

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BOLIVARIAN REPUBLIC OF VENEZUELA, :

4 ET AL., :

5 Petitioners : No. 15-423

6 v. :

7 HELMERICH & PAYNE INTERNATIONAL :

8 DRILLING CO., ET AL., :

9 Respondents. :

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11 Washington, D.C.

12 Wednesday, November 2, 2016

13

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 10:03 a.m.

17 APPEARANCES:

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19 of the Petitioners.

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22 United States, as amicus curiae, supporting the
23 Petitioners.

24 CATHERINE M.A. CARROLL, ESQ., Washington, D.C.; on
25 behalf of the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	CATHERINE E. STETSON, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF	
6	ELAINE J. GOLDENBERG, ESQ.	
7	For United States, as amicus curiae,	
8	supporting the Petitioners	20
9	ORAL ARGUMENT OF	
10	CATHERINE M.A. CARROLL, ESQ.	
11	On behalf of the Respondents	31
12	REBUTTAL ARGUMENT OF	
13	CATHERINE E. STETSON, ESQ.	
14	On behalf of the Petitioners	57
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in Case No. 15-423, Bolivarian
5 Republic of Venezuela v. Helmerich & Payne International
6 Drilling Company.

7 Ms. Stetson.

8 ORAL ARGUMENT OF CATHERINE E. STETSON

9 ON BEHALF OF THE PETITIONERS

10 MS. STETSON: Mr. Chief Justice, and may it
11 please the Court:

12 The exceptionally low Bell v. Hood pleading
13 standard under which a plaintiff's claims will survive
14 dismissal for lack of subject matter jurisdiction as
15 long as they are not wholly insubstantial or frivolous
16 has no application in a Foreign Sovereign Immunities
17 Act. Subject matter jurisdiction bespeaks the court's
18 power to decide a case, and before a court in the United
19 States may exercise that power over a foreign sovereign,
20 it needs to decide that that sovereign is not entitled
21 to immunity. "Decide" comes from Section 1602 of
22 Title 28. That phrase "not entitled to immunity comes
23 from Section 1330. What that means in practice is what
24 this Court has explained in Verlinden, which is that a
25 court presented with a Foreign Sovereign Immunity Act

1 claim against a sovereign must decide at this threshold
2 of the litigation, must satisfy itself that jurisdiction
3 exists.

4 JUSTICE KENNEDY: I take it there will be
5 instances, or there could be instances in which the
6 court finds that there is jurisdiction, that there is no
7 immunity, and then as the case develops in the fact
8 finding stages that, you know, I've made a mistake;
9 there's immunity here. That could happen.

10 MS. STETSON: It could conceivably happen,
11 Your Honor. It generally does not happen for a couple
12 reasons. The first is that immunity is -- unless it is
13 pressed by the sovereign at the beginning, it's
14 considered to be waived. So in circumstances where a
15 sovereign, for example, doesn't raise a factual
16 challenge --

17 JUSTICE KENNEDY: In my -- my hypothetical,
18 it is raised; the judge rules against it, and especially
19 in a case like this where there's, I think, a foreign
20 subsidiary that's incorporated in domestic --
21 domestically in Venezuela, then there might be questions
22 of the extent of overlapping management and so forth.
23 It seems to me that that might -- if there's an initial
24 finding of no immunity, the judge might, in the course
25 of hearing the case on the merits that, you know, really

1 there's immunity here. That's -- that's possible.

2 MS. STETSON: It's certainly possible. I
3 think the more problematic issue is what happened here,
4 though, which is that the D.C. Circuit completed --

5 JUSTICE KENNEDY: This is the opposite,
6 where they didn't know.

7 MS. STETSON: That's -- that's precisely
8 right, that the D.C. Circuit here concluded that because
9 there might be not be immunity, what it said was at this
10 stage of the litigation, it was permitting the claims
11 against the sovereign to go forward.

12 JUSTICE GINSBURG: I think -- I think what
13 you have described sounds to me like the 12(b)(6)
14 standard, that is have you stated a claim that would
15 entitle you to relief under this statute. So to the
16 extent that I comprehend your position, it's -- there's
17 no counterpart to 12(b)(1). There's no discrete
18 12(b)(1), 12(b)(6) standard. It's one and the same.
19 It's the 12(b)(6) standard.

20 MS. STETSON: Well, Justice Ginsburg, I'm
21 not -- I'm not sure that this case blends those two
22 standards, and that's -- in that way. Here's what I'd
23 say. With respect to a 12(b)(1) motion to dismiss for
24 lack of subject matter jurisdiction pursuant to the
25 FSIA, what the court is required to do then is to turn

1 to what this Court has described as all of those
2 substantive, detailed Federal standards that are
3 essentially baked into the jurisdictional standard
4 itself. So for purposes of establishing jurisdiction in
5 a FSIA case, you certainly would bring, and we did
6 bring, that motion under section 12(b)(1). But what you
7 do then is not just to apply this loose Bell v. Hood
8 standard. What you do is you apply the relevant
9 substantive Federal standards that are included in those
10 jurisdictional provisions.

11 Now --

12 JUSTICE GINSBURG: And how did -- and how
13 would that differ from a 12(b)(6) inquiry?

14 MS. STETSON: It differs in a number of
15 different respects, most importantly procedurally. With
16 respect to a 12(b)(6) inquiry, of course a sovereign who
17 loses a 12(b)(6) challenge wouldn't be entitled to the
18 immediate interlocutory appeal.

19 JUSTICE GINSBURG: I was --

20 JUSTICE ALITO: I don't -- I don't quite
21 understand that. Why would that not be so? If this
22 immunity is analogous, for example, to absolute -- a
23 category of absolute immunity for a government official
24 or qualified immunity for a government official, those
25 are also immunities from suit; and therefore, under the

1 collateral-order doctrine, an adverse ruling could be
2 appealed.

3 MS. STETSON: True, but -- true, but --
4 inasmuch as immunity is at stake, it -- it could be
5 appealed. But in a way, that proves our point rather
6 than the converse, which is if a right is so important
7 that it is entitled to -- the sovereign is entitled to
8 take an immediate appeal, it should be tested with
9 something other than the Bell v Hood standard.

10 But more on point --

11 JUSTICE ALITO: Well, no. Because you could
12 test -- you could determine jurisdiction under the Bell
13 v. Hood standard, and then you can move to dismiss the
14 complaint under 12(b)(6). And if you're unsuccessful,
15 you could take appeal under the collateral-order
16 doctrine. Why doesn't that serve interest just as well,
17 without producing some of the unfortunate -- arguably
18 unfortunate collateral consequences of labeling this as
19 jurisdictional, among which is the fact that this Court
20 would have to decide all sorts of questions even if they
21 are not contested by the parties?

22 MS. STETSON: So two responses, Your Honor.
23 The first is, with respect to that last point, the
24 questions that the Court has to decide are the questions
25 that the sovereign asks it to decide. It is the

1 sovereign's prerogative in an FSIA case to call either
2 the factual or the legal predicates into question.

3 JUSTICE ALITO: But what is the basis for
4 that? They're just -- you may waive immunity, but is
5 there a statutory provision that supports what you just
6 said?

7 MS. STETSON: Yes. Section 1330.

8 JUSTICE ALITO: And what does it say?

9 MS. STETSON: It says that a court must
10 decide whether the sovereign is not entitled to immunity
11 before jurisdiction can lie. And that's one of the
12 curious things about this --

13 JUSTICE GINSBURG: Wait. Where does it say
14 that in the text of the statute?

15 MS. STETSON: In the last provision of
16 Section 1330A, that place.

17 JUSTICE KAGAN: Well, the section -- I mean,
18 the question here is -- that seems right. The question
19 is whether a sovereign is entitled to immunity, and I
20 guess I -- I would ask you to look at the statute, and
21 to try to explain to me your reading of the language in
22 the statute. So the statute says "a foreign state shall
23 not be immune... in any case... in which rights in
24 property taken in violation of international law are in
25 issue." Right?

1 Now, it seems to me that you are reading
2 this statute as if it said that a foreign state shall
3 not be immune in any case in which rights and property
4 have been taken in violation of international law. In
5 other words, you're taking out the "are in issue"
6 language and suggesting that the question at the
7 threshold is -- is -- is whether the rights and
8 property, in fact, have been taken, rather than whether
9 they are in dispute.

10 MS. STETSON: Justice Kagan, I think the --
11 I think the answer has to do with that phrase "are in
12 issue" that you've focused on. For a right to be in
13 issue, it actually has to be a right. And as we were
14 explaining to the district court in the D.C. Circuit
15 below, with respect to the parent company who is the
16 plaintiff in this case, that parent company possesses no
17 right. The right is not in issue if your right exists.

18 JUSTICE KAGAN: Well, what -- what is left
19 to be in issue, if you've already decided that there is
20 a right on property and it has -- and that it has been
21 taken in violation of international law?

22 MS. STETSON: With respect to a claim
23 against a sovereign under that particular expropriation
24 provision, depending on the nature of the claim, if it's
25 grounded in a common law claim, there could be other

1 defenses that could be raised. But if it's grounded as
2 this one was, which curiously, just tracks the language
3 of the jurisdictional statute, "a taking in violation of
4 international law," it is conceivable if you test kind
5 of the very end of that hypothetical, that you could
6 imagine a circumstance where the merits get bound up in
7 the jurisdictional inquiry. The problem with the
8 Respondent's position on that, though, is this Court
9 already explained that that is okay.

10 JUSTICE KAGAN: I think I'm just -- I'm just
11 missing what -- and maybe I'm just missing it. But
12 this -- it seems it's a funny way of writing this if
13 you're right. If you're right, Congress should just
14 have said, well, a foreign State shall not be immune in
15 any case in which there's a right in property taken --
16 that has been taken in violation of international law.

17 What is the "are in issue" language doing,
18 except to say that the inquiry is whether there is a
19 dispute about whether there's a violation of
20 international law?

21 MS. STETSON: So two things. The first is
22 for there to be a dispute, there has to be a right, and
23 it has to have been taken in violation of international
24 law. The problem with the Respondent's reading -- and
25 you can see this at pages 3 and again at 18 and again at

1 24 of their brief, they insert the word "claim" at
2 issue, which of course, the statute doesn't -- doesn't
3 contain.

4 JUSTICE ALITO: Would it be -- would it be
5 meaningful to say that when a Bivens action is filed
6 with jurisdiction predicated on the arising under
7 statute, a constitutional right is in issue?

8 MS. STETSON: It would certainly be
9 reasonable to say that in the abstract, but here's --
10 here's the problem with -- with engaging too much on, I
11 think, "are in issue." We have explained why the right
12 must presently be in issue. There must be a right.
13 We've also explained why there has to be a "taken in
14 violation of international law." For purposes of
15 expropriation, that is a particularly important phrase.

16 The issue with reading Federal
17 jurisdictional statutes, as this Court explained just
18 last term in Manning, is that we're already, for the
19 most part, past the point where we are heeling too
20 closely to the text. We look at the dictates of reason
21 and coherence and judicial policy.

22 JUSTICE ALITO: Well, this is a curious
23 argument for you to be raising, because your prime --
24 your lead argument is that the text indisputably
25 supports your position, is it not?

1 MS. STETSON: Our lead argument certainly
2 depends on the text. But my point is the text is not --

3 JUSTICE ALITO: You just -- you just said we
4 shouldn't pay that much attention to what the text says.

5 MS. STETSON: Our text is not our only
6 anchor, is my point. The anchor is, if you get to the
7 point where we are having this intense discussion about
8 "in issue" -- and this has actually come up before in
9 the Alahi case. There was a colloquy between the
10 majority and the concurrence, and the concurring Justice
11 said, it must be acknowledged that the words in issue
12 don't lend themselves to an interpretation that might be
13 infallible.

14 So what you look at is the context from
15 which that decision came.

16 JUSTICE BREYER: So how does it work with
17 diversity? We have a complaint; Petitioner or
18 plaintiff, I'm from Kentucky. Plaintiff, my defendant
19 is from Illinois. Okay? Filed. Response: Hey, I'm
20 not from Illinois. I'm from Kentucky too.

21 All right. How does the judge -- what does
22 the judge do?

23 MS. STETSON: The judge in a diversity case
24 will look outside the pleading in that particular
25 instance, take evidence as to whether or not --

1 JUSTICE BREYER: When?

2 MS. STETSON: -- that defendant is or is not
3 from -- I'm sorry. When?

4 JUSTICE BREYER: When?

5 MS. STETSON: At the beginning. At the
6 jurisdictional stage.

7 JUSTICE BREYER: Okay. And --

8 MS. STETSON: Under 12(b)(1).

9 JUSTICE BREYER: -- that's to determine if
10 there is jurisdiction?

11 MS. STETSON: Correct.

12 JUSTICE BREYER: And you're saying that
13 should be the same here?

14 MS. STETSON: I'm saying that it should be
15 the same here, both with respect to the claim we're
16 bringing right now, which is to the legal sufficiency of
17 the complaint: Did that parent company have a right?
18 Was that Venezuelan subsidiary's company right taken in
19 violation of international law?

20 That sufficiency of the pleading
21 jurisdictional challenge is quintessentially --

22 JUSTICE KAGAN: Your response to Justice
23 Breyer suggests that it's not only a question of legal
24 sufficiency -- and I think that the government
25 specifically says this in its brief --

1 MS. STETSON: Yeah.

2 JUSTICE KAGAN: -- that you would also have
3 a factual -- any factual disputes addressed at that
4 time. So if there are factual disputes, you know,
5 there's -- there's a pleading. It's -- it is legally
6 sufficient, but a defendant can come in and say, well,
7 it might be legally sufficient, but the facts are just
8 wrong. And you would have that at the jurisdictional
9 stage too; is that right?

10 MS. STETSON: We would indeed. And in fact,
11 the way that this particular set of circumstances came
12 about, the parties agreed that in order to avoid what
13 might not be necessary, which was jurisdictional
14 discovery, the parties would -- these defendants would
15 front load the legal sufficiency questions before we
16 get to --

17 JUSTICE BREYER: Okay. So if we take --

18 JUSTICE KAGAN: So I'm going to ask you --
19 I'm sorry.

20 CHIEF JUSTICE ROBERTS: Justice Breyer.

21 JUSTICE BREYER: Well, I was thinking, I
22 can't get my hands around this case, or my mind around
23 it, because it -- it seems to me it's really about a
24 practical matter. And the practical matter is when
25 should the judge in this kind of case decide whether or

1 not there really is a claim here, a legitimate claim
2 they can win on that falls within the category. Rather
3 like diversity.

4 And the answer is, it's a foreign country,
5 and sovereignty is at issue. Do it as soon as you can
6 in an ordinary case. But if you have something special,
7 maybe you can't. Judge, you run your own trial, but
8 keep that in mind. We don't want to have foreign
9 countries in our courts when there isn't really a -- a
10 pretty good case against them, and maybe a winning case.

11 So decide this thing quickly, decide it up
12 front. But to start talking about jurisdiction and
13 these things, I can't really understand as well as, say,
14 Justice Ginsburg, who taught jurisdiction. And -- and
15 I -- why are we in this? Why don't we just give them
16 that practical advice?

17 MS. STETSON: I think that the reason that
18 the practical advice might not be enough is -- is
19 another response to a question that Justice Alito posed
20 to me earlier, which is for purposes of the FSIA, there
21 is a significant difference between a court exercising
22 its power over a foreign sovereign, which is the nature
23 of subject matter jurisdiction, and deciding whether it
24 can exercise that power over foreign sovereign.

25 JUSTICE GINSBURG: What if the Court has to

1 decide whether it has jurisdiction?

2 MS. STETSON: It does indeed. So for
3 purposes of this, that means that the foreign sovereign
4 can present itself to the court and can challenge,
5 whether it's on the sufficiency of the pleadings or on
6 the facts, can challenge the basis for that
7 jurisdiction.

8 And yes, there will be circumstances where a
9 sovereign comes in and makes legal challenges, such as
10 we have made here, and factual challenges such as might
11 be made --

12 JUSTICE SOTOMAYOR: It just seems a little
13 bit like an academic exercise to me for the following
14 reason: It appears to me -- and you're going to have to
15 correct me if I'm wrong -- that on the legal question,
16 the sufficiency of the complaint, that the district
17 court said, and the court of appeals approved the
18 finding, that there was a sufficient allegations of fact
19 to state a claim. So I don't think that that ruling
20 depended on facts; it depended on a legal conclusion.

21 MS. STETSON: Justice Sotomayor, that --
22 that is correct in this respect. We decided, along with
23 the respondents, that we would back load any factual
24 challenges to jurisdiction. So for example, the -- a
25 typical factual challenge would be you've attempted to

1 sue me in U.S. court; I don't have a commercial nexus
2 with the U.S.

3 These challenges, though -- and you can see
4 this best in the D.C. Circuit's panel opinion -- these
5 challenges are challenges of law to the sufficiency of
6 the pleadings. Does a parent company have a right in
7 its subsidiary's property that it can allege here? Does
8 a subsidiary, a Venezuelan company, have a property that
9 was taken in violation of international law?

10 What the D.C. Circuit concluded in those
11 circumstances, and what the words it used at Joint
12 Appendix 183 were, "At this stage, those pleadings were
13 passable to get past the jurisdictional standards."

14 JUSTICE SOTOMAYOR: I'm sorry. What more do
15 you want? I mean, it seems as if you're asking us for
16 an advisory opinion of what the Court's next step should
17 be with respect to what issues of discovery it should
18 have on other legal issues, not on this one. It's
19 already ruled that this complaint is sufficient as a
20 matter of law, that this parent, under international
21 law -- I'm not even questioning whether it's right or
22 wrong. I know you say it's wrong and there's a serious
23 issue of whether it's right or wrong. But are you
24 asking us for an advisory opinion as to what the next
25 steps are for the court below?

1 MS. STETSON: No.

2 JUSTICE SOTOMAYOR: Because we haven't
3 granted cert on a legal question.

4 MS. STETSON: I -- I agree with that,
5 Justice Sotomayor. I'm not asking for an advisory
6 opinion at all. In fact, what you just said about not
7 being sure whether it's right or wrong that the parent
8 company has a right, that's the problem. The problem is
9 that when you're talking about jurisdiction at an FSIA
10 case, you can't just decide that the plaintiff might
11 have stated a jurisdictional predicate. You have to
12 decide whether that right actually exists.

13 So what the D.C. Circuit did here, applying
14 that low Bell v. Hood standard, is to say there is no
15 precedent that completely and inexorably forecloses the
16 plaintiffs from bringing this --

17 JUSTICE GINSBURG: Under the low Bell v.
18 Hood standard, as far as I know, and I think they would
19 be -- bears this out, it's not just 1331. That's the
20 general rule, that to get into court -- just to get your
21 toe in the door, all you have to do is -- you don't have
22 to show that you have stated a claim at that point. You
23 just have to meet the threshold jurisdictional standard.

24 It's -- it's just very strange. Putting
25 together everything you said, what I come out with is in

1 order to have jurisdiction, you have to prevail on the
2 merits, which is a -- a facts dispute. They get
3 front-loaded, too. So everything is decided under the
4 jurisdictional head.

5 MS. STETSON: But Justice Ginsburg, the
6 solution, when it comes to preserving that foreign
7 sovereign's dignity, is not to dilute the FSIA's
8 jurisdictional standard. It is, if necessary, to make
9 those merits determinations --

10 JUSTICE GINSBURG: The question is what is
11 the standard?

12 MS. STETSON: The standard is --

13 JUSTICE GINSBURG: Is it the standard that
14 is -- is not this peculiar to 1331. It is the general
15 standard for how you determine whether you have -- you
16 pass the 12(b)(1) threshold.

17 MS. STETSON: But the standard is the
18 standard that this Court articulated in Verlinden, which
19 is that you look at the substantive jurisdictional
20 standards that are in the FSIA, and you decide whether
21 or not they have been satisfied. Not whether they may
22 be satisfied, which is the Bell v. Hood frivolousness
23 D.C. circuit standard, but whether they have been
24 satisfied. Was there a rate -- right? Was it taken in
25 violation of international law? That is the difference

1 between hypothesizing jurisdiction and actually deciding
2 it.

3 I'd like to reserve my time if I could.

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Goldenberg.

6 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

7 FOR UNITED STATES, AS AMICUS CURIAE,

8 SUPPORTING THE PETITIONERS

9 MS. GOLDENBERG: Mr. Chief Justice, and may
10 it please the Court:

11 I'd like to start by talking about the way
12 that we read the text of this provision, because I think
13 it's a little bit different than the way that
14 Petitioners read it, but not in a way that changes the
15 bottom line in this case.

16 So the statute says "Rights and property
17 taken in violation of international law are an issue."

18 What has to be an issue there are rights and
19 property. And as we know from this Court's decision in
20 Permanent Mission, that means that at the jurisdictional
21 stage, you have to figure out whether the kind of right
22 that's being asserted falls within the federal law
23 definition of rights and property within the FSIA.

24 JUSTICE KAGAN: And you think it's -- it's
25 taken in violation of international law, and that's also

1 a predicate for what's in issue; is that right?

2 MS. GOLDENBERG: I don't think that "in
3 issue" actually applies to "taken in violation of
4 international law." I think that "taken in violation of
5 international law" is describing and defining the kind
6 of property that you have to be talking about in this
7 case.

8 JUSTICE KAGAN: Well, I guess the question
9 is, though, what's left to be in issue? If you're right
10 that the question of whether there is a right in
11 property is decided at the jurisdictional stage, both
12 law and fact, and if you are right that the question of
13 whether that right in property has been taken in
14 violation of international law is also decided, both law
15 and fact, at the jurisdictional stage, then what is the
16 issue, the in issue, that's left for the merits?

17 MS. GOLDENBERG: So I disagree with part of
18 what you said. I do think that the question of whether
19 property was taken in violation of international law is
20 something has to be decided at the jurisdictional stage
21 in law, where there's a challenge like there is here, or
22 in fact, if there's a factual challenge. But with
23 respect to rights and property, those can be an issue.
24 So I don't think you need to decide at the
25 jurisdictional stage whether or not the plaintiff

1 actually possesses the right that they claim.

2 So, for instance, if you had a plaintiff who
3 came in and said, I have a deed to this property and it
4 was taken away from me, and the foreign State wanted to
5 come back and say, no, you don't, this deed is a
6 forgery, you never had any relationship to this property
7 at all, that would be in issue and that would be
8 something that could be decided at the merits.

9 The rights and property question that has to
10 be decided at the jurisdictional stage is the one that
11 this Court decided in Permanent Mission, which is, is
12 this right that's being asserted here something that
13 falls within the definition of rights and property that
14 the FSIA put forward? And so in Permanent Mission, the
15 question was: Is this asserted-lien right a right in
16 property, even though it's not a right to possession of
17 the property or to ownership of the property --

18 JUSTICE KAGAN: I guess I'm not
19 understanding the distinction. Could you -- in this
20 case, what would be the first question that would be the
21 threshold question as to a right in property, and what
22 would be the question that would get diverted to the
23 merit stage?

24 MS. GOLDENBERG: In this case, I think the
25 question mainly is the question about whether what's

1 being asserted is a right in property. Here, it's a
 2 question of whether a shareholder's rights in the
 3 company that they own shares in are something that are
 4 rights in the property of that subsidiary company, the
 5 company that the shareholder has some corporate
 6 ownership interest in. And that is a legal question
 7 that could be answered at the jurisdictional stage. And
 8 here, we don't know the answer to that question, because
 9 all the --

10 JUSTICE KAGAN: And what's the question that
 11 would be answered at the merit stage?

12 MS. GOLDENBERG: The question that would be
 13 answered at the merit stage here, I don't think there
 14 actually would be much dispute on the merits. But, for
 15 instance, in a case like this, you could have a dispute
 16 about whether the plaintiff was actually a shareholder
 17 or was not a shareholder. Or in the example I gave
 18 before, which I think would be the more common
 19 situation, whether the person actually had a deed to
 20 that property, or whether they didn't have a deed.

21 JUSTICE KAGAN: Yeah, but they --

22 JUSTICE BREYER: You're -- actually, I'm
 23 getting pushed the other way. I came in on your side,
 24 but I swing back and forth.

25 MS. GOLDENBERG: Oh, dear.

1 JUSTICE BREYER: But this is what's really
2 bothering me: It sounds, the more I hear you speak,
3 that there isn't a good thing that we're going to write
4 in this case that isn't going to get everybody good and
5 mixed up, because it reminds me of a case where we set a
6 kind of order of battle, as first you have to decide the
7 jurisdiction, and then you decide this. And I've never
8 received so much criticism from the district judges as
9 for that case.

10 MS. GOLDENBERG: Well, also --

11 JUSTICE BREYER: Because they tell us that
12 cases differ a lot one from the other. Let us do what's
13 practical in the circumstances.

14 There are three kinds of issues that can
15 come up. There's a set of facts. Those facts might be
16 in dispute. If you find one way, there is the
17 jurisdiction. Find the other way, there isn't.

18 There is a second kind of issue: that we
19 take the facts as given. Do they, in fact, fall within
20 the definition of this statute? And that can even exist
21 in a diversity case. Somebody's from Guam or
22 somebody -- you know, that's the kind of -- does it
23 really fall within, or is it just possible that it falls
24 within Federal law arising under diversity or this?

25 And then there's the third kind of case:

1 Are you so far out that it isn't even hopeful that you
2 could get into the court on this?

3 Now, if you take the third, which is where
4 we are, you leave it up to the district judge to decide
5 the other two when and if it's most suitable in the
6 case. If you don't, I'm worried.

7 MS. GOLDENBERG: But in that circumstance,
8 you are asserting jurisdiction over a foreign State
9 based on a nonfrivolous allegation, and that is
10 something that doesn't respect the foreign State's
11 dignity --

12 JUSTICE BREYER: Because you are, in fact,
13 asserting jurisdiction over somebody who's from Guam.
14 Because, in fact, you'd have to go into the birth
15 conditions and all kinds of things. The judge wants to
16 put that off for a while because of other things that
17 might dispose of the case.

18 MS. GOLDENBERG: Understood. But this is a
19 special context in which there is a real dignitary harm
20 to the foreign State if the courts of another country
21 sit in judgment as to something that foreign State --

22 CHIEF JUSTICE ROBERTS: But how often -- how
23 often is that a serious concern? I mean, I understand
24 that the reason you're concerned is that you don't want
25 a reciprocal burden imposed on the United States when

1 it's haled into court in a foreign country. But does it
2 really make a difference to a foreign sovereign whether
3 it litigates these issues under 12(b)(1), as opposed to
4 12(b)(6)?

5 MS. GOLDENBERG: It does make a difference
6 to the foreign sovereign for the reason that I gave. It
7 makes a difference to the United States when we're sued
8 in other courts, whether there's a dispute at the
9 jurisdictional stage or later --

10 CHIEF JUSTICE ROBERTS: But why is that?
11 Why is that such a significant issue?

12 MS. GOLDENBERG: Well, as I said, there is
13 something that is a real affront to a foreign sovereign,
14 or can be an affront to a foreign sovereign if another
15 court sits in judgment of something that foreign
16 sovereign has done. And I think that's --

17 CHIEF JUSTICE ROBERTS: But it's going to be
18 sitting -- it's going to be sitting in judgment, one way
19 or another. It's just a question whether it's in the
20 context of 12(b)(1) or 12(b)(6).

21 MS. GOLDENBERG: Well --

22 CHIEF JUSTICE ROBERTS: I can't believe it
23 makes a difference when the ambassador from whatever
24 country calls home and says, well, I've got bad news,
25 we're being sued in Federal court. But don't worry,

1 it's only under 12(b)(1), not 12(b)(6).

2 MS. GOLDENBERG: It does make a difference.

3 And I think it's particularly sensitive with respect to
4 the expropriation exception, actually. And that's why
5 taking in violation of international law is such a
6 critical threshold issue that has to be decided at the
7 jurisdictional stage --

8 JUSTICE KENNEDY: Is there a difference in
9 expropriation and conversion?

10 MS. GOLDENBERG: Well, I do think it's an
11 important point that here, the underlying cause of
12 action could be conversion, if someone brought that kind
13 of cause of action which wouldn't overlap exactly with
14 the jurisdictional determination here. You would still
15 have to allege the jurisdictional prerequisites were
16 met, the jurisdictional requirements of the statute.

17 In an expropriation case --

18 JUSTICE GINSBURG: Tell us when the
19 government arrives at this position, because you know we
20 have an amicus brief, people.

21 JUSTICE KENNEDY: Can you just finish?
22 Expropriation is different because?

23 MS. GOLDENBERG: Expropriation is different
24 because this is a public act of a foreign sovereign
25 taken in its own territory with respect to property in

1 its own territory. And that is something that, in the
2 normal course, is going to be a matter for the courts in
3 that territory to resolve.

4 The very thing that makes it appropriate for
5 the courts of another country to sit in judgment on that
6 kind of act is that there has been a violation of
7 international law. And then you look at the nexus
8 requirements in the expropriation exception, and those
9 show that the property has some connection to the United
10 States, which makes it appropriate for United States
11 courts to sit in judgment.

12 And there actually have been real problems,
13 real sensitivities, real foreign relations concerns that
14 have been raised in this area, stemming from the D.C.
15 Circuit's 2008 decision in the Chabad case, which is
16 where the D.C. Circuit first announced the rule that
17 we're considering here. That's an expropriation case
18 against Russia. The D.C. Circuit decided there was a
19 nonfrivolous allegation that the property had been taken
20 in violation of international law.

21 At that point, Russia, feeling that it was
22 immune and it hadn't gotten a full determination of its
23 immunity, dropped out of the case, and the district
24 court started imposing sanctions of \$50,000 a day. In
25 response, Russia initiated an expropriation action

1 against us in Moscow and started imposing \$50,000-a-day
2 sanctions on the United States.

3 So that could happen -- something like that
4 could conceivably happen, even under the standard that
5 we're talking about, that a foreign state could take
6 offense. But this is a very sensitive issue. And there
7 are real concerns here.

8 JUSTICE GINSBURG: Jurisdiction in the case
9 of Bank Markazi. When the court issued its decision in
10 that case, Iran filed a suit against the United States
11 in the World Court.

12 MS. GOLDENBERG: There are real reciprocity
13 concerns in this area. And I think Congress was
14 cognizant of those. That's part of the purposes of the
15 FSIA. And so that is the reason why the taking in
16 violation of international law, the words "in issue"
17 don't apply to that. It doesn't say whether it is in
18 issue that the property was taken in violation of
19 international law.

20 JUSTICE GINSBURG: Then can you --

21 MS. GOLDENBERG: The question is --

22 JUSTICE GINSBURG: Then can you -- I read
23 the dark green brief. It states a strong case in
24 opposition to the position you're presenting by people
25 who were once part of the government. So I would like

1 to know when the position that you're now taking, when
2 did that become the government's position?

3 MS. GOLDENBERG: I don't know that I can
4 specify a date, but I think it has always been the
5 government's position and the State Department's
6 position that the actual requirements of the exceptions
7 to immunity need to be satisfied at the threshold, as
8 this court said in Verlinden; otherwise, the grant of
9 immunity becomes much less meaningful to the foreign
10 state.

11 JUSTICE SOTOMAYOR: I'm sorry. Are you
12 arguing -- what's important? A 12(b)(6) --

13 MS. GOLDENBERG: No. I --

14 JUSTICE SOTOMAYOR: -- standard, or are you
15 in agreement with the Petitioner that all of the factual
16 disputes have to be decided? You seem to be saying no
17 to the second.

18 MS. GOLDENBERG: The factual disputes with
19 respect to whether the property has been taken in
20 violation of international law --

21 JUSTICE SOTOMAYOR: Exactly.

22 MS. GOLDENBERG: -- if there are any, and if
23 the foreign State chooses to raise those factual
24 disputes, do need to be decided so that you can figure
25 out whether you have the right kind of property in the

1 case.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 Ms. Carroll.

4 ORAL ARGUMENT OF CATHERINE M.A. CARROLL

5 ON BEHALF OF THE RESPONDENTS

6 MS. CARROLL: Mr. Chief Justice, and may it
7 please the Court:

8 The jurisdictional test under the
9 expropriation exception turns on what is, quote, "in
10 issue" in the suit. In other words, what is the dispute
11 about?

12 That language contrasts starkly with
13 language that Congress used in an analogous provision of
14 the FSIA Section 1610(a)(3). And, Justice Kagan, this
15 goes to your earlier discussion regarding the meaning of
16 "in issue."

17 Section 1610(a)(3), which is reprinted at
18 page 28 of the Addendum to the blue brief, Section 1610
19 is the section that governs immunity from attachment and
20 execution, and it includes a provision for expropriation
21 cases. That language says there's -- that there's an
22 exception to immunity where there's been a judgment,
23 quote, establishing that "rights in property," quote,
24 has been "taken in violation of international law."

25 So when Congress wanted to make the fact of

1 a taking in violation of international law a
2 jurisdictional fact that must be resolved at the outset,
3 it knew how to say that, and it used those words in
4 1610.

5 CHIEF JUSTICE ROBERTS: That's not the
6 outset. That's a question of execution of a judgment
7 that's already been in place.

8 This is the issue we're talking about here,
9 is sort of the commencement of -- of litigation.

10 MS. CARROLL: That's correct. And Congress
11 used very different language in 1605(a)(3).

12 JUSTICE KENNEDY: Are you saying that
13 immunity issues are not generally jurisdictional?

14 MS. CARROLL: No, we are saying the
15 opposite.

16 JUSTICE KENNEDY: Immunity issues generally
17 are jurisdictional, are they not?

18 MS. CARROLL: Exactly. The subject matter
19 of the court turns on the immunity standard. They are
20 one in the same standard, and that's why all of the
21 court's body of jurisprudence on what does it mean for a
22 court to have jurisdiction over a particular subject
23 matter are relevant here in this case.

24 To be sure, there are some kinds of
25 jurisdictional inquiries such as citizenship of the

1 parties in a diversity case; for example, where the
2 facts have to be established at the outset.

3 JUSTICE KAGAN: And you say that for the
4 commercial nexus, right?

5 MS. CARROLL: Exactly. The commercial
6 nexus --

7 JUSTICE KAGAN: So what is the difference?

8 MS. CARROLL: The difference here is that
9 other kinds of jurisdictional provisions don't require
10 the establishment of a fact. They simply require that
11 the plaintiff has asserted a particular type of claim.
12 We think the language --

13 JUSTICE KAGAN: In other words, you're
14 saying the commercial nexus language, you have to
15 establish the fact early on --

16 MS. CARROLL: You have to -- yes.

17 JUSTICE KAGAN: -- at the jurisdictional
18 phrase because of the way that's written in the statute.

19 MS. CARROLL: Yes. Correct.

20 JUSTICE KAGAN: Because it doesn't have the
21 language.

22 MS. CARROLL: And -- correct. That's
23 correct, and I want to be very clear. The -- there was
24 a reference earlier that our -- our position suggests
25 that a court has to decide whether there might or might

1 not be immunity. We don't think that's correct, and
2 that's not the position we've asserted.

3 The Court certainly does, must, assure
4 itself at the outset that an exception applies. The
5 question is, what is the standard that defines --

6 CHIEF JUSTICE ROBERTS: Right. And the
7 other -- the other statutes you're talking about and the
8 ones set forth in your red brief just seem to me to
9 avoid the question, which is whether there's a different
10 approach in the foreign sovereign immunity.

11 Our ambassadors have to go to these other
12 countries and say -- or their ambassadors, you're being
13 sued. You have to come into our courts, even though
14 you're a sovereign. And we don't want you dragging us
15 into your courts, but you have to come in our courts
16 because someone has raised a claim that is not wholly
17 insubstantial or frivolous. That's a very low standard
18 in that context.

19 MS. CARROLL: Mr. Chief Justice, the
20 Petitioners and the government have cited no other
21 sovereign immunity context in which the standard they
22 are proposing applies. To the contrary, as we noted in
23 our brief in suits under the Tucker Act, *Bell v. Hood* is
24 the applicable standard. The Petitioners cited *Land v.*
25 *Dollar* in their reply brief. Just two years after that

1 decision in the Larson case, this Court held that --

2 CHIEF JUSTICE ROBERTS: So you're talking
3 about the United States sovereign immunity --

4 MS. CARROLL: That --

5 CHIEF JUSTICE ROBERTS: -- in -- in the
6 United States courts?

7 MS. CARROLL: Exactly. Where the court held
8 that Bell v. Hood was the applicable standard. So the
9 question is why in this one particular area alone would
10 Congress have written a standard that departs from how
11 jurisdictional inquiries are determined in every other
12 context including --

13 JUSTICE KENNEDY: Because there's extreme
14 sensitivity with reference to suing foreign sovereigns.

15 MS. CARROLL: Well, I appreciate that
16 question because I think it calls out the implications
17 of the position being advanced by Petitioners and the
18 United States. Because of the mini trial that it
19 requires at the outset on the question whether this
20 sovereign has violated international law, under their
21 view, if, as is the case here, the defendants are
22 asserting other merits-based legal defenses to the
23 claim, for example, a defense under the act of State
24 doctrine, the court cannot get to those defenses until
25 it has decided whether there's been a taking in

1 violation of international law. The implications of
2 that are -- I think speak for themselves.

3 When a court has to say, first, I have to
4 decide has there been a taking in violation of
5 international law, I think, yes, this sovereign has
6 violated international law. Now I have jurisdiction to
7 consider whether under the act of State doctrine it's
8 not appropriate for me to inquire into the validity of
9 the foreign sovereign's actions. That makes no sense.

10 Under our view and under the application of
11 Bell v. Hood in any other jurisdictional context, the
12 sovereign defendant --

13 CHIEF JUSTICE ROBERTS: I'm sorry. Why does
14 that make no sense? I mean, you -- you establish
15 jurisdiction, and there's an additional defense. Other
16 than that, there's no jurisdiction. I don't see why --

17 MS. CARROLL: Well, from the -- from the
18 perspective of protecting the dignity and comity of the
19 foreign sovereign that has taken U.S.-owned property in
20 violation of international law, to say that the first
21 decision a court must make is to label the defendant, if
22 the claim holds up, a -- a violator of international law
23 before it can consider any other defenses that might not
24 require that determination I think is not consonant with
25 a view that protects the dignity of the sovereign

1 defendant.

2 JUSTICE KAGAN: Ms. Carroll, I -- though I
3 have a good deal of sympathy with the way you read the
4 language, but it does seem to me it gets you into one
5 big problem.

6 So, you know, take a case where there is an
7 arguable claim that there's been a violation of
8 international law, so you would satisfy the Bell v. Hood
9 standard, but then the actual claim that's being made is
10 just a straight conversion claim. So you've -- you've
11 gotten to the merits, but in the merits stage all you're
12 talking about is this conversion claim. And so you
13 could be adjudicated guilty even though nobody has
14 decided, in fact, whether you violated international
15 law. And that seems as though it cannot be right.

16 MS. CARROLL: Well, I -- I think it probably
17 can't be right, but the reason that it's not right has
18 nothing to do with whether Bell applies.

19 Under our view of this statute, Congress and
20 the executive were reacting to a very specific set of
21 problems, and they adopted a very specific solution.
22 They were looking at the Cuban expropriations and other
23 notorious expropriations of property that were affecting
24 U.S. interests where sovereigns were using those
25 expropriations to gain an unfair advantage in the

1 commercial marketplace. And they wrote a statute that
 2 said, we want the courthouse doors to be open to those
 3 kinds of claims; a claim of a taking in violation of
 4 international law, or a tort claim, the gravamen of
 5 which is an assertion that the defendant violated
 6 international law or the defendant's title is no good
 7 because the property was taken in violation of
 8 international law. All those are within the scope.

9 JUSTICE KAGAN: Do you -- sorry, I'm sorry.

10 MS. CARROLL: Sorry. A suit that does not
 11 actually press a claim of seeking a remedy for a taking
 12 in violation of international law we think should not be
 13 brought under this statute. This is not the tort
 14 exception.

15 JUSTICE KAGAN: I see. So you think that's
 16 necessarily a merits issue.

17 MS. CARROLL: We do. Whereas I -- I
 18 understand the Petitioner's and the government's
 19 position to be that this is simply a jurisdictional
 20 fact. So long as the plaintiff can show that this
 21 property was taken at some point by someone from someone
 22 in violation of international law, that opens the door
 23 to any kind of claim at all so long as it somehow
 24 implicates --

25 JUSTICE BREYER: I don't know that that's a

1 different issue, I think. Suppose in a diversity case,
2 A says, I'm from Kentucky. And B says -- and he says B
3 is from Illinois. B files an answer: No, I'm from
4 Kentucky. No diversity.

5 Doesn't the judge normally make that
6 determination right then and there?

7 MS. CARROLL: Yes, with respect --

8 JUSTICE BREYER: Well, then why should it be
9 any different here?

10 MS. CARROLL: Because this is not a
11 jurisdictional fact like the citizenship of the parties.
12 It's a --

13 JUSTICE BREYER: Well, so what? I mean, the
14 reason you do make that right at the beginning, I have
15 always thought, was not a mystical thing. It's because
16 you don't want to haul somebody across the country in
17 different places when there isn't even diversity
18 jurisdiction.

19 Here, though, the reasoning isn't quite the
20 same. They say, try it out at the beginning whether
21 there is at least a claim here, real claim, that they
22 did seize the violation -- they did seize the property,
23 violation of international law. That way we don't bring
24 China or someplace all the way over to the United States
25 and cause all kinds of problems without there really

1 being something. So do it at the beginning, Judge,
2 don't wait till the end of the case.

3 MS. CARROLL: Justice Breyer, Rule 12(b)(6)
4 exists for precisely that purpose, and nothing would
5 have prevented these defendants from proceeding on --

6 JUSTICE BREYER: Okay. So what difference
7 does it make? And here I'm --

8 MS. CARROLL: Yes.

9 JUSTICE BREYER: -- I'm not asking an
10 argumentative question. I don't know.

11 What difference does it make whether you
12 move under 12(b)(6) or move under 12(b)(1)?

13 MS. CARROLL: I think probably the only
14 significant difference it makes is the difference that
15 Justice Alito referred to earlier, which is the
16 implications of taking merits issues and calling them
17 jurisdictional, and those implications are at least
18 among the following:

19 Number one, the arguments can't be weighed.
20 Ms. Stetson is relying on a -- a version of the waiver
21 doctrine that although we as plaintiffs in an FSIA case
22 might be happy with, is not how courts have applied it
23 and not how they've asserted it below. If the sovereign
24 is asserting its immunity, then the court cannot find
25 that immunity has been waived. It must find

1 jurisdiction under another provision.

2 JUSTICE BREYER: Do we have to -- can we say
3 that -- can we just say -- can we say, look, I guess we
4 couldn't, but -- but I don't care whether it's 12(b)(1)
5 or 12(b)(6). Judge, what you ought to do in such a case
6 is try out right at the beginning of the case if it's at
7 all possible whether you have a basis here, the
8 plaintiff, for getting this foreign country into our
9 courts.

10 MS. CARROLL: But the consequence of calling
11 it 12(b)(1) is that it is treated as a subject matter
12 jurisdiction question. That means serial interlocutory
13 appeals over every new statutory theory -- even if we're
14 just looking at legal sufficiency, defendants can
15 serially raise new statutory arguments that then go up
16 and down.

17 JUSTICE SOTOMAYOR: Let's go back to Justice
18 Alito's question.

19 Why I'm confused by this case is I think
20 both the State Department and your adversary are upset
21 that the court found that there was a viable legal
22 argument that a parent could have property interests in
23 the -- in the possessions of a subsidiary.

24 Is that your understanding?

25 MS. CARROLL: With respect, I -- well, I

1 don't have an understanding about the motivations of why
2 they are upset.

3 JUSTICE SOTOMAYOR: I agree.

4 MS. CARROLL: But with respect -- with
5 respect to what the dispute is in the case, what their
6 legal challenge is to the parent's claim, is not about
7 the character of the rights as rights in property. The
8 arguments that were made and decided below were the
9 following: The defendants contended that the only
10 property that was taken was property belonging to the
11 subsidiary. The parent doesn't have standing to assert
12 those rights. The parent does have its own rights, for
13 example, they own shares in the subsidiary. Their
14 position was not that those rights are not property
15 rights, but that those rights were not taken.

16 So there was no dispute about whether those
17 rights at issue are quote/unquote property rights. The
18 dispute is do these two plaintiffs, can they proceed to
19 bring a claim of a violation of international law as a
20 result of the uncompensated, discriminatory taking of
21 their property. That is a merits question. And the
22 Court has made clear that in jurisdictional statutes
23 that turn on the nature of the claim, rather than a
24 factual showing, Bell v. Hood is the governing standard
25 across those contexts, even when sovereign immunity --

1 JUSTICE ALITO: The basis of that, what do
2 you think you would have to prove? That property was
3 taken on the merits, property was taken in violation of
4 a customary international law standard, or that having
5 established that as the jurisdictional predicate, that
6 there was a conversion under the law of whatever
7 jurisdiction is chosen?

8 MS. CARROLL: Our claim is a claim for a
9 taking violation of international law, which has long
10 recognized that expropriation must be compensated, they
11 must be for a public purpose, and they cannot be
12 arbitrary and discriminatory. Those are
13 well-established principles of international law.

14 CHIEF JUSTICE ROBERTS: Property of a
15 domestic citizen?

16 MS. CARROLL: Our argument on that issue is
17 that the Venezuelan incorporation of the subsidiary does
18 not bar the claim in a situation where the foreign
19 sovereign itself deemed that subsidiary to be a foreign
20 company, treated it that way, and took its property on
21 that purpose. The -- the court of appeals looked
22 closely at that issue. It said the only cases we can
23 find -- there aren't very many, but the ones that are
24 out there support this claim. The restatement and other
25 commentary support this claim. And Petitioners, quote,

1 have cited no other contrary authority that forecloses
2 the claim.

3 They took a close look at it. If
4 Petitioners wanted to proceed right away to a 12(b)(6)
5 determination, they could have chosen to do that.
6 Instead, they wanted --

7 CHIEF JUSTICE ROBERTS: Took a close look at
8 it? It was -- I thought it was under the Bell v. Hood
9 standard.

10 MS. CARROLL: They -- they did apply Bell v.
11 Hood, but I would submit that the analysis that the
12 Court adopted, I think going back to Justice Sotomayor's
13 earlier observation, was a -- a fairly robust
14 determination. And --

15 JUSTICE GINSBURG: And we did -- we -- we
16 did say -- I forgot the name of the case -- that if
17 there's a 12(b)(1) question and a 12(b)(6), and you
18 think the 12(b)(6) is easy, you still have to decide the
19 12(b)(1) first. So you can't substitute the 12(b)(6) as
20 the -- has a claim been stated for 12(b)(1). You have
21 to have the jurisdiction decided first.

22 MS. CARROLL: That's -- that's the holding
23 of Your Honor's opinions for the Court in Sinochem and
24 Rudolph, following up on Steel Co. And what those cases
25 recognize, fundamentally, is that determining the legal

1 sufficiency of allegations, even forgetting resolving
2 factual disputes, which Ms. Goldenberg and Ms. Stetson
3 both conceded would have to be resolved at the
4 threshold. But this Court has said, resolving those
5 kinds of claims, even when limited to legal sufficiency,
6 is, itself, an exercise of jurisdiction. In the -- in
7 the Court's words, it's vital to establish jurisdiction
8 first before getting to those issues.

9 JUSTICE KAGAN: And if I could go back to
10 Justice Breyer's question. I hate to ask you to repeat
11 yourself, but if I could understand your -- your view of
12 why it matters, is one 12(b)(1) motions, it's -- it's
13 not clear whether one can waive defenses? And what
14 else?

15 MS. CARROLL: So there's the waiver issue,
16 which is the sort of the opportunity for the defendants
17 to continually come up with new theories. Which has
18 occurred in this case when we went back down to the
19 district court on remand from the district court, new
20 jurisdictional arguments were made at that time that
21 hadn't been made previously. There's the court's
22 obligation to consider issues sua sponte. This goes to
23 the Court's subject-matter jurisdiction. And as the
24 Court observed in Verlinden, when there has not been a
25 waiver of sovereign immunity, the court must assure

1 itself that one of the other exceptions applies. And to
2 do that when there are arguments that have been made by
3 the sovereign, or even when there are just doubts in the
4 case, the court must resolve those, because it goes to
5 subject-matter jurisdiction.

6 All of those issues then become the subject,
7 potentially, of interlocutory appeal. And so you end up
8 with a system where these issues are raised, legal
9 issues going to the merits, but their whole ball of wax
10 is now being put into the jurisdictional determination,
11 going up and down, back and forth between the district
12 court and the circuit. I really am not sure how that
13 serves the sovereign's interests when it means that all
14 of that has to be done before we can get to the
15 straightforward legal merits determinations that -- that
16 the court could decide once it concludes that it has
17 jurisdiction.

18 And I suspect it's for that reason that when
19 Congress wrote this language, even though the Bell v.
20 Hood standard had been long established, far before the
21 FSIA was written, Congress didn't write anything in this
22 statute to suggest, we want this one kind of
23 determination, and this one determination only, to be
24 done in a way that differs from how any other kind of
25 jurisdictional determination of this type is made.

1 JUSTICE KENNEDY: Well, it's always a little
2 difficult for one party to tell the other party it
3 doesn't really know its best interests, which is what
4 you're saying. And -- but -- but isn't, part of it is
5 Venezuela said, we don't want to be labeled as violator
6 of international law?

7 MS. CARROLL: I'm -- I'm sure that they
8 don't. I'm tempted to say a lot of things in response
9 to that, but I think the -- the most straightforward
10 response is that the Bell v. Hood standard is the one
11 that, I think, is best addressed to that concern,
12 because rather than requiring the full-up adjudication
13 of this defendant's status as a violator of
14 international law, it simply applies the same
15 jurisdictional determinations that apply in suits in the
16 United States under the Tucker Act, and says, now that
17 we've assured ourself of jurisdiction, what 12(b)(6)
18 arguments would the defendant like to make?

19 JUSTICE SOTOMAYOR: What discovery would you
20 need if they brought this as a 12(b)(6)? If they came
21 in and said, there is no customary international
22 property right of a parent in a subsidiary's property?
23 What discovery would you be entitled to if they took --
24 if they brought a 12(b)(6) motion?

25 MS. CARROLL: So I want to be clear about

1 the discovery necessary under the commercial nexus
2 requirements, and the discovery necessary to show a
3 violation of international law.

4 JUSTICE SOTOMAYOR: I'm asking a different
5 question. What discovery would you seek, or would you
6 be entitled to have, on what disputed issues of fact to
7 determine the legal question?

8 MS. CARROLL: Well, the defendants have
9 never moved under Rule 12(b)(6).

10 JUSTICE SOTOMAYOR: I understand.

11 MS. CARROLL: So I'm not sure what
12 arguments, specifically, they would make. If they were
13 making factual arguments --

14 JUSTICE SOTOMAYOR: It's the one that they
15 proposed to the district court, which was whether
16 H&P-IDC has standing to assert a taking in violation of
17 international law on the issue of Venezuela's
18 expropriation of H&P-V's property.

19 MS. CARROLL: So that argument was framed as
20 a legal argument. I don't know that it would require
21 any discovery at all. That's why deciding jurisdiction
22 and proceeding to 12(b)(6), I -- I think, you know,
23 again at -- at risk of saying what's good for the other
24 side, I think would serve the comity's interest that's
25 being asserted here, as opposed to a situation where --

1 let's say you have an expropriation complaint, and maybe
2 the facts of the case are that there was a payment of
3 some compensation, but the question is whether it was
4 adequate compensation as international law requires.
5 And maybe even just on the face of the pleadings, or
6 maybe the defendant puts in a factual dispute on that
7 score. What that requires, then, is that the court has
8 to have essentially a mini trial on what is the
9 valuation of this property. What's it's going concern
10 value under the discounted cash-flow model? What was
11 the value of the compensation provided? Is that
12 adequate? All of that has to be decided up front, with
13 the end result being either --

14 MS. CARROLL: You mean under Petitioner's
15 view, with the end results being either I have no
16 jurisdiction, even though I just conducted this whole
17 trial, or I have jurisdiction but it's jurisdiction only
18 to rule for the plaintiff.

19 A court under this position -- under their
20 position can never find that it has jurisdiction to
21 issue a merits -- a merits decision in the defendant's
22 favor. That is an unusual jurisdictional rule, and it's
23 not consistent with how Congress and the Executive
24 Branch, when they were looking at these sorts of
25 situations, and wanting to provide an open door to say

1 we're not opening the courthouse door only to winning
2 claims.

3 They're saying there has been a problem of
4 foreign sovereigns taking property, for discriminatory
5 reasons or without paying for it, using that property to
6 gain advantage in the marketplace, and we want the
7 courthouse doors to be open to that. There's no
8 indication in the text, in the structure, or anywhere
9 that says that's supposed to depart from how these
10 decisions are normally made.

11 And I want to address the Permanent Mission
12 case which Ms. Goldenberg averted to where she, I think,
13 correctly acknowledged that the only issue in that case
14 was the character of the rights in issue as
15 quote/unquote property.

16 There was no issue in that case about
17 whether the plaintiff's claim had any merit to it. The
18 defendants in that case had argued, among other things,
19 that they weren't obligated to pay the tax. And the
20 court said, no, we don't address merits questions. The
21 court did consider the character of the -- of the rights
22 asserted as rights in property. But because that didn't
23 implicate the merits of the claim, the court had no
24 occasion to consider whether Bell v. Hood applied.

25 And as I mentioned earlier, there is no

1 similar dispute here in this case because there's not
2 really any dispute about the fact that the parent-owned
3 shares, that those are property rights, and that the
4 allegation is that the entire value and benefit of that
5 property interest has been completely destroyed by the
6 defendant's conduct.

7 So Permanent Mission simply doesn't speak to
8 any of those -- any of those issues.

9 JUSTICE GINSBURG: What about Verlinden?
10 They cite that many times.

11 MS. CARROLL: They do, and I -- and I am
12 happy for it, because I think Verlinden supports our
13 position. Verlinden describes the FSIA correctly as a
14 comprehensive, substantive regulation of the amenability
15 of foreign sovereigns to sue in U.S. courts. It sets
16 out venue provisions, service of process rules,
17 limitations on damages, rules about attachment of
18 property, and so on. It also imposes substantive
19 provisions requiring a connection between the conduct
20 and the United States. That's how the personal
21 jurisdiction elements work. And it also, in this
22 Court's words, include provisions, quote, governing the
23 types of actions for which foreign sovereigns may be
24 sued and held liable in U.S. courts.

25 That's exactly what we think is the right

1 reading of this provision, which is it's a provision
2 that says if an expropriation and its legality under
3 international law are what's at issue, that's what the
4 suit is about, and if the commercial nexus requirements
5 are met, then the Court has jurisdiction to decide the
6 case one way or the other. And the plaintiff might not
7 win, but the Court has jurisdiction to decide it. It
8 has jurisdiction over the subject matter, and that's all
9 that's required for the claims to go forward.

10 CHIEF JUSTICE ROBERTS: And the -- if
11 there's a dispute about the commercial nexus, that's
12 decided at what stage? 12(b)(1) or 12(b)(6)?

13 MS. CARROLL: We believe that has to be
14 decided at 12(b)(1) because it is a factual requirement
15 just as, for example, a waiver requirement. But it's
16 not unusual to have a jurisdiction provision that
17 combines both of those types of elements.

18 The diversity statute is one, you know,
19 where the citizenship of the parties has to be
20 established. And if there's doubt about it or a dispute
21 about it, the Court must decide at 12(b)(1). But, for
22 example, the amount in controversy need not be fully
23 resolved at the outset.

24 CHIEF JUSTICE ROBERTS: Well, that's really
25 all we're talking about here, and whether the -- the

1 issues set forth in the statute are ones that should be
2 decided at the early stage or not. And -- and whether
3 it's -- there's a commercial nexus, you say, well,
4 that's just -- that's part of the jurisdictional
5 provision, so it has to be decided at 12(b)(1). I don't
6 understand why that answer doesn't apply in this case as
7 well.

8 MS. CARROLL: To be clear, they are all
9 jurisdictional requirements, and they must all be
10 decided up front.

11 The question is, what is the nature of the
12 requirement in this language about what's in issue? Is
13 a right in property is the taking in violation of
14 international in issue? That is the type of
15 jurisdiction requirement that is not a factual
16 requirement in the sense of citizenship of the parties.
17 It's more like the jurisdictional provisions that this
18 Court has considered under the Sherman Act or the
19 Exchange Act, which grants jurisdiction over violations,
20 or the criminal laws which grant jurisdiction over
21 offences, or --

22 JUSTICE ALITO: Does the issue of diversity
23 or the issue of commercial nexus overlap with the merits
24 of those claims?

25 MS. CARROLL: No, they don't. And that's

1 another distinction between that kind of jurisdictional
2 requirement and the kind of requirement that simply goes
3 to what -- what have you put in issue? What's the case
4 about?

5 CHIEF JUSTICE ROBERTS: Well, what if
6 there's a dispute about the shareholder status of the
7 rights and property issue? There may be rights and
8 property, but we think you own only 49 percent of the
9 shares. And the plaintiffs say, no, no, they -- they
10 own 51 percent, so they have a right in property.
11 That's a factual dispute that is decided where?

12 MS. CARROLL: That is a factual dispute that
13 was -- would be part of the merit. If the point of the
14 argument was because of the amount of shares you own,
15 which of course is not an issue here because the parent
16 is the sole shareholder --

17 CHIEF JUSTICE ROBERTS: No, no, I know.
18 It's a hypothetical.

19 MS. CARROLL: But if the argument is because
20 of the amount of shares you own, you don't own enough to
21 be able to succeed and be entitled to relief on the
22 claim that you've alleged, that's a merits
23 determination.

24 CHIEF JUSTICE ROBERTS: Well, it's -- well,
25 or it's a jurisdictional determination because you only

1 have jurisdiction if you have rights and property, and
2 you'd only have rights and property if you own 51
3 percent instead of 49 percent. Why isn't that like
4 somebody coming in and saying, I'm not a citizen of
5 Kentucky?

6 MS. CARROLL: Because the statute doesn't
7 say you must show you have rights and property. It says
8 that you must show that rights and property are an issue
9 in the suit. What's the suit about? It's about an
10 assertion by the plaintiff that their rights and
11 property were taken in violation of -- of international
12 law.

13 The -- the argument that Petitioners has
14 made -- are making now is not a new one. It's an
15 argument that was made to this Court in the *Binderup*
16 case under the Sherman Act in the 1920s. It's an
17 argument that was made to this Court in *Bell v. Hood* in
18 the 1940s. It's the same argument, Justice Ginsburg,
19 that's been made in the whole *Steel Co.* line of cases.
20 And consistently, the Court has recognized that
21 jurisdiction is vital before a court can decide that
22 type of issue.

23 JUSTICE BREYER: So in your view, on the
24 Chief Justice's hypothetical, before -- your view is
25 they move under 12(b)(6) right away and they would say

1 you aren't entitled to relief because you only own
2 49 percent?

3 MS. CARROLL: Right. And nothing would have
4 stopped them from doing that.

5 CHIEF JUSTICE ROBERTS: Well, except that a
6 lot of district judges don't like moving under 12(b)(6)
7 right away. They like to have further development
8 before they -- before they decide whether there's a
9 claim or not.

10 MS. CARROLL: I'm -- I can't say that that's
11 been an -- an issue in this case where there's been fair
12 amount of agreement among the parties and the courts as
13 to what order the issue should be decided in.

14 The -- the petitioners here have asserted a
15 challenge, a factual challenge to jurisdiction under the
16 commercial nexus requirements. They said even though
17 PDVSA is named as the expropriating entity in the
18 decree, and even though PDVSA initiated the eminent
19 domain proceedings, nonetheless, we assert as a factual
20 matter that actually we've shifted ownership and control
21 of the property to some other PDVSA entity, and that
22 entity doesn't engage in commercial activity in the
23 United States, and so, therefore, there's no
24 jurisdiction.

25 And as a matter of fairness, of course we're

1 entitled to examine the -- the factual basis of that
 2 assertion. That's the only discovery that has gone on
 3 so far in the case, and it happened because the
 4 Petitioners chose to make that factual argument. They
 5 didn't have to. They could have just said, we think we
 6 have a great legal argument on the merits, and so we're
 7 going to move under 12(b)(6) to dismiss the action for
 8 failure to state a claim.

9 They have never brought that claim. To this
 10 day, there is no pending motion to dismiss for any of
 11 the grounds that -- that they have asserted for failure
 12 to state a claim, only under 12(b)(1). And of course,
 13 the Rule 12(b) -- the office of Rule 12(b)(1) is very
 14 different from the office of Rule 12(b)(6). 12(b)(1)
 15 implicates all of the concerns of shoving merits issues
 16 into the determination, and for that reason, we think
 17 there's no reason to construe this language to have that
 18 consequence.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Ms. Stestman -- Ms. Stetson, you have a
 21 minute.

22 REBUTTAL ARGUMENT OF CATHERINE E. STETSON
 23 ON BEHALF OF THE PETITIONERS

24 MS. STETSON: Ms. Carroll describes this
 25 case as a subject matter jurisdiction case like any

1 other. What this Court has already said in Altmann is
2 that the FSIA is sui generis. Here, subject matter
3 jurisdiction isn't just about jurisdiction over a class
4 of cases or a type of case. It's jurisdiction over this
5 sovereign standing in front of the Court. That is the
6 difference between 12(b)(1) and 12(b)(6). 12(b)(6)
7 requires that court to have taken jurisdiction, to have
8 exercised its power over that sovereign. Before that
9 happens, it is the sovereign's prerogative to test
10 jurisdiction.

11 In answer, Justice Breyer, to your order --
12 order of battle question, the sovereign sets the order
13 of battle. This is -- the only order that this Court
14 needs to give is the one that it already gave, frankly,
15 in Verlinden, which is courts apply the substantive
16 detailed FSIA standards to determine jurisdiction, not
17 just to hypothesize it.

18 The difference between this case and the
19 Tucker Act is that in the Tucker Act, the jurisdiction
20 depends on a claim against the United States. That's
21 the language that's missing here. And in both the
22 Tucker Act and in this case, there is, of course, an
23 immediate appeal. The reason that an immediate appeal
24 is tolerated under Section 1291, that narrow class of
25 cases where that qualifies, is because this right is so

1 important that it cannot be left for later. That's the
2 difference.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

5 (Whereupon, at 11:04 a.m., the case in the
6 above-entitled matter was submitted.)

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A				
a.m 1:16 3:2 59:5	17:24 18:5	appeals 16:17 41:13 43:21	46:2 47:18 48:12,13	Bank 29:9
able 54:21	affront 26:13,14	APPEARAN... 1:17	arising 11:6 24:24	bar 43:18
above-entitled 1:14 59:6	agree 18:4 42:3	appears 16:14	arrives 27:19	based 25:9
absolute 6:22,23	agreed 14:12	Appendix 17:12	articulated 19:18	basis 8:3 16:6 41:7 43:1 57:1
abstract 11:9	agreement 30:15 56:12	applicable 34:24 35:8	asking 17:15,24 18:5 40:9 48:4	battle 24:6 58:12,13
academic 16:13	AL 1:4,8	application 3:16 36:10	asks 7:25	bears 18:19
acknowledged 12:11 50:13	Alahi 12:9	applied 40:22 50:24	assert 42:11 48:16 56:19	beginning 4:13 13:5 39:14,20 40:1 41:6
act 3:17,25 27:24 28:6 34:23 35:23 36:7 47:16 53:18,19 55:16 58:19,19,22	Alito 6:20 7:11 8:3,8 11:4,22 12:3 15:19 40:15 43:1 53:22	applies 21:3 34:4,22 37:18 46:1 47:14	asserted 20:22 22:12 23:1 33:11 34:2 40:23 48:25 50:22 56:14 57:11	behalf 1:18,25 2:4,11,14 3:9 31:5 57:23
action 11:5 27:12 28:25 57:7	allegation 25:9 28:19 51:4	apply 6:7,8 29:17 44:10 47:15 53:6 58:15	asserted-lien 22:15	believe 26:22 52:13
actions 36:9 51:23	allegations 16:18 45:1	applying 18:13	asserting 25:8 25:13 35:22 40:24	Bell 3:12 6:7 7:9 7:12 18:14,17 19:22 34:23 35:8 36:11 37:8,18 42:24 44:8,10 46:19 47:10 50:24 55:17
activity 56:22	allege 17:7 27:15	appreciate 35:15	assertion 38:5 55:10 57:2	belonging 42:10
actual 30:6 37:9	alleged 54:22	approach 34:10	Assistant 1:20	benefit 51:4
Addendum 31:18	Altman 58:1	appropriate 28:4,10 36:8	assure 34:3 45:25	bespeaks 3:17
additional 36:15	ambassador 26:23	approved 16:17	assured 47:17	best 17:4 47:3 47:11
address 50:11 50:20	ambassadors 34:11,12	arbitrary 43:12	attachment 31:19 51:17	big 37:5
addressed 14:3 47:11	amenability 51:14	area 28:14 29:13 35:9	attempted 16:25	Binderup 55:15
adequate 49:4 49:12	amicus 1:22 2:7 20:7 27:20	arguable 37:7	attention 12:4	birth 25:14
adjudicated 37:13	amount 52:22 54:14,20 56:12	argued 50:18	authority 44:1	bit 16:13 20:13
adjudication 47:12	analogous 6:22 31:13	arguing 30:12	avoid 14:12 34:9	Bivens 11:5
adopted 37:21 44:12	analysis 44:11	argument 1:15 2:2,5,9,12 3:3 3:8 11:23,24 12:1 20:6 31:4 41:22 43:16 48:19,20 54:14 54:19 55:13,15 55:17,18 57:4 57:6,22		blends 5:21
advanced 35:17	anchor 12:6,6	argumentative 40:10	B	blue 31:18
advantage 37:25 50:6	announced 28:16	arguments 40:19 41:15 42:8 45:20	B 39:2,2,3	body 32:21
adversary 41:20	answer 9:11 15:4 23:8 39:3 53:6 58:11		back 16:23 22:5 23:24 41:17 44:12 45:9,18 46:11	Bolivarian 1:3 3:4
adverse 7:1	answered 23:7 23:11,13		bad 26:24	bothering 24:2
advice 15:16,18	appeal 6:18 7:8 7:15 46:7 58:23,23		baked 6:3	bottom 20:15
advisory 17:16	appealed 7:2,5		ball 46:9	bound 10:6
				Branch 49:24
				Breyer 12:16 13:1,4,7,9,12 13:23 14:17,20 14:21 23:22

24:1,11 25:12 38:25 39:8,13 40:3,6,9 41:2 55:23 58:11 Breyer's 45:10 brief 11:1 13:25 27:20 29:23 31:18 34:8,23 34:25 bring 6:5,6 39:23 42:19 bringing 13:16 18:16 brought 27:12 38:13 47:20,24 57:9 burden 25:25	12:9,23 14:22 14:25 15:6,10 15:10 18:10 20:15 21:7 22:20,24 23:15 24:4,5,9,21,25 25:6,17 27:17 28:15,17,23 29:8,10,23 31:1 32:23 33:1 35:1,21 37:6 39:1 40:2 40:21 41:5,6 41:19 42:5 44:16 45:18 46:4 49:2 50:12,13,16,18 51:1 52:6 53:6 54:3 55:16 56:11 57:3,25 57:25 58:4,18 58:22 59:4,5 cases 24:12 31:21 43:22 44:24 55:19 58:4,25 cash-flow 49:10 category 6:23 15:2 CATHERINE 1:18,24 2:3,10 2:13 3:8 31:4 57:22 cause 27:11,13 39:25 cert 18:3 certainly 5:2 6:5 11:8 12:1 34:3 Chabad 28:15 challenge 4:16 6:17 13:21 16:4,6,25 21:21,22 42:6 56:15,15 challenges 16:9 16:10,24 17:3 17:5,5	changes 20:14 character 42:7 50:14,21 Chief 3:3,10 14:20 20:4,9 25:22 26:10,17 26:22 31:2,6 32:5 34:6,19 35:2,5 36:13 43:14 44:7 52:10,24 54:5 54:17,24 55:24 56:5 57:19 59:3 China 39:24 chooses 30:23 chose 57:4 chosen 43:7 44:5 circuit 5:4,8 9:14 17:10 18:13 19:23 28:16,18 46:12 Circuit's 17:4 28:15 circumstance 10:6 25:7 circumstances 4:14 14:11 16:8 17:11 24:13 cite 51:10 cited 34:20,24 44:1 citizen 43:15 55:4 citizenship 32:25 39:11 52:19 53:16 claim 4:1 5:14 9:22,24,25 11:1 13:15 15:1,1 16:19 18:22 22:1 33:11 34:16 35:23 36:22 37:7,9,10,12 38:3,4,11,23	39:21,21 42:6 42:19,23 43:8 43:8,18,24,25 44:2,20 50:17 50:23 54:22 56:9 57:8,9,12 58:20 claims 3:13 5:10 38:3 45:5 50:2 52:9 53:24 class 58:3,24 clear 33:23 42:22 45:13 47:25 53:8 close 44:3,7 closely 11:20 43:22 cognizant 29:14 coherence 11:21 collateral 7:18 collateral-order 7:1,15 colloquy 12:9 combines 52:17 come 12:8 14:6 18:25 22:5 24:15 34:13,15 45:17 comes 3:21,22 16:9 19:6 coming 55:4 comity 36:18 comity's 48:24 commencement 32:9 commentary 43:25 commercial 17:1 33:4,5,14 38:1 48:1 52:4 52:11 53:3,23 56:16,22 common 9:25 23:18 company 3:6 9:15,16 13:17 13:18 17:6,8	18:8 23:3,4,5 43:20 compensated 43:10 compensation 49:3,4,11 complaint 7:14 12:17 13:17 16:16 17:19 49:1 completed 5:4 completely 18:15 51:5 comprehend 5:16 comprehensive 51:14 conceded 45:3 conceivable 10:4 conceivably 4:10 29:4 concern 25:23 47:11 49:9 concerned 25:24 concerns 28:13 29:7,13 57:15 concluded 5:8 17:10 concludes 46:16 conclusion 16:20 concurrence 12:10 concurring 12:10 conditions 25:15 conduct 51:6,19 conducted 49:16 confused 41:19 Congress 10:13 29:13 31:13,25 32:10 35:10 37:19 46:19,21 49:23 connection 28:9 51:19 consequence
---	---	--	--	---

41:10 57:18 consequences 7:18 consider 36:7,23 45:22 50:21,24 considered 4:14 53:18 considering 28:17 consistent 49:23 consistently 55:20 consonant 36:24 constitutional 11:7 construe 57:17 contain 11:3 contended 42:9 contested 7:21 context 12:14 25:19 26:20 34:18,21 35:12 36:11 contexts 42:25 continually 45:17 contrary 34:22 44:1 contrasts 31:12 control 56:20 controversy 52:22 converse 7:6 conversion 27:9 27:12 37:10,12 43:6 corporate 23:5 correct 13:11 16:15,22 32:10 33:19,22,23 34:1 correctly 50:13 51:13 counsel 20:4 31:2 57:19 59:3 counterpart	5:17 countries 15:9 34:12 country 15:4 25:20 26:1,24 28:5 39:16 41:8 couple 4:11 course 4:24 6:16 11:2 28:2 54:15 56:25 57:12 58:22 court 1:1,15 3:11,18,24,25 4:6 5:25 6:1 7:19,24 8:9 9:14 10:8 11:17 15:21,25 16:4,17,17 17:1,25 18:20 19:18 20:10 22:11 25:2 26:1,15,25 28:24 29:9,11 30:8 31:7 32:19,22 33:25 34:3 35:1,7,24 36:3,21 40:24 41:21 42:22 43:21 44:12,23 45:4,19,19,24 45:25 46:4,12 46:16 48:15 49:7,19 50:20 50:21,23 52:5 52:7,21 53:18 55:15,17,20,21 58:1,5,7,13 court's 3:17 17:16 20:19 32:21 45:7,21 45:23 51:22 courthouse 38:2 50:1,7 courts 15:9 25:20 26:8 28:2,5,11	34:13,15,15 35:6 40:22 41:9 51:15,24 56:12 58:15 criminal 53:20 critical 27:6 criticism 24:8 Cuban 37:22 curiae 1:22 2:7 20:7 curious 8:12 11:22 curiously 10:2 customary 43:4 47:21 <hr/> D <hr/> D 3:1 D.C 1:11,18,21 1:24 5:4,8 9:14 17:4,10 18:13 19:23 28:14,16 28:18 damages 51:17 dark 29:23 date 30:4 day 28:24 57:10 deal 37:3 dear 23:25 decide 3:18,20 3:21 4:1 7:20 7:24,25 8:10 14:25 15:11,11 16:1 18:10,12 19:20 21:24 24:6,7 25:4 33:25 36:4 44:18 46:16 52:5,7,21 55:21 56:8 decided 9:19 16:22 19:3 21:11,14,20 22:8,10,11 27:6 28:18 30:16,24 35:25 37:14 42:8	44:21 49:12 52:12,14 53:2 53:5,10 54:11 56:13 deciding 15:23 20:1 48:21 decision 12:15 20:19 28:15 29:9 35:1 36:21 49:21 decisions 50:10 decree 56:18 deed 22:3,5 23:19,20 deemed 43:19 defendant 12:18 13:2 14:6 36:12,21 37:1 38:5 47:18 49:6 defendant's 38:6 47:13 49:21 51:6 defendants 14:14 35:21 40:5 41:14 42:9 45:16 48:8 50:18 defense 35:23 36:15 defenses 10:1 35:22,24 36:23 45:13 defines 34:5 defining 21:5 definition 20:23 22:13 24:20 depart 50:9 Department 1:21 41:20 Department's 30:5 departs 35:10 depended 16:20 16:20 depending 9:24 depends 12:2	58:20 described 5:13 6:1 describes 51:13 57:24 describing 21:5 destroyed 51:5 detailed 6:2 58:16 determination 27:14 28:22 36:24 39:6 44:5,14 46:10 46:23,23,25 54:23,25 57:16 determinations 19:9 46:15 47:15 determine 7:12 13:9 19:15 48:7 58:16 determined 35:11 determining 44:25 development 56:7 develops 4:7 dictates 11:20 differ 6:13 24:12 difference 15:21 19:25 26:2,5,7 26:23 27:2,8 33:7,8 40:6,11 40:14,14 58:6 58:18 59:2 different 6:15 20:13 27:22,23 32:11 34:9 39:1,9,17 48:4 57:14 differs 6:14 46:24 difficult 47:2 dignitary 25:19 dignity 19:7 25:11 36:18,25
--	--	---	--	--

disagree 21:17	domain 56:19	establish 33:15	expropriating	favor 49:22
discounted	domestic 4:20	36:14 45:7	56:17	federal 6:2,9
49:10	43:15	established 33:2	expropriation	11:16 20:22
discovery 14:14	domestically	43:5 46:20	9:23 11:15	24:24 26:25
17:17 47:19,23	4:21	52:20	27:4,9,17,22	feeling 28:21
48:1,2,5,21	door 18:21	establishing 6:4	27:23 28:8,17	figure 20:21
57:2	38:22 49:25	31:23	28:25 31:9,20	30:24
discrete 5:17	50:1	establishment	43:10 48:18	filed 11:5 12:19
discriminatory	doors 38:2 50:7	33:10	49:1 52:2	29:10
42:20 43:12	doubt 52:20	ET 1:4,8	expropriations	files 39:3
50:4	doubts 46:3	everybody 24:4	37:22,23,25	find 24:16,17
discussion 12:7	dragging 34:14	evidence 12:25	extent 4:22 5:16	40:24,25 43:23
31:15	Drilling 1:8 3:6	exactly 27:13	extreme 35:13	49:20
dismiss 5:23	dropped 28:23	30:21 32:18		finding 4:8,24
7:13 57:7,10		33:5 35:7	F	16:18
dismissal 3:14	E	51:25	face 49:5	finds 4:6
dispose 25:17	E 1:18 2:1,3,13	examine 57:1	fact 4:7 7:19 9:8	finish 27:21
dispute 9:9	3:1,1,8 57:22	example 4:15	14:10 16:18	first 3:4 4:12
10:19,22 19:2	earlier 15:20	6:22 16:24	18:6 21:12,15	7:23 10:21
23:14,15 24:16	31:15 33:24	23:17 33:1	21:22 24:19	22:20 24:6
26:8 31:10	40:15 44:13	35:23 42:13	25:12,14 31:25	28:16 36:3,20
42:5,16,18	50:25	52:15,22	32:2 33:10,15	44:19,21 45:8
49:6 51:1,2	early 33:15 53:2	exception 27:4	37:14 38:20	focused 9:12
52:11,20 54:6	easy 44:18	28:8 31:9,22	39:11 48:6	following 16:13
54:11,12	either 8:1 49:13	34:4 38:14	51:2	40:18 42:9
disputed 48:6	49:15	exceptionally	facts 14:7 16:6	44:24
disputes 14:3,4	ELAINE 1:20	3:12	16:20 19:2	forecloses 18:15
30:16,18,24	2:6 20:6	exceptions 30:6	24:15,15,19	44:1
45:2	elements 51:21	46:1	33:2 49:2	foreign 3:16,19
distinction	52:17	Exchange 53:19	factual 4:15 8:2	3:25 4:19 8:22
22:19 54:1	eminent 56:18	execution 31:20	14:3,3,4 16:10	9:2 10:14 15:4
district 9:14	engage 56:22	32:6	16:23,25 21:22	15:8,22,24
16:16 24:8	engaging 11:10	executive 37:20	30:15,18,23	16:3 19:6 22:4
25:4 28:23	entire 51:4	49:23	42:24 45:2	25:8,10,20,21
45:19,19 46:11	entitle 5:15	exercise 3:19	48:13 49:6	26:1,2,6,13,14
48:15 56:6	entitled 3:20,22	15:24 16:13	52:14 53:15	26:15 27:24
diversity 12:17	6:17 7:7,7 8:10	45:6	54:11,12 56:15	28:13 29:5
12:23 15:3	8:19 47:23	exercised 58:8	56:19 57:1,4	30:9,23 34:10
24:21,24 33:1	48:6 54:21	exercising 15:21	failure 57:8,11	35:14 36:9,19
39:1,4,17	56:1 57:1	exist 24:20	fair 56:11	41:8 43:18,19
52:18 53:22	entity 56:17,21	exists 4:3 9:17	fairly 44:13	50:4 51:15,23
diverted 22:22	56:22	18:12 40:4	fairness 56:25	forgery 22:6
doctrine 7:1,16	especially 4:18	explain 8:21	fall 24:19,23	forgetting 45:1
35:24 36:7	ESQ 1:18,20,24	explained 3:24	falls 15:2 20:22	forgot 44:16
40:21	2:3,6,10,13	10:9 11:11,13	22:13 24:23	forth 4:22 23:24
doing 10:17 56:4	essentially 6:3	11:17	far 18:18 25:1	34:8 46:11
Dollar 34:25	49:8	explaining 9:14	46:20 57:3	53:1

forward 5:11 22:14 52:9	55:18	25:13	hypothetical 4:17 10:5 54:18 55:24	4:20
found 41:21	give 15:15 58:14	guess 8:20 21:8		incorporation 43:17
framed 48:19	given 24:19	22:18 41:3		indication 50:8
frankly 58:14	go 5:11 25:14	guilty 37:13	I	indisputably 11:24
frivolous 3:15 34:17	34:11 41:15,17 45:9 52:9		Illinois 12:19,20 39:3	inexorably 18:15
frivolousness 19:22	goes 31:15 45:22 46:4 54:2	H	imagine 10:6	infallible 12:13
front 14:15 15:12 49:12 53:10 58:5	going 14:18 16:14 24:3,4 26:17,18 28:2 44:12 46:9,11 49:9 57:7	H&P-IDC 48:16 H&P-V's 48:18	immediate 6:18 7:8 58:23,23	initial 4:23
front-loaded 19:3	Goldenberg 1:20 2:6 20:5,6 20:9 21:2,17 22:24 23:12,25 24:10 25:7,18 26:5,12,21 27:2,10,23 29:12,21 30:3 30:13,18,22 45:2 50:12	haled 26:1 hands 14:22 happen 4:9,10 4:11 29:3,4 happened 5:3 57:3 happens 58:9 happy 40:22 51:12 harm 25:19 hate 45:10 haul 39:16 head 19:4 hear 3:3 24:2 hearing 4:25 healing 11:19 held 35:1,7 51:24 Helmerich 1:7 3:5 Hey 12:19 holding 44:22 holds 36:22 home 26:24 Honor 4:11 7:22 Honor's 44:23 Hood 3:12 6:7 7:9,13 18:14 18:18 19:22 34:23 35:8 36:11 37:8 42:24 44:8,11 46:20 47:10 50:24 55:17 hopeful 25:1 hypothesize 58:17 hypothesizing 20:1	immune 8:23 9:3 10:14 28:22 immunities 3:16 6:25 immunity 3:21 3:22,25 4:7,9 4:12,24 5:1,9 6:22,23,24 7:4 8:4,10,19 28:23 30:7,9 31:19,22 32:13 32:16,19 34:1 34:10,21 35:3 40:24,25 42:25 45:25 implicate 50:23 implicates 38:24 57:15 implications 35:16 36:1 40:16,17 important 7:6 11:15 27:11 30:12 59:1 importantly 6:15 imposed 25:25 imposes 51:18 imposing 28:24 29:1 inasmuch 7:4 include 51:22 included 6:9 includes 31:20 including 35:12 incorporated	inquire 36:8 inquiries 32:25 35:11 inquiry 6:13,16 10:7,18 insert 11:1 instance 12:25 22:2 23:15 instances 4:5,5 insubstantial 3:15 34:17 intense 12:7 interest 7:16 23:6 48:24 51:5 interests 37:24 41:22 46:13 47:3 interlocutory 6:18 41:12 46:7 international 1:7 3:5 8:24 9:4,21 10:4,16 10:20,23 11:14 13:19 17:9,20 19:25 20:17,25 21:4,5,14,19 27:5 28:7,20 29:16,19 30:20 31:24 32:1 35:20 36:1,5,6 36:20,22 37:8 37:14 38:4,6,8 38:12,22 39:23
G				
G 3:1	good 15:10 24:3 24:4 37:3 38:6 48:23 gotten 28:22 37:11 governing 42:24 51:22 government 6:23,24 13:24 27:19 29:25 34:20 government's 30:2,5 38:18 governs 31:19 grant 30:8 53:20 granted 18:3 grants 53:19 gravamen 38:4 great 57:6 green 29:23 grounded 9:25 10:1 grounds 57:11 Guam 24:21			

42:19 43:4,9 43:13 47:6,14 47:21 48:3,17 49:4 52:3 53:14 55:11 interpretation 12:12 Iran 29:10 issue 5:3 8:25 9:5,12,13,17 9:19 10:17 11:2,7,11,12 11:16 12:8,11 15:5 17:23 20:17,18 21:1 21:3,9,16,16 21:23 22:7 24:18 26:11 27:6 29:6,16 29:18 31:10,16 32:8 38:16 39:1 42:17 43:16,22 45:15 48:17 49:21 50:13,14,16 52:3 53:12,14 53:22,23 54:3 54:7,15 55:8 55:22 56:11,13 issued 29:9 issues 17:17,18 24:14 26:3 32:13,16 40:16 45:8,22 46:6,8 46:9 48:6 51:8 53:1 57:15	26:15,18 28:5 28:11 31:22 32:6 judicial 11:21 jurisdiction 3:14 3:17 4:2,6 5:24 6:4 7:12 8:11 11:6 13:10 15:12,14,23 16:1,7,24 18:9 19:1 20:1 24:7 24:17 25:8,13 29:8 32:22 36:6,15,16 39:18 41:1,12 43:7 44:21 45:6,7,23 46:5 46:17 47:17 48:21 49:16,17 49:17,20 51:21 52:5,7,8,16 53:15,19,20 55:1,21 56:15 56:24 57:25 58:3,3,4,7,10 58:16,19 jurisdictional 6:3,10 7:19 10:3,7 11:17 13:6,21 14:8 14:13 17:13 18:11,23 19:4 19:8,19 20:20 21:11,15,20,25 22:10 23:7 26:9 27:7,14 27:15,16 31:8 32:2,13,17,25 33:9,17 35:11 36:11 38:19 39:11 40:17 42:22 43:5 45:20 46:10,25 47:15 49:22 53:4,9,17 54:1 54:25 jurisprudence	32:21 Justice 1:21 3:3 3:10 4:4,17 5:5 5:12,20 6:12 6:19,20 7:11 8:3,8,13,17 9:10,18 10:10 11:4,22 12:3 12:10,16 13:1 13:4,7,9,12,22 13:22 14:2,17 14:18,20,20,21 15:14,19,25 16:12,21 17:14 18:2,5,17 19:5 19:10,13 20:4 20:9,24 21:8 22:18 23:10,21 23:22 24:1,11 25:12,22 26:10 26:17,22 27:8 27:18,21 29:8 29:20,22 30:11 30:14,21 31:2 31:6,14 32:5 32:12,16 33:3 33:7,13,17,20 34:6,19 35:2,5 35:13 36:13 37:2 38:9,15 38:25 39:8,13 40:3,6,9,15 41:2,17,17 42:3 43:1,14 44:7,12,15 45:9,10 47:1 47:19 48:4,10 48:14 51:9 52:10,24 53:22 54:5,17,24 55:18,23 56:5 57:19 58:11 59:3 Justice's 55:24	9:18 10:10 13:22 14:2,18 20:24 21:8 22:18 23:10,21 31:14 33:3,7 33:13,17,20 37:2 38:9,15 45:9 keep 15:8 KENNEDY 4:4 4:17 5:5 27:8 27:21 32:12,16 35:13 47:1 Kentucky 12:18 12:20 39:2,4 55:5 kind 10:4 14:25 20:21 21:5 24:6,18,22,25 27:12 28:6 30:25 38:23 46:22,24 54:1 54:2 kinds 24:14 25:15 32:24 33:9 38:3 39:25 45:5 knew 32:3 know 4:8,25 5:6 14:4 17:22 18:18 20:19 23:8 24:22 27:19 30:1,3 37:6 38:25 40:10 47:3 48:20,22 52:18 54:17	32:11 33:12,14 33:21 37:4 46:19 53:12 57:17 58:21 Larson 35:1 law 8:24 9:4,21 9:25 10:4,16 10:20,24 11:14 13:19 17:5,9 17:20,21 19:25 20:17,22,25 21:4,5,12,14 21:14,19,21 24:24 27:5 28:7,20 29:16 29:19 30:20 31:24 32:1 35:20 36:1,5,6 36:20,22 37:8 37:15 38:4,6,8 38:12,22 39:23 42:19 43:4,6,9 43:13 47:6,14 48:3,17 49:4 52:3 55:12 laws 53:20 lead 11:24 12:1 leave 25:4 left 9:18 21:9,16 59:1 legal 8:2 13:16 13:23 14:15 16:9,15,20 17:18 18:3 23:6 35:22 41:14,21 42:6 44:25 45:5 46:8,15 48:7 48:20 57:6 legality 52:2 legally 14:5,7 legitimate 15:1 lend 12:12 let's 41:17 49:1 liable 51:24 lie 8:11 limitations
J J 1:20 2:6 20:6 Joint 17:11 judge 4:18,24 12:21,22,23 14:25 15:7 25:4,15 39:5 40:1 41:5 judges 24:8 56:6 judgment 25:21	J J 1:20 2:6 20:6 Joint 17:11 judge 4:18,24 12:21,22,23 14:25 15:7 25:4,15 39:5 40:1 41:5 judges 24:8 56:6 judgment 25:21	K Kagan 8:17 9:10	L label 36:21 labeled 47:5 labeling 7:18 lack 3:14 5:24 Land 34:24 language 8:21 9:6 10:2,17 31:12,13,21	L label 36:21 labeled 47:5 labeling 7:18 lack 3:14 5:24 Land 34:24 language 8:21 9:6 10:2,17 31:12,13,21

51:17 limited 45:5 line 20:15 55:19 litigates 26:3 litigation 4:2 5:10 32:9 little 16:12 20:13 47:1 load 14:15 16:23 long 3:15 38:20 38:23 43:9 46:20 look 8:20 11:20 12:14,24 19:19 28:7 41:3 44:3 44:7 looked 43:21 looking 37:22 41:14 49:24 loose 6:7 loses 6:17 lot 24:12 47:8 56:6 low 3:12 18:14 18:17 34:17	mean 8:17 17:15 25:23 32:21 36:14 39:13 49:14 meaning 31:15 meaningful 11:5 30:9 means 3:23 16:3 20:20 41:12 46:13 meet 18:23 mentioned 50:25 merit 22:23 23:11,13 50:17 54:13 merits 4:25 10:6 19:2,9 21:16 22:8 23:14 37:11,11 38:16 40:16 42:21 43:3 46:9,15 49:21,21 50:20 50:23 53:23 54:22 57:6,15 merits-based 35:22 met 27:16 52:5 mind 14:22 15:8 mini 35:18 49:8 minute 57:21 missing 10:11 10:11 58:21 Mission 20:20 22:11,14 50:11 51:7 mistake 4:8 mixed 24:5 model 49:10 morning 3:4 Moscow 29:1 motion 5:23 6:6 47:24 57:10 motions 45:12 motivations 42:1 move 7:13 40:12	40:12 55:25 57:7 moved 48:9 moving 56:6 mystical 39:15 <hr/> N <hr/> N 2:1,1 3:1 name 44:16 named 56:17 narrow 58:24 nature 9:24 15:22 42:23 53:11 necessarily 38:16 necessary 14:13 19:8 48:1,2 need 21:24 30:7 30:24 47:20 52:22 needs 3:20 58:14 never 22:6 24:7 48:9 49:20 57:9 new 41:13,15 45:17,19 55:14 news 26:24 nexus 17:1 28:7 33:4,6,14 48:1 52:4,11 53:3 53:23 56:16 nonfrivolous 25:9 28:19 normal 28:2 normally 39:5 50:10 noted 34:22 notorious 37:23 November 1:12 number 6:14 40:19 <hr/> O <hr/> O 2:1 3:1 obligated 50:19 obligation 45:22	observation 44:13 observed 45:24 occasion 50:24 occurred 45:18 offences 53:21 offense 29:6 office 57:13,14 official 6:23,24 Oh 23:25 okay 10:9 12:19 13:7 14:17 40:6 once 29:25 46:16 ones 34:8 43:23 53:1 open 38:2 49:25 50:7 opening 50:1 opens 38:22 opinion 17:4,16 17:24 18:6 opinions 44:23 opportunity 45:16 opposed 26:3 48:25 opposite 5:5 32:15 opposition 29:24 oral 1:14 2:2,5,9 3:8 20:6 31:4 order 14:12 19:1 24:6 56:13 58:11,12,12,13 ordinary 15:6 ought 41:5 ourself 47:17 outset 32:2,6 33:2 34:4 35:19 52:23 outside 12:24 overlap 27:13 53:23 overlapping	4:22 ownership 22:17 23:6 56:20 <hr/> P <hr/> P 3:1 page 2:2 31:18 pages 10:25 panel 17:4 parent 9:15,16 13:17 17:6,20 18:7 41:22 42:11,12 47:22 54:15 parent's 42:6 parent-owned 51:2 part 11:19 21:17 29:14,25 47:4 53:4 54:13 particular 9:23 12:24 14:11 32:22 33:11 35:9 particularly 11:15 27:3 parties 7:21 14:12,14 33:1 39:11 52:19 53:16 56:12 party 47:2,2 pass 19:16 passable 17:13 pay 12:4 50:19 paying 50:5 payment 49:2 Payne 1:7 3:5 PDVSA 56:17 56:18,21 peculiar 19:14 pending 57:10 people 27:20 29:24 percent 54:8,10 55:3,3 56:2 Permanent
---	---	---	---	---

20:20 22:11,14 50:11 51:7 permitting 5:10 person 23:19 personal 51:20 perspective 36:18 Petitioner 12:17 30:15 Petitioner's 38:18 49:14 petitioners 1:5 1:19,23 2:4,8 2:14 3:9 20:8 20:14 34:20,24 35:17 43:25 44:4 55:13 56:14 57:4,23 phrase 3:22 9:11 11:15 33:18 place 8:16 32:7 places 39:17 plaintiff 9:16 12:18,18 18:10 21:25 22:2 23:16 33:11 38:20 41:8 49:18 52:6 55:10 plaintiff's 3:13 50:17 plaintiffs 18:16 40:21 42:18 54:9 pleading 3:12 12:24 13:20 14:5 pleadings 16:5 17:6,12 49:5 please 3:11 20:10 31:7 point 7:5,10,23 11:19 12:2,6,7 18:22 27:11 28:21 38:21 54:13 policy 11:21	posed 15:19 position 5:16 10:8 11:25 27:19 29:24 30:1,2,5,6 33:24 34:2 35:17 38:19 42:14 49:19,20 51:13 possesses 9:16 22:1 possession 22:16 possessions 41:23 possible 5:1,2 24:23 41:7 potentially 46:7 power 3:18,19 15:22,24 58:8 practical 14:24 14:24 15:16,18 24:13 practice 3:23 precedent 18:15 precisely 5:7 40:4 predicate 18:11 21:1 43:5 predicated 11:6 predicates 8:2 prerequisites 27:15 prerogative 8:1 58:9 present 16:4 presented 3:25 presenting 29:24 presently 11:12 preserving 19:6 press 38:11 pressed 4:13 pretty 15:10 prevail 19:1 prevented 40:5 previously 45:21 prime 11:23	principles 43:13 probably 37:16 40:13 problem 10:7,24 11:10 18:8,8 37:5 50:3 problematic 5:3 problems 28:12 37:21 39:25 procedurally 6:15 proceed 42:18 44:4 proceeding 40:5 48:22 proceedings 56:19 process 51:16 producing 7:17 property 8:24 9:3,8,20 10:15 17:7,8 20:16 20:19,23 21:6 21:11,13,19,23 22:3,6,9,13,16 22:17,17,21 23:1,4,20 27:25 28:9,19 29:18 30:19,25 31:23 36:19 37:23 38:7,21 39:22 41:22 42:7,10,10,14 42:17,21 43:2 43:3,14,20 47:22,22 48:18 49:9 50:4,5,15 50:22 51:3,5 51:18 53:13 54:7,8,10 55:1 55:2,7,8,11 56:21 proposed 48:15 proposing 34:22 protecting 36:18 protects 36:25 prove 43:2	proves 7:5 provide 49:25 provided 49:11 provision 8:5,15 9:24 20:12 31:13,20 41:1 52:1,1,16 53:5 provisions 6:10 33:9 51:16,19 51:22 53:17 public 27:24 43:11 purpose 40:4 43:11,21 purposes 6:4 11:14 15:20 16:3 29:14 pursuant 5:24 pushed 23:23 put 22:14 25:16 46:10 54:3 puts 49:6 Putting 18:24	14:15 50:20 quickly 15:11 quintessentially 13:21 quite 6:20 39:19 quote 31:9,23,23 43:25 51:22 quote/unquote 42:17 50:15
R				
R 3:1				
raise 4:15 30:23 41:15				
raised 4:18 10:1 28:14 34:16 46:8				
raising 11:23				
rate 19:24				
reacting 37:20				
read 20:12,14 29:22 37:3				
reading 8:21 9:1 10:24 11:16 52:1				
real 25:19 26:13 28:12,13,13 29:7,12 39:21				
really 4:25 14:23 15:1,9 15:13 24:1,23 26:2 39:25 46:12 47:3 51:2 52:24				
reason 11:20 15:17 16:14 25:24 26:6 29:15 37:17 39:14 46:18 57:16,17 58:23				
reasonable 11:9				
reasoning 39:19				
reasons 4:12 50:5				
REBUTTAL 2:12 57:22				
received 24:8				

reciprocal 25:25	45:3 52:23	rights 8:23 9:3,7	says 8:9,22 12:4	shoving 57:15
reciprocity	resolving 45:1,4	20:16,18,23	13:25 20:16	show 18:22 28:9
29:12	respect 5:23	21:23 22:9,13	26:24 31:21	38:20 48:2
recognize 44:25	6:16 7:23 9:15	23:2,4 31:23	39:2,2,2 47:16	55:7,8
recognized	9:22 13:15	42:7,7,12,12	50:9 52:2 55:7	showing 42:24
43:10 55:20	16:22 17:17	42:14,15,15,17	scope 38:8	side 23:23 48:24
red 34:8	21:23 25:10	42:17 50:14,21	score 49:7	significant
reference 33:24	27:3,25 30:19	50:22 51:3	second 24:18	15:21 26:11
35:14	39:7 41:25	54:7,7 55:1,2,7	30:17	40:14
referred 40:15	42:4,5	55:8,10	section 3:21,23	similar 51:1
regarding 31:15	respects 6:15	risk 48:23	6:6 8:7,16,17	simply 33:10
regulation 51:14	Respondent's	ROBERTS 3:3	31:14,17,18,19	38:19 47:14
relations 28:13	10:8,24	14:20 20:4	58:24	51:7 54:2
relationship	respondents 1:9	25:22 26:10,17	see 10:25 17:3	Sinochem 44:23
22:6	1:25 2:11	26:22 31:2	36:16 38:15	sit 25:21 28:5,11
relevant 6:8	16:23 31:5	32:5 34:6 35:2	seek 48:5	sits 26:15
32:23	response 12:19	35:5 36:13	seeking 38:11	sitting 26:18,18
relief 5:15 54:21	13:22 15:19	43:14 44:7	seize 39:22,22	situation 23:19
56:1	28:25 47:8,10	52:10,24 54:5	sense 36:9,14	43:18 48:25
relying 40:20	responses 7:22	54:17,24 56:5	53:16	situations 49:25
remand 45:19	restatement	57:19 59:3	sensitive 27:3	sole 54:16
remedy 38:11	43:24	robust 44:13	29:6	Solicitor 1:20
reminds 24:5	result 42:20	Rudolph 44:24	sensitivities	solution 19:6
repeat 45:10	49:13	rule 18:20 28:16	28:13	37:21
reply 34:25	results 49:15	40:3 48:9	sensitivity 35:14	somebody 24:22
reprinted 31:17	right 5:8 7:6	49:18,22 57:13	serial 41:12	25:13 39:16
Republic 1:3 3:5	8:18,25 9:12	57:13,14	serially 41:15	55:4
require 33:9,10	9:13,17,17,17	ruled 17:19	serious 17:22	Somebody's
36:24 48:20	9:20 10:13,13	rules 4:18 51:16	25:23	24:21
required 5:25	10:15,22 11:7	51:17	serve 7:16 48:24	someplace 39:24
52:9	11:11,12 12:21	ruling 7:1 16:19	serves 46:13	soon 15:5
requirement	13:16,17,18	run 15:7	service 51:16	sorry 13:3 14:19
52:14,15 53:12	14:9 17:6,21	Russia 28:18,21	set 14:11 24:5,15	17:14 30:11
53:15,16 54:2	17:23 18:7,8	28:25	34:8 37:20	36:13 38:9,9
54:2	18:12 19:24		53:1	38:10
requirements	20:21 21:1,9	S	sets 51:15 58:12	sort 32:9 45:16
27:16 28:8	21:10,12,13	S 2:1 3:1	shareholder	sorts 7:20 49:24
30:6 48:2 52:4	22:1,12,15,15	sanctions 28:24	23:5,16,17	Sotomayor
53:9 56:16	22:16,21 23:1	29:2	54:6,16	16:12,21 17:14
requires 35:19	30:25 33:4	satisfied 19:21	shareholder's	18:2,5 30:11
49:4,7 58:7	34:6 37:15,17	19:22,24 30:7	23:2	30:14,21 41:17
requiring 47:12	37:17 39:6,14	satisfy 4:2 37:8	shares 23:3	42:3 47:19
51:19	41:6 44:4	saying 13:12,14	42:13 51:3	48:4,10,14
reserve 20:3	47:22 51:25	30:16 32:12,14	54:9,14,20	Sotomayor's
resolve 28:3	53:13 54:10	33:14 47:4	Sherman 53:18	44:12
46:4	55:25 56:3,7	48:23 50:3	55:16	sounds 5:13
resolved 32:2	58:25	55:4	shifted 56:20	24:2

sovereign 3:16 3:19,20,25 4:1 4:13,15 5:11 6:16 7:7,25 8:10,19 9:23 15:22,24 16:3 16:9 26:2,6,13 26:14,16 27:24 34:10,14,21 35:3,20 36:5 36:12,19,25 40:23 42:25 43:19 45:25 46:3 58:5,8,12	32:19,20 34:5 34:17,21,24 35:8,10 37:9 42:24 43:4 44:9 46:20 47:10 standards 5:22 6:2,9 17:13 19:20 58:16 standing 42:11 48:16 58:5 starkly 31:12 start 15:12 20:11 started 28:24 29:1 state 8:22 9:2 10:14 16:19 22:4 25:8,20 25:21 29:5 30:5,10,23 35:23 36:7 41:20 57:8,12 State's 25:10 stated 5:14 18:11,22 44:20 states 1:1,15,22 2:7 3:19 20:7 25:25 26:7 28:10,10 29:2 29:10,23 35:3 35:6,18 39:24 47:16 51:20 56:23 58:20 status 47:13 54:6 statute 5:15 8:14 8:20,22,22 9:2 10:3 11:2,7 20:16 24:20 27:16 33:18 37:19 38:1,13 46:22 52:18 53:1 55:6 statutes 11:17 34:7 42:22 statutory 8:5	41:13,15 Steel 44:24 55:19 stemming 28:14 step 17:16 steps 17:25 Stestman 57:20 Stetson 1:18 2:3 2:13 3:7,8,10 4:10 5:2,7,20 6:14 7:3,22 8:7 8:9,15 9:10,22 10:21 11:8 12:1,5,23 13:2 13:5,8,11,14 14:1,10 15:17 16:2,21 18:1,4 19:5,12,17 40:20 45:2 57:20,22,24 stopped 56:4 straight 37:10 straightforward 46:15 47:9 strange 18:24 strong 29:23 structure 50:8 sua 45:22 subject 3:14,17 5:24 15:23 32:18,22 41:11 46:6 52:8 57:25 58:2 subject-matter 45:23 46:5 submit 44:11 submitted 59:4 59:6 subsidiary 4:20 17:8 23:4 41:23 42:11,13 43:17,19 subsidiary's 13:18 17:7 47:22 substantive 6:2 6:9 19:19	51:14,18 58:15 substitute 44:19 succeed 54:21 sue 17:1 51:15 sued 26:7,25 34:13 51:24 sufficiency 13:16,20,24 14:15 16:5,16 17:5 41:14 45:1,5 sufficient 14:6,7 16:18 17:19 suggest 46:22 suggesting 9:6 suggests 13:23 33:24 sui 58:2 suing 35:14 suit 6:25 29:10 31:10 38:10 52:4 55:9,9 suitable 25:5 suits 34:23 47:15 support 43:24 43:25 supporting 1:22 2:8 20:8 supports 8:5 11:25 51:12 Suppose 39:1 supposed 50:9 Supreme 1:1,15 sure 5:21 18:7 32:24 46:12 47:7 48:11 survive 3:13 suspect 46:18 swing 23:24 sympathy 37:3 system 46:8 <hr/> T <hr/> T 2:1,1 take 4:4 7:8,15 12:25 14:17	24:19 25:3 29:5 37:6 taken 8:24 9:4,8 9:21 10:15,16 10:23 11:13 13:18 17:9 19:24 20:17,25 21:3,4,13,19 22:4 27:25 28:19 29:18 30:19 31:24 36:19 38:7,21 42:10,15 43:3 43:3 55:11 58:7 talking 15:12 18:9 20:11 21:6 29:5 32:8 34:7 35:2 37:12 52:25 taught 15:14 tax 50:19 tell 24:11 27:18 47:2 tempted 47:8 term 11:18 territory 27:25 28:1,3 test 7:12 10:4 31:8 58:9 tested 7:8 text 8:14 11:20 11:24 12:2,2,4 12:5 20:12 50:8 Thank 20:4 31:2 57:19 59:3 theories 45:17 theory 41:13 thing 15:11 24:3 28:4 39:15 things 8:12 10:21 15:13 25:15,16 47:8 50:18 think 4:19 5:3 5:12,12 9:10
---	--	--	--	--

9:11 10:10 11:11 13:24 15:17 16:19 18:18 20:12,24 21:2,4,18,24 22:24 23:13,18 26:16 27:3,10 29:13 30:4 33:12 34:1 35:16 36:2,5 36:24 37:16 38:12,15 39:1 40:13 41:19 43:2 44:12,18 47:9,11 48:22 48:24 50:12 51:12,25 54:8 57:5,16 thinking 14:21 third 24:25 25:3 thought 39:15 44:8 three 24:14 threshold 4:1 9:7 18:23 19:16 22:21 27:6 30:7 45:4 till 40:2 time 14:4 20:3 45:20 times 51:10 title 3:22 38:6 toe 18:21 tolerated 58:24 tort 38:4,13 tracks 10:2 treated 41:11 43:20 trial 15:7 35:18 49:8,17 true 7:3,3 try 8:21 39:20 41:6 Tucker 34:23 47:16 58:19,19 58:22 turn 5:25 42:23	turns 31:9 32:19 two 5:21 7:22 10:21 25:5 34:25 42:18 type 33:11 46:25 53:14 55:22 58:4 types 51:23 52:17 typical 16:25 <hr/> U U.S 17:1,2 37:24 51:15,24 U.S.-owned 36:19 uncompensated 42:20 underlying 27:11 understand 6:21 15:13 25:23 38:18 45:11 48:10 53:6 understanding 22:19 41:24 42:1 Understood 25:18 unfair 37:25 unfortunate 7:17,18 United 1:1,15,22 2:7 3:18 20:7 25:25 26:7 28:9,10 29:2 29:10 35:3,6 35:18 39:24 47:16 51:20 56:23 58:20 unsuccessful 7:14 unusual 49:22 52:16 upset 41:20 42:2 <hr/> V	v 1:6 3:5,12 6:7 7:9,13 18:14 18:17 19:22 34:23,24 35:8 36:11 37:8 42:24 44:8,10 46:19 47:10 50:24 55:17 validity 36:8 valuation 49:9 value 49:10,11 51:4 Venezuela 1:3 3:5 4:21 47:5 Venezuela's 48:17 Venezuelan 13:18 17:8 43:17 venue 51:16 Verlinden 3:24 19:18 30:8 45:24 51:9,12 51:13 58:15 version 40:20 viable 41:21 view 35:21 36:10,25 37:19 45:11 49:15 55:23,24 violated 35:20 36:6 37:14 38:5 violation 8:24 9:4,21 10:3,16 10:19,23 11:14 13:19 17:9 19:25 20:17,25 21:3,4,14,19 27:5 28:6,20 29:16,18 30:20 31:24 32:1 36:1,4,20 37:7 38:3,7,12,22 39:22,23 42:19 43:3,9 48:3,16 53:13 55:11	violations 53:19 violator 36:22 47:5,13 vital 45:7 55:21 <hr/> W wait 8:13 40:2 waive 8:4 45:13 waived 4:14 40:25 waiver 40:20 45:15,25 52:15 want 15:8 17:15 25:24 33:23 34:14 38:2 39:16 46:22 47:5,25 50:6 50:11 wanted 22:4 31:25 44:4,6 wanting 49:25 wants 25:15 Washington 1:11,18,21,24 wax 46:9 way 5:22 7:5 10:12 14:11 20:11,13,14 23:23 24:16,17 26:18 33:18 37:3 39:23,24 43:20 46:24 52:6 We'll 3:3 we're 11:18 13:15 24:3 26:7,25 28:17 29:5 32:8 41:13 50:1 52:25 56:25 57:6 we've 11:13 34:2 47:17 56:20 Wednesday 1:12 weighed 40:19 well-established 43:13	went 45:18 weren't 50:19 wholly 3:15 34:16 win 15:2 52:7 winning 15:10 50:1 word 11:1 words 9:5 12:11 17:11 29:16 31:10 32:3 33:13 45:7 51:22 work 12:16 51:21 World 29:11 worried 25:6 worry 26:25 wouldn't 6:17 27:13 write 24:3 46:21 writing 10:12 written 33:18 35:10 46:21 wrong 14:8 16:15 17:22,22 17:23 18:7 wrote 38:1 46:19 <hr/> X x 1:2,10 <hr/> Y Yeah 14:1 23:21 years 34:25 <hr/> Z <hr/> 0 <hr/> 1 10:03 1:16 3:2 11:04 59:5 12(b) 57:13 12(b)(1) 5:17,18 5:23 6:6 13:8 19:16 26:3,20
---	--	---	---	---

27:1 40:12	56:2			
41:4,11 44:17				
44:19,20 45:12	5			
52:12,14,21	50,000 28:24			
53:5 57:12,13	50,000-a-day			
57:14 58:6	29:1			
12(b)(6) 5:13,18	51 54:10 55:2			
5:19 6:13,16	57 2:14			
6:17 7:14 26:4				
26:20 27:1	6			
30:12 40:3,12				
41:5 44:4,17	7			
44:18,19 47:17				
47:20,24 48:9	8			
48:22 52:12				
55:25 56:6	9			
57:7,14 58:6,6				
1291 58:24				
1330 3:23 8:7				
1330A 8:16				
1331 18:19				
19:14				
15-423 1:5 3:4				
1602 3:21				
1605(a)(3) 32:11				
1610 31:18 32:4				
1610(a)(3) 31:14				
31:17				
18 10:25				
183 17:12				
1920s 55:16				
1940s 55:18				
2				
2 1:12				
20 2:8				
2008 28:15				
2016 1:12				
24 11:1				
28 3:22 31:18				
3				
3 2:4 10:25				
31 2:11				
4				
49 54:8 55:3				