94:19 old [2] 74:16 75:25 omb [1] 11:1 on/off [2] 25:13,19 on-and-off [1] 74:10 once [7] 19:24 24:19 41:17 64:13 81:17 89:4 94:24 one [46] 7:3,16 9:19 10:9 11:2,8 14:4,5 15:2,3,4 16:14,19 19:6,7,22 20:21 24:12 25:14 26:5 32:10,20 38:4 39:13 43:1 53:11 58:22,22 60:16 64:1 67:7,16,21 69:12,18 71:15 74:11,19 76:3 78:3 80:18 83:13 87:22 92:12 94:20 95:16 ones [1] 41:1 ongoing [1] 9:10 only [17] 17:19 19:11 20:19 21:20,24 28:18 31:18,21 40:1 51:14 53:5 55:9 64:8 70:19 71:4 84:25 88:6 onus [1] 62:9 operate [2] 31:3 65:22 operated [2] 69:16 77:25 operates [1] 9:7 operating [2] 65:9 93:1 operative [1] 19:15 opinion [1] 86:13 opportunity [1] 75:19 opposed [2] 17:21 77:19 opposite [1] 26:7</p>	<p style="text-align: center;">P</p> <hr/> <p>page [3] 12:15 15:2 27:4 paragraph [1] 95:15 parallel [1] 58:15 part [3] 32:21 42:5 45:23 partially [1] 42:2 particular [6] 12:24 13:5 31:21 35:25 62:5,17 particularly [1] 35:17 parties [4] 29:25 76:8 78:20,21 partnering [1] 29:22 parts [1] 58:6 pass [3] 17:4 33:18,21 passed [1] 25:5 past [1] 44:25 path [1] 86:22 patient [1] 66:16 pays [1] 69:5 peculiar [1] 54:20 pending [1] 41:14 people [2] 61:8,11 people's [1] 30:16 percent [15] 10:21 12:10 45:14,15 86:25 87:5,12 88:7,23 89:5,14 92:25,25 98:22,23 perhaps [1] 49:22 permit [1] 19:17 permits [1] 19:1 permitted [1] 19:12</p>	

<p>78:4 81:4,8,12,14,16 82:2,11,18 83:5 85:2,6 96:22,24 presidential [5] 18:23 26:9,25 45:23 83:1 presidents [1] 69:22 president's [3] 25:21 77:10 78:6 pretty [5] 7:16,23 10:2 54:21 65:2 prevent [3] 60:5 62:18 82:5 preventing [1] 20:15 previously [2] 54:3 78:1 primary [8] 30:21 32:24 33:10,12,14, 14,15 71:25 principles [3] 8:15,18 9:12 prior [1] 97:16 private [15] 29:25 33:19 34:16,22 40:2 76:4,6,8 78:19,21 79:11,14,25 81:6 83:20 probably [10] 27:12,23 28:15,20 33:14 38:14 50:10 73:21 97:16,17 problem [8] 14:6 15:23 16:19,20 31:6 41:25 46:25 59:2 problems [3] 14:4 16:14 42:4 procedural [3] 51:7 52:13 53:19 procedure [1] 51:6 procedures [3] 51:14,21 52:18 proceed [6] 30:13 46:9,14 60:25 74: 18 76:2 proceeded [1] 59:7 process [3] 30:20 45:3 53:23 products [1] 9:9 profiteer [1] 84:12 progress [1] 26:12 promote [3] 36:5 45:11 46:23 property [16] 9:8 28:23 30:16 34:10 39:5 48:5 49:17 61:3,5,9,13 69:8,12 79:17 80:20 84:13 protections [1] 64:7 provide [1] 91:2 provides [5] 7:8,9 13:20 63:25 67:5 providing [3] 13:25 14:21 86:6 provision [12] 18:23 19:3 22:1 23:24 24:12 25:12 51:1 52:10,24 58:14 81: 25 83:1 provisions [29] 12:24 20:15 21:14,17, 20 24:16 26:13 28:3 32:15 34:7,9 35: 8,14,17 36:16 37:4 40:25 51:11,17 52:20 53:17 56:6 57:5,13 58:25 60:3, 23 66:1,2 pull [2] 52:25 66:19 pulling [1] 66:2 punish [1] 34:17 punishing [2] 30:15 34:4 purely [1] 30:2 purpose [6] 32:24 33:10,13,14,15 92: 14 purposes [3] 11:16 12:4 46:22 push [1] 39:21 pushing [1] 40:2 put [11] 17:8 45:23 62:9,18 64:6,12,17</p>	<p>74:13,20 75:18 77:18 putting [5] 22:11 27:12 47:5 57:23 60: 4 puzzle [1] 62:2</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qatari [1] 75:10 qualifications [1] 44:9 qualms [2] 29:19 30:2 quarter [1] 96:14 question [56] 14:14 17:6,9,10,19 18:3, 10,18,21 20:12,18 23:6 28:16 29:2,9, 10,14 32:16 37:14 38:9 40:10 41:18 42:6 44:19 48:3,9,12,14 51:18 52:1,6 53:13 54:15,16 55:3 56:13 57:11 59: 14 64:19 65:6,8 70:5 72:22 73:12,17 75:15 77:15 79:18 80:2 83:23 84:1 85:20 94:15 95:6 98:13,24 questioning [1] 80:6 questions [7] 6:3 36:9,20 55:11 68:19 77:5 81:23 quibbling [1] 36:17 quick [1] 24:12 quite [4] 25:16 44:8 60:19,21 quote [1] 42:13</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [1] 39:18 raised [2] 59:19 66:6 raises [1] 54:16 raising [1] 15:25 rare [1] 20:19 rather [5] 7:13 26:4 35:22 54:19 67:17 ratner [53] 6:7 7:1 8:3,10,14 9:14 10:6, 14,24 11:1 12:6 14:3,13,23 15:12 17: 3,13,25 18:7,10,14 19:16,20 20:1,11 21:7 22:13,21 23:1,4,10,18 24:4,11 26:6 27:6,11,15,22 28:10,14 29:17 31:13,25 32:8 33:12 34:2,6,19 49:23 65:15 70:16 73:22 reached [1] 8:5 read [20] 8:13 10:8,12 11:2 13:24 18: 24 20:18 21:9,12,23,24 51:23 53:5 55:9 57:20 65:11 67:15 73:18 95:17, 19 reading [8] 9:4 42:22 63:4 86:12,19 94:22,24 95:7 reads [1] 52:16 real [5] 73:11,16 77:8,16 91:23 really [22] 22:14 25:20 27:8 30:19,20 31:1 43:20 44:4 45:24 50:9 55:21,22 57:13 59:1,2,5 62:15,21 64:24 72:14 92:20 93:6 reason [14] 11:11 25:25 26:8,19 50:2 55:14 57:14 62:17 83:11,12,13 90:12 91:7,23 reasons [1] 7:14 rebut [1] 84:25</p>	<p>rebuttal [1] 49:25 receipt [1] 80:8 receive [1] 80:15 recognized [2] 44:24 47:16 reconcile [6] 36:23 37:19 70:19 71:11, 15 72:7 reconciled [1] 37:16 reconciling [2] 72:14 73:4 record [1] 9:5 recover [1] 92:19 redirect [1] 75:14 refer [1] 47:11 reference [3] 13:6 23:25 54:20 references [1] 57:1 referred [1] 66:14 refused [1] 14:7 regard [1] 35:11 regime [5] 7:19 64:15 75:25 76:1 97: 14 region [1] 91:7 registering [1] 50:6 regular [1] 31:2 regulations [2] 15:3,4 rejected [1] 12:14 relate [1] 12:24 relationship [1] 33:22 relevant [4] 11:23 15:8 43:3 85:24 reliance [1] 84:22 relies [1] 86:15 rely [2] 6:1 14:21 relying [7] 15:8,13 16:23 17:23 23:3 56:7 98:12 remedies [1] 16:10 remittance [1] 97:4 remittances [3] 68:12 96:16,18 remove [1] 13:2 rendered [3] 86:9,10 97:15 repeal [16] 10:13,16 12:20 52:7 70:23, 24 71:16 72:1,18,25 73:2,8 95:6,8,9, 13 repeals [1] 70:20 repeatedly [1] 16:7 replace [1] 14:12 report [2] 27:16 45:7 reports [1] 45:17 republic [1] 12:25 repudiate [1] 62:16 request [1] 43:4 requested [1] 45:6 required [3] 8:16 27:2 88:17 requirement [2] 14:7 52:4 requirements [3] 51:7 52:14 53:19 requires [1] 91:20 reserve [1] 41:18 residential [1] 34:10 resist [1] 71:2 resources [1] 79:10 respect [14] 14:8 19:2 21:13 40:13,23 41:6 43:12 54:24 55:12 58:5,17 82:</p>
--	---	--

<p>11 92:1 93:25 respects [1] 96:7 respond [3] 26:5 30:17 70:16 respondents [2] 7:7 67:1 respondents' [1] 42:22 response [2] 42:18 55:8 responses [1] 76:3 rest [1] 10:20 restrictions [1] 67:25 restrictive [3] 20:14 67:11 97:14 resulted [1] 68:10 reverse [1] 36:8 reversed [2] 8:2 13:1 reverting [1] 74:15 review [1] 47:7 reviewable [2] 47:4,10 rhetoric [1] 43:18 rid [1] 24:19 risk [2] 41:12 43:9 roberts [16] 20:24 22:3 25:7 28:8 30:5 34:25 47:24 50:23 54:4 61:21 66:22 94:11,14,19 97:5,24 role [1] 77:5 rule [16] 7:4 13:4 16:3,21 17:5,16,21, 24 37:2 46:8 52:21 62:11,25 63:5 93: 1 95:4 rules [11] 13:21 14:1,22 21:6 31:3,21 51:9,11 52:22 53:1 79:5 russian [1] 75:8</p>	<p>seemed [1] 11:6 seems [10] 13:9,19,23 30:7 50:5,9 54: 6 65:14,16 77:17 seen [1] 29:3 selectively [1] 21:17 senate [2] 22:8 96:5 sense [1] 56:2 sent [1] 83:9 separate [3] 7:19 26:13 52:3 september [1] 83:10 series [1] 11:18 seriously [1] 22:7 service [2] 52:22 53:22 service-of-process [1] 52:21 set [4] 31:1,8,15 58:9 sets [1] 11:18 setting [1] 17:22 settlement [2] 47:19 49:21 seven [1] 9:18 several [4] 7:14 40:25 41:2 66:1 sg [1] 82:9 shall [3] 52:22 67:6 95:16 she'd [1] 71:24 she's [1] 72:11 ships [3] 53:12 69:4,14 shot [3] 25:3 50:10,12 shouldn't [4] 6:19 11:21 26:1 83:7 show [5] 35:9 70:17 71:3,4 72:15 shown [1] 84:2 shows [1] 53:25 sia [1] 22:9 side [4] 25:10 27:19 42:13 72:15 sign [2] 7:23 10:2 signals [1] 34:23 signed [1] 25:6 silent [1] 65:18 similar [1] 77:16 simply [3] 6:18 7:11 48:23 simultaneously [2] 7:15,21 since [4] 9:9 47:5 58:12 77:9 single [1] 41:14 situation [5] 13:1 38:2 47:17 49:9 92: 21 situations [1] 86:22 six [4] 64:7 66:20 69:15 77:11 sky [1] 25:4 slightly [1] 29:10 slow [1] 64:2 smaller [1] 58:9 solve [1] 31:7 somebody [1] 50:15 somehow [1] 33:6 sorry [3] 38:6 70:14 75:16 sort [11] 10:25 12:18 28:17 30:15 36: 22 41:25 44:11 46:7 48:10,15 58:23 sorts [3] 69:2 82:19,20 sotomayor [59] 7:24 8:3,8,11,17 9:14 10:4,7,14 11:11 12:19 15:24 18:18 19:16,17,24 20:2,11 22:4,5,13,19,22</p>	<p>23:2,5,11,18 24:2,5,11 38:6,8,11,16, 19,24 39:10 40:17,20 41:2,5,17,21 50:25 51:5,20 52:5,12 55:8 63:4 79:9, 15,20 97:25 98:1,12,15,21,25 sotomayor's [1] 70:4 sovereign [54] 6:11,14 8:25 9:12 13:3 17:11 18:2,6,8,13,25 19:18 23:7,13 28:11 31:10 33:1 35:12 36:11,12 39: 17 40:22 53:10 54:25 55:4 56:21 57: 22 58:1 63:6,7 64:7 65:5,8,10,12,19, 21 70:17 71:5 72:5 73:10 75:7 82:12 83:6,14,23 84:18 85:15 87:8 88:17 92:17,22 93:8 98:4 sovereigns [14] 6:9,10,20 17:6,7,12, 15,18 29:12 43:10 54:10,12 55:13 78: 24 sovereignty [4] 6:5 54:14 67:5 87:4 spate [1] 91:5 speaking [1] 55:11 speaks [1] 15:25 special [1] 17:16 specific [9] 7:5 13:4 23:25 24:15 31: 21 41:1 57:1 63:8 95:4 specifically [3] 9:24 26:17 42:13 speed [1] 45:2 square [1] 33:23 squared [1] 15:19 stand [1] 85:11 staring [1] 91:14 start [2] 40:10 94:24 state [10] 12:10,11 24:23 42:12 67:6 74:17 75:1 76:1 83:9 96:4 state-controlled [2] 29:21,22 stated [1] 28:14 statement [15] 8:16 16:5,21 17:1,4 18: 16,16,17 27:2 36:18 62:11,24 65:7 84:22,25 statements [2] 45:8 85:11 states [22] 6:12,20 7:21,22 12:14 24: 14,20 35:4 48:5,13 50:5 51:9 58:18 59:21 61:4,6 68:11 69:1 80:16 91:21 95:16 96:1 statute [64] 8:1,12,13,14,18 10:3 11: 23 13:11,17,22 14:10 15:21 16:2,17 17:8 20:18 26:14 29:7,11 30:21 31: 17 33:11 34:7,15 36:21 37:10 42:10 45:22 54:8 57:3,16,20 63:13 65:11, 20,22 72:10 73:9,20 74:21 75:2 77:4, 6,10 82:13 85:21 88:9 90:18,20 91: 11 92:2,7,13 93:25 94:5,22 95:7,18, 19,22 96:6,21 97:3 98:5 statutes [21] 7:2,17 10:11 12:2 13:9 18:19 19:8,11,14 20:23 37:16 39:25 67:18 68:5 70:19 71:10,12 89:8 94: 22 95:4 97:23 statutory [10] 12:12 14:5 22:6 25:22 28:17 34:23 36:24 37:23 97:20,21 still [15] 9:3 10:10 19:14,17 20:9 23:5 25:1 36:17 38:19 52:5 59:11 85:1,2</p>
<p style="text-align: center;">S</p> <p>salazar [1] 70:21 same [8] 6:5 19:6 51:11 56:20 58:5 64: 14 77:3 89:5 satisfied [2] 37:8 50:18 satisfy [2] 38:23 62:24 saw [3] 75:4,4,5 saying [26] 10:8 15:17 19:6 27:4 32:3, 25 33:4 37:19,19 40:18 46:4 51:16 55:22 56:9,13 60:1,19,24 62:15 63: 19,21 72:11 75:23 84:21 88:18 98:18 says [22] 7:16 9:22,23 15:20 16:2,18 17:2 21:20 25:11 32:14 37:6,13 51:6 52:22 53:4 61:8 71:14 78:6 84:17 86: 18 95:15 98:6 scalia [1] 90:15 scheme [1] 12:18 schemes [3] 12:12 36:24 37:23 scholars [2] 39:17,18 second [9] 24:21 26:3 41:16,20,23 47: 6 65:14 69:13 76:19 secondly [1] 44:15 secretary [4] 75:1 83:9 96:4,4 section [15] 21:21 24:13 32:13,14,16 35:20,22,25 37:6 51:6,13 52:23 67:4 95:15 97:2 see [12] 30:3,17,23 31:11 32:23 39:14 49:12 50:25 70:11 82:13 85:21 92:11 seem [1] 85:12</p>	<p>Heritage Reporting Corporation</p>	<p>respect - still</p>

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<p>95:9,13 stop [1] 7:25 stops [1] 87:22 stripping [1] 73:10 strong [3] 66:12,14,15 stronger [1] 6:13 structurally [1] 81:21 structure [2] 77:3,22 subject [3] 14:1 43:21 55:11 subsection [3] 51:8,10 52:21 subsequently [1] 92:8 subsidiaries [2] 22:25 40:3 substantial [2] 26:11 96:8 substitute [2] 13:22 68:2 substituted [1] 22:24 succeed [3] 68:1 86:25 89:12 successfully [1] 9:17 sudden [1] 25:4 sue [7] 40:6 75:6,8,9,9,10 92:9 sued [4] 69:8,17 78:16 79:14 sufficient [1] 85:15 suggest [1] 85:12 suggested [1] 11:11 suggestion [2] 23:12 71:3 suggestive [1] 21:13 suggests [1] 44:24 suit [14] 11:4,8 20:2,4 38:1,22 51:25 52:2 53:2,4,4,10 74:17 76:2 suits [26] 6:12 16:8 19:18 35:19,21,23 36:3 38:14 42:14 43:20 44:22 48:22 49:13 53:3 62:6,14,20 68:1 70:3,6 76: 4,5 77:14 81:14,17 97:15 sum [1] 14:16 superfluous [1] 12:10 super-majorities [1] 25:5 super-super-clear [1] 71:4 supplement [1] 13:7 supplies [3] 35:23 96:10,12 supported [1] 19:4 supporting [1] 35:5 survived [1] 20:3 survives [1] 9:4 suspend [15] 42:2,2 45:19 64:8 76:13, 13,15,17,22 78:5,7,14,15 81:5,12 suspenders [1] 60:14 suspending [1] 81:19 suspension [14] 26:13 27:18 28:3 42: 1 43:5,7,17 44:8 45:23 66:8 78:23 79: 1,20 82:1 swath [1] 38:20 swept [1] 29:24 swiss [1] 38:2 switch [5] 25:13,19 74:10 75:18 82:11</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>talked [3] 32:11 61:16 72:4 talks [6] 8:7 25:14 31:17,20,22 86:13 targeted [1] 13:4 targeting [1] 39:4</p>	<p>tarnoff [1] 96:5 technical [1] 58:25 tells [4] 11:15 15:21 17:17 76:1 tens [2] 25:18 49:11 tent [2] 95:1,2 terms [1] 72:11 territories [1] 6:22 terror [1] 58:18 terrorism [2] 12:24 19:4 test [3] 6:8,11 54:17 testified [1] 96:5 testimony [1] 96:15 tests [1] 11:19 text [7] 67:9 68:15 70:11 77:8 78:6 81: 4 87:10 textual [1] 68:3 textually [1] 78:4 themselves [1] 23:22 thereby [1] 36:3 therefore [4] 26:2 45:1 67:23 85:8 there's [43] 9:5,8,10 11:7,24,25 13:13, 14,14,20 15:2 21:10 23:22 24:15 25: 20 26:19 27:2 28:19 33:25,25 41:6, 13 44:10 48:17 49:1,19 51:22 52:3 54:13 57:14 58:19 59:11 60:12 70:11 71:25 79:22 86:2,12,14 92:16 95:6 98:7,19 thinking [1] 21:12 thinks [1] 43:8 third [5] 40:10,14 47:1 81:7 84:7 third-country [1] 41:15 third-country's [1] 81:7 third-party [4] 30:25 31:6 33:6,13 thomas [13] 6:4,7,23 21:1 36:10 37:11, 15 48:1 68:20 97:7,8,11,19 though [4] 13:19 29:12 72:24 74:9 thoughts [1] 71:8 thousand [1] 54:18 three [1] 85:5 throughout [1] 26:14 throwing [1] 46:11 thrust [6] 16:13 30:8,21 31:14 58:23, 25 tiny [3] 93:6 94:22,25 title [34] 6:24 10:12 15:25 17:20,23 21: 21 22:8 30:9 32:15,15 35:19 39:23 41:14 42:3 51:17 53:1 65:1,18 67:8,9, 20 68:1,15,21 72:4 74:23 75:2 83:3,7, 11 88:10 96:19 97:9,15 today [1] 66:14 together [2] 35:8 81:22 toggle [5] 26:15 28:3 75:18 76:20 82: 11 togglng [1] 74:10 tomorrow [1] 44:22 took [5] 22:11,23 23:12 83:15 85:6 tool [1] 61:1 top [1] 77:19 tort [2] 91:20,21</p>	<p>total [1] 14:16 totally [2] 13:15 46:13 touch [1] 60:2 toward [1] 26:18 trade [9] 67:25 68:18 70:2 84:3,8 96:8, 22,25 97:1 trafficker [1] 34:22 traffickers [1] 33:13 trafficking [8] 15:5 28:22 29:24 33:20 39:4,8 46:25 61:9 transactions [1] 84:4 transition [6] 25:23 36:6 43:13 45:12 46:24 64:3 transitions [2] 45:22,24 trans-substantive [1] 11:13 travelers [3] 68:12 96:13,13 treat [3] 6:4 36:10 52:17 treble [1] 61:10 tribes [1] 6:21 true [1] 11:2 try [3] 12:7 39:24 49:18 trying [16] 10:7 15:13 19:8 30:24 31:7 33:5 36:23 43:18 50:7 58:24 59:6 62: 2,15 64:24 72:6 81:21 turn [1] 75:20 turns [1] 74:1 two [42] 7:2,2 10:11 12:7 14:4 16:14, 17 18:19 19:5,8,10,13 24:12,24 25:3 32:9,13 35:17 36:23 37:12,16,22 39: 16 41:11 53:17 55:22 60:22 64:4 67: 17 68:4,13 70:19 71:9,11 76:3 78:10 80:18 86:2 89:2 94:22 95:3 97:22 two-hour [1] 94:6 type [1] 60:11 types [5] 6:20 42:9 46:25 60:22,24</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>u.s [17] 34:3 36:5 43:12 45:4,10 51:10 61:13 64:25 67:7 74:1,2,24 79:17,24 80:8,12,14 u.s.c [1] 35:21 ultimate [1] 59:4 ultimately [2] 46:15,20 um-hum [1] 88:15 un [1] 73:17 unavailable [1] 89:6 unclear [1] 54:21 undeniably [1] 73:17 under [25] 13:12 22:8 23:21 32:6 35: 21,23 37:3 49:1 50:13 51:10,12,24 52:1 53:6,6 68:15,23 69:2 70:20 87:6 91:4 95:1 96:4,19 98:1 understand [10] 16:24 21:8 37:21 62: 8 64:11,17 73:15 74:10 87:21 94:8 understood [2] 16:12 66:11 undisputably [1] 72:17 undisputedly [1] 72:21 unequivocal [1] 10:18 unequivocally [2] 17:4 18:1</p>
---	--	---

Official - Subject to Final Review

union [2] 20:4,6	western [4] 9:7 20:4,6,6
unions [1] 9:7	whatever [2] 87:14 96:23
united [15] 7:20,22 35:4 48:5,13 50:5 58:18 59:21 61:4,6 68:11 69:1 80:16 91:21 96:1	whatsoever [1] 82:2
universe [2] 15:6 92:4	whenever [1] 56:11
unless [6] 15:25 34:11 48:4 49:1 67:7 95:16	whether [27] 17:17,19 22:16 29:10,15 31:3 32:5 40:5 43:8,10 46:14 60:8,11, 12,13 67:12 69:24 70:6,7 74:17 76:2, 23 87:11 89:10,11 94:6 95:11
unlike [1] 19:13	whole [5] 26:8 63:15 77:20 82:22 84: 22
unlimited [2] 43:24 44:2	whom [1] 35:16
unmistakably [1] 98:4	wider [1] 79:2
unpack [1] 12:7	will [12] 12:13 35:15 36:5 38:22 46:9,9 54:15 86:8 91:15 94:25 95:1 97:4
until [1] 25:3	win [1] 73:17
unusual [2] 54:7 57:21	wipe [1] 87:5
up [15] 11:18 12:8 17:22 28:16 31:1,8, 15 44:5 45:25 46:13 49:25 60:6 71: 21 77:4 91:25	within [3] 25:6 80:10 81:1
useless [1] 88:21	without [5] 11:3 35:11 51:23 72:21 91: 2
uses [1] 51:19	word [4] 51:19,23 52:16 96:3
using [1] 69:8	words [14] 8:23 14:7,9,11 25:16 27:7 30:20 54:17 56:20 63:12 73:9 88:19 90:22 94:12
<hr/> V <hr/>	work [3] 14:16 64:18 97:9
value [5] 48:17 49:4,19 50:3,6	world [9] 13:18 16:21 17:15 62:4 74: 16 76:8 77:8,16 91:7
various [3] 17:5 23:23 69:22	worried [1] 76:4
vast [1] 38:13	worth [1] 43:12
vastly [1] 79:11	woven [1] 31:16
ventures [1] 84:8	write [1] 24:17
versus [1] 70:21	written [1] 97:9
views [2] 27:24,25	wrongly [1] 61:14
vindicate [1] 49:15	<hr/> Y <hr/>
violate [1] 39:25	years [3] 9:19 44:3 77:11
violated [1] 74:23	<hr/> Z <hr/>
violation [2] 23:9 24:10	zero [1] 88:23
<hr/> W <hr/>	
waive [1] 56:21	
waiver [14] 12:12 13:3 18:25 22:9,12 24:6 29:16 49:1 58:16,19 63:7,22 98: 2,3	
wanted [21] 10:2,9 16:8,9,11 30:12 34: 21 39:8,21 43:20 44:21 45:4,10 47: 20 52:16 55:15 59:2 60:24,25 62:4 76:12	
warehouses [1] 69:10	
warren [2] 75:1 83:8	
wave [2] 26:23 28:1	
way [34] 7:3,6 8:22 11:2,7 13:24 19:10, 14,20,22 20:22 21:15 43:7,14,16 47: 23 50:14,14 51:23 52:19 53:5 55:9 57:21 65:17 66:9 67:18 70:19 74:12 78:3 79:2 81:24 86:19 92:9,16	
ways [9] 7:2 15:11,13 20:7 26:14 54: 19 74:11,25 86:2	
weapons [2] 15:3,4	
weeds [1] 47:5	
weigh [2] 30:4 77:23	
weight [1] 47:6	
welcome [3] 6:3 36:9 68:19	