

In the
Supreme Court of the United States

HEREDEROS DE ROBERTO GOMEZ CABRERA, LLC,

Petitioner,

v.

TECK RESOURCES LIMITED,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Amendment imposes the same restrictions as the Fourteenth Amendment on the exercise of personal jurisdiction by a federal court under a federal statute that applies extraterritorially to foreign conduct by a foreign defendant.

RULE 29.6 STATEMENT

Petitioner Herederos De Roberto Gomez Cabrera, LLC has no parent companies or subsidiaries, and no public company owns 10% or more of its stock.

LIST OF PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit
Docket No. 21-12834

*Herederos De Roberto Gomez Cabrera, LLC v. Teck
Res. Ltd.*

Date of Final Judgment: August 12, 2022

United States District Court for the Southern
District of Florida

Docket No. 1:20-cv-21630-RNS

*Herederos De Roberto Gomez Cabrera, LLC v. Teck
Res. Ltd.*

Date of Final Judgment: April 27, 2021

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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals appears in the Appendix (“App.”) at 1a to this Petition, and is reported at 43 F.4th 1303. The order of the United States District Court for the Southern District of Florida, dated April 27, 2021, granting the Motion to Dismiss for Lack of Personal Jurisdiction appears at App.31a, and is reported at 535 F. Supp. 3d 1299. The district court order denying Petitioner’s Motion for Reconsideration is included at App.16a.



STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its opinion on August 12, 2022. [App.1a]. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



CONSTITUTIONAL PROVISIONS, STATUTES, AND JUDICIAL RULES INVOLVED

U.S. Const. amend. V

The Due Process Clause of the Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No Person shall be . . . deprived of life, liberty, or property, without due process of law . . .

U.S. Const. amend. XIV § 1

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides in pertinent part as follows:

nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

Federal Rules of Civil Procedure 4(k)(2)

(2) FEDERAL CLAIM OUTSIDE STATE-COURT JURISDICTION. For a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

- (A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and
- (B) exercising jurisdiction is consistent with the United States Constitution and laws.

The relevant provisions of the following statutes are reproduced in the appendix:

- Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 [App.47a]



STATEMENT OF THE CASE

A. Proceedings in the District Court

On April 17, 2020, Petitioner Herederos de Roberto Gomez Cabrera, LLC (“Petitioner” or “HRGC”) brought suit in the United States District Court for the Southern District of Florida against Defendant,

Teck Resources, Limited (“Teck”) for violation of Title III of the Cuban Liberty and Democratic Solidarity Act (the “Helms-Burton Act,” or the “Libertad Act”). The District Court had jurisdiction under 28 U.S.C. § 1331 because this action arises under the laws of the United States, specifically Title III of the Libertad Act, codified at 22 U.S.C. § 6021 et seq.

HRGC obtained service of process over Teck in the State of Washington, by serving Trevor Hall, the registered agent of Teck’s subsidiary, Teck American Incorporated. On September 15, 2020, Teck moved for dismissal of HRGC’s Amended Complaint, asserting that the District Court lacked personal jurisdiction over it and that HRGC failed to state a claim. On April 27, 2021, without holding a hearing, the District Court entered an Order Granting Motion to Dismiss, dismissing the Amended Complaint without leave to amend. [App.31a]. On July 20, 2021, the District Court entered an Order denying HRGC’s Motion for Reconsideration. [App.16a].

B. The Court of Appeals’ Affirmance

The Court of Appeals for the Eleventh Circuit affirmed, finding in pertinent part, as follows:

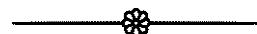
We conclude that the personal-jurisdiction analysis under the Fifth Amendment is the same as that under the Fourteenth for three principal reasons.

First, and most importantly, the operative language of the Fifth and Fourteenth Amendments is materially identical, and it would be incongruous for the same words to generate markedly different doctrinal analyses. (citations omitted)

Second, this Court has all but held already that the Fifth Amendment’s personal-jurisdiction analysis should track the Fourteenth’s. (citations omitted)

Third, adopting Herederos’s preferred “arbitrary or fundamentally unfair” standard for Fifth Amendment cases—rather than the traditional minimum-contacts test—would create unnecessary tension with personal-jurisdiction precedents more generally. Fourteenth Amendment decisions have repeatedly emphasized the heavy burden faced by foreign defendants forced to litigate in U.S. courts, and there’s no reason to think that those burdens are any lighter in cases governed by the Fifth Amendment. (citations omitted)

[App.5a-6a].



STATEMENT OF FACTS

Mr. Roberto Gomez Cabrera (deceased), through his company Rogoca Minera, S.A., owned twenty-one mines, industrial mining equipment, and installations (the “Confiscated Property,” or the “Property”) spanning over 624.91 acres of land in the town of El Cobre, Cuba. [App.141a-143a]. In October 1960 the communist Cuban Government wrongfully and forcefully nationalized, expropriated, and seized ownership and control of the Confiscated Property. *Id.*, ¶ 23. All right, title, and interest held by Mr. Gomez Cabrera in Minera Rogoca, S.A., and the Confiscated

Property were inherited by his children (the “Gomez Cabrera Heirs”) in or about September 1969. *Id.*, ¶¶ 8 & 11. The Gomez Cabrera Heirs have all been citizens of the United States prior to 1996. *Id.*, ¶¶ 8 & 11.

Teck is a Canadian company publicly traded on the New York Stock Exchange. [App.144a]. Teck owns nine registered trademarks in the United States. [App.196a]. Teck, directly or indirectly, owns, operates, controls, manages, and/or supervises at least seven U.S.-based subsidiaries in the State of Washington. [App.33a, App.143a-144a]. Some of Teck’s corporate officers or leadership are also officers of Teck’s U.S.-based subsidiaries. [App.14a, App.196a]. For instance, Mr. Dale Andres is the Senior Vice President of Base Metals for Teck while also serving as the Board of Governors for Teck American Metal Sales Incorporated, a U.S.-based subsidiary of Teck in Washington State. *Id.* Another shared officer is Shehzad Bharmal, who serves as Teck’s Vice President of North American Operations in Base Metals, and who also serves as a director or corporate officer in each of the following Teck’s U.S.-based subsidiaries: (a) Teck American Incorporated, (b) Teck American Energy Sales Incorporated, and Teck Alaska Incorporated (formerly known as “Teck Cominco Alaska Incorporated”). *Id.*

Teck, directly or indirectly, owns, operates, controls, manages, and/or supervises one of the world’s largest zinc mines known as “Red Dog” in Alaska and an underground zinc and lead mine known as the “Pend Oreille” in Washington State. *Id.*, ¶ 15. Teck’s U.S.-based operations alone have yielded hundreds of millions of dollars in revenue and gross profit. *Id.*, ¶ 18. For instance, Teck’s Red Dog mine operations yielded a \$990 million gross profit before depreciation

and amortization in 2018, compared with \$971 million in 2017 and \$749 million in 2016. *Id.* Teck consolidates its financial statements with those of its US-subsidiaries and, with respect to “Red Dog” reports \$125 million in gross profit in Q1 2021. [App.144a]. Teck offers employment and employs persons to work in the United States. [App.144a].

From 1994 through 2009, Teck, together with Joutel Resources Limited, a Canadian corporation, and directly or indirectly with Geominera S.A, a Cuban government-owned and operated entity, exploited and trafficked in the Confiscated Property and extracted significant valuable minerals and other geological materials from the Confiscated Property. [App.145a, App. 158a].

On August 1, 1996, the Helms-Burton Act was passed following “the act of terrorism by the Castro regime in shooting down the Brothers to the Rescue aircraft on February 24, 1996.” 22 U.S.C. § 6046(b)(1). Congress enacted the Helms-Burton Act for the express purposes of, *inter alia*, “provid[ing] for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism,” encouraging democracy in Cuba, and “protect[ing] United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.” § 6022(3), (4) & (6). The Act was meant to deter terrorism, and those who aid and abet terrorism, from carrying out attacks on Americans by hitting them where it hurts the most: their pocket. § 6081(6) (“This ‘trafficking’ in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and

thus undermines the foreign policy of the United States . . .").

Congress found that “[t]he Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using property and assets some of which were confiscated from United States nationals.” § 6081(5) (emphasis supplied). The Act creates a private right of action to United States nationals against “any person that . . . traffics in property that was confiscated by the Cuban Government . . .” § 6082(a)(1)(A) (emphasis supplied). The express language of the Act makes clear that Congress intended that “United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro’s wrongful seizures.” § 6081(11) (emphasis supplied).

Teck is listed in the 1996 Congressional Record as a foreign company subject to the Helms-Burton Act for wrongfully trafficking in confiscated property in Cuba. Cuban Liberty and Democratic Solidarity [Libertad] Act of 1996: Hearing on H.R. 927, 104th Cong. Vol. 142, No. 28 at s1489 (1996) (conference report on H.R. 927).¹

In 1997, the Gomez Cabrera Heirs sent a letter to Teck’s joint venture partner, Joutel Resources Limited, providing notice that they were trafficking in property that was confiscated by the Cuban Government belonging to United States citizens. *Id.*, ¶ 31.

¹ (<https://www.congress.gov/crec/1996/03/05/CREC-1996-03-05-pt1-PgS1479-5.pdf>)

Prior to filing suit, the Gomez Cabrera Heirs organized a Florida limited liability company called Herederos de Roberto Gomez Cabrera, LLC (“HRGC”) to act as trustee on their behalf to prosecute their Helms-Burton Act claim against Teck. [App.191a-192a, App.194a].



REASONS FOR GRANTING THE PETITION

The Eleventh Circuit erroneously applied the minimum contacts test to a foreign defendant that has knowingly trafficked in stolen property in violation of the Helms-Burton Act, which expressly applies to conduct abroad. The circuit court’s opinion is in contravention of its own precedents and in conflict with the decisions of all other circuits that routinely apply the “arbitrary or fundamentally unfair” standard as the test for satisfying the Due Process Clause of the Fifth Amendment. As to the broader issue of whether the due process analysis under the Fifth and Fourteenth Amendments are the same, this Court has yet to express its opinion.

The following facts are necessary to the proper evaluation of Teck’s jurisdictional defense and to the scope of the federal court’s adjudicative power: first, this is a federal question case filed in federal, and not state court; second, service of process was accomplished under Federal Rule of Civil Procedure 4(k)(2); and third, the Helms-Burton Act expressly and solely applies to extraterritorial conduct (trafficking in confiscated property in Cuba). These facts distinguish Teck’s authorities on which the Eleventh Circuit

relied. Only two of these authorities—*Walden v. Fiore*, 571 U.S. 277 (2014), and *Daimler AG v. Bauman*, 571 U.S. 117 (2014)—were filed in federal court, and neither invoked Rule 4(k)(2). Rather, jurisdiction in both cases hinged exclusively on Rule 4(k)(1)(A), which subjects a federal district court to the same constitutional limitations that would apply to the state where the federal court is located. *See Walden*, 571 U.S. at 283 (citing Rule 4(k)(1)(A)); *Daimler*, 571 U.S. at 125 (same). There is simply no legal precedent or justification for applying the minimum contacts test to a foreign defendant that has violated a US federal statute that regulates extraterritorial conduct.

Tying the scope of federal personal jurisdiction to the “minimum contacts” framework developed in the Fourteenth Amendment context would unduly constrain the United States’ unique prerogatives and powers. The Constitution gives Congress the power to prescribe overseas conduct. *See United States v. Rojas*, 812 F.3d 382, 390-393 (5th Cir. 2016). It gives the Executive the power to prosecute foreign nationals who violate our laws. *Id.* And it grants federal courts the power to render binding judgments against those foreigners, regardless of their contacts with U.S. territory. *See United States v. Murillo*, 826 F.3d 152, 157 (4th Cir. 2016). There is no constitutional reason to require a different result when Congress authorizes private attorneys general to vindicate federal interests in civil actions.

Importing the Fourteenth Amendment’s minimum contacts test to the Fifth Amendment due process analysis would unduly hamper Congress in the exercise of its unquestioned authority to provide relief for

Americans injured by foreigners acting abroad or to prescribe laws governing criminal conduct abroad.

The Circuit Courts have routinely applied the “arbitrary or fundamentally unfair” standard—never the minimum contacts test—to defendants who violate US federal statutes that regulate extraterritorial conduct. If foreign defendants enjoy any due-process rights under the Fifth Amendment, the substantive limits on Congress’ law-making authority, coupled with the presumption against extraterritoriality and discretionary doctrines such as *forum non conveniens*, are more than adequate to protect them without imposing territorial constraints on federal judicial power.

I. THERE IS NO CONSTITUTIONAL BASIS TO RESTRICT FEDERAL JUDICIAL POWER TO A MINIMUM-CONTACTS TEST.

It is well-established that the Fifth Amendment’s Due Process Clause—not the Due Process Clause of the Fourteenth Amendment—is the relevant provision that limits the territorial jurisdiction of federal courts in federal question cases. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619-20 (1992) (concluding that the Fifth Amendment’s Due Process Clause did not foreclose personal jurisdiction because the defendant had “purposefully avail[ed] itself of the privilege of conducting activities within the [United States]” (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985))). Because federal courts are components of a separate sovereign, these distinct constitutional constraints mean that federal courts may constitutionally exercise personal jurisdiction under circumstances that state courts could not. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 884 (2011) (plurality opinion) (“Because the United States

is a distinct sovereign, a defendant may in principle be subject to the jurisdiction of the courts of the United States but not of any particular State."); *See United States v. Bennett*, 232 U.S. 299, 306 (1914) (holding that the constitutional barriers that border the states and keep them from infringing on the rights of other states do not apply to the United States government, which has broader powers by virtue of its sovereignty).

This Court has consistently reserved the question whether restrictions on personal jurisdiction imposed under the Fourteenth Amendment would also apply in a case governed by the Fifth Amendment. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1783-84 (2017) ("[S]ince our decision concerns the due process limits on the exercise of specific jurisdiction by a State, we leave open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."); *Omni Capital*, 484 U.S. at 102 n.5 (indicating that there was no occasion in the case to address the scope of jurisdictional reach under the Fifth Amendment); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 113 n.* (1987) (plurality opinion).

The limited constitutional rights of foreign defendants, is an important reason to differentiate between interpretation of the Fourteenth and Fifth Amendment's due process clauses such that the "bound of Fifth Amendment due process are likely not wholly defined by modern Fourteen Amendment caselaw." *See, e.g., Department of Homeland Security v. Thuraissigiam*, 140 S. Ct. 1959, 1981-83 (2020) (holding that non-citizen seeking asylum and determined to be removable on an expedited basis had no

due process rights to further judicial or other proceedings), and *United States Agency for International Development v. Alliance for Open Society International, Inc.*, 140 S. Ct. 2082 (2020) (holding no First Amendment protection available to foreign subsidiaries of US companies). *Willingway Hosp., Inc. v. Blue Cross & Blue Shield of Ohio*, 870 F. Supp. 1102, 1107 (S.D. Ga. 1994) (holding that the due process analysis is “more relaxed” under the Fifth Amendment than under the Fourteenth Amendment).

Justice Kennedy’s separate opinion in *United States v. Verdugo-Urquidez* draws on Justice Harlan’s concurrence in *Reid v. Covert*, that the extraterritorial application of constitutional protections is not governed by some “rigid and abstract rule” so as to lead to “impracticable and anomalous results.” 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. 1, 65, 74 (1957)). Justice Kennedy found that application of the Fourth Amendment impracticable to a situation involving a warrantless search in Mexico where warrants evidently could not be obtained. *Id.* at 278. The opinion quoted Justice Harlan’s statement that “the question of which specific safeguards are appropriately to be applied in a particular context can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.” *Id.*

A context-specific approach makes sense of the Fifth Amendment holding in *Johnson v. Eisentrager* that “the Constitution does not confer a [Fifth Amendment] right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in hostile service of a government at war with the United States.” 339 U.S. 763, 785 (1949). In

the words of the Supreme Court: “[i]t is war that exposes the relative vulnerability of the alien’s status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are generally impaired when his nation takes up arms against us. . . . But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage.” *Id.* at 771-72.

“It is beyond doubt that, as a general proposition, Congress has the authority to ‘enforce its laws beyond the territorial boundaries of the United States.’ *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L.Ed.2d 274 (1991)). The United States holds a strong interest in “provid[ing] for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism,” encouraging democracy in Cuba, and “protect[ing] United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.” See § 6022(3), (4) & (6). In particular, “the act of terrorism by the Castro regime in shooting down the Brothers to the Rescue aircraft on February 24, 1996” was a major impetus in the statute’s drafting. 22 USC 6046(b)(1). Congress acted to ensure United States citizens were able to seek redress in their own country’s courts by opening the doors to jurisdiction as widely as possible under the Fifth Amendment. Applying *Daimler*’s “at home” standard to cases under the Act would virtually ensure that the victims never achieve civil justice in United States courts. The Fifth Amendment cannot unduly constrain

the United States’ ability to catch within the net of our laws aliens that are engaged in hostile service of a government at war with the United States. *Johnson*, 339 U.S. at 785. These national security and foreign policy imperatives cannot be achieved if foreign corporations can escape civil liability for trafficking simply by doing business here through subsidiaries or otherwise attempting to keep their overseas conduct separate from their U.S. activities, as Teck has done.

While the Due Process Clauses of the Fifth and Fourteenth Amendments use the same words, as recognized by the Eleventh Circuit below, they are addressed to different sovereigns those words mean different things in context. The exercise of jurisdiction over a defendant that violates a United States statute regulating extraterritorial conduct does not involve a “minimum contacts” analysis, as is usually required under the Fourteenth Amendment, because the Fifth Amendment’s due process clause is rooted in federal, not state, sovereign power, which is broader than those of the states and “knows no restriction except where one is expressed in the Constitution.” *U.S. v. Bennett*, 232 U.S. 299, 306 (U.S. 1914). As the Solicitor General explained in a 2021 brief to this Court,

“[T]he United States’ constitutional powers and special competence in matters of foreign affairs and international commerce, in contrast to the limited and geographically cabined sovereignty of each of the several States, would permit the exercise of federal judicial power in ways that have no analogue at the state level.”

Br. of the United States as Amicus Curiae at 32, *Ford Motor Co. v. Mont. Eighth Jud. Dist.*, 141 S. Ct. 1017 (2021) (Nos. 19-368 & 19-369).

The Constitution gives Congress exclusive authority to “provide for the common Defense and general Welfare of the United States,” to “regulate Commerce with foreign Nations,” and to “define and punish . . . Offences against the Law of Nations.” U.S. Const. art. I, § 8. That includes, where “Necessary and Proper,” *id.*, the power to enact laws that address overseas conduct. It is well settled that “Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.” *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991); *cf. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (Congress “clearly has constitutional authority to” prescribe overseas conduct).

States, by contrast, are barred by “the inherent limits” of their authority from regulating commercial activity in other States. *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989); *cf. LaFave*, 1 SUBST. CRIM. L. § 4.4(a) (3d ed.) (noting the general consensus that States may not criminalize out-of-state conduct with no in-state effect). And even the bare “likelihood that state legislation will produce something more than incidental effect in conflict with express foreign policy of the National Government” requires preemption of state laws that purport to reach overseas. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 420 (2003); *see Zschernig v. Miller*, 389 U.S. 429, 441 (1968).

The Helms-Burton Act requires claimants to have been United States citizens as of March 1996, unlike *Daimler* that involved foreign plaintiffs. Under *Daimler*, it would be exceedingly difficult for a

Helms-Burton Act plaintiff to allege facts sufficient to show that a “trafficker” is “at home” in the United States since the Act excludes “traffickers” from entering the United States in the first place. *See generally* § 6091. Specific jurisdiction would also be obliterated given that the US Embargo prohibits importing Cuban goods into the United States (if the stolen property being trafficked cannot enter the US, then there can be no connection between the trafficking and the US). Should *Daimler* control Fifth Amendment Due Process concerns brought under the Act, the very purpose of the Act’s enactment would go unfulfilled. A complete obstruction of the Act’s legislative intent in favor of *Daimler*’s “at home” standard is an extreme, but ultimately undeniable, consequence of the Eleventh Circuit’s decision, the type Justice Kennedy recognized would result from applying constitutional protections extraterritorially using a “rigid and abstract rule.” 494 U.S. at 277-78. The danger to the Act’s future comes from the District Court’s application of *Daimler*. The right due process analysis steers clear of impracticable or absurd results. To avoid complete destruction of the Act, federal courts should examine the issue by applying a due process analysis that respects and upholds Congress’s intent in forming the statute. There is little sense, legislative or otherwise, in creating a claim if jurisdiction does not go with it.

II. THE EXERCISE OF PERSONAL JURISDICTION OVER TECK IS NOT “ARBITRARY OR FUNDAMENTALLY UNFAIR” AND IS CONSISTENT WITH INTERNATIONAL LAW PRINCIPLES.

The United States exercises jurisdiction to prescribe with respect to conduct outside its territory by persons not its nationals or residents that is

directed against the security of the United States. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1379 n.5 (11th Cir. 2011); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW § 402 (2018). Courts uniformly agree that Fifth Amendment due process requires at the very least that an extraterritorial application of U.S. law to a foreign defendant not be “arbitrary or fundamentally unfair.” *United States v. Davis*, 905 F. 2d 245, 248-49 (9th Cir. 1990) (“[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair.”); *United States v. Yousef*, 327 F.3d 56, at 111-12 (2nd Cir. 2003) (adopting the Ninth Circuit’s analysis). The Third, Fifth, and D.C. Circuits have rejected the need for a nexus, and the First Circuit and Eleventh Circuit have applied the “arbitrary or fundamentally unfair standard”. *United States v. Perez-Oviedo*, 281 F.3d 400, 403 (3d Cir. 2002); *United States v. Suerte*, 291 F.3d 366, 376 (5th Cir. 2002); *Livnat v. Palestinian Authority*, 582 F. Supp. 3d 19 (D.C. 2015) (the exercise of personal jurisdiction over a defendant that violates United States statute which regulates extraterritorial conduct “does not require a nexus between the specific criminal conduct and the United States.”); *United States v. Martinez-Hidalgo*, 993 F. 2d 1052, 1056 (3d Cir. 1993); *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1377-79 (11th Cir. 2011); *see also U.S. v. Gonzales-Cahvec*, 750 Fed. Appx. 853, 856 (11th Cir. 2018) (“Due process in the context of extraterritorial jurisdiction requires only that the exercise of jurisdiction not be arbitrary or fundamentally unfair.”).

In most cases, fairness requires only that there be a “nexus between the conduct condemned and the United States.” *Lawrence*, 727 F.3d at 396. This “nexus” requirement, the Fifth Circuit has recognized, “serves the same purpose as the ‘minimum contacts’ test of personal jurisdiction.” *United States v. Suerte*, 291 F.3d 366, 370 (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)). By demanding some connection between the defendant’s conduct and U.S. interests, the presence of a nexus “ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country.” *Id.* (quoting *Klimavicius-Viloria*, 144 F.3d at 1257) (internal quotation marks omitted). Yet, unlike the Fourteenth Amendment’s “purposeful availment” requirement, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, this nexus requirement is not territorial. As the cases bear out, there are other ways to find that a given extraterritorial application of U.S. law satisfies due process so as not to be arbitrary or unfair, even absent a nexus to the United States—namely, through principles of international law.

Congress’s intent in passing the Helms-Burton Act was plain: the Act is intended to apply extraterritorially, and on its face it reaches the conduct alleged in this case. (liability for trafficking “in property which was confiscated by the Cuban Government”); § 6081(5) (recognizing that “foreign investors” doing business with the Cuban Government with respect to property confiscated from United States nationals); § 6081(7) (the United States has “notified other governments”); § 6081(9) (providing for “rules of law with respect to conduct outside its territory . . . ”);

§ 6081(10) (“provide protection against wrongful confiscations by foreign nations and their citizens”); § 6081(11) (“United States nationals who were victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro’s wrongful seizures.”); § 6091 (excluding from the United States “aliens” who have “trafficked” in such property); § 6032 (enforcement of economic embargo of Cuba).

Congress’s designs are made even more plain by the supporting sections of Helms-Burton Act, in which Congress found that “[i]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory” and that “[t]he United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies.” 22 U.S.C. § 6081(9) and (10).

Given the sensitive interests in national security and foreign affairs at stake, the political branches have enacted the Helms-Burton Act to serve the United States’ interest in deterring terrorism, and those who aid and abet terrorism, from carrying out attacks on Americans by hitting them where it hurts the most: their pocket. § 6081(6) (“This ‘trafficking’ in confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise, to the current Cuban Government and thus undermines the foreign policy of the United States . . . ”).

The Eleventh Circuit has established that “[c]ompliance with international law satisfies due process because it puts a defendant “on notice” that he could be subjected to the jurisdiction of the United States.” *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016); *see also U.S. v. Carvajal*, 924 F. Supp.2d 219, 262 (D.C. 2013) (Court found that the exercise of jurisdiction over defendants trafficking drugs across the high seas was not arbitrary or fundamentally unfair because they “were on notice that . . . they were opening themselves to the possibility of prosecution.”). Here, Congress has expressly found that “[i]nternational law recognizes that a nation has the ability to provide for rules of law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.” § 6081(9).

Teck was further on notice because it was listed as a company doing business with Cuba in the Congressional Record,² was sent a notification by the Gomez Cabrera Heirs [App.17a, App.26a, App.195a], and notice is an element of a Helms-Burton Act claim. § 6082(a)(3)(B), (3)(D). In fact, liability under Helms-Burton only attaches to the “knowing and intentional” trafficking in confiscated property. *See* 22 U.S.C. § 6023 (13)(A) (defining “trafficking” as “knowingly and intentionally” using confiscated property). Further, the Helms-Burton Act mandates the Attorney General to “prepare and publish in the Federal Register a concise summary of the provisions of this subchapter, including a statement of the liability under this subchapter of a person trafficking in confiscated property, and the

² Cuban Liberty and Democratic Solidarity [Libertad] Act of 1996: Hearing on H.R. 927, 104th Cong. Vol. 142, No. 28 at s1489 (1996) (conference report on H.R. 927)

remedies available to United States nationals under this subchapter.” § 6082(a)(8). There is no doubt that Teck was on notice of its potential for liability and assumed that risk while continuing to traffic in confiscated property following the 3-month safe harbor period following the enactment of Helms-Burton. § 6082(a)(1). Apparently, Teck is resting on a Canadian “blocking statute”³ that it attempted to wield in the District Court to block HRGC from taking discovery. [App.167a, App.176a].

Moreover, Helms-Burton recognizes that the trafficking in property confiscated from United States nationals by the Cuban Government has a substantial effect felt in the United States, thereby conferring jurisdiction under the protective principal and even under *Calder* “effects test” applied in the traditional fourteenth amendment specific jurisdiction framework. See Restatement (Fourth) of Foreign Relations Law § 402, Comment (f) (2018) (“Jurisdiction based on effects. The United States exercises jurisdiction to prescribe with respect to conduct outside its territory that has or is intended to have a substantial effect within its territory.”). Teck’s trafficking of the confiscated property had substantial effects in the United States including trafficking in property stolen from a U.S. National and the unjust enrichment of a hostile Castro regime that is an enemy of the United States. Indeed, Teck’s actions undermined the economic embargo that the United States placed on Cuba in order to

³ The Canadian “blocking statute” prevents enforcement in Canada of judgment entered in cases under the Helms-Burton Act and allows the Attorney General of Canada to prohibit compliance by Canadian parties with discovery orders entered in cases under the Helms-Burton Act. [App.176a].

prevent Cuba from carrying out its terrorist threats against the United States. If the economic embargo is constitutional, which is clearly the case, then Congress has the constitutional authority to impose liability on entities which circumvent the embargo in violation of the rights of United States nationals. This is precisely the purpose of Title III of the Helms-Burton Act. In addition, Teck has substantial contacts in the United States through its subsidiary entities that it controls.

For these reasons, it is not “arbitrary or fundamentally unfair” for the federal court to exercise jurisdiction over Teck in this action.

III. EXISTING DOCTRINES ARE SUFFICIENT TO ENSURE THE BASIC FAIRNESS TO WHICH FOREIGN DEFENDANTS ARE ENTITLED.

Territorial limitations on federal judicial power are simply unnecessary to protect the limited rights of foreign defendants in U.S. courts. After all, if “fairness” requires no territorial connection between the defendant’s conduct and this country before a foreign criminal defendant can be locked away for life or put to death, *see, e.g., United States v. Lawrence*, 727 F.3d 386, 396 (5th Cir. 2013), it is hard to see why it should be construed to require more before the same defendant is subjected to civil liability.

The “arbitrary and fundamentally unfair” requirement, *supra*, ensures that our laws apply only to those who would “reasonably anticipate” being haled into U.S. courts. *See, e.g., Suerte*, 291 F.3d at 370. And other doctrines complement the nexus requirement or provide alternative safeguards where no nexus is required.

It is a “longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (citations omitted) (applying the presumption against extraterritoriality to the Securities Exchange Act of 1934); *see also RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016) (holding that RICO’s private right of action does not apply extraterritorially); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (applying the presumption against extraterritoriality, the Court ruled that federal courts do not have jurisdiction over an ATS claim when it “involves a foreign plaintiff suing a foreign defendant where ‘all relevant conduct’ occurred on foreign soil (a so-called ‘foreign-cubed’ case).”).

In addition, Rule 4(k)(2) and the Fifth Amendment does not eliminate other avenues that defendants might have to avoid litigating in a US court. For example, a federal court has “discretion to dismiss a case on the ground of forum non conveniens when an alternative forum has jurisdiction to hear the case, and trial in the chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to plaintiff ‘s convenience.” *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (internal quotation marks omitted).

And, because plaintiffs need to be able to collect on their judgments from US courts, that will be possible only if the defendant has US assets, or, as the case here, if the foreign country has a statute that blocks enforcement of the judgment, both of which provide

further assurances that Rule 4(k)(2) will be applied reasonably.

Respectfully submitted,

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