

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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REPUBLIC OF HUNGARY, ET AL.,)
 Petitioners,)
 v.) No. 18-1447
ROSALIE SIMON, ET AL.,)
 Respondents.)
- - - - -

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9
10 Washington, D.C.
11 Monday, December 7, 2020

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13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:00 a.m.

16
17 APPEARANCES:

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1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	GREGORY SILBERT, ESQ.	
4	On behalf of the Petitioners	3
5	ORAL ARGUMENT OF:	
6	BENJAMIN W. SNYDER, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioners	28
9	ORAL ARGUMENT OF:	
10	SARAH E. HARRINGTON, ESQ.	
11	On behalf of the Respondents	49
12	REBUTTAL ARGUMENT OF:	
13	GREGORY SILBERT, ESQ.	
14	On behalf of the Petitioners	84
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
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23
24
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P R O C E E D I N G S

(10:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 18-1447, Republic of Hungary versus Simon.

Mr. Silbert.

ORAL ARGUMENT OF GREGORY SILBERT
ON BEHALF OF THE PETITIONERS

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

Comity-based abstention proceeds from a simple premise that this Court has recognized since 1885. When a complaint alleges that foreign parties harmed other foreign parties in a foreign country, a federal court can decline jurisdiction in favor of a foreign tribunal.

In this case, plaintiffs allege that Hungary took property from Hungarians in Hungary during World War II. The United States long ago settled its claims against Hungary for wartime property confiscations, yet plaintiffs ask an American court to apply American law and impose economy-crushing liability on another sovereign nation for conduct in the sovereign's own territory that harmed its own nationals more

1 than 75 years ago.

2 If the shoe were on the other foot and
3 the United States faced analogous claims in a
4 foreign nation's court, the comity grounds for
5 dismissal would be clear and undeniable. Those
6 grounds are every bit as strong when the United
7 States orders Hungary to submit to the
8 jurisdiction of an American court.

9 If these same plaintiffs had sued
10 private defendants for aiding and abetting the
11 same property confiscations, their claims could
12 be dismissed because of the risk of
13 international friction. Plaintiffs say this
14 case can't be dismissed only because they sued
15 sovereign defendants under the Foreign Sovereign
16 Immunities Act.

17 But, for three reasons, that can't be
18 right. First, the FSIA's plain text tells us
19 that it concerns only sovereign immunity from
20 jurisdiction. It has no effect on
21 non-jurisdictional prudential doctrines like
22 comity-based abstention.

23 Second, the FSIA says that when
24 sovereign defendants lack sovereign immunity,
25 they should be treated the same as private

1 defendants, not worse than private defendants.

2 And, finally, the FSIA undisputedly
3 leaves in place other prudential grounds for
4 declining jurisdiction, like forum non
5 conveniens, and there is no textual or other
6 basis to treat comity any differently.

7 CHIEF JUSTICE ROBERTS: Mr. Silbert, I
8 want to pick up on that very last thing you said
9 but look at it from a different perspective.

10 What independent role do you think
11 international comity plays, given the fact that
12 you already have whether unchallenged forum non
13 convenience grounds and act of state grounds,
14 what is the independent significance of
15 international comity?

16 MR. SILBERT: The -- the international
17 comity doctrine applies in different
18 circumstances than FNC and act of state, and it
19 -- it serves different interests.

20 The -- the forum non doctrine, in
21 particular, ultimately serves objectives of
22 convenience and the practicalities of
23 litigation. The -- the interests served by the
24 international comity doctrine are -- are quite
25 different. They go to the --

1 CHIEF JUSTICE ROBERTS: Well, you
2 talked about, you know, this case involves
3 Hungarian citizens suing Hungary for events in
4 Hungary. Those sound like considerations a
5 court would take into account under forum non
6 conveniens.

7 MR. SILBERT: They -- they might be,
8 Your Honor, but the -- the D.C. Circuit held in
9 this case that the FNC doctrine does not apply.
10 We think the international comity doctrine
11 clearly does apply.

12 And even if they did happen to apply
13 in the same cases, they do serve different
14 objectives because the comity doctrine is not
15 ultimately about questions of convenience or
16 practicality. It's about the -- the dignitary
17 interests that each sovereign has when it has a
18 competing claim to jurisdiction.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas.

22 JUSTICE THOMAS: Yes, thank you, Mr.
23 Chief Justice.

24 Counsel, I had just perhaps a somewhat
25 preliminary question and a bit different from

1 the Chief. If we come out -- if we reverse in
2 the following case, in Germany's,
3 hypothetically, what should we do with your
4 case?

5 MR. SILBERT: Well, Your Honor, you --
6 you could then hold that there is no
7 jurisdiction in this case and vacate the -- the
8 D.C. Circuit's decision. You also could go on
9 to decide the comity question, as this Court's
10 decision in Sinochem and in Levin against
11 Commerce Energy made clear.

12 And under the circumstances, I think
13 it would be useful if this Court did go forward
14 and -- and reach the comity issue because that
15 is a question that has divided the lower courts,
16 and there is substantial confusion about when
17 comity applies and how it applies. And I think
18 the lower courts would benefit from guidance
19 from this Court.

20 JUSTICE THOMAS: So, if we do not
21 think -- for example, if I don't think that
22 comity existed pre-1976, do you think we have
23 the authority to just create comit -- a doctrine
24 such as that?

25 MR. SILBERT: I think you -- you have

1 the authority to do it, Your Honor. I -- I
2 understand that this -- this Court has not
3 created common law doctrines like that very much
4 recently.

5 I do think it's clear that the comity
6 defense that we're asserting did exist prior to
7 the enactment of the FSIA. It's -- it's
8 discussed explicitly in *The Belgenland*. It's
9 discussed in *Canada Malting*. Justice -- Justice
10 Scalia's dissenting opinion in *Hartford Fire*
11 discusses the doctrine at length. Justice
12 Breyer's concurring opinion in *Kiobel* and
13 Justice Sotomayor's dissenting opinion in *Jesner*
14 all talk about --

15 JUSTICE THOMAS: But wouldn't that --

16 MR. SILBERT: -- this topic.

17 JUSTICE THOMAS: -- take us just --
18 excuse me, I'm sorry, timing, I just want to get
19 this in -- wouldn't that get us back to where we
20 were pre-FSIA and on -- having these decided on
21 a case-by-case basis?

22 MR. SILBERT: It -- it wouldn't, Your
23 Honor. The -- the problem with the -- the
24 pre-FSIA regime was that sovereign immunity
25 determinations were left to the executive, and

1 the executive was subjected to political or
2 diplomatic pressure in individual cases.

3 The comity doctrine that we're
4 asserting is easy for courts to apply, and it
5 demands nothing from the executive. The courts
6 start by asking a simple question: Does this
7 complaint allege that foreign parties harmed
8 other foreign parties?

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 MR. SILBERT: And --

12 JUSTICE THOMAS: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer.

15 JUSTICE BREYER: I'd like to -- to
16 pick up on that last question. One, as the
17 Chief, I think, brought up, how do we know that
18 comity is a separate doctrine rather than, say,
19 a -- a motivating principle underlying a bunch
20 of other doctrines, like foreign non conveniens
21 and -- and exhaustion and sovereign immunity and
22 abstention?

23 And if we -- if it is a separate
24 doctrine, what exactly does it consist of? Do
25 you prefer the Ninth Circuit, which has five

1 factors? I -- Estreicher and Lee are good
2 international law professors, suggest four
3 factors. And maybe you have some other factors.

4 MR. SILBERT: Well, I -- I think Your
5 -- Your Honor first is -- is correct that
6 principles of comity find expression in a number
7 of different doctrines of U.S. law, including
8 sovereign immunity and act of state.

9 There is a separate and distinct
10 comity-based abstention doctrine that this Court
11 recognized as far back as *The Belgenland*, and
12 it's clear that the application of that doctrine
13 did not depend on factors of convenience or --
14 or practicality because the -- this Court in
15 1885 said that courts look to motives of
16 international comity. And -- and it's -- and --
17 and those principles are simply different than
18 the ones -- the interests that FNC serves.

19 As to how to apply the doctrine,
20 again, I -- I think, first, the Court should
21 ask, is this a case alleging that a foreign
22 party harmed another foreign party? And if it
23 is, then I think a comity-based abstention may
24 be available. And I think the Court should then
25 ask the question that you asked, Justice Breyer,

1 in -- in your concurring opinion in Kiobel, and
2 that is, is there nonetheless a distinct
3 American interest in the controversy that would
4 justify the assertion of jurisdiction?

5 And if there is -- I'm sorry, Justice
6 Breyer, were you asking a question?

7 JUSTICE BREYER: No, no, no.

8 MR. SILBERT: Okay. So if -- I think,
9 again, in a -- in a case where a foreigner harms
10 another foreigner, there -- there is a comity
11 interest that may warrant abstention, and the
12 Court then asks: Is there a distinct American
13 interest that would justify asserting
14 jurisdiction here?

15 If there is, then a court may exercise
16 jurisdiction. But, in this case, where there
17 isn't, a court should decline jurisdiction and
18 abstain so that the sovereign that has the
19 paramount interest in the controversy can
20 address it under the framework of its own legal
21 system.

22 CHIEF JUSTICE ROBERTS: Justice Alito.

23 JUSTICE ALITO: Section 1606 on which
24 you rely makes a foreign state "liable in the
25 same manner and to the same extent as a private

1 individual under like circumstances."

2 The -- your friend on the other side
3 says this concerns substantive liability rather
4 than threshold federal common law defenses.

5 Why isn't that a -- a reading that's
6 more faithful to the statutory text?

7 MR. SILBERT: So two answers, Justice
8 Alito. First, we -- we think we would win on
9 the statutory text, even if Section 1606 were
10 not in the statute, just based on the language
11 of 1605, but I do think that Section 1606 helps
12 us, and it helps us because it refers not only
13 to the extent of liability but also the manner
14 of liability. And so, for example, if a private
15 defendant would not be subjected to class action
16 liability in a U.S. court, then a sovereign
17 defendant should not be subjected to class
18 action liability in a U.S. court because that is
19 a -- the same manner of liability.

20 And I would also note that my friend
21 has no textual explanation for why the forum non
22 conveniens doctrine survived the enactment of
23 the FSIA because, like comity-based abstention,
24 FNC is another common law doctrine that permits
25 a court to decline jurisdiction.

1 And so, if -- if that doctrine
2 survives, then I think -- I think comity-based
3 abstention also must survive.

4 JUSTICE ALITO: One other question.
5 If we were to rule, hypothetically, and this is
6 just hypothetical, that -- in favor of Germany
7 on the jurisdictional issue, wouldn't the
8 plaintiffs in this case still have an argument
9 based on their claim of denaturalization?

10 MR. SILBERT: I -- I don't think so,
11 Your Honor. I think, if that argument had
12 merit, then it would apply in -- in every case
13 where the -- the plaintiffs in the next case
14 would assert that there is jurisdiction.

15 In other words, if -- if the -- if the
16 domestic takings rule does not apply in
17 instances of genocide, then I believe the -- the
18 argument that my friend makes that the
19 plaintiffs here were stateless persons would
20 apply in every such case, so --

21 JUSTICE ALITO: All right. Thank you.

22 CHIEF JUSTICE ROBERTS: Justice --

23 JUSTICE ALITO: Thank you, counsel.

24 CHIEF JUSTICE ROBERTS: Justice
25 Sotomayor.

1 JUSTICE SOTOMAYOR: Counsel --
2 counsel, I -- I don't understand how if in the
3 following case hypothetically we were to decide
4 there's no jurisdiction, what power would we
5 have, essentially, to give an advisory opinion
6 on this international comity doctrine? I
7 thought no jurisdiction meant just that, that we
8 don't have the power to decide anything?

9 MR. SILBERT: Well, Justice Sotomayor,
10 this Court held in -- in Sinochem and -- and
11 again in -- in Levin that a court can dismiss on
12 threshold comity grounds without first
13 determining that it has subject matter
14 jurisdiction. That was the --

15 JUSTICE SOTOMAYOR: I thought that --
16 counsel, I understand that principle, but this
17 is something different. We have already decided
18 we have no -- we would have already decided we
19 have no jurisdiction, so having made that
20 decision, how would this become nothing more
21 than an advisory opinion?

22 MR. SILBERT: I -- I think, Justice
23 Sotomayor, you certainly could then hold that
24 you have no jurisdiction in this case and vacate
25 the court of appeals' decision.

1 JUSTICE SOTOMAYOR: One final --

2 MR. SILBERT: I --

3 JUSTICE SOTOMAYOR: -- one final
4 point. As I read the record below, it appeared
5 that this prudential international comity
6 doctrine was not really the focus of your
7 argument in briefing.

8 It seemed to me that the focus was on
9 the -- that Respondents have to exhaust their
10 remedy. This -- what you've raised before us
11 seems like a very different tact.

12 MR. SILBERT: Well, I think, in the
13 circumstances of -- of this case, Justice
14 Sotomayor, they -- they amount to the same
15 thing. Our point is that because of principles
16 of comity, these plaintiffs should first assert
17 their claims in a Hungarian court and have --
18 because they first asserted them in an American
19 court, the American court should decline
20 jurisdiction and the case should proceed
21 originally in Hungary.

22 I think whether you call that an
23 abstention principle or an -- an exhaustion
24 principle, the point is that Hungary should have
25 the first opportunity to address these claims.

1 JUSTICE SOTOMAYOR: But you did use
2 the word "exhaustion." Thank you, counsel.

3 CHIEF JUSTICE ROBERTS: Justice Kagan.

4 JUSTICE KAGAN: Mr. Silbert, you've
5 referred a couple of times now to the historical
6 basis of the comity doctrine. There's an amicus
7 brief by Professors Dodge and Gardner that takes
8 you on on that and that says that all the
9 various cases that you've cited fall into one of
10 two categories: some are immunity cases and
11 some are forum non conveniens cases, and that
12 there's really no historical basis for this
13 separate international comity.

14 So I think I'd like you to respond to
15 -- to that brief.

16 MR. SILBERT: Well, if you -- if you
17 look at The Belgenland, Justice Kagan, which was
18 this Court's decision in -- in 1885, it says two
19 things that directly refute that position by
20 Professor Dodge and Professor Gardner.

21 First, it says expressly that courts
22 decline jurisdiction in cases between foreigners
23 out of motives of both convenience and
24 international comity. So those are -- those are
25 two separate doctrines.

1 But even more to the point, it says
2 that in some cases, before exercising
3 jurisdiction in cases involving foreign
4 interests, federal courts would seek the consent
5 of the consul of the foreign nation with a
6 competing claim to jurisdiction.

7 And, clearly, that foreign consul was
8 not providing an opinion about matters relating
9 to the convenience of the parties. What the
10 foreign consul was -- was telling the -- the
11 courts was whether exercising jurisdiction in a
12 U.S. court would be an affront to the dignity of
13 the other nation with a competing claim to
14 jurisdiction. That is a comity interest, not a
15 forum non conveniens interest.

16 JUSTICE KAGAN: You're pointing me to
17 Belgenland as your best case? That's the one I
18 should read?

19 MR. SILBERT: I -- I think The
20 Belgenland is clear on that subject. We've also
21 cited two district court cases.

22 JUSTICE KAGAN: Okay. If I could just
23 go on.

24 MR. SILBERT: Please, Justice.

25 JUSTICE KAGAN: You said you're not --

1 we're not going back to the old immunity
2 doctrine, the one that was supposed to have been
3 displaced by the FSIA, because that was
4 executive-driven. But I would think the fact
5 that it was executive-driven would cut the other
6 way. At least the executive knew something
7 about foreign affairs and were politically
8 accountable.

9 And -- and it seems like much of the
10 unhappiness about that doctrine had to do with
11 the fact that it was a kind of kitchen sink
12 approach and nobody could predict it. And isn't
13 that what you're asking us to replicate?

14 MR. SILBERT: We're not, Justice
15 Kagan. We're -- we're not asking federal courts
16 to make any kind of foreign policy judgment.
17 What -- what we're asking the courts to do is to
18 do what this Court did in *Sosa*, in *Kiobel*, in
19 *Jesner*, in *RJR Nabisco*, in *Empagran*, and a
20 number of other cases, and that's simply
21 recognize that when a lawsuit asserts claims by
22 a foreigner against another foreigner,
23 especially for conduct in a foreign country,
24 there is a risk of international friction, and
25 --

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 JUSTICE KAGAN: Thank you,
4 Mr. Silbert.

5 CHIEF JUSTICE ROBERTS: Justice
6 Gorsuch.

7 JUSTICE GORSUCH: Counsel, that's
8 exactly where I wanted to -- to go, which is,
9 you know, prior to the FSIA, we -- we did have
10 what this Court has described as bedlam in a
11 multifactor balancing test on the convenience of
12 the parties as one thing but also international
13 friction and -- and a sense about foreign --
14 foreign dignity and all that, which, as Justice
15 Kagan pointed out, was channeled through the
16 State Department.

17 And, here, you're asking us to do it
18 directly. And I -- I -- I guess I'm still
19 struggling with what's the difference between
20 the regime you'd have us create and the regime
21 that Congress clearly wished to displace because
22 it was producing "bedlam"?

23 MR. SILBERT: Well, in the -- in the
24 regime that Congress displaced, the executive
25 was forced to make foreign policy judgments.

1 In -- in the regime that we are
2 proposing, the courts would avoid making foreign
3 policy judgments by recognizing --

4 JUSTICE GORSUCH: Counsel, I thought
5 you said we should be concerned about friction,
6 for example.

7 MR. SILBERT: Well -- well, I think
8 you -- I think the courts can recognize the
9 kinds of cases that would cause international
10 friction --

11 JUSTICE GORSUCH: Isn't that a foreign
12 policy judgment?

13 MR. SILBERT: It -- it's not, Justice
14 Gorsuch. I think my friend is asking you to
15 make --

16 JUSTICE GORSUCH: All right. Let --
17 let's say I -- let's say I disagree with you,
18 that sounds to me like a foreign policy
19 judgment. Then what?

20 MR. SILBERT: Well, if -- if a court
21 accepted jurisdiction in this case and extended
22 U.S. or D.C. common law to apply in an
23 international context to regulate the conduct of
24 foreigners or foreign sovereigns harming other
25 foreigners in a foreign country, that is a

1 foreign policy judgment. So --

2 JUSTICE GORSUCH: Okay.

3 MR. SILBERT: -- if -- if you think my
4 rule is a foreign --

5 JUSTICE GORSUCH: I agree with that.
6 So -- so let me -- what do we do on a separate
7 but related matter, which is normally we assume
8 that when -- when -- when Congress dictates that
9 we shall hear certain classes of cases, that we
10 have a duty to hear those certain classes of
11 cases, and we can't decide not to do it just
12 because it would be inconvenient to us.

13 MR. SILBERT: Well, that -- that is
14 the general rule, Justice Gorsuch, and this --
15 this Court has recognized discrete exceptions,
16 and one of the exceptions, as -- as set out in
17 Canada Malting and in The Belgenland, is that
18 courts have discretion to decline to hear
19 controversies between foreigners.

20 JUSTICE GORSUCH: Thank you.

21 MR. SILBERT: And then we -- yes.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you, Chief
25 Justice.

1 And good morning, Mr. Silbert. On
2 your point that it's easy for courts to apply
3 this, I hear you giving us something of a bright
4 line, that if it's foreign defendants who
5 injured foreign plaintiffs in a foreign country,
6 then abstain. Is that accurate?

7 MR. SILBERT: I think, if there are no
8 other relevant facts and circumstances, then
9 yes, Justice Kavanaugh.

10 JUSTICE KAVANAUGH: Okay. Well, what
11 could be other relevant facts and circumstances?

12 MR. SILBERT: Well, let's say, for
13 example, the controversy concerns a discrete
14 piece of artwork and that piece of artwork is
15 hanging in a gallery in Washington, D.C., and
16 let's say if the -- if the possessor of that
17 piece of artwork gives it back to the wrong
18 party, that U.S. party could become liable.
19 Then a -- and then there would be an interest in
20 -- in a U.S. court hearing the dispute, and
21 maybe that interest is -- is sufficient to
22 override the foreign interest.

23 JUSTICE KAVANAUGH: How do you see
24 this playing out in the Hungary courts?

25 MR. SILBERT: Well, the -- the

1 plaintiffs would file a civil action, as they
2 would in any normal case. Hungary has waived by
3 constitutional amendment any statute of
4 limitations to these claims. They would file
5 claims under, we believe, the Hungarian Code of
6 1959, which was the first codified law in
7 Hungary and which applies to causes of action
8 that accrued before its enactment.

9 The claims would be Hungarian versions
10 that are similar to the claims they've asserted
11 here, like for property loss or unjust
12 enrichment. And -- and they would go forward
13 and -- and litigate their claims like any
14 Hungarian plaintiff.

15 JUSTICE KAVANAUGH: And you say in
16 your reply brief, if they think they were
17 treated unfairly in the Hungarian courts, they
18 could go to the European Court of Human Rights.
19 Is that accurate?

20 MR. SILBERT: That is accurate,
21 Justice Kavanaugh. If there was a violation of
22 the -- the rules set out in the European
23 Convention of Human Rights, like the rule under
24 Article 6 to a fair trial by an -- an impartial
25 tribunal, then the plaintiffs, after exhausting

1 Hungarian remedies, could apply for relief to
2 the European Court of Human Rights.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Good morning,
7 Mr. Silbert. So you told Justice Sotomayor,
8 when she asked you about the distinction between
9 exhaustion and the comity doctrine that we're
10 talking about this morning, that whether you
11 call it abstention or exhaustion, it means you
12 go to Hungary first, that they're functionally
13 the same thing here or they're very closely
14 related.

15 But, if these plaintiffs had exhausted
16 in Hungary first, I gather from your answer to
17 Justice Kavanaugh that they still could not come
18 here, that the doctrine of international comity
19 that you propose would still be a bar, is that
20 correct?

21 MR. SILBERT: Well, I -- I think they
22 -- they could come here and -- and seek relief
23 like any plaintiff who had litigated in a
24 foreign court could. And whether the U.S.
25 courts would -- would recognize the foreign

1 judgment would be controlled by the principles
2 set out in the Restatement for -- of Foreign
3 Relations Law at Sections 483 to 484; in other
4 words, the same principles would apply in this
5 case as would apply in -- in any case where a --
6 a foreign court had rendered a judgment.

7 JUSTICE BARRETT: But that's a little
8 bit of a different question, right? That's the
9 question about the preclusive effect and whether
10 any preclusive doctrines would themselves bar
11 the plaintiffs from seeking relief here?

12 MR. SILBERT: Well, I -- I -- I -- I
13 think that, yes, it -- it ultimately comes down
14 to a question of preclusion, but if the -- we
15 believe the plaintiffs should first bring these
16 claims in Hungary. If they did, and if they
17 exhausted all available Hungarian remedies and
18 they came back here and it turned out that they
19 were denied relief on grounds that were somehow
20 illegitimate for reasons of -- if the Hungarian
21 remedies turned out to be a sham or a fraud,
22 then I think they could try to reopen these
23 claims in the United States courts.

24 JUSTICE BARRETT: But why would that
25 be? Because it seems that all of the concerns

1 you're identifying, like the foreign-cubed
2 nature of this suit, would still apply even if
3 they had exhausted their claims in Hungary
4 first.

5 MR. SILBERT: Well, I think it's
6 appropriate for a U.S. court to ask in this
7 context, as it does in other abstention
8 contexts, whether there are available remedies
9 in the alternative forum.

10 And I -- I think that plaintiffs
11 should first seek relief from Hungarian courts,
12 so you could call that an exhaustion principle,
13 but once they do, if it turns out that Hungarian
14 courts were not actually available, they -- they
15 could then press their claims in the United
16 States. I think that should be a high bar, and
17 it is a high bar under the Restatement, but I
18 don't -- I don't think it's impossible in this
19 case any more than in any case involving a
20 foreign judgment.

21 JUSTICE BARRETT: Thank you, Mr.
22 Silbert.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, Mr. Silbert.

25 MR. SILBERT: Thank you, Mr. Chief

1 Justice.

2 I -- I'd like to emphasize two reasons
3 why I think you should be skeptical of the
4 arguments made by my friend on the other side.

5 First, my friend's position creates
6 the anomalous result that it's easier to sue
7 foreign sovereigns for conduct in their own
8 territory than it is to sue private defendants
9 for foreign conduct. And that should be a big
10 red flag. If a -- if a case against private
11 defendants causes too much international
12 friction, that problem only gets worse when
13 foreign sovereigns are named as defendants.

14 Second, my friend never owns up to the
15 reciprocity implications of her position. The
16 treatment of foreign sovereigns by U.S. courts
17 suggests that the United States can be treated
18 the same way by foreign courts.

19 So, if my friend is right that this
20 case must proceed against Hungary, then
21 analogous suits against the United States must
22 also proceed in foreign nations' courts. That
23 is not what Congress intended.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Snyder.

2 ORAL ARGUMENT OF BENJAMIN W. SNYDER
3 FOR THE UNITED STATES, AS AMICUS CURIAE,
4 SUPPORTING THE PETITIONERS

5 MR. SNYDER: Mr. Chief Justice, and
6 may it please the Court:

7 For well over a century, this Court
8 has recognized that when an American court
9 encounters a case that raises serious foreign
10 relations concerns, the Court may abstain from
11 the exercise of jurisdiction as a matter of
12 international comity if it determines that the
13 case would be better heard in a foreign forum.

14 Nothing in the Foreign Sovereign
15 Immunities Act forecloses courts from applying
16 that case-by-case abstention any more than it
17 forecloses courts from applying the similar
18 case-by-case analysis called for by the forum
19 non conveniens doctrine.

20 On the contrary, as Judge Katsas
21 correctly explained below, Section 1606 of the
22 FSIA requires that when foreign sovereigns can
23 be sued in American courts at all, they must be
24 treated no worse than private foreign defendants
25 facing equivalent claims.

1 Because private foreign defendants are
2 free to seek comity-based abstention,
3 Section 1606, therefore, requires that foreign
4 sovereign defendants must be free to do so as
5 well.

6 CHIEF JUSTICE ROBERTS: Mr. Snyder,
7 this question will not surprise you. You -- you
8 emphasize the significance of the international
9 relations context as a reason for international
10 comity, but your client, the United States, has
11 scrupulously avoided taking a position on what
12 the courts should do given the international
13 relations context.

14 This is the perfect time for you to
15 fill that void. Why -- why hasn't the
16 government told the courts what the foreign
17 relations impact on the United States is?

18 MR. SNYDER: Well, Your Honor, the
19 United States doesn't feel that it has
20 sufficient information about how the proceedings
21 would unfold in Hungary to take --

22 CHIEF JUSTICE ROBERTS: How -- how
23 long has the case been going on that you haven't
24 gotten that information yet?

25 MR. SNYDER: Your Honor, the case has

1 been going on for quite some time. I forget
2 when exactly the complaint was filed in the
3 case. We have the same information that the
4 Court has in terms of the party presentation and
5 the expert declarations submitted in the case.

6 CHIEF JUSTICE ROBERTS: Well, I'm sure
7 that's true, but you also have other resources,
8 like our embassies, other communications between
9 the two countries at the executive level.

10 MR. SNYDER: That's true, Your Honor.
11 The State Department simply doesn't feel that it
12 has sufficient information to provide the Court
13 with a recommendation.

14 CHIEF JUSTICE ROBERTS: Mr. Snyder,
15 surely they have as much information as they --
16 they need to make a decision. They just don't
17 want to make a decision.

18 MR. SNYDER: Your Honor, they -- they
19 have informed us that they don't have sufficient
20 information to -- to make a decision about that.

21 Our interest in this case, though, is
22 that, more broadly, we think that the
23 implications of the court of appeals' decision
24 would be detrimental to U.S. policy inasmuch as
25 the court of appeals said that courts may never

1 defer -- may never abstain on international
2 comity grounds, and the --

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Justice Thomas.

6 JUSTICE THOMAS: Thank you, Mr. Chief
7 Justice.

8 Mr. Snyder, doesn't it seem that your
9 suggestion and Petitioners' suggestion takes us
10 right back to the case-by-case approach that
11 FSIA was supposed to remedy?

12 MR. SNYDER: Well, no, Your Honor.
13 Let me give that -- let me answer that in a
14 couple of ways.

15 The first is that if you look to the
16 text of the FSIA, I think it's very clear from
17 the text that what the FSIA was directed to
18 address was sovereign immunity specifically.

19 And the doctrine that we're talking
20 about here is neither an immunity nor is it only
21 for sovereigns. And this Court has repeatedly
22 recognized that in adopting the FSIA, Congress
23 was not intending to displace every other
24 doctrine.

25 So most closely analogous here, the

1 Court in Samantar recognized that the FSIA
2 doesn't displace the very similar doctrine of
3 official immunity. That remains subject to the
4 common law rules.

5 And we think the same thing is true
6 here. Congress did not in the text of the FSIA
7 seek to displace the international comity-based
8 abstention, and so that doctrine remains
9 available.

10 JUSTICE THOMAS: Does that abstention
11 predate FSIA?

12 MR. SNYDER: Yes, it does, Your Honor.
13 If you look back at The Belgenland, as my friend
14 said, the Court in The Belgenland specifically
15 noted that American courts have looked to the
16 views of foreign consuls in deciding whether to
17 -- to extend jurisdiction or to exercise
18 jurisdiction over cases between foreign parties
19 and that in doing so, it took account both
20 questions of convenience and also questions of
21 international comity. So we think that those
22 are distinct strands.

23 JUSTICE THOMAS: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Breyer.

1 JUSTICE BREYER: Well, it's the same
2 question. One of the things Congress seemed to
3 be upset about and wanted to pass the FSIA was
4 contradictory information from State.

5 The American strawberry industry wants
6 to sue the country of Xanadu, run by a terrible
7 dictator, but, in Xanadu, our strawberry
8 industry is being sued by some Xanadu nationals,
9 and State wants to help our industry.

10 Now all I have to do is reverse the
11 situation and they'll want to help them in
12 opposite ways. So depending on who is being
13 sued where, you get a different result when you
14 ask State, is it immediately in our interest or
15 not and how is American industry being hurt or
16 helped? Is that something we should take into
17 account in comity?

18 MR. SNYDER: Your Honor, I think,
19 certainly, courts can take account of American
20 and foreign interests in come -- in -- in
21 applying the comity-based abstention doctrine.

22 I think one important difference
23 between comity-based abstention and sovereign
24 immunity that -- that helps to address some of
25 the concerns is, in our view, comity-based

1 abstention looks in particular to whether there
2 is an adequate forum in the other country.

3 And that's not something that
4 sovereign immunity would look to. So, to the
5 extent that Congress was concerned with ensuring
6 that plaintiffs, especially American plaintiffs,
7 would have a forum in which they could seek
8 redress and that they would not be denied that
9 forum based on political considerations, comity
10 accounts for that in a way that sovereign
11 immunity did not.

12 CHIEF JUSTICE ROBERTS: Justice --
13 Justice Alito.

14 JUSTICE ALITO: If this doctrine is
15 all about the effect on foreign relations, if I
16 were a district judge and I received a motion
17 asking me to abstain on comity grounds, my first
18 question would be, what does the government of
19 the United States think about the foreign
20 relations impact of this -- of this lawsuit?

21 So won't you be in the position of
22 having to answer that question every time this
23 doctrine is asserted?

24 MR. SNYDER: We don't think so, Your
25 Honor. We think that there are certainly

1 circumstances in which courts can make decisions
2 about whether to abstain without needing
3 participation from the United States Government.

4 There are certain considerations that
5 are cross-cutting that -- and that will always
6 apply. So, for example, the United States
7 certainly has more of an interest in
8 adjudicating claims brought by United States
9 citizens. The United States has more of an
10 interest in adjudicating claims that concern
11 conduct that occurred here in the United States.

12 JUSTICE ALITO: I mean, what if you --
13 what if the judge asked -- what if the -- the
14 State Department says, we don't think that this
15 raises foreign affairs concerns? Would that be
16 dispositive?

17 MR. SNYDER: I -- I think that that
18 should get substantial deference and might well
19 be dispositive, Your Honor, yes.

20 JUSTICE ALITO: I mean, there are
21 almost 700 district judges. You want every one
22 of them to assess whether a particular lawsuit
23 raises foreign relations concerns?

24 MR. SNYDER: Your Honor, we think that
25 it makes sense for the courts to be able to do

1 that. When this Court has expressed concern
2 about the capabilities of federal courts in
3 addressing foreign relations issues, the concern
4 has been primarily about courts creating tension
5 unintentionally.

6 This is a very different context. The
7 question here is whether courts may abstain from
8 the exercise of jurisdiction, and they will
9 rarely create unintentional international
10 friction by doing that.

11 So the question is just whether you
12 should completely foreclose them from doing so.
13 And we don't think that you should.

14 JUSTICE ALITO: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor.

17 JUSTICE SOTOMAYOR: Counsel, I
18 understood that the FSIA was passed to remove
19 the pressure on the Department of State to
20 decide whether or not it would grant -- immunity
21 should be granted or not.

22 I, like my -- my predecessor
23 colleagues' questions indicate, don't know how
24 that pressure would stop in this situation, but
25 I also don't know why that judgment has all --

1 not already been made by Congress, meaning if we
2 accept the argument in Germany that
3 expropriation has to be -- as an international
4 norm, involve only expropriations of
5 non-nationals and not domestic people and we
6 dismiss that case, or if we rule the other way
7 and we say Congress intended for those suits to
8 be in the United States, that, yes, takings from
9 nationals could have a forum here, I'm not sure
10 how we can substitute -- the Court could
11 substitute its judgment for Congress.

12 MR. SNYDER: Well, Your Honor, we
13 don't think that the Court would be substituting
14 its judgment for Congress. Whenever the Court
15 applies an abstention doctrine, it is, by -- it
16 is, by definition, determining that in a
17 circumstance where Congress in -- in the statute
18 allowed for jurisdiction, that the Court is --
19 is not going to exercise that jurisdiction.

20 So we don't think that -- that a court
21 should exercise jurisdiction -- or, excuse me,
22 abstain from jurisdiction under the
23 international comity doctrine on grounds it
24 would precisely replicate a judgment that
25 Congress has already made.

1 JUSTICE SOTOMAYOR: Why? So why
2 wouldn't the other doctrines that already exist,
3 like forum non conveniens, take care of
4 virtually any other consideration, would be --
5 be addressed?

6 Meaning the issue of foreign relations
7 tension is exactly what the FSIA was intended to
8 -- the judgment of Congress that in these
9 designated circumstances, those tensions should
10 not lead to immunity. But why should they lead
11 to abstention?

12 MR. SNYDER: Your Honor, I -- I think
13 the FSIA had a more specific purpose. And you
14 can see that from its text. It was about the
15 circumstances in which courts should apply
16 categorical immunity.

17 But the Court has recognized that that
18 didn't deal with every other comity-based
19 doctrine that preexisted the FSIA.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Kagan.

23 JUSTICE KAGAN: Mr. Snyder, you told
24 the Chief Justice that the State Department
25 didn't have enough information to make a

1 decision in this case. But, if the State
2 Department doesn't have that information, how
3 are courts to have it?

4 MR. SNYDER: Well, Your Honor, we
5 think that there is something of a difference
6 between the -- the scope of the decision that a
7 court makes and the scope of a -- of the
8 decision that the State Department makes.

9 When a court makes a decision about
10 whether to abstain in a particular case, the
11 court is -- is doing just that. It's making the
12 decision about that particular case based on the
13 evidence presented by the parties in that
14 particular case.

15 JUSTICE KAGAN: I mean, I would think
16 that it's -- that that's exactly what the State
17 Department would be doing here too. They'd be
18 looking at this particular case, the claims in
19 this case, the alternative forum that Hungary is
20 providing in this case, and they would make a
21 decision.

22 I mean, some might say that what's
23 going on here is that the State Department is
24 expecting the courts to do the difficult and
25 sensitive and some might say dirty work for you.

1 MR. SNYDER: I don't think that's
2 right, Your Honor. The -- the issue that the
3 State Department has in particularly indicated
4 that it doesn't feel it has enough information
5 to provide a recommendation on is how this case
6 would proceed in Hungary.

7 And that's a decision that courts
8 already make in the context of the forum non
9 conveniens doctrine. And -- and courts are well
10 suited to address the adequacy of an alternative
11 forum. We know that because, again, they --
12 they do that already in the forum non context.

13 JUSTICE KAGAN: Thanks. When I asked
14 Mr. Silbert about the historical basis of this
15 doctrine, he gave me the Belgenland case as his
16 principal case showing that this comity-based
17 doctrine that you're espousing, in fact, has
18 such a basis.

19 In your brief, you call Belgenland an
20 early example of forum non conveniens. So
21 what's your best case, best historical case, for
22 this comity doctrine?

23 MR. SNYDER: Your Honor, I would say
24 the same thing, The Belgenland is the best case
25 on this. It is true that this Court has

1 described The Belgenland as a precursor of
2 modern forum non conveniens doctrine. But, if
3 you look at The Belgenland, it's describing a
4 whole swath of cases that involve different
5 considerations.

6 So relevant to modern forum non
7 conveniens doctrine, it talks about declining to
8 exercise jurisdiction on basis -- on the basis
9 of convenience, but it also says that courts do
10 so for international comity grounds. And --

11 JUSTICE KAGAN: Thank you, Mr. Snyder.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Mr. Snyder, I guess
15 I'm curious about this: Is -- is what you're
16 arguing for a broad-based comity abstention
17 doctrine or an exhaustion doctrine? In -- in
18 response to Justice Kagan, I believe you said
19 that the real confusion for the State Department
20 apparently lies in what remedies would be
21 available in Hungary.

22 That sounds like exhaustion. And
23 Mr. Silbert, in response to Justice Barrett,
24 indicated that after exhausting Hungarian
25 remedies, the plaintiffs would be free to come

1 to the United States subject only to preclusion
2 principles, which have nothing to do with
3 abstention and would apply in domestically
4 normal law.

5 So what -- what do you say to that?
6 Is -- is what you're arguing for really just an
7 exhaustion argument?

8 MR. SNYDER: No, we don't think it's
9 an exhaustion argument. I mean, we -- we think
10 there are similarities between the two, but, in
11 our view, it's appropriate for a court at the
12 front end to make a decision about whether it
13 would be appropriate to abstain based, in part,
14 on whether there is an adequate forum available
15 in the other context.

16 JUSTICE GORSUCH: Boy, that sure
17 sounds like exhaustion doctrine to me.

18 MR. SNYDER: Well, I --

19 JUSTICE GORSUCH: That's exactly what
20 courts do at the front end. They say, have you
21 exhausted your remedies elsewhere before we take
22 up your case? That is exhaustion.

23 MR. SNYDER: Your Honor, to be clear,
24 I'm not saying that the question is whether they
25 have already exhausted them. I'm saying that

1 the question is whether the remedies that would
2 be available elsewhere are adequate.

3 And so the --

4 JUSTICE GORSUCH: Yeah, that -- that's
5 -- we do that all the time under the -- the --
6 the rubric of exhaustion, counsel. Okay. Fine.

7 Let's say they have to exhaust. Why,
8 if -- if -- if Jewish victims of the Holocaust
9 were deemed non-citizens, stripped of their
10 citizenship at least in Germany, why should they
11 then have to go exhaust remedies elsewhere?

12 MR. SNYDER: Well, we haven't taken a
13 position on that, Your Honor, but let me point
14 -- point you to a case in which we have.
15 There's an amicus brief filed in this case by
16 SNCF, the French National Railroad, and that
17 amicus brief describes a case in the Seventh
18 Circuit in which the district court
19 appropriately dismissed claims that had been
20 brought against SN -- SNCF.

21 We think that was appropriate on
22 international comity grounds because the United
23 States has worked with France to establish an
24 administrative mechanism by which claimants who
25 lost property during World War II in France can

1 seek redress for those injuries and would --

2 JUSTICE GORSUCH: Thank you, counsel.

3 CHIEF JUSTICE ROBERTS: Justice
4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Chief
6 Justice.

7 Good morning, Mr. Snyder. Is it your
8 position that when a foreign defendant has
9 injured foreign parties in a foreign country
10 that abstention is necessarily appropriate?

11 MR. SNYDER: No, Your Honor. We have
12 not taken that bright-line approach.

13 JUSTICE KAVANAUGH: What else in that
14 circumstance should a court ask itself?

15 MR. SNYDER: Well, first, I'd say that
16 the court should look in that circumstance to
17 the adequacy of the alternative forum.

18 JUSTICE KAVANAUGH: Okay. If the
19 alternative forum is adequate, anything else?

20 MR. SNYDER: I think, in that
21 circumstance, there would be a very strong case
22 for abstention.

23 JUSTICE KAVANAUGH: What could -- what
24 could defeat that?

25 MR. SNYDER: If the United States has

1 some strong interest in the subject matter --

2 JUSTICE KAVANAUGH: And how would a --
3 how would a district court determine that?

4 MR. SNYDER: So, for example, if the
5 property that were at issue were in the United
6 States, that might give the United States a
7 stronger interest. If there were some question
8 of the -- the ongoing negotiation of a treaty or
9 if there were some law that Congress had passed
10 expressing a particular interest in that subject
11 matter, that might well affect the decision.

12 JUSTICE KAVANAUGH: Is a district
13 court to do all that on its own or to seek the
14 guidance of the State Department in that
15 circumstance?

16 MR. SNYDER: Well, I think, Your
17 Honor, certainly, the Court should not foreclose
18 the possibility of the district court doing so
19 when the State Department provides input, but we
20 think that there may also be circumstances in
21 which a district court can do that without the
22 State Department's input.

23 There may be circumstances in which
24 there's a statute that expresses a particular
25 United States interest in the subject matter,

1 things along those lines, on which the district
2 court could base its decision.

3 JUSTICE KAVANAUGH: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Barrett.

6 JUSTICE BARRETT: Counsel, the
7 doctrine that you're proposing of comity sounds
8 like a little bit of this and a little bit of
9 that. It -- it incorporates some concepts from
10 exhaustion and also sounds like forum non
11 conveniens. It also sounds like it incorporates
12 some of the same considerations of foreign
13 relations and friction with other countries that
14 are addressed by the Foreign Sovereign
15 Immunities Act itself.

16 So would it subsume the need for some
17 of these other doctrines? Like, what role would
18 forum non conveniens still play if we do adopt
19 the broader comity doctrine that you propose?

20 MR. SNYDER: So I wouldn't call it a
21 broader comity doctrine. I would say that it's
22 a distinct comity doctrine. Forum non
23 conveniens is focused specifically on the
24 litigants and -- and their convenience and the
25 convenience to witnesses, things along those

1 lines.

2 In an ordinary case, that makes sense,
3 but in a case that presents significant foreign
4 relations concerns, we don't think it makes
5 sense to give weight to the plaintiff's choice
6 of forum or the convenience of witnesses.
7 Instead, it makes sense to look to those --

8 JUSTICE BARRETT: But --

9 MR. SNYDER: -- the foreign relations
10 --

11 JUSTICE BARRETT: -- can I interrupt
12 just for one moment? In this case, the foreign
13 country or one of its arms is one of the
14 litigants. So isn't it concerns -- aren't its
15 concerns taken into account in forum non
16 conveniens doctrine?

17 MR. SNYDER: No, Your Honor. The --
18 the considerations that forum non looks to are
19 -- are considerations of convenience. The --
20 the interest that international comity-based
21 abstention looks to is -- is more of the
22 sovereign dignitary interest in being able to
23 adjudicate claims that are -- are -- you know,
24 touch closely on that foreign sovereign's
25 territory or its acts in its own fora.

1 That's -- that's something that this
2 Court spoke to in the Pimentel case, for
3 example. We think those are just categorically
4 different.

5 JUSTICE BARRETT: Thank you, counsel.

6 CHIEF JUSTICE ROBERTS: A minute to
7 wrap up, Mr. Snyder.

8 MR. SNYDER: The policy of the United
9 States Government with respect to claims for
10 restitution or compensation by Holocaust
11 survivors and other victims of the Nazi era has
12 consistently been motivated by the twin
13 considerations of justice and urgency.

14 To that end, the United States has
15 advocated that concerned parties, foreign
16 governments, and non-governmental organizations
17 act to resolve matters of Holocaust-era
18 restitution and compensation justly through
19 dialogue, negotiation, and cooperation wherever
20 possible.

21 The potential availability of
22 comity-based abstention in United States courts
23 plays an important role in our diplomatic
24 efforts on that issue.

25 Accordingly, while the United States

1 takes no position on the appropriateness of
2 comity-based abstention in this particular case,
3 the Court should make clear that the FSIA does
4 not foreclose such abstention.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 Ms. Harrington.

8 ORAL ARGUMENT OF SARAH E. HARRINGTON
9 ON BEHALF OF THE RESPONDENTS

10 MS. HARRINGTON: Thank you, Mr. Chief
11 Justice, and may it please the Court:

12 I want to start by addressing the
13 United States' interest in having these types of
14 claims adjudicated in U.S. courts.

15 This country has a strong and
16 longstanding interest in directly helping
17 Holocaust victims seek justice. Today is Pearl
18 Harbor Day, and it marks 79 years exactly since
19 the U.S. was drawn into World War II.

20 The reason the atrocities at places
21 like Auschwitz were stopped and were exposed to
22 the world is due in large part to our soldiers
23 who sacrificed in the name of the United States.

24 This Court has held over and over that
25 our Constitution assigns responsibility for

1 foreign policy to the elected branches, not to
2 courts. And over the last 70 years, those
3 branches have repeatedly taken steps to make it
4 easier for plaintiffs to pursue Holocaust-era
5 claims like these in U.S. courts.

6 For example, more than two decades
7 before the FSIA was enacted, the executive
8 branch waived application of the act of state
9 doctrine in Holocaust-era expropriation cases,
10 explaining in the so-called Bernstein letter
11 that it sought to remove obstacles to courts'
12 jurisdiction to decide such claims on the
13 merits.

14 When Congress enacted the FSIA, it
15 made clear that U.S. courts have jurisdiction to
16 decide these types of claims. And Congress has
17 updated the FSIA and enacted other legislation
18 to make it easier for plaintiffs to pursue
19 Holocaust-era claims in U.S. courts.

20 Hungary and the U.S. now ask this
21 Court to recognize an abstention doctrine that
22 would permit courts to overrule Congress's
23 foreign policy determinations with no
24 involvement from the executive. Such a doctrine
25 runs afoul of separation of powers principles

1 and has no foundation in our legal history.

2 It would also undo the primary purpose
3 of the FSIA, which was to eliminate ad hoc
4 determinations about when courts should exercise
5 jurisdiction over foreign sovereigns based on
6 the foreign policy concerns of the moment.

7 Hungary wants courts to decide whether
8 these are the types of claims that should be
9 heard in U.S. courts, but Congress has already
10 decided that they are.

11 CHIEF JUSTICE ROBERTS: Counsel, we
12 said in the Verlinden case that the FSIA does
13 not appear to have affected the -- the doctrine
14 of forum non conveniens.

15 Now, if that's true, why has it
16 affected the doctrine of international comity?

17 MS. HARRINGTON: Well, Mr. Chief
18 Justice --

19 CHIEF JUSTICE ROBERTS: It does seem
20 that -- that your -- the theory of your argument
21 would sweep very broadly and call into question
22 not only forum non conveniens but the act of
23 state doctrine and other related theories.

24 MS. HARRINGTON: Sorry for the
25 interruption. Mr. Chief Justice, I have two

1 answers to that.

2 First is that we don't think there was
3 an independent doctrine of comity-based
4 abstention before the FSIA was enacted. The
5 three Petitioners in the United States have not
6 identified any case that wasn't either a foreign
7 -- foreign sovereign immunity case or a forum
8 non conveniens case.

9 But, second, to the extent that the
10 FSIA displaced any existing common law
11 doctrines, they were doctrines that were
12 directed to foreign sovereign immunity or things
13 like that.

14 So my friend, Mr. Silbert, describes
15 the comity inquiry as directed to the dignity
16 interests of the foreign sovereign. To the
17 extent that's different from a foreign sovereign
18 immunity inquiry -- it's hard to tell how it's
19 different -- but it would be -- would have been
20 subsumed by the FSIA.

21 In -- in contrast, the forum non
22 conveniens is a generally applicable common law
23 doctrine that survives. And, generally, when a
24 statute is enacted, we don't think that it
25 displaces generally applicable common law

1 doctrines that aren't directly sort of addressed
2 by the statute.

3 CHIEF JUSTICE ROBERTS: Counsel, your
4 -- your position is categorical. In other
5 words, you don't think the international comity
6 applies in any case.

7 And yet it's -- given the nature of
8 international relations, it's easy to envision
9 cases where it would seem particularly
10 inappropriate for United States courts to get
11 involved in litigation. I don't know if this is
12 one of them or -- or not.

13 I mean, is there room for any kind of
14 a safety valve under your theory where the --
15 the doctrine is -- while maybe not available in
16 the normal course, is appropriate in
17 particularly sensitive international relations
18 cases?

19 MS. HARRINGTON: Mr. Chief Justice, I
20 think there are a number of safety valves that
21 already exist, including things like statute of
22 limitations, the act of state doctrine,
23 political question doctrine, forum non
24 conveniens.

25 In addition, we also have our fallback

1 argument that, if you disagree that there is no
2 doctrine of comity-based abstention that's
3 available, it should at least only be available
4 where the executive branch comes in and asks for
5 a specific case to be dismissed. That would
6 respect the constitutional assignment of foreign
7 policy authority to the elected branches and
8 would maintain political accountability for
9 those kinds of decisions.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.

15 Counsel, if we reverse in the --
16 again, this is a hypothetical -- if we were to
17 reverse in the Germany case, what should we do
18 with this case?

19 MS. HARRINGTON: I think you should
20 affirm in this case. I mean, I'd so, first off,
21 say I think you should not reverse in the
22 Germany case. I think there's a strong textual
23 argument that takings that are themselves acts
24 of genocide are covered by the expropriation
25 exception.

1 I also want to say there are -- there
2 are reasons maybe to view the facts alleged in
3 the Germany case differently from the facts
4 alleged in this case. In this case, the
5 plaintiffs allege that Hungary took every single
6 thing they owned, including things that were
7 necessary for survival, and that is more clearly
8 a genocidal type of taking perhaps than the
9 takings that are alleged in Germany.

10 But there are also these alternative
11 arguments that are available and that were
12 raised by us below, which is that the plaintiffs
13 -- you know, some of our plaintiffs were never
14 Hungarian nationals. They lived in occupied
15 territories and were never treated as
16 Hungarians. And so they should have an
17 opportunity to make their claim under whatever
18 rule this Court says applies under the
19 expropriation exception.

20 The other plaintiffs were certainly
21 not treated as Hungarian nationals or citizens.
22 They were stripped of all rights and privileges
23 of -- of nationality, and they should similarly
24 have a chance to make their claim.

25 JUSTICE THOMAS: Could you spend a few

1 -- a little bit of your time to explain whether
2 or not you preserved the genocidal taking
3 argument?

4 MS. HARRINGTON: We did. I mean, that
5 issue was decided in this case in the first
6 appeal in the D.C. Circuit. Hungary did not
7 raise it in its cert petition in this case.

8 But, of course, as you know, Germany
9 did, and you granted cert on that question.
10 It's a question that goes to subject matter
11 jurisdiction. And perhaps you're asking why we
12 chose to address it even though it's not one of
13 the questions presented in this case raised by
14 Hungary.

15 And that's because, as I said, we
16 think that considering that question in the
17 context of the facts of this case is clarifying,
18 and, also, it is a subject matter jurisdiction
19 question that Hungary has said it intends to
20 take advantage of if Germany prevails.

21 JUSTICE THOMAS: You -- in your
22 answers, you seem pretty firm that under F --
23 FSIA, you -- there's no room to create new
24 abstention doctrines. What's your view of a
25 court staying FSIA proceedings?

1 MS. HARRINGTON: Well, it would depend
2 on the basis for the -- for staying. I mean,
3 you know, as one of your colleagues has said,
4 there is generally an unflagging obligation to
5 exercise jurisdiction that's been given by
6 Congress.

7 There are some abstention doctrines
8 that will allow a court to stay damages actions
9 when there are, for example, pending proceedings
10 in another forum.

11 There's no such pending proceedings in
12 this case.

13 JUSTICE THOMAS: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Breyer.

16 JUSTICE BREYER: Thank you.

17 A group of victims of apartheid sue --
18 maybe they're from Botswana -- they sue the
19 South African government on a claim that fits
20 within this for taking their property, et
21 cetera.

22 South Africa says: You don't
23 understand. We don't have apartheid anymore,
24 and we have a system for dealing with it. It's
25 called the Truth and Reconciliation committee.

1 Please don't mess up what we're trying to do,
2 Judge, in New York. Dismiss the case or use
3 comity.

4 What's supposed to happen on your
5 theory?

6 MS. HARRINGTON: Well, I think we
7 could imagine in that case perhaps the State
8 Department would come in and say that --

9 JUSTICE BREYER: Okay. Okay, I see
10 what you're doing. You're taking some factors
11 and saying it doesn't zero exist. It exists,
12 but only a few things are allowed to appeal to
13 comity, is that right?

14 MS. HARRINGTON: No, Justice Breyer,
15 we think it doesn't exist. But we think, if the
16 Court disagrees with that, it should at least --

17 JUSTICE BREYER: Yeah, I got that
18 point, but the --

19 MS. HARRINGTON: Okay.

20 JUSTICE BREYER: -- but my question
21 is, fine, you think it don't exist -- it doesn't
22 exist. So, when the people from Botswana sue on
23 apartheid the South African government and the
24 South African government says please don't do
25 this, you're going to mess up our Truth and

1 Reconciliation, the answer -- your first choice
2 is to say, too bad, we go ahead with the suit
3 anyway, is that right?

4 MS. HARRINGTON: Well, it's -- it's
5 right if all of the requirements of the FSIA are
6 met, and --

7 JUSTICE BREYER: Then take your second
8 position. Your second position says, well,
9 maybe not sometimes. And that's where deference
10 to well-considered views of the executive
11 branch. That's one of them. You agree with
12 that one, right?

13 MS. HARRINGTON: Yes.

14 JUSTICE BREYER: Then you agree with
15 the general practice of other nations,
16 particularly the reciprocal practice of the
17 nation directly implicated?

18 MS. HARRINGTON: Justice Breyer, we
19 think that's a question for Congress or perhaps
20 the executive to make.

21 JUSTICE BREYER: So you say don't take
22 that?

23 MS. HARRINGTON: Of course --

24 JUSTICE BREYER: Even if every other
25 nation does it a different way, don't do it?

1 I'm just trying to get your position on this.

2 MS. HARRINGTON: No, because that --

3 JUSTICE BREYER: But what about the
4 third, applicable of U.S. statutes or treaties
5 that demonstrate a strong sovereign interest to
6 ignore or displace foreign sovereign acts or
7 interests in this situation?

8 MS. HARRINGTON: If claims have been
9 -- been displaced by Congress or the executive,
10 then the claims have been displaced. I just
11 want to make one point on the reciprocity point,
12 which is that the expropriation exception does
13 not exist anywhere else in the world in the
14 context of foreign sovereign immunity. And so
15 that sort of reciprocity risk is baked into the
16 statute intentionally by Congress.

17 JUSTICE BREYER: Hmm. Okay. Then
18 what I'm doing, I'm reading to you, as you know,
19 Professor Estreicher's four considerations that
20 would go into comity. And so it seems to me
21 that your -- at least your second choice is you
22 agree with some but not others.

23 MS. HARRINGTON: Right. I mean, our
24 -- our basic principle --

25 JUSTICE BREYER: Is that right?

1 MS. HARRINGTON: That's right, yes.
2 Our -- our basic principle is that those
3 professors are asking district courts to make
4 foreign policy determinations. That's not the
5 constitutional role of a district court.

6 I mean, under separation of powers
7 principles, those determinations are assigned to
8 our elected branches. Here, Congress has made
9 the comity-based decision about what types of
10 claims can be brought in U.S. courts.

11 In Verlinden, the --

12 JUSTICE BREYER: You would read that
13 statute as saying, well, South Africa, you're
14 trying to end the bitterness caused by
15 apartheid, but that's just too bad?

16 MS. HARRINGTON: I mean, if all of the
17 requirements --

18 JUSTICE BREYER: Is that right?

19 MS. HARRINGTON: -- of the FSIA are
20 satisfied, then yes.

21 JUSTICE BREYER: Yes. Okay.

22 MS. HARRINGTON: But, again, the
23 executive branch can come in and try to
24 intervene. They have not done so in this case.
25 They've been invited multiple times to express

1 their view about whether this case should be
2 dismissed, and -- including today, and they have
3 declined to do that.

4 It shouldn't be up to a district court
5 to make that foreign policy determination in the
6 absence of direction from the executive when
7 Congress has provided jurisdiction.

8 JUSTICE BREYER: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: Counsel, I think you
11 really do have to choose between two
12 alternatives. Your primary argument is never,
13 this doctrine doesn't exist, there are no
14 circumstances in which a case could be dismissed
15 based on comity abstention.

16 And so, if there were a case at some
17 time in the future where going forward would
18 cause -- cause grave foreign policy problems,
19 your answer has to be that's just too bad.

20 MS. HARRINGTON: Well, Justice Alito
21 --

22 JUSTICE ALITO: Is that really your --
23 is that your argument?

24 MS. HARRINGTON: So I'd say two
25 things. First, as I mentioned to the Chief

1 Justice, there are a number of other doctrines
2 that will weed out lots of these cases, like
3 forum non conveniens, political question, act of
4 state, things like that.

5 But, second --

6 JUSTICE ALITO: Yeah, but there could
7 be cases that don't -- where -- that don't fall
8 within any of these doctrines that could have
9 very serious foreign policy implications. I --
10 I mean, your argument might be right, but you
11 have to -- either you have to say yes, even if
12 it means war, even if it means very serious
13 foreign policy problems, we want you to say
14 never.

15 Or you have your fallback argument,
16 which is, well, maybe if the State Department
17 comes in and says please do not go forward with
18 this, it will cause terrible international
19 repercussions. That's a fallback argument, but
20 that argument negates your primary argument that
21 this doctrine never existed and, therefore, it
22 doesn't exist at this time.

23 MS. HARRINGTON: Right. We think
24 Congress has already made these foreign policy
25 determinations and has taken into account comity

1 when it enacted the FSIA. As we explain in our
2 brief, Congress and the executive can step in
3 and settle certain categories of claims that
4 they think pose a sort of risk to foreign
5 policy. They haven't done that here.

6 And as a fallback -- and it is an
7 alternative argument because it would sort of
8 undermine our argument about comprehensiveness
9 and clarity of rules, but, as a backup argument,
10 we're saying, you know, if you're going to
11 dismiss a case based on foreign policy concerns,
12 it really shouldn't be a court, with all due
13 respect to courts, making that decision. It
14 should be an elected branch of government.

15 JUSTICE ALITO: Well, you know, there
16 is the do no harm principle. And the only issue
17 that is before us, assuming that -- that you
18 would prevail on the jurisdictional question, is
19 whether this doctrine should be -- whether we
20 should hold that this doctrine doesn't exist at
21 all, can never be invoked under any imaginable
22 circumstances.

23 It could be that this is just a very,
24 very narrow doctrine. All we would need to
25 decide is it does exist in some form.

1 MS. HARRINGTON: I mean, Justice
2 Alito, I think it would be helpful to provide
3 more guidance than that, precisely because the
4 FSIA was meant to get rid of this system where
5 you made these sort of case-by-case ad hoc
6 determinations based on the foreign policy
7 considerations of the moment.

8 It was intended to get rid of what
9 this Court has called the bedlam of these sort
10 of inconsistent rules and sort of, as I
11 mentioned, the ad hoc determination of whether
12 and when courts should exercise jurisdiction.

13 And so, if you're going to say
14 sometimes you can have comity-based abstention,
15 it would be helpful to have some guidance about
16 when that is. And I think the -- the factors
17 that Hungary and the United States have pointed
18 to, that's just a subset of factors that are
19 already accounted for in the forum non
20 conveniens doctrine. And those are the factors
21 that are already accounted for in the FSIA and
22 generally in the foreign sovereign immunity
23 doctrine.

24 JUSTICE ALITO: But, you know,
25 Congress could -- if Congress wants the answer

1 to be never, Congress could so provide, as it
2 has in -- in some statutes. Why should we take
3 the lead on that?

4 MS. HARRINGTON: Well, I think the
5 existence of the Foreign Sovereign Immunities
6 Act, which is a finely reticulated and
7 frequently updated statute, is a strong
8 indication that those are the rules that are
9 intended to ply -- to apply when you're asking
10 about when a court should exercise jurisdiction
11 over a foreign sovereign.

12 JUSTICE ALITO: Thank you, counsel.

13 CHIEF JUSTICE ROBERTS: Justice
14 Sotomayor.

15 JUSTICE SOTOMAYOR: Counsel, I'd like
16 to follow up a little bit on Justice Alito's
17 question, but my simple question to you is,
18 again, hypothetically, if we were to rule that
19 there is no international expropriation --
20 customary international law for expropriation of
21 a national, do you also believe that we should
22 address this comity issue, notwithstanding that
23 we held there was no jurisdiction?

24 MS. HARRINGTON: I mean, I think you
25 would need to, because even if you think that

1 there's no jurisdiction under the theory that
2 these takings are genocidal and -- and,
3 therefore, violate international law, as I
4 mentioned earlier, the plaintiffs still should
5 have a right to make a case that they would fall
6 in under whatever rule you announce does apply.

7 So, as I mentioned, some of the
8 plaintiffs were never Hungarian nationals. They
9 lived in occupied territories. The rest of the
10 plaintiffs were certainly stripped of all of
11 their rights and privileges of nationality and
12 citizenship before they were kicked out of their
13 homes and forced into ghettos and then deported
14 to be murdered in the death camps.

15 JUSTICE SOTOMAYOR: All right. Then
16 one follow-up question to this. Assume that we
17 find a never answer to be inappropriate, because
18 we have at least two shipping cases, the
19 Carolina and the Infanta, in which the -- in
20 which 19th-century courts declined jurisdiction,
21 at least, in part, out of concern for commercial
22 relations between the U.S. and a foreign
23 sovereign. So it does suggest some equity
24 principles or -- or comity principles that have
25 guided courts in the common law.

1 So, if we never say never, how should
2 we write it --

3 MS. HARRINGTON: Well, Justice
4 Sotomayor --

5 JUSTICE SOTOMAYOR: -- to narrow it?
6 What -- what -- what sort of extremes do you
7 think might justify the use of that doctrine?

8 MS. HARRINGTON: I'm sorry for the
9 interruption. I would first say I think those
10 cases that you cite are really viewed as forum
11 non conveniens cases. Mr. Silbert says that
12 forum non conveniens, and Mr. Snyder said too,
13 is just directed to the convenience of the
14 parties. But there are also the public factors
15 that are -- have to be taken into consideration,
16 and those address the interests of the two
17 different court systems in hearing the case.

18 And so I think those cases are
19 examples of forum non conveniens cases, not
20 comity cases. But, if you're going to -- to
21 actually answer your question, you know, I think
22 what you would need is some indication from one
23 of the elected branches that there is actually a
24 foreign policy concern.

25 I don't think you can have a court

1 abstaining from exercising its jurisdiction
2 based on its own assessment of a foreign policy
3 concern.

4 JUSTICE SOTOMAYOR: Thank you,
5 counsel.

6 MS. HARRINGTON: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice Kagan.

8 JUSTICE KAGAN: Ms. Harrington, on
9 much the same subject, I mean, just think about
10 these cases particularly. The -- I think it's
11 not yours, but the Hungary case in the Seventh
12 Circuit which involved very similar claims. It
13 had potential damages amounting to 40 percent of
14 Hungary's GDP. So this is a suit that could
15 essentially bankrupt a foreign nation.

16 Now that seems as though it's
17 screaming severe international friction. Why
18 shouldn't we be able to acknowledge something
19 like that?

20 MS. HARRINGTON: Well, Justice Kagan,
21 you know, I think any sort of speculation about
22 a damages amount that would be implicated in
23 this case is just that, it's pure speculation at
24 this point. No class has been certified. We
25 don't know how large the class would be if it

1 were certified.

2 And so I don't think a district court
3 at the very front end of the case should be
4 saying, well, maybe if there was a giant class
5 and they proved all their damages, it would be
6 too much money and, therefore, we should abstain
7 from exercising jurisdiction. That's just not
8 normally the way that kind of inquiry works.

9 And -- and, again, you know, if -- if
10 the United States thinks it's a problem, they
11 can come in and say so, as they have. I mean,
12 Hungary is very different from many of the other
13 axis/allied and axis-abetting countries in that
14 it has never taken any steps to reach a
15 comprehensive settlement.

16 If you -- you have countries like
17 Germany, Switzerland, France, Austria who have
18 cooperated with the United States to create
19 these alternative fora to resolve these claims
20 on a global basis. And then --

21 JUSTICE KAGAN: That was going to be
22 my next question, Ms. Harrington, because the SG
23 tells us that, if we -- if we don't recognize
24 this kind of abstention, then the government is
25 going to be hampered in its efforts to encourage

1 the establishment of -- of redress and
2 compensation mechanisms for human rights
3 violations.

4 And in some countries, that has worked
5 to at least some extent. So what's your answer
6 to the Solicitor General's position on that
7 score? And do you really think that we can
8 treat Hungary differently because those efforts
9 have not succeeded as well?

10 MS. HARRINGTON: So this Court
11 explained in the Garamendi case that it was
12 actually the filing of class action lawsuits
13 related to Holocaust-era claims that spurred
14 those other countries to create these
15 alternative fora in cooperation with the United
16 States.

17 And so I think it's absolutely
18 backwards to say, well, we should just get rid
19 of all these things and that's going to actually
20 be the thing that motivates the remaining
21 countries to come to the table.

22 And in terms of whether we should
23 treat them differently, the United States treats
24 them differently. I mean, the United States
25 came into this case in the -- in the -- in the

1 district court uninvited and asked the district
2 court to dismiss the -- the Austrian-owned
3 company that was the other defendant precisely
4 because Austrian companies have come to the
5 table and created this alternative way to
6 resolve these -- these on a global basis.

7 They didn't do the same for Hungary or
8 the Hungary-owned railroad. And so the United
9 States is obviously treating them differently in
10 that respect, and it's perfectly appropriate for
11 the Court to do so as well.

12 JUSTICE KAGAN: Will your position
13 leave private litigants in a better position
14 than sovereign litigants?

15 MS. HARRINGTON: It won't. I mean, I
16 don't think -- so the -- Hungary relies on these
17 couple of courts of appeals that in the last 15
18 years have recognized a doctrine of
19 international comity-based abstention. Those
20 cases came 30 years after the FSIA was enacted.

21 And in the two primary cases that they
22 rely on, the United States actually did come in
23 and specifically request that the cases be
24 dismissed. That's Ugarro-Benages and Mujica in
25 the Ninth Circuit; the first is in the Eleventh

1 Circuit. And the courts in those cases gave
2 dispositive weight to the United States' request
3 that those suits be dismissed based on foreign
4 policy concerns.

5 So it's just not true that it's easier
6 to sue foreign sovereigns than private
7 plaintiffs. In fact, the only Holocaust-era
8 class actions or most of them that have actually
9 reached a substantive result in the U.S. courts
10 have been against private companies.

11 JUSTICE KAGAN: Thank you, Ms.
12 Harrington.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch.

15 JUSTICE GORSUCH: Good morning, Ms.
16 Harrington. I'd -- I'd like to address a
17 slightly different point that you've -- you've
18 alluded to a couple of times.

19 Normally, takings within a country are
20 -- are subject to domestic takings laws. You've
21 argued in this suit that the Holocaust and human
22 rights forms an exception to that rule, but
23 you've also pressed the point and alluded to it
24 today that, even if that rule were normally to
25 apply, it -- it wouldn't here because Germany

1 and perhaps Hungary stripped citizenship from
2 its Jewish victims during the Holocaust.

3 That's a very interesting argument,
4 but it's not developed much in this Court, and
5 I'm just curious why and -- and what -- what we
6 should do about it?

7 MS. HARRINGTON: It hasn't been
8 developed much -- much in this Court because
9 it's not actually the question that's presented.
10 It's not the basis that the -- that the D.C.
11 Circuit relied on in deciding the two cases.

12 So, you know, I think it -- it -- that
13 is an issue that would need to be resolved on
14 remand. I think that's the most appropriate way
15 to resolve it since it hasn't really been
16 briefed and wasn't squarely presented in
17 Germany's cert petition.

18 JUSTICE GORSUCH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh.

21 JUSTICE KAVANAUGH: Good morning, Ms.
22 Harrington. I think you agree that forum non
23 conveniens survives the FSIA, so I take from
24 that that the FSIA would not displace comity if
25 a comity doctrine exists and existed at the

1 time.

2 And you've made important arguments,
3 as have Professors Dodge and Gardner, that the
4 doctrine doesn't exist. And I understand those,
5 but put those aside for now.

6 If the doctrine does exist, then the
7 question's how to apply it. And I did not view
8 it necessarily, again, assuming it exists, as
9 requiring a case-by-case foreign policy or
10 international friction evaluation. In part for
11 reasons others have expressed, that would not be
12 predictable. It would be hard for courts to do
13 that, wouldn't necessarily be equitable, given
14 the number of courts who would be involved
15 hearing similarly situated plaintiffs.

16 Rather, I viewed the doctrine at least
17 as it's been articulated as reflecting a general
18 foreign policy concern, and then the question
19 becomes the particulars of the doctrine.

20 And I had understood the argument to
21 be that, if foreign defendants harm foreign
22 parties in a foreign country and remedies are
23 available in the foreign country, then American
24 courts should usually abstain.

25 So, again, if the doctrine exists,

1 what is the problem with that kind of fairly
2 bright-line principle that would not require a
3 case-by-case evaluation of foreign policy
4 interests?

5 MS. HARRINGTON: Well, Justice
6 Kavanaugh, any such doctrine was plainly
7 displaced by the FSIA. This Court held in
8 Verlinden that Congress intended in the FSIA to
9 grant U.S. courts jurisdiction over suits by
10 foreign plaintiffs against a foreign sovereign
11 based on domestic state law.

12 And the expropriation -- excuse me,
13 the expropriation exception that we're relying
14 on here expressly applies to conduct that
15 occurred abroad. It's principally directed to
16 nationalization of property, and that has to
17 occur abroad. It also -- we think it also
18 applies here, where you have genocidal takings,
19 but there's no reason that those shouldn't --
20 shouldn't also be covered if they -- if they
21 happened abroad.

22 And so, to the extent any such
23 doctrine like that did exist, we think it was
24 plainly displaced by the FSIA --

25 JUSTICE KAVANAUGH: Well, if --

1 MS. HARRINGTON: -- and it -- and it
2 was not -- you know, it was sort of not a
3 consideration that was separate from foreign
4 sovereign immunity determinations that were made
5 at common law.

6 JUSTICE KAVANAUGH: But, if such a
7 doctrine exists and the articulation I just
8 provided applied to private foreign defendants
9 as well, do you still have the same argument?

10 MS. HARRINGTON: Well, I mean, it
11 would depend on the context. You know, the --
12 Hungary relies on the ATS cases, but the -- what
13 the Court is doing in the ATS cases is just
14 fundamentally different from what it's being
15 asked to do here.

16 There, what the Court is doing is
17 asking whether there is jurisdiction, not making
18 a determination about whether courts should
19 abstain from exercising jurisdiction that
20 plainly exists.

21 And so the sort of separation of
22 powers and small fee conservative way that
23 courts should sort of wade into foreign policy
24 determinations points in the opposite direction
25 in the two types of cases.

1 Here, if a court says I'm going to
2 abstain from exercising jurisdiction, it's
3 countermanding foreign policy determinations
4 that Congress has already made.

5 In the ATS context, if a court says
6 I'm going to recognize this inferred cause of
7 action, it's kind of venturing out into a
8 foreign policy way -- in a foreign policy way --
9 excuse me -- in a way that Congress has not yet
10 done.

11 JUSTICE KAVANAUGH: But that would
12 lead if that -- by the way you just described
13 it, that would lead to a private defendant case
14 and the Court would abstain. In a national
15 country defendant case, the Court would not
16 abstain, which seems unusual.

17 MS. HARRINGTON: Well, it wouldn't be
18 an abstention, Justice Kavanaugh. There -- it
19 would be a determination that there is no
20 jurisdiction in the first place. And, you know,
21 that's a determination that's up to Congress to
22 make.

23 JUSTICE KAVANAUGH: Okay. I take that
24 point. Thank you very much, Ms. Harrington.

25 MS. HARRINGTON: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett.

3 JUSTICE BARRETT: Good morning, Ms.
4 Harrington. I have a question about the nature
5 of this kind of comity doctrine especially as
6 compared to forum non conveniens. So everybody
7 agrees that forum non conveniens doctrine
8 survives the enactment of the FSIA, and I'm
9 wondering, why in your view?

10 Is that because forum non conveniens
11 doctrine is a background principle that's
12 incorporated somehow into the statute itself, or
13 is that because courts retain the power to
14 develop it as a common law doctrine?

15 If the latter, why wouldn't they
16 retain the power to develop a doctrine of comity
17 like Hungary proposes here?

18 MS. HARRINGTON: So it's more the
19 latter. I mean, there's a general background
20 principle that statutes don't displace common
21 law -- you know, sort of generally applicable
22 common law doctrines unless there's some
23 indication in the statute itself that that's the
24 intent of the statute.

25 And so, for example, foreign sovereign

1 immunity everyone agrees was a common law
2 background doctrine -- excuse me, common law
3 doctrine that was displaced by the FSIA.

4 To the extent there was any separate
5 comity abstention doctrine, which we don't think
6 there was, but if you disagree, we think it was
7 also subsumed within and displaced by the FSIA
8 because, as Mr. -- my friend, Mr. Silbert,
9 describes the comity-based inquiry, what the
10 Court is supposed to do is -- is think about the
11 dignity interests of the foreign sovereign.

12 It's really hard to see how that is
13 separate from the foreign sovereign immunity
14 doctrine in a way that the FSIA was not intended
15 to account for.

16 JUSTICE BARRETT: So your argument is
17 that courts may retain some authority to
18 recognize some of these abstention-based
19 doctrines, like forum non conveniens, but the
20 structure and the text of the FSIA preclude us
21 from doing so here?

22 MS. HARRINGTON: Yes. I mean, and --
23 and I'd just add that the State Department, when
24 it transmitted the draft bill in 1973 to
25 Congress, it included a section-by-section

1 analysis, and in that, it said we don't think
2 this would -- this would displace forum non
3 conveniens doctrine. So there is sort of a --
4 it was sort of baked into the enactment history
5 of the FSIA.

6 JUSTICE BARRETT: And let me ask you a
7 question about the citizenship point. You know,
8 you point out that some of the plaintiffs in the
9 suit below were not Hungarian nationals and
10 others have a claim to their citizenship having
11 been severed by the genocide.

12 Is that a claim that you raised below?
13 As Justice Gorsuch pointed out, it's not one
14 that's developed here, it wasn't part of the
15 QPA. Did you raise that below or develop it all
16 below and, if not, did you have to in order to
17 preserve it?

18 MS. HARRINGTON: We did raise it
19 below. And I regret that I don't have the exact
20 citation, but it was raised in the briefing on
21 appeal.

22 JUSTICE BARRETT: Okay. Thanks,
23 counsel.

24 CHIEF JUSTICE ROBERTS: You have
25 several minutes to wrap up, Ms. Harrington.

1 MS. HARRINGTON: Okay. Thank you, Mr.
2 Chief Justice.

3 I just want to sort of linger for a
4 second on the separation of powers point. The
5 Constitution assigns authority over foreign
6 policy to the elected branches. Here, Congress
7 has decided that this type of claim -- this is a
8 -- sorry, this is the type of claim that U.S.
9 courts should hear. And the executive, even
10 after being invited multiple times to disagree
11 with respect to this specific case, has declined
12 to do that.

13 In these circumstances, a court should
14 not be able to step in and disregard its
15 statutory jurisdiction based on its own
16 assessment of foreign policy concerns. That
17 scheme would raise serious separation of powers
18 concerns and would completely undermine the
19 central purpose of the FSIA, which was to
20 eliminate case-specific foreign policy concerns
21 from questions about when a court should
22 exercise jurisdiction over a foreign sovereign.

23 And just one final point. I would
24 like to just say another word on the other
25 question that you're considering this morning in

1 the Germany case. That question is whether a
2 taking that is itself genocide is a taking that
3 violates international law.

4 Under the plain and broad text of the
5 expropriation exception, it is. In considering
6 that question, I really invite the Court to
7 consider the facts of this case which arise out
8 of the worst atrocities in human history.

9 Here, Hungary took everything the
10 plaintiffs owned, including possessions
11 necessary to survive, such as shelter, clothing,
12 and medicine, and the undisputed purpose of
13 Hungary's takings was to bring about the
14 physical destruction of Jews in Hungary. That
15 is genocide.

16 And it is hard to imagine a more vivid
17 example of property takings that themselves
18 violate international law. Indeed, the only
19 U.S. interest that the Solicitor General's
20 office or the Department of Justice has
21 identified in this case in the 10 years of
22 litigate -- litigating it is the moral
23 imperative to provide victims of the Holocaust
24 with some relief in their lifetime.

25 There's no way to read the text of the

1 expropriation exception as withholding
2 jurisdiction in this case, and there is no room
3 in the FSIA's comprehensive scheme to allow
4 abstention based on international comity.

5 Thank you, Mr. Chief Justice.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal, Mr. Silbert.

9 REBUTTAL ARGUMENT OF GREGORY SILBERT
10 ON BEHALF OF THE PETITIONERS

11 MR. SILBERT: Thank you, Mr. Chief
12 Justice. I -- I have three points.

13 First, I -- I did not hear my friend
14 give you any real workable limiting principle or
15 safety valve for her position, and I think the
16 colloquies with Justice Breyer and -- and
17 Justice Alito brought that out.

18 The fact is, if you accept my friend's
19 interpretation of the FSIA, then U.S. courts not
20 only can but must hear cases alleging that
21 foreign sovereigns harmed other foreigners in
22 foreign countries.

23 There's no doubt that those cases will
24 be asserted here and some of them will be highly
25 problematic, like the South Africa hypo that

1 Justice Breyer proposed. And I think foreign
2 nations will be understandably upset if U.S.
3 courts adjudicate foreign disputes where foreign
4 interests predominate and there is little, if
5 any, U.S. interest on the other side.

6 When U.S. courts decide cases like
7 that, they cause meaningful harm to
8 international relations and they expose the
9 United States to similar litigation in foreign
10 courts.

11 The second point: I think the text of
12 the FSIA just does not do the work that my
13 friend needs it to do. The expropriation
14 exception withdraws sovereign immunity from
15 jurisdiction. It doesn't do anything else.

16 The comity abstention doctrine that
17 we're asserting predates the FSIA by about 100
18 years. So the question is whether the FSIA
19 affirmatively displaced it, and -- and, clearly,
20 it did not.

21 If the FSIA actually displaced all
22 comity defenses in favor of a foreign sovereign,
23 as my friend proposes, then the act of state
24 doctrine would also be displaced. But this
25 Court held in *Altmann* that it isn't.

1 If Congress wanted to go further and
2 invite the kinds of foreign policy consequences
3 that will follow if U.S. courts are compelled to
4 hear cases like this one, then Congress can
5 certainly do that.

6 But that is not what Congress said in
7 the FSIA, and the courts should not take on
8 those policy -- foreign policy risks on their
9 own without clear instructions from Congress and
10 the executive.

11 Last point: I think you should take
12 the reciprocity concerns in this case very
13 seriously, because it's an unfortunate fact but
14 a -- a fact we all know, that the United States
15 Government has sometimes fallen short of the
16 ideals of justice that every nation should
17 aspire to meet.

18 And some people say that the United
19 States owes large outstanding debts for
20 injustices that were committed in this country.
21 That's a profoundly important question, and
22 maybe one day Congress will address it or maybe
23 one day it will come before this Court.

24 All right, that we can all agree, that
25 the remedies for the worst injustices committed

1 by the United States in the United States should
2 not be decided by a Hungarian judge applying
3 Hungarian law from a courtroom in Budapest.

4 For the same reasons, the merits of
5 this case should not be decided by an American
6 judge applying American law in Washington, D.C.

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

9 (Whereupon, at 11:21 a.m., the case
10 was submitted.)

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Official - Subject to Final Review

1	account ^[7] 6:5 32 :19 33 :17,19 47 :15 63 :25 80 :15 accountability ^[1] 54:8 accountable ^[1] 18:8 accounted ^[2] 65:19,21 accounts ^[1] 34:10 accrued ^[1] 23:8 accurate ^[3] 22:6 23 :19,20 acknowledge ^[1] 69:18 Act ^[13] 4:16 5 :13,18 10 :8 28 :15 46 :15 48 :17 50 :8 51 :22 53 :22 63 :3 66 :6 85 :23 action ^[6] 12:15,18 23 :1,7 71 :12 78 :7 actions ^[2] 57:8 73 :8 acts ^[3] 47:25 54 :23 60 :6 actually ^[9] 26:14 68 :21,23 71 :12,19 72 :22 73 :8 74 :9 85 :21 ad ^[3] 51:3 65 :5,11 add ^[1] 80:23 addition ^[1] 53:25 address ^[10] 11:20 15 :25 31 :18 33 :24 40 :10 56 :12 66 :22 68 :16 73 :16 86 :22 addressed ^[3] 38:5 46 :14 53 :1 addressing ^[2] 36:3 49 :12 adequacy ^[2] 40:10 44 :17 adequate ^[4] 34:2 42 :14 43 :2 44 :19 adjudicate ^[2] 47:23 85 :3 adjudicated ^[1] 49:14 adjudicating ^[2] 35:8,10 administrative ^[1] 43:24 adopt ^[1] 46:18 adopting ^[1] 31:22 advantage ^[1] 56:20 advisory ^[2] 14:5,21 advocated ^[1] 48:15 affairs ^[2] 18:7 35 :15 affect ^[1] 45:11 affected ^[2] 51:13,16 affirm ^[1] 54:20 affirmatively ^[1] 85:19 affront ^[1] 17:12 afoul ^[1] 50:25 Africa ^[3] 57:22 61 :13 84 :25 African ^[3] 57:19 58 :23,24 ago ^[2] 3:19 4 :1 agree ^[6] 21:5 59 :11,14 60 :22 74 :22 86 :24 agrees ^[2] 79:7 80 :1 ahead ^[1] 59:2 aiding ^[1] 4:10 AL ^[2] 1:3,6 Alito ^[2] 11:22,23 12 :8 13 :4,21,23 34 :13,14 35 :12,20 36 :14 62 :9,10,20,22 63 :6 64 :15 65 :2,24 66 :12 84 :17 Alito's ^[1] 66:16 allege ^[3] 3:17 9 :7 55 :5 alleged ^[3] 55:2,4,9 alleges ^[1] 3:13 alleging ^[2] 10:21 84 :20 allow ^[2] 57:8 84 :3	allowed ^[2] 37:18 58 :12 alluded ^[2] 73:18,23 almost ^[1] 35:21 already ^[15] 5:12 14 :17,18 37 :1,25 38 :2 40 :8,12 42 :25 51 :9 53 :21 63 :24 65 :19,21 78 :4 alternative ^[10] 26:9 39 :19 40 :10 44 :17,19 55 :10 64 :7 70 :19 71 :15 72 :5 alternatives ^[1] 62:12 Altmann ^[1] 85:25 amendment ^[1] 23:3 American ^[17] 3:22,22 4 :8 11 :3,12 15 :18,19 28 :8,23 32 :15 33 :5,15,19 34 :6 75 :23 87 :5,6 amicus ^[6] 1:22 2 :7 16 :6 28 :3 43 :15,17 amount ^[2] 15:14 69 :22 amounting ^[1] 69:13 analogous ^[3] 4:3 27 :21 31 :25 analysis ^[2] 28:18 81 :1 announce ^[1] 67:6 anomalous ^[1] 27:6 another ^[7] 3:23 10 :22 11 :10 12 :24 18 :22 57 :10 82 :24 answer ^[9] 24:16 31 :13 34 :22 59 :1 62 :19 65 :25 67 :17 68 :21 71 :5 answers ^[3] 12:7 52 :1 56 :22 anyway ^[1] 59:3 apartheid ^[4] 57:17,23 58 :23 61 :15 apparently ^[1] 41:20 appeal ^[3] 56:6 58 :12 81 :21 appeals ^[2] 30:25 72 :17 appeals' ^[2] 14:25 30 :23 appear ^[1] 51:13 APPEARANCES ^[1] 1:17 appeared ^[1] 15:4 applicable ^[4] 52:22,25 60 :4 79 :21 application ^[2] 10:12 50 :8 applied ^[1] 77:8 applies ^[9] 5:17 7 :17,17 23 :7 37 :15 53 :6 55 :18 76 :14,18 apply ^[22] 3:22 6 :9,11,12 9 :4 10 :19 13 :12,16,20 20 :22 22 :2 24 :1 25 :4,5 26 :2 35 :6 38 :15 42 :3 66 :9 67 :6 73 :25 75 :7 applying ^[5] 28:15,17 33 :21 87 :2,6 approach ^[3] 18:12 31 :10 44 :12 appropriate ^[8] 26:6 42 :11,13 43 :21 44 :10 53 :16 72 :10 74 :14 appropriately ^[1] 43:19 appropriateness ^[1] 49:1 aren't ^[2] 47:14 53 :1 argued ^[1] 73:21 arguing ^[2] 41:16 42 :6 argument ^[35] 1:14 2 :2,5,9,12 3 :4,7 13 :8,11,18 15 :7 28 :2 37 :2 42 :7,9 49 :8 51 :20 54 :1,23 56 :3 62 :12,23 63 :10,15,19,20,20 64 :7,8,9 74 :3 75 :20 77 :9 80 :16 84 :9 arguments ^[3] 27:4 55 :11 75 :2 arise ^[1] 83:7	arms ^[1] 47:13 Article ^[1] 23:24 articulated ^[1] 75:17 articulation ^[1] 77:7 artwork ^[3] 22:14,14,17 aside ^[1] 75:5 asks ^[2] 11:12 54 :4 aspire ^[1] 86:17 assert ^[2] 13:14 15 :16 asserted ^[4] 15:18 23 :10 34 :23 84 :24 asserting ^[4] 8:6 9 :4 11 :13 85 :17 assertion ^[1] 11:4 asserts ^[1] 18:21 assess ^[1] 35:22 assessment ^[2] 69:2 82 :16 assigned ^[1] 61:7 assignment ^[1] 54:6 assigns ^[2] 49:25 82 :5 Assistant ^[1] 1:20 assume ^[2] 21:7 67 :16 assuming ^[2] 64:17 75 :8 atrocities ^[2] 49:20 83 :8 ATS ^[3] 77:12,13 78 :5 Auschwitz ^[1] 49:21 Austria ^[1] 70:17 Austrian ^[1] 72:4 Austrian-owned ^[1] 72:2 authority ^[5] 7:23 8 :1 54 :7 80 :17 82 :5 availability ^[1] 48:21 available ^[13] 10:24 25 :17 26 :8,14 32 :9 41 :21 42 :14 43 :2 53 :15 54 :3,3 55 :11 75 :23 avoid ^[1] 20:2 avoided ^[1] 29:11 axis-abetting ^[1] 70:13 axis/allied ^[1] 70:13
2	2020 ^[1] 1:11 28 ^[1] 2:8	B	
3	ad ^[3] 51:3 65 :5,11 add ^[1] 80:23 addition ^[1] 53:25 address ^[10] 11:20 15 :25 31 :18 33 :24 40 :10 56 :12 66 :22 68 :16 73 :16 86 :22 addressed ^[3] 38:5 46 :14 53 :1 addressing ^[2] 36:3 49 :12 adequacy ^[2] 40:10 44 :17 adequate ^[4] 34:2 42 :14 43 :2 44 :19 adjudicate ^[2] 47:23 85 :3 adjudicated ^[1] 49:14 adjudicating ^[2] 35:8,10 administrative ^[1] 43:24 adopt ^[1] 46:18 adopting ^[1] 31:22 advantage ^[1] 56:20 advisory ^[2] 14:5,21 advocated ^[1] 48:15 affairs ^[2] 18:7 35 :15 affect ^[1] 45:11 affected ^[2] 51:13,16 affirm ^[1] 54:20 affirmatively ^[1] 85:19 affront ^[1] 17:12 afoul ^[1] 50:25 Africa ^[3] 57:22 61 :13 84 :25 African ^[3] 57:19 58 :23,24 ago ^[2] 3:19 4 :1 agree ^[6] 21:5 59 :11,14 60 :22 74 :22 86 :24 agrees ^[2] 79:7 80 :1 ahead ^[1] 59:2 aiding ^[1] 4:10 AL ^[2] 1:3,6 Alito ^[2] 11:22,23 12 :8 13 :4,21,23 34 :13,14 35 :12,20 36 :14 62 :9,10,20,22 63 :6 64 :15 65 :2,24 66 :12 84 :17 Alito's ^[1] 66:16 allege ^[3] 3:17 9 :7 55 :5 alleged ^[3] 55:2,4,9 alleges ^[1] 3:13 alleging ^[2] 10:21 84 :20 allow ^[2] 57:8 84 :3	B	
4	40 ^[1] 69:13 483 ^[1] 25:3 484 ^[1] 25:3 49 ^[1] 2:11	back ^[7] 8:19 10 :11 18 :1 22 :17 25 :18 31 :10 32 :13 background ^[3] 79:11,19 80 :2 backup ^[1] 64:9 backwards ^[1] 71:18 bad ^[3] 59:2 61 :15 62 :19 baked ^[2] 60:15 81 :4 balancing ^[1] 19:11 bankrupt ^[1] 69:15 bar ^[4] 24:19 25 :10 26 :16,17 Barrett ^[16] 24:5,6 25 :7,24 26 :21 41 :23 46 :5,6 47 :8,11 48 :5 79 :2,3 80 :16 81 :6,22 base ^[1] 46:2 based ^[14] 12:10 13 :9 34 :9 39 :12 42 :13 51 :5 62 :15 64 :11 65 :6 69 :2 73 :3 76 :11 82 :15 84 :4 basic ^[2] 60:24 61 :2 basis ^[12] 5:6 8 :21 16 :6,12 40 :14,18 41 :8,8 57 :2 70 :20 72 :6 74 :10 become ^[2] 14:20 22 :18 becomes ^[1] 75:19 bedlam ^[3] 19:10,22 65 :9 behalf ^[8] 1:19,25 2 :4,11,14 3 :8 49 :	
6	6 ^[1] 23:24		
7	7 ^[1] 1:11 70 ^[1] 50:2 700 ^[1] 35:21 75 ^[1] 4:1 79 ^[1] 49:18		
8	84 ^[1] 2:14		
A	a.m ^[3] 1:15 3 :2 87 :9 abetting ^[1] 4:10 able ^[4] 35:25 47 :22 69 :18 82 :14 above-entitled ^[1] 1:13 abroad ^[3] 76:15,17,21 absence ^[1] 62:6 absolutely ^[1] 71:17 abstain ^[16] 11:18 22 :6 28 :10 31 :1 34 :17 35 :2 36 :7 37 :22 39 :10 42 :13 70 :6 75 :24 77 :19 78 :2,14,16 abstaining ^[1] 69:1 abstention ^[4] 3:11 4 :22 9 :22 10 :10,23 11 :11 12 :23 13 :3 15 :23 24 :11 26 :7 28 :16 29 :2 32 :8,10 33 :21,23 34 :1 37 :15 38 :11 41 :16 42 :3,44:10,22 47 :21 48 :22 49 :2,4 50 :21 52 :4 54 :2 56 :24 57 :7 62 :15 65 :14 70 :24 72 :19 78 :18 80 :5 84 :4 85 :16 abstention-based ^[1] 80:18 accept ^[2] 37:2 84 :18 accepted ^[1] 20:21 Accordingly ^[1] 48:25		

Official - Subject to Final Review

<p>9 84:10 Belgenland [13] 8:8 10:11 16:17 17:17,20 21:17 32:13,14 40:15,19, 24 41:1,3 believe [5] 13:17 23:5 25:15 41:18 66:21 below [8] 15:4 28:21 55:12 81:9, 12,15,16,19 benefit [1] 7:18 BENJAMIN [3] 1:20 2:6 28:2 Bernstein [1] 50:10 best [4] 17:17 40:21,21,24 Bethesda [1] 1:24 better [2] 28:13 72:13 between [11] 16:22 19:19 21:19 24:8 30:8 32:18 33:23 39:6 42:10 62:11 67:22 big [1] 27:9 bill [1] 80:24 bit [7] 4:6 6:25 25:8 46:8,8 56:1 66: 16 bitterness [1] 61:14 both [2] 16:23 32:19 Botswana [2] 57:18 58:22 Boy [1] 42:16 branch [5] 50:8 54:4 59:11 61:23 64:14 branches [6] 50:1,3 54:7 61:8 68: 23 82:6 Breyer [27] 9:14,15 10:25 11:6,7 32:25 33:1 57:15,16 58:9,14,17, 20 59:7,14,18,21,24 60:3,17,25 61: 12,18,21 62:8 84:16 85:1 Breyer's [1] 8:12 brief [7] 16:7,15 23:16 40:19 43:15, 17 64:2 briefed [1] 74:16 briefing [2] 15:7 81:20 bright [1] 22:3 bright-line [2] 44:12 76:2 bring [2] 25:15 83:13 broad [1] 83:4 broad-based [1] 41:16 broader [2] 46:19,21 broadly [2] 30:22 51:21 brought [5] 9:17 35:8 43:20 61:10 84:17 Budapest [1] 87:3 bunch [1] 9:19</p> <p style="text-align: center;">C</p> <p>call [6] 15:22 24:11 26:12 40:19 46: 20 51:21 called [3] 28:18 57:25 65:9 came [4] 1:13 25:18 71:25 72:20 camps [1] 67:14 Canada [2] 8:9 21:17 capabilities [1] 36:2 care [1] 38:3 Carolina [1] 67:19 Case [102] 3:4,17 4:14 6:2,9 7:2,4, 7 10:21 11:9,16 13:8,12,13,20 14: 3,24 15:13,20 17:17 20:21 23:2 25:5,5 26:19,19 27:10,20 28:9,13</p>	<p>29:23,25 30:3,5,21 37:6 39:1,10, 12,14,18,19,20 40:5,15,16,21,21, 24 42:22 43:14,15,17 44:21 47:2, 3,12 48:2 49:2 51:12 52:6,7,8 53: 6 54:5,17,18,20,22 55:3,4,4 56:5,7, 13,17 57:12 58:2,7 61:24 62:1,14, 16 64:11 67:5 68:17 69:11,23 70: 3 71:11,25 78:13,15 82:11 83:1,7, 21 84:2 86:12 87:5,8,9 case-by-case [7] 8:21 28:16,18 31:10 65:5 75:9 76:3 case-specific [1] 82:20 cases [39] 6:13 9:2 16:9,10,11,22 17:2,3,21 18:20 20:9 21:9,11 32: 18 41:4 50:9 53:9,18 63:2,7 67:18 68:10,11,18,19,20 69:10 72:20,21, 23 73:1 74:11 77:12,13,25 84:20, 23 85:6 86:4 categorical [2] 38:16 53:4 categorically [1] 48:3 categories [2] 16:10 64:3 cause [6] 20:9 62:18,18 63:18 78: 6 85:7 caused [1] 61:14 causes [2] 23:7 27:11 central [1] 82:19 century [1] 28:7 cert [3] 56:7,9 74:17 certain [4] 21:9,10 35:4 64:3 certainly [8] 14:23 33:19 34:25 35: 7 45:17 55:20 67:10 86:5 certified [2] 69:24 70:1 cetera [1] 57:21 chance [1] 55:24 channeled [1] 19:15 CHIEF [63] 3:3,9 5:7 6:1,19,23 7:1 9:9,13,17 11:22 13:22,24 16:3 19: 1,5 21:22,24 24:4 26:23,25 27:24 28:5 29:6,22 30:6,14 31:3,6 32:24 34:12 36:15 38:20,24 41:12 44:3, 5 46:4 48:6 49:5,10 51:11,17,19, 25 53:3,19 54:10,13 57:14 62:9, 25 66:13 69:7 73:13 74:19 79:1 81:24 82:2 84:5,6,11 87:7 choice [3] 47:5 59:1 60:21 choose [1] 62:11 chose [1] 56:12 Circuit [8] 6:8 9:25 43:18 56:6 69: 12 72:25 73:1 74:11 Circuit's [1] 7:8 circumstance [5] 37:17 44:14,16, 21 45:15 circumstances [14] 5:18 7:12 12: 1 15:13 22:8,11 35:1 38:9,15 45: 20,23 62:14 64:22 82:13 citation [1] 81:20 cite [1] 68:10 cited [2] 16:9 17:21 citizens [3] 6:3 35:9 55:21 citizenship [5] 43:10 67:12 74:1 81:7,10 civil [1] 23:1 claim [11] 6:18 13:9 17:6,13 55:17, 24 57:19 81:10,12 82:7,8</p>	<p>claimants [1] 43:24 claims [35] 3:20 4:3,11 15:17,25 18:21 23:4,5,9,10,13 25:16,23 26: 3,15 28:25 35:8,10 39:18 43:19 47:23 48:9 49:14 50:5,12,16,19 51:8 60:8,10 61:10 64:3 69:12 70: 19 71:13 clarifying [1] 56:17 clarity [1] 64:9 class [7] 12:15,17 69:24,25 70:4 71:12 73:8 classes [2] 21:9,10 clear [10] 4:5 7:11 8:5 10:12 17:20 31:16 42:23 49:3 50:15 86:9 clearly [5] 6:11 17:7 19:21 55:7 85: 19 client [1] 29:10 closely [3] 24:13 31:25 47:24 clothing [1] 83:11 Code [1] 23:5 codified [1] 23:6 colleagues [1] 57:3 colleagues' [1] 36:23 colloquies [1] 84:16 come [12] 7:1 24:17,22 33:20 41: 25 58:8 61:23 70:11 71:21 72:4, 22 86:23 comes [3] 25:13 54:4 63:17 comit [1] 7:23 comity [63] 4:4 5:6,11,15,17,24 6: 10,14 7:9,14,17,22 8:5 9:3,18 10: 6,16 11:10 14:6,12 15:5,16 16:6, 13,24 17:14 24:9,18 28:12 29:10 31:2 32:21 33:17 34:9,17 37:23 40:22 41:10,16 43:22 46:7,19,21, 22 51:16 52:15 53:5 58:3,13 60: 20 62:15 63:25 66:22 67:24 68:20 74:24,25 79:5,16 80:5 84:4 85:16, 22 Comity-based [22] 3:11 4:22 10: 10,23 12:23 13:2 29:2 32:7 33:21, 23,25 38:18 40:16 47:20 48:22 49: 2 52:3 54:2 61:9 65:14 72:19 80:9 Commerce [1] 7:11 commercial [1] 67:21 committed [2] 86:20,25 committee [1] 57:25 common [15] 8:3 12:4,24 20:22 32:4 52:10,22,25 67:25 77:5 79: 14,20,22 80:1,2 communications [1] 30:8 companies [2] 72:4 73:10 company [1] 72:3 compared [1] 79:6 compelled [1] 86:3 compensation [3] 48:10,18 71:2 competing [3] 6:18 17:6,13 complaint [3] 3:13 9:7 30:2 completely [2] 36:12 82:18 comprehensive [2] 70:15 84:3 comprehensiveness [1] 64:8 concepts [1] 46:9 concern [7] 35:10 36:1,3 67:21 68: 24 69:3 75:18</p>	<p>concerned [3] 20:5 34:5 48:15 concerns [18] 4:19 12:3 22:13 25: 25 28:10 33:25 35:15,23 47:4,14, 15 51:6 64:11 73:4 82:16,18,20 86:12 concurring [2] 8:12 11:1 conduct [7] 3:24 18:23 20:23 27:7, 9 35:11 76:14 confiscations [2] 3:21 4:11 confusion [2] 7:16 41:19 Congress [41] 19:21,24 21:8 27: 23 31:22 32:6 33:2 34:5 37:1,7,11, 14,17,25 38:8 45:9 50:14,16 51:9 57:6 59:19 60:9,16 61:8 62:7 63: 24 64:2 65:25,25 66:1 76:8 78:4,9, 21 80:25 82:6 86:1,4,6,9,22 Congress's [1] 50:22 consent [1] 17:4 consequences [1] 86:2 conservative [1] 77:22 consider [1] 83:7 consideration [3] 38:4 68:15 77: 3 considerations [10] 6:4 34:9 35:4 41:5 46:12 47:18,19 48:13 60:19 65:7 considering [3] 56:16 82:25 83:5 consist [1] 9:24 consistently [1] 48:12 Constitution [2] 49:25 82:5 constitutional [3] 23:3 54:6 61:5 consul [3] 17:5,7,10 consuls [1] 32:16 context [12] 20:23 26:7 29:9,13 36: 6 40:8,12 42:15 56:17 60:14 77: 11 78:5 contexts [1] 26:8 contradictory [1] 33:4 contrary [1] 28:20 contrast [1] 52:21 controlled [1] 25:1 controversies [1] 21:19 controversy [3] 11:3,19 22:13 convenience [14] 5:13,22 6:15 10: 13 16:23 17:9 19:11 32:20 41:9 46:24,25 47:6,19 68:13 conveniens [32] 5:5 6:6 9:20 12: 22 16:11 17:15 28:19 38:3 40:9, 20 41:2,7 46:11,18,23 47:16 51: 14,22 52:8,22 53:24 63:3 65:20 68:11,12,19 74:23 79:6,7,10 80: 19 81:3 Convention [1] 23:23 cooperated [1] 70:18 cooperation [2] 48:19 71:15 correct [2] 10:5 24:20 correctly [1] 28:21 counsel [31] 6:20,24 9:10 13:23 14:1,2,16 16:2 19:2,7 20:4 27:25 31:4 36:17 38:21 43:6 44:2 46:6 48:5 49:6 51:11 53:3 54:11,15 62: 10 66:12,15 69:5 81:23 84:7 87:8 countermanding [1] 78:3 countries [8] 30:9 46:13 70:13,16</p>
---	--	--	--

Official - Subject to Final Review

<p>71:4,14,21 84:22 country ^[14] 3:15 18:23 20:25 22:5 33:6 34:2 44:9 47:13 49:15 73:19 75:22,23 78:15 86:20 couple ^[4] 16:5 31:14 72:17 73:18 course ^[3] 53:16 56:8 59:23 COURT ^[108] 1:1,14 3:10,12,15,22 4:4,8 6:5 7:13,19 8:2 10:10,14,20, 24 11:12,15,17 12:16,18,25 14:10, 11,25 15:17,19,19 17:12,21 18:18 19:10 20:20 21:15 22:20 23:18 24: 2,24 25:6 26:6 28:6,7,8,10 30:4, 12,23,25 31:21 32:1,14 36:1 37: 10,13,14,18,20 38:17 39:7,9,11 40: 25 42:11 43:18 44:14,16 45:3,13, 17,18,21 46:2 48:2 49:3,11,24 50: 21 55:18 56:25 57:8 58:16 61:5 62:4 64:12 65:9 66:10 68:17,25 70:2 71:10 72:1,2,11 74:4,8 76:7 77:13,16 78:1,5,14,15 80:10 82: 13,21 83:6 85:25 86:23 Court's ^[2] 7:9 16:18 courtroom ^[1] 87:3 courts ^[78] 7:15,18 9:4,5 10:15 16: 21 17:4,11 18:15,17 20:2,8 21:18 22:2,24 23:17 24:25 25:23 26:11, 14 27:16,18,22 28:15,17,23 29:12, 16 30:25 32:15 33:19 35:1,25 36: 2,4,7 38:15 39:3,24 40:7,9 41:9 42:20 48:22 49:14 50:2,5,15,19, 22 51:4,7,9 53:10 61:3,10 64:13 65:12 67:20,25 72:17 73:1,9 75: 12,14,24 76:9 77:18,23 79:13 80: 17 82:9 84:19 85:3,6,10 86:3,7 courts' ^[1] 50:11 covered ^[2] 54:24 76:20 create ^[6] 7:23 19:20 36:9 56:23 70:18 71:14 created ^[2] 8:3 72:5 creates ^[1] 27:5 creating ^[1] 36:4 cross-cutting ^[1] 35:5 curiae ^[3] 1:22 2:8 28:3 curious ^[2] 41:15 74:5 customary ^[1] 66:20 cut ^[1] 18:5</p>	<p>18 30:16,17,20,23 39:1,6,8,9,12, 21 40:7 42:12 45:11 46:2 61:9 64: 13 decisions ^[2] 35:1 54:9 declarations ^[1] 30:5 decline ^[6] 3:15 11:17 12:25 15:19 16:22 21:18 declined ^[3] 62:3 67:20 82:11 declining ^[2] 5:4 41:7 deemed ^[1] 43:9 defeat ^[1] 44:24 defendant ^[6] 12:15,17 44:8 72:3 78:13,15 defendants ^[14] 4:10,15,24 5:1,1 22:4 27:8,11,13 28:24 29:1,4 75: 21 77:8 defense ^[1] 8:6 defenses ^[2] 12:4 85:22 defer ^[1] 31:1 deference ^[2] 35:18 59:9 definition ^[1] 37:16 demands ^[1] 9:5 demonstrate ^[1] 60:5 denaturalization ^[1] 13:9 denied ^[2] 25:19 34:8 Department ^[18] 1:21 19:16 30:11 35:14 36:19 38:24 39:2,8,17,23 40:3 41:19 45:14,19 58:8 63:16 80:23 83:20 Department's ^[1] 45:22 depend ^[3] 10:13 57:1 77:11 depending ^[1] 33:12 deported ^[1] 67:13 described ^[3] 19:10 41:1 78:12 describes ^[3] 43:17 52:14 80:9 describing ^[1] 41:3 designated ^[1] 38:9 destruction ^[1] 83:14 determination ^[5] 62:5 65:11 77: 18 78:19,21 determinations ^[10] 8:25 50:23 51:4 61:4,7 63:25 65:6 77:4,24 78: 3 determine ^[1] 45:3 determines ^[1] 28:12 determining ^[2] 14:13 37:16 detrimental ^[1] 30:24 develop ^[3] 79:14,16 81:15 developed ^[3] 74:4,8 81:14 dialogue ^[1] 48:19 dictates ^[1] 21:8 dictator ^[1] 33:7 difference ^[3] 19:19 33:22 39:5 different ^[22] 5:9,17,19,25 6:13,25 10:7,17 14:17 15:11 25:8 33:13 36:6 41:4 48:4 52:17,19 59:25 68: 17 70:12 73:17 77:14 differently ^[6] 5:6 55:3 71:8,23,24 72:9 difficult ^[1] 39:24 dignitary ^[2] 6:16 47:22 dignity ^[4] 17:12 19:14 52:15 80: 11 diplomatic ^[2] 9:2 48:23</p>	<p>directed ^[5] 31:17 52:12,15 68:13 76:15 direction ^[2] 62:6 77:24 directly ^[5] 16:19 19:18 49:16 53:1 59:17 dirty ^[1] 39:25 disagree ^[4] 20:17 54:1 80:6 82: 10 disagrees ^[1] 58:16 discrete ^[2] 21:15 22:13 discretion ^[1] 21:18 discussed ^[2] 8:8,9 discusses ^[1] 8:11 dismiss ^[5] 14:11 37:6 58:2 64:11 72:2 dismissal ^[1] 4:5 dismissed ^[8] 4:12,14 43:19 54:5 62:2,14 72:24 73:3 displace ^[8] 19:21 31:23 32:2,7 60: 6 74:24 79:20 81:2 displaced ^[12] 18:3 19:24 52:10 60:9,10 76:7,24 80:3,7 85:19,21, 24 displaces ^[1] 52:25 dispositive ^[3] 35:16,19 73:2 dispute ^[1] 22:20 disputes ^[1] 85:3 disregard ^[1] 82:14 dissenting ^[2] 8:10,13 distinct ^[5] 10:9 11:2,12 32:22 46: 22 distinction ^[1] 24:8 district ^[15] 17:21 34:16 35:21 43: 18 45:3,12,18,21 46:1 61:3,5 62:4 70:2 72:1,1 divided ^[1] 7:15 doctrine ^[9] 5:17,20,24 6:9,10,14 7:23 8:11 9:3,18,24 10:10,12,19 12:22,24 13:1 14:6 15:6 16:6 18:2, 10 24:9,18 28:19 31:19,24 32:2,8 33:21 34:14,23 37:15,23 38:19 40: 9,15,17,22 41:2,7,17,17 42:17 46: 7,19,21,22 47:16 50:9,21,24 51:13, 16,23 52:3,23 53:15,22,23 54:2 62:13 63:21 64:19,20,24 65:20,23 68:7 72:18 74:25 75:4,6,16,19,25 76:6,23 77:7 79:5,7,11,14,16 80:2, 3,5,14 81:3 85:16,24 doctrines ^[17] 4:21 8:3 9:20 10:7 16:25 25:10 38:2 46:17 52:11,11 53:1 56:24 57:7 63:1,8 79:22 80: 19 Dodge ^[3] 16:7,20 75:3 doing ^[11] 32:19 36:10,12 39:11, 17 45:18 58:10 60:18 77:13,16 80: 21 domestic ^[4] 13:16 37:5 73:20 76: 11 domestically ^[1] 42:3 done ^[3] 61:24 64:5 78:10 doubt ^[1] 84:23 down ^[1] 25:13 draft ^[1] 80:24 drawn ^[1] 49:19</p>	<p>due ^[2] 49:22 64:12 during ^[3] 3:19 43:25 74:2 duty ^[1] 21:10</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each ^[1] 6:17 earlier ^[1] 67:4 early ^[1] 40:20 easier ^[4] 27:6 50:4,18 73:5 easy ^[3] 9:4 22:2 53:8 economy-crushing ^[1] 3:23 effect ^[3] 4:20 25:9 34:15 efforts ^[3] 48:24 70:25 71:8 either ^[2] 52:6 63:11 elected ^[6] 50:1 54:7 61:8 64:14 68:23 82:6 Eleventh ^[1] 72:25 eliminate ^[2] 51:3 82:20 elsewhere ^[3] 42:21 43:2,11 embassies ^[1] 30:8 Empagran ^[1] 18:19 emphasize ^[2] 27:2 29:8 enacted ^[7] 50:7,14,17 52:4,24 64: 1 72:20 enactment ^[5] 8:7 12:22 23:8 79: 8 81:4 encounters ^[1] 28:9 encourage ^[1] 70:25 end ^[5] 42:12,20 48:14 61:14 70:3 Energy ^[1] 7:11 enough ^[2] 38:25 40:4 enrichment ^[1] 23:12 ensuring ^[1] 34:5 envision ^[1] 53:8 equitable ^[1] 75:13 equity ^[1] 67:23 equivalent ^[1] 28:25 era ^[1] 48:11 especially ^[3] 18:23 34:6 79:5 espousing ^[1] 40:17 ESQ ^[4] 2:3,6,10,13 ESQUIRE ^[2] 1:18,24 essentially ^[2] 14:5 69:15 establish ^[1] 43:23 establishment ^[1] 71:1 Estreicher ^[1] 10:1 Estreicher's ^[1] 60:19 ET ^[3] 1:3,6 57:20 European ^[3] 23:18,22 24:2 evaluation ^[2] 75:10 76:3 even ^[11] 6:12 12:9 17:1 26:2 56: 12 59:24 63:11,12 66:25 73:24 82: 9 events ^[1] 6:3 everybody ^[1] 79:6 everyone ^[1] 80:1 everything ^[1] 83:9 evidence ^[1] 39:13 exact ^[1] 81:19 exactly ^[7] 9:24 19:8 30:2 38:7 39: 16 42:19 49:18 example ^[12] 7:21 12:14 20:6 22: 13 35:6 40:20 45:4 48:3 50:6 57:9 79:25 83:17</p>
---	--	--	---

Official - Subject to Final Review

<p>examples ^[1] 68:19 exception ^[8] 54:25 55:19 60:12 73:22 76:13 83:5 84:1 85:14 exceptions ^[2] 21:15,16 excuse ^[5] 8:18 37:21 76:12 78:9 80:2 executive ^[17] 8:25 9:1,5 18:6 19: 24 30:9 50:7,24 54:4 59:10,20 60: 9 61:23 62:6 64:2 82:9 86:10 executive-driven ^[2] 18:4,5 exercise ^[12] 11:15 28:11 32:17 36:8 37:19,21 41:8 51:4 57:5 65: 12 66:10 82:22 exercising ^[6] 17:2,11 69:1 70:7 77:19 78:2 exhaust ^[3] 15:9 43:7,11 exhausted ^[5] 24:15 25:17 26:3 42:21,25 exhausting ^[2] 23:25 41:24 exhaustion ^[14] 9:21 15:23 16:2 24:9,11 26:12 41:17,22 42:7,9,17, 22 43:6 46:10 exist ^[15] 8:6 38:2 53:21 58:11,15, 21,22 60:13 62:13 63:22 64:20,25 75:4,6 76:23 existed ^[3] 7:22 63:21 74:25 existence ^[1] 66:5 existing ^[1] 52:10 exists ^[6] 58:11 74:25 75:8,25 77: 7,20 expecting ^[1] 39:24 expert ^[1] 30:5 explain ^[2] 56:1 64:1 explained ^[2] 28:21 71:11 explaining ^[1] 50:10 explanation ^[1] 12:21 explicitly ^[1] 8:8 expose ^[1] 85:8 exposed ^[1] 49:21 express ^[1] 61:25 expressed ^[2] 36:1 75:11 expresses ^[1] 45:24 expressing ^[1] 45:10 expression ^[1] 10:6 expressly ^[2] 16:21 76:14 expropriation ^[12] 37:3 50:9 54: 24 55:19 60:12 66:19,20 76:12,13 83:5 84:1 85:13 expropriations ^[1] 37:4 extend ^[1] 32:17 extended ^[1] 20:21 extent ^[8] 11:25 12:13 34:5 52:9, 17 71:5 76:22 80:4 extremes ^[1] 68:6</p>	<p>fairly ^[1] 76:1 faithful ^[1] 12:6 fall ^[3] 16:9 63:7 67:5 fallback ^[4] 53:25 63:15,19 64:6 fallen ^[1] 86:15 far ^[1] 10:11 favor ^[3] 3:16 13:6 85:22 federal ^[5] 3:15 12:4 17:4 18:15 36:2 fee ^[1] 77:22 feel ^[3] 29:19 30:11 40:4 few ^[2] 55:25 58:12 file ^[2] 23:1,4 filed ^[2] 30:2 43:15 filing ^[1] 71:12 fill ^[1] 29:15 final ^[3] 15:1,3 82:23 finally ^[1] 5:2 find ^[2] 10:6 67:17 Fine ^[2] 43:6 58:21 finely ^[1] 66:6 Fire ^[1] 8:10 firm ^[1] 56:22 first ^[29] 3:4 4:18 10:5,20 12:8 14: 12 15:16,18,25 16:21 23:6 24:12, 16 25:15 26:4,11 27:5 31:15 34: 17 44:15 52:2 54:20 56:5 59:1 62: 25 68:9 72:25 78:20 84:13 fits ^[1] 57:19 five ^[1] 9:25 flag ^[1] 27:10 FNC ^[4] 5:18 6:9 10:18 12:24 focus ^[2] 15:6,8 focused ^[1] 46:23 follow ^[2] 66:16 86:3 follow-up ^[1] 67:16 following ^[2] 7:2 14:3 foot ^[1] 4:2 fora ^[3] 47:25 70:19 71:15 forced ^[2] 19:25 67:13 foreclose ^[3] 36:12 45:17 49:4 forecloses ^[2] 28:15,17 foreign ^[132] 3:14,14,15,16 4:4,15 9:7,8,20 10:21,22 11:24 17:3,5,7, 10 18:7,16,23 19:13,14,25 20:2,11, 18,24,25 21:1,4 22:4,5,5,22 24:24, 25 25:2,6 26:20 27:7,9,13,16,18, 22 28:9,13,14,22,24 29:1,3,16 32: 16,18 33:20 34:15,19 35:15,23 36: 3 38:6 44:8,9,9 46:12,14 47:3,9, 12,24 48:15 50:1,23 51:5,6 52:6,7, 12,16,17 54:6 60:6,14 61:4 62:5, 18 63:9,13,24 64:4,11 65:6,22 66: 5,11 67:22 68:24 69:2,15 73:3,6 75:9,18,21,21,22,23 76:3,10,10 77: 3,8,23 78:3,8,8 79:25 80:11,13 82: 5,16,20,22 84:21,22 85:1,3,3,9,22 86:2,8 foreign-cubed ^[1] 26:1 foreigner ^[4] 11:9,10 18:22,22 foreigners ^[5] 16:22 20:24,25 21: 19 84:21 forget ^[1] 30:1 form ^[1] 64:25</p>	<p>forms ^[1] 73:22 forum ^[48] 5:4,12,20 6:5 12:21 16: 11 17:15 26:9 28:13,18 34:2,7,9 37:9 38:3 39:19 40:8,11,12,20 41: 2,6 42:14 44:17,19 46:10,18,22 47:6,15,18 51:14,22 52:7,21 53: 23 57:10 63:3 65:19 68:10,12,19 74:22 79:6,7,10 80:19 81:2 forward ^[4] 7:13 23:12 62:17 63: 17 foundation ^[1] 51:1 four ^[2] 10:2 60:19 framework ^[1] 11:20 France ^[3] 43:23,25 70:17 fraud ^[1] 25:21 free ^[3] 29:2,4 41:25 French ^[1] 43:16 frequently ^[1] 66:7 friction ^[10] 4:13 18:24 19:13 20:5, 10 27:12 36:10 46:13 69:17 75:10 friend ^[13] 12:2,20 13:18 20:14 27: 4,14,19 32:13 52:14 80:8 84:13 85:13,23 friend's ^[2] 27:5 84:18 front ^[3] 42:12,20 70:3 FSIA ^[54] 4:23 5:2 8:7 12:23 18:3 19:9 28:22 31:11,16,17,22 32:1,6, 11 33:3 36:18 38:7,13,19 49:3 50: 7,14,17 51:3,12 52:4,10,20 56:23, 25 59:5 61:19 64:1 65:4,21 72:20 74:23,24 76:7,8,24 79:8 80:3,7,14, 20 81:5 82:19 84:19 85:12,17,18, 21 86:7 FSIA's ^[2] 4:18 84:3 functionally ^[1] 24:12 fundamentally ^[1] 77:14 further ^[1] 86:1 future ^[1] 62:17</p>	<p>given ^[5] 5:11 29:12 53:7 57:5 75: 13 gives ^[1] 22:17 giving ^[1] 22:3 global ^[2] 70:20 72:6 Gorsuch ^[20] 19:6,7 20:4,11,14,16 21:2,5,14,20 41:13,14 42:16,19 43:4 44:2 73:14,15 74:18 81:13 got ^[1] 58:17 gotten ^[1] 29:24 government ^[10] 29:16 34:18 35: 3 48:9 57:19 58:23,24 64:14 70: 24 86:15 governments ^[1] 48:16 grant ^[2] 36:20 76:9 granted ^[2] 36:21 56:9 grave ^[1] 62:18 GREGORY ^[5] 1:18 2:3,13 3:7 84: 9 grounds ^[12] 4:4,6 5:3,13,13 14: 12 25:19 31:2 34:17 37:23 41:10 43:22 group ^[1] 57:17 guess ^[2] 19:18 41:14 guidance ^[4] 7:18 45:14 65:3,15 guided ^[1] 67:25</p>
H			
		G	<p>hampered ^[1] 70:25 hanging ^[1] 22:15 happen ^[2] 6:12 58:4 happened ^[1] 76:21 Harbor ^[1] 49:18 hard ^[4] 52:18 75:12 80:12 83:16 harm ^[3] 64:16 75:21 85:7 harmed ^[5] 3:14,25 9:7 10:22 84: 21 harming ^[1] 20:24 harms ^[1] 11:9 HARRINGTON ^[55] 1:24 2:10 49: 7,8,10 51:17,24 53:19 54:19 56:4 57:1 58:6,14,19 59:4,13,18,23 60: 2,8,23 61:1,16,19,22 62:20,24 63: 23 65:1 66:4,24 68:3,8 69:6,8,20 70:22 71:10 72:15 73:12,16 74:7, 22 76:5 77:1,10 78:17,24,25 79:4, 18 80:22 81:18,25 82:1 Hartford ^[1] 8:10 hear ^[9] 3:3 21:9,10,18 22:3 82:9 84:13,20 86:4 heard ^[2] 28:13 51:9 hearing ^[3] 22:20 68:17 75:15 held ^[6] 6:8 14:10 49:24 66:23 76: 7 85:25 help ^[2] 33:9,11 helped ^[1] 33:16 helpful ^[2] 65:2,15 helping ^[1] 49:16 helps ^[3] 12:11,12 33:24 high ^[2] 26:16,17 highly ^[1] 84:24 historical ^[4] 16:5,12 40:14,21 history ^[3] 51:1 81:4 83:8 Hmm ^[1] 60:17</p>

Official - Subject to Final Review

<p>hoc ^[3] 51:3 65:5,11 hold ^[3] 7:6 14:23 64:20 Holocaust ^[6] 43:8 48:10 49:17 73:21 74:2 83:23 Holocaust-era ^[6] 48:17 50:4,9, 19 71:13 73:7 homes ^[1] 67:13 Honor ^[26] 6:8 7:5 8:1,23 10:5 13: 11 29:18,25 30:10,18 31:12 32:12 33:18 34:25 35:19,24 37:12 38:12 39:4 40:2,23 42:23 43:13 44:11 45:17 47:17 Human ^[6] 23:18,23 24:2 71:2 73: 21 83:8 Hungarian ^[18] 6:3 15:17 23:5,9, 14,17 24:1 25:17,20 26:11,13 41: 24 55:14,21 67:8 81:9 87:2,3 Hungarians ^[2] 3:18 55:16 HUNGARY ^[39] 1:3 3:5,18,18,20 4: 7 6:3,4 15:21,24 22:24 23:2,7 24: 12,16 25:16 26:3 27:20 29:21 39: 19 40:6 41:21 50:20 51:7 55:5 56: 6,14,19 65:17 69:11 70:12 71:8 72:7,16 74:1 77:12 79:17 83:9,14 Hungary's ^[2] 69:14 83:13 Hungary-owned ^[1] 72:8 hurt ^[1] 33:15 hypo ^[1] 84:25 hypothetical ^[2] 13:6 54:16 hypothetically ^[4] 7:3 13:5 14:3 66:18</p>	<p>inconvenient ^[1] 21:12 incorporated ^[1] 79:12 incorporates ^[2] 46:9,11 Indeed ^[1] 83:18 independent ^[3] 5:10,14 52:3 indicate ^[1] 36:23 indicated ^[2] 40:3 41:24 indication ^[3] 66:8 68:22 79:23 individual ^[2] 9:2 12:1 industry ^[4] 33:5,8,9,15 Infanta ^[1] 67:19 inferred ^[1] 78:6 information ^[10] 29:20,24 30:3,12, 15,20 33:4 38:25 39:2 40:4 informed ^[1] 30:19 injured ^[2] 22:5 44:9 injuries ^[1] 44:1 injustices ^[2] 86:20,25 input ^[2] 45:19,22 inquiry ^[4] 52:15,18 70:8 80:9 instances ^[1] 13:17 Instead ^[1] 47:7 instructions ^[1] 86:9 intended ^[7] 27:23 37:7 38:7 65:8 66:9 76:8 80:14 intending ^[1] 31:23 intends ^[1] 56:19 intent ^[1] 79:24 intentionally ^[1] 60:16 interest ^[24] 11:3,11,13,19 17:14, 15 22:19,21,22 30:21 33:14 35:7, 10 45:1,7,10,25 47:20,22 49:13,16 60:5 83:19 85:5 interesting ^[1] 74:3 interests ^[12] 5:19,23 6:17 10:18 17:4 33:20 52:16 60:7 68:16 76:4 80:11 85:4 international ^[46] 4:13 5:11,15,16, 24 6:10 10:2,16 14:6 15:5 16:13, 24 18:24 19:12 20:9,23 24:18 27: 11 28:12 29:8,9,12 31:1 32:7,21 36:9 37:3,23 41:10 43:22 47:20 51:16 53:5,8,17 63:18 66:19,20 67:3 69:17 72:19 75:10 83:3,18 84:4 85:8 interpretation ^[1] 84:19 interrupt ^[1] 47:11 interruption ^[2] 51:25 68:9 intervene ^[1] 61:24 invite ^[2] 83:6 86:2 invited ^[2] 61:25 82:10 invoked ^[1] 64:21 involve ^[2] 37:4 41:4 involved ^[3] 53:11 69:12 75:14 involvement ^[1] 50:24 involves ^[1] 6:2 involving ^[2] 17:3 26:19 isn't ^[6] 11:17 12:5 18:12 20:11 47: 14 85:25 issue ^[10] 7:14 13:7 38:6 40:2 45:5 48:24 56:5 64:16 66:22 74:13 issues ^[1] 36:3 itself ^[5] 44:14 46:15 79:12,23 83: 2</p>	<p style="text-align: center;">J</p> <p>Jesner ^[2] 8:13 18:19 Jewish ^[2] 43:8 74:2 Jews ^[1] 83:14 Judge ^[6] 28:20 34:16 35:13 58:2 87:2,6 judges ^[1] 35:21 judgment ^[12] 18:16 20:12,19 21: 1 25:1,6 26:20 36:25 37:11,14,24 38:8 judgments ^[2] 19:25 20:3 jurisdiction ^[56] 3:16 4:8,20 5:4 6: 18 7:7 11:4,14,16,17 12:25 13:14 14:4,7,14,19,24 15:20 16:22 17:3, 6,11,14 20:21 28:11 32:17,18 36: 8 37:18,19,21,22 41:8 50:12,15 51:5 56:11,18 57:5 62:7 65:12 66: 10,23 67:1,20 69:1 70:7 76:9 77: 17,19 78:2,20 82:15,22 84:2 85: 15 jurisdictional ^[2] 13:7 64:18 Justice ^[238] 1:21 3:3,9 5:7 6:1,19, 21,22,23 7:20 8:9,9,11,13,15,17 9: 9,12,13,13,15 10:25 11:5,7,22,22, 23 12:7 13:4,21,22,22,23,24,24 14: 1,9,15,22 15:1,3,13 16:1,3,3,4,17 17:16,22,24,25 18:14 19:1,3,5,5,7, 14 20:4,11,13,16 21:2,5,14,20,22, 22,24,25 22:9,10,23 23:15,21 24:3, 4,4,6,7,17 25:7,24 26:21,23 27:1, 24 28:5 29:6,22 30:6,14 31:3,5,6, 7 32:10,23,24,24 33:1 34:12,12,13, 14 35:12,20 36:14,15,15,17 38:1, 20,22,23,24 39:15 40:13 41:11,12, 12,14,18,23 42:16,19 43:4 44:2,3, 3,5,6,13,18,23 45:2,12 46:3,4,4,6 47:8,11 48:5,6,13 49:5,11,17 51: 11,18,19,25 53:3,19 54:10,12,13, 14 55:25 56:21 57:13,14,14,16 58: 9,14,17,20 59:7,14,18,21,24 60:3, 17,25 61:12,18,21 62:8,9,9,10,20, 22 63:1,6 64:15 65:1,24 66:12,13, 13,15,16 67:15 68:3,5 69:4,7,7,8, 20 70:21 72:12 73:11,13,13,15 74: 18,19,19,21 76:5,25 77:6 78:11,18, 23 79:1,1,3 80:16 81:6,13,22,24 82:2 83:20 84:5,6,12,16,17 85:1 86:16 87:7 justify ^[3] 11:4,13 68:7 justly ^[1] 48:18</p>	<p>1 78:7 79:5 kinds ^[3] 20:9 54:9 86:2 Kiobel ^[3] 8:12 11:1 18:18 kitchen ^[1] 18:11</p> <p style="text-align: center;">L</p> <p>lack ^[1] 4:24 language ^[1] 12:10 large ^[3] 49:22 69:25 86:19 last ^[5] 5:8 9:16 50:2 72:17 86:11 latter ^[2] 79:15,19 law ^[29] 3:22 8:3 10:2,7 12:4,24 20: 22 23:6 25:3 32:4 42:4 45:9 52:10, 22,25 66:20 67:3,25 76:11 77:5 79:14,21,22 80:1,2 83:3,18 87:3,6 laws ^[1] 73:20 lawsuit ^[3] 18:21 34:20 35:22 lawsuits ^[1] 71:12 lead ^[5] 38:10,10 66:3 78:12,13 least ^[9] 18:6 43:10 54:3 58:16 60: 21 67:18,21 71:5 75:16 leave ^[1] 72:13 leaves ^[1] 5:3 Lee ^[1] 10:1 left ^[1] 8:25 legal ^[2] 11:20 51:1 legislation ^[1] 50:17 length ^[1] 8:11 letter ^[1] 50:10 level ^[1] 30:9 Levin ^[2] 7:10 14:11 liability ^[7] 3:23 12:3,13,14,16,18, 19 liable ^[2] 11:24 22:18 lies ^[1] 41:20 lifetime ^[1] 83:24 limitations ^[2] 23:4 53:22 limiting ^[1] 84:14 line ^[1] 22:4 lines ^[2] 46:1 47:1 linger ^[1] 82:3 litigants ^[4] 46:24 47:14 72:13,14 litigate ^[2] 23:13 83:22 litigated ^[1] 24:23 litigating ^[1] 83:22 litigation ^[3] 5:23 53:11 85:9 little ^[6] 25:7 46:8,8 56:1 66:16 85: 4 lived ^[2] 55:14 67:9 long ^[2] 3:19 29:23 longstanding ^[1] 49:16 look ^[9] 5:9 10:15 16:17 31:15 32: 13 34:4 41:3 44:16 47:7 looked ^[1] 32:15 looking ^[1] 39:18 looks ^[3] 34:1 47:18,21 loss ^[1] 23:11 lost ^[1] 43:25 lots ^[1] 63:2 lower ^[2] 7:15,18</p>
		<p style="text-align: center;">K</p> <p>Kagan ^[21] 16:3,4,17 17:16,22,25 18:15 19:3,15 38:22,23 39:15 40: 13 41:11,18 69:7,8,20 70:21 72: 12 73:11 Katsas ^[1] 28:20 Kavanaugh ^[25] 21:23,24 22:9,10, 23 23:15,21 24:3,17 44:4,5,13,18, 23 45:2,12 46:3 74:20,21 76:6,25 77:6 78:11,18,23 kicked ^[1] 67:12 kind ^[8] 18:11,16 53:13 70:8,24 76:</p>	<p style="text-align: center;">M</p> <p>made ^[12] 7:11 14:19 27:4 37:1,25 50:15 61:8 63:24 65:5 75:2 77:4</p>

Official - Subject to Final Review

<p>78:4 maintain [1] 54:8 Malting [2] 8:9 21:17 manner [3] 11:25 12:13,19 many [1] 70:12 marks [1] 49:18 Maryland [1] 1:24 matter [9] 1:13 14:13 21:7 28:11 45:1,11,25 56:10,18 matters [2] 17:8 48:17 mean [22] 35:12,20 39:15,22 42:9 53:13 54:20 56:4 57:2 60:23 61:6, 16 63:10 65:1 66:24 69:9 70:11 71:24 72:15 77:10 79:19 80:22 meaning [2] 37:1 38:6 meaningful [1] 85:7 means [3] 24:11 63:12,12 meant [2] 14:7 65:4 mechanism [1] 43:24 mechanisms [1] 71:2 medicine [1] 83:12 meet [1] 86:17 mentioned [4] 62:25 65:11 67:4,7 merit [1] 13:12 merits [2] 50:13 87:4 mess [2] 58:1,25 met [1] 59:6 might [8] 6:7 35:18 39:22,25 45:6, 11 63:10 68:7 minute [2] 26:23 48:6 minutes [1] 81:25 modern [2] 41:2,6 moment [3] 47:12 51:6 65:7 Monday [1] 1:11 money [1] 70:6 moral [1] 83:22 morning [9] 3:4 22:1 24:6,10 44:7 73:15 74:21 79:3 82:25 most [3] 31:25 73:8 74:14 motion [1] 34:16 motivated [1] 48:12 motivates [1] 71:20 motivating [1] 9:19 motives [2] 10:15 16:23 Ms [52] 49:7,10 51:17,24 53:19 54: 19 56:4 57:1 58:6,14,19 59:4,13, 18,23 60:2,8,23 61:1,16,19,22 62: 20,24 63:23 65:1 66:4,24 68:3,8 69:6,8,20 70:22 71:10 72:15 73: 11,15 74:7,21 76:5 77:1,10 78:17, 24,25 79:3,18 80:22 81:18,25 82: 1</p>	<p>named [1] 27:13 narrow [2] 64:24 68:5 nation [7] 3:24 17:5,13 59:17,25 69:15 86:16 nation's [1] 4:4 National [3] 43:16 66:21 78:14 nationality [2] 55:23 67:11 nationalization [1] 76:16 nationals [7] 3:25 33:8 37:9 55:14, 21 67:8 81:9 nations [2] 59:15 85:2 nations' [1] 27:22 nature [3] 26:2 53:7 79:4 Nazi [1] 48:11 necessarily [3] 44:10 75:8,13 necessary [2] 55:7 83:11 need [6] 30:16 46:16 64:24 66:25 68:22 74:13 needing [1] 35:2 needs [1] 85:13 negates [1] 63:20 negotiation [2] 45:8 48:19 neither [1] 31:20 never [15] 27:14 30:25 31:1 55:13, 15 62:12 63:14,21 64:21 66:1 67: 8,17 68:1,1 70:14 New [4] 1:18,18 56:23 58:2 next [2] 13:13 70:22 Ninth [2] 9:25 72:25 nobody [1] 18:12 non [36] 5:4,12,20 6:5 9:20 12:21 16:11 17:15 28:19 38:3 40:8,12, 20 41:2,6 46:10,18,22 47:15,18 51:14,22 52:8,21 53:23 63:3 65: 19 68:11,12,19 74:22 79:6,7,10 80:19 81:2 non-citizens [1] 43:9 non-governmental [1] 48:16 non-jurisdictional [1] 4:21 non-nationals [1] 37:5 nonetheless [1] 11:2 nor [1] 31:20 norm [1] 37:4 normal [3] 23:2 42:4 53:16 normally [4] 21:7 70:8 73:19,24 note [1] 12:20 noted [1] 32:15 nothing [4] 9:5 14:20 28:14 42:2 notwithstanding [1] 66:22 number [5] 10:6 18:20 53:20 63:1 75:14</p>	<p>78:23 81:22 82:1 old [1] 18:1 once [1] 26:13 One [28] 9:16 13:4 15:1,3 16:9 17: 17 18:2 19:12 21:16 33:2,22 35: 21 47:12,13,13 53:12 56:12 57:3 59:11,12 60:11 67:16 68:22 81:13 82:23 86:4,22,23 ones [1] 10:18 ongoing [1] 45:8 only [14] 4:14,19 12:12 27:12 31: 20 37:4 42:1 51:22 54:3 58:12 64: 16 73:7 83:18 84:20 opinion [7] 8:10,12,13 11:1 14:5, 21 17:8 opportunity [2] 15:25 55:17 opposite [2] 33:12 77:24 oral [7] 1:14 2:2,5,9 3:7 28:2 49:8 order [1] 81:16 orders [1] 4:7 ordinary [1] 47:2 organizations [1] 48:16 originally [1] 15:21 other [44] 3:14 4:2 5:3,5 9:8,20 10: 3 12:2 13:4,15 17:13 18:5,20 20: 24 22:8,11 25:3 26:7 27:4 30:7,8 31:23 34:2 37:6 38:2,4,18 42:15 46:13,17 48:11 50:17 51:23 53:4 55:20 59:15,24 63:1 70:12 71:14 72:3 82:24 84:21 85:5 others [3] 60:22 75:11 81:10 out [18] 7:1 16:23 19:15 21:16 22: 24 23:22 25:2,18,21 26:13 63:2 67:12,21 78:7 81:8,13 83:7 84:17 outstanding [1] 86:19 over [10] 28:7 32:18 49:24,24 50:2 51:5 66:11 76:9 82:5,22 override [1] 22:22 overrule [1] 50:22 owes [1] 86:19 own [9] 3:24,25 11:20 27:7 45:13 47:25 69:2 82:15 86:9 owned [2] 55:6 83:10 owns [1] 27:14</p>	<p>people [3] 37:5 58:22 86:18 percent [1] 69:13 perfect [1] 29:14 perfectly [1] 72:10 perhaps [6] 6:24 55:8 56:11 58:7 59:19 74:1 permit [1] 50:22 permits [1] 12:24 persons [1] 13:19 perspective [1] 5:9 petition [2] 56:7 74:17 Petitioners [10] 1:4,19,23 2:4,8,14 3:8 28:4 52:5 84:10 Petitioners' [1] 31:9 physical [1] 83:14 pick [2] 5:8 9:16 piece [3] 22:14,14,17 Pimentel [1] 48:2 place [2] 5:3 78:20 places [1] 49:20 plain [2] 4:18 83:4 plainly [3] 76:6,24 77:20 plaintiff [2] 23:14 24:23 plaintiffs [1] 47:5 plaintiffs [32] 3:17,21 4:9,13 13:8, 13,19 15:16 22:5 23:1,25 24:15 25:11,15 26:10 34:6,6 41:25 50:4, 18 55:5,12,13,20 67:4,8,10 73:7 75:15 76:10 81:8 83:10 play [1] 46:18 playing [1] 22:24 plays [2] 5:11 48:23 please [7] 3:10 17:24 28:6 49:11 58:1,24 63:17 ply [1] 66:9 point [20] 15:4,15,24 17:1 22:2 43: 13,14 58:18 60:11,11 69:24 73:17, 23 78:24 81:7,8 82:4,23 85:11 86: 11 pointed [3] 19:15 65:17 81:13 pointing [1] 17:16 points [2] 77:24 84:12 policy [37] 18:16 19:25 20:3,12,18 21:1 30:24 48:8 50:1,23 51:6 54:7 61:4 62:5,18 63:9,13,24 64:5,11 65:6 68:24 69:2 73:4 75:9,18 76:3 77:23 78:3,8,8 82:6,16,20 86:2,8, 8 political [5] 9:1 34:9 53:23 54:8 63:3 politically [1] 18:7 pose [1] 64:4 position [16] 16:19 27:5,15 29:11 34:21 43:13 44:8 49:1 53:4 59:8,8 60:1 71:6 72:12,13 84:15 possessions [1] 83:10 possessor [1] 22:16 possibility [1] 45:18 possible [1] 48:20 potential [2] 48:21 69:13 power [4] 14:4,8 79:13,16 powers [5] 50:25 61:6 77:22 82:4, 17 practicalities [1] 5:22</p>
<p style="text-align: center;">N</p> <p>Nabisco [1] 18:19 name [1] 49:23</p>		<p style="text-align: center;">O</p> <p>objectives [2] 5:21 6:14 obligation [1] 57:4 obstacles [1] 50:11 obviously [1] 72:9 occupied [2] 55:14 67:9 occur [1] 76:17 occurred [2] 35:11 76:15 office [1] 83:20 official [1] 32:3 Okay [14] 11:8 17:22 21:2 22:10 43:6 44:18 58:9,9,19 60:17 61:21</p>	<p style="text-align: center;">P</p> <p>PAGE [1] 2:2 paramount [1] 11:19 part [5] 42:13 49:22 67:21 75:10 81:14 participation [1] 35:3 particular [10] 5:21 34:1 35:22 39: 10,12,14,18 45:10,24 49:2 particularly [5] 40:3 53:9,17 59: 16 69:10 particulars [1] 75:19 parties [12] 3:14,14 9:7,8 17:9 19: 12 32:18 39:13 44:9 48:15 68:14 75:22 party [5] 10:22,22 22:18,18 30:4 pass [1] 33:3 passed [2] 36:18 45:9 Pearl [1] 49:17 pending [2] 57:9,11</p>

Official - Subject to Final Review

<p>practicality [2] 6:16 10:14 practice [2] 59:15,16 pre-1976 [1] 7:22 pre-FSIA [2] 8:20,24 precisely [3] 37:24 65:3 72:3 preclude [1] 80:20 preclusion [2] 25:14 42:1 preclusive [2] 25:9,10 precursor [1] 41:1 predate [1] 32:11 predates [1] 85:17 predecessor [1] 36:22 predict [1] 18:12 predictable [1] 75:12 predominate [1] 85:4 preexisted [1] 38:19 prefer [1] 9:25 preliminary [1] 6:25 premise [1] 3:12 presentation [1] 30:4 presented [4] 39:13 56:13 74:9,16 presents [1] 47:3 preserve [1] 81:17 preserved [1] 56:2 press [1] 26:15 pressed [1] 73:23 pressure [3] 9:2 36:19,24 pretty [1] 56:22 prevail [1] 64:18 prevails [1] 56:20 primarily [1] 36:4 primary [4] 51:2 62:12 63:20 72:21 principal [1] 40:16 principally [1] 76:15 principle [12] 9:19 14:16 15:23,24 26:12 60:24 61:2 64:16 76:2 79:11,20 84:14 principles [10] 10:6,17 15:15 25:1,4 42:2 50:25 61:7 67:24,24 prior [2] 8:6 19:9 private [14] 4:10,25 5:1 11:25 12:14 27:8,10 28:24 29:1 72:13 73:6,10 77:8 78:13 privileges [2] 55:22 67:11 problem [4] 8:23 27:12 70:10 76:1 problematic [1] 84:25 problems [2] 62:18 63:13 proceed [4] 15:20 27:20,22 40:6 proceedings [4] 29:20 56:25 57:9,11 proceeds [1] 3:11 producing [1] 19:22 Professor [3] 16:20,20 60:19 professors [4] 10:2 16:7 61:3 75:3 profoundly [1] 86:21 property [9] 3:18,21 4:11 23:11 43:25 45:5 57:20 76:16 83:17 propose [2] 24:19 46:19 proposed [1] 85:1 proposes [2] 79:17 85:23 proposing [2] 20:2 46:7 proved [1] 70:5</p>	<p>provide [5] 30:12 40:5 65:2 66:1 83:23 provided [2] 62:7 77:8 provides [1] 45:19 providing [2] 17:8 39:20 prudential [3] 4:21 5:3 15:5 public [1] 68:14 pure [1] 69:23 purpose [4] 38:13 51:2 82:19 83:12 pursue [2] 50:4,18 put [1] 75:5</p> <hr/> <p style="text-align: center;">Q</p> <hr/> <p>QPA [1] 81:15 question [44] 6:25 7:9,15 9:6,16 10:25 11:6 13:4 25:8,9,14 29:7 33:2 34:18,22 36:7,11 42:24 43:1 45:7 51:21 53:23 56:9,10,16,19 58:20 59:19 63:3 64:18 66:17,17 67:16 68:21 70:22 74:9 75:18 79:4 81:7 82:25 83:1,6 85:18 86:21 question's [1] 75:7 questions [6] 6:15 32:20,20 36:23 56:13 82:21 quite [2] 5:24 30:1</p> <hr/> <p style="text-align: center;">R</p> <hr/> <p>Railroad [2] 43:16 72:8 raise [4] 56:7 81:15,18 82:17 raised [5] 15:10 55:12 56:13 81:12,20 raises [3] 28:9 35:15,23 rarely [1] 36:9 rather [3] 9:18 12:3 75:16 reach [2] 7:14 70:14 reached [1] 73:9 read [4] 15:4 17:18 61:12 83:25 reading [2] 12:5 60:18 real [2] 41:19 84:14 really [11] 15:6 16:12 42:6 62:11,22 64:12 68:10 71:7 74:15 80:12 83:6 reason [3] 29:9 49:20 76:19 reasons [6] 4:17 25:20 27:2 55:2 75:11 87:4 REBUTTAL [3] 2:12 84:8,9 received [1] 34:16 recently [1] 8:4 reciprocal [1] 59:16 reciprocity [4] 27:15 60:11,15 86:12 recognize [7] 18:21 20:8 24:25 50:21 70:23 78:6 80:18 recognized [8] 3:12 10:11 21:15 28:8 31:22 32:1 38:17 72:18 recognizing [1] 20:3 recommendation [2] 30:13 40:5 Reconciliation [2] 57:25 59:1 record [1] 15:4 red [1] 27:10 redress [3] 34:8 44:1 71:1 referred [1] 16:5 refers [1] 12:12</p>	<p>reflecting [1] 75:17 refute [1] 16:19 regime [5] 8:24 19:20,20,24 20:1 regret [1] 81:19 regulate [1] 20:23 related [4] 21:7 24:14 51:23 71:13 relating [1] 17:8 Relations [17] 25:3 28:10 29:9,13,17 34:15,20 35:23 36:3 38:6 46:13 47:4,9 53:8,17 67:22 85:8 relevant [3] 22:8,11 41:6 relied [1] 74:11 relief [6] 24:1,22 25:11,19 26:11 83:24 relies [2] 72:16 77:12 rely [2] 11:24 72:22 relying [1] 76:13 remaining [1] 71:20 remains [2] 32:3,8 remand [1] 74:14 remedies [11] 24:1 25:17,21 26:8 41:20,25 42:21 43:1,11 75:22 86:25 remedy [2] 15:10 31:11 remove [2] 36:18 50:11 rendered [1] 25:6 reopen [1] 25:22 repeatedly [2] 31:21 50:3 repercussions [1] 63:19 replicate [2] 18:13 37:24 reply [1] 23:16 REPUBLIC [2] 1:3 3:5 request [2] 72:23 73:2 require [1] 76:2 requirements [2] 59:5 61:17 requires [2] 28:22 29:3 requiring [1] 75:9 resolve [4] 48:17 70:19 72:6 74:15 resolved [1] 74:13 resources [1] 30:7 respect [5] 48:9 54:6 64:13 72:10 82:11 respond [1] 16:14 Respondents [5] 1:7,25 2:11 15:9 49:9 response [2] 41:18,23 responsibility [1] 49:25 rest [1] 67:9 Restatement [2] 25:2 26:17 restitution [2] 48:10,18 result [3] 27:6 33:13 73:9 retain [3] 79:13,16 80:17 reticulated [1] 66:6 reverse [5] 7:1 33:10 54:15,17,21 rid [3] 65:4,8 71:18 Rights [7] 23:18,23 24:2 55:22 67:11 71:2 73:22 risk [4] 4:12 18:24 60:15 64:4 risks [1] 86:8 RJR [1] 18:19 ROBERTS [44] 3:3 5:7 6:1,19 9:9,13 11:22 13:22,24 16:3 19:1,5 21:22 24:4 26:23 27:24 29:6,22 30:6,14 31:3 32:24 34:12 36:15 38:20</p>	<p>41:12 44:3 46:4 48:6 49:5 51:11,19 53:3 54:10 57:14 62:9 66:13 69:7 73:13 74:19 79:1 81:24 84:6 87:7 role [4] 5:10 46:17 48:23 61:5 room [3] 53:13 56:23 84:2 ROSALIE [1] 1:6 rubric [1] 43:6 rule [11] 13:5,16 21:4,14 23:23 37:6 55:18 66:18 67:6 73:22,24 rules [5] 23:22 32:4 64:9 65:10 66:8 run [1] 33:6 runs [1] 50:25</p> <hr/> <p style="text-align: center;">S</p> <hr/> <p>sacrificed [1] 49:23 safety [3] 53:14,20 84:15 Samantar [1] 32:1 same [20] 4:9,11,25 6:13 11:25,25 12:19 15:14 24:13 25:4 27:18 30:3 32:5 33:1 40:24 46:12 69:9 72:7 77:9 87:4 SARAH [3] 1:24 2:10 49:8 satisfied [1] 61:20 saying [6] 42:24,25 58:11 61:13 64:10 70:4 says [16] 4:23 12:3 16:8,18,21 17:1 35:14 41:9 55:18 57:22 58:24 59:8 63:17 68:11 78:1,5 Scalia's [1] 8:10 schema [2] 82:17 84:3 scope [2] 39:6,7 score [1] 71:7 screaming [1] 69:17 scrupulously [1] 29:11 Second [9] 4:23 27:14 52:9 59:7,8 60:21 63:5 82:4 85:11 Section [5] 11:23 12:9,11 28:21 29:3 section-by-section [1] 80:25 Sections [1] 25:3 see [4] 22:23 38:14 58:9 80:12 seek [9] 17:4 24:22 26:11 29:2 32:7 34:7 44:1 45:13 49:17 seeking [1] 25:11 seem [4] 31:8 51:19 53:9 56:22 seeded [2] 15:8 33:2 seems [6] 15:11 18:9 25:25 60:20 69:16 78:16 sense [5] 19:13 35:25 47:2,5,7 sensitive [2] 39:25 53:17 separate [9] 9:18,23 10:9 16:13,25 21:6 77:3 80:4,13 separation [5] 50:25 61:6 77:21 82:4,17 serious [4] 28:9 63:9,12 82:17 seriously [1] 86:13 serve [1] 6:13 served [1] 5:23 serves [3] 5:19,21 10:18 set [3] 21:16 23:22 25:2 settle [1] 64:3 settled [1] 3:20</p>
---	--	--	--

Official - Subject to Final Review

<p>settlement ^[1] 70:15 Seventh ^[2] 43:17 69:11 several ^[1] 81:25 severe ^[1] 69:17 severed ^[1] 81:11 SG ^[1] 70:22 shall ^[1] 21:9 sham ^[1] 25:21 shelter ^[1] 83:11 shipping ^[1] 67:18 shoe ^[1] 4:2 short ^[1] 86:15 shouldn't ^[5] 62:4 64:12 69:18 76:19,20 showing ^[1] 40:16 side ^[3] 12:2 27:4 85:5 significance ^[2] 5:14 29:8 significant ^[1] 47:3 SILBERT ^[55] 1:18 2:3,13 3:6,7,9 5:7,16 6:7 7:5,25 8:16,22 9:11 10:4 11:8 12:7 13:10 14:9,22 15:2,12 16:4,16 17:19,24 18:14 19:4,23 20:7,13,20 21:3,13,21 22:1,7,12,25 23:20 24:7,21 25:12 26:5,22,24,25 40:14 41:23 52:14 68:11 80:8 84:8,9,11 similar ^[5] 23:10 28:17 32:2 69:12 85:9 similarities ^[1] 42:10 similarly ^[2] 55:23 75:15 SIMON ^[2] 1:6 3:5 simple ^[3] 3:12 9:6 66:17 simply ^[3] 10:17 18:20 30:11 since ^[3] 3:13 49:18 74:15 single ^[1] 55:5 sink ^[1] 18:11 Sinochem ^[2] 7:10 14:10 situated ^[1] 75:15 situation ^[3] 33:11 36:24 60:7 skeptical ^[1] 77:3 slightly ^[1] 73:17 small ^[1] 77:22 SN ^[1] 43:20 SNCF ^[2] 43:16,20 SNYDER ^[43] 1:20 2:6 28:1,2,5 29:6,18,25 30:10,14,18 31:8,12 32:12 33:18 34:24 35:17,24 37:12 38:12,23 39:4 40:1,23 41:11,14 42:8,18,23 43:12 44:7,11,15,20,25 45:4,16 46:20 47:9,17 48:7,8 68:12 so-called ^[1] 50:10 soldiers ^[1] 49:22 Solicitor ^[3] 1:20 71:6 83:19 somehow ^[2] 25:19 79:12 sometimes ^[3] 59:9 65:14 86:15 somewhat ^[1] 6:24 sorry ^[8] 8:18 11:5 51:24 68:8 82:8 sort ^[16] 53:1 60:15 64:4,7 65:5,9,10 68:6 69:21 77:2,21,23 79:21 81:3,4 82:3 Sosa ^[1] 18:18 Sotomayor ^[19] 13:25 14:1,9,15,23 15:1,3,14 16:1 24:7 36:16,17 38:1 66:14,15 67:15 68:4,5 69:4</p>	<p>Sotomayor's ^[1] 8:13 sought ^[1] 50:11 sound ^[1] 6:4 sounds ^[6] 20:18 41:22 42:17 46:7,10,11 South ^[6] 57:19,22 58:23,24 61:13 84:25 sovereign ^[40] 3:23 4:15,15,19,24,24 6:17 8:24 9:21 10:8 11:18 12:16 28:14 29:4 31:18 33:23 34:4,10 46:14 47:22 52:7,12,16,17 60:5,6,14 65:22 66:5,11 67:23 72:14 76:10 77:4 79:25 80:11,13 82:22 85:14,22 sovereign's ^[2] 3:24 47:24 sovereigns ^[9] 20:24 27:7,13,16 28:22 31:21 51:5 73:6 84:21 specific ^[3] 38:13 54:5 82:11 specifically ^[4] 31:18 32:14 46:23 72:23 speculation ^[2] 69:21,23 spend ^[1] 55:25 spoke ^[1] 48:2 spurred ^[1] 71:13 squarely ^[1] 74:16 start ^[2] 9:6 49:12 state ^[30] 5:13,18 10:8 11:24 19:16 30:11 33:4,9,14 35:14 36:19 38:24 39:1,8,16,23 40:3 41:19 45:14,19,22 50:8 51:23 53:22 58:7 63:4,16 76:11 80:23 85:23 stateless ^[1] 13:19 STATES ^[48] 1:1,15,22 2:7 3:19 4:3,7 25:23 26:16 27:17,21 28:3 29:10,17,19 34:19 35:3,6,8,9,11 37:8 42:1 43:23 44:25 45:6,6,25 48:9,14,22,25 49:23 52:5 53:10 65:17 70:10,18 71:16,23,24 72:9,22 85:9 86:14,19 87:1,1 States' ^[2] 49:13 73:2 statute ^[13] 12:10 23:3 37:17 45:24 52:24 53:2,21 60:16 61:13 66:7 79:12,23,24 statutes ^[3] 60:4 66:2 79:20 statutory ^[3] 12:6,9 82:15 stay ^[1] 57:8 staying ^[2] 56:25 57:2 step ^[2] 64:2 82:14 steps ^[2] 50:3 70:14 still ^[8] 13:8 19:18 24:17,19 26:2 46:18 67:4 77:9 stop ^[1] 36:24 stopped ^[1] 49:21 strands ^[1] 32:22 strawberry ^[2] 33:5,7 stripped ^[4] 43:9 55:22 67:10 74:1 strong ^[7] 4:6 44:21 45:1 49:15 54:22 60:5 66:7 stronger ^[1] 45:7 structure ^[1] 80:20 struggling ^[1] 19:19 subject ^[11] 14:13 17:20 32:3 42:1 45:1,10,25 56:10,18 69:9 73:20 subjected ^[3] 9:1 12:15,17</p>	<p>submit ^[1] 4:7 submitted ^[3] 30:5 87:8,10 subset ^[1] 65:18 substantial ^[2] 7:16 35:18 substantive ^[2] 12:3 73:9 substitute ^[2] 37:10,11 substituting ^[1] 37:13 subsume ^[1] 46:16 subsumed ^[2] 52:20 80:7 succeeded ^[1] 71:9 sue ^[7] 27:6,8 33:6 57:17,18 58:22 73:6 sued ^[5] 4:9,14 28:23 33:8,13 sufficient ^[4] 22:21 29:20 30:12,19 suggest ^[2] 10:2 67:23 suggestion ^[2] 31:9,9 suggests ^[1] 27:17 suing ^[1] 6:3 suit ^[5] 26:2 59:2 69:14 73:21 81:9 suited ^[1] 40:10 suits ^[4] 27:21 37:7 73:3 76:9 supporting ^[3] 1:23 2:8 28:4 supposed ^[4] 18:2 31:11 58:4 80:10 SUPREME ^[2] 1:1,14 surely ^[1] 30:15 surprise ^[1] 29:7 survival ^[1] 55:7 survive ^[2] 13:3 83:11 survived ^[1] 12:22 survives ^[4] 13:2 52:23 74:23 79:8 survivors ^[1] 48:11 swath ^[1] 41:4 sweep ^[1] 51:21 Switzerland ^[1] 70:17 system ^[3] 11:21 57:24 65:4 systems ^[1] 68:17</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>table ^[2] 71:21 72:5 tact ^[1] 15:11 takings ^[10] 13:16 37:8 54:23 55:9 67:2 73:19,20 76:18 83:13,17 talked ^[1] 6:2 talks ^[1] 41:7 tells ^[2] 4:18 70:23 tension ^[2] 36:4 38:7 tensions ^[1] 38:9 terms ^[2] 30:4 71:22 terrible ^[2] 33:6 63:18 territories ^[2] 55:15 67:9 territory ^[3] 3:25 27:8 47:25 test ^[1] 19:11 text ^[11] 4:18 12:6,9 31:16,17 32:6 38:14 80:20 83:4,25 85:11 textual ^[3] 5:5 12:21 54:22 Thanks ^[2] 40:13 81:22 themselves ^[3] 25:10 54:23 83:17 theories ^[1] 51:23 theory ^[4] 51:20 53:14 58:5 67:1 there's ^[14] 14:4 16:6,12 43:15 45:24 54:22 56:23 57:11 67:1 76:19</p>	<p>79:19,22 83:25 84:23 therefore ^[4] 29:3 63:21 67:3 70:6 they'll ^[1] 33:11 they've ^[2] 23:10 61:25 thinks ^[1] 70:10 third ^[1] 60:4 Thomas ^[15] 6:21,22 7:20 8:15,17 9:12 31:5,6 32:10,23 54:12,13 55:25 56:21 57:13 though ^[3] 30:21 56:12 69:16 three ^[3] 4:17 52:5 84:12 threshold ^[2] 12:4 14:12 timing ^[1] 8:18 Today ^[3] 49:17 62:2 73:24 took ^[4] 3:18 32:19 55:5 83:9 topic ^[1] 8:16 touch ^[1] 47:24 transmitted ^[1] 80:24 treat ^[3] 5:6 71:8,23 treated ^[6] 4:25 23:17 27:17 28:24 55:15,21 treaties ^[1] 60:4 treating ^[1] 72:9 treatment ^[1] 27:16 treats ^[1] 71:23 treaty ^[1] 45:8 trial ^[1] 23:24 tribunal ^[2] 3:16 23:25 true ^[6] 30:7,10 32:5 40:25 51:15 73:5 Truth ^[2] 57:25 58:25 try ^[2] 25:22 61:23 trying ^[3] 58:1 60:1 61:14 turned ^[2] 25:18,21 turns ^[1] 26:13 twin ^[1] 48:12 two ^[17] 12:7 16:10,18,25 17:21 27:2 30:9 42:10 50:6 51:25 62:11,24 67:18 68:16 72:21 74:11 77:25 type ^[3] 55:8 82:7,8 types ^[5] 49:13 50:16 51:8 61:9 77:25</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. ^[30] 10:7 12:16,18 17:12 20:22 22:18,20 24:24 26:6 27:16 30:24 49:14,19 50:5,15,19,20 51:9 60:4 61:10 67:22 73:9 76:9 82:8 83:19 84:19 85:2,5,6 86:3 Ugarro-Benages ^[1] 72:24 ultimately ^[3] 5:21 6:15 25:13 unchallenged ^[1] 5:12 undeniable ^[1] 4:5 under ^[19] 4:15 6:5 7:12 11:20 12:1 23:5,23 26:17 37:22 43:5 53:14 55:17,18 56:22 61:6 64:21 67:1,6 83:4 underlying ^[1] 9:19 undermine ^[2] 64:8 82:18 understand ^[5] 8:2 14:2,16 57:23 75:4 understandably ^[1] 85:2 understood ^[2] 36:18 75:20 undisputed ^[1] 83:12</p>
---	---	---	---

Official - Subject to Final Review

undisputedly ^[1] 5:2	ways ^[2] 31:14 33:12
undo ^[1] 51:2	weed ^[1] 63:2
unfairly ^[1] 23:17	weight ^[2] 47:5 73:2
unflinching ^[1] 57:4	well-considered ^[1] 59:10
unfold ^[1] 29:21	whatever ^[2] 55:17 67:6
unfortunate ^[1] 86:13	Whenever ^[1] 37:14
unhappiness ^[1] 18:10	Whereupon ^[1] 87:9
unintentional ^[1] 36:9	wherever ^[1] 48:19
unintentionally ^[1] 36:5	whether ^[30] 5:12 15:22 17:11 24:10,24 25:9 26:8 32:16 34:1 35:2,22 36:7,11,20 39:10 42:12,14,24 43:1 51:7 56:1 62:1 64:19,19 65:11 71:22 77:17,18 83:1 85:18
uninvited ^[1] 72:1	whole ^[1] 41:4
UNITED ^[50] 1:1,15,22 2:7 3:19 4:3,6 25:23 26:15 27:17,21 28:3 29:10,17,19 34:19 35:3,6,8,9,11 37:8 42:1 43:22 44:25 45:5,6,25 48:8,14,22,25 49:13,23 52:5 53:10 65:17 70:10,18 71:15,23,24 72:8,22 73:2 85:9 86:14,18 87:1,1	will ^[14] 3:3 29:7 35:5 36:8 57:8 63:2,18 72:12 84:23,24 85:2 86:3,22,23
unjust ^[1] 23:11	win ^[1] 12:8
unless ^[1] 79:22	wished ^[1] 19:21
unusual ^[1] 78:16	withdraws ^[1] 85:14
up ^[13] 5:8 9:16,17 26:24 27:14 42:22 48:7 58:1,25 62:4 66:16 78:21 81:25	withholding ^[1] 84:1
updated ^[2] 50:17 66:7	within ^[4] 57:20 63:8 73:19 80:7
upset ^[2] 33:3 85:2	without ^[4] 14:12 35:2 45:21 86:9
urgency ^[1] 48:13	witnesses ^[2] 46:25 47:6
useful ^[1] 7:13	wondering ^[1] 79:9
V	word ^[2] 16:2 82:24
vacate ^[2] 7:7 14:24	words ^[3] 13:15 25:4 53:5
valve ^[2] 53:14 84:15	work ^[2] 39:25 85:12
valves ^[1] 53:20	workable ^[1] 84:14
various ^[1] 16:9	worked ^[2] 43:23 71:4
venturing ^[1] 78:7	works ^[1] 70:8
Verlinden ^[3] 51:12 61:11 76:8	World ^[5] 3:19 43:25 49:19,22 60:13
versions ^[1] 23:9	worse ^[3] 5:1 27:12 28:24
versus ^[1] 3:5	worst ^[2] 83:8 86:25
victims ^[6] 43:8 48:11 49:17 57:17 74:2 83:23	wrap ^[3] 26:24 48:7 81:25
view ^[7] 33:25 42:11 55:2 56:24 62:1 75:7 79:9	write ^[1] 68:2
viewed ^[2] 68:10 75:16	X
views ^[2] 32:16 59:10	Xanadu ^[3] 33:6,7,8
violate ^[2] 67:3 83:18	Y
violates ^[1] 83:3	years ^[7] 4:1 49:18 50:2 72:18,20 83:21 85:18
violation ^[1] 23:21	York ^[3] 1:18,18 58:2
violations ^[1] 71:3	Z
virtually ^[1] 38:4	zero ^[1] 58:11
vivid ^[1] 83:16	
void ^[1] 29:15	
W	
wade ^[1] 77:23	
waived ^[2] 23:2 50:8	
wanted ^[3] 19:8 33:3 86:1	
wants ^[4] 33:5,9 51:7 65:25	
War ^[4] 3:19 43:25 49:19 63:12	
warrant ^[1] 11:11	
wartime ^[1] 3:20	
Washington ^[4] 1:10,21 22:15 87:6	
way ^[15] 18:6 27:18 34:10 37:6 59:25 70:8 72:5 74:14 77:22 78:8,8,9,12 80:14 83:25	