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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	RICHARD D. KLINGLER, ESQ.	
4	On behalf of the Petitioner	4
5	ORAL ARGUMENT OF:	
6	AIMEE BROWN, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	39
9	ORAL ARGUMENT OF:	
10	PAUL D. CLEMENT, ESQ.	
11	On behalf of the Respondents	63
12	REBUTTAL ARGUMENT OF:	
13	RICHARD D. KLINGLER, ESQ.	
14	On behalf of the Petitioner	102
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
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18
19
20
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23
24
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 24-983, Havana Docks versus Royal Caribbean Cruises.

Mr. Klingler.

ORAL ARGUMENT OF RICHARD D. KLINGLER

ON BEHALF OF THE PETITIONER

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

Confiscated property is defined to include property Cuba seized control of. As the Commission observed, Cuban officials physically occupied the dock facilities, making them confiscated property. Stopping trafficking in such facilities locks them up as tainted until Cuba pays for what it took. It's a takings remedy. Those are the core -- I'm sorry -- and -- sorry -- it stops money flowing to Cuba in the interim. It's an anti-fencing remedy as well. Those are the core statutory objectives. They require an ongoing remedy.

Because trafficking is in facilities, not property interests, term limits on interest have no effect on the remedy's duration.

1 Instead, that remedy's duration is set out in
2 the definition of "confiscated" and ends when
3 the claim is resolved or democracy comes to
4 Cuba. It's also true if confiscated property
5 is viewed instead as an interest, the control
6 of the docks taken and extinguished in 1960.

7 Title III is at the core of the
8 foreign commerce power. Yet the Eleventh
9 Circuit shrunk Title III by viewing the issue
10 as though no confiscation had occurred.

11 But that gives little or no effect to
12 future contingent life, leasehold, and the many
13 expired interests, including patents, and
14 places an "open for business" sign on property
15 taken from Americans, all contrary to why Title
16 III was enacted.

17 The cruise lines acted in concert with
18 Cuba and paid state security forces a hundred
19 and thirty million dollars to make a billion
20 dollars without seeking our authorization.
21 They relied on the suspension of the private
22 right of action but now would have this case be
23 all about Cuban property law.

24 But the Claims Commission conclusively
25 resolved those issues and gave courts all the

1 guidance needed regarding the claim and
2 confiscated property at issue in Title III
3 cases.

4 I welcome the Court's questions.

5 JUSTICE THOMAS: What exactly is the
6 property here that has been confiscated?

7 MR. KLINGLER: The interests that were
8 taken from us are the equivalent of a leasehold
9 and comprised the docks, the land, the rights
10 to operate those, the concession and machinery.

11 Confiscated property, though, in terms
12 of the anti-trafficking prohibition, is the
13 docks themselves.

14 JUSTICE THOMAS: The -- I thought your
15 claim had to do with the usufruct rights that
16 you had.

17 MR. KLINGLER: That's correct. The
18 claim reflects the particular interests that
19 were taken from us. Those include two
20 usufructs, the first of which gave rights over
21 an area that allowed us to construct the works
22 and operate them. That's plenary control. The
23 Eleventh Circuit indicated the usufruct is for
24 all uses and for all fruits. And the other
25 usufruct was in relation to the areas between

1 streets on the land. That was granted later,
2 and that's, again, a plenary commercial control
3 in relation to that.

4 JUSTICE THOMAS: So it seems as though
5 you are treating the usufruct interests that
6 you have almost as a actual ownership of the
7 property itself, so --

8 MR. KLINGLER: I wouldn't say that,
9 no. We're treating it as essentially ownership
10 of a leasehold, a set of interests related to
11 the facilities. The facilities themselves are
12 what was seized and are set off limits, but
13 that's the underlying property. We don't own
14 the docks other than in the sense of having
15 held a leasehold interest in relation to those.

16 JUSTICE THOMAS: But you normally
17 don't think of someone as confiscating a lease
18 or a leasehold.

19 MR. KLINGLER: That's right. That's
20 exactly our -- our principal argument, is that
21 we don't naturally think of trafficking or
22 confiscating necessarily being the interests,
23 that it's the underlying property that is the
24 sort of subject of the anti-trafficking
25 prohibition, and then the taken interests are

1 reflected in the claim.

2 JUSTICE JACKSON: Counsel, isn't --

3 CHIEF JUSTICE ROBERTS: What --

4 JUSTICE JACKSON: -- isn't the other
5 answer to Justice Thomas and the concerns about
6 what is the nature of this property taken care
7 of by the statute itself? Because it seems to
8 me that "property" is a defined term here and
9 that the statute itself includes the kinds of
10 interests that you're talking about, not just
11 real property but also things like the
12 leasehold interest you're describing.

13 MR. KLINGLER: Absolutely. I mean,
14 leasehold and any other interests are included
15 in the statutory definition. And I would say
16 that the property definition is so broad that
17 it includes both the underlying things, the res
18 and the interests themselves.

19 And it has two parts. The first part
20 is, as you say, the sort of real mixed and
21 personal property, the things --

22 JUSTICE JACKSON: Yeah.

23 MR. KLINGLER: -- the underlying
24 things. And then the second part is the
25 interests, and that can be, you know, present,

1 future, contingent.

2 JUSTICE JACKSON: And I guess my point
3 is that we have defined terms in this statute
4 that tell us what Congress intended when they
5 said you are trafficking in confiscated
6 property. The words "trafficking,"
7 "confiscated," "property," all of those things
8 are in the statute. So it's a little confusing
9 how the Eleventh Circuit got to essentially
10 redefine what it means to be trafficking in
11 confiscated property in light of this statute.

12 MR. KLINGLER: That's absolutely true,
13 particularly if we focus on the word
14 "confiscated." "Confiscated" has the effect of
15 indicating that stolen property remains stolen
16 until three things happen.

17 It's the claim, the underlying claim,
18 is settled by the international claims process,
19 the property is returned, or, particularly,
20 adequate compensation is paid.

21 JUSTICE KAGAN: Well, Mr. Klingler,
22 whatever the definition of "property" is, I
23 mean, you can't sue for property that you're
24 unconnected to, right? You can't just say, you
25 know, they -- they -- the Cuban government

1 seized a piece of property across the street
2 someplace and I didn't -- I saw it, I didn't
3 have anything to do with it, I think I'll go
4 bring a lawsuit about it.

5 MR. KLINGLER: Yeah.

6 JUSTICE KAGAN: You can't do that.

7 MR. KLINGLER: That's absolutely
8 right.

9 JUSTICE KAGAN: So -- so what -- what
10 the statute is saying is that the person can --
11 can sue for property that has been confiscated
12 from that person, correct?

13 And once the -- once you read the
14 statute like that, it seems as though that the
15 property that was confiscated from that person
16 is here not the docks, the docks is the
17 physical thing, but the property that the
18 person had was just an interest in that
19 physical thing.

20 It was, you know, a stick in the
21 bundle, whatever you want to call it, but the
22 property that the person had was a -- a
23 concession.

24 MR. KLINGLER: If you view the
25 confiscated property as just the interest, that

1 is something that produces almost the same
2 result. And as you saw in the briefing, we
3 believe that even that model operates to our
4 benefit and requires that the cause of action
5 be upheld. But --

6 JUSTICE KAGAN: Well, I guess I don't
7 see why that's true. I mean, if you see it
8 that way and the property that you have a right
9 to sue about is the concession, that was the
10 thing that was confiscated from you, I mean,
11 the concession expired.

12 MR. KLINGLER: Yeah.

13 JUSTICE KAGAN: And -- and so you
14 could have sued from 1960 for however long the
15 concession lasted 'til, but once the concession
16 expired, I mean, you no longer have a property
17 interest. You're just like that bystander that
18 I was telling you about which is like, you
19 know, there was property that was confiscated
20 all over Cuba, but that doesn't mean that I
21 have a right to be here in court.

22 MR. KLINGLER: So if I could go back
23 to your --

24 JUSTICE BARRETT: So could you talk
25 just a little bit louder? Maybe adjust the

1 mic. Thank you.

2 MR. KLINGLER: I'm sorry. Yeah. I'm
3 sorry.

4 Let me take one crack at the seized
5 property as confiscated before moving on to why
6 the remedy continues even if it's seen as an
7 interest in that that's -- the nexus that
8 you're looking for is, I think, broader than
9 what you're suggesting, that you need to have a
10 claim in the property that's the property which
11 was confiscated and that is defined, more
12 broadly, it's defined as the property that was
13 seized, and it reflects Congress indicating
14 that any, you know, the facility, the mine, the
15 factory, that if that's what's seized, that
16 that's off limits from trafficking, that that
17 is the enforcement mechanism for having the
18 takings component enforced and it stops money
19 flowing from Cuba from the exploitation of that
20 property.

21 The linkage is that once Cuba seizes,
22 say, the docks, that that takes a whole series
23 of interests. And Congress is giving each
24 claimant to that property --

25 JUSTICE KAGAN: I -- I -- I guess

1 I understand that, but it doesn't seem to me to
2 fit with the statutory language very well
3 because the statutory language does not talk
4 about trafficking in claims. The statutory
5 language talks about trafficking in property.
6 And, clearly, the property that it's referring
7 to is the property that the person who's suing
8 owned.

9 And your property is not the entire
10 docks. Your property is a concession in the
11 docks that was time-limited.

12 MR. KLINGLER: But the statutory
13 language indicates that ties trafficking into
14 the -- to the property which was seized. I'm
15 not arguing that our claim is the basis for
16 trafficking. It's trafficking in the
17 underlying property to which we have a claim.

18 So any number of claimants can enforce
19 the anti-trafficking provision as it applies to
20 the underlying facilities, the dock facilities.
21 However, if you view the plaintiff's interest
22 as the taken property, it is still the -- the
23 remedy is not tied to the duration of that
24 interest. It's like a takings claim.

25 If my leasehold is taken, whether

1 before or after the leasehold ends, I have an
2 ongoing remedy to be paid for it. And that's
3 the gist of what is being -- Congress is
4 providing here.

5 JUSTICE KAGAN: I guess I wonder why
6 that's true, and this will be my -- my last
7 one. Like, suppose that the docks were split
8 up physically, you know, so that there was a
9 blue half and there was a yellow half, and you
10 only had the concession on the blue half.

11 Then, if you came in and said, you
12 know, the yellow half is being used and I want
13 compensation for that, I think -- tell me if --
14 if you would disagree -- but I think we would
15 all say, well, no, you can't have that because
16 there's -- there are -- there's a spatial
17 boundary that applies to your property
18 interest.

19 And -- and -- and so too here there's
20 a boundary. It's not spatial, so it's not as
21 natural to think about it. It's temporal. But
22 it's still a boundary on your property
23 interest. You know, once it's over, it's over.
24 And you have nothing to complain about anymore,
25 any more than you would have had anything to

1 complain about if you were arguing about the
2 yellow part of the dock.

3 MR. KLINGLER: The Commission's
4 determination would let you know what
5 confiscated property was. If you held an
6 interest just in the yellow portion,
7 presumably, the Commission would have said the
8 confiscated property is the yellow portion.

9 But -- but be that as it may, that
10 even if you are claiming trafficking in, you
11 know, the blue portion, that it's still a
12 takings-related remedy, that it wouldn't mean
13 that you don't have the ability to pursue your
14 remedy, get a remedy to be paid for what was
15 taken from you, just because there's a time
16 limit on the particular interest.

17 JUSTICE BARRETT: Well, if you put the
18 time limit aside, let's look about -- let's
19 talk about the use limit. So, as I understand
20 it, you had a cargo usufruct, right? Your
21 concession was only for cargo, and the cruise
22 ships used it for passenger? Am I
23 understanding that correctly?

24 MR. KLINGLER: No, we -- we completely
25 disagree with that. We think that we had

1 plenary commercial control as a result of being
2 granted each of the usufructs. What an
3 usufruct is is the equivalent of a leasehold.
4 That's the closest translation. It -- as the
5 Eleventh Circuit said, it provides for all uses
6 and all --

7 JUSTICE BARRETT: So there was no
8 finding below that your usufruct was for cargo
9 only?

10 MR. KLINGLER: Correct. In fact,
11 Judge Bloom considered the full range of
12 arguments and found that to not be the case.
13 She rejected that cargo limitation. And, in
14 fact, we've charged for, you know, passenger
15 ships and cargo ships, and there is no there
16 there to the argument, that the other side
17 cannot point to a single instance where we did
18 not exercise complete plenary control over the
19 docks and the land.

20 JUSTICE BARRETT: So -- so what
21 happens -- this is a question's that somewhat
22 like Justice Kagan's question about
23 divisibility. Your claim that was certified
24 includes not just the docks but also some
25 office supplies, some office buildings.

1 And I don't know whether those were
2 attached to the docks or not, but in this
3 hypothetical, let's just assume they're farther
4 away and the cruise ships never use them, but
5 they are part of the valuation that you got
6 from the Commission.

7 Are they liable for that even if they
8 never touched that property and even if it was
9 at some removed from the docks themselves?

10 MR. KLINGLER: They are because that's
11 the property interests that underlie the claim.
12 And the property confiscated was taken when --
13 I'm sorry -- and the control over those
14 components --

15 JUSTICE BARRETT: What if you had a
16 grocery store too in the middle of the island
17 that has nothing to do with the docks, but it's
18 also part of your claim? Are they liable for
19 that?

20 MR. KLINGLER: The claim sets forth
21 certain value. The trafficking just needs to
22 be in the property that's taken, that's right,
23 from you. As long as it's your property, as
24 long as one portion of it is, that would extend
25 to both trafficking --

1 JUSTICE BARRETT: I don't
2 understand -- I don't understand that. Is --
3 is there -- I mean, the way this Commission
4 worked, would you have had to go for
5 separate -- go and get separate valuations for
6 different parts of the property?

7 In this hypothetical I'm giving you,
8 the grocery store is completely unrelated to
9 the docks, cruise ship hasn't touched it, and
10 is the way that it would work that you could
11 get it all valued in one single claim? Because
12 I guess I don't understand why they trafficked
13 in the grocery store in my hypothetical.

14 MR. KLINGLER: That is right. You
15 would -- the -- the owner of those taken
16 interests would come before the Claims
17 Commission and say: Here are my taken
18 interests, and I want this claim certified.

19 And whether they are near or far,
20 those would be the ones that the Commission
21 would pass on.

22 JUSTICE JACKSON: And then the
23 question of trafficking, who is trafficking in
24 those interests, is the sort of later question,
25 but the Commission has determined the scope of

1 your property interests. I guess I'm -- I'm a
2 little confused about the questions related to
3 the limitations on your property interests
4 because I thought that was what the statute was
5 saying was the purpose of the Commission, that
6 when you say I have my -- I've had my property
7 interests taken, you go to the Commission, and
8 they decide whether or not the extent of your
9 interest is just the blue part of the dock or
10 the yellow part of the dock.

11 The later question becomes, who is
12 trafficking or is someone trafficking in the
13 yellow part or the blue part? And I think you
14 would say, obviously, in this situation, when
15 the yellow part is the dock and the cruise line
16 is using it, they've absolutely trafficked in
17 the property interest that the Commission has
18 identified and told us we own.

19 MR. KLINGLER: Told you -- told us we
20 own and indicated is off limits for
21 trafficking. And, you know, here --

22 JUSTICE JACKSON: I mean, and the
23 statute only -- the statute says anyone who
24 owns a property interest as certified as the --
25 by the Commission can make a claim that someone

1 is trafficking in it and get relief or get the
2 money that is associated with that activity in
3 the statute. So it seems pretty
4 straightforward to me. I'm -- I'm --

5 MR. KLINGLER: I --

6 JUSTICE JACKSON: -- struggling.

7 MR. KLINGLER: I think that's right.
8 There's -- there's land and there's the three
9 piers. If the cruise lines only used one of
10 the piers, the fact that the other piers didn't
11 get used doesn't mean that they're off limits
12 from trafficking and it doesn't mean that the
13 certified claims damage amount doesn't
14 encompass all of those. Each of -- they're
15 all --

16 JUSTICE JACKSON: And your other
17 point, I think, is that the fact that you might
18 have limited property interests in some way,
19 like the property interest that was taken was
20 temporary or whatnot, doesn't impact whether or
21 not you have a claim. And all you need is a
22 claim in order to trigger this kind of cause of
23 action in the statute.

24 MR. KLINGLER: That's -- that's
25 correct. And that's necessary to get the

1 statute to work as Congress clearly intended,
2 that if the -- the takings component of the
3 remedy, which, like any takings remedy,
4 continues until there's actually a payment for
5 the taken property, that if the locking up of
6 the docks doesn't continue until that remedy's
7 provided, Cuba has no incentive to pay. That's
8 the whole point of the -- of the statute. And
9 your stolen property is exploited.

10 JUSTICE JACKSON: Thank you.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Justice Thomas, anything further?

14 Justice Alito?

15 JUSTICE ALITO: On the time question,
16 when the Foreign Claims Settlement Commission
17 calculated the value of what was confiscated
18 from you, did they calculate how much you were
19 likely to have owned -- to have received as a
20 result of your concession during the time
21 period of the concession, or did they calculate
22 how much you would have received if the
23 concession had remained in effect up to the
24 time when they made the calculation?

25 MR. KLINGLER: The -- if I understand

1 the question correctly, the Commission noted
2 that the docks and related rights were to be
3 turned over and -- after an additional 44
4 years, and that presumably factored into their
5 valuation calculation.

6 It's not entirely clear that that's
7 the case because of the methodologies that they
8 used in terms of book value and the -- you
9 know, the concession and the land, they sort of
10 treated that as having almost a market value at
11 the time. But I can't say that they didn't
12 take into account because I think they probably
13 did. They treated it as a time-limited
14 leasehold essentially.

15 JUSTICE ALITO: As to the extent of
16 the concession, I think you said that the
17 district court found that it applied to
18 passengers as well as cargo?

19 MR. KLINGLER: They rejected -- Judge
20 Bloom rejected an argument that there was this
21 cargo limitation. She viewed the Commission
22 decision as foreclosing that. But she went
23 further. She allowed the full presentation of
24 argument based on the, you know, legal expert.
25 She considered that, found it to be of

1 no value, and there would be no reason to
2 disregard the Commission. But then she went
3 further and she looked at the legal --

4 JUSTICE ALITO: Was that -- was that
5 factual question or that question of sort of
6 contract interpretation challenged on appeal in
7 the Eleventh Circuit? Do you regard it as
8 settled, or is it something that would remain
9 open if the case were remanded?

10 MR. KLINGLER: I -- the Eleventh
11 Circuit expressly left that open. And that's
12 open for remand. It did not reach that.

13 JUSTICE ALITO: If we think of the --
14 these piers as -- and the property -- the
15 property that these piers constitute as a
16 bundle of rights, did the Cuban government,
17 from the beginning, have what would be the
18 equivalent of a fee simple interest in the
19 pier?

20 MR. KLINGLER: Yes.

21 JUSTICE ALITO: They -- did they have
22 a fee -- fee simple --

23 MR. KLINGLER: "Yes" is the short
24 answer.

25 JUSTICE ALITO: And you had

1 basically --

2 MR. KLINGLER: They were like the
3 lessor, and we were like the -- the long-term
4 lessee for the leasehold.

5 JUSTICE ALITO: So what other rights
6 are there in this -- what other rights are
7 there in this bundle of rights besides that?

8 MR. KLINGLER: Besides --

9 JUSTICE ALITO: The interests that
10 the -- the right that the Cuban government
11 retains, your concession. What else is there?

12 MR. KLINGLER: There's the physical
13 property itself, the -- the docks. There's the
14 land. There's the concession --

15 JUSTICE ALITO: The Cuban government
16 owned the land from the beginning, right, or
17 not?

18 MR. KLINGLER: Yes. And -- and they
19 essentially leased it to us, would be our
20 analogy. That's right. We had complete
21 plenary control at the time it was taken, and
22 then our interest was extinguished. And it's
23 that taken interest that is locked into place
24 and continues over time.

25 JUSTICE ALITO: And now you want to

1 recover a certain amount of money from this one
2 cruise ship line. Were there other cruise ship
3 lines that used these docks during the period,
4 and would you be entitled to receive the same
5 amount from every cruise ship line that used
6 the docks?

7 MR. KLINGLER: There were four
8 judgments entered against each of four cruise
9 lines. And if, in the future, a cruise line
10 used docks that have been set off by Congress
11 as off limits from trafficking without our
12 authorization, yes, they would be violating the
13 law and subject to the very extensive penalties
14 that Congress imposed in relation to anyone who
15 traffics in property without authorization.

16 JUSTICE ALITO: Okay. Last question.
17 Do you think this scheme is primarily a
18 compensatory scheme, or do you think it is at
19 least equally and perhaps even to a greater
20 extent a scheme that is intended to tell people
21 stay away from Cuba because we want to put
22 maximum pressure on the Cuban government to
23 democratize?

24 MR. KLINGLER: I think the latter is
25 the overwhelming impetus from this. They --

1 Congress clearly also wanted to give claim
2 holders a remedy because they didn't have one
3 in court in the claims -- the international
4 claims settlement process, but this is a -- has
5 a punitive component to it, and, you know,
6 Congress is presuming or wants this property
7 not to be trafficked because that's what funds
8 the communist regime. That's what continues
9 the regime in power and --

10 JUSTICE ALITO: Thank you.

11 MR. KLINGLER: -- achieving --

12 JUSTICE ALITO: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor?

15 JUSTICE SOTOMAYOR: I'm not sure I
16 understood your answer to Justice Barrett, but
17 I'm more concerned about your last point
18 because I do think the Due Process Clause would
19 have something to say about a tying of any kind
20 of recovery where the most you would have been
21 entitled to was reasonable compensation at the
22 time of -- of the Cuban government taking over,
23 correct? And you can put --

24 MR. KLINGLER: No --

25 JUSTICE SOTOMAYOR: -- three level --

1 or you might. It hasn't been decided yet. You
2 were entitled to compensation for the value of
3 what you had at the moment of compensation,
4 correct, at -- of confiscation?

5 MR. KLINGLER: If there's use of the
6 property -- I'm sorry. If Cuba --

7 JUSTICE SOTOMAYOR: Forget about the
8 property.

9 MR. KLINGLER: If Cuba --

10 JUSTICE SOTOMAYOR: When it was
11 compensated, you were -- when it was
12 confiscated, you were entitled to its
13 reasonable value?

14 MR. KLINGLER: That's the -- yes. If
15 Cuba paid just an adequate amount of
16 compensation --

17 JUSTICE SOTOMAYOR: Now, if they
18 didn't pay --

19 MR. KLINGLER: -- then that would
20 release the claim.

21 JUSTICE SOTOMAYOR: -- you're entitled
22 to interest up until you receive payment,
23 correct?

24 MR. KLINGLER: Correct.

25 JUSTICE SOTOMAYOR: But what you're

1 seeking is something dramatically different.
2 You're seeking now not one compensation with
3 interest; you're seeking infinite compensation
4 forever. I think that's might -- what might
5 have troubled the court below, because it's one
6 thing to say: I am entitled to my value from
7 either the Cuban government or from its proxy,
8 the cruise lines. But I don't know what
9 entitles you to ad nauseam compensation for use
10 by everyone forever --

11 MR. KLINGLER: All right. With --

12 JUSTICE SOTOMAYOR: -- because that's
13 not an interest in that property. You didn't
14 have an interest in that property forever.

15 MR. KLINGLER: With respect, the
16 infinity-and-beyond point is one that is in
17 Cuba's control. It had the --

18 JUSTICE SOTOMAYOR: It doesn't matter
19 whose control it is. There's a due process
20 problem in thinking that you're entitled to
21 multiple recovery from infinite number of
22 people who might use this dock that far exceeds
23 by I don't know how much -- what proportion the
24 amount that you were owed.

25 MR. KLINGLER: The due process

1 concerns are taken care -- account of by
2 notice. Congress, through the statute, and the
3 Commission, through defining what confiscated
4 property was, ruled those off limits. Unless
5 there's a substantive problem with that,
6 Congress said --

7 JUSTICE SOTOMAYOR: There might well
8 be. There's a substantive excessive fines
9 problem, excessive punishment problem. I mean,
10 this just -- this is something that could be
11 left for another day, I understand that,
12 because that's not what -- what is before us.
13 What's before us is did you have an interest in
14 the docks, and the answer is yes, correct?

15 MR. KLINGLER: Correct.

16 JUSTICE SOTOMAYOR: You're admitting
17 that that interest was time-limited, correct?
18 You didn't own the docks.

19 MR. KLINGLER: It -- it would have
20 been time-limited to 2004 had there been no
21 confiscation, but our time limit on that
22 interest was 1960. It ended there.

23 JUSTICE SOTOMAYOR: It ended there,
24 but it wouldn't have -- it wouldn't have gone
25 forever. It went to a defined period of time.

1 So the Commission's charge was to value that
2 interest at the moment of -- of confiscation,
3 right?

4 MR. KLINGLER: That's completely true.
5 And for takings analysis --

6 JUSTICE SOTOMAYOR: All right. For
7 takings, it's what was that interest then?

8 MR. KLINGLER: I agree with that.

9 JUSTICE SOTOMAYOR: All right. Now
10 you said to Justice Barrett that you were
11 entitled to this even if they used a piece of
12 land that wasn't a part of the dock. If it was
13 a store in the middle of the island --

14 JUSTICE BARRETT: No, he meant if they
15 didn't use it.

16 JUSTICE SOTOMAYOR: Oh.

17 JUSTICE BARRETT: Like, he -- well --

18 JUSTICE SOTOMAYOR: Yeah. No, no, no.

19 JUSTICE BARRETT: Yeah.

20 JUSTICE SOTOMAYOR: Did you say, if
21 the cruise line had used that store in the
22 middle of the island and it wasn't a part of
23 the dock, you would be entitled to
24 compensation?

25 MR. KLINGLER: Correct. That is what

1 is ruled off limits. That's the seized
2 property that resulted in the --

3 JUSTICE SOTOMAYOR: The dock was the
4 seized property, not the store.

5 MR. KLINGLER: Well, our --

6 JUSTICE SOTOMAYOR: And what did the
7 store have to do with the dock? That's what
8 I'm trying to get to.

9 MR. KLINGLER: Well, our -- the store
10 would have been seized as well, and that's
11 where you look to the FCSC's decision.

12 JUSTICE SOTOMAYOR: Oh, now you're
13 talking about that the contract at issue would
14 have included the store as well? Is that the
15 assumption you're making?

16 MR. KLINGLER: If -- if the FCSC had
17 considered and ruled that Cuba's confiscation
18 extended to the grocery store as well and was
19 part of our claim, then yes, just as if there
20 had been --

21 JUSTICE SOTOMAYOR: It was part of
22 what was seized from you?

23 MR. KLINGLER: Correct.

24 JUSTICE SOTOMAYOR: Okay.

25 MR. KLINGLER: And so I'm assuming

1 that our grocery store got seized as well.

2 JUSTICE SOTOMAYOR: Because Justice
3 Kagan's question was, if that store had not
4 been part of what was seized, you would not be
5 entitled to compensation.

6 MR. KLINGLER: Well, there's two
7 issues. We would be entitled to compensation
8 according to the scope of the damages set forth
9 in the FCSC's claim. There's a separate issue
10 about whether trafficking in that interest
11 would give rise to liability.

12 JUSTICE SOTOMAYOR: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?
14 Justice Gorsuch?

15 Justice Kavanaugh?

16 JUSTICE KAVANAUGH: So pick up on
17 Justice Sotomayor's questions, what is the
18 theory you have of why Congress would enact a
19 statute that allows you to obtain compensation
20 from a variety of American businesses
21 potentially that vastly exceeds the value of
22 your property?

23 MR. KLINGLER: Because Congress had at
24 least dual objectives, and the principal one
25 was to rule off limits from trafficking

1 property that Cuba had seized or the property
2 interest, however way you wish to think about
3 it, because that was what was fueling or
4 stopping the transition to democracy in Cuba.

5 And that -- that -- the taking is --
6 the payment in relation to the taking is only
7 going to happen if Cuba has the incentive to do
8 that, and that's why there's an anti-fencing
9 component too that is matched to the taking
10 remedy. But they are recognizing the taking
11 remedy and providing an unusual and an
12 unusually large disincentive to be trafficking
13 in property.

14 There's no American company right to
15 be violating the embargo and to be dealing in
16 Cuba. There's no countervailing interest. All
17 the companies, wherever they're domiciled, are
18 on notice of what the scope of the property is.
19 And they have actually -- if they need to use
20 it or justify, they can negotiate with the
21 claim holder. They can just seek authorization
22 through a negotiation or they can just not use
23 it. I mean, those are the choices Congress is
24 presenting to them for extremely important
25 foreign policy reasons.

1 This is the -- the sanctions and claim
2 settlement portions of the Cuban embargo
3 broadly that are at the heart of the commerce
4 power, and the Eleventh Circuit gave an
5 extremely narrow reading to those foreign
6 policy interests and to the remedy that
7 Congress had provided.

8 JUSTICE KAVANAUGH: On the lawful
9 travel issue that several of the amicus briefs
10 raise, I assume that remains open even if you
11 prevail here on this issue? And is there
12 anything else you want to say about that at
13 this point? And it's fine if you don't.

14 MR. KLINGLER: It does remain open,
15 but I'll just point out that almost all the
16 trafficking took place during the Trump
17 administration, and even during the Obama
18 administration, there was -- the regulation
19 they rely on expressly prohibited activities,
20 primarily tourism.

21 JUSTICE KAVANAUGH: And last thing.
22 Anything on the briefing at least that you
23 disagree with the Solicitor General on?

24 MR. KLINGLER: No. We agree with the
25 Solicitor General's positions, although, of

1 course, we went on to argue at considerable
2 length that even if the property interest is
3 what the confiscated property is, subject to
4 the trafficking prohibition, that we would
5 still prevail and it's an ongoing remedy rather
6 than one truncated by the 2004 limit that was
7 extinguished and doesn't exist any more than
8 the benefits we received.

9 JUSTICE KAVANAUGH: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice
11 Barrett?

12 JUSTICE BARRETT: Just one question
13 and it's about valuation of the claim. So I
14 know, when you have the Commission having
15 valued the claim, that's presumptively the
16 value, but let's -- let's say that liability is
17 established. The cruise lines come back and
18 they can establish, they can challenge that,
19 right?

20 MR. KLINGLER: They can challenge the
21 valuation amount?

22 JUSTICE BARRETT: They can challenge
23 the valuation amount.

24 MR. KLINGLER: No, they cannot.

25 JUSTICE BARRETT: I thought they

1 could.

2 MR. KLINGLER: Congress made it clear
3 that all determinations of law and fact that
4 the Commission determines in the claims process
5 is conclusive and final, not subject to review
6 in any court by mandamus or otherwise. That's
7 Section 20 -- 1623(h).

8 JUSTICE BARRETT: Okay. I thought
9 there was an ability by, you know, some
10 heightened evidentiary standard. I don't have
11 it right in front of me, though.

12 MR. KLINGLER: Yes. No, what you're
13 referring to is that there are three types of
14 valuation. One is the amount of the claim.
15 Another is if a special master has made the
16 determination or the Commission in the course
17 of considering a claim that's not certified.
18 And then the third is a fair market value
19 valuation.

20 But it's the higher of any of those.
21 So that's really only a plaintiff's right to
22 secure --

23 JUSTICE BARRETT: So the defendant has
24 no rights in that. And, I mean, I'll tell you
25 where I'm going with this. I mean, it's just

1 kind of unbelievable to me that in the grocery
2 store hypothetical, that if you have these
3 disparate interests all over the island and
4 your claim -- you know, and that was the
5 property taken, that someone who uses the docks
6 is going to be liable for the value of the
7 grocery store and let's say you also have gas
8 stations, let's say you have lots of things
9 because you just happen to be someone with
10 wide-ranging property interests.

11 You're saying there's no way for the
12 defendant to get out from under that huge
13 liability which is just because of the chance
14 that you happen to have wide-ranging interests
15 on the island. It could just as easily have
16 been docks and somebody who owned nothing but
17 the docks.

18 MR. KLINGLER: That's right. But the
19 chance they have to get out from under that
20 liability is to not traffic in confiscated
21 property deemed off limits at all or without
22 our authorization.

23 JUSTICE BARRETT: Okay. Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Jackson?

1 JUSTICE JACKSON: Just to follow up on
2 your response to Justice Barrett, the chance
3 they have is to say we're not trafficking as
4 the statute defines it in those particular
5 property interests. So it's fine. The person
6 might have a grocery store and a, you know, set
7 of other interests and this is the cruise line
8 and they're only using the docks.

9 The cruise line's response is: We're
10 not trafficking in the grocery store per the
11 statute. And someone like us would say, you're
12 right. But, here, the cruise lines are
13 trafficking in the sense -- and, you know,
14 there's a definition of traffic, sells,
15 transfers, distributes, dispenses, uses,
16 whatever, right?

17 So the -- the argument, I think, is
18 that the cruise lines are trafficking in the
19 ownership of the property at issue here, as
20 determined by the FCSC, which is the ownership
21 of the dock interest. Is that right?

22 MR. KLINGLER: That's absolutely --
23 our claim relates to the docks themselves, the
24 confiscated property, and the extra --

25 JUSTICE JACKSON: Which you own the

1 claim to because the FCSC said you're the owner
2 of the use of the docks.

3 MR. KLINGLER: That's exactly right.
4 And the -- the point that you're making about
5 the "trafficking" definition more broadly, I
6 was using shorthand in talking about
7 authorization. But the "trafficking"
8 definition excludes from the traffic -- from
9 liability or from trafficking any use of
10 property when the person undertaking the
11 actions that are otherwise prohibited secures
12 the authorization of the former owner.

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Ms. Brown.

17 ORAL ARGUMENT OF AIMEE BROWN
18 FOR THE UNITED STATES, AS AMICUS CURIAE,
19 SUPPORTING THE PETITIONER

20 MS. BROWN: Thank you, Mr. Chief
21 Justice, and may it please the Court:

22 In 1960, the Cuban government seized
23 the docks that Petitioner built without paying
24 a penny. When Respondents then paid the Cuban
25 government around a hundred and thirty million

1 dollars to use those same docks, Respondents
2 trafficked in property which was confiscated.
3 And Congress gave Petitioner the right to seek
4 damages from Respondents because Petitioner
5 owns the certified claim to the docks.

6 Petitioner's suit can proceed
7 regardless of whether you think of the relevant
8 property as the physical docks or as the right
9 to 44 years of possession, control, and
10 operation of the docks.

11 Either way, Respondents were complicit
12 in Cuba's exploitation of property before Cuba
13 either provided compensation or returned the
14 property to Petitioner.

15 The court of appeals rejected that
16 analysis by considering the confiscated
17 property as if there had been no expropriation
18 and then asking whether Petitioner would have
19 had an interest in the property at the time of
20 the trafficking.

21 That test undermines the scheme that
22 Congress enacted, which expressly protects
23 time-limited interests and which is aimed at
24 providing a remedy for Cuba's expropriations,
25 not pretending they never happened.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Who owns the docks?

3 MS. BROWN: So, at all times relevant
4 here, the Cuban government had the underlying
5 ownership of the docks, but they had -- they
6 had provided for control of the docks and
7 possession of the docks to go to Petitioner for
8 the term of the usufruct --

9 JUSTICE THOMAS: So --

10 MS. BROWN: -- the term of the
11 concession.

12 JUSTICE THOMAS: -- how could Cuba
13 confiscate docks that it owned?

14 MS. BROWN: The statutory definition
15 of "confiscated" refers to seizure of ownership
16 or control of the property. And so, while the
17 Cuban government owned the -- the property at
18 this time, they did not have control of the
19 property. That's why, in order to effectuate
20 the expropriation here, they had to send
21 government agents, armed soldiers, out to the
22 property to take back control of the physical
23 docks from Petitioner.

24 We think that qualifies as a seizure
25 of control under the -- the statutory

1 definitions here. You could imagine this like
2 a car lease, for example. So say I have a -- a
3 lease of a car for a term of two years from a
4 dealership. The dealership decides at year --
5 after one year that it wants to take the car
6 back. I think it's perfectly natural to say
7 that they seized the car even though they had
8 the underlying ownership of the car at all
9 times.

10 CHIEF JUSTICE ROBERTS: Do you agree
11 with Petitioner's position on the grocery store
12 hypothetical?

13 MS. BROWN: No, we don't. We don't
14 think that you have to just take the certified
15 claim and every interest that's reflected in
16 the claim as given. I think the -- the -- the
17 Claims Commission does lay out, as Justice
18 Barrett noted, that there are facilities here,
19 there are office space, there's equipment.
20 Each of those is valued separately. And so you
21 have to be trafficking in whatever interest or
22 in -- in whatever property is at issue, and you
23 don't get to just kind of bundle everything
24 together necessarily just because of -- of the
25 way that the claim was set out or the way it

1 was certified.

2 JUSTICE KAGAN: So, if we're not
3 looking to the Commission's understanding of
4 what the claim is and we're just focusing on
5 what it means to traffic in the property which
6 was confiscated, again, I would think the
7 property which is confiscated is the property
8 which was confiscated from you, the plaintiff,
9 and -- and that's a time-limited concession.
10 And the time -- it's gone. It's gone by now.
11 It doesn't exist.

12 MS. BROWN: So I do think that it --
13 that it is relevant that the property which was
14 confiscated doesn't say that it has to be the
15 property which was confiscated from you. It's
16 the property which was confiscated to which you
17 hold the claim. And we know that the claim
18 reflects an interest in the property.

19 JUSTICE KAGAN: Oh, no, I don't think
20 it does say that. I mean, you could have
21 easily written a statute which said, you know,
22 the property in which you hold an interest, and
23 that would have directed everybody to say,
24 okay, they're not talking about the property
25 interest that you own; they're talking about

1 sort of like the underlying piece of land in
2 which you have some more limited interest.

3 But that's not the way this statute is
4 written. This statute is not the property in
5 which you have an interest. This statute is
6 the property that's confiscated. It has to be
7 the property that's confiscated from you. And
8 that's, like, not the docks. It's just the
9 time-limited interest.

10 MS. BROWN: So I do think that a claim
11 reflects the interest, right, and the
12 confiscated property can be confiscated even if
13 you didn't have the ownership of it. So I
14 think putting those two things together, you
15 can get to where I was suggesting, which is
16 that you have to own the interest in the
17 property which was confiscated.

18 But, even if you disagree with me, I
19 do think that we get to the same place, and
20 that's because you look at the property which
21 was confiscated at the time of the
22 confiscation. So that is the 44 years of the
23 right to possess and control and operate the
24 docks.

25 Those 44 years don't continue to run

1 because they -- they disappeared at the date of
2 the expropriation. It's like Cuba here is
3 cutting in line in front of Petitioner and
4 exercising the rights that Petitioner was
5 supposed to be able to exercise for another 44
6 years, and Respondents are complicit in that by
7 paying the Cuban government for the exercise of
8 those rights.

9 JUSTICE KAGAN: But, if that's true, I
10 mean, I do think that the Eleventh Circuit is
11 right that you're converting a time-limited
12 interest into a perpetual interest because of
13 the seizure.

14 A seizure -- like, nobody's defending
15 the seizure here, right? But the question is,
16 like, what does this compensation scheme
17 entitle you to as a result of that seizure?
18 And -- and you didn't have a perpetual
19 interest, and now you're saying, because of the
20 seizure, because, you know, your -- your
21 interest was interrupted, we're going to treat
22 you as if you did.

23 MS. BROWN: I don't think that's
24 right. I think, at the time of the
25 confiscation, this 44-year interest is

1 distilled into a claim, and that claim entitles
2 you to recover for those 44 years or to get
3 those 44 years back. And until you either get
4 the compensation for the 44 years or you get 44
5 years returned, you do have the right to sue
6 anybody who interferes with that. And Cuba and
7 Respondents are acting in concert to interfere
8 with the right for those 44 years.

9 JUSTICE GORSUCH: Ms. Brown, I -- I
10 understand your point that the interest isn't
11 the docks; it's the use of those docks for 44
12 years that are reduced to a claim in -- in
13 value.

14 Mr. Klingler suggested, though, that I
15 can recover that amount over and over and over
16 again. You've handled the grocery store
17 hypothetical. How about that one?

18 MS. BROWN: So, before the court of
19 appeals, the Respondents here have argued that
20 the statute should be read to incorporate a
21 single -- a single recovery kind of rule so
22 that Petitioners here could only receive the
23 value of their claim a single time.

24 That argument is still open on remand.
25 Judge Brasher, in his dissent, appeared to

1 adopt the argument, although he didn't explain
2 any of the basis for that. So that is an
3 argument that you don't need to resolve today.

4 But, to the extent that I think
5 there's a multiple recovery possibility here, I
6 don't think that that should dissuade you from
7 reversing in this case because that does
8 reflect that this is not a purely compensatory
9 regime. It's a foreign policy tool that
10 Congress is -- is using in order to deter
11 trafficking and to impose harsh economic
12 pressure on the Cuban government.

13 JUSTICE GORSUCH: So let me see if
14 I've got it right. I don't have to touch it,
15 for which I am truly grateful --

16 MS. BROWN: Correct.

17 JUSTICE GORSUCH: -- but the
18 government does believe it allows multiple
19 recoveries?

20 MS. BROWN: We haven't taken a
21 position --

22 JUSTICE GORSUCH: Okay.

23 MS. BROWN: -- expressly in the
24 briefing on this.

25 JUSTICE GORSUCH: Okay. Okay.

1 MS. BROWN: But -- but, to the extent
2 that that's a possibility, I do think that
3 that's just reflective of the foreign policy --
4 the significant foreign policy interests here.

5 JUSTICE GORSUCH: Got it. Thank you.

6 JUSTICE KAVANAUGH: Do you have a
7 position?

8 JUSTICE GORSUCH: No.

9 JUSTICE KAVANAUGH: You say the
10 briefing doesn't expressly take a position.
11 Does the government have a position? It would
12 be odd if the government didn't have a position
13 on such a significant foreign policy question.

14 MS. BROWN: So we do think that the
15 foreign policy interests here do suggest that
16 Congress wasn't particularly concerned with
17 multiple recoveries in this -- in this
18 instance, and I think that that is because, if
19 you look at the congressional findings as to
20 foreign policy in Section 6081, in particular
21 paragraph (6) and paragraph (11) -- this is 10a
22 and 11a of the appendix to our brief --
23 Congress sets out that trafficking in
24 confiscated property provides the Cuban
25 government with badly needed financial

1 benefits, including hard currency, and that
2 that provision of those resources undermines
3 the foreign policy that's -- that's encompassed
4 within the economic embargo, that pressure that
5 we're trying to apply to the Cuban government
6 in order to persuade it to return to democratic
7 regimes.

8 And I -- I think that allowing for
9 somebody -- the fact that some companies have
10 paid off the claim to mean that then they can
11 continue business with Cuba and continue paying
12 Cuba millions of dollars, that really
13 undermines that foreign policy interest.

14 This isn't supposed to be a cost of
15 doing business for companies. It's supposed to
16 be a poison pill that essentially deters them
17 from ever operating with Cuba, at least with
18 respect to the confiscated property, unless and
19 until the Cuban government returns that
20 property, provides compensation for that
21 property, or otherwise returns to democracy.

22 JUSTICE JACKSON: Could we also glean
23 from the enactment history here what Congress
24 was really trying to do? And that is not
25 necessarily set up a compensation scheme, as

1 has been said, but, you know, the fact that the
2 Cuban Claims Act, which initially created the
3 Foreign Claims Settlement Commission in 1964,
4 just a few years after all this property was
5 taken but didn't give a remedy, suggests to me
6 what Congress was doing was -- was really
7 freezing and trying to highlight the fact that
8 this property is taken, that it has a lot of
9 value, and we're going to set up a system to
10 prevent Cuba from trafficking in it.

11 It did not at that time, sort of the
12 initial thrust of this, focus on how much
13 anybody was going to get or the people whose
14 property had been stolen, what is the avenue
15 for recovery. That wasn't the focus.

16 It was to try to keep Cuba from
17 trafficking in this property.

18 MS. BROWN: I think that's exactly
19 right. That's reflected specifically in
20 Section 6081 and -- and paragraph 11. Congress
21 notes there that there is no existing judicial
22 remedy for the victims of these confiscations
23 and that it wanted to provide such a remedy in
24 the federal courts of the United States.

25 JUSTICE JACKSON: And then, when the

1 remedy comes along, I mean, it may seem pretty
2 draconian to suddenly give multiple recoveries
3 to all these people, but if you think of it in
4 light of Congress's intention to really, really
5 make it hard for Cuba to traffic in these
6 properties, that kind of a sanction makes at
7 least some sense.

8 MS. BROWN: Yes, that's exactly right.
9 This -- this was intended to be a -- a huge
10 deterrent. It wasn't intended to be something
11 that people actually ended up paying because it
12 was supposed to make them think twice about
13 ever getting involved in these kinds of
14 transactions at all.

15 JUSTICE JACKSON: Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas?

19 JUSTICE THOMAS: The -- how far can --
20 is there any limit to how far Congress can go
21 with this sort of poison pill remedy?

22 MS. BROWN: As -- as Justice Sotomayor
23 mentioned, there are some due process concerns,
24 I suppose, that -- that could be raised to the
25 extent that the -- that the recovery so far

1 outweighs something else. I think that nobody
2 would kind of bat an eye at this if the
3 recovery was just going to the Treasury instead
4 of going to Petitioners.

5 Respondents here have raised due
6 process concerns as to the remedy as well.
7 That is another issue that will be open on
8 remand to the -- to the extent that the Court
9 has -- has further concerns with that there.

10 CHIEF JUSTICE ROBERTS: Justice Alito?

11 JUSTICE ALITO: When the -- the
12 Commission was calculating -- excuse me -- the
13 amount due, was it supposed to calculate how
14 much Petitioner would have received during the
15 44-year period or a longer period, or what does
16 the statute say about that, or does it say
17 nothing about it and leave it to the
18 Commission?

19 MS. BROWN: So it says that the
20 Commission is supposed to understand or figure
21 out what the property interest here was and
22 then value that in the way that's the most
23 equitable, undertaking considerations of fair
24 market value, book value, replacement value,
25 things like that.

1 I think you can see from the
2 Commission decision that they were very well
3 aware that this was a 44-year time-limited
4 interest and that that -- there's every
5 indication that that was taken into account in
6 the way that they were valuing it.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 JUSTICE SOTOMAYOR: I -- I'm not sure
11 you're answering the question.

12 Your answer earlier made it seem as it
13 wasn't 44 years, that was -- it was infinite
14 until the Cuban government gave the property
15 back, it gave back 44 years.

16 So how could the Commission value it
17 on 44 years when it -- by your claim, it's
18 infinite?

19 MS. BROWN: So the claim --

20 JUSTICE SOTOMAYOR: Until Cuba acts.

21 MS. BROWN: The claim continues to
22 exist and the claim continues to be able to be
23 enforced until then.

24 JUSTICE SOTOMAYOR: You know
25 something, that --

1 MS. BROWN: But the value of the
2 interest --

3 JUSTICE SOTOMAYOR: When I think of
4 claim, I think of like a lien, all right? And
5 I thought that analogy in one of the briefs was
6 very useful.

7 I lend someone money. Sometimes I
8 lend it for purposes of that property, but
9 often I lend it for the person to use it on
10 something else. But I take a lien on property.

11 That mean that that lien exists until
12 somebody pays it off, all right? And if
13 someone buys that property and knowing the lien
14 exists, they have to pay me even if though they
15 may have given the full value to the -- to the
16 owner, the original -- the -- the full owner.

17 And that's what I think this was
18 like -- this law is like, correct?

19 MS. BROWN: I think that that's a
20 helpful analogy, yes. We think that the
21 property interest is reduced to the claim.

22 JUSTICE SOTOMAYOR: So what the
23 Commission did was value that lien, correct?

24 MS. BROWN: Yes. They valued the --
25 the 44 years.

1 JUSTICE SOTOMAYOR: All right. When I
2 read the law or the snippets of it that were
3 given to me, it seemed to say that you -- the
4 Respondent could challenge -- that the value
5 was presumptive that the Commission gave but
6 that they could fight it if it was invalid --
7 if it was not ripe, correct?

8 MS. BROWN: So I don't think that
9 that's correct. The way that I read that is
10 that the presumption is that the Claims
11 Commission's valuation is going to be the
12 amount that you recover. You can't challenge
13 what their valuation was, but you can challenge
14 whether that is the right amount to recover or
15 whether you should --

16 JUSTICE SOTOMAYOR: That's what I
17 mean.

18 MS. BROWN: -- instead recover fair
19 market value.

20 JUSTICE SOTOMAYOR: Yes, exactly.

21 MS. BROWN: Yes. That is correct.

22 JUSTICE SOTOMAYOR: Okay. So that's
23 still open to -- the other side said no, that
24 it's --

25 MS. BROWN: So I -- I -- to the extent

1 that that's what -- that's what my friend said,
2 I -- I think that that's incorrect, but I --
3 but I do think that you would to have show that
4 the fair market value is the greater of the
5 amounts because the -- the recovery is for the
6 greater of the claim's certified amount, the
7 other amount that the special master
8 determines, which isn't relevant here, or the
9 fair market value.

10 But, if you can show that the fair
11 market value is greater and is the appropriate
12 amount to be applied in this situation, then
13 that's what's going to apply.

14 JUSTICE SOTOMAYOR: I see. So he's
15 right. Okay. That's what I needed to know.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 JUSTICE SOTOMAYOR: And --

18 CHIEF JUSTICE ROBERTS: Oh, I'm sorry.

19 JUSTICE SOTOMAYOR: No.

20 CHIEF JUSTICE ROBERTS: Justice Kagan?

21 Justice Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Do you want to say
24 anything on lawful travel? In particular, you
25 know, the story on the other side and in the

1 amicus briefs is that they did this at the
2 encouragement of the United States Government
3 and that they consulted with the United States
4 Government, who told them they were good to go.
5 I'm paraphrasing.

6 MS. BROWN: Yeah.

7 JUSTICE KAVANAUGH: And they say
8 that's lawful travel. And I notice in your
9 brief you don't take a position on that.

10 Do you have a position on the lawful
11 travel in this case?

12 MS. BROWN: So the government has not
13 made a determination in this case as to whether
14 the particular activities here constituted
15 lawful travel, whether they were within, I
16 think, the general license that -- that
17 Respondents were purporting to operate under.

18 We have in other cases --

19 JUSTICE KAVANAUGH: They were told
20 that previously, weren't they, by the
21 government?

22 MS. BROWN: They say that they were.
23 Again, we haven't taken -- we haven't made any
24 kind of determination that that is correct.

25 To the extent that Respondents

1 received assurances from appropriate government
2 officials that what they were doing was lawful
3 and authorized, we do think that that would
4 raise due process concerns.

5 To the extent that the Eleventh
6 Circuit wants the --

7 JUSTICE KAVANAUGH: Like, huge ones,
8 wouldn't it?

9 MS. BROWN: To the extent that the
10 Eleventh Circuit wants the government's
11 position and determination on those issues, the
12 Eleventh Circuit has in prior cases involving
13 lawful travel asked for the United States'
14 views on those kinds of questions, and we would
15 be happy to provide them at that point.

16 We haven't provided them here simply
17 because it's not a part of the question
18 presented.

19 JUSTICE KAVANAUGH: Thank you.

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: So you agree that
23 would be open on remand?

24 MS. BROWN: Yes, definitely.

25 JUSTICE BARRETT: Okay. And then

1 just -- just one question. Let's say that I
2 agree with you about the time question and I
3 think it has to be engaged at the time of the
4 confiscation. I just want to go back to that
5 use question I raised before. So there's this
6 dispute about whether it was cargo-only or if
7 it was passengers too.

8 I mean, the statute repeatedly talks
9 about "the property," "the property that was
10 taken." And I -- I took you to agree with that
11 insofar as you distanced yourself from your
12 friend's answer to the grocery store
13 hypothetical.

14 If it turns out on, let's say it's
15 open on remand, on remand that really it was
16 just cargo, then does that mean that the cruise
17 lines did not traffic in the property if they
18 didn't use it for cargo purposes?

19 MS. BROWN: So not necessarily. I do
20 think it depends on first what you think of the
21 property is because, if the property here is
22 the docks and they had an interest in the docks
23 and someone trafficked in the docks, then their
24 interest would reflect that their -- that their
25 interest was limited just to cargo uses and not

1 to passenger uses, and that would be connected
2 to the valuation, but it would still qualify.

3 But I also -- I -- I think the cargo-
4 versus-passenger thing here is kind of a red
5 herring because even Respondents have
6 acknowledged that if Petitioners had the
7 exclusive control of this particular piece of
8 property, if someone used it for a different
9 purpose than they did, that would still be
10 infringing, I think, on -- on their right to
11 use.

12 This is the hypothetical with, like,
13 the -- the -- the building where one floor,
14 where you lease it out and there's a use
15 restriction and it can only be used for office
16 space and then someone comes and uses it for a
17 restaurant. Everyone agrees, I think, that
18 that's still trafficking in confiscated
19 property.

20 So the real question here is whether
21 this was an exclusive right to the docks or a
22 non-exclusive right. And on that, we see
23 nothing in the record that would indicate that
24 it was non-exclusive. Certainly, the court of
25 appeals didn't take that position. Otherwise,

1 there would have been no need to remand for
2 further consideration of the trafficking that
3 had occurred before 2004 if this was a
4 completely non-exclusive interest that -- that
5 could have allowed for -- for others to use it
6 in the same way.

7 JUSTICE BARRETT: And isn't it the
8 case that part of the value is that they had
9 invested in building the docks, so it's not
10 just like the car lease where I was going to
11 have to keep paying monthly and then you take
12 the car and -- and then what are -- you know,
13 what have you really lost?

14 But, here, it was like their
15 consideration was that they kept -- they had a
16 lot of money invested that they never got back
17 because Cuba confiscated it.

18 MS. BROWN: That's exactly right.
19 They built the docks. The payment for the
20 docks was supposed to be the right to operate
21 and commercially benefit from them.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Can I just get you
25 to quickly explain the role of the certified

1 claim in your analysis?

2 I'm concerned that we might be led to
3 reason from first principles about property law
4 in general when, really, the certified claim
5 process which is in this statute is doing very
6 important work.

7 MS. BROWN: I certainly agree with
8 that. The certified claim is going to set out
9 what the property interest was under the
10 appropriate law, which I assume would be taking
11 into account the Cuban law that defined the
12 scope of the property interest.

13 They looked at all the record
14 documents that explained the extent of what the
15 usufruct here was, the extent of the
16 concession, the time limits remaining on that,
17 and then they valued that based on the
18 remaining life of the concession and what value
19 was supposed to be able to come out of that.

20 JUSTICE JACKSON: And what they gave
21 as a claim, as I understand it, never said this
22 terminates or evaporates or something happens
23 to it in the same way that the property
24 interest would have expired?

25 MS. BROWN: Yes. That's exactly

1 right. The claim --

2 JUSTICE JACKSON: The claim doesn't
3 have any sort of termination provision in it.
4 They were just valuing what the underlying
5 property interest is and giving them a claim.

6 MS. BROWN: That's exactly right.

7 JUSTICE JACKSON: And then the statute
8 here says, if you have a claim, you get to make
9 this kind of -- you have this kind of cause of
10 action, right?

11 MS. BROWN: That's correct. The claim
12 essentially encumbers the property as the lien
13 analogy goes, and that property is treated as
14 tainted. Anyone who transacts with, engages
15 with, benefits from that property is then
16 trafficking in that property, and the claim
17 holder has the right to -- to pursue that.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Mr. Clement.

22 ORAL ARGUMENT OF PAUL D. CLEMENT

23 ON BEHALF OF THE RESPONDENTS

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

1 Title III of the Helms-Burton Act
2 provides an action against someone who traffics
3 in property which was confiscated from the
4 Cuban government. "Property" is a defined term
5 in the statute that includes any property
6 interest, including a time-limited one like a
7 leasehold. And then the Act gives a cause of
8 action to someone who has the claim to such
9 property, i.e., the property that was
10 confiscated.

11 The plain text of the statute requires
12 a one-to-one correspondence between what was
13 confiscated, the property interest that was
14 confiscated, and the property interest that was
15 trafficked. So, if all that was confiscated
16 was the mining interest in a property, only
17 somebody who traffics in the mining interest,
18 not somebody who harvests timber on the
19 property, is trafficking in the property
20 interest that was confiscated.

21 The same principles apply to time
22 limits on the property. So, if someone had a
23 50-year leasehold in the property, anyone who
24 traffics during the leasehold traffics in
25 confiscated property. But someone who arrives

1 after the leasehold has run might have a --
2 might be subject to a claim by the landlord but
3 not to the leaseholder.

4 And basic principles of property law
5 reflect those same distinctions. Tahoe-Sierra
6 says that both the spatial and the temporal
7 limits define the metes and bounds of the
8 property interests.

9 And so, with respect to what's at
10 issue here, I think it's clear, as suggested in
11 the response to Justice Kagan's hypo, that with
12 respect to the spatial limits, this is obvious.
13 You can't -- if somebody traffics in your
14 neighbor's property, you don't have a
15 trafficking claim against them.

16 But the same things apply temporally.
17 And, here, it should be common ground that the
18 only interest that Petitioner had in these
19 docks was a concession that expired in 2004.
20 Someone who arrives later is not in a position
21 to traffic in the -- the property interest that
22 was confiscated. There's not the one-to-one
23 correspondence the statute requires.

24 I welcome the Court's questions.

25 JUSTICE THOMAS: If I had a lease in

1 property, if I leased the property and -- how
2 would that lease be confiscated?

3 MR. CLEMENT: So the lease would be
4 confiscated in the sense that I -- I mean, I
5 assume that what would happen is that the Cuban
6 authorities would come in and they would take
7 control over the facilities, and then, in the
8 process, you would say they confiscated the
9 leasehold. That's the way it works in domestic
10 takings law. And in domestic takings law,
11 there is such a thing as a taking of a lease,
12 but, of course, the value of the lease is --
13 reflects its time limit.

14 And what we don't have in domestic
15 takings law is this idea that under certain
16 limited circumstances, there is a substitute
17 payor that pays the person who had their
18 property taken in lieu of the government. And
19 that's the unusual regime that Helms-Burton
20 creates.

21 But the only person who is in a
22 position to be that substitute payor is the
23 person who traffics in the very property
24 interest that was confiscated by the Cuban
25 government. If there's a mismatch --

1 JUSTICE THOMAS: But the statute
2 doesn't say "property interest." It says
3 "traffics in property which was confiscated."
4 You would more naturally think that it was
5 speaking to the property that was the basis of
6 the lease.

7 MR. CLEMENT: Here's the problem with
8 that, Justice Thomas: "Property" is a defined
9 term in the statute. So, when you read
10 "property," you go to the definition and it
11 says any interest in the property, including
12 leaseholds, including future interests.

13 So we're clearly talking about sticks
14 in the bundle, and that makes sense. I mean,
15 if any stick in the bundle is confiscated, then
16 it makes sense that you get compensation. And
17 under this unusual regime where you put
18 somebody as a substitute payor, it makes sense
19 that you put the substitute payor in that
20 position only if they traffic in the stick in
21 the bundle that was confiscated.

22 So it's the example I used with
23 mineral rights. And that's a real-world
24 example. Some people, their only interest in
25 property that was taken over by the Cuban

1 government was a mineral interest. Well, if --

2 JUSTICE THOMAS: What would -- what
3 would be the interests if you owned it fee
4 simple?

5 MR. CLEMENT: Then it's easy. You own
6 the whole thing. And then you do have the
7 perpetual ability to go after people who later
8 traffic on the property. But, as the Eleventh
9 Circuit held here, if you ignore the time
10 limits on concessions or leaseholds, you end up
11 sort of treating relatively small sticks in the
12 bundle as if they're the whole kit and
13 caboodle.

14 And that doesn't make any sense, and
15 it really doesn't make sense particularly if
16 you understand that nothing about our position
17 makes the confiscation end or goes away --
18 makes the claim against the Cuban government go
19 away.

20 JUSTICE THOMAS: But it also seems
21 quite difficult to pinpoint the interest, the
22 particular interest, in property. It could be
23 a very small interest. I could lease a closet
24 in -- in -- in a huge dock facility and somehow
25 I would have to pinpoint that.

1 MR. CLEMENT: Well, in theory, it
2 could be difficult. In practice, what you
3 principally see, if you look at the claims, is
4 you do have some leaseholds but only a handful.
5 I mean, this whole case is about -- like, the
6 government in their brief at page 29 identifies
7 a grand total of five time-limited interests
8 among the claims, three leases and two patents.
9 So we're talking about a pretty small universe
10 here of the time-limited ones.

11 But the time limits are crystal-clear.
12 If you went and looked at the Claims Commission
13 order here, you would say that -- you would see
14 that it ends in 2004. So there are ones where
15 you would have very clear notice.

16 I do want to talk about Justice
17 Barrett's hypo because it's not a hypo. If you
18 look at the claim here, it didn't just cover
19 the docks. It also covered a thousand shares
20 of Cuban telephone stock, and it also covered
21 about \$300,000 in repudiated debts.

22 Now the district court awarded them
23 the whole 9 million even though there's no
24 question that we didn't traffic in Cuban
25 telephone stock and there's no question that we

1 didn't telephone -- traffic in the confiscated
2 debts.

3 And the confiscated debts are
4 important for another reason, because I don't
5 think it's actually possible to traffic in
6 confiscated debts. Yet that is probably the
7 single-most recurring claim that's reflected in
8 the Claim Commission's decisions, because what
9 happened is not only, when Cuba owed money to
10 U.S. companies, it wasn't going to pay, so you
11 have all those repudiated debts, but then you
12 had the other problem, which is a lot of
13 American companies had accounts receivables
14 from other American companies that were
15 expropriated.

16 JUSTICE GORSUCH: Mr. Clement --

17 MR. CLEMENT: All of that's part of
18 the confiscated property. I'm sorry.

19 JUSTICE GORSUCH: -- I'm -- I'm --
20 I'm -- I'm following you, but I struggle just a
21 little bit. The docks were confiscated, right?

22 MR. CLEMENT: Well, the -- the
23 Petitioner's time-limited interests --

24 JUSTICE GORSUCH: No, no, no.

25 MR. CLEMENT: -- in the docks were

1 confiscated.

2 JUSTICE GORSUCH: The docks were
3 confiscated.

4 MR. CLEMENT: I can't agree to that,
5 with all due respect --

6 JUSTICE GORSUCH: Really?

7 MR. CLEMENT: -- because Cuba owned
8 the docks. So the only thing that was
9 confiscated --

10 JUSTICE GORSUCH: Okay. They -- they
11 confiscated control of the docks.

12 MR. CLEMENT: -- is the part of the
13 documents they didn't control, which is the
14 time interest.

15 JUSTICE GORSUCH: They confiscated
16 control of the docks, right?

17 MR. CLEMENT: They confiscated the
18 concessionary interest. They actually -- with
19 all respect, I'm not trying to be difficult,
20 though I know I am being difficult, but --

21 JUSTICE GORSUCH: Just a little bit,
22 but that's okay.

23 MR. CLEMENT: Yeah. No, no, but the
24 things is we don't concede -- the government
25 comes up here and said they had a right to

1 control the docks. That is directly contrary
2 to the position that we took in the district
3 court and that we appealed to the Eleventh
4 Circuit.

5 JUSTICE GORSUCH: All right. Let
6 me -- Mr. Clement, let me --

7 MR. CLEMENT: Our position is they had
8 no control of the docks. They just had a
9 non-exclusive --

10 JUSTICE GORSUCH: Fine.

11 MR. CLEMENT: -- cargo concession.

12 JUSTICE GORSUCH: There's a -- there's
13 a disagreement over exclusivity. I understand
14 that, but for purposes of this question, let's
15 put that aside.

16 There was confiscation of a property
17 interest in the docks. Let's -- how about
18 that? Can we agree on that?

19 MR. CLEMENT: We're together.

20 JUSTICE GORSUCH: Okay. And there's
21 no question that your client has used the
22 docks.

23 MR. CLEMENT: We have used the docks.

24 JUSTICE GORSUCH: Okay.

25 MR. CLEMENT: I agree with you.

1 JUSTICE GORSUCH: All right.

2 MR. CLEMENT: We just haven't
3 trafficked in that which was confiscated --

4 JUSTICE GORSUCH: Well --

5 MR. CLEMENT: -- which was a
6 time-limited concession.

7 JUSTICE GORSUCH: And there's a claim
8 with respect to those docks.

9 MR. CLEMENT: There is. The claim
10 reflects the time limit. And if you look at
11 the claim --

12 JUSTICE GORSUCH: And the claim
13 reflects the time limit, okay. All right. So
14 we have -- we have confiscation, we have
15 trafficking, and we have a claim. What's
16 missing?

17 MR. CLEMENT: What's missing is the
18 overlap between the property interest that was
19 confiscated and the property interest that was
20 trafficked. So the property interest that was
21 confiscated was a time-limited interest --

22 JUSTICE GORSUCH: Well, where do you
23 get that from? It says traffics in -- traffics
24 in property which was confiscated.

25 MR. CLEMENT: Right.

1 JUSTICE GORSUCH: Any -- any property
2 of any kind in which -- was confiscated, yeah.
3 Got that.

4 MR. CLEMENT: Right, but then you keep
5 reading.

6 JUSTICE GORSUCH: We have trafficking.
7 Got that.

8 MR. CLEMENT: And when you keep
9 reading, you see --

10 JUSTICE GORSUCH: I -- I got it right
11 all -- I've read it -- I've read it.

12 MR. CLEMENT: Yeah, yeah. I do too.
13 I do too. And if you keep reading, it says
14 that you shall be liable to any United States
15 national who owns "the," not "a," "the claim to
16 such property." And the "such property" is
17 plainly referring back to the property which
18 was confiscated.

19 JUSTICE GORSUCH: Yeah.

20 MR. CLEMENT: QED. With all due
21 respect, this statute requires a one-to-one
22 correspondence between what was confiscated and
23 what was trafficked in, and that makes sense.

24 JUSTICE GORSUCH: I think I follow all
25 of it except for the QED.

1 MR. CLEMENT: What's that?

2 JUSTICE GORSUCH: I think I follow all
3 of that except for the QED.

4 MR. CLEMENT: I -- I thought that
5 might be your response, Your Honor, but I
6 really do think that if you read the statute,
7 it says that the person who can bring the
8 action is the person with the claim to such
9 property.

10 JUSTICE JACKSON: But, Mr. Clement --

11 MR. CLEMENT: "Such property" has to
12 refer back to the property which was
13 confiscated.

14 JUSTICE JACKSON: -- why -- why isn't
15 the -- why isn't the claim --

16 JUSTICE BARRETT: It was --

17 JUSTICE JACKSON: Oh.

18 MR. CLEMENT: Sorry.

19 JUSTICE BARRETT: It refers to
20 property which was confiscated, and so that
21 kind of goes back to Justice Gorsuch's point
22 because property -- the "such property" refers
23 back to property that doesn't have an article
24 in front of it. It doesn't say "the property
25 that was confiscated." It says "property that

1 was confiscated," making it seem broader.

2 MR. CLEMENT: No, I don't think so
3 because, again, "property's" a defined term in
4 the statute, and so property includes any
5 property interest that you have in the
6 property. And then it --

7 JUSTICE BARRETT: No, but it doesn't
8 say that, though. It says "any property," and
9 then, when it gives the long list of kinds of
10 property, I read that definition to say
11 essentially any kind of property. So it can be
12 intangible, it can be a patent, it can be a
13 leasehold, et cetera.

14 But it doesn't say -- a couple times
15 you put in "interest" before it, any interest
16 in property, but it doesn't say any interest in
17 property. It says any property.

18 MR. CLEMENT: So, with respect, it
19 says any property, and then it talks about
20 specific --

21 JUSTICE BARRETT: Right.

22 MR. CLEMENT: -- limited interests in
23 property. And so I'm reading it, and I don't
24 think it's a leap, to say that it's being
25 inclusive and it's saying any interest in the

1 property.

2 JUSTICE JACKSON: Mr. Clement, what

3 I --

4 MR. CLEMENT: And -- and then -- and

5 then --

6 JUSTICE JACKSON: Right. Sorry.

7 Yeah.

8 JUSTICE BARRETT: Can you just finish,

9 if you could finish for me.

10 MR. CLEMENT: Yeah. And then it says
11 that the person with the claim to such property
12 gets to bring the action, and that's important
13 because, otherwise, you -- you could certainly
14 have a situation where different people have
15 different property interests in the same
16 property, the same physical location, and you
17 don't want to let one of them bring a claim for
18 the other person's claim in the property. And
19 the statute would kind of be chaotic if you did
20 that because it allows you to traffic if you
21 have authorization.

22 Well, presumably, you need to get
23 authorization from the person who has the exact
24 interest in the property that you plan to
25 traffic in. And, similarly, there's a -- a

1 provision in the statute, (a)(5)(D), that's
2 worth a look because that provision suggests
3 that basically, once somebody brings one of
4 these actions, it's exclusive to anybody else
5 bringing an action in the property.

6 Now, again, if "property" means a
7 specific slice of the bundle, a specific stick
8 in the bundle, statute works great. If I have
9 a leasehold and somebody traffics during my
10 leasehold, I can bring an action for my
11 leasehold, but I don't get to give
12 authorization for trafficking years later and
13 interfere with somebody else --

14 JUSTICE JACKSON: But, Mr. Clement --

15 MR. CLEMENT: -- who's got the fee
16 interest. I'm sorry.

17 JUSTICE JACKSON: -- Mr. Clement,
18 why -- why doesn't the statute also work great
19 if we understand that it has a provision that
20 gives some authority to the FCSC to tell us
21 what the person's property interest is?

22 It seems to me that your analysis has
23 at least -- I -- I -- I counted two problems,
24 but that's really the main one in -- in --
25 in -- in that you're trying to get us to

1 evaluate what the person's property interest is
2 when this statute gives that responsibility to
3 that agency.

4 That is, in fact, all that agency is
5 supposed to be doing is listening to the
6 arguments that you're talking about and
7 deciding what this company's -- Havana Docks's
8 property interest is. And once they've decided
9 that, they said, you have a claim to -- to
10 enforce the interest as we've defined it.

11 And the statute then appears to say:
12 Anybody who has a claim can come in and try to
13 recover in this way. And the -- the thing --
14 the other thing that I think is missing from
15 your analysis is that nothing about the statute
16 says that the scope or extent of that claim is
17 tied to whether their property interest was
18 temporary or limited or anything like that, and
19 that's the way you seem to want us to read it.

20 You cut out the FC -- FCSC in the
21 analysis, and you say but they only had a
22 limited property interest, so -- and that
23 expired before we arrived and so they don't get
24 to press their claim. There's nothing in the
25 statute that says the claim should be evaluated

1 based on what the property interest was.

2 The S -- the FCSC does that. They
3 tell us this person has a claim. They evaluate
4 all of the limitations. And then the statute
5 operates perfectly.

6 MR. CLEMENT: So, with respect,
7 Justice Jackson, we're not fighting what the
8 Commission certified. What the Commission
9 certified was actually a -- a time-limited
10 interest. And if you look at the -- I mean,
11 that's obviously Joint Appendix 259 because
12 they say it expires in -- in -- in 2004. But
13 it's even more obvious if you look at page 256
14 of the Joint Appendix, where they say that
15 the -- the whole claim to ownership and control
16 of the docks is on the basis of a concession.

17 JUSTICE JACKSON: Right. But what
18 they don't say --

19 MR. CLEMENT: And nobody doubts
20 that --

21 JUSTICE JACKSON: -- but what they
22 don't say is that the claim that we are
23 certifying today has the same limitations as
24 the limited property interest that we are
25 evaluating. That's the thing you're missing, I

1 think, in order to make your argument work.

2 MR. CLEMENT: I don't think so with
3 respect. And I think it's no different if I
4 can take Justice Kagan's hypo. If the Claims
5 Commission looked at this thing, and I forget
6 whether it was the blue or the yellow, but if
7 the Claims Commission said you got the blues,
8 that's great. And then, if somebody traffics
9 in the blues, I have a claim.

10 Now I want to say, if -- if you
11 traffic in the blues, you don't get the claim
12 to the Cuban telephone stock, but that's a
13 separate issue. But you get what is specified
14 in the claim, but you don't get a claim over
15 the yellows just because you -- they're near it
16 and --

17 JUSTICE JACKSON: So why didn't you
18 traffic in the blues? I -- I -- I understood
19 you to be trafficking in the blues for the
20 purpose of this hypothetical.

21 MR. CLEMENT: Well, but what I'm
22 saying is, by parity of reasoning, what happens
23 for the spatial limits of the property
24 interests have to apply to the temporal
25 interests in the property.

1 So think if there were, like, two
2 stacked leases of 50 years and then another 50
3 years. If you traffic in year 45, you have a
4 trafficking claim against the person who owned
5 the first leasehold. But, if you traffic in
6 year 55, you have a claim against -- the person
7 who owns the second leasehold has the claim
8 against you, but the first one doesn't.

9 And keep in mind there's nothing
10 terrible about that. This statute, Congress
11 didn't think it was giving a trafficking claim
12 to everybody who had a claim against Cuba.
13 There are lots and lots of claims that, by the
14 nature of the property, you're not going to
15 have a trafficking claim.

16 JUSTICE ALITO: No, it didn't think it
17 was -- it didn't think it was giving a claim to
18 everybody who had a claim -- giving a -- a
19 claim that could be asserted in court to
20 anybody who had property confiscated by the
21 Cuban government, but isn't what it -- what
22 Congress said this as applied to this case?

23 Havana Docks had a concession for 44
24 more years and that had a value, and the Cuban
25 government has not compensated them for what

1 they've taken, and, therefore, nobody is to use
2 that concession in the future, that nobody is
3 to use the property interest that was the
4 subject of that concession in the future until
5 there's compensation from the Cuban government.
6 It's not -- so, you know, you go into this with
7 your -- with your eyes open.

8 Now maybe you were misled by the -- by
9 the government, and that's another -- another
10 story, but, you know, if your client came to
11 you and said we're thinking of docking our
12 cruise ships and, you know, what does that --
13 what's the Helms-Burton Act going to mean for
14 us, I mean, a lawyer like you would say: Whoa,
15 you know, you're -- you're taking a big risk.

16 MR. CLEMENT: Well, I would say, yeah,
17 it's -- it's a close question, we might end up
18 in the Supreme Court of the United States.

19 (Laughter.)

20 MR. CLEMENT: But I would say -- I'll
21 tell you what my best view --

22 JUSTICE ALITO: I would bet -- I would
23 bet you would not -- you know, you would not
24 advise them full speed ahead and we'll -- we'll
25 litigate this in the United -- in -- in the

1 Supreme Court.

2 MR. CLEMENT: I would -- what I would
3 tell them is there might be reasons to be
4 somewhat cautious, but my best reading of the
5 statute is you don't have anything to worry
6 about after 2005.

7 And the reason I say that is because,
8 first of all, the statutory text specifically
9 says that you have to compensate -- you have to
10 traffic in the property interest that was
11 compensated, like -- confiscated. Now,
12 obviously, I've pieced together some pieces of
13 the statute, but I think that is the best
14 reading, that you need the one-to-one
15 correspondence.

16 And then I would say: Look, I pulled
17 the claim, and when I pulled the claim, I saw
18 that the only basis for a claim to ownership of
19 the docks was on the basis of the concession.
20 That's Joint Appendix 256. And then I'd keep
21 paging through, and at Joint Appendix 259, it
22 says that expires in 2004.

23 So I would say: Look, you know,
24 there's a lot of money under the statute the
25 way the Petitioners interpret it. There's an

1 enormous amount of money under the statute. So
2 you may get sued. But, if you want my best
3 answer, my best answer is you're in the clear
4 after 2005.

5 And like I said, that doesn't really
6 distinguish it from a whole bunch of other
7 property that Cuba confiscated. From the
8 Sabbatino case, they -- they -- they -- they
9 confiscated sugar. It's a perishable good.
10 The sugar that was confiscated in 1960 is not
11 available for trafficking anymore. That
12 doesn't mean that the claim to the perishable
13 good is -- it doesn't mean that it wasn't
14 confiscated. It doesn't mean that the people
15 in Sabbatino don't have a claim against the
16 Cuban government.

17 It just means that in the nature of
18 certain property interests, there will either
19 be very little sort of window for trafficking
20 in that same property interest or there will be
21 none at all. As I said, the big --

22 JUSTICE ALITO: Well, if your -- if
23 your reading of the -- of the statute is
24 correct, it's argued it would make hash of the
25 coverage of patents, and that does seem to me

1 to be correct. Why is it not?

2 MR. CLEMENT: Well, it's not for two
3 reasons. One is because the universe of
4 confiscations didn't stop in 1960. So, as a --
5 as at -- as at least a theoretical matter, and
6 that's what you should be looking at if you're
7 worried about deeming terms superfluous in a
8 statute, you could confiscate patents going
9 forward.

10 But the second reason is not --

11 JUSTICE ALITO: As a theoretical
12 matter, Congress included patents because it
13 thought that even though all the patents that
14 had been issued to Americans in Cuba before the
15 Cuban revolution had expired after 17 years,
16 somebody here might go to Cuba after the
17 enactment of the -- of the Helms-Burton Act and
18 get a patent on something under Cuban law and
19 then the Cuban government might subsequently
20 confiscate that patent? That's why Congress
21 included patents in the statute?

22 MR. CLEMENT: So I think -- in
23 fairness, I think Cuba -- Congress included
24 patents in the statute because it wanted to be
25 comprehensive of all interests in the -- in

1 property. But I don't think it's a farfetched
2 hypothetical to say that somebody might have,
3 like, illegally left Cuba, from the Cuban
4 government standpoint, had a patent, and that
5 patent was canceled, and that might be
6 something that they could give a -- bring an
7 action to.

8 The other thing I will say is, look,
9 the government looked through all these claims,
10 and they found -- even in 1960, they found only
11 two claims that involved patents. And I do
12 think this does underscore the point that
13 Justice Barrett alluded to, which is it just
14 can't be right that if you traffic in anything
15 that's covered by one of these claims that you
16 get to recover the full amount of the claim
17 because, like, one of the two patent claims
18 that they point to on page 29 of their brief --
19 I looked it up -- it's ITT. So IT&T was one of
20 the largest sort of confiscees, if you will,
21 and the total amount of their claim is \$500
22 million. The value of the patents that were
23 confiscated is \$7,000.

24 Now, first of all, I think the reason
25 we're right about patents is because, like, I

1 think it's weird to create a perpetual patent.
2 But, if you assume that that's the right answer
3 and so that patent becomes the super-patent and
4 it continues to apply and somebody infringes on
5 one of IT&T's patents in 2026, they can't be
6 entitled to the full \$500 million in the claim,
7 or, if they are, I'm going to stop doing what
8 I'm doing and move on to something else --

9 (Laughter.)

10 MR. CLEMENT: -- because that is an
11 unbelievable windfall. So it has to be that
12 it's not the claim, the claim, the claim. It's
13 the property interest, the property interest,
14 the property interest.

15 And you need to have that one-to-one
16 correspondence between that which was
17 confiscated and that which you trafficked in.
18 If you don't have that, it doesn't mean the
19 claim goes away. It doesn't mean the
20 property's not confiscated. It just means that
21 the particular person who arrived at a
22 neighbor's property or arrived at the docks
23 five years too late, they are somebody who is
24 now going to be put in the extraordinary
25 position of being the substitute payor of just

1 compensation for the Cuban government.

2 JUSTICE SOTOMAYOR: Why not? Putting
3 aside the multiple recovery issue, which I
4 agree with you gives rise for concern, okay?
5 Putting that aside, why isn't this like a lien?

6 You buy the property. You know that
7 you have to pay someone who owned the use of
8 the docks before. Now, whether it was
9 exclusive or not, you're a cruise line, you
10 know that the Commission has said that they had
11 a lease interest that was at least for
12 unloading cargo, I'll concede that, why aren't
13 you liable?

14 MR. CLEMENT: Because that's not the
15 statute that Congress wrote. I mean, I too
16 enjoyed the part of --

17 JUSTICE SOTOMAYOR: If I -- if I
18 disagree with your construction of the statute,
19 if I see that all you have to have is a claim
20 in confiscated property, and the lease is a
21 claim on the docks, whether you want it to be a
22 claim on the docks or not, it is because the
23 lease is of the docks.

24 MR. CLEMENT: So I just can't find
25 that in the statute. And, like, I too enjoyed

1 their brief and I enjoyed the reference to lien
2 and I enjoyed the reference to encumbrance.
3 And if I found either of those words in this
4 statute, I might think --

5 JUSTICE SOTOMAYOR: It defines --

6 MR. CLEMENT: -- they had a pretty
7 good point.

8 JUSTICE SOTOMAYOR: -- "property" as
9 liens.

10 MR. CLEMENT: What's that?

11 JUSTICE SOTOMAYOR: It defines -- the
12 statute defines "property."

13 MR. CLEMENT: It might include
14 liens --

15 JUSTICE SOTOMAYOR: Legal.

16 MR. CLEMENT: -- but it doesn't make
17 the claims liens. It doesn't make a Claim
18 Commission claim a lien on the property. It
19 doesn't make it an encumbrance on the property.
20 It doesn't do all of those things.

21 And, of course, I don't need to tell
22 you, like, you know, liens are, like,
23 interesting creatures. They don't require you
24 to have any real interest in the property. If
25 I have a mechanic's lien on a property, I don't

1 have to have any interest in the property.

2 So I think, if Congress wanted to come
3 up with a lien regime, then, you know, it would
4 have written a different statute, and I would
5 have given different advice to the client in --
6 in Justice Alito's hypothetical. I would say,
7 yeah, that's the same address.

8 JUSTICE SOTOMAYOR: All right. Thank
9 you.

10 MR. CLEMENT: And --

11 JUSTICE BARRETT: Mr. Clement, why
12 wouldn't -- so part of the intuitive appeal of
13 your argument is it feels unjust, right?
14 Putting aside the statutory language, I mean,
15 it feels unjust because of the multiple
16 recoveries possibility and because this was a
17 time-limited interest.

18 But the time-limited nature of it is
19 presumably accounted for in the valuation. And
20 I don't see what's wrong with Justice Alito's
21 description of saying that if something is
22 taken at the time, so in 1960, Castro takes it,
23 that it then becomes kryptonite. For purposes
24 of trafficking, nobody can touch it. And it
25 wasn't just the lease because they paid for

1 these improvements and they were never
2 compensated for those improvements.

3 So I guess I just don't see in the
4 statute, which does talk -- I agree with you
5 that it requires a one-to-one insofar as you
6 have to traffic in "the property" and not the
7 grocery store, right? The property.

8 But it seems like "the property" is
9 the docks, the use of the docks. I guess I
10 don't understand why that's crazy.

11 MR. CLEMENT: Well, it's not crazy,
12 but it's -- with all due respect, it's wrong
13 because it needs to be the particular property
14 interest that was confiscated. And so let's
15 take the hypo with the -- the mineral rights
16 and the timber rights. Maybe it's easier to
17 understand because it's the same parcel.

18 But, if somebody goes there and all
19 that was ever confiscated was the mineral
20 rights, and, you know, some company goes there
21 and it takes all the timber and takes the
22 lumber away, I wouldn't think they trafficked
23 in the confiscated property. And I don't know
24 why it's different from the -- the time limits.

25 And to the extent the government is

1 sort of suggesting this sort of suspension or
2 tolling rationale, there's two things wrong
3 with that. One is my friends on the other
4 side, at page 9 of their reply brief, expressly
5 disclaim suspension or tolling.

6 And the other thing is it's just wrong
7 as a factual matter because we know from the
8 experience with this particular concession
9 where, from 1906 to 1910, the Cuban government
10 had a spat with, you know, Scovel or whoever
11 was the original developer, and they couldn't
12 move forward for four years, and it didn't tack
13 on four extra years to the concession. The
14 concession ends -- you know, the first one was
15 50 years. It got extended 49 years, which is
16 the maximum, by the way, that Cuban law
17 allowed. So it was always like it's not a
18 tolling, it's not like -- it really isn't 44
19 years. It really is until 2004.

20 But the bottom line is Congress could
21 have written a different statute. They could
22 have made it clear that it's a lien, it's an
23 encumbrance. They could have said no, no,
24 it's -- it's just the parcel.

25 Now they would have really had to

1 write a different statute because I think then,
2 if you go to 6082(a)(5)(D), that provision
3 would be written differently if that's the way
4 they conceptualized. And then the provision
5 about authorization I think would have been
6 written differently because it doesn't make
7 sense. If -- like, if somebody had the mining
8 rights and somebody had the timber rights and
9 somebody wants to harvest the lumber, if the
10 person with the mining rights gave permission
11 to the person who took all the lumber, like,
12 that doesn't make any sense. It's got to be
13 the specific property interest.

14 And if that's true spatially or for
15 mining versus timber, there's no reason that's
16 not the right answer for the basis of time.

17 JUSTICE JACKSON: Mr. Clement, what's
18 your response to it would have been written
19 differently and in the way that you describe if
20 Congress's aim was compensation? But, if
21 Congress's aim is to do what Justice Alito
22 suggested, which is put pressure on the Cuban
23 government, create a sanctions regime, and keep
24 people from trafficking in foreign property or
25 stolen property in this way, I don't understand

1 why the statute wouldn't be written exactly as
2 it is, giving anybody whose property was -- was
3 taken, as certified by the FCSC, the ability to
4 say, however many years later, nobody should be
5 using my property until I get compensation for
6 it.

7 MR. CLEMENT: Well, it -- I mean,
8 first of all, it all depends on what we mean by
9 "my property." And I would say my property --

10 JUSTICE JACKSON: No. Can you answer
11 the purpose question?

12 MR. CLEMENT: -- is that which was
13 confiscated, which was --

14 JUSTICE JACKSON: Can -- can -- can
15 you answer the -- the extent to which what we
16 expect to see in the statute, the structure?
17 You keep saying Congress would have written it
18 a different way, but I'm saying Congress would
19 have written it the way you're talking about if
20 they were trying to compensate people.

21 JUSTICE KAGAN: But you're not saying
22 it has to be compensation, right? I mean,
23 there were 44 more years left in which these
24 kinds of suits could have been brought. And
25 that doesn't have anything to do with

1 compensation or not. The -- the suits could
2 have gone wildly over the amount that was --
3 that -- that you had at -- at issue, correct?

4 MR. CLEMENT: Absolutely. And,
5 indeed, like --

6 JUSTICE KAGAN: The only thing you're
7 saying -- you're not saying tie it to
8 compensation. You're saying tie it to the
9 nature of the property interest.

10 MR. CLEMENT: And -- and --

11 JUSTICE KAGAN: And at some point, a
12 temporal property interest runs out and you
13 don't have it anymore.

14 MR. CLEMENT: That -- that's exactly
15 right. And what the -- what Congress clearly
16 wrote this statute is they put not everybody,
17 but they put a very specific person in this
18 unusual role as the substitute payor for a just
19 compensation for the Cuban government, and it's
20 the person who traffics in the property
21 interest that was confiscated.

22 Now, in this case, even one of the
23 Respondents, there's an argument that they went
24 there before 2004. So this is not like -- this
25 is not an argument that nobody gets

1 compensation for this -- this interest, but,
2 you know -- and if you have some, like, amazing
3 sugar that can still be used in 2027, well,
4 then that's something where you can traffic in
5 that which was confiscated.

6 But there are plenty of interests.
7 And -- and I do want to say, like, the single
8 largest element of all of these claims when I
9 looked at them are these forgiven debts or
10 repudiated debts or destroyed accounts
11 receivable because they expropriated the other
12 U.S. company. I don't see how anybody traffics
13 in any of those.

14 So Congress wasn't trying to pass a
15 statute that says we don't want anybody to go
16 anywhere near Cuba and we want to provide a
17 trafficking remedy for everybody who has a
18 claim against Cuba.

19 It's a more limited statute. And this
20 is the other thing, Justice Jackson. Like, if
21 you look at the statute, I mean, my friends
22 want you to sort of say this is the most
23 punitive statute ever, so you should interpret
24 every word in it to be as punitive as possible.

25 That's actually not the statute that

1 Congress wrote. There are things like anybody
2 who was there before gets a grace period.
3 There's a two-year statute of limitations, so
4 if nobody sues you within two years of
5 trafficking, there's an amount in controversy
6 requirement. So --

7 JUSTICE JACKSON: Why doesn't that go
8 to deterrence? I mean, the last thing the SG
9 said was it's not remedial, that -- that the
10 point of it is to make this scheme be so that
11 cruise lines in the future will not use
12 property that has been confiscated by the Cuban
13 government in this way.

14 MR. CLEMENT: So can I say two things
15 in response to that?

16 JUSTICE JACKSON: Yes.

17 MR. CLEMENT: One is that everything I
18 just said about the statute not being maximally
19 punitive means that it's also not maximally
20 deterrent. It's a balanced statute. There are
21 provisions in there. Presumably, it was a
22 compromise.

23 The other thing is, if you take a step
24 back, this is at some level a statute about
25 compensation because what makes what Cuba did

1 unlawful is not that they took U.S. nationals'
2 property. It's that they did it without
3 providing just compensation.

4 So the whole theory of this statute
5 is, I don't know whether we're ever going to
6 get just compensation from Cuba, but if we can
7 get substitute payors who actually trafficked
8 in the confiscated property, that's good
9 enough. I'm sorry.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 Justice Sotomayor?

15 Justice Gorsuch, anything further?

16 JUSTICE KAVANAUGH: Just critical to
17 your whole case and the answers to everyone is
18 the exact parsing of the definition of
19 "property." So you just want to walk through
20 the definition of "property"? Because you
21 keep -- you -- you said to Justice Alito:
22 We're piecing together various parts of the
23 statute.

24 MR. CLEMENT: Sure.

25 JUSTICE KAVANAUGH: But I think it

1 boils down to those -- those words in the -- in
2 the property definition, I think, and, if so,
3 can you just walk us through and summarize your
4 position on that?

5 MR. CLEMENT: Sure. I mean, for me,
6 it's most helpful to start with 682(a)(1)(A)
7 that says, any person -- and I'm going to skip
8 over after the end of the three-month period --
9 any person that traffics in property which was
10 confiscated.

11 JUSTICE KAVANAUGH: Mm-hmm.

12 MR. CLEMENT: So then it's a defined
13 term in the statute, so, of course, like any
14 good textualist, I'm going to go to the
15 definition of "property" in the statute, which
16 is in sub 12, it's in 11A of the blue -- the
17 appendix to the blue brief.

18 And then it says the term "property"
19 means any property. And that seems to me
20 almost the most important thing, but, to me,
21 what makes this kind of easy is then it it says
22 including any leasehold interest.

23 Okay. So I know that the concession's
24 not exactly a leasehold interest because a
25 leasehold gives you control and we desperately

1 say they didn't have control of the docks, they
2 just had a concession. But it's -- it's at
3 least like a leasehold and then it's
4 time-limited.

5 And then I pop back to 682(a)(1)(A)
6 and I say: Okay, who has the cause of action
7 here? It's the -- it's the U.S. national who
8 owns the claim, not a claim, which -- I mean, I
9 know -- I know, like, you don't always get too
10 excited about definite versus indefinite
11 articles, but this would be a much better
12 statute for the other side if it said "a"
13 instead of "the."

14 It says "the claim," but here's the
15 killer, "to such property." And so the "such
16 property" has to refer back to the property
17 that was confiscated, and that isn't like the
18 street address or the dock says facilities.
19 That's the property that was confiscated, and
20 that includes a leasehold, but when the
21 leasehold's over, you're not going to be in a
22 position to find somebody who trafficked in
23 that which was confiscated.

24 JUSTICE KAVANAUGH: Thank you.

25 MR. CLEMENT: That's all I got.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?

3 JUSTICE BARRETT: No.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 Thank you, counsel.

7 MR. CLEMENT: Thank you, Your Honors.

8 CHIEF JUSTICE ROBERTS: Rebuttal,
9 Mr. Klingler?

10 REBUTTAL ARGUMENT OF RICHARD D. KLINGLER
11 ON BEHALF OF THE PETITIONER

12 MR. KLINGLER: Just a couple of
13 points. First, the claim. It doesn't stand in
14 isolation. Section 682 requires proof of
15 ownership of the claim. And Congress used "the
16 claim" rather than "a claim" because that can
17 be contested, that if you look at (a)(5)(D),
18 particularly if you don't have a certified
19 claim, you're asserting the claim in the
20 particular litigation, you still need to show
21 that there's ownership to it, and if someone
22 else has a certified claim that is covering the
23 same interests, that you don't have the claim.

24 So Congress had to use the claim
25 there. But, in (a)(3), it talks about

1 liability arising from someone who traffics,
2 and the liability is in relation to anyone who
3 holds a claim. Same with (a)(4), it talks
4 about bringing an action on a claim.

5 Second, Justice Alito's advice
6 question isn't a hypothetical. The cruise line
7 association was asked as it appeared that
8 suspension may be lifted for the private right
9 of action, they were asked: Do we have
10 exposure here? And the answer wasn't: Oh, no,
11 there may be some litigation risk, but 2005 on
12 you're fine. It was: Oh, my gosh, you have a
13 tremendous amount of risk, and they gave the
14 certain reasons that might be defenses, but
15 the -- the gist of it was hardly that the
16 statute's clear and in some way relieves you of
17 the obligation.

18 And when the cruise lines were
19 lobbying to keep the suspension or to keep the
20 private right of action suspended, they said:
21 Please, President Trump, don't implement the
22 private right of action because we're liable
23 for hundreds of millions of dollars.

24 They knew exactly what had happened.
25 They'd been advised by their lawyers. We have

1 the Cleo memo in the Joint Appendix, and the --
2 the 2005 issue didn't even feature at least
3 prominently. It was -- a lot were mentioned.
4 You can throw one of the -- well, and then a
5 third is I just want to tie the foreign policy
6 interest to the scope of the remedy here.

7 I think that -- I mean, kryptonite was
8 a better example. I wish I had used that. But
9 this is designed by Congress to put property
10 that had been seized off limits from
11 trafficking. That's what fueled the communist
12 regime. That's what was trying to be
13 prohibited here, in addition to giving an
14 incentive for Cuba to make a remedy, but I
15 don't think that was actually expected.

16 But, if you take the Eleventh
17 Circuit's approach here, almost nothing is left
18 of the statute in this regard, that it's not
19 just a few time-limited interests, it's leases,
20 almost all business leases over a 65-year
21 period will have evaporated by now. It's life
22 interests. Every day another interest holder
23 dies, then their -- that property is freed up
24 for exploitation under the --

25 CHIEF JUSTICE ROBERTS: You can finish

1 your sentence.

2 MR. KLINGLER: Freed up for
3 exploitation under the Eleventh Circuit's view.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 The case is submitted.

7 (Whereupon, at 11:37 a.m., the case
8 was submitted.)

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Official - Subject to Final Review

\$	9	
\$300,000 [1] 69:21	9 [2] 69:23 93:4	94:21 99:13,21
\$500 [2] 87:21 88:6	A	alito's [3] 91:6,20 103:5
\$7,000 [1] 87:23		allowed [4] 6:21 22:23 61:5 93:17
1		allowing [1] 49:8
10:04 [1] 4:2	a)(3 [1] 102:25	allows [3] 32:19 47:18 77:20
102 [1] 3:14	a)(4 [1] 103:3	alluded [1] 87:13
10a [1] 48:21	a)(5)(d [2] 78:1 102:17	almost [7] 7:6 11:1 22:10 34:15 100: 20 104:17,20
11 [2] 48:21 50:20	a.m [1] 4:2	although [2] 34:25 47:1
11a [2] 48:22 100:16	ability [4] 15:13 36:9 68:7 95:3	amazing [1] 97:2
12 [1] 100:16	able [3] 45:5 53:22 62:19	american [4] 32:20 33:14 70:13,14
1623(h [1] 36:7	absolutely [6] 8:13 9:12 10:7 19:16 38:22 96:4	americans [2] 5:15 86:14
17 [1] 86:15	according [1] 32:8	amicus [5] 2:6 3:7 34:9 39:18 57:1
1906 [1] 93:9	account [4] 22:12 29:1 53:5 62:11	among [1] 69:8
1910 [1] 93:9	accounted [1] 91:19	amount [21] 20:13 25:1,5 27:15 28:24 35:21,23 36:14 46:15 52:13 55:12,14 56:6,7,12 85:1 87:16,21 96:2 98:5 103:13
1960 [8] 5:6 11:14 29:22 39:22 85:10 86:4 87:10 91:22	accounts [2] 70:13 97:10	amounts [1] 56:5
1964 [1] 50:3	achieving [1] 26:11	analogy [4] 24:20 54:5,20 63:13
2	acknowledged [1] 60:6	analysis [6] 30:5 40:16 62:1 78:22 79: 15,21
20 [1] 36:7	across [1] 10:1	another [9] 29:11 36:15 45:5 52:7 70: 4 82:2 83:9,9 104:22
2004 [9] 29:20 35:6 61:3 65:19 69:14	act [5] 50:2 64:1,7 83:13 86:17	answer [13] 8:5 23:24 26:16 29:14 53: 12 59:12 85:3,3 88:2 94:16 95:10,15 103:10
80:12 84:22 93:19 96:24	acted [1] 5:17	answering [1] 53:11
2005 [4] 84:6 85:4 103:11 104:2	acting [1] 46:7	answers [1] 99:17
2026 [1] 88:5	action [16] 5:22 11:4 20:23 63:10 64:2, 8 75:8 77:12 78:5,10 87:7 101:6 103: 4,9,20,22	anti-fencing [2] 4:20 33:8
2027 [1] 97:3	actions [2] 39:11 78:4	anti-trafficking [3] 6:12 7:24 13:19
24-983 [1] 4:4	activities [2] 34:19 57:14	anybody [9] 46:6 50:13 78:4 79:12 82: 20 95:2 97:12,15 98:1
256 [2] 80:13 84:20	activity [1] 20:2	appeal [2] 23:6 91:12
259 [2] 80:11 84:21	acts [1] 53:20	appealed [1] 72:3
29 [2] 69:6 87:18	actual [1] 7:6	appeals [3] 40:15 46:19 60:25
3	actually [9] 21:4 33:19 51:11 70:5 71: 18 80:9 97:25 99:7 104:15	appearances [1] 2:1
39 [1] 3:8	ad [1] 28:9	appeared [2] 46:25 103:7
4	addition [1] 104:13	appears [1] 79:11
4 [1] 3:4	additional [1] 22:3	appendix [7] 48:22 80:11,14 84:20,21 100:17 104:1
44 [18] 22:3 40:9 44:22,25 45:5 46:2,3, 4,4,8,11 53:13,15,17 54:25 82:23 93: 18 95:23	address [2] 91:7 101:18	applied [3] 22:17 56:12 82:22
44-year [3] 45:25 52:15 53:3	adequate [2] 9:20 27:15	applies [2] 13:19 14:17
45 [1] 82:3	adjust [1] 11:25	apply [6] 49:5 56:13 64:21 65:16 81: 24 88:4
49 [1] 93:15	administration [2] 34:17,18	approach [1] 104:17
5	admitting [1] 29:16	appropriate [3] 56:11 58:1 62:10
50 [3] 82:2,2 93:15	adopt [1] 47:1	area [1] 6:21
50-year [1] 64:23	advice [2] 91:5 103:5	areas [1] 6:25
55 [1] 82:6	advise [1] 83:24	aren't [1] 89:12
6	advised [1] 103:25	argue [1] 35:1
6 [1] 48:21	agency [2] 79:3,4	argued [2] 46:19 85:24
6081 [2] 48:20 50:20	agents [1] 41:21	arguing [2] 13:15 15:1
6082(a)(5)(d [1] 94:2	agree [12] 30:8 34:24 42:10 58:22 59: 2,10 62:7 71:4 72:18,25 89:4 92:4	argument [21] 3:2,5,9,12 4:4,7 7:20 16:16 22:20,24 38:17 39:17 46:24 47: 1,3 63:22 81:1 91:13 96:23,25 102: 10
63 [1] 3:11	agrees [1] 60:17	arguments [2] 16:12 79:6
65-year [1] 104:20	ahead [1] 83:24	arising [1] 103:1
682 [1] 102:14	aim [2] 94:20,21	
682(a)(1)(a [2] 100:6 101:5	aimed [1] 40:23	
	aimee [3] 2:4 3:6 39:17	
	alexandria [1] 2:8	
	alito [24] 21:14,15 22:15 23:4,13,21, 25 24:5,9,15,25 25:16 26:10,12 52: 10,11 53:7 82:16 83:22 85:22 86:11	

<p>armed [1] 41:21 around [1] 39:25 arrived [3] 79:23 88:21,22 arrives [2] 64:25 65:20 article [1] 75:23 articles [1] 101:11 aside [5] 15:18 72:15 89:3,5 91:14 asserted [1] 82:19 asserting [1] 102:19 assistant [1] 2:4 associated [1] 20:2 association [1] 103:7 assume [5] 17:3 34:10 62:10 66:5 88:2 assuming [1] 31:25 assumption [1] 31:15 assurances [1] 58:1 attached [1] 17:2 authorities [1] 66:6 authority [1] 78:20 authorization [11] 5:20 25:12,15 33:21 37:22 39:7,12 77:21,23 78:12 94:5 authorized [1] 58:3 available [1] 85:11 avenue [1] 50:14 awarded [1] 69:22 aware [1] 53:3 away [6] 17:4 25:21 68:17,19 88:19 92:22</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back [16] 11:22 35:17 41:22 42:6 46:3 53:15,15 59:4 61:16 74:17 75:12,21,23 98:24 101:5,16 badly [1] 48:25 balanced [1] 98:20 barrett [33] 11:24 15:17 16:7,20 17:15 18:1 26:16 30:10,14,17,19 35:11,12,22,25 36:8,23 37:23 38:2 42:18 58:21,22,25 61:7 75:16,19 76:7,21 77:8 87:13 91:11 102:2,3 barrett's [1] 69:17 based [3] 22:24 62:17 80:1 basic [1] 65:4 basically [2] 24:1 78:3 basis [7] 13:15 47:2 67:5 80:16 84:18,19 94:16 bat [1] 52:2 becomes [3] 19:11 88:3 91:23 beginning [2] 23:17 24:16 behalf [8] 2:3,9 3:4,11,14 4:8 63:23 102:11 believe [2] 11:3 47:18 below [2] 16:8 28:5 benefit [2] 11:4 61:21 benefits [3] 35:8 49:1 63:15 besides [2] 24:7,8 best [5] 83:21 84:4,13 85:2,3</p>	<p>bet [2] 83:22,23 better [2] 101:11 104:8 between [5] 6:25 64:12 73:18 74:22 88:16 big [2] 83:15 85:21 billion [1] 5:19 bit [3] 11:25 70:21 71:21 bloom [2] 16:11 22:20 blue [8] 14:9,10 15:11 19:9,13 81:6 100:16,17 blues [5] 81:7,9,11,18,19 boils [1] 100:1 book [2] 22:8 52:24 both [3] 8:17 17:25 65:6 bottom [1] 93:20 boundary [3] 14:17,20,22 bounds [1] 65:7 brasher [1] 46:25 brief [7] 48:22 57:9 69:6 87:18 90:1 93:4 100:17 briefing [4] 11:2 34:22 47:24 48:10 briefs [3] 34:9 54:5 57:1 bring [6] 10:4 75:7 77:12,17 78:10 87:6 bringing [2] 78:5 103:4 brings [1] 78:3 broad [1] 8:16 broader [2] 12:8 76:1 broadly [3] 12:12 34:3 39:5 brought [1] 95:24 brown [43] 2:4 3:6 39:16,17,20 41:3,10,14 42:13 43:12 44:10 45:23 46:9,18 47:16,20,23 48:1,14 50:18 51:8,22 52:19 53:19,21 54:1,19,24 55:8,18,21,25 57:6,12,22 58:9,24 59:19 61:18 62:7,25 63:6,11 building [2] 60:13 61:9 buildings [1] 16:25 built [2] 39:23 61:19 bunch [1] 85:6 bundle [10] 10:21 23:16 24:7 42:23 67:14,15,21 68:12 78:7,8 business [4] 5:14 49:11,15 104:20 businesses [1] 32:20 buy [1] 89:6 buys [1] 54:13 bystander [1] 11:17</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>caboodle [1] 68:13 calculate [3] 21:18,21 52:13 calculated [1] 21:17 calculating [1] 52:12 calculation [2] 21:24 22:5 call [1] 10:21 came [2] 14:11 83:10 canceled [1] 87:5 cannot [2] 16:17 35:24 car [7] 42:2,3,5,7,8 61:10,12</p>	<p>care [2] 8:6 29:1 cargo [13] 15:20,21 16:8,13,15 22:18,21 59:16,18,25 60:3 72:11 89:12 cargo-only [1] 59:6 caribbean [1] 4:5 case [14] 4:4 5:22 16:12 22:7 23:9 47:7 57:11,13 61:8 69:5 82:22 85:8 96:22 99:17 cases [3] 6:3 57:18 58:12 castro [1] 91:22 cause [5] 11:4 20:22 63:9 64:7 101:6 cautious [1] 84:4 certain [5] 17:21 25:1 66:15 85:18 103:14 certainly [3] 60:24 62:7 77:13 certified [17] 16:23 18:18 19:24 20:13 36:17 40:5 42:14 43:1 56:6 61:25 62:4,8 80:8,9 95:3 102:18,22 certifying [1] 80:23 cetera [1] 76:13 challenge [6] 35:18,20,22 55:4,12,13 challenged [1] 23:6 chance [3] 37:13,19 38:2 chaotic [1] 77:19 charge [1] 30:1 charged [1] 16:14 chief [26] 4:3,9 8:3 21:11 26:13 32:13 35:10 37:24 39:14,20 42:10 51:16 52:10 53:8 56:16,18,20 58:20 61:22 63:19,24 99:10 102:1,4,8 104:25 choices [1] 33:23 circuit [13] 5:9 6:23 9:9 16:5 23:7,11 34:4 45:10 58:6,10,12 68:9 72:4 circuit's [1] 104:17 circumstances [1] 66:16 claimant [1] 12:24 claimants [1] 13:18 claiming [1] 15:10 claims [25] 5:24 9:18 13:4 18:16 20:13 21:16 26:3,4 36:4 42:17 50:2,3 55:10 69:3,8,12 81:4,7 82:13 87:9,11,15,17 90:17 97:8 claim's [1] 56:6 clause [1] 26:18 clear [7] 22:6 36:2 65:10 69:15 85:3 93:22 103:16 clearly [5] 13:6 21:1 26:1 67:13 96:15 clement [79] 2:8 3:10 63:21,22,24 66:3 67:7 68:5 69:1 70:16,17,22,25 71:4,7,12,17,23 72:6,7,11,19,23,25 73:2,5,9,17,25 74:4,8,12,20 75:1,4,10,11,18 76:2,18,22 77:2,4,10 78:14,15,17 80:6,19 81:2,21 83:16,20 84:2 86:2,22 88:10 89:14,24 90:6,10,13,16 91:10,11 92:11 94:17 95:7,12 96:4,10,14 98:14,17 99:24 100:5,12 101:25 102:7 cleo [1] 104:1 client [3] 72:21 83:10 91:5</p>
---	--	--

<p>close [1] 83:17 closest [1] 16:4 closet [1] 68:23 come [6] 18:16 35:17 62:19 66:6 79:12 91:2 comes [4] 5:3 51:1 60:16 71:25 commerce [2] 5:8 34:3 commercial [2] 7:2 16:1 commercially [1] 61:21 commission [36] 4:13 5:24 15:7 17:6 18:3,17,20,25 19:5,7,17,25 21:16 22:1,21 23:2 29:3 35:14 36:4,16 42:17 50:3 52:12,18,20 53:2,16 54:23 55:5 69:12 80:8,8 81:5,7 89:10 90:18 commission's [5] 15:3 30:1 43:3 55:11 70:8 common [1] 65:17 communist [2] 26:8 104:11 companies [6] 33:17 49:9,15 70:10,13,14 company [3] 33:14 92:20 97:12 company's [1] 79:7 compensate [2] 84:9 95:20 compensated [4] 27:11 82:25 84:11 92:2 compensation [31] 9:20 14:13 26:21 27:2,3,16 28:2,3,9 30:24 32:5,7,19 40:13 45:16 46:4 49:20,25 67:16 83:5 89:1 94:20 95:5,22 96:1,8,19 97:1 98:25 99:3,6 compensatory [2] 25:18 47:8 complain [2] 14:24 15:1 complete [2] 16:18 24:20 completely [4] 15:24 18:8 30:4 61:4 complicit [2] 40:11 45:6 component [4] 12:18 21:2 26:5 33:9 components [1] 17:14 comprehensive [1] 86:25 comprised [1] 6:9 compromise [1] 98:22 concede [2] 71:24 89:12 conceptualized [1] 94:4 concern [1] 89:4 concerned [3] 26:17 48:16 62:2 concerns [6] 8:5 29:1 51:23 52:6,9 58:4 concert [2] 5:17 46:7 concession [32] 6:10 10:23 11:9,11,15,15 13:10 14:10 15:21 21:20,21,23 22:9,16 24:11,14 41:11 43:9 62:16,18 65:19 72:11 73:6 80:16 82:23 83:2,4 84:19 93:8,13,14 101:2 concessionary [1] 71:18 concessions [1] 68:10 concession's [1] 100:23 conclusive [1] 36:5 conclusively [1] 5:24 confiscate [3] 41:13 86:8,20 confiscating [2] 7:17,22</p>	<p>confiscation [11] 5:10 27:4 29:21 30:2 31:17 44:22 45:25 59:4 68:17 72:16 73:14 confiscations [2] 50:22 86:4 confiscees [1] 87:20 confused [1] 19:2 confusing [1] 9:8 congress [41] 9:4 12:13,23 14:3 21:1 25:10,14 26:1,6 29:2,6 32:18,23 33:23 34:7 36:2 40:3,22 47:10 48:16,23 49:23 50:6,20 51:20 82:10,22 86:12,20,23 89:15 91:2 93:20 95:17,18 96:15 97:14 98:1 102:15,24 104:9 congressional [1] 48:19 congress's [3] 51:4 94:20,21 connected [1] 60:1 considerable [1] 35:1 consideration [2] 61:2,15 considerations [1] 52:23 considered [3] 16:11 22:25 31:17 considering [2] 36:17 40:16 constitute [1] 23:15 constituted [1] 57:14 construct [1] 6:21 construction [1] 89:18 consulted [1] 57:3 contested [1] 102:17 contingent [2] 5:12 9:1 continue [4] 21:6 44:25 49:11,11 continues [7] 12:6 21:4 24:24 26:8 53:21,22 88:4 contract [2] 23:6 31:13 contrary [2] 5:15 72:1 control [27] 4:12 5:5 6:22 7:2 16:1,18 17:13 24:21 28:17,19 40:9 41:6,16,18,22,25 44:23 60:7 66:7 71:11,13,16 72:1,8 80:15 100:25 101:1 controversy [1] 98:5 converting [1] 45:11 core [3] 4:18,21 5:7 correct [24] 6:17 10:12 16:10 20:25 26:23 27:4,23,24 29:14,15,17 30:25 31:23 47:16 54:18,23 55:7,9,21 57:24 63:11 85:24 86:1 96:3 correctly [2] 15:23 22:1 correspondence [5] 64:12 65:23 74:22 84:15 88:16 cost [1] 49:14 couldn't [1] 93:11 counsel [7] 8:2 21:12 39:15 51:17 63:20 99:11 102:6 counted [1] 78:23 countervailing [1] 33:16 couple [2] 76:14 102:12 course [5] 35:1 36:16 66:12 90:21 100:13 court [17] 4:10 11:21 22:17 26:3 28:5 36:6 39:21 40:15 46:18 52:8 60:24 63:25 69:22 72:3 82:19 83:18 84:1</p>	<p>courts [2] 5:25 50:24 court's [3] 6:4 41:1 65:24 cover [1] 69:18 coverage [1] 85:25 covered [3] 69:19,20 87:15 covering [1] 102:22 crack [1] 12:4 crazy [2] 92:10,11 create [2] 88:1 94:23 created [1] 50:2 creates [1] 66:20 creatures [1] 90:23 critical [1] 99:16 cruise [24] 5:17 15:21 17:4 18:9 19:15 20:9 25:2,2,5,8,9 28:8 30:21 35:17 38:7,9,12,18 59:16 83:12 89:9 98:11 103:6,18 cruises [1] 4:5 crystal-clear [1] 69:11 cuba [42] 4:12,17,20 5:4,18 11:20 12:19,21 21:7 25:21 27:6,9,15 33:1,4,7,16 40:12 41:12 45:2 46:6 49:11,12,17 50:10,16 51:5 53:20 61:17 70:9 71:7 82:12 85:7 86:14,16,23 87:3 97:16,18 98:25 99:6 104:14 cuban [44] 4:13 5:23 9:25 23:16 24:10,15 25:22 26:22 28:7 34:2 39:22,24 41:4,17 45:7 47:12 48:24 49:5,19 50:2 53:14 62:11 64:4 66:5,24 67:25 68:18 69:20,24 81:12 82:21,24 83:5 85:16 86:15,18,19 87:3 89:1 93:9,16 94:22 96:19 98:12 cuba's [4] 28:17 31:17 40:12,24 curiae [3] 2:6 3:8 39:18 currency [1] 49:1 cut [1] 79:20 cutting [1] 45:3</p> <hr/> <p style="text-align: center;">D</p> <hr/> <p>d.c [2] 2:2,5 damage [1] 20:13 damages [2] 32:8 40:4 date [1] 45:1 day [2] 29:11 104:22 dealership [2] 42:4,4 dealing [1] 33:15 debts [7] 69:21 70:2,3,6,11 97:9,10 decide [1] 19:8 decided [2] 27:1 79:8 decides [1] 42:4 deciding [1] 79:7 decision [3] 22:22 31:11 53:2 decisions [1] 70:8 deemed [1] 37:21 deeming [1] 86:7 defendant [2] 36:23 37:12 defending [1] 45:14 defenses [1] 103:14 define [1] 65:7</p>
---	--	---

<p>defined [12] 4:11 8:8 9:3 12:11,12 29:25 62:11 64:4 67:8 76:3 79:10 100:12</p> <p>defines [4] 38:4 90:5,11,12</p> <p>defining [1] 29:3</p> <p>definite [1] 101:10</p> <p>definitely [1] 58:24</p> <p>definition [14] 5:2 8:15,16 9:22 38:14 39:5,8 41:14 67:10 76:10 99:18,20 100:2,15</p> <p>definitions [1] 42:1</p> <p>democracy [3] 5:3 33:4 49:21</p> <p>democratic [1] 49:6</p> <p>democratize [1] 25:23</p> <p>department [1] 2:5</p> <p>depends [2] 59:20 95:8</p> <p>describe [1] 94:19</p> <p>describing [1] 8:12</p> <p>description [1] 91:21</p> <p>designed [1] 104:9</p> <p>desperately [1] 100:25</p> <p>destroyed [1] 97:10</p> <p>deter [1] 47:10</p> <p>determination [5] 15:4 36:16 57:13,24 58:11</p> <p>determinations [1] 36:3</p> <p>determined [2] 18:25 38:20</p> <p>determines [2] 36:4 56:8</p> <p>deterrence [1] 98:8</p> <p>deterrent [2] 51:10 98:20</p> <p>deters [1] 49:16</p> <p>developer [1] 93:11</p> <p>dies [1] 104:23</p> <p>different [12] 18:6 28:1 60:8 77:14,15 81:3 91:4,5 92:24 93:21 94:1 95:18</p> <p>differently [3] 94:3,6,19</p> <p>difficult [4] 68:21 69:2 71:19,20</p> <p>directed [1] 43:23</p> <p>directly [1] 72:1</p> <p>disagree [5] 14:14 15:25 34:23 44:18 89:18</p> <p>disagreement [1] 72:13</p> <p>disappeared [1] 45:1</p> <p>disclaim [1] 93:5</p> <p>disincentive [1] 33:12</p> <p>disparate [1] 37:3</p> <p>dispenses [1] 38:15</p> <p>dispute [1] 59:6</p> <p>disregard [1] 23:2</p> <p>dissent [1] 46:25</p> <p>dissuade [1] 47:6</p> <p>distanced [1] 59:11</p> <p>distilled [1] 46:1</p> <p>distinctions [1] 65:5</p> <p>distinguish [1] 85:6</p> <p>distributes [1] 38:15</p> <p>district [3] 22:17 69:22 72:2</p> <p>divisibility [1] 16:23</p> <p>dock [14] 4:14 13:20 15:2 19:9,10,15</p>	<p>28:22 30:12,23 31:3,7 38:21 68:24 101:18</p> <p>docking [1] 83:11</p> <p>docks [78] 4:5 5:6 6:9,13 7:14 10:16,16 12:22 13:10,11 14:7 16:19,24 17:2,9,17 18:9 21:6 22:2 24:13 25:3,6,10 29:14,18 37:5,16,17 38:8,23 39:2,23 40:1,5,8,10 41:2,5,6,7,13,23 44:8,24 46:11,11 59:22,22,23 60:21 61:9,19,20 65:19 69:19 70:21,25 71:2,8,11,16 72:1,8,17,22,23 73:8 80:16 82:23 84:19 88:22 89:8,21,22,23 92:9,9 101:1</p> <p>docks's [1] 79:7</p> <p>documents [2] 62:14 71:13</p> <p>doing [7] 49:15 50:6 58:2 62:5 79:5 88:7,8</p> <p>dollars [5] 5:19,20 40:1 49:12 103:23</p> <p>domestic [3] 66:9,10,14</p> <p>domiciled [1] 33:17</p> <p>doubts [1] 80:19</p> <p>down [1] 100:1</p> <p>draconian [1] 51:2</p> <p>dramatically [1] 28:1</p> <p>dual [1] 32:24</p> <p>due [10] 26:18 28:19,25 51:23 52:5,13 58:4 71:5 74:20 92:12</p> <p>duration [3] 4:25 5:1 13:23</p> <p>during [7] 21:20 25:3 34:16,17 52:14 64:24 78:9</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [5] 12:23 16:2 20:14 25:8 42:20</p> <p>earlier [1] 53:12</p> <p>easier [1] 92:16</p> <p>easily [2] 37:15 43:21</p> <p>easy [2] 68:5 100:21</p> <p>economic [2] 47:11 49:4</p> <p>effect [4] 4:25 5:11 9:14 21:23</p> <p>effectuate [1] 41:19</p> <p>either [6] 28:7 40:11,13 46:3 85:18 90:3</p> <p>element [1] 97:8</p> <p>eleventh [14] 5:8 6:23 9:9 16:5 23:7,10 34:4 45:10 58:5,10,12 68:8 72:3 104:16</p> <p>embargo [3] 33:15 34:2 49:4</p> <p>enact [1] 32:18</p> <p>enacted [2] 5:16 40:22</p> <p>enactment [2] 49:23 86:17</p> <p>encompass [1] 20:14</p> <p>encompassed [1] 49:3</p> <p>encouragement [1] 57:2</p> <p>encumbers [1] 63:12</p> <p>encumbrance [3] 90:2,19 93:23</p> <p>end [4] 68:10,17 83:17 100:8</p> <p>ended [3] 29:22,23 51:11</p> <p>ends [4] 5:2 14:1 69:14 93:14</p> <p>enforce [2] 13:18 79:10</p>	<p>enforced [2] 12:18 53:23</p> <p>enforcement [1] 12:17</p> <p>engaged [1] 59:3</p> <p>engages [1] 63:14</p> <p>enjoyed [4] 89:16,25 90:1,2</p> <p>enormous [1] 85:1</p> <p>enough [1] 99:9</p> <p>entered [1] 25:8</p> <p>entire [1] 13:9</p> <p>entirely [1] 22:6</p> <p>entitle [1] 45:17</p> <p>entitled [12] 25:4 26:21 27:2,12,21 28:6,20 30:11,23 32:5,7 88:6</p> <p>entitles [2] 28:9 46:1</p> <p>equally [1] 25:19</p> <p>equipment [1] 42:19</p> <p>equitable [1] 52:23</p> <p>equivalent [3] 6:8 16:3 23:18</p> <p>esq [4] 3:3,6,10,13</p> <p>esquire [2] 2:2,8</p> <p>essentially [7] 7:9 9:9 22:14 24:19 49:16 63:12 76:11</p> <p>establish [1] 35:18</p> <p>established [1] 35:17</p> <p>et [1] 76:13</p> <p>evaluate [2] 79:1 80:3</p> <p>evaluated [1] 79:25</p> <p>evaluating [1] 80:25</p> <p>evaporated [1] 104:21</p> <p>evaporates [1] 62:22</p> <p>even [21] 11:3 12:6 15:10 17:7,8 25:19 30:11 34:10,17 35:2 42:7 44:12,18 54:14 60:5 69:23 80:13 86:13 87:10 96:22 104:2</p> <p>everybody [5] 43:23 82:12,18 96:16 97:17</p> <p>everyone [3] 28:10 60:17 99:17</p> <p>everything [2] 42:23 98:17</p> <p>evidentiary [1] 36:10</p> <p>exact [2] 77:23 99:18</p> <p>exactly [13] 6:5 7:20 39:3 50:18 51:8 55:20 61:18 62:25 63:6 95:1 96:14 100:24 103:24</p> <p>example [4] 42:2 67:22,24 104:8</p> <p>exceeds [2] 28:22 32:21</p> <p>except [2] 74:25 75:3</p> <p>excessive [2] 29:8,9</p> <p>excited [1] 101:10</p> <p>excludes [1] 39:8</p> <p>exclusive [4] 60:7,21 78:4 89:9</p> <p>exclusivity [1] 72:13</p> <p>excuse [1] 52:12</p> <p>exercise [3] 16:18 45:5,7</p> <p>exercising [1] 45:4</p> <p>exist [3] 35:7 43:11 53:22</p> <p>existing [1] 50:21</p> <p>exists [2] 54:11,14</p> <p>expect [1] 95:16</p> <p>expected [1] 104:15</p>
---	---	---

<p>experience [1] 93:8 expert [1] 22:24 expired [7] 5:13 11:11,16 62:24 65:19 79:23 86:15 expires [2] 80:12 84:22 explain [2] 47:1 61:25 explained [1] 62:14 exploitation [3] 12:19 40:12 104:24 exploited [1] 21:9 exposure [1] 103:10 expressly [6] 23:11 34:19 40:22 47:23 48:10 93:4 expropriated [2] 70:15 97:11 expropriation [3] 40:17 41:20 45:2 expropriations [1] 40:24 extend [1] 17:24 extended [2] 31:18 93:15 extensive [1] 25:13 extent [16] 19:8 22:15 25:20 47:4 48:1 51:25 52:8 55:25 57:25 58:5,9 62:14, 15 79:16 92:25 95:15 extinguished [3] 5:6 24:22 35:7 extra [2] 38:24 93:13 extraordinary [1] 88:24 extremely [2] 33:24 34:5 eye [1] 52:2 eyes [1] 83:7</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>facilities [10] 4:14,16,23 7:11,11 13: 20,20 42:18 66:7 101:18 facility [2] 12:14 68:24 fact [9] 16:10,14 20:10,17 36:3 49:9 50:1,7 79:4 factored [1] 22:4 factory [1] 12:15 factual [2] 23:5 93:7 fair [6] 36:18 52:23 55:18 56:4,9,10 fairness [1] 86:23 far [5] 18:19 28:22 51:19,20,25 farfetched [1] 87:1 farther [1] 17:3 fc [1] 79:20 fcsc [7] 31:16 38:20 39:1 78:20 79:20 80:2 95:3 fcsc's [2] 31:11 32:9 feature [1] 104:2 federal [1] 50:24 fee [5] 23:18,22,22 68:3 78:15 feels [2] 91:13,15 few [2] 50:4 104:19 fight [1] 55:6 fighting [1] 80:7 figure [1] 52:20 final [1] 36:5 financial [1] 48:25 find [2] 89:24 101:22 finding [1] 16:8 findings [1] 48:19</p>	<p>fine [4] 34:13 38:5 72:10 103:12 finer [1] 29:8 finish [3] 77:8,9 104:25 first [12] 4:4 6:20 8:19 59:20 62:3 82: 5,8 84:8 87:24 93:14 95:8 102:13 fit [1] 13:2 five [2] 69:7 88:23 floor [1] 60:13 flowing [2] 4:19 12:19 focus [3] 9:13 50:12,15 focusing [1] 43:4 follow [3] 38:1 74:24 75:2 following [1] 70:20 forces [1] 5:18 foreclosing [1] 22:22 foreign [15] 5:8 21:16 33:25 34:5 47:9 48:3,4,13,15,20 49:3,13 50:3 94:24 104:5 forever [4] 28:4,10,14 29:25 forget [2] 27:7 81:5 forgiven [1] 97:9 former [1] 39:12 forth [2] 17:20 32:8 forward [2] 86:9 93:12 found [6] 16:12 22:17,25 87:10,10 90: 3 four [4] 25:7,8 93:12,13 freed [1] 104:23 freezing [1] 50:7 friend [1] 56:1 friends [2] 93:3 97:21 friend's [1] 59:12 front [3] 36:11 45:3 75:24 fruits [1] 6:24 fueled [1] 104:11 fueling [1] 33:3 full [7] 16:11 22:23 54:15,16 83:24 87: 16 88:6 funds [1] 26:7 further [6] 21:13 22:23 23:3 52:9 61:2 99:15 future [7] 5:12 9:1 25:9 67:12 83:2,4 98:11</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gas [1] 37:7 gave [10] 5:25 6:20 34:4 40:3 53:14, 15 55:5 62:20 94:10 103:13 general [4] 2:4 34:23 57:16 62:4 general's [1] 34:25 gets [3] 77:12 96:25 98:2 getting [1] 51:13 gist [2] 14:3 103:15 give [6] 26:1 32:11 50:5 51:2 78:11 87: 6 given [4] 42:16 54:15 55:3 91:5 gives [7] 5:11 64:7 76:9 78:20 79:2 89: 4 100:25 giving [8] 12:23 18:7 63:5 82:11,17,18</p>	<p>95:2 104:13 glean [1] 49:22 gorsuch [34] 32:14 46:9 47:13,17,22, 25 48:5,8 56:21 70:16,19,24 71:2,6, 10,15,21 72:5,10,12,20,24 73:1,4,7, 12,22 74:1,6,10,19,24 75:2 99:15 gorsuch's [1] 75:21 gosh [1] 103:12 got [14] 9:9 17:5 32:1 47:14 48:5 61: 16 74:3,7,10 78:15 81:7 93:15 94:12 101:25 government [47] 9:25 23:16 24:10,15 25:22 26:22 28:7 39:22,25 41:4,17, 21 45:7 47:12,18 48:11,12,25 49:5, 19 53:14 57:2,4,12,21 58:1 64:4 66: 18,25 68:1,18 69:6 71:24 82:21,25 83:5,9 85:16 86:19 87:4,9 89:1 92:25 93:9 94:23 96:19 98:13 government's [1] 58:10 grace [1] 98:2 grand [1] 69:7 granted [2] 7:1 16:2 grateful [1] 47:15 great [3] 78:8,18 81:8 greater [4] 25:19 56:4,6,11 grocery [13] 17:16 18:8,13 31:18 32:1 37:1,7 38:6,10 42:11 46:16 59:12 92: 7 ground [1] 65:17 guess [8] 9:2 11:6 12:25 14:5 18:12 19:1 92:3,9 guidance [1] 6:1</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>half [4] 14:9,9,10,12 handful [1] 69:4 handled [1] 46:16 happen [5] 9:16 33:7 37:9,14 66:5 happened [3] 40:25 70:9 103:24 happens [3] 16:21 62:22 81:22 happy [1] 58:15 hard [2] 49:1 51:5 hardly [1] 103:15 harsh [1] 47:11 harvest [1] 94:9 harvests [1] 64:18 hash [1] 85:24 havana [3] 4:5 79:7 82:23 hear [1] 4:3 heart [1] 34:3 heightened [1] 36:10 held [3] 7:15 15:5 68:9 helms-burton [4] 64:1 66:19 83:13 86: 17 helpful [2] 54:20 100:6 herring [1] 60:5 higher [1] 36:20 highlight [1] 50:7 history [1] 49:23</p>
---	--	--

<p>hold [2] 43:17,22 holder [3] 33:21 63:17 104:22 holders [1] 26:2 holds [1] 103:3 honor [1] 75:5 honors [1] 102:7 however [4] 11:14 13:21 33:2 95:4 huge [4] 37:12 51:9 58:7 68:24 hundred [2] 5:18 39:25 hundreds [1] 103:23 hypo [5] 65:11 69:17,17 81:4 92:15 hypothetical [12] 17:3 18:7,13 37:2 42:12 46:17 59:13 60:12 81:20 87:2 91:6 103:6</p>	<p>intended [5] 9:4 21:1 25:20 51:9,10 intention [1] 51:4 interesting [1] 90:23 interests [46] 4:24 5:13 6:7,18 7:5,10, 22,25 8:10,14,18,25 12:23 17:11 18: 16,18,24 19:1,3,7 20:18 24:9 34:6 37: 3,10,14 38:5,7 40:23 48:4,15 65:8 67: 12 68:3 69:7 70:23 76:22 77:15 81: 24,25 85:18 86:25 97:6 102:23 104: 19,22 interfere [2] 46:7 78:13 interferes [1] 46:6 interim [1] 4:20 international [2] 9:18 26:3 interpret [2] 84:25 97:23 interpretation [1] 23:6 interrupted [1] 45:21 intuitive [1] 91:12 invalid [1] 55:6 identified [2] 61:9,16 involved [2] 51:13 87:11 involving [1] 58:12 island [5] 17:16 30:13,22 37:3,15 isn't [13] 8:2,4 46:10 49:14 56:8 61:7 75:14,15 82:21 89:5 93:18 101:17 103:6 isolation [1] 102:14 issue [14] 5:9 6:2 31:13 32:9 34:9,11 38:19 42:22 52:7 65:10 81:13 89:3 96:3 104:2 issued [1] 86:14 issues [3] 5:25 32:7 58:11 it&t [1] 87:19 it&t's [1] 88:5 itself [4] 7:7 8:7,9 24:13 itt [1] 87:19</p>	<p>keep [12] 50:16 61:11 74:4,8,13 82:9 84:20 94:23 95:17 99:21 103:19,19 kept [1] 61:15 killer [1] 101:15 kind [16] 20:22 26:19 37:1 42:23 46: 21 51:6 52:2 57:24 60:4 63:9,9 74:2 75:21 76:11 77:19 100:21 kinds [5] 8:9 51:13 58:14 76:9 95:24 kit [1] 68:12 klingler [77] 2:2 3:3,13 4:6,7,9 6:7,17 7:8,19 8:13,23 9:12,21 10:5,7,24 11: 12,22 12:2 13:12 15:3,24 16:10 17: 10,20 18:14 19:19 20:5,7,24 21:25 22:19 23:10,20,23 24:2,8,12,18 25:7, 24 26:11,24 27:5,9,14,19,24 28:11, 15,25 29:15,19 30:4,8,25 31:5,9,16, 23,25 32:6,23 34:14,24 35:20,24 36: 2,12 37:18 38:22 39:3 46:14 102:9, 10,12 knowing [1] 54:13 kryptonite [2] 91:23 104:7</p>
I		
<p>i.e [1] 64:9 idea [1] 66:15 identified [1] 19:18 identifies [1] 69:6 ignore [1] 68:9 iii [5] 5:7,9,16 6:2 64:1 illegally [1] 87:3 imagine [1] 42:1 impact [1] 20:20 impetus [1] 25:25 implement [1] 103:21 important [5] 33:24 62:6 70:4 77:12 100:20 impose [1] 47:11 imposed [1] 25:14 improvements [2] 92:1,2 incentive [3] 21:7 33:7 104:14 include [3] 4:12 6:19 90:13 included [5] 8:14 31:14 86:12,21,23 includes [6] 8:9,17 16:24 64:5 76:4 101:20 including [6] 5:13 49:1 64:6 67:11,12 100:22 inclusive [1] 76:25 incorporate [1] 46:20 incorrect [1] 56:2 indeed [1] 96:5 indefinite [1] 101:10 indicate [1] 60:23 indicated [2] 6:23 19:20 indicates [1] 13:13 indicating [2] 9:15 12:13 indication [1] 53:5 infinite [4] 28:3,21 53:13,18 infinity-and-beyond [1] 28:16 infringes [1] 88:4 infringing [1] 60:10 initial [1] 50:12 initially [1] 50:2 insofar [2] 59:11 92:5 instance [2] 16:17 48:18 instead [5] 5:1,5 52:3 55:18 101:13 intangible [1] 76:12</p>	<p>intended [5] 9:4 21:1 25:20 51:9,10 intention [1] 51:4 interesting [1] 90:23 interests [46] 4:24 5:13 6:7,18 7:5,10, 22,25 8:10,14,18,25 12:23 17:11 18: 16,18,24 19:1,3,7 20:18 24:9 34:6 37: 3,10,14 38:5,7 40:23 48:4,15 65:8 67: 12 68:3 69:7 70:23 76:22 77:15 81: 24,25 85:18 86:25 97:6 102:23 104: 19,22 interfere [2] 46:7 78:13 interferes [1] 46:6 interim [1] 4:20 international [2] 9:18 26:3 interpret [2] 84:25 97:23 interpretation [1] 23:6 interrupted [1] 45:21 intuitive [1] 91:12 invalid [1] 55:6 identified [2] 61:9,16 involved [2] 51:13 87:11 involving [1] 58:12 island [5] 17:16 30:13,22 37:3,15 isn't [13] 8:2,4 46:10 49:14 56:8 61:7 75:14,15 82:21 89:5 93:18 101:17 103:6 isolation [1] 102:14 issue [14] 5:9 6:2 31:13 32:9 34:9,11 38:19 42:22 52:7 65:10 81:13 89:3 96:3 104:2 issued [1] 86:14 issues [3] 5:25 32:7 58:11 it&t [1] 87:19 it&t's [1] 88:5 itself [4] 7:7 8:7,9 24:13 itt [1] 87:19</p>	<p>keep [12] 50:16 61:11 74:4,8,13 82:9 84:20 94:23 95:17 99:21 103:19,19 kept [1] 61:15 killer [1] 101:15 kind [16] 20:22 26:19 37:1 42:23 46: 21 51:6 52:2 57:24 60:4 63:9,9 74:2 75:21 76:11 77:19 100:21 kinds [5] 8:9 51:13 58:14 76:9 95:24 kit [1] 68:12 klingler [77] 2:2 3:3,13 4:6,7,9 6:7,17 7:8,19 8:13,23 9:12,21 10:5,7,24 11: 12,22 12:2 13:12 15:3,24 16:10 17: 10,20 18:14 19:19 20:5,7,24 21:25 22:19 23:10,20,23 24:2,8,12,18 25:7, 24 26:11,24 27:5,9,14,19,24 28:11, 15,25 29:15,19 30:4,8,25 31:5,9,16, 23,25 32:6,23 34:14,24 35:20,24 36: 2,12 37:18 38:22 39:3 46:14 102:9, 10,12 knowing [1] 54:13 kryptonite [2] 91:23 104:7</p>
J		
<p>jackson [40] 8:2,4,22 9:2 18:22 19:22 20:6,16 21:10 37:25 38:1,25 39:13 49:22 50:25 51:15 61:23,24 62:20 63: 2,7,18 75:10,14,17 77:2,6 78:14,17 80:7,17,21 81:17 94:17 95:10,14 97: 20 98:7,16 102:5 joint [5] 80:11,14 84:20,21 104:1 judge [3] 16:11 22:19 46:25 judgments [1] 25:8 judicial [1] 50:21 justify [1] 33:20</p>	<p>jackson [40] 8:2,4,22 9:2 18:22 19:22 20:6,16 21:10 37:25 38:1,25 39:13 49:22 50:25 51:15 61:23,24 62:20 63: 2,7,18 75:10,14,17 77:2,6 78:14,17 80:7,17,21 81:17 94:17 95:10,14 97: 20 98:7,16 102:5 joint [5] 80:11,14 84:20,21 104:1 judge [3] 16:11 22:19 46:25 judgments [1] 25:8 judicial [1] 50:21 justify [1] 33:20</p>	<p>keep [12] 50:16 61:11 74:4,8,13 82:9 84:20 94:23 95:17 99:21 103:19,19 kept [1] 61:15 killer [1] 101:15 kind [16] 20:22 26:19 37:1 42:23 46: 21 51:6 52:2 57:24 60:4 63:9,9 74:2 75:21 76:11 77:19 100:21 kinds [5] 8:9 51:13 58:14 76:9 95:24 kit [1] 68:12 klingler [77] 2:2 3:3,13 4:6,7,9 6:7,17 7:8,19 8:13,23 9:12,21 10:5,7,24 11: 12,22 12:2 13:12 15:3,24 16:10 17: 10,20 18:14 19:19 20:5,7,24 21:25 22:19 23:10,20,23 24:2,8,12,18 25:7, 24 26:11,24 27:5,9,14,19,24 28:11, 15,25 29:15,19 30:4,8,25 31:5,9,16, 23,25 32:6,23 34:14,24 35:20,24 36: 2,12 37:18 38:22 39:3 46:14 102:9, 10,12 knowing [1] 54:13 kryptonite [2] 91:23 104:7</p>
K		
<p>kagan [16] 9:21 10:6,9 11:6,13 12:25 14:5 32:13 43:2,19 45:9 56:16,20 95: 21 96:6,11 kagan's [4] 16:22 32:3 65:11 81:4 kavanaugh [17] 32:15,16 34:8,21 35:9 48:6,9 56:22,23 57:7,19 58:7,19 99: 16,25 100:11 101:24</p>	<p>kagan [16] 9:21 10:6,9 11:6,13 12:25 14:5 32:13 43:2,19 45:9 56:16,20 95: 21 96:6,11 kagan's [4] 16:22 32:3 65:11 81:4 kavanaugh [17] 32:15,16 34:8,21 35:9 48:6,9 56:22,23 57:7,19 58:7,19 99: 16,25 100:11 101:24</p>	<p>land [9] 6:9 7:1 16:19 20:8 22:9 24:14, 16 30:12 44:1 landlord [1] 65:2 language [5] 13:2,3,5,13 91:14 large [1] 33:12 largest [2] 87:20 97:8 last [5] 14:6 25:16 26:17 34:21 98:8 lasted [1] 11:15 late [1] 88:23 later [7] 7:1 18:24 19:11 65:20 68:7 78:12 95:4 latter [1] 25:24 laughter [2] 83:19 88:9 law [14] 5:23 25:13 36:3 54:18 55:2 62:3,10,11 65:4 66:10,10,15 86:18 93:16 lawful [7] 34:8 56:24 57:8,10,15 58:2, 13 lawsuit [1] 10:4 lawyer [1] 83:14 lawyers [1] 103:25 lay [1] 42:17 leap [1] 76:24 lease [16] 7:17 42:2,3 60:14 61:10 65: 25 66:2,3,11,12 67:6 68:23 89:11,20, 23 91:25 leased [2] 24:19 66:1 leasehold [28] 5:12 6:8 7:10,15,18 8: 12,14 13:25 14:1 16:3 22:14 24:4 64: 7,23,24 65:1 66:9 76:13 78:9,10,11 82:5,7 100:22,24,25 101:3,20 leaseholder [1] 65:3 leaseholds [3] 67:12 68:10 69:4 leasehold's [1] 101:21 leases [4] 69:8 82:2 104:19,20 least [10] 25:19 32:24 34:22 49:17 51:</p>

<p>7 78:23 86:5 89:11 101:3 104:2 leave [1] 52:17 led [1] 62:2 left [5] 23:11 29:11 87:3 95:23 104:17 legal [3] 22:24 23:3 90:15 lend [3] 54:7,8,9 length [1] 35:2 lessee [1] 24:4 lessor [1] 24:3 level [2] 26:25 98:24 liability [7] 32:11 35:16 37:13,20 39:9 103:1,2 liable [6] 17:7,18 37:6 74:14 89:13 103:22 license [1] 57:16 lien [12] 54:4,10,11,13,23 63:12 89:5 90:1,18,25 91:3 93:22 liens [4] 90:9,14,17,22 lieu [1] 66:18 life [3] 5:12 62:18 104:21 lifted [1] 103:8 light [2] 9:11 51:4 likely [1] 21:19 limit [9] 15:16,18,19 29:21 35:6 51:20 66:13 73:10,13 limitation [2] 16:13 22:21 limitations [4] 19:3 80:4,23 98:3 limited [9] 20:18 44:2 59:25 66:16 76:22 79:18,22 80:24 97:19 limits [19] 4:24 7:12 12:16 19:20 20:11 25:11 29:4 31:1 32:25 37:21 62:16 64:22 65:7,12 68:10 69:11 81:23 92:24 104:10 line [10] 19:15 25:2,5,9 30:21 38:7 45:3 89:9 93:20 103:6 lines [11] 5:17 20:9 25:3,9 28:8 35:17 38:12,18 59:17 98:11 103:18 line's [1] 38:9 linkage [1] 12:21 list [1] 76:9 listening [1] 79:5 litigate [1] 83:25 litigation [2] 102:20 103:11 little [7] 5:11 9:8 11:25 19:2 70:21 71:21 85:19 lobbying [1] 103:19 location [1] 77:16 locked [1] 24:23 locking [1] 21:5 locks [1] 4:16 long [4] 11:14 17:23,24 76:9 longer [2] 11:16 52:15 long-term [1] 24:3 look [15] 15:18 31:11 44:20 48:19 69:3,18 73:10 78:2 80:10,13 84:16,23 87:8 97:21 102:17 looked [7] 23:3 62:13 69:12 81:5 87:9,19 97:9 looking [3] 12:8 43:3 86:6</p>	<p>lost [1] 61:13 lot [5] 50:8 61:16 70:12 84:24 104:3 lots [3] 37:8 82:13,13 louder [1] 11:25 lumber [3] 92:22 94:9,11</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>machinery [1] 6:10 made [7] 21:24 36:2,15 53:12 57:13,23 93:22 main [1] 78:24 mandamus [1] 36:6 many [2] 5:12 95:4 market [7] 22:10 36:18 52:24 55:19 56:4,9,11 master [2] 36:15 56:7 matched [1] 33:9 matter [4] 28:18 86:5,12 93:7 maximally [2] 98:18,19 maximum [2] 25:22 93:16 mean [44] 8:13 9:23 11:7,10,16,20 15:12 18:3 19:22 20:11,12 29:9 33:23 36:24,25 43:20 45:10 49:10 51:1 54:11 55:17 59:8,16 66:4 67:14 69:5 80:10 83:13,14 85:12,13,14 88:18,19 89:15 91:14 95:7,8,22 97:21 98:8 100:5 101:8 104:7 means [7] 9:10 43:5 78:6 85:17 88:20 98:19 100:19 meant [1] 30:14 mechanic's [1] 90:25 mechanism [1] 12:17 memo [1] 104:1 mentioned [2] 51:23 104:3 metes [1] 65:7 methodologies [1] 22:7 mic [1] 12:1 middle [3] 17:16 30:13,22 might [20] 20:17 27:1 28:4,4,22 29:7 38:6 62:2 65:1,2 75:5 83:17 84:3 86:16,19 87:2,5 90:4,13 103:14 million [5] 5:19 39:25 69:23 87:22 88:6 millions [2] 49:12 103:23 mind [1] 82:9 mine [1] 12:14 mineral [4] 67:23 68:1 92:15,19 mining [5] 64:16,17 94:7,10,15 misled [1] 83:8 mismatch [1] 66:25 missing [4] 73:16,17 79:14 80:25 mixed [1] 8:20 mm-hmm [1] 100:11 model [1] 11:3 moment [2] 27:3 30:2 money [9] 4:19 12:18 20:2 25:1 54:7 61:16 70:9 84:24 85:1 monthly [1] 61:11 morning [1] 4:4</p>	<p>most [5] 26:20 52:22 97:22 100:6,20 move [2] 88:8 93:12 moving [1] 12:5 ms [40] 39:16,20 41:3,10,14 42:13 43:12 44:10 45:23 46:9,18 47:16,20,23 48:1,14 50:18 51:8,22 52:19 53:19,21 54:1,19,24 55:8,18,21,25 57:6,12,22 58:9,24 59:19 61:18 62:7,25 63:6,11 much [6] 21:18,22 28:23 50:12 52:14 101:11 multiple [7] 28:21 47:5,18 48:17 51:2 89:3 91:15</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>narrow [1] 34:5 national [2] 74:15 101:7 nationals' [1] 99:1 natural [2] 14:21 42:6 naturally [2] 7:21 67:4 nature [5] 8:6 82:14 85:17 91:18 96:9 nauseam [1] 28:9 near [3] 18:19 81:15 97:16 necessarily [4] 7:22 42:24 49:25 59:19 necessary [1] 20:25 need [10] 12:9 20:21 33:19 47:3 61:1 77:22 84:14 88:15 90:21 102:20 needed [3] 6:1 48:25 56:15 needs [2] 17:21 92:13 negotiate [1] 33:20 negotiation [1] 33:22 neighbor's [2] 65:14 88:22 never [6] 17:4,8 40:25 61:16 62:21 92:1 nexus [1] 12:7 nobody [8] 52:1 80:19 83:1,2 91:24 95:4 96:25 98:4 nobody's [1] 45:14 none [1] 85:21 non-exclusive [4] 60:22,24 61:4 72:9 normally [1] 7:16 noted [2] 22:1 42:18 notes [1] 50:21 nothing [10] 14:24 17:17 37:16 52:17 60:23 68:16 79:15,24 82:9 104:17 notice [4] 29:2 33:18 57:8 69:15 number [2] 13:18 28:21</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>obama [1] 34:17 objectives [2] 4:22 32:24 obligation [1] 103:17 observed [1] 4:13 obtain [1] 32:19 obvious [2] 65:12 80:13 obviously [3] 19:14 80:11 84:12 occupied [1] 4:14</p>
---	---	--

<p> occurred [2] 5:10 61:3 odd [1] 48:12 office [4] 16:25,25 42:19 60:15 officials [2] 4:13 58:2 often [1] 54:9 okay [19] 25:16 31:24 36:8 37:23 43:24 47:22,25,25 55:22 56:15 58:25 71:10,22 72:20,24 73:13 89:4 100:23 101:6 once [7] 10:13,13 11:15 12:21 14:23 78:3 79:8 one [34] 12:4 14:7 17:24 18:11 20:9 25:1 26:2 28:2,5,16 32:24 35:6,12 36:14 42:5 46:17 54:5 59:1 60:13 64:6 77:17 78:3,24 82:8 86:3 87:15,17,19 88:5 93:3,14 96:22 98:17 104:4 ones [4] 18:20 58:7 69:10,14 one-to-one [6] 64:12 65:22 74:21 84:14 88:15 92:5 ongoing [3] 4:22 14:2 35:5 only [22] 14:10 15:21 16:9 19:23 20:9 33:6 36:21 38:8 46:22 60:15 64:16 65:18 66:21 67:20,24 69:4 70:9 71:8 79:21 84:18 87:10 96:6 open [12] 5:14 23:9,11,12 34:10,14 46:24 52:7 55:23 58:23 59:15 83:7 operate [5] 6:10,22 44:23 57:17 61:20 operates [2] 11:3 80:5 operating [1] 49:17 operation [1] 40:10 oral [6] 3:2,5,9 4:7 39:17 63:22 order [6] 20:22 41:19 47:10 49:6 69:13 81:1 original [2] 54:16 93:11 other [27] 6:24 7:14 8:4,14 16:16 20:10,16 24:5,6 25:2 38:7 55:23 56:7,25 57:18 70:12,14 77:18 79:14 85:6 87:8 93:3,6 97:11,20 98:23 101:12 others [1] 61:5 otherwise [5] 36:6 39:11 49:21 60:25 77:13 out [15] 5:1 34:15 37:12,19 41:21 42:17,25 48:23 52:21 59:14 60:14 62:8,19 79:20 96:12 outweighs [1] 52:1 over [21] 6:20 11:20 14:23,23 16:18 17:13 22:3 24:24 26:22 37:3 46:15,15,15 66:7 67:25 72:13 81:14 96:2 100:8 101:21 104:20 overlap [1] 73:18 overwhelming [1] 25:25 owed [2] 28:24 70:9 own [8] 7:13 19:18,20 29:18 38:25 43:25 44:16 68:5 owned [10] 13:8 21:19 24:16 37:16 41:13,17 68:3 71:7 82:4 89:7 owner [5] 18:15 39:1,12 54:16,16 ownership [12] 7:6,9 38:19,20 41:5,15 42:8 44:13 80:15 84:18 102:15,21 </p>	<p> owns [6] 19:24 40:5 41:2 74:15 82:7 101:8 </p> <hr/> <p style="text-align: center;">P</p> <hr/> <p> page [5] 3:2 69:6 80:13 87:18 93:4 paging [1] 84:21 paid [8] 5:18 9:20 14:2 15:14 27:15 39:24 49:10 91:25 paragraph [3] 48:21,21 50:20 paraphrasing [1] 57:5 parcel [2] 92:17 93:24 parity [1] 81:22 parsing [1] 99:18 part [21] 8:19,24 15:2 17:5,18 19:9,10,13,13,15 30:12,22 31:19,21 32:4 58:17 61:8 70:17 71:12 89:16 91:12 particular [12] 6:18 15:16 38:4 48:20 56:24 57:14 60:7 68:22 88:21 92:13 93:8 102:20 particularly [5] 9:13,19 48:16 68:15 102:18 parts [3] 8:19 18:6 99:22 pass [2] 18:21 97:14 passenger [3] 15:22 16:14 60:1 passengers [2] 22:18 59:7 patent [8] 76:12 86:18,20 87:4,5,17 88:1,3 patents [12] 5:13 69:8 85:25 86:8,12,13,21,24 87:11,22,25 88:5 paul [3] 2:8 3:10 63:22 pay [5] 21:7 27:18 54:14 70:10 89:7 paying [5] 39:23 45:7 49:11 51:11 61:11 payment [4] 21:4 27:22 33:6 61:19 payor [6] 66:17,22 67:18,19 88:25 96:18 payors [1] 99:7 pays [3] 4:17 54:12 66:17 penalties [1] 25:13 penny [1] 39:24 people [11] 25:20 28:22 50:13 51:3,11 67:24 68:7 77:14 85:14 94:24 95:20 per [1] 38:10 perfectly [2] 42:6 80:5 perhaps [1] 25:19 period [8] 21:21 25:3 29:25 52:15,15 98:2 100:8 104:21 perishable [2] 85:9,12 permission [1] 94:10 perpetual [4] 45:12,18 68:7 88:1 person [26] 10:10,12,15,18,22 13:7 38:5 39:10 54:9 66:17,21,23 75:7,8 77:11,23 80:3 82:4,6 88:21 94:10,11 96:17,20 100:7,9 personal [1] 8:21 person's [3] 77:18 78:21 79:1 persuade [1] 49:6 petitioner [19] 2:3,7 3:4,8,14 4:8 39:19,23 40:3,4,14,18 41:7,23 45:3,4 52: </p>	<p> 14 65:18 102:11 petitioners [4] 46:22 52:4 60:6 84:25 petitioner's [3] 40:6 42:11 70:23 physical [6] 10:17,19 24:12 40:8 41:22 77:16 physically [2] 4:14 14:8 pick [1] 32:16 piece [4] 10:1 30:11 44:1 60:7 pieced [1] 84:12 pieces [1] 84:12 piecing [1] 99:22 pier [1] 23:19 piers [5] 20:9,10,10 23:14,15 pill [2] 49:16 51:21 pinpoint [2] 68:21,25 place [3] 24:23 34:16 44:19 places [1] 5:14 plain [1] 64:11 plainly [1] 74:17 plaintiff [1] 43:8 plaintiff's [2] 13:21 36:21 plan [1] 77:24 please [4] 4:10 39:21 63:25 103:21 plenary [5] 6:22 7:2 16:1,18 24:21 plenty [1] 97:6 point [17] 9:2 16:17 20:17 21:8 26:17 28:16 34:13,15 39:4 46:10 58:15 75:21 87:12,18 90:7 96:11 98:10 points [1] 102:13 poison [2] 49:16 51:21 policy [11] 33:25 34:6 47:9 48:3,4,13,15,20 49:3,13 104:5 pop [1] 101:5 portion [4] 15:6,8,11 17:24 portions [1] 34:2 position [19] 42:11 47:21 48:7,10,11,12 57:9,10 58:11 60:25 65:20 66:22 67:20 68:16 72:2,7 88:25 100:4 101:22 positions [1] 34:25 possess [1] 44:23 possession [2] 40:9 41:7 possibility [3] 47:5 48:2 91:16 possible [2] 70:5 97:24 potentially [1] 32:21 power [3] 5:8 26:9 34:4 practice [1] 69:2 present [1] 8:25 presentation [1] 22:23 presented [1] 58:18 presenting [1] 33:24 president [1] 103:21 press [1] 79:24 pressure [4] 25:22 47:12 49:4 94:22 presumably [5] 15:7 22:4 77:22 91:19 98:21 presuming [1] 26:6 presumption [1] 55:10 presumptive [1] 55:5 </p>
--	---	---

<p>presumptively [1] 35:15 pretending [1] 40:25 pretty [4] 20:3 51:1 69:9 90:6 prevail [2] 34:11 35:5 prevent [1] 50:10 previously [1] 57:20 primarily [2] 25:17 34:20 principal [2] 7:20 32:24 principally [1] 69:3 principles [3] 62:3 64:21 65:4 prior [1] 58:12 private [4] 5:21 103:8,20,22 probably [2] 22:12 70:6 problem [6] 28:20 29:5,9,9 67:7 70:12 problems [1] 78:23 proceed [1] 40:6 process [11] 9:18 26:4,18 28:19,25 36:4 51:23 52:6 58:4 62:5 66:8 produces [1] 11:1 prohibited [3] 34:19 39:11 104:13 prohibition [3] 6:12 7:25 35:4 prominently [1] 104:3 proof [1] 102:14 properties [1] 51:6 property's [2] 76:3 88:20 proportion [1] 28:23 protects [1] 40:22 provide [3] 50:23 58:15 97:16 provided [5] 21:7 34:7 40:13 41:6 58:16 provides [4] 16:5 48:24 49:20 64:2 providing [4] 14:4 33:11 40:24 99:3 provision [8] 13:19 49:2 63:3 78:1,2,19 94:2,4 provisions [1] 98:21 proxy [1] 28:7 pulled [2] 84:16,17 punishment [1] 29:9 punitive [4] 26:5 97:23,24 98:19 purely [1] 47:8 purporting [1] 57:17 purpose [4] 19:5 60:9 81:20 95:11 purposes [4] 54:8 59:18 72:14 91:23 pursue [2] 15:13 63:17 put [12] 15:17 25:21 26:23 67:17,19 72:15 76:15 88:24 94:22 96:16,17 104:9 putting [4] 44:14 89:2,5 91:14</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>qed [3] 74:20,25 75:3 qualifies [1] 41:24 qualify [1] 60:2 question [26] 16:22 18:23,24 19:11 21:15 22:1 23:5,5 25:16 32:3 35:12 45:15 48:13 53:11 58:17 59:1,2,5 60:20 69:24,25 72:14,21 83:17 95:11 103:6 questions [6] 6:4 19:2 32:17 41:1 58:14 65:24</p>	<p>question's [1] 16:21 quickly [1] 61:25 quite [1] 68:21</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>raise [2] 34:10 58:4 raised [3] 51:24 52:5 59:5 range [1] 16:11 rather [2] 35:5 102:16 rationale [1] 93:2 reach [1] 23:12 read [10] 10:13 46:20 55:2,9 67:9 74:11,11 75:6 76:10 79:19 reading [8] 34:5 74:5,9,13 76:23 84:4,14 85:23 real [4] 8:11,20 60:20 90:24 really [17] 36:21 49:12,24 50:6 51:4,4 59:15 61:13 62:4 68:15 71:6 75:6 78:24 85:5 93:18,19,25 real-world [1] 67:23 reason [7] 23:1 62:3 70:4 84:7 86:10 87:24 94:15 reasonable [2] 26:21 27:13 reasoning [1] 81:22 reasons [4] 33:25 84:3 86:3 103:14 rebuttal [3] 3:12 102:8,10 receivable [1] 97:11 receivables [1] 70:13 receive [3] 25:4 27:22 46:22 received [5] 21:19,22 35:8 52:14 58:1 recognizing [1] 33:10 record [2] 60:23 62:13 recover [8] 25:1 46:2,15 55:12,14,18 79:13 87:16 recoveries [4] 47:19 48:17 51:2 91:16 recovery [9] 26:20 28:21 46:21 47:5 50:15 51:25 52:3 56:5 89:3 recurring [1] 70:7 red [1] 60:4 redefine [1] 9:10 reduced [2] 46:12 54:21 refer [2] 75:12 101:16 reference [2] 90:1,2 referring [3] 13:6 36:13 74:17 refers [3] 41:15 75:19,22 reflect [3] 47:8 59:24 65:5 reflected [4] 8:1 42:15 50:19 70:7 reflective [1] 48:3 reflects [7] 6:18 12:13 43:18 44:11 66:13 73:10,13 regard [2] 23:7 104:18 regarding [1] 6:1 regardless [1] 40:7 regime [8] 26:8,9 47:9 66:19 67:17 91:3 94:23 104:12 regimes [1] 49:7 regulation [1] 34:18 rejected [4] 16:13 22:19,20 40:15 related [3] 7:10 19:2 22:2</p>	<p>relates [1] 38:23 relation [6] 6:25 7:3,15 25:14 33:6 103:2 relatively [1] 68:11 release [1] 27:20 relevant [4] 40:7 41:3 43:13 56:8 relied [1] 5:21 relief [1] 20:1 relieves [1] 103:16 rely [1] 34:19 remain [2] 23:8 34:14 remained [1] 21:23 remaining [2] 62:16,18 remains [2] 9:15 34:10 remand [7] 23:12 46:24 52:8 58:23 59:15,15 61:1 remanded [1] 23:9 remedial [1] 98:9 remedy [26] 4:18,21,22 12:6 13:23 14:2 15:12,14,14 21:3,3 26:2 33:10,11 34:6 35:5 40:24 50:5,22,23 51:1,21 52:6 97:17 104:6,14 remedy's [3] 4:25 5:1 21:6 removed [1] 17:9 repeatedly [1] 59:8 replacement [1] 52:24 reply [1] 93:4 repudiated [3] 69:21 70:11 97:10 require [2] 4:22 90:23 requirement [1] 98:6 requires [6] 11:4 64:11 65:23 74:21 92:5 102:14 res [1] 8:17 resolve [1] 47:3 resolved [2] 5:3,25 resources [1] 49:2 respect [12] 28:15 49:18 65:9,12 71:5,19 73:8 74:21 76:18 80:6 81:3 92:12 respondent [1] 55:4 respondents [15] 2:9 3:11 39:24 40:1,4,11 45:6 46:7,19 52:5 57:17,25 60:5 63:23 96:23 response [6] 38:2,9 65:11 75:5 94:18 98:15 responsibility [1] 79:2 restaurant [1] 60:17 restriction [1] 60:15 result [4] 11:2 16:1 21:20 45:17 resulted [1] 31:2 retains [1] 24:11 return [1] 49:6 returned [3] 9:19 40:13 46:5 returns [2] 49:19,21 reversing [1] 47:7 review [1] 36:5 revolution [1] 86:15 richard [5] 2:2 3:3,13 4:7 102:10 rights [18] 6:9,15,20 22:2 23:16 24:5,6,7 36:24 45:4,8 67:23 92:15,16,20 94:</p>
--	---	--

<p>8,8,10 ripe [1] 55:7 rise [2] 32:11 89:4 risk [3] 83:15 103:11,13 roberts [23] 4:3 8:3 21:11 26:13 32:13 35:10 37:24 39:14 42:10 51:16 52:10 53:8 56:16,18,20 58:20 61:22 63:19 99:10 102:1,4,8 104:25 role [2] 61:25 96:18 royal [1] 4:5 rule [2] 32:25 46:21 ruled [3] 29:4 31:1,17 run [2] 44:25 65:1 runs [1] 96:12</p>	<p>16,18 68:14,15 74:23 94:7,12 separate [4] 18:5,5 32:9 81:13 separately [1] 42:20 series [1] 12:22 set [10] 5:1 7:10,12 25:10 32:8 38:6 42:25 49:25 50:9 62:8 sets [2] 17:20 48:23 settled [2] 9:18 23:8 settlement [4] 21:16 26:4 34:2 50:3 several [1] 34:9 sg [1] 98:8 shall [1] 74:14 shares [1] 69:19 ship [4] 18:9 25:2,2,5 ships [5] 15:22 16:15,15 17:4 83:12 short [1] 23:23 shorthand [1] 39:6 show [3] 56:3,10 102:20 shrunk [1] 5:9 side [5] 16:16 55:23 56:25 93:4 101: 12 sign [1] 5:14 significant [2] 48:4,13 similarly [1] 77:25 simple [3] 23:18,22 68:4 simply [1] 58:16 single [6] 16:17 18:11 46:21,21,23 97: 7 single-most [1] 70:7 situation [3] 19:14 56:12 77:14 skip [1] 100:7 slice [1] 78:7 small [3] 68:11,23 69:9 snippets [1] 55:2 soldiers [1] 41:21 solicitor [3] 2:4 34:23,25 somebody [20] 37:16 49:9 54:12 64: 17,18 65:13 67:18 78:3,9,13 81:8 86: 16 87:2 88:4,23 92:18 94:7,8,9 101: 22 somehow [1] 68:24 someone [19] 7:17 19:12,25 37:5,9 38: 11 54:7,13 59:23 60:8,16 64:2,8,22, 25 65:20 89:7 102:21 103:1 someplace [1] 10:2 sometimes [1] 54:7 somewhat [2] 16:21 84:4 sorry [12] 4:19,19 12:2,3 17:13 27:6 56:18 70:18 75:18 77:6 78:16 99:9 sort [15] 7:24 8:20 18:24 22:9 23:5 44: 1 50:11 51:21 63:3 68:11 85:19 87: 20 93:1,1 97:22 sotomayor [47] 26:14,15,25 27:7,10, 17,21,25 28:12,18 29:7,16,23 30:6,9, 16,18,20 31:3,6,12,21,24 32:2,12 51: 22 53:9,10,20,24 54:3,22 55:1,16,20, 22 56:14,17,19 89:2,17 90:5,8,11,15 91:8 99:14 sotomayor's [1] 32:17</p>	<p>space [2] 42:19 60:16 spat [1] 93:10 spatial [5] 14:16,20 65:6,12 81:23 spatially [1] 94:14 speaking [1] 67:5 special [2] 36:15 56:7 specific [5] 76:20 78:7,7 94:13 96:17 specifically [2] 50:19 84:8 specified [1] 81:13 speed [1] 83:24 split [1] 14:7 stacked [1] 82:2 stand [1] 102:13 standard [1] 36:10 standpoint [1] 87:4 start [1] 100:6 state [1] 5:18 states [8] 2:6 3:7 39:18 50:24 57:2,3 74:14 83:18 states' [1] 58:13 stations [1] 37:8 statute [80] 8:7,9 9:3,8,11 10:10,14 19: 4,23,23 20:3,23 21:1,8 29:2 32:19 38: 4,11 43:21 44:3,4,5 46:20 52:16 59:8 62:5 63:7 64:5,11 65:23 67:1,9 74:21 75:6 76:4 77:19 78:1,8,18 79:2,11,15, 25 80:4 82:10 84:5,13,24 85:1,23 86: 8,21,24 89:15,18,25 90:4,12 91:4 92: 4 93:21 94:1 95:1,16 96:16 97:15,19, 21,23,25 98:3,18,20,24 99:4,23 100: 13,15 101:12 104:18 statute's [1] 103:16 statutory [10] 4:21 8:15 13:2,3,4,12 41:14,25 84:8 91:14 stay [1] 25:21 step [1] 98:23 stick [4] 10:20 67:15,20 78:7 sticks [2] 67:13 68:11 still [11] 13:22 14:22 15:11 35:5 46:24 55:23 60:2,9,18 97:3 102:20 stock [3] 69:20,25 81:12 stolen [5] 9:15,15 21:9 50:14 94:25 stop [2] 86:4 88:7 stopping [2] 4:15 33:4 stops [2] 4:19 12:18 store [20] 17:16 18:8,13 30:13,21 31:4, 7,9,14,18 32:1,3 37:2,7 38:6,10 42: 11 46:16 59:12 92:7 story [2] 56:25 83:10 straightforward [1] 20:4 street [2] 10:1 101:18 streets [1] 7:1 structure [1] 95:16 struggle [1] 70:20 struggling [1] 20:6 sub [1] 100:16 subject [6] 7:24 25:13 35:3 36:5 65:2 83:4 subsequently [1] 86:19</p>
S		
<p>sabbatino [2] 85:8,15 same [17] 11:1 25:4 40:1 44:19 61:6 62:23 64:21 65:5,16 77:15,16 80:23 85:20 91:7 92:17 102:23 103:3 sanction [1] 51:6 sanctions [2] 34:1 94:23 saw [3] 10:2 11:2 84:17 saying [13] 10:10 19:5 37:11 45:19 76: 25 81:22 91:21 95:17,18,21 96:7,7,8 says [24] 19:23 52:19 63:8 65:6 67:2, 11 73:23 74:13 75:7,25 76:8,17,19 77:10 79:16,25 84:9,22 97:15 100:7, 18,21 101:14,18 scheme [7] 25:17,18,20 40:21 45:16 49:25 98:10 scope [6] 18:25 32:8 33:18 62:12 79: 16 104:6 scovel [1] 93:10 second [4] 8:24 82:7 86:10 103:5 section [4] 36:7 48:20 50:20 102:14 secure [1] 36:22 secures [1] 39:11 security [1] 5:18 see [14] 11:7,7 47:13 53:1 56:14 60: 22 69:3,13 74:9 89:19 91:20 92:3 95: 16 97:12 seek [2] 33:21 40:3 seeking [4] 5:20 28:1,2,3 seem [6] 13:1 51:1 53:12 76:1 79:19 85:25 seemed [1] 55:3 seems [8] 7:4 8:7 10:14 20:3 68:20 78: 22 92:8 100:19 seen [1] 12:6 seized [17] 4:12 7:12 10:1 12:4,13,15 13:14 31:1,4,10,22 32:1,4 33:1 39:22 42:7 104:10 seizes [1] 12:21 seizure [7] 41:15,24 45:13,14,15,17, 20 sells [1] 38:14 send [1] 41:20 sense [12] 7:14 38:13 51:7 66:4 67:14,</p>		

<p>substantive [2] 29:5,8 substitute [7] 66:16,22 67:18,19 88:25 96:18 99:7 suddenly [1] 51:2 sue [4] 9:23 10:11 11:9 46:5 sued [2] 11:14 85:2 sues [1] 98:4 sugar [3] 85:9,10 97:3 suggest [1] 48:15 suggested [3] 46:14 65:10 94:22 suggesting [3] 12:9 44:15 93:1 suggests [2] 50:5 78:2 suing [1] 13:7 suit [1] 40:6 suits [2] 95:24 96:1 summarize [1] 100:3 superfluous [1] 86:7 super-patent [1] 88:3 supplies [1] 16:25 supporting [3] 2:6 3:8 39:19 suppose [2] 14:7 51:24 supposed [9] 45:5 49:14,15 51:12 52:13,20 61:20 62:19 79:5 supreme [2] 83:18 84:1 suspended [1] 103:20 suspension [5] 5:21 93:1,5 103:8,19 system [1] 50:9</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tack [1] 93:12 tahoe-sierra [1] 65:5 tainted [2] 4:17 63:14 takings [10] 4:18 12:18 13:24 21:2,3 30:5,7 66:10,10,15 takings-related [1] 15:12 talks [5] 13:5 59:8 76:19 102:25 103:3 telephone [4] 69:20,25 70:1 81:12 temporal [4] 14:21 65:6 81:24 96:12 temporally [1] 65:16 temporary [2] 20:20 79:18 term [10] 4:24 8:8 41:8,10 42:3 64:4 67:9 76:3 100:13,18 terminates [1] 62:22 termination [1] 63:3 terms [4] 6:11 9:3 22:8 86:7 terrible [1] 82:10 test [1] 40:21 text [2] 64:11 84:8 textualist [1] 100:14 themselves [5] 6:13 7:11 8:18 17:9 38:23 theoretical [2] 86:5,11 theory [3] 32:18 69:1 99:4 therefore [1] 83:1 there's [47] 14:16,16,19 15:15 20:8,8, 8 21:4 24:12,13,14 27:5 28:19 29:5,8 32:6,9 33:8,14,16 37:11 38:14 42:19 47:5 53:4 59:5 60:14 65:22 66:25 69:23,25 72:12,12,20 73:7 77:25 79:24</p>	<p>82:9 83:5 84:24,25 93:2 94:15 96:23 98:3,5 102:21 they've [3] 19:16 79:8 83:1 thinking [2] 28:20 83:11 third [2] 36:18 104:5 thirty [2] 5:19 39:25 thomas [17] 6:5,14 7:4,16 8:5 21:13 41:2,9,12 51:18,19 65:25 67:1,8 68:2, 20 99:12 though [12] 5:10 6:11 7:4 10:14 36:11 42:7 46:14 54:14 69:23 71:20 76:8 86:13 thousand [1] 69:19 three [5] 9:16 20:8 26:25 36:13 69:8 three-month [1] 100:8 throw [1] 104:4 thrust [1] 50:12 tie [3] 96:7,8 104:5 tied [2] 13:23 79:17 ties [1] 13:13 til [1] 11:15 timber [5] 64:18 92:16,21 94:8,15 time-limited [20] 13:11 22:13 29:17,20 40:23 43:9 44:9 45:11 53:3 64:6 69:7, 10 70:23 73:6,21 80:9 91:17,18 101:4 104:19 title [5] 5:7,9,15 6:2 64:1 today [2] 47:3 80:23 together [5] 42:24 44:14 72:19 84:12 99:22 tolling [3] 93:2,5,18 took [6] 4:17 34:16 59:10 72:2 94:11 99:1 tool [1] 47:9 total [2] 69:7 87:21 touch [2] 47:14 91:24 touched [2] 17:8 18:9 tourism [1] 34:20 traffic [22] 37:20 38:14 39:8 43:5 51:5 59:17 65:21 67:20 68:8 69:24 70:1,5 77:20,25 81:11,18 82:3,5 84:10 87:14 92:6 97:4 trafficked [13] 18:12 19:16 26:7 40:2 59:23 64:15 73:3,20 74:23 88:17 92:22 99:7 101:22 trafficking [60] 4:16,23 7:21 9:5,6,10 12:16 13:4,5,13,16,16 15:10 17:21, 25 18:23,23 19:12,12,21 20:1,12 25:11 32:10,25 33:12 34:16 35:4 38:3, 10,13,18 39:5,7,9 40:20 42:21 47:11 48:23 50:10,17 60:18 61:2 63:16 64:19 65:15 73:15 74:6 78:12 81:19 82:4,11,15 85:11,19 91:24 94:24 97:17 98:5 104:11 traffics [16] 25:15 64:2,17,24,24 65:13 66:23 67:3 73:23,23 78:9 81:8 96:20 97:12 100:9 103:1 transactions [1] 51:14 transacts [1] 63:14</p>	<p>transfers [1] 38:15 transition [1] 33:4 translation [1] 16:4 travel [6] 34:9 56:24 57:8,11,15 58:13 treasury [1] 52:3 treat [1] 45:21 treated [3] 22:10,13 63:13 treating [3] 7:5,9 68:11 tremendous [1] 103:13 trigger [1] 20:22 troubled [1] 28:5 true [7] 5:4 9:12 11:7 14:6 30:4 45:9 94:14 truly [1] 47:15 trump [2] 34:16 103:21 truncated [1] 35:6 try [2] 50:16 79:12 trying [9] 31:8 49:5,24 50:7 71:19 78:25 95:20 97:14 104:12 turned [1] 22:3 turns [1] 59:14 twice [1] 51:12 two [14] 6:19 8:19 32:6 42:3 44:14 69:8 78:23 82:1 86:2 87:11,17 93:2 98:4, 14 two-year [1] 98:3 tying [1] 26:19 types [1] 36:13</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>u.s [4] 70:10 97:12 99:1 101:7 unbelievable [2] 37:1 88:11 unconnected [1] 9:24 under [11] 37:12,19 41:25 57:17 62:9 66:15 67:17 84:24 85:1 86:18 104:24 underlie [1] 17:11 underlying [11] 7:13,23 8:17,23 9:17 13:17,20 41:4 42:8 44:1 63:4 undermines [3] 40:21 49:2,13 underscore [1] 87:12 understand [16] 13:1 15:19 18:2,2,12 21:25 29:11 46:10 52:20 62:21 68:16 72:13 78:19 92:10,17 94:25 understanding [2] 15:23 43:3 understood [2] 26:16 81:18 undertaking [2] 39:10 52:23 united [10] 2:6 3:7 39:18 50:24 57:2,3 58:13 74:14 83:18,25 universe [2] 69:9 86:3 unjust [2] 91:13,15 unlawful [1] 99:1 unless [2] 29:4 49:18 unloading [1] 89:12 unrelated [1] 18:8 until [14] 4:17 9:16 21:4,6 27:22 46:3 49:19 53:14,20,23 54:11 83:4 93:19 95:5 unusual [4] 33:11 66:19 67:17 96:18 unusually [1] 33:12</p>
---	---	---

<p>up [16] 4:16 14:8 21:5,23 27:22 32:16 38:1 49:25 50:9 51:11 68:10 71:25 83:17 87:19 91:3 104:23</p> <p>upheld [1] 11:5</p> <p>useful [1] 54:6</p> <p>uses [7] 6:24 16:5 37:5 38:15 59:25 60:1,16</p> <p>using [5] 19:16 38:8 39:6 47:10 95:5</p> <p>usufruct [9] 6:15,23,25 7:5 15:20 16:3, 8 41:8 62:15</p> <p>usufructs [2] 6:20 16:2</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>valuation [11] 17:5 22:5 35:13,21,23 36:14,19 55:11,13 60:2 91:19</p> <p>valuations [1] 18:5</p> <p>value [34] 17:21 21:17 22:8,10 23:1 27:2,13 28:6 30:1 32:21 35:16 36:18 37:6 46:13,23 50:9 52:22,24,24,24 53:16 54:1,15,23 55:4,19 56:4,9,11 61:8 62:18 66:12 82:24 87:22</p> <p>valued [5] 18:11 35:15 42:20 54:24 62: 17</p> <p>valuing [2] 53:6 63:4</p> <p>variety [1] 32:20</p> <p>various [1] 99:22</p> <p>vastly [1] 32:21</p> <p>versus [3] 4:5 94:15 101:10</p> <p>versus-passenger [1] 60:4</p> <p>victims [1] 50:22</p> <p>view [3] 10:24 13:21 83:21</p> <p>viewed [2] 5:5 22:21</p> <p>viewing [1] 5:9</p> <p>views [1] 58:14</p> <p>violating [2] 25:12 33:15</p> <p>virginia [1] 2:8</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>walk [2] 99:19 100:3</p> <p>wanted [4] 26:1 50:23 86:24 91:2</p> <p>wants [5] 26:6 42:5 58:6,10 94:9</p> <p>washington [2] 2:2,5</p> <p>way [27] 11:8 18:3,10 20:18 33:2 37: 11 40:11 42:25,25 44:3 52:22 53:6 55:9 61:6 62:23 66:9 79:13,19 84:25 93:16 94:3,19,25 95:18,19 98:13 103: 16</p> <p>weird [1] 88:1</p> <p>welcome [3] 6:4 41:1 65:24</p> <p>whatever [5] 9:22 10:21 38:16 42:21, 22</p> <p>whatnot [1] 20:20</p> <p>wherever [1] 33:17</p> <p>whether [19] 13:25 17:1 18:19 19:8 20:20 32:10 40:7,18 55:14,15 57:13, 15 59:6 60:20 79:17 81:6 89:8,21 99: 5</p> <p>whoa [1] 83:14</p>	<p>whoever [1] 93:10</p> <p>whole [10] 12:22 21:8 68:6,12 69:5,23 80:15 85:6 99:4,17</p> <p>who's [2] 13:7 78:15</p> <p>wide-ranging [2] 37:10,14</p> <p>wildly [1] 96:2</p> <p>will [9] 4:3 14:6 52:7 85:18,20 87:8,20 98:11 104:21</p> <p>windfall [1] 88:11</p> <p>window [1] 85:19</p> <p>wish [2] 33:2 104:8</p> <p>within [3] 49:4 57:15 98:4</p> <p>without [6] 5:20 25:11,15 37:21 39:23 99:2</p> <p>wonder [1] 14:5</p> <p>word [2] 9:13 97:24</p> <p>words [3] 9:6 90:3 100:1</p> <p>work [5] 18:10 21:1 62:6 78:18 81:1</p> <p>worked [1] 18:4</p> <p>works [3] 6:21 66:9 78:8</p> <p>worried [1] 86:7</p> <p>worry [1] 84:5</p> <p>worth [1] 78:2</p> <p>write [1] 94:1</p> <p>written [10] 43:21 44:4 91:4 93:21 94: 3,6,18 95:1,17,19</p> <p>wrote [3] 89:15 96:16 98:1</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>year [4] 42:4,5 82:3,6</p> <p>years [31] 22:4 40:9 42:3 44:22,25 45: 6 46:2,3,4,5,8,12 50:4 53:13,15,17 54:25 78:12 82:2,3,24 86:15 88:23 93:12,13,15,15,19 95:4,23 98:4</p> <p>yellow [9] 14:9,12 15:2,6,8 19:10,13, 15 81:6</p> <p>yellow [1] 81:15</p> <p>yourself [1] 59:11</p>
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