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IN THE SUPREME COURT OF THE UNITED STATES

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HAVANA DOCKS CORPORATION,)

Petitioner,)

v.) No. 24-983

ROYAL CARIBBEAN CRUISES, LTD.,)

ET AL.,)

Respondents.)

- - - - -

Washington, D.C.

Monday, February 23, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

1 APPEARANCES:

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3 behalf of the Petitioner.

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9 behalf of the Respondents.

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

2 (10:04 a.m.)

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

6 Mr. Klingler.

7 ORAL ARGUMENT OF RICHARD D. KLINGLER

8 ON BEHALF OF THE PETITIONER

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

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

23 Because trafficking is in facilities,
24 not property interests, term limits on interest
25 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 \$130
19 million to make a billion dollars without
20 seeking our authorization. They relied on the
21 suspension of the private right of action but
22 now would have this case be all about Cuban
23 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 of the
12 anti-trafficking prohibition, is the docks
13 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 usufruct is for all
24 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 seconds part is the
25 interests, and that can be present, future,

1 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 until, but once the
16 concession expired, I mean, you no longer have
17 a property interest. You're just like that
18 bystander that I was telling you about which is
19 like, you know, there was property that was
20 confiscated all over Cuba, but that doesn't
21 mean that I 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.

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 you're
8 looking for is, I think, broader than what
9 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 like my last one.
7 Like, suppose that the docks were split up
8 physically, you know, so that there was a blue
9 half and there was a yellow half, and you only
10 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
25 anymore, any more than you would have had

1 anything to complain about if you were arguing
2 about the 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 has nothing to do with the docks, but it's also
18 part of your claim? Are they liable for that?

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

25 JUSTICE BARRETT: I don't understand

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

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

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

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

21 JUSTICE JACKSON: And then the
22 question of trafficking, who is trafficking in
23 those interests, is the sort of later question,
24 but the Commission has determined the scope of
25 your property interests. I guess I'm -- I'm a

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

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

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

21 JUSTICE JACKSON: I mean, and the
22 statute only -- the statute says anyone who
23 owns a property interest as certified as the --
24 by the Commission can make a claim that someone
25 is trafficking in it and get relief or get the

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

4 MR. KLINGLER: I --

5 JUSTICE JACKSON: -- struggling.

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

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

23 MR. KLINGLER: That's -- that's
24 correct. And that's necessary to get the
25 statute to work as Congress clearly intended,

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

9 JUSTICE JACKSON: Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas, anything further?

13 Justice Alito?

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

24 MR. KLINGLER: The -- if I understand
25 the question correctly, the Commission noted

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

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

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

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

24 She considered that, found it to be of
25 no value, and there would be no reason to

1 disregard the Commission. But then she went
2 further and she looked at the legal --

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

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

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

19 MR. KLINGLER: Yes.

20 JUSTICE ALITO: They -- they have a
21 fee -- fee simple --

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

24 JUSTICE ALITO: You had basically --

25 MR. KLINGLER: They were like the

1 lessor, and we were like the -- the long-term
2 lessee for the leasehold.

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

6 MR. KLINGLER: Besides --

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

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

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

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

23 JUSTICE ALITO: And now you want to
24 recover a certain amount of money from this one
25 cruise ship line. Were there other cruise ship

1 lines that used these docks during the period,
2 and would you be entitled to receive the same
3 amount from every cruise ship line that used
4 the docks?

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

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

22 MR. KLINGLER: I think the latter is
23 the overwhelming impetus from this. They --
24 Congress clearly also wanted to give claim
25 holders a remedy because they didn't have one

1 in court in the claims -- the international
2 claims settlement process, but this is a -- has
3 a punitive component to it, and, you know,
4 Congress is presuming or wants this property
5 not to be trafficked because that's what funds
6 the communist regime. That's what continues
7 the regime in power and --

8 JUSTICE ALITO: Thank you.

9 MR. KLINGLER: -- achieving --

10 JUSTICE ALITO: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

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

22 MR. KLINGLER: No --

23 JUSTICE SOTOMAYOR: -- three level --
24 or you might, it hasn't been decided yet. You
25 were entitled to compensation for the value of

1 what you had at the moment of compensation,
2 correct? At -- of confiscation?

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

5 JUSTICE SOTOMAYOR: Forget about the
6 property.

7 MR. KLINGLER: If Cuba --

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

12 MR. KLINGLER: That's the -- yes, if
13 Cuba paid just an adequate amount of
14 compensation --

15 JUSTICE SOTOMAYOR: Now, if they
16 didn't pay --

17 MR. KLINGLER: -- then that would
18 release the claim.

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

22 MR. KLINGLER: Correct.

23 JUSTICE SOTOMAYOR: But what you're
24 seeking is something dramatically different.
25 You're seeking now not one compensation with

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

9 MR. KLINGLER: All right. With --

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

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

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

23 MR. KLINGLER: The due process
24 concerns are taken care -- account of by
25 notice. Congress, through the statute, and the

1 Commission, through defining what confiscated
2 property was, ruled those off limits. Unless
3 there's a substantive problem with that,
4 Congress said --

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

13 MR. KLINGLER: Correct.

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

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

21 JUSTICE SOTOMAYOR: It ended there,
22 but it wouldn't have -- it wouldn't have gone
23 forever. It went to a defined period of time.
24 So the Commission's charge was to value that
25 interest at the moment of -- of confiscation,

1 right?

2 MR. KLINGLER: That's completely true.

3 And for takings analysis --

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

6 MR. KLINGLER: I agree with that.

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

12 JUSTICE BARRETT: No, he meant if they
13 didn't use it.

14 JUSTICE SOTOMAYOR: Oh.

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

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

17 JUSTICE BARRETT: Yeah.

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

23 MR. KLINGLER: Correct. That is what
24 is ruled off limits. That's the seized
25 property that resulted in the --

1 JUSTICE SOTOMAYOR: The dock was the
2 seized property, not the store.

3 MR. KLINGLER: Well, our --

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

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

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

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

19 JUSTICE SOTOMAYOR: It was part of
20 what was seized from you?

21 MR. KLINGLER: Correct.

22 JUSTICE SOTOMAYOR: Okay.

23 MR. KLINGLER: And so I'm assuming
24 that our grocery store got seized as well.

25 JUSTICE SOTOMAYOR: Because Justice

1 Kagan's question was, if that store had not
2 been part of what was seized, you would not be
3 entitled to compensation.

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

10 JUSTICE SOTOMAYOR: Thank you.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

12 Justice Gorsuch?

13 Justice Kavanaugh?

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

21 MR. KLINGLER: Because Congress had at
22 least dual objectives, and the principal one
23 was to rule off limits from trafficking
24 property that Cuba had seized or the property
25 interest, however way you wish to think about

1 it, because that was what was fueling or
2 stopping the transition to democracy in Cuba.

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

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

24 This is the -- the sanctions and claim
25 settlement portions of the Cuban embargo

1 broadly that are at the heart of the commerce
2 power, and the Eleventh Circuit gave an
3 extremely narrow reading to those foreign
4 policy interests and to the remedy that
5 Congress had provided.

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

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

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

22 MR. KLINGLER: No. We agree with the
23 Solicitor General's positions, although, of
24 course, we went on to argue at considerable
25 length that even if the property interest is

1 what the confiscated property is, subject to
2 the trafficking prohibition, that we would
3 still prevail and it's an ongoing remedy rather
4 than one truncated by the 2004 limit that was
5 extinguished and doesn't exist any more than
6 the benefits we received.

7 JUSTICE KAVANAUGH: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Barrett?

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

18 MR. KLINGLER: They can challenge the
19 valuation amount?

20 JUSTICE BARRETT: They can challenge
21 the valuation amount.

22 MR. KLINGLER: No, they cannot.

23 JUSTICE BARRETT: I thought they
24 could.

25 MR. KLINGLER: Congress made it clear

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

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

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

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

21 JUSTICE BARRETT: So the defendant has
22 no rights in that. And, I mean, I'll tell you
23 where I'm going with this. I mean, it's just
24 kind of unbelievable to me that in the grocery
25 store hypothetical, that if you have these

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

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

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

21 JUSTICE BARRETT: Okay. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Jackson?

24 JUSTICE JACKSON: Just to follow up on
25 your response to Justice Barrett, the chance

1 they have is to say we're not trafficking as
2 the statute defines it in those particular
3 property interests. So it's fine. The person
4 might have a grocery store and, you know, set
5 of other interests and this is the cruise line
6 and they're only using the docks.

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

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

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

23 JUSTICE JACKSON: Which you own the
24 claim to because the FCSC said you're the owner
25 of the use of the docks.

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

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Ms. Brown.

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

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

20 In 1960, the Cuban government seized
21 the docks that Petitioner built without paying
22 a penny. When Respondents then paid the Cuban
23 government around \$130 million to use those
24 same docks, Respondents trafficked in property
25 which was confiscated. And Congress gave

1 Petitioner the right to seek damages from
2 Respondents because Petitioner owns the
3 certified claim to the docks.

4 Petitioner's suit can proceed
5 regardless of whether you think of the relevant
6 property as the physical docks or as the right
7 to 44 years of possession, control, and
8 operation of the docks. Either way,
9 Respondents were complicit in Cuba's
10 exploitation of property before Cuba either
11 provided compensation or returned the property
12 to Petitioner.

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Who owns the docks?

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

7 JUSTICE THOMAS: So --

8 MS. BROWN: -- the term of the
9 concession.

10 JUSTICE THOMAS: -- how could Cuba
11 confiscate docks that it owned?

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

22 We think that qualifies as a seizure
23 of control under the -- the statutory
24 definitions here. You could imagine this like
25 a car lease, for example. So say I have a -- a

1 lease of a car for a term of two years from a
2 dealership. The dealership decides at year --
3 after one year that it wants to take the car
4 back. I think it's perfectly natural to say
5 that they seized the car even though they had
6 the underlying ownership of the car at all
7 times.

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

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

25 JUSTICE KAGAN: So, if we're not

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

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

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

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

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

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

23 Those 44 years don't continue to run
24 because they -- they disappeared at the date of
25 the expropriation. It's like Cuba here is

1 cutting in line in front of Petitioner and
2 exercising the rights that Petitioner was
3 supposed to be able to exercise for another 44
4 years, and Respondents are complicit in that by
5 paying the Cuban government for the exercise of
6 those rights.

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

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

21 MS. BROWN: I don't think that's
22 right. I think, at the time of the
23 confiscation, this 44-year interest is
24 distilled into a claim, and that claim entitles
25 you to recover for those 44 years or to get

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

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

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

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

22 That argument is still open on remand.
23 Judge Brasher, in his dissent, appeared to
24 adopt the argument, although he didn't explain
25 any of the basis for that. So that is an

1 argument that you don't need to resolve today.

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

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

14 MS. BROWN: Correct.

15 JUSTICE GORSUCH: -- but the
16 government does believe it allows multiple
17 recoveries?

18 MS. BROWN: We haven't taken a
19 position --

20 JUSTICE GORSUCH: Okay.

21 MS. BROWN: -- expressly in the
22 briefing on this.

23 JUSTICE GORSUCH: Okay.

24 MS. BROWN: But -- but, to the extent
25 that that's a possibility, I do think that

1 that's just reflective of the foreign policy --
2 the significant foreign policy interests here.

3 JUSTICE GORSUCH: Got it. Thank you.

4 JUSTICE KAVANAUGH: Do you have a
5 position?

6 JUSTICE GORSUCH: No.

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

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

1 the foreign policy that's -- that's encompassed
2 within the economic embargo, that pressure that
3 we're trying to apply to the Cuban government
4 in order to persuade it to return to democratic
5 regimes.

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

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

20 JUSTICE JACKSON: Could we also glean
21 from the enactment history here what Congress
22 was really trying to do? And that is not
23 necessarily set up a compensation scheme, as
24 has been said, but, you know, the fact that the
25 Cuban Claims Act, which initially created the

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

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

14 It was to try to keep Cuba from
15 trafficking in this property.

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

23 JUSTICE JACKSON: And then, when the
24 remedy comes along, I mean, it may seem pretty
25 draconian to suddenly give multiple recoveries

1 to all these people, but if you think of it in
2 light of Congress's intention to really, really
3 make it hard for Cuba to traffic in these
4 properties, that kind of a sanction makes at
5 least some sense.

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

13 JUSTICE JACKSON: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel.

16 Justice Thomas?

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

20 MS. BROWN: As -- as Justice Sotomayor
21 mentioned, there are some due process concerns,
22 I suppose, that -- that could be raised to the
23 extent that the -- that the recovery so far
24 outweighs something else. I think that nobody
25 would kind of bat an eye at this if the

1 recovery was just going to the Treasury instead
2 of going to Petitioners.

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

8 CHIEF JUSTICE ROBERTS: Justice Alito?

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

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

24 I think you can see from the
25 Commission decision that they were very well

1 aware that this was a 44-year time-limited
2 interest and that that -- there's every
3 indication that that was taken into account in
4 the way that they were valuing it.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: I -- I'm not sure
9 you're answering the question.

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

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

17 MS. BROWN: So the claim --

18 JUSTICE SOTOMAYOR: Until Cuba acts.

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

22 JUSTICE SOTOMAYOR: You know
23 something, that --

24 MS. BROWN: But the value of the
25 interest --

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

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

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

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

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

20 JUSTICE SOTOMAYOR: So what the
21 Commission did was value that lien, correct?

22 MS. BROWN: Yes. They valued the --
23 the 44 years.

24 JUSTICE SOTOMAYOR: All right. When I
25 read the law or the snippets of it that were

1 given to me, it seemed to say that you -- the
2 Respondent could challenge -- that the value
3 was presumptive that the Commission gave but
4 that they could fight it if it was invalid --
5 if it was not ripe, correct?

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

15 JUSTICE SOTOMAYOR: That's what I
16 mean. Yes, exactly.

17 MS. BROWN: Yes. That is correct.

18 JUSTICE SOTOMAYOR: Okay. So that's
19 still open to -- the other side said no, that
20 it's --

21 MS. BROWN: So I -- I -- to the extent
22 that that's what -- that's what my friend said,
23 I -- I think that that's incorrect, but I --
24 but I do think that you would to have show that
25 the fair market value is the greater of the

1 amounts because the -- the recovery is for the
2 greater of the claim's certified amount, the
3 other amount that the special master
4 determines, which isn't relevant here, or the
5 fair market value.

6 But, if you can show that the fair
7 market value is greater and is the appropriate
8 amount to be applied in this situation, then
9 that's what's going to apply.

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

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE SOTOMAYOR: And --

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

15 JUSTICE SOTOMAYOR: No.

16 CHIEF JUSTICE ROBERTS: Justice Kagan?

17 Justice Gorsuch?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: Do you want to say
20 anything on lawful travel? In particular, you
21 know, the story on the other side and in the
22 amicus briefs is that they did this at the
23 encouragement of the United States Government
24 and that they consulted with the United States
25 Government, who told them they were good to go.

1 I'm paraphrasing.

2 MS. BROWN: Yeah.

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

6 Do you have a position on the lawful
7 travel in this case?

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

14 We have in other cases --

15 JUSTICE KAVANAUGH: They were told
16 that previously, weren't they, by the
17 government?

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

21 To the extent that Respondents
22 received assurances from appropriate government
23 officials that what they were doing was lawful
24 and authorized, we do think that that would
25 raise due process concerns.

1 To the extent that the Eleventh
2 Circuit wants the --

3 JUSTICE KAVANAUGH: Like, huge ones,
4 wouldn't it?

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

12 We haven't provided them here simply
13 because it's not a part of the question
14 presented.

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

18 JUSTICE BARRETT: So you agree that
19 would be open on remand?

20 MS. BROWN: Yes, definitely.

21 JUSTICE BARRETT: Okay. And then
22 just -- just one question. Let's say that I
23 agree with you about the time question and I
24 think it has to be engaged at the time of the
25 confiscation. I just want to go back to that

1 use question I raised before. So there's this
2 dispute about whether it was cargo-only or if
3 it was passengers too.

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

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

15 MS. BROWN: So not necessarily. I do
16 think it depends on first what you think of the
17 property is because, if the property here is
18 the docks and they had an interest in the docks
19 and someone trafficked in the docks, then their
20 interest would reflect that their -- that their
21 interest was limited just to cargo uses and not
22 to passenger uses, and that would be connected
23 to the valuation, but it would still qualify.

24 But I also -- I -- I think the cargo
25 versus passenger thing here is kind of a red

1 herring because even Respondents have
2 acknowledged that if Petitioners had the
3 exclusive control of this particular piece of
4 property, if someone used it for a different
5 purpose than they did, that would still be
6 infringing, I think, on -- on their right to
7 use.

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

16 So the real question here is whether
17 this was an exclusive right to the docks or a
18 non-exclusive right. And on that, we see
19 nothing in the record that would indicate that
20 it was non-exclusive. Certainly, the court of
21 appeals didn't take that position. Otherwise,
22 there would have been no need to remand for
23 further consideration of the trafficking that
24 had occurred before 2004 if this was a
25 completely non-exclusive interest that -- that

1 could have allowed for -- for others to use it
2 in the same way.

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

10 But, here, it was like their
11 consideration was that they kept -- they had a
12 lot of money invested that they never got back
13 because Cuba confiscated it.

14 MS. BROWN: That's exactly right.
15 They built the docks. The payment for the
16 docks was supposed to be the right to operate
17 and commercially benefit from them.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: Can I just get you
21 to quickly explain the role of the certified
22 claim in your analysis?

23 I'm concerned that we might be led to
24 reason from first principles about property law
25 in general when, really, the certified claim

1 process, which is in this statute, is doing
2 very important work.

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

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

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

21 MS. BROWN: Yes. That's exactly
22 right. The claims --

23 JUSTICE JACKSON: The claim doesn't
24 have a sort of termination provision in it,
25 they were just valuing what the underlying

1 property interest is and giving them a claim.

2 MS. BROWN: That's correct.

3 JUSTICE JACKSON: And the statute here
4 says if you have a claim, you get to make this
5 kind of -- you have this kind of cause of
6 action, right?

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

14 JUSTICE JACKSON: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Mr. Clement.

18 ORAL ARGUMENT OF PAUL D. CLEMENT

19 ON BEHALF OF THE RESPONDENTS

20 MR. CLEMENT: Mr. Chief Justice, and
21 may it please the Court:

22 Title III of the Helms-Burton Act
23 provides an action against someone who traffics
24 in property which was confiscated from the
25 Cuban government. "Property" is a defined term

1 in the statute that includes any property
2 interest, including a time-limited one like a
3 leasehold. And then the Act gives a cause of
4 action to someone who has the claim to such
5 property, i.e., the property that was
6 confiscated.

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

17 The same principles apply to time
18 limits on the property. So if someone had a
19 50-year leasehold in the property, anyone who
20 traffics during the leasehold traffics in
21 confiscated property. But someone who arrives
22 after the leasehold has run might have a --
23 might be subject to a claim by the landlord,
24 but not to the leaseholder.

25 And basic principles of property law

1 reflect those same distinctions. Tahoe-Sierra
2 says that both the spatial and the temporal
3 limits define the metes and bounds of the
4 property interests.

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

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

20 I welcome the Court's questions.

21 JUSTICE THOMAS: If I had a lease in
22 property, if I leased the property and -- how
23 would that lease be confiscated?

24 MR. CLEMENT: So the lease would be
25 confiscated in the sense that -- I mean, I

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

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

17 But the only person who is in a
18 position to be that substitute payor is the
19 person who traffics in the very property
20 interest that was confiscated by the Cuban
21 government. If there's a mismatch --

22 JUSTICE THOMAS: But the statute
23 doesn't say "property interest." It says
24 "traffics in property which was confiscated."
25 You would more naturally think that it was

1 speaking to the property that was the basis of
2 the lease.

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

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

18 So it's the example I used with
19 mineral rights. And that's a real-world
20 example. Some people, their only interest in
21 property that was taken over by the Cuban
22 government was a mineral interest. Well, if --

23 JUSTICE THOMAS: What would -- what
24 would be the interests if you owned it fee
25 simple?

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

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

16 JUSTICE THOMAS: But it also seems
17 quite difficult to pinpoint the interest, the
18 particular interest in property. It could be a
19 very small interest. I could lease a closet in
20 -- in a huge data facility and somehow I would
21 have to pinpoint that.

22 MR. CLEMENT: Well, in theory, it
23 could be difficult. In practice, what you
24 principally see, if you look at the claims, is
25 you do have some leaseholds but only a handful.

1 I mean, this whole case is about -- like, the
2 government in their brief at page 29 identifies
3 a grand total of five time-limited interests
4 among the claims, three leases and two patents.
5 So we're talking about a pretty small universe
6 here of the time-limited ones.

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

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

18 Now, the district court awarded them
19 the whole 9 million, even though there's no
20 question that we didn't traffic in Cuban
21 telephone stock and there's no question that we
22 didn't telephone -- traffic in the confiscated
23 debts.

24 And the confiscated debts are
25 important for another reason because I don't

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

12 JUSTICE GORSUCH: Mr. Clement --

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

15 JUSTICE GORSUCH: I'm -- I'm -- I'm --
16 I'm following you, but I struggle just a little
17 bit. The docks were confiscated. Right?

18 MR. CLEMENT: Well, the -- the
19 Petitioner's time-limited interests --

20 JUSTICE GORSUCH: No, no, no --

21 MR. CLEMENT: -- in the docks were
22 confiscated.

23 JUSTICE GORSUCH: The docks were
24 confiscated.

25 MR. CLEMENT: I can't agree to that,

1 with all due respect --

2 JUSTICE GORSUCH: Really?

3 MR. CLEMENT: -- because Cuba owned
4 the docks. So the only thing that was
5 confiscated --

6 JUSTICE GORSUCH: Okay, they
7 compensated control of the docks.

8 MR. CLEMENT: -- was the part of the
9 documents they didn't control, the time
10 interest.

11 JUSTICE GORSUCH: They confiscated
12 control of the docks, right?

13 MR. CLEMENT: They confiscated the
14 concessionary interest. They actually -- with
15 all respect, I'm not trying to be difficult,
16 though I know I am being difficult, but --

17 JUSTICE GORSUCH: Just a little bit,
18 but that's okay.

19 MR. CLEMENT: No, but -- no, but the
20 things is we don't concede -- the government
21 comes up here and said they had a right to
22 control the docks. That is directly contrary
23 to the position that we took in the district
24 court and that we appealed to the Eleventh
25 Circuit.

1 JUSTICE GORSUCH: All right. Let me
2 -- Mr. Clement --

3 MR. CLEMENT: Our position is they had
4 no control of the docks. They just had a
5 non-exclusive --

6 JUSTICE GORSUCH: Fine.

7 MR. CLEMENT: -- cargo concession.

8 JUSTICE GORSUCH: There's a -- there's
9 a disagreement over exclusivity. I understand
10 that, but for purposes of this question, let's
11 put that aside.

12 There was confiscation of a property
13 interest in the docks. Let's -- how about
14 that? Can we agree on that?

15 MR. CLEMENT: We're together.

16 JUSTICE GORSUCH: Okay. And there's
17 no question that your client has used the
18 docks.

19 MR. CLEMENT: We have used with the
20 docks.

21 JUSTICE GORSUCH: Okay.

22 MR. CLEMENT: I agree with you.

23 JUSTICE GORSUCH: All right.

24 MR. CLEMENT: We just haven't
25 trafficked in that which was confiscated.

1 JUSTICE GORSUCH: Well --

2 MR. CLEMENT: It was a time-limited
3 concession.

4 JUSTICE GORSUCH: And there's a claim
5 with respect to those docks.

6 MR. CLEMENT: There is. The claim
7 reflects the time limit. And -- and if you
8 look at the claim --

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

14 MR. CLEMENT: What's missing is the
15 overlap between the property interest that was
16 confiscated and the proper interest that was
17 trafficked. So the property interest that was
18 confiscated was a time-limited interest --

19 JUSTICE GORSUCH: But where do you get
20 that from? It says traffics in -- traffics in
21 property which was confiscated.

22 MR. CLEMENT: Right.

23 JUSTICE GORSUCH: Any -- any property
24 of any kind in which -- was confiscated, yeah.
25 Got that.

1 MR. CLEMENT: Right, but then you keep
2 reading.

3 JUSTICE GORSUCH: We have trafficking.
4 Got that.

5 MR. CLEMENT: And when you keep
6 reading, you --

7 JUSTICE GORSUCH: I -- I got it all
8 right -- I've read it -- I've read it.

9 MR. CLEMENT: I do too. If you keep
10 reading, it says that you shall be liable to
11 any United States national who owns "the," not
12 "a," the claim to such property. And the "such
13 property" is plainly referring back to the
14 property which was confiscated.

15 JUSTICE GORSUCH: Yeah.

16 MR. CLEMENT: QED. With all due
17 respect, this statute requires a run one-to-one
18 correspondence between what was confiscated and
19 what was trafficked in. That makes sense.

20 JUSTICE GORSUCH: I think I follow all
21 of that except for the QED.

22 MR. CLEMENT: I -- I thought that
23 might be your response, Your Honor, but I
24 really do think that if you read the statute,
25 it says that the person who can bring the

1 action is the person with the claim to such
2 property.

3 JUSTICE JACKSON: But, Mr.
4 Clement --

5 MR. CLEMENT: "Such property" has to
6 refer back to the property which was
7 confiscated.

8 JUSTICE JACKSON: -- why -- why isn't
9 the -- why isn't the claim --

10 JUSTICE BARRETT: It was --

11 JUSTICE JACKSON: Oh.

12 MR. CLEMENT: Sorry.

13 JUSTICE BARRETT: It refers to
14 property which was confiscated, and so that
15 kind of goes back to Justice Gorsuch's point
16 because property -- the "such property" refers
17 back to property that doesn't have an article
18 in front of it. It doesn't say "the property
19 that was confiscated." It says "property that
20 was confiscated," making it seem broader.

21 MR. CLEMENT: No, I don't think so
22 because, again, property's a defined term in
23 the statute, and so property includes any
24 property interest that you have in the
25 property. And then it --

1 JUSTICE BARRETT: No, but it doesn't
2 say that, though. It says any property, and
3 then, when it gives the long list of kinds of
4 property, I read that definition to say
5 essentially any kind of property. So it can be
6 intangible, it can be a patent, it can be a
7 leasehold, et cetera.

8 But it doesn't say -- a couple times
9 you put in "interest" before it, any interest
10 in property, but it doesn't say any interest in
11 property. It says any property.

12 MR. CLEMENT: So, with respect, it
13 says any property, and then it talks about
14 specific --

15 JUSTICE BARRETT: Right.

16 MR. CLEMENT: -- limited interests in
17 property. And so I'm reading it, and I don't
18 think it's a leap, to say that it's being
19 inclusive and it's saying any interest in the
20 property.

21 JUSTICE JACKSON: Mr. Clement, what
22 I --

23 MR. CLEMENT: And -- and then -- and
24 then --

25 JUSTICE JACKSON: Right. Sorry.

1 Yeah.

2 JUSTICE BARRETT: Can you just finish,
3 if you could finish for me.

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

16 Well, presumably, you need to get
17 authorization from the person who has the exact
18 interest in the property that you plan to
19 traffic in. And, similarly, there's a -- a
20 provision in the statute, (a)(5)(D), that's
21 worth a look because that provision suggests
22 that basically, once somebody brings one of
23 these actions, it's exclusive to anybody else
24 bringing an action in the property.

25 Now, again, if "property" means a

1 specific slice of the bundle, a specific stick
2 in the bundle, statute works great. If I have
3 a leasehold and somebody traffics during my
4 leasehold, I can bring an action for my
5 leasehold, but I don't get to give
6 authorization for trafficking years later and
7 interfere with somebody else --

8 JUSTICE JACKSON: But, Mr.
9 Clement --

10 MR. CLEMENT: -- who's got the fee
11 interest. I'm sorry.

12 JUSTICE JACKSON: Mr. Clement, why --
13 why doesn't the statute also work great if we
14 understand that it has a provision that gives
15 some authority to the FCSC to tell us what the
16 person's property interest is?

17 It seems to me that your analysis has
18 at least -- I -- I -- I counted two problems,
19 but that's really the main one in -- in --
20 in -- in that you're trying to get us to
21 evaluate what the person's property interest is
22 when this statute gives that responsibility to
23 that agency.

24 That is, in fact, all that agency is
25 supposed to be doing is listening to the

1 arguments that you're talking about and
2 deciding what this company's -- Havana Docks's
3 property interest is. And once they've decided
4 that, they said, you have a claim to -- to
5 enforce the interest as we've defined it.

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

15 You cut out the FC -- FCSC in the
16 analysis, and you say but they only had a
17 limited property interest, so -- that expired
18 before we arrived and so they don't get to
19 press their claim. There's nothing in the
20 statute that says the claim should be evaluated
21 based on what the property interest was.

22 The S -- the FCSC does that. They
23 tell us this person has a claim. They evaluate
24 all of the limitations. And then the statute
25 operates perfectly.

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

12 JUSTICE JACKSON: Right. But what
13 they don't say --

14 MR. CLEMENT: And nobody doubts
15 that --

16 JUSTICE JACKSON: -- but what they
17 don't say is that the claim that we are
18 certifying today has the same limitations as
19 the limited property interest that we are
20 evaluating. That's the thing you're missing, I
21 think, in order to make your argument work.

22 MR. CLEMENT: I don't think so with
23 respect. And I think it's no different if I
24 can take Justice Kagan's hypo. If the Claims
25 Commission looked at this thing, and I forget

1 whether it was the blue or the yellow, but if
2 the Claims Commission said you got the blues,
3 that's great. And then, if somebody traffics
4 in the blues, I have a claim.

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

12 JUSTICE JACKSON: So why didn't you
13 traffic in the blues? I -- I -- I understood
14 you to be trafficking in the blues for the
15 purpose of this hypothetical.

16 MR. CLEMENT: Well, but what I'm
17 saying is, by parity of reasoning, what happens
18 for the spatial limits of the property
19 interests have to apply to the temporal
20 interests in the property. So think if there
21 were, like, two stacked leases of 50 years and
22 then another 50 years.

23 If you traffic in year 45, you have a
24 trafficking claim against the person who owned
25 the first leasehold. But, if you traffic in

1 year 55, you have a claim against -- the person
2 who owns the second leasehold has the claim
3 against you, but the first one doesn't.

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

11 JUSTICE ALITO: No, it didn't think it
12 was -- it didn't think it was giving a claim to
13 everybody who had a claim -- giving a -- a
14 claim that could be asserted in court to
15 anybody who had property confiscated by the
16 Cuban government, but isn't what it -- what
17 Congress said this, as applied to this case:
18 Havana Docks had a concession for 44 more years
19 and that had a value, and the Cuban government
20 has not compensated them for what they've
21 taken, and, therefore, nobody is to use that
22 concession in the future, that nobody is to use
23 the property interest that was the subject of
24 that concession in the future until there's
25 compensation from the Cuban government. It's

1 not -- so, you know, you go into this with
2 your -- with your eyes open.

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

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

14 (Laughter.)

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

17 JUSTICE ALITO: I would bet -- I would
18 bet you would not -- you know, you would not
19 advise them full speed ahead and we'll -- we'll
20 litigate this in the United -- in -- in the
21 Supreme Court.

22 MR. CLEMENT: I -- I would -- what I
23 would tell them is there might be reasons to be
24 somewhat cautious, but my best reading of the
25 statute is you don't have anything to worry

1 about after 2005.

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

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

18 So I would say: Look, you know,
19 there's a lot of money under the statute the
20 way the Petitioners interpret it. There's an
21 enormous amount of money under the statute. So
22 you may get sued. But, if you want my best
23 answer, my best answer is you're in the clear
24 after 2005.

25 And like I said, that doesn't really

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

12 It just means that in the nature of
13 certain property interests, there will either
14 be very little sort of window for trafficking
15 in that same property interest or there will be
16 none at all. As I said, the big --

17 JUSTICE ALITO: Well, if your -- if
18 your reading of the -- of the statute is
19 correct, it's argued it would make hash of the
20 coverage of patents, and that does seem to me
21 to be correct. Why is it not?

22 MR. CLEMENT: Well, it's not for two
23 reasons. One is because the universe of
24 confiscations didn't stop in 1960. So, as a --
25 as at -- as at least a theoretical matter, and

1 that's what you should be looking at if you're
2 worried about deeming terms superfluous in a
3 statute, you could confiscate patents going
4 forward.

5 But the second reason is not --

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

17 MR. CLEMENT: So I think -- in
18 fairness, I think Cuba -- Congress included
19 patents in the statute because it wanted to be
20 comprehensive of all interests in the -- in
21 property. But I don't think it's a farfetched
22 hypothetical to say that somebody might have,
23 like, illegally left Cuba, from the Cuban
24 government standpoint, had a patent, and that
25 patent was canceled, and that might be

1 something that they could give a -- bring an
2 action to.

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

19 Now, first of all, I think the reason
20 we're right about patents is because, like, I
21 think it's weird to create a perpetual patent.
22 But if you assume that that's the right answer
23 and so that patent becomes the super-patent and
24 it continues to apply, and somebody infringes
25 on one of IT&T 's patents in 2026, they can't

1 be entitled to the full \$500 million in the
2 claim, or if they are, I'm going to stop doing
3 what I'm doing and move on to something else.

4 (Laughter.)

5 MR. CLEMENT: Because that is an
6 unbelievable windfall. So it has to be that
7 it's not the claim, the claim, the claim. It's
8 the property interest, the property interest,
9 the property interest.

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

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

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

9 MR. CLEMENT: Because that's not the
10 statute that Congress wrote. I mean, I too
11 enjoyed the --

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

19 MR. CLEMENT: So I just can't find
20 that in the statute. And, like, I too enjoyed
21 their brief and I enjoyed the reference to lien
22 and I enjoyed the reference to encumbrance.
23 And if I found either of those words in this
24 statute, I might think --

25 JUSTICE SOTOMAYOR: It defines --

1 MR. CLEMENT: -- they have a pretty
2 good point.

3 JUSTICE SOTOMAYOR: -- property as
4 liens.

5 MR. CLEMENT: What's that?

6 JUSTICE SOTOMAYOR: It defines -- the
7 statute defines, property as liens.

8 MR. CLEMENT: It might include
9 liens --

10 JUSTICE SOTOMAYOR: Legal.

11 MR. CLEMENT: -- but it doesn't make
12 the claims liens. It doesn't make a Claim
13 Commission claim a lien on the property. It
14 doesn't make it an encumbrance on the property.
15 It doesn't do all of those things.

16 And, of course, I don't need to tell
17 you, like, you know, liens are, like,
18 interesting creatures. They don't require you
19 to have any real interest in the property. If
20 I have a mechanic's lien on a property, I don't
21 have to have any interest in the property.

22 So I think if Congress wanted to come
23 up with a lien regime, then, you know, it would
24 have written a different statute, and I would
25 have given different advice to the client in --

1 in Justice Alito's hypothetical. I would say
2 yeah, that's the same address.

3 JUSTICE SOTOMAYOR: Thank you.

4 JUSTICE BARRETT: Mr. Clement, why
5 wouldn't -- so part of the intuitive appeal of
6 your argument is it feels unjust, right?
7 Putting aside the statutory language, I mean,
8 it feels unjust because of the multiple
9 recoveries possibility and because this was a
10 time-limited interest.

11 But the time-limited nature of it is
12 presumably accounted for in the valuation. And
13 I don't see what's wrong with Justice Alito's
14 description of saying that if something is
15 taken at the time, so in 1960, Castro takes it,
16 that it then becomes kryptonite. For purposes
17 of trafficking, nobody can touch it. And it
18 wasn't just the lease because they paid for
19 these improvements. And they were never
20 compensated for those improvements.

21 So I guess I just don't see in the
22 statute, which does talk -- I agree with you
23 that it requires a one-to-one, insofar as you
24 have to traffic in "the property" and not the
25 grocery store, right? The property.

1 But it seems like "the property" is
2 the docks, the use of the docks. I guess I
3 don't understand why that's crazy.

4 MR. CLEMENT: Well, it's not crazy,
5 but it's -- with all due respect, it's wrong
6 because it needs to be the particular property
7 interest that was confiscated. And so let's
8 take the hypo with the -- the mineral rights
9 and the timber rights. Maybe it's easier to
10 understand because it's the same parcel.

11 But if somebody goes there and all
12 that was ever confiscated was the mineral
13 rights, and, you know, some company goes there
14 and it takes all the timber and takes the
15 lumber away, I wouldn't think they trafficked
16 in the confiscated property. And I don't know
17 why it's different from the -- the time limits.

18 And to the extent that government the
19 sort of suggesting this sort of suspension or
20 tolling rationale, there's two things wrong
21 with that. One is my friends on the other
22 side, at page 9 of their reply brief, expressly
23 disclaim suspension or tolling.

24 And the other thing is it's just wrong
25 as a factual matter because we know from the

1 experience with this particular concession,
2 where from 1906 to 1910, the Cuban government
3 had a spat with, you know, Scovel, or whoever
4 was the original developer, and they couldn't
5 move forward for four years, and it didn't tack
6 on four extra years to the concession. The
7 concession ends -- you know, the first one was
8 50 years. It got extended 49 years, which is
9 the maximum, by the way, that Cuban law
10 allowed. So it was always like it's not a
11 tolling, it's not like -- it really isn't 44
12 years. It really is until 2004.

13 But the bottom line is Congress could
14 have written a different statute. They could
15 have made it clear that it's a lien, it's an
16 encumbrance. They could have said no, no, it's
17 -- it's just the parcel.

18 Now, they would have really had to
19 write a different statute because I think then,
20 if you go to 6082(a)(5)(D), that provision
21 would be written differently if that's the way
22 they conceptualized. And then the provision
23 about authorization I think would have been
24 written differently because it doesn't make
25 sense. If -- like, if somebody had the mining

1 rights and somebody had the timber rights, and
2 somebody wants to harvest the lumber, if the
3 person with the mining rights gave permission
4 to the person who took all the lumber, like,
5 that doesn't make any sense. It's got to be
6 the specific property interest.

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

10 JUSTICE JACKSON: Mr. Clement, what's
11 your response to it would have been written
12 differently, and in the way that you described,
13 if Congress's aim was compensation? But if
14 Congress's aim is to do what Justice Alito
15 suggested, which is put pressure on the Cuban
16 government, create a sanctions regime, and keep
17 people from trafficking in foreign property or
18 stolen property in this way, I don't understand
19 why the statute wouldn't be written exactly as
20 it is, giving anybody whose property was -- was
21 taken, as certified by the FCSC, the ability to
22 say, however many years later, nobody should be
23 using my property until I get compensation for
24 it.

25 MR. CLEMENT: Well, it -- I mean,

1 first of all, it all depends on what we mean by
2 "my property." And I would say my property --

3 JUSTICE JACKSON: No. Can you answer
4 the purpose question?

5 MR. CLEMENT: -- is that which was
6 confiscated which was --

7 JUSTICE JACKSON: Can you -- can you
8 answer the extent to which what we expect to
9 see in the statute, the structure? You keep
10 saying Congress would have written it a
11 different way, but I'm saying Congress would
12 have written it the way you're talking about if
13 they were trying to compensate people.

14 JUSTICE KAGAN: But you're not saying
15 it has to be compensation, right? I mean,
16 there were 44 more years left in which these
17 kinds of suits could have been brought. And
18 that doesn't have anything to do with
19 compensation or not. The -- the suits could
20 have gone wildly over the amount that was --
21 that -- that you had at -- at issue, correct?

22 MR. CLEMENT: Absolutely. And, indeed
23 like --

24 JUSTICE KAGAN: The only thing you're
25 saying -- you're not saying tie it to

1 compensation. You're saying tie it to the
2 nature of the property, right?

3 MR. CLEMENT: And -- and --

4 JUSTICE KAGAN: And at some point, a
5 temporal property interest runs out and you
6 don't have it anymore.

7 MR. CLEMENT: That -- that's exactly
8 right. And what the -- what Congress clearly
9 wrote this statute is they put not everybody
10 but they put a very specific person in this
11 unusual role as the substitute payor for a just
12 compensation for the Cuban government. And
13 it's the person who traffics in the property
14 interest that was confiscated.

15 Now, in this case one, of the
16 Respondents, there's an argument that they went
17 there before 2004. So this is not like -- this
18 is not an argument that nobody gets
19 compensation for this -- this interest, but,
20 you know -- and if you have some, like, amazing
21 sugar that can still be used in 2027, well,
22 then that's something where you can traffic in
23 that which was confiscated.

24 But there are plenty of interests.
25 And I -- and I do want to say, like, the single

1 largest element of all of these claims when I
2 looked at them are these forgiven debts or
3 repudiated debts or destroyed accounts
4 receivable because they expropriated the other
5 U.S. company. I don't see how anybody traffics
6 in any of those.

7 So Congress wasn't trying to pass a
8 statute that says we don't want anybody to go
9 anywhere near Cuba and we want to provide a
10 trafficking remedy for everybody who has a
11 claim against Cuba.

12 It's a more limited statute. And this
13 is the other thing, Justice Jackson. Like if
14 you look at the statute, I mean, my friends
15 want you to sort of say this is the most
16 punitive statute ever, so you should interpret
17 it -- every word in it -- to be as punitive as
18 possible.

19 That's actually not the statute that
20 Congress wrote. There are things like anybody
21 who was there before gets a grace period.
22 There's a two-year statute of limitations, so
23 if nobody sues you within two years of
24 trafficking, there's an amount in controversy
25 requirement. So --

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

8 MR. CLEMENT: So can I say two things
9 in response to that?

10 JUSTICE JACKSON: Yes.

11 MR. CLEMENT: One is that everything I
12 just said about the statute not being maximally
13 punitive means that it's also not maximally
14 deterrent. It's a balanced statute. There are
15 provisions in there. Presumably, it was a
16 compromise.

17 The other thing is, if you take a step
18 back, this is at some level a statute about
19 compensation because what makes what Cuba did
20 unlawful is not that they took U.S. nationals'
21 property, it's that they did it without
22 providing just compensation.

23 So the whole theory of this statute
24 is, I don't know whether we're ever going to
25 get just compensation from Cuba, but if we can

1 get substitute payors who actually trafficked
2 in the confiscated property, that's good
3 enough. I'm sorry.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Justice Thomas?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Gorsuch, anything further?

10 JUSTICE KAVANAUGH: Just critical to
11 your whole case and the answers to everyone is
12 the exact parsing of the definition of
13 "property." So you just want to walk through
14 the definition of "property"? Because you
15 keep -- you -- you said to Justice Alito:
16 We're piecing together various parts of the
17 statute.

18 MR. CLEMENT: Sure.

19 JUSTICE KAVANAUGH: But I think it
20 boils down to those -- those words in the -- in
21 the property definition, I think, and, if so,
22 can you just walk us through and summarize your
23 position on that?

24 MR. CLEMENT: Sure. I mean, for me,
25 it's most helpful to start with 682(a)(1)(A)

1 that says, any person -- and I'm going to skip
2 over after the end of the three-month period --
3 any person that traffics in property which was
4 confiscated.

5 JUSTICE KAVANAUGH: Mm-hmm.

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

12 And then it says the term "property"
13 means any property. And that seems to me
14 almost the most important thing, but to me,
15 what makes this kind of easy is then it it says
16 including any leasehold interest. Okay.

17 So I know that the concession's not
18 exactly a leasehold interest because a
19 leasehold gives you control and we desperately
20 say they didn't have control of the docks, they
21 just had a concession. But it's -- it's at
22 least like a leasehold and then it's
23 time-limited.

24 And then I pop back to 682(a)(1)(A)
25 and I say: Okay, who has the cause of action

1 here? It's the -- it's the U.S. national who
2 owns the claim, not a claim, which -- I mean, I
3 know -- I know, like, you don't always get too
4 excited about definite versus indefinite
5 articles, but this would be a much better
6 statute for the other side if it said "a"
7 instead of "the."

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

18 JUSTICE KAVANAUGH: Thank you.

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

20 CHIEF JUSTICE ROBERTS: Justice
21 Barrett?

22 JUSTICE BARRETT: No.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 Thank you, counsel.

1 MR. CLEMENT: Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Rebuttal,
3 Mr. Klingler?

4 REBUTTAL ARGUMENT OF RICHARD D. KLINGLER
5 ON BEHALF OF THE PETITIONER

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

18 So Congress had to use the claim
19 there. But, in (a)(3), it talks about
20 liability arising from someone who traffics and
21 liability is in relation to anyone who holds a
22 claim. Same with (a)(4), it talks about
23 bringing an action on a claim.

24 Second, Justice Alito's advice
25 question isn't a hypothetical. The cruise line

1 association was asked as it appeared that
2 suspension may be lifted for the private right
3 of action. They were asked: Do we have
4 exposure here? And the answer wasn't: Oh, no,
5 there may be some litigation risk, but 2005 on
6 you're fine. It was: Oh, my gosh, you have a
7 tremendous amount of risk, and they gave the
8 certain reasons that might be defenses, but
9 the -- the gist of it was hardly that the
10 statute's clear and in some way relieves you of
11 the obligation.

12 And when the cruise lines were
13 lobbying to keep the suspension or to keep the
14 private right of action suspended, they said:
15 Please, President Trump, don't implement the
16 private right of action because we're liable
17 for hundreds of millions of dollars.

18 They knew exactly what had happened.
19 They'd been advised by their lawyers. We have
20 the Cleo memo in the Joint Appendix, and the --
21 the 2005 issue didn't even feature at least
22 prominently. It was -- a lot were mentioned.
23 You can throw one of the -- well, and then a
24 third is I just want to tie the foreign policy
25 interest to the scope of the remedy here.

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

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

19 CHIEF JUSTICE ROBERTS: You can finish
20 your sentence.

21 MR. KLINGLER: Freed up for
22 exploitation under the Eleventh Circuit's view.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 11:37 a.m., the case
2 was submitted.)

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