



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

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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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APPEARANCES:  
MORGAN L. RATNER, ESQUIRE, Washington, D.C.; on behalf  
of the Petitioner.  
CURTIS E. GANNON, Deputy Solicitor General, Department  
of Justice, Washington, D.C.; for the United  
States, as amicus curiae, supporting the  
Petitioner.  
JULES L. LOBEL, ESQUIRE, Pittsburgh, Pennsylvania; on  
behalf of the Respondents.

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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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 Helms-Burton  
5 Act is an additional specific abrogation. The  
6 other way of harmonizing is what Respondents  
7 have said, which is the Helms-Burton Act  
8 provides the cause of action and the FSIA  
9 provides any abrogation of immunity.

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

23 JUSTICE SOTOMAYOR: Could we -- could  
24 we stop at your first point? Because what  
25 you're arguing is that the statute here

1 impliedly reversed FSIA's application, correct?

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

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

9 MS. RATNER: Okay.

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

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

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

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

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

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

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

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

1 wanted, then we think that's a pretty good sign  
2 that that statute itself abrogates immunity.

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

5 MS. RATNER: And --

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

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

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

22 JUSTICE KAGAN: Well, I think it --

23 MS. RATNER: And it --

24 JUSTICE KAGAN: -- sort of did,  
25 Ms. Ratner. I mean, in Kirtz, in FMO -- OMB,

1 it was just true that if -- if read one way,  
2 there was going to be a cause of action without  
3 any ability to bring the suit.

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

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

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

1 statutes, but we don't take that to be -- we  
2 don't look to those causes of action for  
3 purposes of deciding jurisdictional immunity  
4 for foreign agencies.

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

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

22 And, there -- this is involving the  
23 particular terrorism provisions as they relate  
24 to the Republic of Iraq, and, there, the  
25 situation was reversed. It was Congress

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

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

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

1 jurisdictional immunity.

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

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

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

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

22 MS. RATNER: There are extremely few  
23 causes of action that expressly apply to  
24 foreign governments, foreign agencies and  
25 instrumentalities. By our count -- our

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

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

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

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

22 I mean, the -- the problem I think --  
23 and this is the point that Justice Sotomayor  
24 was raising -- is that unless Title III speaks  
25 to abrogation, I don't know how you overcome

1 the statute that says abrogation for foreign  
2 governments, look here and apply this rule.

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

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

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

1 the FSIA that says this is how you abrogate.

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

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

12 MS. RATNER: It --

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

24 MS. RATNER: Justice Jackson, what  
25 Congress did here would unequivocally be enough

1 for any other foreign sovereign, and so then  
2 the question is, does the existence of the  
3 FSIA --

4 JUSTICE JACKSON: For any other  
5 foreign sovereign?

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

8 JUSTICE JACKSON: Right. And so my --

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

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

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

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

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

25 The EWSSA permits the President "to

1 make inapplicable with respect to Iraq any  
2 provision of law that applies to countries that  
3 have supported terrorism."

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

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

15           MS. RATNER: Justice Sotomayor --

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

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

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

25           MS. RATNER: Well --

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas?

25 Justice Alito?

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

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

13 I think it has to be the former way  
14 because elsewhere Congress expressly and  
15 selectively incorporates FSIA provisions,  
16 including in 6082(c)(2), and I think in  
17 combination of that and (c)(1), where Congress  
18 says we want to apply only the provisions of  
19 Title 28 that apply in Section 1331 cases,  
20 which does not include the FSIA, when you read  
21 those in -- in combination, I think that you  
22 can only read 1611(c) as kind of a  
23 belt-and-suspenders provision.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Your point is  
3 statutory history. So do I. And I take  
4 seriously the fact that the original both  
5 Senate and House bills here under Title III  
6 included a waiver of the SIA -- FSIA. And so  
7 it's not clear to me that when Congress took it  
8 out why we would be putting that waiver back  
9 in.

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

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

16 JUSTICE SOTOMAYOR: So why did it say  
17 that directly? I know.

18 MS. RATNER: Well --

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

23 MS. RATNER: That's correct.

24 JUSTICE SOTOMAYOR: That's what you're  
25 relying on?

1 MS. RATNER: Correct.

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

7 MS. RATNER: That's correct.

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

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

24 JUSTICE SOTOMAYOR: But that doesn't  
25 make --

1 MS. RATNER: -- and then, after  
2 that --

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

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

19 And, second, if you are looking at  
20 that legislative history, I do think you have  
21 to look at the fact that the State Department,  
22 two months after this amendment, continued to  
23 say, well, now it applies to agencies and  
24 instrumentalities, sure, but it is still going  
25 beyond the FSIA. That likely ground the bill

1 to a halt in the fall until Cuba shot two  
2 planes out of the sky, and all of a sudden,  
3 super-majorities of Congress passed and the  
4 President signed this law within 17 days.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

6 Justice Gorsuch?

7 Justice Kavanaugh?

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

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

23 And they say, for that reason, we  
24 shouldn't assume Congress intended to give that  
25 huge power to the President, so, therefore,

1 choose the narrower second option as you first  
2 described them, I think, rather than the first  
3 one. Do you want to respond to that?

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

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

24 JUSTICE KAVANAUGH: So you don't think  
25 there's some kind of clear statement required

1 in connection with that? That's what they, I  
2 think, are saying on page 47 and then the  
3 amicus brief also.

4 MS. RATNER: I don't --

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

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

12 JUSTICE KAVANAUGH: National interest?

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

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

20 MS. RATNER: It -- it sure was. I  
21 think the President and the -- and Congress  
22 probably had differing views, but what they  
23 didn't have differing views on was the  
24 importance of this wave of claims against Cuban  
25 instrumentalities. And that's why you need to

1 have four different suspension provisions to  
2 toggle on and off for all the diplomatic  
3 circumstances. You just don't need that if  
4 we're talking about a couple edge cases getting  
5 through.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Barrett?

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

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

24 But we don't think and the government  
25 doesn't think the Court needs to answer that

1 question given that some of the indicia are  
2 Cuba-specific, and we've never seen a  
3 non-Cuba --

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

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

25 But, again, if the Court does have

1 qualms about that, it's a purely hypothetical  
2 circumstance at this point, so we don't see any  
3 need to weigh in on it.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Jackson?

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

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

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

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

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

23           JUSTICE JACKSON: Right.

24           MS. RATNER: And when --

25           JUSTICE JACKSON: So it -- it -- it

1 appreciated that claims could happen. I -- I'm  
2 not faulting you or saying that that's not in  
3 there.

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

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

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

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

20 How does allowing this flood of claims  
21 to come in advance what I see as Congress's  
22 primary purpose? I think you get a little bit  
23 more mileage out of it if you're saying they  
24 absolutely intended to abrogate sovereign  
25 immunity with this cause of action,

1 notwithstanding the existence of the FSIA, and  
2 they're not saying anything about that, because  
3 we know that they were trying to deter  
4 third-party investment and somehow this is  
5 going to help that.

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

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

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

22 JUSTICE JACKSON: Maybe. Maybe. I  
23 mean, you know, there's -- there's foreign  
24 policy implications. The --

25 MS. RATNER: Correct. But --

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

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

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

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

22 JUSTICE JACKSON: Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Mr. Gannon.

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

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

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

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

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

25                  The decision below would effectively

1 negate suits that Congress authorized, thereby  
2 compromising a mechanism that Congress and the  
3 Executive have concluded will promote U.S. and  
4 national interests and a transition to  
5 democracy in Cuba.

6 This Court should reverse that  
7 decision. I welcome its questions.

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

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

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

1 an action that's going to arise under 1331.

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

7 And, here, Congress said that's not  
8 the statute that governs this action.

9 JUSTICE THOMAS: Do you think these  
10 two --

11 MR. GANNON: It said this is a federal  
12 question of jurisdiction.

13 JUSTICE THOMAS: So do you think that  
14 these two statutes can be reconciled?

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

22 I think Congress has already made the  
23 decision and said we want this not to be an  
24 FSIA suit and -- and they did not want this to  
25 be a Swiss cheese situation where there would

1 have to be some incidental overlap that would  
2 allow you to get through one of the -- like the  
3 commercial activities exception here.

4 JUSTICE SOTOMAYOR: I'm sorry.

5 MR. GANNON: I mean, with --

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

8 MR. GANNON: I -- I think --

9 JUSTICE SOTOMAYOR: Is it impossible  
10 to go through both gates?

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

14 JUSTICE SOTOMAYOR: I didn't say -- I  
15 didn't ask that.

16 MR. GANNON: I -- I -- I --

17 JUSTICE SOTOMAYOR: There are still a  
18 swath of cases.

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

22 JUSTICE SOTOMAYOR: All right.

23 Could --

24 MR. GANNON: -- the commercial  
25 activities exception, but I think that that's a

1 gross mismatch between what Congress was  
2 targeting here, which is trafficking in all of  
3 this expropriated property, especially when the  
4 Cuban governmental entities are the main --  
5 they -- the main culprits and beneficiaries of  
6 that trafficking conduct which Congress wanted  
7 to --

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

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

22 But Charming Betsy cautions us to try  
23 to construe statutes not to violate  
24 international law. Here, not only is it  
25 pushing it to a private cause of action against

1 the Cuban government and its subsidiaries.  
2 Justice Barrett has asked your -- the  
3 Petitioner's counsel whether they could also  
4 sue other countries' agencies and  
5 instrumentalities, and she said yes.

6 What's your position on that?

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

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

17 MR. GANNON: I -- I --

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

22 MR. GANNON: It -- I think that  
23 several of the provisions are Cuba-specific.  
24 The ones that specific --

25 JUSTICE SOTOMAYOR: Several are but

1 not all of them.

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

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

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

17 MR. GANNON: They -- they make -- and  
18 second --

19 JUSTICE SOTOMAYOR: You know that  
20 we're inviting that litigation. But go ahead.

21 MR. GANNON: And I -- and my second  
22 point is, to the extent that it looks like  
23 that's going to be any sort of problem, then  
24 the President has the suspension power and he  
25 could suspend or partially suspend the right to

1 bring Title III actions if he thought that that  
2 was going to create foreign policy problems.

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

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

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

24 And the one change that I think  
25 Congress made after that point in the

1 legislative development that is relevant to  
2 this is that at the executive branch's request,  
3 they granted the President the suspension  
4 power.

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

12           JUSTICE KAVANAUGH: Which way does --

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

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

21           And yet Congress gave the President  
22 unlimited power --

23           MR. GANNON: Well, I --

24           JUSTICE KAVANAUGH: -- to say no,  
25 almost unlimited power to say no, which then

1 happened for the next 23 years. And that's  
2 really just based on national interests.  
3 Basically, it's completely up to the President.

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

11 JUSTICE KAVANAUGH: No, I know -- I  
12 know that --

13 MR. GANNON: And, secondly, I would  
14 say that --

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

21 MR. GANNON: Well, I -- I -- I think  
22 it suggests that they recognized that they were  
23 going past what the FSIA would otherwise allow  
24 and that, therefore, there was a need to have  
25 this extra potential governor on the speed of

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

11 JUSTICE KAVANAUGH: That's a hundred  
12 percent in the discretion of the President, a  
13 hundred percent.

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

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

24 MR. GANNON: Well, I mean, I -- I  
25 think that --

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

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

10 JUSTICE KAVANAUGH: You keep on  
11 floating that it's totally up to the President  
12 whether these claims can proceed.

13 MR. GANNON: The President ultimately  
14 has --

15 JUSTICE KAVANAUGH: Right?

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

17 JUSTICE KAVANAUGH: Isn't that right?

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

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

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

10 JUSTICE KAVANAUGH: That's fine.

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

22 CHIEF JUSTICE ROBERTS: Thank you,  
23 counsel.

24 Justice Thomas, anything further?

25 JUSTICE ALITO: What are the practical

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

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

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

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

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

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

24                 But, I mean, I assume Exxon has some  
25          financial reason for doing this. And it's kind

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

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

18 JUSTICE ALITO: Thank you.

19 MR. GANNON: -- jurisdictional  
20 immunity.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 JUSTICE SOTOMAYOR: Do you see 6082(c)  
24 as a -- as a jurisdictional provision?

25 MR. GANNON: I -- yes, I think that

1 it's -- it's -- it points us to 1331 as the  
2 basis for jurisdiction and --

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

12 So it's only talking about procedures.  
13 It's not talking about jurisdiction.

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

18 JUSTICE SOTOMAYOR: All the  
19 procedures.

20 MR. GANNON: And I think there's no  
21 way to read the word "other" there without  
22 making it say that this too is an action under  
23 1331, which means that this is not an FSIA suit  
24 under 1330; it's a federal question  
25 jurisdiction suit.

1           There's also a separate, you know,  
2 amount in controversy requirement.

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

7           MR. GANNON: I think, because it's  
8 pointing to the jurisdictional provision of the  
9 FSIA --

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

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

24          Here, they said Title 28's rules apply  
25 here, like it's a 1331 suit, like -- like other

1 1331 suits. It doesn't say it's like it's a  
2 1331 suit. It says it is another 1331 suit.  
3 And so I think that the only way to read that  
4 is, if it's under 1331, it's not under 1330.

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

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

22           And so I -- I -- I do think that that  
23 shows that Congress was making the  
24 jurisdictional decision here, not just the  
25 liability-creating decision, as Justice Kagan

1 was previously asking.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

20 But why didn't Congress just say,  
21 like, we're -- you know, we're displacing the  
22 FSIA with respect to this, so we're abrogating  
23 sovereign immunity, or just give some  
24 indication that that's what it meant to do,  
25 other than create a cause of action, which is a

1 completely different question in the foreign  
2 sovereign immunity context?

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

7 I think the only way to read  
8 6082(c)(1) and (c)(2) is to say that Congress  
9 here was speaking to questions of subject  
10 matter and personal jurisdiction with respect  
11 to foreign sovereigns. And that's the --  
12 that's the reason, I mean, they -- if they  
13 wanted it to just be about other defendants,  
14 like the cruise lines --

15 JUSTICE KAGAN: Yeah.

16 MR. GANNON: -- then -- then they --  
17 they don't need to be -- they --

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

20 MR. GANNON: Those are the best --

21 JUSTICE KAGAN: Yeah.

22 MR. GANNON: -- indications we have  
23 that Congress is actually talking about it in  
24 the jurisdictional sense.

25 JUSTICE KAGAN: Yeah. So you're not

1 making a -- a point about, like --

2 MR. GANNON: But -- but we have all  
3 the other confirmatory provisions that my  
4 friend is relying upon.

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

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

1 JUSTICE KAGAN: And --

2 MR. GANNON: -- these provisions  
3 talking about what I'm calling --

4 JUSTICE KAGAN: Got it.

5 MR. GANNON: -- an ouster of the  
6 jurisdictional portion of the FSIA.

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

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

24 So, like, why would Congress have done  
25 that?

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

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

18           JUSTICE KAGAN: Yeah, I mean, I guess  
19 one -- one aspect of this is, if -- if -- if  
20 sort of the thrust of the argument, and I know,  
21 you know, you're trying to hook it into these  
22 technical provisions, but if the thrust of the  
23 argument is Congress was really concerned about  
24 this -- this problem and it really wanted to go  
25 after these agencies and instrumentalities

1 because weren't they the ultimate bad guys  
2 here, I mean, if that's really what Congress  
3 was trying to do, it -- it -- it -- it  
4 proceeded in a very odd fashion because you're  
5 not going to get anything from them anyway  
6 given that the execution immunity exists.

7 MR. GANNON: Well, take -- take --  
8 take out the execution immunity. There's still  
9 going to be the basic --

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

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

22 JUSTICE KAGAN: But, again, it's not  
23 just the practical thing that I'm saying. What  
24 Congress did not do was to touch executive  
25 immunity, execution immunity provisions, that

1 we're putting aside the practical concerns,  
2 we're going to prevent as a legal matter these  
3 agencies from having to cough up.

4 MR. GANNON: I -- I -- I think that  
5 1611(c) is ambiguous about whether they were  
6 displacing 1610 or not. I think, as my friend  
7 pointed out, notwithstanding clauses often  
8 create this type of ambiguity, whether they're  
9 going to be -- whether there's a negative  
10 implication or whether they're just belt and  
11 suspenders.

12 JUSTICE KAGAN: Yeah, I don't buy that  
13 one.

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

17 JUSTICE KAGAN: The choice.

18 MR. GANNON: -- it is quite common for  
19 there to be a mismatch between these two types  
20 of provisions. And I don't think, when  
21 Congress was saying that it wanted these types  
22 of lawsuits to proceed and they wanted them to  
23 be a tool for foreign policy, that even if at  
24 the end of the day there wasn't going to be  
25 collection against actual Cuban property that

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

15 JUSTICE KAGAN: Thank you.

16 MR. GANNON: -- others from  
17 cooperating with the Cuban government.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Gorsuch?

20 Justice Kavanaugh?

21 Justice Barrett?

22 Justice Jackson?

23 JUSTICE JACKSON: Yeah. I guess I'm  
24 just trying to puzzle through why, where you  
25 landed with Justice Kavanaugh, that Congress

1 wanted to go back to the pre-FSIA world in this  
2 particular context such that the President was  
3 controlling when these suits go forward and  
4 when they don't.

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

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

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

23 MR. GANNON: I -- I -- I think that  
24 what Congress did is -- is essentially exactly  
25 what they did in the Beaty case that Justice

1 Sotomayor was reading before -- from before,  
2 which is to say the default rule here is no  
3 sovereign immunity in this context. We are  
4 adding a waiver, an abrogation of sovereign  
5 immunity for these specific circumstances.  
6 It's a narrow and --

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

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

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

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

20 JUSTICE JACKSON: Yeah.

21 MR. GANNON: -- is something that --  
22 that -- that provides a couple of different  
23 functions. One is that it ensures that these  
24 aren't something that's actually going to slow  
25 down a transition to democracy in Cuba, make

1 it -- make it counter-productive; and, two, it  
2 makes it possible for the President to -- to  
3 put back in this narrow category of cases the  
4 protections of sovereign immunity that for six  
5 months at a time, I mean, he can only suspend  
6 the ability to bring new lawsuits. He can't  
7 actually just cancel out lawsuits.

8 JUSTICE JACKSON: I understand. But  
9 we don't need to put --

10 MR. GANNON: Once the lawsuit is  
11 filed, this is not the same as the pre-1942  
12 regime.

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

19 MR. GANNON: But I --

20 JUSTICE JACKSON: I think that a lot  
21 of these arguments are really just trying to  
22 get around the fact that what the U.S.  
23 Government did in this Title III action is  
24 pretty extraordinary in general, and we would  
25 have expected that if they were creating a

1 cause of action like this, they would have  
2 addressed the -- the sovereign immunity  
3 question.

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

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

22           MR. GANNON: Well -- and -- and we  
23 have several different provisions that are,  
24 like, pulling individual provisions out of the  
25 FSIA and incorporating them here. They're

1 doing -- they're -- they're doing all that. We  
2 know that Congress was legislating against the  
3 FSIA. We know the executive branch had raised  
4 concerns about going beyond the FSIA.

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

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

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Lobel?

22 ORAL ARGUMENT OF JULES L. LOBEL

23 ON BEHALF OF THE RESPONDENTS

24 MR. LOBEL: Mr. Chief Justice, and may  
25 it please the Court:

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

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

20           Petitioner therefore pivots to a  
21 practical argument that because of the  
22 embargo's heavy restrictions on trade with  
23 Cuba, few Title III suits could succeed. That  
24 policy argument can't substitute for the  
25 absence of an explicit textual abrogation or an

1 irreconcilable conflict between the two  
2 statutes.

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

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

16 I welcome the Court's questions.

17 JUSTICE THOMAS: Could you give an  
18 example of an action that -- a Title III action  
19 that could be brought consistent with an  
20 exception under FSIA?

21 MR. LOBEL: Sure. There are now 50  
22 Cuban importers that import millions of dollars  
23 of goods from the United States, grains,  
24 chickens, all sorts of goods under general  
25 licenses. They enter into a contract with an

1 American exporter. The American exporter ships  
2 the goods. The Cuban importer pays the money  
3 to the exporter. That is a direct effect.

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

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

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

21 And you cannot fix in time whether or  
22 not this was going to happen in 1995, 1996, or  
23 now. There has been an enormous expansion of  
24 trade with Cuba, and that expansion allows for  
25 the possibilities of many suits.

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

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

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

19           And we're not dealing with, she would  
20 say, an implied repeal here. We're dealing  
21 with an express repeal. And she has evidence,  
22 and you may find that insufficient or -- or --  
23 or adequate, but -- and we can have that  
24 argument, but I -- I think she would resist  
25 you -- your suggestion that she has to show a

1 super-super-clear abrogation, not only show  
2 that Congress abrogated sovereign immunity but  
3 that it also made clear its intention to  
4 displace the FSIA.

5 Thoughts?

6 MR. LOBEL: Well, there are two  
7 statutes, so they have to make clear -- they  
8 have -- they have to -- you have to reconcile  
9 the two statutes. But --

10 JUSTICE GORSUCH: Well, no, not -- not  
11 necessarily. Carcieri says you have to  
12 reconcile them when there -- when one's an  
13 implied repeal.

14 MR. LOBEL: Right.

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

20 MR. LOBEL: But --

21 JUSTICE GORSUCH: But I think she'd  
22 say: My primary argument is that there's an  
23 express repeal. And so yes, in other  
24 circumstances, you go to the FSIA, but, here,  
25 why couldn't Congress, for example -- I mean, I

1 think we've talked about it in Title III -- if  
2 it had said we abrogate sovereign immunity,  
3 nobody would be talking about trying to  
4 reconcile that with the FSIA, right? We --

5 MR. LOBEL: Correct.

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

10 Now you may disagree with that, but  
11 this reconciling of things really is kind of a  
12 side show, isn't it?

13 MR. LOBEL: You're right that I  
14 disagree with it. There is undisputably no  
15 express repeal.

16 JUSTICE GORSUCH: Oh, oh, fair enough.  
17 I -- I -- I --

18 MR. LOBEL: Undisputably, there's no  
19 express repeal.

20 JUSTICE GORSUCH: But you'd agree with  
21 me, though, that if it -- if it were an express  
22 repeal --

23 MR. LOBEL: If there were an express  
24 repeal --

25 JUSTICE GORSUCH: -- we wouldn't be

1 talking about reconciling things?

2 MR. LOBEL: Correct. Correct.

3 JUSTICE GORSUCH: Okay. All right.

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

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

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

11 JUSTICE GORSUCH: Okay. No, I  
12 understand that point.

13 MR. LOBEL: If that's the real  
14 question, we win undeniably.

15 JUSTICE GORSUCH: Well --

16 MR. LOBEL: There is no express appeal  
17 that anybody could read --

18 JUSTICE GORSUCH: I -- I think it --

19 MR. LOBEL: -- in the statute.

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

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

24 JUSTICE GORSUCH: And -- and by the  
25 U.S. Government it turns out too.

1           MR. LOBEL:  And maybe the U.S.  
2           Government.

3           JUSTICE GORSUCH:  So I --

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

6           (Laughter.)

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

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

21          JUSTICE GORSUCH:  I agree with you.

22          MR. LOBEL:  -- Title III violated  
23          international law, extended U.S. jurisdiction  
24          in many controversial ways.  And the President,  
25          Secretary of State Warren Christopher, said the

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

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

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

12 MR. LOBEL: Yeah.

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

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

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

1 whether or not a suit should proceed?

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

5 JUSTICE GORSUCH: Private entities.

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

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

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

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

23 JUSTICE KAVANAUGH: But the effect is  
24 the --

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's 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 go 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's  
24 going to have the power, and that's how it's  
25 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: Right. The President  
5 textually is given the power to suspend the  
6 cause of action. The text says nothing about  
7 the President's power to suspend immunity.

8 Now, of course, if you --

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

11 MR. LOBEL: The difference is --

12 JUSTICE KAVANAUGH: -- in -- in  
13 practice?

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

18 JUSTICE KAVANAUGH: Right.

19 MR. LOBEL: If you don't suspend --

20 JUSTICE KAGAN: Including private  
21 parties.

22 MR. LOBEL: Including private parties.

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

1 MR. LOBEL: Exactly.

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

4 MR. LOBEL: Correct.

5 JUSTICE KAGAN: So it's not clear that  
6 the suspension has anything to do with FSIA  
7 rules.

8 MR. LOBEL: I don't think it did. It  
9 had to do with the fact that the cause of  
10 action itself was very controversial, and the  
11 President --

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

16 MR. LOBEL: Correct. That's why the  
17 private entities were sued.

18 JUSTICE SOTOMAYOR: Because more of  
19 them, including other foreign governments, have  
20 more property in the U.S., correct?

21 MR. LOBEL: No question about that.  
22 But back to --

23 JUSTICE SOTOMAYOR: So the suspension,  
24 given what Justice Alito pointed out to, which  
25 is there's going to be very little assets of

1 Cuban agency or the Cuban government in the  
2 U.S., most of the assets are going to be in the  
3 private lawsuits.

4 MR. LOBEL: Correct. But back to  
5 Justice Gorsuch's question because I think it's  
6 central --

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

15 MR. LOBEL: Correct. By a U.S.  
16 exporter of goods to Cuba --

17 JUSTICE ALITO: Yeah, a U.S. exporter.

18 MR. LOBEL: -- and they would receive  
19 money back in the United States.

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

24 MR. LOBEL: Oh, no. If it was against  
25 a Cuban entity. If it's against a Cuban

1 entity, they couldn't execute --

2 JUSTICE ALITO: Okay.

3 MR. LOBEL: -- but it would fall  
4 within the FSIA's commercial exception because  
5 it would be clearly a direct effect.

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

11 It does not give the President --

12 JUSTICE KAVANAUGH: So it's even  
13 broader. I mean --

14 MR. LOBEL: Yeah.

15 JUSTICE KAVANAUGH: Yeah.

16 MR. LOBEL: But it -- it -- it does  
17 not give the President the power to suspend  
18 immunity or to override immunity. What the  
19 President could do is say: No suits can be  
20 brought.

21 The President does not have the power  
22 to say that once suits are brought, and if they  
23 are brought against a foreign government  
24 entity, I'm suspending the FSIA.

25 JUSTICE KAVANAUGH: That's a fair

1 point. I just think it's structurally trying  
2 to figure out how this fits together is why I'm  
3 asking these questions.

4 MR. LOBEL: Well, but that's the way  
5 to harm -- the provision allows for the  
6 suspension of the cause of action but doesn't  
7 give the President any power whatsoever about  
8 an immunity except --

9 JUSTICE JACKSON: And the point --

10 MR. LOBEL: -- to prevent these causes  
11 of action.

12 JUSTICE ALITO: Does -- does --

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

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

1 JUSTICE ALITO: Just the -- just --

2 JUSTICE JACKSON: That was the point  
3 of the FSIA to begin with, right?

4 MR. LOBEL: Yeah.

5 JUSTICE KAVANAUGH: Why do you think  
6 the presidential provision is in there given  
7 the FSIA?

8 MR. LOBEL: Because -- because Title  
9 III itself was incredibly controversial. And  
10 the President argued not just that the foreign  
11 sovereign immunities exception should not be  
12 in, but Title III shouldn't be in.

13 And, actually, Warren Christopher, the  
14 Secretary of State, made his -- sent a letter  
15 to the House on September 20 excoriating Title  
16 III. It's bad for this reason. It's bad for  
17 that reason. He didn't mention one reason,  
18 foreign sovereign immunity, and that's because  
19 they knew they took out the exception two  
20 months thereafter.

21 JUSTICE BARRETT: Well, maybe that's  
22 also because, you know, the Cuba -- Cuba and  
23 its instrumentalities were the most culpable.  
24 I mean, so you're going to go after the private  
25 entities because that's where the money is, but

1 maybe -- maybe Congress and the executive  
2 weren't as concerned about the sovereign  
3 immunity question when they were talking about  
4 Cuba.

5 MR. LOBEL: Right. But -- but the  
6 question isn't Cuba's culpability. As the  
7 argument has shown, what Congress was  
8 interested in was deterring trade and  
9 transactions with Cuba.

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

16 JUSTICE BARRETT: Well, because it  
17 didn't want Cuba to continue to profiteer and  
18 make money off of the property that it had  
19 expropriated.

20 MR. LOBEL: Correct.

21 JUSTICE BARRETT: Yeah.

22 MR. LOBEL: But that says nothing  
23 about sovereign immunity.

24 JUSTICE BARRETT: Yeah. I mean, I'm  
25 not -- well, I'm not fighting with you about

1 that point. I'm just saying that I don't think  
2 this whole reliance on the Christopher  
3 statement to the House does that much for you,  
4 but anyway.

5 MR. LOBEL: Well, no. I'm just -- I  
6 used the Christopher statement only to rebut  
7 the argument that Congress still must have  
8 thought or that the President still thought  
9 that there was an abrogation of immunity.

10 The fact that Christopher never  
11 mentioned that three months later after they  
12 took out the exception meant that the President  
13 no longer thought there was an abrogation of  
14 immunity and, therefore, didn't argue against  
15 it at that point.

16 JUSTICE ALITO: Just to be clear where  
17 we stand, you've made some statements during  
18 your argument that seem to me to suggest that  
19 you think that the mere fact that Congress did  
20 not say expressly that it was abrogating  
21 sovereign immunity is sufficient, that's the  
22 end of it? We don't need to look any further  
23 than that? Is that your argument?

24 MR. LOBEL: No.

25 JUSTICE ALITO: Okay.

1 MR. LOBEL: You --

2 JUSTICE ALITO: So then the question  
3 is what we can infer from what we see in the  
4 statute, right --

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

6 JUSTICE ALITO: -- in the -- in the  
7 relevant context?

8 MR. LOBEL: No, I don't think it's  
9 what you can infer. I think there's two ways  
10 that you've said in Kirtz and FOMB that you can  
11 abrogate immunity and that you can abrogate the  
12 FSIA, either some express language, which you  
13 don't have, or providing a cause of action  
14 against a government -- government entities --  
15 in this case, it would be foreign government  
16 entities -- which would be rendered a dead  
17 letter, which would be rendered meaningless.  
18 We --

19 JUSTICE ALITO: Well, that's an  
20 interesting reading of Kirtz, but there's  
21 nothing in the opinion that talks to that.

22 MR. LOBEL: Well, certainly, there's  
23 something in FOMB, which Kirtz relies on, which  
24 says that --

25 JUSTICE ALITO: Kirtz itself doesn't

1 say anything about that, does it?

2 MR. LOBEL: It says "negate." And I  
3 think that reading Kirtz in any other way would  
4 both be inconsistent with your precedent and  
5 would leave this Court in all of those  
6 situations down -- down a path of determining  
7 what's not a dead letter? Is it like in the  
8 expropriation exception, is it that there are  
9 1 percent of claims that can succeed? How are  
10 you going to determine that?

11 JUSTICE ALITO: Well, if we knew that  
12 Congress thought that the immunity conferred by  
13 the Foreign Sovereign Immunities Act would wipe  
14 out 99.999 percent of the potential claims that  
15 could be asserted under Helms-Burton, wouldn't  
16 it be a fair inference that it did not intend  
17 to -- to preserve the foreign sovereign  
18 immunities immunity?

19 MR. LOBEL: I think that the text  
20 governs because you can't determine whether it  
21 would knock out 99.99 percent.

22 JUSTICE ALITO: Well, what's the  
23 difference between a hundred and 99.9 or  
24 whatever? I mean --

25 MR. LOBEL: Well --

1 JUSTICE ALITO: -- in the case of a  
2 hundred, you're inferring they wouldn't have --  
3 they wouldn't have created a cause of action  
4 against a -- an instrument -- a foreign  
5 government instrumentality if it was a dead  
6 letter. It's an inference.

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

10 MR. LOBEL: Even if I agreed with you  
11 that -- that you can make that inference,  
12 that's not the case here. There are many  
13 claims that could --

14 JUSTICE GORSUCH: Well, first of all,  
15 do -- do you agree with Justice Alito we can  
16 make that --

17 MR. LOBEL: I do not. I do not.

18 JUSTICE GORSUCH: So we can only make  
19 that inference if a hundred percent of cases  
20 are eliminated?

21 MR. LOBEL: If you look at the statute  
22 and you look at the two -- and you look at the  
23 FSIA and you look at Title III --

24 JUSTICE GORSUCH: No, no, no. I'm  
25 asking -- forget about the FSIA. We've --

1 we've dealt with that.

2 MR. LOBEL: Mm-hmm.

3 JUSTICE GORSUCH: We're just dealing  
4 with -- with what -- what's required to  
5 abrogate sovereign immunity, and you're saying:  
6 Okay, you can either use the magic words, or  
7 you can create a cause of action that would  
8 completely be useless otherwise.

9 MR. LOBEL: Correct.

10 JUSTICE GORSUCH: Zero percent of  
11 cases.

12 MR. LOBEL: That's right.

13 JUSTICE GORSUCH: You agree with those  
14 two things?

15 MR. LOBEL: I do.

16 JUSTICE GORSUCH: But, once we get to  
17 99.9 percent of cases, you say that same  
18 inference is unavailable.

19 MR. LOBEL: Because I think it's  
20 impossible to tell, looking at the statutes,  
21 how many -- not in -- not in this case, but  
22 more generally, whether or not -- how many  
23 cases are too few, whether or not they're going  
24 to succeed.

25 If you could say we know for certain

1 that 99.9 percent of all the cases are going to  
2 fail, maybe then.

3 JUSTICE GORSUCH: All right.

4 MR. LOBEL: But you'll never know for  
5 certain.

6 JUSTICE GORSUCH: Okay, okay, okay.  
7 So now we're at 99.

8 MR. LOBEL: Right.

9 JUSTICE GORSUCH: Okay. How about 90?

10 MR. LOBEL: That's exactly my point.  
11 That is at the --

12 JUSTICE GORSUCH: No, but you conceded  
13 99.

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

16 JUSTICE GORSUCH: Well, you didn't at  
17 first.

18 MR. LOBEL: I said maybe.

19 JUSTICE GORSUCH: Oh, maybe.

20 MR. LOBEL: Maybe.

21 JUSTICE GORSUCH: Oh, maybe. Okay.  
22 All right.

23 (Laughter.)

24 MR. LOBEL: But the reason that I  
25 don't want to concede 99 is because then you'd

1 say what about 90? And the answer to that is  
2 the answer that Justice Scalia gave in the NML  
3 case. If you think that too many cases are  
4 being excluded, go to Congress. Get Congress  
5 to enact a new statute.

6 JUSTICE GORSUCH: Well, then it's  
7 magic --

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

9 JUSTICE GORSUCH: Then we're magic  
10 words, right?

11 MR. LOBEL: No.

12 JUSTICE JACKSON: It --

13 MR. LOBEL: I can give -- I can give  
14 you an example where the FSIA -- Congress could  
15 provide a cause of action without explicitly  
16 abrogating the FSIA and it should be abrogated  
17 under Kirtz.

18 Let's say there was a spate of  
19 automobile accidents in some country or some  
20 reason in the -- region of the world where all  
21 the instrumentalities -- all the automobile  
22 accidents were caused by foreign  
23 instrumentalities, and Congress enacted a  
24 statute, there was some ether going around in  
25 the Congress, and they forgot that the FSIA

1       existed, which clearly isn't here. They were  
2       staring the FSIA in the face.

3                But let's say they said there will be  
4       a cause of action for any American national  
5       injured in an automobile accident that occurs  
6       in another country. That would be barred by  
7       1605 -- 16 -- that would be barred by the  
8       FSIA's tort exception because it requires that  
9       the tort occur in the United States.

10               JUSTICE JACKSON: Mr. Lobel, isn't the  
11       real reason why we have to keep the Kirtz  
12       avenue narrow is because, if you don't do that,  
13       you end up end-running Congress's intentions  
14       with respect to enacting the FSIA? That we  
15       have a statute that Congress, as Justice Kagan  
16       said at the beginning, thought about the  
17       universe of claims that could be brought  
18       against foreign governments, said we don't want  
19       this being done in an ad hoc fashion anymore,  
20       so we're going to create a statute that lays  
21       out what we, the Court, has said subsequently  
22       is the exclusive way in which you get to sue a  
23       foreign government.

24               Kirtz comes along and we see this kind  
25       of one circumstance in which we might conceive

1 of an exception to application of the statute  
2 that Congress has created for this purpose, and  
3 it is this dead letter, you know, if you have a  
4 cause of action, but there's no way you could  
5 ever, you know, abrogate sovereign immunity --  
6 or a cause of action against a government, but  
7 you could never recover. Then you go, okay,  
8 that really does have to be interpreted as a  
9 situation in which Congress did intend for  
10 sovereign immunity to be abrogated,  
11 notwithstanding the FSIA.

12 But, if you get broader than that, if  
13 we're in 99 percent of the cases, 97 percent,  
14 96, then you could have a rule operating  
15 outside of the FSIA to do the very thing that  
16 Congress didn't want the FSIA -- or didn't want  
17 to have happen, which is why it enacted the  
18 FSIA. So this exception has to be, like,  
19 really tiny or else we don't give effect to  
20 Congress's expressed intent to have the FSIA be  
21 the exclusive avenue for abrogating sovereign  
22 immunity.

23 MR. LOBEL: Exactly, Your Honor.  
24 Exactly.

25 JUSTICE ALITO: Well, the FSIA may --

1 may have been the exclusive avenue when the  
2 FSIA was enacted. But the Congress that  
3 enacted the FSIA does not have the right to  
4 control what later Congresses do.

5 MR. LOBEL: Correct.

6 JUSTICE ALITO: So I don't know where  
7 that --

8 JUSTICE JACKSON: And that's why --

9 JUSTICE ALITO: I don't know where  
10 that -- I don't -- I --

11 JUSTICE JACKSON: -- that's why we --  
12 that's Justice Gorsuch's point, right? Later  
13 Congresses can say with respect to each statute  
14 this -- don't apply the FSIA here. And they  
15 can say that. But what -- what's happening  
16 here is that we are now implying that later  
17 Congresses intended that. But that -- that  
18 language doesn't appear in this statute, but  
19 we're having a two-hour argument as to whether  
20 or not we should interpret it, and -- and I  
21 don't understand that.

22 MR. LOBEL: Right. And it's not  
23 any --

24 CHIEF JUSTICE ROBERTS: Justice --

25 MR. LOBEL: -- magic words. They just

1 need to --

2 CHIEF JUSTICE ROBERTS: I think  
3 Justice Alito had a question.

4 MR. LOBEL: Oh, sure.

5 JUSTICE ALITO: No, that's all right.  
6 Go ahead.

7 CHIEF JUSTICE ROBERTS: Okay.

8 MR. LOBEL: Well, just one last point.  
9 They claim that you can harmonize the statute,  
10 the two statutes, by reading a tiny exception  
11 into the FSIA. And I agree with Justice  
12 Jackson that once you start reading that tiny  
13 exception in, it -- it will expand. The  
14 camel's tent -- nose will be under the tent.

15 But that does not harmonize these two  
16 statutes. The rule that specific can -- can  
17 override a general in this context doesn't  
18 apply when there's an implied repeal question.  
19 Their reading of the statute is that you have a  
20 narrow exception, a narrow repeal of the FSIA,  
21 and that's still an implied repeal.

22 As this Court said in Home Builders,  
23 it doesn't matter whether you call it an  
24 exception, an amendment, an implied amendment;  
25 it's still an implied repeal.

1           And it contradicts the FSIA. The FSIA  
2 1604, paragraph 16 -- Section 1604 says foreign  
3 states shall be immune unless one of the  
4 exceptions apply. They want to read the  
5 statute exactly how, Justice Alito, you didn't  
6 allow them to -- to read the statute in Home  
7 Builders. Just add another exception. Just  
8 add another criteria which is not in the  
9 statute.

10           JUSTICE ALITO: In 1996, were -- in  
11 1996, were there instrumentalities of the Cuban  
12 government that were engaging in commercial  
13 activity in the United States?

14           MR. LOBEL: There definitely were.  
15 You don't have to take my word for it.  
16 Secretary -- the Under Secretary of State Peter  
17 Tarnoff testified before the Senate committee  
18 dealing with this exact statute, the  
19 Helms-Burton Act, and said, in many respects,  
20 the trade with Cuba is substantial.

21           And he was right. There were \$65  
22 million of medicines and medical supplies. Not  
23 just humanitarian goods. Medicines, medical  
24 supplies. There were 20 -- over 20,000  
25 travelers in 1993, 50,000 travelers in 1994.

1 And there were a quarter of a billion dollars  
2 according to Exxon's testimony -- exhibits in  
3 the district court of remittances going to  
4 Cuban entities in 1994, and as the court of  
5 appeals held here, those remittances could be  
6 the basis of lawsuits under Title III.

7 And I don't think you can fix it to  
8 1995/1996 in any event because the statute  
9 gives the President the power to expand trade  
10 with Cuba. And so whatever the case was in  
11 1995, given that Congress gave the President  
12 the power to expand trade, they must have  
13 anticipated that trade might be expanded.

14 In fact, in Section 112 of the  
15 statute, it explicitly anticipates that the  
16 remittance policy will be expanded.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 Justice Thomas, anything further?

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

22 MR. LOBEL: Pre-FSIA?

23 JUSTICE THOMAS: Yeah.

24 MR. LOBEL: It could because pre-FSIA,  
25 1952 to 1976, it could because there was a

1 restrictive regime of immunity, which wouldn't  
2 have rendered Title III suits meaningless.

3 Prior to 1952, it probably wouldn't --  
4 it probably meets the Kirtz -- the Kirtz  
5 exception.

6 JUSTICE THOMAS: So this is basically  
7 a statutory case?

8 MR. LOBEL: It is clearly a statutory  
9 case. You've got to interpret these two  
10 statutes harmoniously.

11 CHIEF JUSTICE ROBERTS: Justice Alito?  
12 Justice Sotomayor?

13 JUSTICE SOTOMAYOR: Under Kirtz's  
14 language, you either have an express waiver  
15 or -- but a -- but a implied waiver of  
16 sovereign immunity that is "unmistakably clear"  
17 in the language of the statute.

18 And then what Kirtz says to -- when  
19 there's a cause of action against a government  
20 on a claim, it has to be clear enough to  
21 effectively "negate a claim Congress has  
22 clearly authorized," correct?

23 MR. LOBEL: Mm-hmm.

24 JUSTICE SOTOMAYOR: You're relying on  
25 the negation question?

1 MR. LOBEL: Correct.

2 JUSTICE SOTOMAYOR: And my colleague  
3 said, well, doesn't the amount of the  
4 negation -- how much is enough? And the point  
5 is, however, you're saying we don't know how  
6 much, but there's a meaningful amount, correct?

7 MR. LOBEL: Correct.

8 JUSTICE SOTOMAYOR: This is not  
9 1 percent?

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

12 JUSTICE SOTOMAYOR: Right.

13 MR. LOBEL: But, here, there are  
14 hundreds of claims, thousands of claims  
15 probably, that could be brought.

16 JUSTICE SOTOMAYOR: And if you go as  
17 far as Petitioner wants, there's hundreds of,  
18 maybe thousands of claims against foreign  
19 governments and foreign entities, correct?

20 MR. LOBEL: Yes. The statute says --  
21 doesn't say Cuban -- claims against Cuban  
22 entities. It says any instrumentality of a  
23 foreign state -- of a foreign state. That's  
24 the text the statute.

25 JUSTICE SOTOMAYOR: So we could be

1 expanding this even more?

2 MR. LOBEL: Correct. You --

3 JUSTICE SOTOMAYOR: Thank you.

4 MR. LOBEL: You'd be allowing  
5 plaintiffs to sue every instrumentality in the  
6 world that does any trade with Cuba.

7 CHIEF JUSTICE ROBERTS: Justice Kagan?

8 Justice Gorsuch, anything?

9 Justice Kavanaugh?

10 Justice Barrett?

11 Justice Jackson?

12 Thank you, counsel.

13 MR. LOBEL: Thank you.

14 CHIEF JUSTICE ROBERTS: Rebuttal, Ms.  
15 Ratner?

16 REBUTTAL ARGUMENT OF MORGAN L. RATNER

17 ON BEHALF OF THE PETITIONER

18 MS. RATNER: Thank you. Four points.

19 First, Justice Alito, to your question  
20 about why this practically matters, the first  
21 is yes, there are not significant assets of  
22 Cuban instrumentalities in the United States.  
23 We have the ability to seek those assets  
24 worldwide, which is pretty standard fare in  
25 dealing with international judgments.

1           The second is that Exxon is a company  
2           that plays the long game. We've had this claim  
3           for over 60 years now, and so there may be  
4           changes in the future that affect what assets  
5           we can recover on.

6           Second point, I hate to complicate the  
7           presidential suspension authority further, but  
8           I do want to be clear that there are two  
9           suspension authorities that are specific to the  
10          Cuban government -- excuse me, to Cuban  
11          instrumentalities, that's 6064(a) and 6082(d),  
12          so this can't be dismissed as just potentially  
13          suspensions relating to private entities'  
14          claims.

15          Third point. I think the food and  
16          medicine importer -- importer examples really  
17          underscore the extreme mismatch here of a  
18          Congress that shut down commerce and allowed a  
19          few humanitarian examples -- food imports,  
20          family-oriented remittances, medicine  
21          imports -- and now, under Respondents' theory,  
22          those are the only hook. Those are the only  
23          claims that you can bring against Cuban  
24          instrumentalities, are the very thing that  
25          Congress decided to have a little more

1 solicitude for. I think that creates an  
2 incredible mismatch with what they were trying  
3 to do here.

4 Finally, I -- I want to underscore we  
5 are not asking for this Court to have some  
6 broad rule that once a sovereign is covered by  
7 a cause of action, that's enough.

8 Again, we have pointed to all of these  
9 overlapping provisions. This is the express  
10 and only defendant called out. There are rules  
11 specific to these claims and judgments. There  
12 are multiple overlapping suspension  
13 authorities. And there are jurisdictional  
14 provisions that take this claim out of the  
15 FSIA.

16 So that is the sum total, and that is  
17 enough for a background statute like the FSIA,  
18 just as it would be enough for a background  
19 constitutional or common law immunity  
20 protection. Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 The case is submitted.

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

<b>\$</b>	<b>50,000</b> [1] 96:25	<b>accident</b> [1] 92:5
<b>\$65</b> [1] 96:21	<b>6</b>	<b>accidents</b> [2] 91:19,22
<b>\$70</b> [1] 49:9	<b>6</b> [1] 84:11	<b>accomplish</b> [1] 62:13
<b>\$8</b> [1] 68:7	<b>60</b> [1] 101:3	<b>accordance</b> [1] 52:21
<b>1</b>	<b>6032</b> [1] 32:12	<b>according</b> [2] 47:20 97:2
<b>1</b> [4] 32:14 87:9 99:9,10	<b>6032(h)</b> [1] 20:13	<b>account</b> [1] 25:9
<b>100</b> [3] 3:14 10:20 12:9	<b>6040</b> [1] 20:15	<b>accountability</b> [1] 47:12
<b>11</b> [2] 5:19 84:11	<b>6064(a)</b> [1] 101:11	<b>accountable</b> [1] 61:9
<b>11:38</b> [1] 4:2	<b>6081(5)</b> [1] 84:11	<b>accused</b> [1] 34:6
<b>112</b> [1] 97:14	<b>6081(8)</b> [1] 5:18	<b>acknowledgment</b> [1] 75:23
<b>1330</b> [6] 37:4,4 51:24 53:4,5,8	<b>6082(a)</b> [1] 5:2	<b>act</b> [15] 4:11,19 7:5,7 17:10 28:10 35:7,10 46:20 50:6 54:12 67:2 75:6 87:13 96:19
<b>1331</b> [18] 13:11 21:19 32:15 35:19 37:1 51:1,11,23 52:12,16,25 53:1,2,2,4,5,13 54:19	<b>6082(a)(7)</b> [1] 5:13	<b>action</b> [66] 5:3,4 7:8 8:20,24 11:2,6,13,15,23,24 12:2,12 13:10,22,24 14:17,19,23 15:9 16:6,15 17:21 20:18 30:25 31:8,14 32:25 37:1,8 39:25 46:7 51:10,16,22 52:16 54:6,7,9,25 56:8 64:23 65:1 67:7 68:18,18 76:13,14,16,17,21 78:6,15,16 79:10 81:8 82:6,11 86:13 88:3 89:7 91:15 92:4 93:4,6 98:19
<b>16</b> [2] 92:7 96:2	<b>6082(c)</b> [2] 32:13 50:23	<b>actions</b> [5] 21:3 32:15,16 42:1 51:8
<b>1604</b> [3] 67:1 96:2,2	<b>6082(c)(1)</b> [2] 35:18 55:8	<b>activities</b> [2] 38:3,25
<b>1605</b> [3] 24:11 67:4 92:7	<b>6082(c)(2)</b> [2] 21:16 35:22	<b>activity</b> [6] 6:2 7:19,21 19:18 80:13 96:13
<b>1605b</b> [1] 58:10	<b>6082(d)</b> [1] 101:11	<b>actor</b> [1] 13:4
<b>1607</b> [1] 67:5	<b>66</b> [1] 3:11	<b>acts</b> [1] 58:14
<b>1608</b> [1] 52:21	<b>7</b>	<b>actual</b> [1] 60:25
<b>1610</b> [2] 48:10 60:6	<b>7</b> [1] 84:11	<b>actually</b> [13] 9:16 27:16 31:3 33:7 34:2 45:3 46:5 55:23 58:10 61:5 63:24 64:7 83:13
<b>1611(c)</b> [4] 21:6,22 48:10 60:5	<b>70</b> [1] 68:6	<b>ad</b> [2] 62:16 92:19
<b>17</b> [1] 25:4	<b>75</b> [1] 12:14	<b>add</b> [3] 23:22 96:7,8
<b>1952</b> [2] 97:25 98:3	<b>9</b>	<b>added</b> [1] 58:11
<b>1960</b> [1] 49:10	<b>90</b> [2] 90:9 91:1	<b>adding</b> [1] 63:4
<b>1976</b> [1] 97:25	<b>95</b> [3] 22:15 23:17,21	<b>additional</b> [2] 7:5 36:14
<b>1993</b> [1] 96:25	<b>96</b> [2] 27:19 93:14	<b>address</b> [2] 10:14 49:22
<b>1994</b> [2] 96:25 97:4	<b>97</b> [1] 93:13	<b>addressed</b> [1] 65:2
<b>1995</b> [3] 42:9 69:22 97:11	<b>99</b> [5] 90:7,13,15,25 93:13	<b>addressing</b> [1] 19:4
<b>1995/1996</b> [1] 97:8	<b>99.9</b> [3] 87:23 89:17 90:1	<b>adds</b> [1] 20:14
<b>1996</b> [9] 4:14 20:12 29:17 32:11 42:9 56:16 69:22 96:10,11	<b>99.99</b> [1] 87:21	<b>adequate</b> [1] 70:23
<b>2</b>	<b>99.999</b> [1] 87:14	<b>administration</b> [1] 42:6
<b>20</b> [2] 83:15 96:24	<b>A</b>	<b>admittedly</b> [1] 4:20
<b>20,000</b> [1] 96:24	<b>a.m</b> [1] 4:2	<b>adopt</b> [1] 42:19
<b>2001</b> [1] 9:8	<b>ability</b> [7] 11:3 25:19 46:16,19 64:6 66:14 100:23	<b>adoption</b> [1] 45:7
<b>2009</b> [1] 12:20	<b>able</b> [4] 42:21 47:20 56:17 66:13	<b>advance</b> [1] 32:21
<b>2016</b> [1] 58:11	<b>above</b> [1] 18:15	<b>advancing</b> [1] 7:3
<b>2017</b> [1] 27:19	<b>abrogate</b> [20] 8:24 14:9,9,11,18 15:21 17:1,23 22:13,14 23:14 31:9 32:24 57:18 65:18 72:2 86:11,11 89:5 93:5	<b>affect</b> [2] 44:18 101:4
<b>23</b> [2] 44:1 77:11	<b>abrogated</b> [7] 14:14 35:8 40:18 65:10 71:2 91:16 93:10	<b>affirmatively</b> [1] 35:22
<b>24-699</b> [1] 4:4	<b>abrogates</b> [5] 10:2 23:18 28:10 40:20 67:6	<b>ag</b> [1] 34:14
<b>28</b> [4] 21:19 32:14 35:19 51:15	<b>abrogating</b> [8] 4:17 23:4,9 54:10,22 85:20 91:16 93:21	<b>agencies</b> [18] 12:4 14:24 22:22 23:23 24:12,14,23 28:11 35:9,13 40:4 41:5,13 42:12 56:20,24 58:25 60:3
<b>28's</b> [1] 52:24	<b>abrogation</b> [25] 4:21 5:5 7:5,9 13:13 15:16,25 16:1,14,15,18,21 17:17 29:15 40:19 41:4 63:4 65:16 67:25 68:12,13 70:14 71:1 85:9,13	<b>agency</b> [3] 8:21,23 80:1
<b>3</b>	<b>absence</b> [2] 65:4 67:25	<b>agents</b> [1] 24:5
<b>30</b> [1] 15:1	<b>absolute</b> [1] 5:10	<b>ago</b> [2] 80:21,22
<b>35</b> [1] 3:8	<b>absolutely</b> [1] 32:24	<b>agree</b> [8] 29:11 41:2 72:20 73:22 74:21 88:15 89:13 95:11
<b>4</b>	<b>absurd</b> [1] 11:5	
<b>4</b> [1] 3:4	<b>accept</b> [1] 6:23	
<b>47</b> [1] 27:2		
<b>5</b>		
<b>5</b> [1] 40:12		
<b>50</b> [1] 68:21		

<p> <b>agreed</b> [1] 88:10  <b>agricultural</b> [1] 9:9  <b>ahead</b> [2] 41:20 95:6  <b>aimed</b> [1] 33:7  <b>airlines</b> [3] 75:7,8,9  <b>airports</b> [1] 69:7  <b>al</b> [1] 4:5  <b>alito</b> [36] 20:25 21:1,5,24 47:25 48:7  49:20 50:18 57:21 59:16 79:24 80:7,  17,20 81:2 82:12 83:1 85:16,25 86:2,  6,19,25 87:11,22 88:1,15 93:25 94:6,  9 95:3,5 96:5,10 98:11 100:19  <b>alito's</b> [1] 57:8  <b>allow</b> [9] 20:17 25:15 30:10 32:6 38:2  43:18 44:23 65:19 96:6  <b>allowed</b> [1] 101:18  <b>allowing</b> [4] 13:1 32:20 33:7 100:4  <b>allows</b> [8] 20:15 25:10 42:19 43:9 49:  5 67:17 69:24 82:5  <b>alluded</b> [1] 59:14  <b>alludes</b> [1] 82:21  <b>almost</b> [1] 43:25  <b>already</b> [6] 4:13 32:10 37:22 50:17 61:  1,2  <b>alternative</b> [1] 78:1  <b>although</b> [2] 24:11,15  <b>ambiguity</b> [1] 60:8  <b>ambiguous</b> [1] 60:5  <b>ameliorate</b> [1] 66:6  <b>amend</b> [1] 91:8  <b>amended</b> [2] 21:3 57:13  <b>amendment</b> [3] 24:22 95:24,24  <b>american</b> [3] 69:1,1 92:4  <b>amicus</b> [6] 2:6 3:7 25:12 27:3 35:2 39:  14  <b>amount</b> [4] 52:2 79:13 99:3,6  <b>ancient</b> [1] 75:24  <b>anomalous</b> [2] 48:16 50:11  <b>another</b> [7] 8:17 13:21 53:2 67:9 92:6  96:7,8  <b>answer</b> [16] 14:15 16:18 17:11 28:14,  25 29:13 32:7,9 38:6 42:3 46:2,3 48:  9 70:9 91:1,2  <b>answers</b> [1] 56:9  <b>anticipated</b> [1] 97:13  <b>anticipates</b> [1] 97:15  <b>anybody</b> [2] 73:17 81:8  <b>anyway</b> [3] 59:5,18 85:4  <b>apart</b> [1] 35:11  <b>appeal</b> [1] 73:16  <b>appeals</b> [1] 97:5  <b>appear</b> [1] 94:18  <b>appearances</b> [1] 2:1  <b>applicable</b> [2] 50:15 52:23  <b>application</b> [2] 8:1 93:1  <b>applied</b> [4] 5:3 17:4 21:2 74:20  <b>applies</b> [4] 9:23 19:2,10 24:23  <b>apply</b> [21] 14:7,23 16:2 17:10 21:12,  18,19 28:17,17 32:13,14 35:17 51:8,  10,15 52:24 74:14 75:7 94:14 95:18  96:4  <b>applying</b> [1] 9:24  <b>appreciate</b> [1] 63:14  <b>appreciated</b> [1] 32:1  <b>appropriate</b> [2] 46:8 49:15  <b>architecture</b> [1] 31:15  <b>aren't</b> [3] 58:4 63:9,24  <b>arguably</b> [1] 6:11  <b>argue</b> [1] 85:14  <b>argued</b> [3] 6:10 12:10 83:10  <b>arguing</b> [2] 7:25 71:16  <b>argument</b> [26] 3:2,5,9,12 4:4,7 6:24  16:12 30:7 31:13 35:1 58:20,23 63:  12 66:22 67:21,24 70:24 71:16,22 84:  7 85:7,18,23 94:19 100:16  <b>arguments</b> [1] 64:21  <b>arise</b> [1] 37:1  <b>around</b> [5] 11:13 13:19 64:22 76:7 91:  24  <b>article</b> [1] 11:25  <b>aside</b> [2] 57:20 60:1  <b>aspect</b> [1] 58:19  <b>aspects</b> [1] 23:20  <b>asserted</b> [2] 6:12 87:15  <b>assertion</b> [3] 6:5 36:9,10  <b>assets</b> [8] 48:11 59:18,19 79:25 80:2  100:21,23 101:4  <b>associated</b> [4] 34:9 41:10 45:7 47:13  <b>assume</b> [4] 23:13 25:24 49:24 57:9  <b>assumes</b> [1] 11:12  <b>assuming</b> [1] 22:20  <b>attach</b> [2] 48:17 49:16  <b>attachment</b> [5] 48:17 58:4,7,16 79:13  <b>august</b> [1] 23:20  <b>authorities</b> [1] 101:9  <b>authority</b> [1] 101:7  <b>authorized</b> [4] 5:21 10:19 36:1 98:22  <b>authorizing</b> [1] 34:13  <b>automobile</b> [3] 91:19,21 92:5  <b>avenue</b> [3] 92:12 93:21 94:1  <b>avoid</b> [1] 21:9  <b>away</b> [1] 11:7 </p>	<p style="text-align: center;"><b>B</b></p> <p> <b>back</b> [26] 4:12 10:15 14:5 18:16,19 19:  24 22:8 40:9 45:20,22 52:4 53:15,16  55:4 57:8 59:14 62:1 63:19 64:3,14  66:17 70:1 79:22 80:4,19 81:6  <b>backdrop</b> [1] 65:17  <b>background</b> [6] 8:14,16 11:11 29:14  36:21,25  <b>backstop</b> [1] 26:23  <b>bad</b> [4] 59:1 82:24 83:16,16  <b>banning</b> [1] 7:20  <b>bar</b> [1] 4:20  <b>barred</b> [2] 92:6,7  <b>barrett</b> [11] 28:8,9 29:4,16 40:2 61:21  83:21 84:16,21,24 100:10 </p>	<p> <b>bars</b> [1] 57:22  <b>based</b> [2] 12:15 44:2  <b>basic</b> [1] 59:9  <b>basically</b> [2] 44:3 98:6  <b>basis</b> [2] 51:2 97:6  <b>beaty</b> [2] 12:21 62:25  <b>becomes</b> [1] 22:12  <b>begin</b> [2] 64:15 83:3  <b>beginning</b> [1] 92:16  <b>begs</b> [1] 23:3  <b>behalf</b> [8] 2:2,9 3:4,11,14 4:8 66:23  100:17  <b>believe</b> [1] 7:11  <b>below</b> [1] 35:25  <b>belt</b> [1] 60:10  <b>belt-and-suspenders</b> [2] 21:9,23  <b>beneficiaries</b> [1] 39:5  <b>best</b> [2] 32:8 55:20  <b>betsy</b> [7] 39:17,18,22 40:11 42:5 75:  20 77:20  <b>better</b> [3] 6:19 17:6 34:19  <b>between</b> [6] 5:24 39:1 60:19 68:1 78:  10 87:23  <b>beyond</b> [10] 24:25 42:13,18,22 43:9  49:4,18 50:1,6 66:4  <b>bigger</b> [1] 10:8  <b>biggest</b> [1] 15:5  <b>bill</b> [5] 23:17,20 24:25 42:8 45:7  <b>billion</b> [2] 68:7 97:1  <b>billions</b> [4] 25:15,16,16 68:8  <b>bills</b> [2] 22:5 23:10  <b>bill's</b> [1] 22:15  <b>bit</b> [2] 32:22 57:14  <b>blocked</b> [1] 59:19  <b>board</b> [1] 5:7  <b>borrow</b> [1] 52:17  <b>borrows</b> [2] 52:17,19  <b>both</b> [12] 15:10,12 22:4 23:10 24:5,11  37:18 38:7,10 55:3 74:10 87:4  <b>boundaries</b> [1] 39:20  <b>branch</b> [4] 42:6,14 45:4 66:3  <b>branch's</b> [1] 43:2  <b>brief</b> [3] 27:3 28:14 40:12  <b>briefs</b> [2] 25:12 39:14  <b>bring</b> [7] 8:22 11:3,6 31:3 42:1 64:6  101:23  <b>brings</b> [2] 35:23 41:12  <b>broad</b> [1] 15:9  <b>broader</b> [2] 81:13 93:12  <b>brought</b> [11] 4:18 9:2 16:8 35:19 51:  10 68:19 81:20,22,23 92:17 99:15  <b>builders</b> [2] 95:22 96:7  <b>building-block</b> [1] 53:18  <b>business</b> [2] 20:3,4  <b>buy</b> [1] 60:12 </p>
<b>C</b>		
<p> <b>c)(1</b> [1] 21:17  <b>c)(2</b> [2] 5:14 55:8 </p>		

## Official - Subject to Final Review

<p><b>call</b> [1] 95:23  <b>called</b> [1] 4:24  <b>calling</b> [1] 57:3  <b>calls</b> [2] 15:14 31:18  <b>came</b> [2] 12:10 28:15  <b>camel's</b> [1] 95:14  <b>cancel</b> [1] 64:7  <b>cannot</b> [2] 69:21 78:15  <b>canon</b> [1] 39:17  <b>capital</b> [2] 48:20 58:6  <b>carcieri</b> [2] 70:18 71:11  <b>carved</b> [1] 17:15  <b>carving</b> [1] 24:14  <b>case</b> [31] 4:4 6:22 9:1,2 11:9 16:5 30:22 31:11 41:7,12 42:21 48:2,21 49:15 50:13 53:10,12,19 62:25 64:17 69:10 70:18 75:3 86:15 88:1,12 89:21 91:3 97:10 98:7,9  <b>cases</b> [17] 11:4 21:4,19 26:19 28:4 38:18 57:19 64:3 69:16 75:2 88:19 89:11,17,23 90:1 91:3 93:13  <b>category</b> [1] 64:3  <b>cause</b> [49] 5:3,4 7:8 8:20,23 11:2,6,24 12:12 13:10,22,24 14:17 15:9 16:6,15 17:21 26:22 30:25 31:7,14 32:25 39:25 54:6,7,9,25 56:8 65:1 67:6 76:12,14,16,16,21 78:6,15,16 79:9 81:8 82:6 86:13 88:3 89:7 91:15 92:4 93:4,6 98:19  <b>caused</b> [1] 91:22  <b>cause-of-action</b> [1] 56:14  <b>causes</b> [9] 11:13,15,23 12:2 14:19,23 20:18 46:6 82:10  <b>cautions</b> [1] 39:22  <b>center</b> [2] 77:11,18  <b>central</b> [1] 80:6  <b>certain</b> [3] 15:4 89:25 90:5  <b>certainly</b> [1] 86:22  <b>certainty</b> [1] 5:10  <b>certified</b> [1] 49:18  <b>chain</b> [1] 80:8  <b>change</b> [2] 22:13 42:24  <b>changed</b> [2] 22:14 45:3  <b>changes</b> [1] 101:4  <b>charge</b> [2] 10:12 54:12  <b>charming</b> [7] 39:16,18,22 40:11 42:5 75:20 77:20  <b>cheese</b> [1] 37:25  <b>chemical</b> [1] 15:2  <b>chickens</b> [1] 68:24  <b>chief</b> [22] 4:3,9 20:22 21:25 25:5 28:7 30:4 34:23 35:4 47:22 50:21 54:2 61:18 66:19,24 94:24 95:2,7 97:17 98:11 100:7,14  <b>chinese</b> [1] 75:8  <b>choice</b> [1] 60:17  <b>choose</b> [1] 26:1  <b>chooses</b> [1] 49:22  <b>chopped</b> [1] 23:11</p>	<p><b>christopher</b> [5] 74:25 83:13 85:2,6,10  <b>cimex</b> [4] 4:5 9:3,5 48:10  <b>circle</b> [1] 10:4  <b>circulate</b> [1] 7:17  <b>circumstance</b> [4] 9:25 30:2 62:14 92:25  <b>circumstances</b> [7] 20:18 28:3 30:13 32:6 47:21 63:5 71:24  <b>circumvention</b> [1] 20:15  <b>claim</b> [15] 8:22 9:2,17,17,19,23 10:8,9 31:3 33:18 49:18 95:9 98:20,21 101:2  <b>claims</b> [39] 4:18 5:11 7:18 9:25 10:18,20 12:12 23:22 26:7,13,13,21 27:24 30:10,11,19 31:20,21,21 32:1,5,20 33:7 41:13 46:12 47:17 49:19 63:17 87:9,14 88:9,13 92:17 99:14,14,18,21 101:14,23  <b>clarity</b> [1] 8:4  <b>clause</b> [1] 47:4  <b>clauses</b> [1] 60:7  <b>clear</b> [36] 4:12,24 8:15 16:20 17:3 18:15,15 19:6 22:7,12,20 23:3 26:25 29:10,15 30:9 35:18 36:16,23 44:5,6 45:1 57:14 62:7,8,21 63:15 70:14 71:3,7 79:5 85:16 97:20 98:16,20 101:8  <b>clearer</b> [2] 18:14 41:4  <b>clearly</b> [8] 14:13 27:6 35:7,12 81:5 92:1 98:8,22  <b>codified</b> [2] 5:22 32:11  <b>codifies</b> [1] 20:12  <b>cold-blooded</b> [1] 34:6  <b>colleague</b> [3] 61:13 66:10 99:2  <b>collect</b> [1] 48:22  <b>collecting</b> [1] 57:22  <b>collection</b> [1] 60:25  <b>combination</b> [4] 5:25 21:17,21 53:15  <b>come</b> [3] 10:21 32:21 49:11  <b>comes</b> [3] 6:15 70:17 92:24  <b>comfort</b> [1] 36:13  <b>comity</b> [2] 6:16 74:17  <b>commerce</b> [2] 5:24 101:18  <b>commercial</b> [11] 6:2 7:19,20 19:11,18 20:9 38:3,24 80:13 81:4 96:12  <b>commission</b> [1] 47:18  <b>committee</b> [1] 96:17  <b>common</b> [2] 36:20 60:18  <b>companies</b> [3] 9:7 29:20,22  <b>company</b> [5] 33:17,19 34:19 49:8 101:1  <b>comparable</b> [1] 33:17  <b>compelling</b> [1] 56:21  <b>complaining</b> [1] 24:7  <b>completely</b> [3] 44:3 55:1 89:8  <b>complicate</b> [1] 101:6  <b>comply</b> [1] 42:22  <b>comprehensive</b> [2] 12:17 82:22  <b>compromising</b> [1] 36:2  <b>concede</b> [2] 90:15,25</p>	<p><b>conceded</b> [1] 90:12  <b>concedes</b> [1] 68:11  <b>conceive</b> [1] 92:25  <b>concerned</b> [5] 42:7,15 58:23 75:19 84:2  <b>concerns</b> [5] 60:1 66:4,6,7 75:21  <b>concluded</b> [1] 36:3  <b>conduct</b> [2] 34:16 39:6  <b>conference</b> [2] 27:14 45:5  <b>conferred</b> [1] 87:12  <b>confirm</b> [1] 5:9  <b>confirmatory</b> [1] 56:3  <b>confiscated</b> [3] 9:6 28:22 30:15  <b>conflict</b> [5] 8:18 21:8 68:1 70:9,12  <b>congresses</b> [3] 94:4,13,17  <b>congress's</b> [6] 32:21 33:8 42:16 82:15 92:13 93:20  <b>congruity</b> [1] 39:13  <b>conjunction</b> [1] 8:14  <b>connection</b> [2] 20:19 27:1  <b>considerations</b> [1] 59:15  <b>considered</b> [2] 67:9 82:22  <b>consistent</b> [2] 48:23 68:19  <b>constitutional</b> [1] 77:22  <b>constraints</b> [2] 25:19 27:11  <b>construe</b> [1] 39:23  <b>contemplate</b> [1] 35:12  <b>context</b> [5] 55:2 62:2 63:3 86:7 95:17  <b>continue</b> [4] 57:11,12,15 84:17  <b>continued</b> [1] 24:22  <b>contract</b> [2] 68:25 69:18  <b>contradicts</b> [1] 96:1  <b>control</b> [1] 94:4  <b>controlling</b> [1] 62:3  <b>controls</b> [1] 56:7  <b>controversial</b> [4] 74:24 76:17 79:10 83:9  <b>controversy</b> [1] 52:2  <b>cooperating</b> [1] 61:17  <b>copy-and-paste</b> [1] 24:17  <b>corporación</b> [1] 4:5  <b>corporation</b> [1] 4:5  <b>corporations</b> [1] 49:12  <b>correct</b> [27] 8:1,12 22:22,23 23:1,6,7,16 33:25 56:12 72:5 73:2,2 79:4,16,20 80:4,15 84:20 89:9 94:5 98:22 99:1,6,7,19 100:2  <b>corresponding</b> [1] 58:16  <b>cough</b> [1] 60:3  <b>couldn't</b> [3] 71:25 77:14 81:1  <b>counsel</b> [10] 10:4 20:23 34:24 40:3 43:17 47:23 50:22 66:20 97:18 100:12  <b>count</b> [1] 14:25  <b>counter-productive</b> [1] 64:1  <b>countries</b> [9] 19:2 28:12 40:8,12 46:25 49:3,6 68:14 84:12  <b>countries'</b> [1] 40:4  <b>country</b> [3] 50:5 91:19 92:6  <b>couple</b> [6] 9:14 26:18 28:4 34:5,7 63:</p>
---	--	---

<p>22  <b>course</b> [3] 11:23 71:17 78:8  <b>court</b> [29] 4:10,21 5:6 7:15 8:5,19 12:13 13:2 14:6 16:9 18:21 28:15,25 29:25 35:5 36:6 41:6 47:5 48:19 58:5 66:25 67:12,14 70:2 87:5 92:21 95:22 97:3,4  <b>courts</b> [5] 5:17 49:3 51:7 67:4 74:15  <b>court's</b> [4] 6:3 12:20 68:16 70:7  <b>cover</b> [1] 24:11  <b>create</b> [8] 13:22 42:2 54:6,25 60:8 67:9 89:7 92:20  <b>created</b> [6] 5:2 16:6 46:5 54:9 88:3 93:2  <b>creating</b> [1] 64:25  <b>crimes</b> [1] 15:4  <b>criteria</b> [1] 96:8  <b>cruise</b> [4] 53:10 55:14 69:11 81:9  <b>crushing</b> [1] 4:15  <b>cuba</b> [38] 5:24 9:4,8 20:9 25:1,22 26:16 28:12 29:7,7 30:14,23 34:2,6 36:5 40:21 43:13 45:10 46:22 61:5 63:25 66:16 67:23 68:10,15 69:24 77:21,23 80:16 83:22,22 84:4,9,13,17 96:20 97:10 100:6  <b>cuban</b> [52] 4:16,17 5:11,21 22:21 26:8,14,21 27:24 28:18 29:21 31:21 33:13,16,18,19,20 34:9,15,19 35:8,12 39:4,10,11 40:1 41:5 48:2 56:23 59:17 60:25 61:1,17 68:13,22 69:2,4,13 80:1,1,12,25,25 81:9 96:11 97:4 99:21,21 100:22 101:10,10,23  <b>cuba's</b> [1] 84:6  <b>cuba-specific</b> [2] 29:2 40:23  <b>culpability</b> [1] 84:6  <b>culpable</b> [1] 83:23  <b>culprit</b> [3] 33:14 39:9,9  <b>culprits</b> [1] 39:5  <b>curiae</b> [3] 2:6 3:8 35:2  <b>current</b> [2] 9:5 42:13  <b>currently</b> [1] 18  <b>curtis</b> [3] 2:4 3:6 35:1  <b>customary</b> [4] 40:10 42:4 43:9 49:5  <b>cut</b> [3] 43:15 74:10,11  <b>cutting</b> [1] 5:23</p> <hr/> <p style="text-align: center;"><b>D</b></p> <hr/> <p><b>d.c</b> [2] 2:2,5  <b>damages</b> [1] 61:7  <b>day</b> [1] 60:24  <b>days</b> [1] 25:4  <b>dead</b> [7] 9:10,15,21 86:16 87:7 88:5 93:3  <b>dealing</b> [5] 70:19,20 89:3 96:18 100:25  <b>dealt</b> [1] 89:1  <b>debate</b> [2] 5:14,15  <b>debated</b> [1] 42:9  <b>decades</b> [5] 47:15,16 49:14 59:20 68:</p>	<p>10  <b>decide</b> [2] 46:19 66:16  <b>decided</b> [3] 25:17 67:10 101:25  <b>deciding</b> [3] 12:3 29:14 62:16  <b>decision</b> [6] 12:20 35:25 36:7 37:23 53:24,25  <b>decline</b> [1] 44:9  <b>default</b> [3] 18:24 46:6 63:2  <b>defendant</b> [2] 48:25 53:7  <b>defendants</b> [8] 12:10 15:15 31:17,17 35:14 39:12 46:8 55:13  <b>defines</b> [1] 9:22  <b>definitely</b> [2] 56:7 96:14  <b>definition</b> [1] 35:11  <b>democracy</b> [6] 25:21 26:10 36:5 43:13 45:10 63:25  <b>democratic</b> [1] 26:16  <b>deniable</b> [1] 73:21  <b>department</b> [5] 2:4 24:21 42:10 74:16 75:25  <b>depend</b> [1] 6:2  <b>dependent</b> [1] 50:4  <b>depending</b> [2] 49:7 53:6  <b>depends</b> [1] 7:19  <b>deputy</b> [1] 2:4  <b>described</b> [1] 26:2  <b>designed</b> [1] 50:12  <b>deter</b> [2] 33:3 61:14  <b>determination</b> [3] 45:15 47:6 82:22  <b>determine</b> [3] 17:16 87:10,20  <b>determining</b> [1] 87:6  <b>detering</b> [3] 30:24 84:8,12  <b>developed</b> [1] 47:21  <b>development</b> [1] 43:1  <b>dice</b> [1] 46:9  <b>difference</b> [4] 48:4 78:10,11 87:23  <b>different</b> [14] 6:8 9:12 16:16 28:1 29:8,9 36:10,19,22 37:20 54:17 55:1 63:22 65:23  <b>differing</b> [2] 27:22,23  <b>dig</b> [1] 22:11  <b>dint</b> [1] 33:19  <b>diplomatic</b> [2] 4:15 28:2  <b>diplomatically</b> [1] 26:16  <b>direct</b> [2] 69:3 81:5  <b>directly</b> [4] 16:14 22:17 29:13 54:7  <b>disagree</b> [2] 72:10,14  <b>discretion</b> [1] 45:12  <b>discusses</b> [1] 5:13  <b>dismiss</b> [1] 20:2  <b>dismissed</b> [1] 101:12  <b>displace</b> [3] 16:25 17:19 71:4  <b>displacing</b> [3] 36:24 54:21 60:6  <b>district</b> [1] 97:3  <b>diverse</b> [1] 9:18  <b>docks</b> [4] 69:6,12,14,15  <b>doctrinal</b> [2] 14:4,4  <b>doing</b> [12] 13:23 20:4 46:20 49:25 62:7,18 64:15 66:1,1 75:23,24 82:23</p>	<p><b>doj</b> [1] 23:3  <b>dollars</b> [5] 25:16,17 68:8,22 97:1  <b>done</b> [6] 32:18 46:5 54:16 57:24 61:12 92:19  <b>dovetails</b> [1] 30:20  <b>down</b> [4] 63:25 87:6,6 101:18  <b>dropped</b> [3] 23:10,11 39:10  <b>drops</b> [1] 48:13  <b>drug</b> [1] 15:4  <b>during</b> [1] 85:17  <b>duty</b> [1] 70:13</p> <hr/> <p style="text-align: center;"><b>E</b></p> <hr/> <p><b>each</b> [1] 94:13  <b>earlier</b> [4] 30:21 34:6 61:14 66:11  <b>ease</b> [2] 68:5 69:20  <b>echoed</b> [1] 58:4  <b>economic</b> [1] 4:15  <b>economically</b> [1] 30:23  <b>edge</b> [2] 26:18 28:4  <b>effect</b> [6] 69:3 76:23 77:2,13 81:5 93:19  <b>effective</b> [2] 5:17 16:9  <b>effectively</b> [4] 7:1 10:17 35:25 98:21  <b>either</b> [6] 21:7 69:14,20 86:12 89:6 98:14  <b>eliminated</b> [1] 88:20  <b>elsewhere</b> [1] 21:14  <b>embargo</b> [9] 5:23 7:14 20:7,13 32:9,10 68:5 69:19,20  <b>embargoes</b> [1] 16:10  <b>embargo's</b> [1] 67:22  <b>emphasized</b> [1] 5:16  <b>enact</b> [3] 7:16 67:13 91:5  <b>enacted</b> [7] 7:14 75:2 78:2 91:23 93:17 94:2,3  <b>enacting</b> [1] 92:14  <b>enactment</b> [1] 77:9  <b>enacts</b> [1] 8:20  <b>encouraging</b> [1] 46:21  <b>end</b> [5] 60:24 63:19 64:16 85:22 92:13  <b>end-running</b> [1] 92:13  <b>enforce</b> [1] 49:6  <b>engage</b> [1] 19:18  <b>engaging</b> [1] 96:12  <b>enormous</b> [1] 69:23  <b>enough</b> [12] 16:24 17:19,25 18:12 28:19 29:10,15 41:6 71:19 72:16 98:20 99:4  <b>ensures</b> [1] 63:23  <b>enter</b> [1] 68:25  <b>entering</b> [2] 84:12,13  <b>entirely</b> [1] 6:16  <b>entities</b> [16] 19:17 29:18 39:4 68:13 76:5 79:15,17 81:9,9,10 83:25 86:14,16 97:4 99:19,22  <b>entities'</b> [1] 101:13  <b>entity</b> [5] 9:24 20:4 80:25 81:1,24  <b>especially</b> [2] 32:10 39:3</p>
---	--	---

<p> <b>esq</b> [4] 3:3,6,10,13  <b>esquire</b> [2] 2:2,8  <b>essentially</b> [5] 25:11 29:20 62:24 72:9  75:22  <b>establish</b> [1] 35:16  <b>et</b> [1] 4:5  <b>ether</b> [1] 91:24  <b>evaluate</b> [3] 66:14 70:3,7  <b>even</b> [16] 6:13 9:5 15:6 16:23 18:14  20:7 29:11 41:16 48:8,9 57:19 60:23  62:6 81:12 88:10 100:1  <b>event</b> [3] 84:15 97:8 99:11  <b>everyone</b> [1] 28:17  <b>evidence</b> [3] 30:17 32:8 70:21  <b>evolving</b> [1] 47:15  <b>ewssa</b> [2] 18:22,25  <b>exact</b> [1] 96:18  <b>exactly</b> [12] 14:13 19:4 26:5 42:7 62:  24 74:8 79:1 82:20 90:10 93:23,24  96:5  <b>example</b> [3] 68:18 71:25 91:14  <b>examples</b> [2] 101:16,19  <b>excellent</b> [1] 48:7  <b>except</b> [2] 74:13 82:8  <b>exception</b> [25] 29:8 37:5 38:3,25 48:  18,23 50:15 67:9,13 68:20 80:14 81:  4 83:11,19 85:12 87:8 92:8 93:1,18  95:10,13,20,24 96:7 98:5  <b>exceptions</b> [10] 6:2 19:11 20:16 48:16  58:3,5,6 67:4,19 96:4  <b>excluded</b> [1] 91:4  <b>exclusive</b> [4] 15:20 92:22 93:21 94:1  <b>excoriating</b> [1] 83:15  <b>excuse</b> [3] 18:6 32:12 101:10  <b>execute</b> [2] 50:5 81:1  <b>executed</b> [3] 48:4 50:2 80:23  <b>execution</b> [12] 21:4,11 48:12,17 50:15  57:9 58:7,12,17 59:6,8,25  <b>executive</b> [9] 36:3 42:6,14 43:2 45:4  59:24 66:3 67:11 84:1  <b>exemptions</b> [1] 42:14  <b>exercise</b> [1] 42:17  <b>exhibits</b> [1] 97:2  <b>exist</b> [2] 13:25 18:10  <b>existed</b> [1] 92:1  <b>existence</b> [4] 12:11 18:2,13 33:1  <b>existing</b> [1] 24:13  <b>exists</b> [3] 13:15 37:5 59:6  <b>expand</b> [5] 69:18,20 95:13 97:9,12  <b>expanded</b> [2] 97:13,16  <b>expanding</b> [1] 100:1  <b>expansion</b> [2] 69:23,24  <b>expect</b> [3] 27:6 47:7 62:20  <b>expected</b> [3] 64:25 65:20 82:17  <b>expedited</b> [1] 47:6  <b>expediting</b> [1] 43:11  <b>expedition</b> [1] 45:9  <b>explained</b> [2] 8:19 45:5  <b>explicit</b> [1] 67:25 </p>	<p> <b>explicitly</b> [2] 91:15 97:15  <b>exported</b> [1] 9:8  <b>exporter</b> [5] 69:1,1,3 80:16,17  <b>exports</b> [3] 9:9 26:20 68:7  <b>express</b> [10] 70:21 71:23 72:15,19,21,  23 73:5,16 86:12 98:14  <b>expressed</b> [1] 93:20  <b>expressly</b> [5] 5:3 14:23 15:14 21:14  85:20  <b>expropriated</b> [7] 39:3 49:10 61:6,11  69:5,8 84:19  <b>expropriation</b> [1] 87:8  <b>extended</b> [1] 74:23  <b>extent</b> [6] 6:8 36:17 41:22 46:22 49:4  51:9  <b>extra</b> [1] 44:25  <b>extraordinary</b> [3] 25:15 64:24 82:19  <b>extreme</b> [2] 20:8 101:17  <b>extremely</b> [3] 14:22 20:12,15  <b>exxon</b> [5] 4:4 34:14 49:9,24 101:1  <b>exxon's</b> [1] 97:2 </p> <hr/> <p style="text-align: center;"><b>F</b></p> <hr/> <p> <b>face</b> [1] 92:2  <b>fact</b> [16] 7:13 9:2 11:22 13:16 22:4 24:  21 27:11 36:13,18 56:16 57:13 64:22  79:9 85:10,19 97:14  <b>factual</b> [1] 68:3  <b>fail</b> [1] 90:2  <b>fail-safe</b> [1] 26:7  <b>fair</b> [4] 71:18 72:16 81:25 87:16  <b>faith</b> [1] 27:15  <b>fall</b> [3] 25:1 80:13 81:3  <b>family-oriented</b> [1] 101:20  <b>far</b> [2] 42:13 99:17  <b>fare</b> [2] 34:19 100:24  <b>fashion</b> [2] 59:4 92:19  <b>fast</b> [1] 47:19  <b>faulting</b> [1] 32:2  <b>february</b> [2] 22:15 23:17  <b>federal</b> [11] 6:13,21 23:11 32:15 37:11  51:16,24 53:11 56:18 59:19 61:4  <b>feel</b> [1] 52:21  <b>few</b> [7] 14:22 20:16 67:23 70:4,5 89:  23 101:19  <b>fighting</b> [1] 84:25  <b>figure</b> [3] 33:6 43:16 82:2  <b>filed</b> [1] 64:11  <b>final</b> [1] 45:7  <b>finally</b> [1] 68:11  <b>financial</b> [2] 5:7 49:25  <b>find</b> [4] 20:19 49:15 70:22 88:8  <b>findings</b> [1] 84:10  <b>fine</b> [1] 47:10  <b>finish</b> [1] 44:16  <b>first</b> [17] 5:9 7:24 9:15 12:7 26:1,2 27:  9 41:11 51:6 53:10 63:7,8,12 88:14  90:17 100:19,20  <b>fits</b> [1] 82:2 </p>	<p> <b>fix</b> [2] 69:21 97:7  <b>floating</b> [1] 46:11  <b>flood</b> [2] 32:20 33:7  <b>floor</b> [1] 45:6  <b>flowing</b> [2] 20:7 68:9  <b>fmo</b> [1] 10:25  <b>focus</b> [2] 31:3,4  <b>fomb</b> [2] 86:10,23  <b>food</b> [3] 26:20 101:15,19  <b>footing</b> [1] 6:14  <b>footnote</b> [1] 40:12  <b>foreign</b> [64] 5:4 6:9,14,15,18 12:4 14:  24,24 16:1 17:6,9,14,17 18:1,5,12 19:  17 23:12 24:12,17 30:12 31:18 33:23  35:10 39:14,15 42:2 43:7,8 47:17 49:  19 50:5 53:7 54:7,9,11 55:1,11 56:19  57:23 60:23 66:14 67:1,2,17 75:6 76:  14 78:25 79:19 81:23 83:10,18 86:15  87:13,17 88:4 91:22 92:18,23 96:2  99:18,19,23,23  <b>forget</b> [1] 88:25  <b>forgot</b> [1] 91:25  <b>forgotten</b> [1] 61:9  <b>former</b> [2] 7:12 21:13  <b>forth</b> [1] 15:8  <b>forward</b> [6] 30:10 62:3,11,17 63:17 77:  14  <b>founding</b> [1] 39:18  <b>four</b> [3] 26:11 28:1 100:18  <b>friend</b> [3] 37:16 56:4 60:6  <b>friends</b> [1] 42:11  <b>front</b> [4] 4:12 64:16 77:10,18  <b>fs</b> [1] 18:23  <b>fsia's</b> [6] 8:1 21:3 58:3 67:18 81:4 92:  8  <b>fully</b> [2] 5:17 16:9  <b>functions</b> [1] 63:23  <b>further</b> [4] 47:24 85:22 97:19 101:7  <b>furthering</b> [1] 33:8  <b>future</b> [1] 101:4 </p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p> <b>game</b> [1] 101:2  <b>gannon</b> [63] 2:4 3:6 34:25 35:1,4 36:  12 37:11,15 38:5,8,11,16,19,24 40:7,  17,22 41:2,17,21 43:13,23 44:4,13,  21 45:14,24 46:4,13,16,18 47:7,11  48:6 50:9,19,25 51:14,20 52:7,13 55:  3,16,20,22 56:2,11 57:2,5 58:1 59:7,  12 60:4,14,18 61:16 62:23 63:11,18,  21 64:10,19 65:22  <b>gate</b> [1] 50:17  <b>gatekeeping</b> [1] 43:19  <b>gates</b> [3] 37:18 38:7,10  <b>gave</b> [10] 13:10,11 43:21 44:6,10,16  68:4 69:17 91:2 97:11  <b>general</b> [9] 2:4 7:4 32:15 64:24 68:6,  24 75:1,1 95:17  <b>generally</b> [3] 35:16 76:13 89:22 </p>
---	---	---

<p><b>gets</b> [2] 14:5 49:23  <b>getting</b> [2] 28:4 47:3  <b>give</b> [16] 11:7 12:7 25:24 26:12 27:7 33:16 54:23 68:17 71:18 81:11,17 82:7,15 91:13,13 93:19  <b>given</b> [7] 29:1 34:20 59:6 78:5 79:24 83:6 97:11  <b>gives</b> [2] 81:7 97:9  <b>giving</b> [1] 75:18  <b>glaring</b> [2] 7:15,22  <b>goods</b> [5] 68:23,24 69:2 80:16 96:23  <b>gorsuch</b> [42] 25:6 61:19 70:10 71:10,15,21 72:6,16,20,25 73:3,8,11,15,18,20,24 74:3,7,21 75:10,13,16 76:5,8 88:14,18,24 89:3,10,13,16 90:3,6,9,12,16,19,21 91:6,9 100:8  <b>gorsuch's</b> [4] 77:4,17 80:5 94:12  <b>got</b> [4] 24:17 48:22 57:4 98:9  <b>gotten</b> [1] 50:17  <b>government</b> [40] 4:16 6:13,21 8:23 9:24 16:8 22:21 23:5,11 24:5 26:8,14 28:24 29:12 33:13,20 34:2,10,15 39:10,11 40:1 56:9,23 59:20 61:17 64:23 73:25 74:2 80:1 81:23 86:14,14,15 88:5 92:23 93:6 96:12 98:19 101:10  <b>governmental</b> [4] 8:21 18:7 39:4 61:2  <b>governments</b> [11] 5:18 6:15,16,19 14:24 16:2 23:19 26:21 79:19 92:18 99:19  <b>government's</b> [1] 24:6  <b>governor</b> [1] 44:25  <b>governs</b> [3] 37:8 65:17 87:20  <b>grab</b> [1] 52:22  <b>grace</b> [2] 6:17 74:17  <b>grains</b> [1] 68:23  <b>granted</b> [1] 43:3  <b>greater</b> [1] 79:14  <b>gross</b> [1] 39:1  <b>ground</b> [1] 24:25  <b>group</b> [1] 15:14  <b>grown</b> [1] 58:10  <b>guess</b> [5] 13:7 31:10 58:18 61:23 62:5  <b>guys</b> [1] 59:1</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>half</b> [1] 63:12  <b>halt</b> [1] 25:1  <b>hand</b> [2] 11:7 12:14  <b>happen</b> [5] 32:1,5 66:15 69:22 93:17  <b>happened</b> [3] 44:1 72:9 77:9  <b>happening</b> [1] 94:15  <b>happy</b> [2] 8:3 40:7  <b>hard</b> [3] 21:6 29:5 33:21  <b>harm</b> [1] 82:5  <b>harmoniously</b> [2] 10:11 98:10  <b>harmonize</b> [10] 7:2 18:18 19:7,9,20,21 20:21 67:14 95:9,15  <b>harmonized</b> [1] 19:13</p>	<p><b>harmonizing</b> [1] 7:6  <b>hate</b> [1] 101:6  <b>havana</b> [4] 69:11,12,12,14  <b>heading</b> [1] 53:17  <b>hear</b> [2] 4:3 62:11  <b>heard</b> [2] 69:6,10  <b>heavy</b> [1] 67:22  <b>held</b> [2] 61:8 97:5  <b>helms-burton</b> [9] 4:11 7:4,7 21:2 50:6 68:4 69:17 87:15 96:19  <b>help</b> [4] 26:15 33:5,6 43:6  <b>hence</b> [1] 53:21  <b>hibbs</b> [1] 5:6  <b>high</b> [1] 4:20  <b>highly</b> [1] 57:18  <b>hinges</b> [1] 55:19  <b>history</b> [7] 22:3,11 23:13,16,16 24:20 27:14  <b>hoc</b> [2] 62:16 92:19  <b>holding</b> [1] 59:20  <b>home</b> [2] 95:22 96:6  <b>honor</b> [2] 82:20 93:23  <b>hook</b> [4] 28:23 33:17 58:21 101:22  <b>hopefully</b> [1] 74:4  <b>host</b> [1] 28:16  <b>house</b> [4] 22:5 34:10 83:15 85:3  <b>however</b> [1] 99:5  <b>huge</b> [3] 25:25 62:10 77:5  <b>humanitarian</b> [5] 20:16,20 26:19 96:23 101:19  <b>hundred</b> [6] 9:7 45:11,13 87:23 88:2,19  <b>hundreds</b> [3] 25:16 99:14,17  <b>hypothetical</b> [2] 30:1 99:11</p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea</b> [3] 8:17 36:15 77:20  <b>ignore</b> [1] 16:5  <b>iii</b> [28] 4:19 6:25 10:11 11:25 15:24 17:19,22 22:5 30:8 35:17 39:21 41:12 42:1 64:23 65:15 67:17,23 68:18 72:1 74:22 75:1 83:9,12,16 88:23 97:6,21 98:2  <b>iii's</b> [3] 67:5,6 68:12  <b>immune</b> [6] 11:16,17,18,19 67:3 96:3  <b>immunities</b> [7] 35:10 54:12 67:2 75:6 83:11 87:13,18  <b>immunity</b> [100] 4:17 6:12,14 7:9,18 8:25 9:11,24 10:2 12:3 13:2,14,20 14:1,9,11,14,18 17:7,10 18:24 21:4,12 22:14 23:4,10,14,18,21 28:11 31:9 32:25 33:15 35:8 36:9,11 37:3 39:15 40:20 48:12,17,19,24 50:15,20 54:10,13,23 55:2 56:18 57:10,19 58:3,7,8,13,14,17 59:6,8,25,25 63:3,5 64:4 65:2,5,8,9,16,18 67:6,8,10 70:15 71:2 72:2 73:7 76:20 77:1 78:7 81:18,18 82:8,17 83:18 84:3,23 85:9,14,21 86:11 87:12,18 89:5 93:5,10,22 98:1,16</p>	<p><b>impersonating</b> [1] 31:4  <b>implausible</b> [3] 20:21 34:18 65:12  <b>implicate</b> [1] 10:12  <b>implication</b> [1] 60:10  <b>implications</b> [2] 33:24 48:1  <b>implied</b> [9] 10:15 70:17,20 71:13 95:18,21,24,25 98:15  <b>impliedly</b> [2] 8:1 12:19  <b>implying</b> [2] 63:16 94:16  <b>import</b> [1] 68:22  <b>importance</b> [2] 27:24 56:15  <b>important</b> [2] 5:1 56:22  <b>importantly</b> [1] 9:20  <b>importer</b> [4] 69:2 80:12 101:16,16  <b>importers</b> [2] 68:22 69:4  <b>imports</b> [2] 101:19,21  <b>impose</b> [2] 9:11 27:16  <b>impossible</b> [3] 38:9,13 89:20  <b>inapplicable</b> [1] 19:1  <b>incidental</b> [1] 38:1  <b>include</b> [3] 21:20 26:17 32:16  <b>included</b> [1] 22:6  <b>includes</b> [1] 4:16  <b>including</b> [7] 5:13,18 21:16 26:13 78:20,22 79:19  <b>inconsistent</b> [3] 12:20 67:7 87:4  <b>incorporates</b> [1] 21:15  <b>incorporating</b> [1] 65:25  <b>incredibly</b> [2] 5:23 83:9  <b>indeed</b> [2] 57:13 66:9  <b>indian</b> [1] 6:21  <b>indicated</b> [1] 16:7  <b>indicates</b> [2] 30:18 66:8  <b>indication</b> [2] 54:24 56:21  <b>indications</b> [1] 55:22  <b>indicia</b> [2] 28:16 29:1  <b>individual</b> [2] 62:11 65:24  <b>individuals</b> [1] 34:14  <b>infer</b> [2] 86:3,9  <b>inference</b> [6] 87:16 88:6,8,11,19 89:18  <b>inferring</b> [1] 88:2  <b>injured</b> [1] 92:5  <b>innumerable</b> [1] 69:16  <b>instrument</b> [1] 88:4  <b>instrumentalities</b> [42] 4:18 5:4,12,22 14:25 23:5,12,23 24:6,13,15,24 27:25 28:11,18,20 29:19 31:19,22 35:9,13 40:5 41:5,14 42:13 48:2 56:19,24 58:25 67:3,18 68:14 69:13 76:6,15 83:23 91:21,23 96:11 100:22 101:11,24  <b>instrumentality</b> [5] 33:16 80:12 88:5 99:22 100:5  <b>insufficient</b> [1] 70:22  <b>intend</b> [4] 65:6,7 87:16 93:9  <b>intended</b> [8] 6:1 7:11 25:24 31:9 32:5,24 46:21 94:17  <b>intending</b> [2] 23:14 65:19</p>
--	---	--

<p><b>intent</b> [6] 4:24 5:9 10:7 52:4,6 93:20  <b>intention</b> [2] 71:3 82:15  <b>intentionally</b> [2] 28:21 29:22  <b>intentions</b> [2] 62:7 92:13  <b>interaction</b> [1] 6:24  <b>interest</b> [3] 25:21 27:12 43:11  <b>interested</b> [1] 84:8  <b>interesting</b> [2] 48:1 86:20  <b>interests</b> [4] 36:4 44:2 45:3,9  <b>interfere</b> [1] 26:9  <b>international</b> [16] 23:6 24:8 39:16,20, 24 40:10 42:4 43:9 49:5 50:7 58:15 66:7 74:23 75:21 77:21 100:25  <b>interpret</b> [2] 94:20 98:9  <b>interpretation</b> [2] 39:17,17  <b>interpreted</b> [1] 93:8  <b>interrupt</b> [2] 70:11 80:8  <b>intro</b> [1] 55:5  <b>investment</b> [4] 9:4 30:24 31:5 33:4  <b>investments</b> [2] 20:9 49:13  <b>inviting</b> [1] 41:20  <b>involving</b> [2] 6:12 12:22  <b>iraq</b> [3] 12:24 18:20 19:1  <b>iraq's</b> [1] 18:24  <b>irreconcilable</b> [4] 8:18 68:1 70:8,12  <b>isn't</b> [13] 9:10,12 40:15 46:17 48:14 49:2 61:4 72:12 73:9 75:22 84:6 92:1, 10  <b>isolate</b> [1] 30:23  <b>issues</b> [1] 57:20  <b>itself</b> [10] 8:19,24 9:6 10:2 33:14 35: 22 76:17 79:10 83:9 86:25</p>	<p>17 15:6,11 25:5 53:25 54:2,3 55:15, 18,21,25 56:5 57:1,4,7 58:18 59:10, 13,22 60:12,17 61:15 78:20,23 79:2, 5 92:15 100:7  <b>kavanaugh</b> [36] 25:7,8 26:5,24 27:5, 12,18 28:6 43:12,14,24 44:5,11,15 45:11,19 46:1,10,15,17 47:1,10 61: 20,25 76:23 77:2,13 78:9,12,18 81:6, 12,15,25 83:5 100:9  <b>keep</b> [5] 18:18 23:14 46:10 70:11 92: 11  <b>kept</b> [1] 23:12  <b>key</b> [2] 33:14 69:17  <b>kill</b> [1] 66:13  <b>kimel</b> [6] 5:6,15 12:8,14 15:8,13  <b>kind</b> [12] 15:9 16:11 21:22 26:22,25 49:25 65:13 72:11 74:14 75:22,24 92: 24  <b>kinds</b> [3] 6:9 16:7,22  <b>kirtz</b> [34] 4:24 5:6,15 6:6 8:11,18 9:12, 21,22 10:14,16,19,25 12:8,15 15:8, 13 19:12,12 36:11 56:7,13 73:5 86: 10,20,23,25 87:3 91:17 92:11,24 98: 4,4,18  <b>kirtz's</b> [2] 8:22 98:13  <b>knock</b> [1] 87:21  <b>knowingly</b> [2] 28:21 29:22  <b>knowledge</b> [1] 41:11  <b>knows</b> [1] 13:18</p>	<p><b>liability</b> [1] 75:19  <b>liability-creating</b> [1] 53:25  <b>libertad</b> [3] 28:10 35:7 46:20  <b>licenses</b> [2] 68:6,25  <b>light</b> [2] 16:16 62:8  <b>likely</b> [4] 24:25 49:6 50:3 69:8  <b>limits</b> [1] 34:9  <b>lines</b> [2] 55:14 81:9  <b>linked</b> [1] 26:19  <b>links</b> [2] 20:16,20  <b>literally</b> [3] 48:21 50:14 58:12  <b>litigation</b> [1] 41:20  <b>little</b> [9] 21:6 32:22 55:19 57:14 64:17 66:17 79:25 80:22 101:25  <b>logic</b> [1] 40:15  <b>long</b> [3] 50:8,10 101:2  <b>longer</b> [1] 85:13  <b>long-established</b> [1] 17:22  <b>long-lived</b> [1] 49:12  <b>look</b> [18] 6:25 12:2 16:2,17 17:20 18: 20,20 24:21 30:8 61:5 77:8 78:3 84: 10 85:22 88:21,22,22,23  <b>looking</b> [12] 16:17 18:21 20:11 24:19 27:13 37:20 65:14 77:3,7,15,16 89: 20  <b>looks</b> [1] 41:22  <b>lot</b> [4] 29:6 36:13 49:10 64:20  <b>lower</b> [1] 6:10  <b>lurks</b> [1] 29:14</p>
<p style="text-align: center;"><b>J</b></p> <p><b>jackson</b> [40] 15:17 17:2,8,13,24 18:4, 8,11 30:5,6 31:12,23,25 32:17 33:22 34:1,4,12,17,22 36:17 61:22,23 63:7, 13,20 64:8,13,20 66:18 82:9,13,21 83:2 91:12 92:10 94:8,11 95:12 100: 11  <b>job</b> [3] 24:17 70:5,7  <b>joint</b> [1] 84:13  <b>judgment</b> [9] 48:4,15,22 49:2,14 50:1, 13 57:22 61:4  <b>judgments</b> [6] 5:11 26:14 30:10 35:14 47:20 100:25  <b>judicially</b> [2] 47:2,8  <b>jules</b> [3] 2:8 3:10 66:22  <b>jurisdiction</b> [14] 13:11 16:21 35:21 37: 5,12 51:2,13,16,25 53:11,20,21 55: 10 74:23  <b>jurisdictional</b> [18] 12:3 13:20 14:1,21 35:8 37:2,3 48:19,23 50:19,24 51:6 52:8 53:24 55:24 57:6 58:8,14  <b>justices</b> [1] 74:5</p>	<p style="text-align: center;"><b>L</b></p> <p><b>labeled</b> [1] 51:5  <b>landed</b> [1] 61:25  <b>language</b> [9] 15:19 24:16 25:20 30:8 56:14 86:12 94:18 98:14,17  <b>largest</b> [1] 9:18  <b>last</b> [3] 13:17 68:10 95:8  <b>later</b> [4] 85:11 94:4,12,16  <b>latter</b> [1] 7:12  <b>laughter</b> [2] 74:6 90:23  <b>law</b> [19] 11:11 19:2 23:6 24:8 25:4 36: 21 39:16,20,24 40:10 42:5 43:9 49:5 50:7 66:7 70:18 74:23 75:21 77:21  <b>lawsuit</b> [1] 64:10  <b>lawsuits</b> [8] 46:23,24 60:22 64:6,7 67: 17 80:3 97:6  <b>lays</b> [1] 92:20  <b>least</b> [2] 73:21 80:10  <b>leave</b> [1] 87:5  <b>leaving</b> [1] 27:17  <b>led</b> [1] 82:24  <b>legal</b> [2] 57:22 60:2  <b>legislating</b> [1] 66:2  <b>legislative</b> [4] 22:11 24:20 27:14 43:1  <b>length</b> [1] 25:13  <b>less</b> [1] 49:6  <b>letter</b> [10] 9:10,16,21 24:7 42:10 83:14 86:17 87:7 88:6 93:3  <b>level</b> [1] 8:4</p>	<p style="text-align: center;"><b>M</b></p> <p><b>made</b> [11] 9:16,19 23:3 36:23 37:22 42:25 52:20 71:3 82:21 83:14 85:17  <b>magic</b> [8] 4:22 14:5,8 54:15 89:6 91:7, 9 94:25  <b>main</b> [5] 39:4,5,8,9,9  <b>majority</b> [1] 38:12  <b>manage</b> [1] 43:6  <b>management</b> [1] 5:7  <b>many</b> [14] 10:18 11:25 20:9 59:17 69: 25 70:3,4 73:6 74:24 88:12 89:21,22 91:3 96:19  <b>matter</b> [8] 6:16 13:15 48:5,8 55:10 60: 2 74:17 95:23  <b>matters</b> [1] 100:20  <b>mean</b> [34] 6:8 8:10 10:25 15:22 18:14 27:9 29:4 33:23 38:5 44:4 45:24 47:2 48:14 49:1,16,24 50:9 54:4 55:4,12 58:1,18 59:2 61:3 62:9 64:5 65:9 71: 25 77:3 81:13 82:25 83:24 84:24 87: 24  <b>meaningful</b> [1] 99:6  <b>meaningless</b> [3] 7:16 86:17 98:2  <b>means</b> [3] 10:10 51:23 54:19  <b>meant</b> [4] 30:9 31:8 54:24 85:12  <b>mechanism</b> [1] 36:2  <b>medical</b> [2] 96:22,23  <b>medicine</b> [4] 66:9,11 101:16,20  <b>medicines</b> [2] 96:22,23</p>
<p style="text-align: center;"><b>K</b></p> <p><b>kagan</b> [34] 10:22,24 12:5 13:7 14:2,8,</p>		

## Official - Subject to Final Review

<p>meets [1] 98:4  mention [1] 83:17  mentioned [4] 4:13 17:5,11 85:11  mentioning [1] 70:12  mere [1] 85:19  merely [1] 50:16  met [2] 67:5,19  might [10] 13:12 46:1 48:8 50:10 66:12 70:13 75:11 88:9 92:25 97:13  mileage [1] 32:23  million [3] 49:10 88:9 96:22  millions [2] 68:9,22  mind [2] 22:13,14  minimize [1] 56:15  minute [2] 80:21 88:8  minutes [1] 80:21  mismatch [4] 39:1 58:10 60:19 101:17  missing [1] 50:8  mitigate [1] 41:10  mm-hmm [2] 89:2 98:23  mobil [1] 4:4  moment [2] 13:4 20:8  money [6] 20:6 69:2 80:12,19 83:25 84:18  months [6] 24:22 64:5 66:17 77:11 83:20 85:11  moreover [1] 68:3  morgan [5] 2:2 3:3,13 4:7 100:16  morning [5] 4:14 53:11 69:6,11 75:4  most [6] 5:1 9:18 10:18 28:16 80:2 83:23  motion [1] 20:2  moving [1] 12:16  ms [57] 4:6,9 6:7 7:1 8:2,9,13 9:13 10:5,13,23,25 12:5 14:2,12,22 15:11 17:2,12,24 18:6,9,13 19:15,19,25 20:10 21:5 22:10,18,23 23:1,7,15 24:1,9 26:4 27:4,9,13,20 28:9,13 29:16 31:12,24 32:7 33:10,25 34:4,17 49:21 65:12 70:13 73:21 100:14,18  much [7] 9:4 15:7 27:7 47:4 85:3 99:4,6  multiple [1] 35:6  murder [1] 34:7  must [5] 8:24 31:8 67:14 85:7 97:12</p> <hr/> <p style="text-align: center;"><b>N</b></p> <hr/> <p>name [1] 31:18  narrow [5] 63:6 64:3 92:12 95:20,20  narrower [2] 26:1 48:18  national [8] 25:20 27:12 36:4 43:10 44:2 45:2,8 92:4  nationals [1] 61:10  nations [1] 28:20  natural [1] 65:14  necessarily [3] 31:10 65:9 71:11  necessary [2] 8:4 26:15  need [19] 4:22 9:21 13:5,9 18:14 25:9</p>	<p>26:22 27:25 28:3 30:3 37:18 44:9,24 48:9 55:17 64:9,14 85:22 95:1  needed [1] 26:6  needs [4] 4:23 28:25 36:16 47:9  negate [6] 9:25 10:17 12:12 36:1 87:2 98:21  negation [2] 98:25 99:4  negative [1] 60:9  neighboring [1] 35:20  neon [1] 7:22  never [6] 10:21 29:2 38:20 85:10 90:4 93:7  new [3] 58:10 64:6 91:5  next [3] 4:4 44:1 52:18  nml [3] 48:20 58:5 91:2  nobody [3] 9:16 72:3 78:16  non-absolute [1] 67:8  non-cuba [1] 29:3  none [2] 74:4,5  normal [1] 37:19  nose [1] 95:14  nothing [6] 41:9 48:16 67:5 78:6 84:22 86:21  notion [4] 7:17 10:20 12:16 15:13  notwithstanding [3] 33:1 60:7 93:11  nuclear [1] 15:3</p> <hr/> <p style="text-align: center;"><b>O</b></p> <hr/> <p>object [1] 67:11  objected [1] 67:11  observed [1] 48:19  obtained [1] 35:15  obviates [1] 48:9  obvious [1] 67:16  occasionally [1] 49:11  occur [2] 79:14 92:9  occurs [2] 17:17 92:5  odd [3] 59:4 64:18 77:18  offending [1] 43:7  offices [1] 69:7  often [3] 7:15 50:13 60:7  okay [20] 8:9 11:21 18:21 41:16 63:7 73:3,11,22 75:15 80:20 81:2 85:25 89:6 90:6,6,6,9,21 93:7 95:7  old [2] 74:15 75:24  omb [1] 10:25  on/off [2] 25:11,17  on-and-off [1] 74:9  once [7] 19:23 24:17 41:15 64:10 81:22 89:16 95:12  one [47] 4:12,13 7:3,15 9:18 10:8 11:1,7 14:3,4 15:1,2,3 16:13,18 19:5,6,21 20:19 24:10 25:12 26:3 32:9,18 38:2 39:11 42:24 53:9 58:19,19 60:13 63:23 67:4,13,18 69:9,15 74:10,18 76:2 78:3 80:21 83:17 88:8 92:25 95:8 96:3  ones [1] 40:24  one's [1] 71:12</p>	<p>ongoing [1] 9:9  only [19] 17:18 19:10 20:18 21:18,22 28:17 31:17,20 39:24 51:12 53:3 55:7 64:5 70:16 71:1 85:6 88:18 101:22,22  onus [1] 62:6  operate [2] 31:2 65:19  operated [2] 69:14 77:25  operates [1] 9:6  operating [2] 65:6 93:14  operative [1] 19:14  opinion [1] 86:21  opportunity [1] 75:18  opposed [2] 17:20 77:19  opposite [1] 26:5  option [1] 26:1  oral [6] 3:2,5,9 4:7 35:1 66:22  order [3] 57:18 62:21 66:16  original [5] 16:4 22:4 23:17,17 52:4  other [44] 6:9,20 7:6 9:9 11:8,13,25 16:19 17:4,10 18:1,4,6,12 19:21 25:8,14 27:5 28:12,20 29:11,18 30:18 33:12 34:20 35:12 40:4 42:11 49:3,6 51:10,17,17,21 52:14,17,25 54:25 55:13 56:3 58:2 71:23 79:19 87:3  others [2] 49:12 61:16  otherwise [3] 35:23 44:23 89:8  ousted [1] 35:24  ouster [1] 57:5  out [30] 12:13 15:14 17:15 22:8,20 23:9,21 24:3,4,14 25:2 31:18 32:23 33:6 43:16 48:13 52:14 59:8,10 60:7 64:7 65:24 73:25 79:24 82:2 83:19 85:12 87:14,21 92:21  outcry [1] 23:19  outside [1] 93:15  over [7] 7:18 9:7 14:19 16:17 56:24 96:24 101:3  overcome [2] 15:25 16:4  overlap [1] 38:1  override [3] 76:25 81:18 95:17  oversight [1] 5:7  own [1] 72:8  owned [1] 69:14</p> <hr/> <p style="text-align: center;"><b>P</b></p> <hr/> <p>page [4] 3:2 12:14 15:1 27:2  paragraph [1] 96:2  parallel [1] 58:12  part [3] 32:19 42:3 45:21  partially [1] 41:25  particular [6] 12:23 13:4 31:20 35:23 62:2,14  particularly [1] 35:15  parties [4] 29:24 76:7 78:21,22  partnering [1] 29:21  parts [1] 58:3  pass [3] 17:3 33:16,19  passed [1] 25:3</p>
--	---	---

<p><b>past</b> [1] 44:23  <b>path</b> [1] 87:6  <b>patient</b> [1] 66:13  <b>pays</b> [1] 69:2  <b>peculiar</b> [1] 54:18  <b>pending</b> [1] 41:12  <b>pennsylvania</b> [1] 2:8  <b>people</b> [2] 61:5,8  <b>people's</b> [1] 30:15  <b>percent</b> [15] 10:20 12:9 45:12,13 87:9,14,21 88:19 89:10,17 90:1 93:13,13 99:9,10  <b>perhaps</b> [1] 49:20  <b>permit</b> [1] 19:16  <b>permits</b> [1] 18:25  <b>permitted</b> [1] 19:11  <b>person</b> [2] 35:11 77:22  <b>personal</b> [2] 53:21 55:10  <b>peter</b> [1] 96:16  <b>petition</b> [1] 15:1  <b>petitioner</b> [11] 2:3,7 3:4,8,14 4:8 35:3 67:20 68:11 99:17 100:17  <b>petitioner's</b> [3] 40:3 43:17 68:3  <b>phrasing</b> [1] 45:3  <b>pick</b> [1] 77:4  <b>piece</b> [1] 5:2  <b>pieces</b> [1] 32:8  <b>pill</b> [2] 61:13 66:10  <b>pittsburgh</b> [1] 2:8  <b>pivots</b> [1] 67:20  <b>place</b> [3] 14:19 27:19 62:15  <b>plaintiff</b> [2] 38:21 48:21  <b>plaintiffs</b> [1] 100:5  <b>planes</b> [1] 25:2  <b>plausible</b> [3] 7:11 19:21,24  <b>plays</b> [1] 101:2  <b>please</b> [3] 4:10 35:5 66:25  <b>plus</b> [1] 56:13  <b>point</b> [35] 6:18 7:10,24 10:14 12:8 15:23 18:19 22:2 30:2 34:12,18 36:23 40:10 41:22 42:5,25 53:16 56:1 57:16 59:13 69:17 73:12 76:9 82:1,9,13 83:2 85:1,15 90:10 94:12 95:8 99:4 101:6,15  <b>pointed</b> [2] 60:7 79:24  <b>pointing</b> [3] 52:8,11,11  <b>points</b> [4] 29:7 41:9 51:1 100:18  <b>poison</b> [2] 61:13 66:10  <b>policy</b> [8] 30:13 33:24 42:2 43:7 60:23 66:14 67:24 97:16  <b>political</b> [2] 30:12 47:12  <b>portion</b> [1] 57:6  <b>ports</b> [1] 69:6  <b>position</b> [4] 40:6,13,16 60:15  <b>possibilities</b> [1] 69:25  <b>possible</b> [5] 10:9 64:2 67:15,16 75:21  <b>possibly</b> [1] 16:24  <b>potential</b> [4] 39:11 41:10 44:25 87:14  <b>potentially</b> [2] 74:12 101:12</p>	<p><b>power</b> [28] 19:8 25:25 27:8 41:24 42:18 43:4,5,15,22,25 44:6,10,16 45:16 61:4 63:19 66:5 68:5 69:18 77:24 78:5,7 81:7,17,21 82:7 97:9,12  <b>practical</b> [8] 47:25 48:5,8 57:20 59:15,23 60:1 67:21  <b>practically</b> [1] 100:20  <b>practice</b> [2] 78:13,14  <b>pre-1942</b> [1] 64:11  <b>precedent</b> [1] 87:4  <b>preexisting</b> [1] 17:23  <b>pre-fsia</b> [5] 45:22 62:1 97:21,22,24  <b>premise</b> [1] 68:4  <b>present</b> [1] 8:18  <b>preserve</b> [1] 87:17  <b>preserving</b> [1] 33:15  <b>president</b> [54] 9:5 13:1 18:25 19:6,8 25:4,10,18,25 27:7,15,21 41:24 43:3,6,21 44:3,7 45:12,23 46:11,13 47:20 62:2,16 64:2 66:13 68:5 69:18 74:10,24 75:18 76:11,19,20,22 77:5,18,21 78:4 79:11 81:7,11,17,19,21 82:7,16,23 83:10 85:8,12 97:9,11  <b>presidential</b> [6] 18:22 26:7,23 45:21 83:6 101:7  <b>presidents</b> [1] 69:19  <b>president's</b> [4] 25:19 77:10,23 78:7  <b>pressure</b> [1] 4:15  <b>pretty</b> [6] 7:15,22 10:1 54:19 64:24 100:24  <b>prevent</b> [3] 60:2 62:15 82:10  <b>preventing</b> [1] 20:14  <b>previously</b> [2] 54:1 78:1  <b>primary</b> [8] 30:20 32:22 33:8,10,12,12,13 71:22  <b>principles</b> [3] 8:14,17 9:11  <b>prior</b> [1] 98:3  <b>private</b> [16] 29:24 33:17 34:14,20 39:25 76:3,5,7 78:20,22 79:14,17 80:3 81:9 83:24 101:13  <b>probably</b> [11] 27:10,22 28:14,19 33:12 38:12 50:8 73:20 98:3,4 99:15  <b>problem</b> [8] 14:5 15:22 16:18,19 31:5 41:23 46:23 58:24  <b>problems</b> [3] 14:3 16:13 42:2  <b>procedural</b> [3] 51:5 52:11 53:17  <b>procedure</b> [1] 51:4  <b>procedures</b> [3] 51:12,19 52:16  <b>proceed</b> [6] 30:12 46:7,12 60:22 74:17 76:1  <b>proceeded</b> [1] 59:4  <b>process</b> [3] 30:19 45:1 53:21  <b>products</b> [1] 9:8  <b>profiteer</b> [1] 84:17  <b>progress</b> [1] 26:10  <b>promote</b> [3] 36:3 45:9 46:21  <b>property</b> [16] 9:7 28:22 30:15 34:8 39:3 48:3 49:15 60:25 61:2,6,10 69:5,9 79:20 80:23 84:18</p>	<p><b>protections</b> [1] 64:4  <b>provide</b> [1] 91:15  <b>provides</b> [5] 7:8,9 13:19 63:22 67:2  <b>providing</b> [3] 13:24 14:20 86:13  <b>provision</b> [12] 18:22 19:2 21:23 23:21 24:10 25:10 50:24 52:8,22 58:11 82:5 83:6  <b>provisions</b> [29] 12:23 20:14 21:12,15,18 24:14 26:11 28:1 32:14 34:5,7 35:6,12,15 36:14 37:2 40:23 51:9,15 52:18 53:15 56:3 57:2,10 58:22 59:25 60:20 65:23,24  <b>pull</b> [2] 52:23 66:16  <b>pulling</b> [1] 65:24  <b>punish</b> [1] 34:15  <b>punishing</b> [2] 30:14 34:2  <b>purely</b> [1] 30:1  <b>purpose</b> [6] 32:22 33:8,11,12,13 93:2  <b>purposes</b> [3] 11:15 12:3 46:20  <b>push</b> [1] 39:19  <b>pushing</b> [1] 39:25  <b>put</b> [12] 4:14 17:7 45:21 62:6,15 64:3,9,14 74:12,19 75:17 77:18  <b>putting</b> [5] 22:8 27:10 47:3 57:20 60:1  <b>puzzle</b> [1] 61:24</p> <hr/> <p style="text-align: center;"><b>Q</b></p> <hr/> <p><b>qatari</b> [1] 75:9  <b>qualifications</b> [1] 44:7  <b>qualms</b> [2] 29:18 30:1  <b>quarter</b> [1] 97:1  <b>question</b> [56] 14:13 17:5,8,9,18 18:2,9,17,20 20:11,17 23:3 28:15 29:1,8,9,13 32:15 37:12 38:7 40:8 41:16 42:4 44:17 48:1,7,10,12 51:16,24 52:4 53:11 54:13,14 55:1 56:10 57:8 59:11 64:16 65:3,5 70:2 73:9,14 75:14 77:15 79:21 80:5 84:3,6 86:2 95:3,18 98:25 99:11 100:19  <b>questioning</b> [1] 80:9  <b>questions</b> [7] 6:3 36:7,18 55:9 68:16 77:5 82:3  <b>quibbling</b> [1] 36:15  <b>quick</b> [1] 24:10  <b>quite</b> [4] 25:14 44:6 60:16,18  <b>quote</b> [1] 42:11</p> <hr/> <p style="text-align: center;"><b>R</b></p> <hr/> <p><b>raise</b> [1] 39:16  <b>raised</b> [2] 59:16 66:3  <b>raises</b> [1] 54:14  <b>raising</b> [1] 15:24  <b>rare</b> [1] 20:18  <b>rather</b> [5] 7:12 26:2 35:20 54:17 67:14  <b>ratner</b> [63] 2:2 3:3,13 4:6,6,7,9 6:7 7:1 8:2,9,13 9:13 10:5,13,23,25 12:5 14:2,12,22 15:11 17:2,12,24 18:6,9,13 19:15,19,25 20:10 21:5 22:10,18,23</p>
---	---	--

<p>23:1,7,15 24:1,9 26:4 27:4,9,13,20 28:9,13 29:16 31:12,24 32:7 33:10, 25 34:4,17 49:21 65:12 70:13 73:21 100:15,16,18 reached [1] 8:4 read [21] 4:11 8:12 10:7,11 11:1 13:23 18:23 20:17 21:7,10,20,22 51:21 53: 3 55:7 57:17 65:8 67:12 73:17 96:4,6 reading [8] 9:3 42:20 63:1 86:20 87:3 95:10,12,19 reads [1] 52:14 real [5] 73:8,13 77:8,16 92:11 really [23] 22:11 25:18 27:6 30:18,19 31:1 43:18 44:2 45:22 50:7 55:18,19 57:10 58:23,24 59:2 62:12,18 64:21 72:11 93:8,19 101:16 reason [14] 11:10 25:23 26:6,17 49:25 55:12 57:11 62:14 83:16,17,17 90:24 91:20 92:11 reasons [1] 7:13 rebut [1] 85:6 rebuttal [4] 3:12 49:23 100:14,16 receipt [1] 80:11 receive [1] 80:18 recognized [3] 5:6 44:22 47:14 reconcile [6] 36:21 37:17 70:16 71:8, 12 72:4 reconciled [1] 37:14 reconciling [2] 72:11 73:1 record [1] 9:4 recover [2] 93:7 101:5 redirect [1] 75:13 refer [1] 47:9 reference [3] 13:5 23:22 54:18 references [1] 56:23 referred [1] 66:11 refused [1] 14:6 regard [1] 35:9 regime [5] 7:18 64:12 75:24,25 98:1 region [1] 91:20 registering [1] 50:4 regular [1] 31:2 regulations [2] 15:2,3 rejected [1] 12:13 relate [1] 12:23 relating [1] 101:13 relationship [1] 33:20 relevant [4] 11:22 15:7 43:1 86:7 reliance [1] 85:2 relies [1] 86:23 rely [2] 6:1 14:20 relying [7] 15:7,12 16:22 17:22 22:25 56:4 98:24 remedies [2] 5:17 16:9 remittance [1] 97:16 remittances [4] 68:9 97:3,5 101:20 remove [1] 13:1 rendered [3] 86:16,17 98:2 repeal [17] 10:12,15 12:19 52:5 70:20,</p>	<p>21 71:13,23 72:15,19,22,24 73:5 95: 18,20,21,25 repeals [1] 70:17 repeatedly [2] 5:12 16:6 replace [1] 14:11 report [2] 27:14 45:5 reports [1] 45:15 republic [1] 12:24 repudiate [1] 62:13 request [1] 43:2 requested [1] 45:4 required [3] 8:15 26:25 89:4 requirement [2] 14:6 52:2 requirements [3] 51:5 52:12 53:17 requires [1] 92:8 reserve [1] 41:16 residential [1] 34:8 resist [1] 70:24 resources [1] 79:13 respect [14] 14:7 19:1 21:11 40:11,21 41:4 43:10 54:22 55:10 58:2,14 82: 16 92:14 94:13 respects [1] 96:19 respond [3] 26:3 30:16 70:13 respondents [4] 2:9 3:11 7:6 66:23 respondents' [2] 42:20 101:21 response [2] 42:16 55:6 responses [1] 76:2 rest [1] 10:19 restrictions [1] 67:22 restrictive [4] 5:23 20:13 67:8 98:1 resulted [1] 68:7 reverse [1] 36:6 reversed [2] 8:1 12:25 reverting [1] 74:14 review [1] 47:5 reviewable [2] 47:2,8 rhetoric [1] 43:16 rid [1] 24:17 risk [2] 41:10 43:7 roberts [19] 4:3 20:22 21:25 25:5 28:7 30:4 34:23 47:22 50:21 54:2 61:18 66:19 94:24 95:2,7 97:17 98:11 100: 7,14 role [1] 77:5 route [1] 5:5 rule [16] 7:4 13:3 16:2,20 17:4,15,20, 23 36:25 46:6 52:19 62:8,22 63:2 93: 14 95:16 rules [11] 13:20,25 14:21 21:4 31:2,20 51:7,9 52:20,24 79:7 russian [1] 75:7</p> <hr/> <p style="text-align: center;"><b>S</b></p> <hr/> <p>salazar [1] 70:18 same [9] 5:20 6:5 19:5 51:9 56:17 58: 2 64:11 77:3 89:17 satisfied [2] 37:6 50:16 satisfy [2] 38:21 62:21</p>	<p>saw [3] 75:3,3,4 saying [26] 10:7 15:16 19:5 27:2 32:2, 23 33:2 37:17,17 40:16 46:2 51:14 55:19 56:6,10 59:23 60:16,21 62:12 63:16,18 72:8 75:22 85:1 89:5 99:5 says [24] 7:15 9:21,22 15:19 16:1,17 17:1 21:18 25:9 32:13 37:4 51:4 52: 20 53:2 61:5 71:11 78:6 84:22 86:24 87:2 96:2 98:18 99:20,22 scalia [1] 91:2 scheme [1] 12:17 schemes [3] 12:11 36:22 37:21 scholars [2] 39:15,16 second [12] 5:16 24:19 26:1 41:14,18, 21 47:4 65:11 69:10 76:18 101:1,6 secondly [1] 44:13 secretary [4] 74:25 83:14 96:16,16 section [16] 5:2 21:19 24:11 32:12,13, 15 35:18,20,23 37:4 51:4,11 52:21 67:1 96:2 97:14 see [12] 30:2,16,22 31:10 32:21 39:12 49:10 50:23 70:8 82:18 86:3 92:24 seek [1] 100:23 seem [1] 85:18 seemed [1] 11:5 seems [10] 13:8,18,22 30:6 50:3,7 54: 4 65:11,13 77:17 seen [1] 29:2 selectively [1] 21:15 senate [2] 22:5 96:17 sense [2] 5:25 55:24 sent [1] 83:14 separate [4] 7:18 26:11 46:9 52:1 september [1] 83:15 series [1] 11:17 seriously [1] 22:4 service [2] 52:20 53:20 service-of-process [1] 52:19 set [4] 30:25 31:7,14 58:6 sets [1] 11:17 setting [1] 17:21 settlement [2] 47:17 49:19 seven [1] 9:17 several [4] 7:13 40:23,25 65:23 sg [1] 82:14 shall [3] 52:20 67:3 96:3 she'd [1] 71:21 she's [1] 72:8 ships [3] 53:10 69:1,11 shot [3] 25:1 50:8,10 shouldn't [4] 6:19 11:20 25:24 83:12 show [5] 35:7 70:14,25 71:1 72:12 shown [1] 84:7 shows [1] 53:23 shut [1] 101:18 sia [1] 22:6 side [4] 25:8 27:17 42:11 72:12 sign [2] 7:22 10:1 signals [1] 34:21</p>
---	--	---

<p>signed [1] 25:4  significant [1] 100:21  silent [1] 65:15  similar [1] 77:16  simply [3] 6:18 7:10 48:21  simultaneously [2] 7:14,20  since [4] 9:8 47:3 58:9 77:9  single [1] 41:12  situation [5] 12:25 37:25 47:15 49:7 93:9  situations [1] 87:6  six [4] 64:4 66:17 69:13 77:11  sky [1] 25:2  slightly [1] 29:9  slow [1] 63:24  smaller [1] 58:6  solicitor [1] 2:4  solve [1] 31:6  somebody [1] 50:13  somehow [1] 33:4  sorry [3] 38:4 70:11 75:15  sort [11] 10:24 12:17 28:16 30:14 36:20 41:23 44:9 46:5 48:8,13 58:20  sorts [3] 68:24 82:24,25  sotomayor [62] 7:23 8:2,7,10,16 9:13 10:3,6,13 11:10 12:18 15:23 18:17 19:15,16,23 20:1,10 22:1,2,10,16,19,24 23:2,8,15,24 24:3,9 38:4,6,9,14,17,22 39:8 40:15,18,25 41:3,15,19 50:23 51:3,18 52:3,10 55:6 63:1 79:12,18,23 98:12,13,24 99:2,8,12,16,25 100:3  sotomayor's [1] 70:1  sovereign [58] 4:17 6:11,14 8:24 9:11 13:2 17:10 18:1,5,7,12,24 19:17 23:4,10 28:10 31:9 32:24 35:10 36:9,10 39:15 40:20 53:8 54:11,23 55:2 56:18 57:19,23 63:3,4 64:4 65:2,5,7,9,16,18 67:1 70:14 71:2 72:2 73:7 75:6 82:17 83:11,18 84:2,23 85:21 87:13,17 89:5 93:5,10,21 98:16  sovereigns [14] 6:9,10,20 17:5,6,11,14,17 29:11 43:8 54:8,10 55:11 78:25  sovereignty [1] 6:5  spate [1] 91:18  speaking [1] 55:9  speaks [1] 15:24  special [1] 17:15  specific [10] 7:5 13:3 23:22 24:13 31:20 40:24 56:23 63:5 95:16 101:9  specifically [3] 9:23 26:15 42:11  speed [1] 44:25  square [1] 33:21  squared [1] 15:18  stand [1] 85:17  standard [2] 5:5 100:24  staring [1] 92:2  start [3] 5:1 40:8 95:12</p>	<p>state [12] 12:9,10 24:21 42:10 67:2 74:16,25 75:25 83:14 96:16 99:23,23  state-controlled [2] 29:20,21  stated [1] 28:13  statement [15] 8:15 16:4,20,25 17:3 18:15,15,16 26:25 36:16 62:8,21 65:4 85:3,6  statements [2] 45:6 85:17  states [26] 2:6 3:7 5:24 6:12,20 7:20,21 12:13 24:12,18 35:2 48:3,11 50:3 51:7 58:15 59:18 61:1,3 68:8,23 80:19 92:9 96:3,13 100:22  statute [65] 7:25 8:11,12,13,17 10:2 11:22 13:10,16,21 15:20 16:1,16 17:7 20:17 26:12 29:6,10 30:20 31:16 33:9 34:5,13 36:19 37:8 42:8 45:20 54:6 56:25 57:13,17 63:10 65:8,17,19 72:7 73:6,19 74:20 75:1 77:4,6,10 82:18 86:4 88:21 91:5,8,24 92:15,20 93:1 94:13,18 95:9,19 96:5,6,9,18 97:8,15 98:17 99:20,24  statutes [21] 7:2,16 10:10 12:1 13:8 18:18 19:7,10,13 20:21 37:14 39:23 67:15 68:2 70:16 71:7,9 89:20 95:10,16 98:10  statutory [10] 12:11 14:4 22:3 25:20 28:16 34:21 36:22 37:21 98:7,8  still [15] 9:2 10:9 19:13,16 20:8 23:2 24:24 36:15 38:17 52:3 59:8 85:7,8 95:21,25  stop [1] 7:24  stops [1] 88:8  stripping [1] 73:7  strong [3] 66:9,11,12  stronger [1] 6:13  structurally [1] 82:1  structure [2] 77:3,22  subject [3] 13:25 43:19 55:9  subsection [3] 51:6,8 52:19  subsequently [1] 92:21  subsidiaries [2] 22:22 40:1  substantial [2] 26:9 96:20  substitute [2] 13:21 67:24  substituted [1] 22:21  succeed [3] 67:23 87:9 89:24  successfully [1] 9:16  sudden [1] 25:2  sue [8] 40:4 75:5,7,8,8,9 92:22 100:5  sued [4] 69:5,15 78:17 79:17  sufficient [1] 85:21  suggest [1] 85:18  suggested [1] 11:10  suggestion [2] 23:9 70:25  suggestive [1] 21:11  suggests [1] 44:22  suit [14] 11:3,7 20:1,3 37:24 38:20 51:23,25 52:25 53:2,2,8 74:16 76:1  suits [27] 5:21 6:12 16:7 19:17 35:17,19,21 36:1 38:12 42:12 43:18 44:20</p>	<p>48:20 49:11 53:1 62:3,11,17 67:23 69:25 70:3 76:3,4 77:14 81:19,22 98:2  sum [2] 4:24 14:15  superfluous [1] 12:9  super-majorities [1] 25:3  super-super-clear [1] 71:1  supplement [1] 13:6  supplies [3] 35:21 96:22,24  supported [1] 19:3  supporting [3] 2:6 3:8 35:3  survived [1] 20:2  survives [1] 9:3  suspend [16] 41:25,25 45:17 64:5 76:12,12,14,16,21 78:5,7,15,16,19 81:8,17  suspenders [1] 60:11  suspending [1] 81:24  suspension [17] 26:11 27:16 28:1 41:24 43:3,5,15 44:6 45:21 66:5 78:24 79:2,6,23 82:6 101:7,9  suspensions [1] 101:13  swath [1] 38:18  swept [1] 29:23  swiss [1] 37:25  switch [5] 25:11,17 74:9 75:17 82:16</p> <hr/> <p style="text-align: center;"><b>T</b></p> <hr/> <p>take-away [1] 4:12  talked [3] 32:10 61:13 72:1  talks [6] 8:6 25:12 31:16,19,21 86:21  targeted [1] 13:3  targeting [1] 39:2  tarnoff [1] 96:17  technical [1] 58:22  tells [4] 11:14 15:20 17:16 75:25  tens [2] 25:16 49:9  tent [2] 95:14,14  terms [1] 72:8  territories [1] 6:22  terror [1] 58:15  terrorism [2] 12:23 19:3  test [3] 6:8,11 54:15  testified [1] 96:17  testimony [1] 97:2  tests [1] 11:18  text [8] 67:5 68:12 70:8 77:8 78:6 81:7 87:19 99:24  textual [1] 67:25  textually [1] 78:5  themselves [1] 23:19  theory [1] 101:21  thereafter [1] 83:20  thereby [1] 36:1  therefore [4] 25:25 44:24 67:20 85:14  there's [46] 4:20 9:4,7,9 11:6,23,24 13:12,13,13,19 15:1 21:8 23:19 24:13 25:18 26:17,25 28:18 33:23,23 41:4,11 44:8 48:15,24 49:17 51:20 52:1</p>
---	---	--

<p>54:11 57:11 58:16 59:8 60:9 70:8 71:22 72:18 79:25 86:9,20,22 93:4 95:18 98:19 99:6,17  <b>thinking</b> [1] 21:10  <b>thinks</b> [1] 43:6  <b>third</b> [7] 5:20 40:8,12 46:24 81:10 84:12 101:15  <b>third-country</b> [1] 41:13  <b>third-country's</b> [1] 81:10  <b>third-party</b> [4] 30:24 31:5 33:4,11  <b>thomas</b> [13] 6:4,7,23 20:24 36:8 37:9,13 47:24 68:17 97:19,20,23 98:6  <b>though</b> [4] 13:18 29:11 72:21 74:8  <b>thoughts</b> [1] 71:5  <b>thousand</b> [1] 54:16  <b>thousands</b> [2] 99:14,18  <b>three</b> [2] 5:8 85:11  <b>throughout</b> [1] 26:12  <b>throwing</b> [1] 46:9  <b>thrust</b> [6] 16:12 30:7,20 31:13 58:20,22  <b>tiny</b> [3] 93:19 95:10,12  <b>title</b> [35] 4:18 6:24 10:11 15:24 17:19,22 21:19 22:5 30:8 32:14,14 35:17 39:21 41:12 42:1 51:15 52:24 64:23 65:15 67:5,6,17,23 68:12,18 72:1 74:22 75:1 83:8,12,15 88:23 97:6,21 98:2  <b>today</b> [1] 66:11  <b>together</b> [2] 35:6 82:2  <b>toggle</b> [5] 26:13 28:2 75:17 76:19 82:16  <b>togglng</b> [1] 74:9  <b>tomorrow</b> [1] 44:20  <b>took</b> [5] 22:7,20 23:9 83:19 85:12  <b>tool</b> [1] 60:23  <b>top</b> [1] 77:19  <b>tort</b> [2] 92:8,9  <b>total</b> [2] 4:25 14:15  <b>totally</b> [2] 13:14 46:11  <b>touch</b> [1] 59:24  <b>toward</b> [1] 26:16  <b>trade</b> [10] 67:22 68:15 69:24 84:8,13 96:20 97:9,12,13 100:6  <b>trafficker</b> [1] 34:20  <b>traffickers</b> [1] 33:11  <b>trafficking</b> [8] 15:4 28:21 29:23 33:18 39:2,6 46:23 61:6  <b>transactions</b> [1] 84:9  <b>transition</b> [6] 25:21 36:4 43:11 45:10 46:22 63:25  <b>transitions</b> [2] 45:20,22  <b>trans-substantive</b> [1] 11:12  <b>travelers</b> [3] 68:9 96:25,25  <b>treat</b> [3] 6:4 36:8 52:15  <b>treble</b> [1] 61:7  <b>tribes</b> [1] 6:21  <b>true</b> [1] 11:1  <b>try</b> [3] 12:6 39:22 49:16</p>	<p><b>trying</b> [16] 10:6 15:12 19:7 30:23 31:6 33:3 36:21 43:16 50:5 58:21 59:3 61:24 62:12 64:21 72:3 82:1  <b>turn</b> [1] 75:18  <b>turns</b> [1] 73:25  <b>two</b> [45] 7:2,2 10:10 12:6 14:3 16:13,16 18:18 19:4,7,9,12 24:10,22 25:1 32:8,12 35:15 36:21 37:10,14,20 39:14 41:9 53:15 55:19 60:19 64:1 67:14 68:1,10 70:16 71:6,9 76:2 78:10 80:21 83:19 86:9 88:22 89:14 95:10,15 98:9 101:8  <b>two-hour</b> [1] 94:19  <b>type</b> [1] 60:8  <b>types</b> [5] 6:20 42:7 46:23 60:19,21</p> <hr/> <p style="text-align: center;"><b>U</b></p> <hr/> <p><b>u.s</b> [18] 5:17 34:1 36:3 43:10 45:2,8 51:8 61:10 64:22 67:3 73:25 74:1,23 79:20 80:2,11,15,17  <b>u.s.c</b> [1] 35:19  <b>ultimate</b> [1] 59:1  <b>ultimately</b> [2] 46:13,18  <b>unavailable</b> [1] 89:18  <b>unclear</b> [1] 54:19  <b>undeniably</b> [1] 73:14  <b>under</b> [27] 4:18 13:11 22:5 23:18 32:5 35:19,21 37:1 48:24 50:11 51:8,10,22,24 53:4,4 68:12,20,24 70:17 87:15 91:17 95:14 96:16 97:6 98:13 101:21  <b>underscore</b> [1] 101:17  <b>understand</b> [10] 16:23 21:6 37:19 62:5 64:8,14 73:12 74:9 88:7 94:21  <b>understood</b> [2] 16:11 66:8  <b>undisputably</b> [2] 72:14,18  <b>unequivocal</b> [1] 10:17  <b>unequivocally</b> [2] 17:3,25  <b>union</b> [2] 20:3,5  <b>unions</b> [1] 9:6  <b>united</b> [19] 2:5 3:7 5:24 7:19,21 35:2 48:3,11 50:3 58:15 59:18 61:1,3 68:8,23 80:19 92:9 96:13 100:22  <b>universe</b> [2] 15:5 92:17  <b>unless</b> [6] 15:24 34:9 48:2,24 67:4 96:3  <b>unlike</b> [1] 19:12  <b>unlimited</b> [2] 43:22,25  <b>unmistakably</b> [1] 98:16  <b>unpack</b> [1] 12:6  <b>until</b> [1] 25:1  <b>unusual</b> [2] 54:5 57:18  <b>up</b> [17] 5:14,15 11:17 12:7 17:21 28:15 30:25 31:7,14 44:3 45:23 46:11 49:23 60:3 71:18 77:4 92:13  <b>useless</b> [1] 89:8  <b>uses</b> [1] 51:17  <b>using</b> [1] 69:5</p>	<hr/> <p style="text-align: center;"><b>V</b></p> <hr/> <p><b>value</b> [5] 48:15 49:2,17 50:1,4  <b>various</b> [3] 17:4 23:20 69:19  <b>vast</b> [1] 38:11  <b>vastly</b> [1] 79:14  <b>ventures</b> [1] 84:13  <b>versus</b> [2] 4:5 70:18  <b>views</b> [2] 27:22,23  <b>vindicate</b> [1] 49:13  <b>violate</b> [1] 39:23  <b>violated</b> [1] 74:22  <b>violation</b> [2] 23:6 24:8</p> <hr/> <p style="text-align: center;"><b>W</b></p> <hr/> <p><b>waive</b> [1] 56:18  <b>waiver</b> [14] 12:11 13:2 18:24 22:6,8 24:4 29:15 48:24 58:13,16 63:4,19 98:14,15  <b>wanted</b> [24] 4:14 5:10,17 10:1,8 16:7,8,10 30:11 34:19 39:6,19 43:18 44:19 45:2,8 47:18 52:14 55:13 58:24 60:21,22 62:1 76:11  <b>wants</b> [1] 99:17  <b>warehouses</b> [1] 69:7  <b>warren</b> [2] 74:25 83:13  <b>washington</b> [2] 2:2,5  <b>wave</b> [2] 26:21 27:24  <b>way</b> [34] 7:3,6 8:21 11:1,6 13:23 19:9,13,19,21 20:21 21:13 43:5,12,14 47:21 50:12,12 51:21 52:17 53:3 55:7 57:18 65:14 66:6 67:15 70:16 74:11 78:3 79:3 82:4 87:3 92:22 93:4  <b>ways</b> [9] 7:2 15:10,12 20:6 26:12 54:17 74:10,24 86:9  <b>weapons</b> [2] 15:2,3  <b>weeds</b> [1] 47:3  <b>weigh</b> [2] 30:3 77:23  <b>weight</b> [1] 47:4  <b>welcome</b> [3] 6:3 36:7 68:16  <b>western</b> [4] 9:6 20:3,5,5  <b>whatever</b> [2] 87:24 97:10  <b>whatsoever</b> [1] 82:7  <b>whenever</b> [1] 56:8  <b>whether</b> [27] 17:16,18 22:13 29:9,14 31:2 32:4 40:3 43:6,8 46:12 60:5,8,9,10 67:9 69:21 70:3,4 74:16 76:1,22 87:20 89:22,23 94:19 95:23  <b>whole</b> [4] 26:6 63:12 77:20 85:2  <b>whom</b> [1] 35:14  <b>wider</b> [1] 79:3  <b>will</b> [11] 12:12 35:13 36:3 38:20 46:7,7 54:13 92:3 95:13,14 97:16  <b>win</b> [1] 73:14  <b>wipe</b> [1] 87:13  <b>within</b> [3] 25:4 80:13 81:4  <b>without</b> [4] 11:2 35:9 51:21 91:15  <b>word</b> [4] 51:17,21 52:14 96:15</p>
--	--	---

**words** <sup>[15]</sup> 4:23 8:22 14:6,8,10 25:14  
 27:5 30:19 54:15 56:17 63:9 73:6 89:  
 6 91:10 94:25

**work** <sup>[4]</sup> 4:25 14:15 64:15 97:21

**world** <sup>[10]</sup> 13:17 16:20 17:14 62:1 74:  
 15 76:7 77:8,16 91:20 100:6

**worldwide** <sup>[1]</sup> 100:24

**worried** <sup>[1]</sup> 76:3

**worth** <sup>[1]</sup> 43:10

**woven** <sup>[1]</sup> 31:15

**write** <sup>[1]</sup> 24:15

**written** <sup>[1]</sup> 97:21

**wrongly** <sup>[1]</sup> 61:11

---

**Y**

---

**years** <sup>[4]</sup> 9:18 44:1 77:11 101:3

---

**Z**

---

**zero** <sup>[1]</sup> 89:10