

No.

In the Supreme Court of the United States

JOHN A. TORTORA, PETITIONER,

v.

MARIA I. ALVAREZ, RESPONDENT.

*ON PETITION FOR A WRIT OF
CERTIORARI TO THE NEW JERSEY
SUPREME COURT*

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the New Jersey State Court's decision to deem two American-born citizens lawfully married in Cuba, when the parties obtained no license from the Office of Foreign Asset Control, prohibitively undermines the President's broad, extensive, and exclusive foreign affairs authority to administer the Cuban Foreign Asset Control Regulations authorized under the International Emergency Economic Powers Act.

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INTRODUCTION

For many couples, planning a luxurious, unforgettable destination wedding is now as much a part of the American dream as owning a home. These extravagant celebrations can take place all over the world. But, not every picturesque location is within reach, and it has nothing to do with the couple's finances. The United States Federal Government has either partially or completely restricted its citizens' ability to travel to certain destinations. For various reasons, about one dozen countries are blocked by the United States Department of Treasury's Office of Foreign Asset Control (OFAC). This ultimately means that although Cuba is a popular host country for destination weddings for Canadian and European citizens, American-born citizens are federally prohibited from having destination weddings in Cuba. This case poses the question of whether individual States can deem two parties married based on a purported marriage certificate obtained in defiance of OFAC's regulatory authority.

"In the early 1960's, Cuba's attempts to 'destabilize governments throughout Latin America' were deemed by President Kennedy to constitute a national emergency." *Miranda v. Sec'y of Treasury*, 766 F.2d 1, 4 (1st Cir. 1985) (quoting Presidential Proclamation 3447, 27 Fed. Reg. 1085 (Feb. 6, 1962)). In response, on July 8, 1963, the Treasury Department promulgated the Cuban Assets Control Regulations (CACR), originally authorized by the Trading With the Enemy Act (TWEA), and subsequently authorized by the International Emergency Economic Powers Act (IEEPA). *Lary v. Republic of Cuba*, 643 F. Supp. 194,

195 (S.D.N.Y. 1986) (citing 50 U.S.C. § 1702(a)(1)(b); 31 C.F.R. § 515) (citations omitted); *see* 50 U.S.C. § 4305(b)(1). The Secretary of the Treasury has delegated authority to administer CACR, commonly referred to as the Cuban embargo, to OFAC. *Havana Club Holding, S.A. v. Galleon, S.A.*, 203 F.3d 116, 120 (2d Cir. 2000) (citing 31 C.F.R. § 515.802). The intent was to prohibit all financial and commercial transactions between United States nationals and Cuba and Cuban nationals. *See Lary*, 643 F. Supp. at 195. Circuit Courts and the Supreme Court have recognized these regulations as both important to foreign policy objectives, and also validly authorized by the TWEA. *See, e.g., id.* at 197 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir. 1966)) (citation omitted).

The Code of Federal Regulations (CFR) permits Americans to travel to Cuba under twelve permitted categories, and OFAC will only license travel for one of those purposes. 31 C.F.R. § 515.560(a)(1)–(12). Getting married in Cuba does not fall within one of the twelve permitted categories and it is an un-licensable tourist activity. *See* 31 C.F.R. § 515.560(b) (“Effective October 28, 2000, no specific licenses will be issued authorizing . . . travel-related transactions . . . other than those referenced in paragraph (a) of this section.”); *see also* 31 C.F.R. 515.560(c). An unlicensed person subject to United States jurisdiction who travels to Cuba is presumed to have engaged in prohibited travel-related transactions. *Uritsky v. Newcomb*, No. 03-10569-PBS, 2004 U.S. Dist. LEXIS 8971, at *9 (D. Mass. May 19, 2004) (citing 31 C.F.R. § 515.420(c)).

In this case, as Alvarez testified, the parties were in a ceremony in Cuba that was conducted in Spanish and seemingly resulted in Alvarez obtaining a Cuban document purporting to be a marriage license. Pet. App. 16-17a. The parties, both American-born citizens, obtained no requisite license from OFAC before or after they traveled to Cuba. Pet. App. 15a. Alvarez merely “called a cousin” in Cuba. Pet. App. 2a. As such, the trial court found that the parties, both American-born citizens, could not possibly have been lawfully married in Cuba. Pet. App. 4a, 23a. The trial court dismissed Alvarez’s complaint for divorce. Pet. App. 11-12a, 23a.

Although the parties had no OFAC authorization to transact with Cuba or Cuban nationals for the purposes of obtaining a marriage or marriage certificate, New Jersey’s intermediate appellate court, known as the Superior Court, Appellate Division (appellate division), reversed, and reinstated Alvarez’s complaint for divorce. Pet. App. 1a. The New Jersey Supreme Court denied review. Pet. App. 24a.

The appellate division reasoned that Tortora “presented no evidence the marriage was invalid under Cuban Law – or under any law, for that matter” and characterized his position as “unsupported by legal authority.” Pet. App. 9a. That court also reasoned there was no “authority supporting the premise a failure to obtain the federal government’s permission to get married in Cuba has the legal effect of voiding a marriage properly entered in Cuba in accordance with Cuban law.” Pet. App. 7a. Notwithstanding the fact that there was absolutely no showing the parties were lawfully married in accordance

with Cuban law, several interpretations of the regulations lead to the conclusion that any purported marriage is unequivocally “null and void.” See 31 C.F.R. § 515.203(a).

The appellate division went one step further by imposing the burden on Tortora to disprove the validity of the parties’ marriage once a document purporting to be a marriage certificate was offered into evidence. Pet. App. 6-9a. However, this is also impermissible under the regulations. Transacting with the Cuban government to ascertain the validity of a Cuban document is a dealing prohibited by the regulations. See 31 C.F.R. § 515.201. Moreover, the “prohibition on dealing in property in which Cuba or a Cuban national has an interest” affects goods or services “even if provided free-of-charge by the Government of Cuba or a national of Cuba[.]” 31 C.F.R. § 515.420. An American citizen cannot transact with Cuba if such transactions involve property in which Cuba “has at any time had an interest of any nature whatsoever[.]” 31 C.F.R. § 515.201(b)(1).

The New Jersey appellate court’s approach conflicts with CACR and district and circuit court precedent, and authorizes, as much as it requires, federally impermissible actions. As it stands, New Jersey has ignored CACR by permitting American-born, United States citizens to get married in Cuba without obtaining a license from OFAC. Federal sovereignty and exclusive executive authority prohibits New Jersey from so easily casting aside the federal regulations. New Jersey lacks the authority to administer the Cuban embargo and decide on its own volition to regulate foreign affairs otherwise within the purview of OFAC.

This case is an ideal vehicle for clarifying and reaffirming exclusive executive authority imposed on the States in the realm of foreign affairs. Without consideration of federal legislation or regulations, the appellate division reversed the trial court and relied on the premise that possession of a document from Cuba, obtained without a license, was adequate to deem the parties married. Moreover, the appellate division placed a federally impermissible mandate on Tortora that he, personally, must be the one to prove the invalidity of the purported marriage certificate. Since he did not, the New Jersey Courts deemed the parties to be validly married. This Court should grant the petition and hold that States cannot meddle with exclusive executive authority to administer the Cuban embargo, and specifically hold that United States, American-born citizens cannot marry in Cuba absent specific OFAC authorization.

OPINIONS AND ORDERS BELOW

The judgment of the New Jersey Supreme Court denying certification (App., *infra*, 24a) is reported at 232 N.J. 155 (2018). The opinion of the New Jersey Superior Court, Appellate Division (App., *infra*, 1a-10a) is unreported in the *New Jersey Superior Court Reporter* but is available at 2017 N.J. Super. Unpub. LEXIS 1781 (N.J. App. Div. July 17, 2017).

JURISDICTION

The judgment of the New Jersey Supreme Court was entered on February 9, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 5(b) of the Trading With the Enemy Act of 1917 (TWEA), Pub L. No. 65-91, 40 Stat. 411, codified in relevant part at 50 U.S.C. § 4305, provides as follows:

(b) (1) During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise--

...

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest, by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the

accomplishment or furtherance of these purposes[.]

Section 5(b) of the International Emergency Economic Powers Act of 1977 (IEEPA), Pub L. No. 95-223, 91 Stat. 1625, codified in relevant part at 50 U.S.C. § 1702, provides as follows:

(a) In general.

(1) At the times and to the extent specified in section 202 [50 U.S.C. § 1701], the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise . . .

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States[.]

STATEMENT OF THE CASE

The Parties and Their Divorce Proceedings

Maria Alvarez was born in Florida, and John Tortora was born in New York. Pet. App. 14-15a. Together, they have one daughter born in 1995. Pet. App. 15a. In the spring of 2004, Alvarez contacted a travel agency and arranged for the parties and their daughter to travel to Cuba. Pet. App. 15a. The parties did not inform the travel agency of their intent to get married in Cuba. Pet. App. 20a. Further, neither party contacted any United States government official prior to the trip, and the parties did not “specifically request permission from the U.S. Government to enter Cuba for the purpose of marriage[.]” Pet. App. 15a, 19a. Alvarez, however, “called a cousin living in Cuba and ascertained what was needed to get married there.” Pet. App. 2a. The parties then flew to Cuba on April 23, 2004. Pet. App. 15-16a.

On Saturday, April 24, 2004, the parties and their daughter allegedly went to Revolutionary Plaza in Havana to obtain a marriage license. Pet. App. 16a. On April 26, 2004, some sort of ceremony was conducted in Spanish. Pet. App. 16a. Present were the “officiant,” the parties, their daughter, two of Alvarez’s cousins, one cousin’s friend, and presumably the videographer. Pet. App. 16a. The few minute event was captured on video, but the audio was mostly inaudible and unintelligible. Pet. App. 16a. There was no exchange of wedding rings or recitation of any vows. Pet. App. 16a.

After returning from Cuba, the parties took no

steps to get married in the United States or register a Cuban marriage certificate in the United States. Pet. App. 22a. From the birth of their daughter in 1995 to the present, the parties never lived together. Pet. App. 3a, 17a, 20a. Alvarez held herself out as single in her bankruptcy petition, application for welfare benefits, tax returns, domestic violence applications against Tortora, and case information statement. Pet. App. 3a, 18a, 21a. Alvarez received government assistance and never advised social welfare agencies that she was married as of April 2004. Pet. App. 22-23a.

One day after filing for bankruptcy as “not married,” Alvarez filed for divorce from Tortora on January 6, 2012. Pet. App. 12a, 18a. The question of whether the parties could be validly married in Cuba was placed squarely before the family court, and following a testimonial hearing the court dismissed Alvarez’s complaint for divorce on February 10, 2015. Pet. App. 11-13a, 17a. The court acknowledged the Cuban embargo, CACR, and the need to obtain a license from OFAC for tourist travel, and placed the burden of proof on Alvarez. Pet. App. 14a, 17-18a, 23a.

Alvarez did not know the date of the parties “marriage.” Pet. App. 19a. Alvarez presented a document at trial dated April 27th, not April 26, 2004, as she testified. Pet. App. 17a. No licenses to travel were presented, and the court presumed neither party had “authorization to spend U.S. dollars in Cuba for any purpose other than in connection with a vacation.” Pet. App. 19a. In dismissing her complaint for divorce, the court reasoned that Alvarez failed to meet her burden of proof. Pet. App. 23a. Alvarez appealed.

The appellate division acknowledged the trial court found the parties were required to obtain a license from the United States government to get married in Cuba, but nonetheless found there was no authority supporting the notion that “failure to obtain such a license voided their marriage.” Pet. App. 4a. The appellate division reversed and reinstated Alvarez’s complaint for divorce on the basis that Tortora bore the burden to show the marriage was invalid, and that he introduced no evidence disputing its validity. Pet. App. 7-8a. The court found no “authority supporting the premise a failure to obtain the federal government’s permission to get married in Cuba has the legal effect of voiding a marriage properly entered in Cuba in accordance with Cuban law.” Pet. App. 7a. Moreover, the court opined that Tortora “had ample time before the hearing to investigate the authenticity of the document, but did not introduce any evidence challenging the authenticity of the marriage certificate.” Pet. App. 8a. The appellate division ultimately concluded that Tortora’s “argument the parties’ alleged violations of federal regulations invalidated their marriage was unsupported by legal authority.” Pet. App. 9a.

Tortora petitioned the New Jersey Supreme Court for certification, but the New Jersey Supreme Court denied review. Pet. App. 24a.

John Tortora now petitions for review by this court.

REASONS FOR GRANTING THE WRIT

1. This Case Marks New Jersey's Departure From Federal Authority and Precedent

a. States Cannot Administer the Cuban Embargo and Only OFAC has Authority to License Activity in Cuba

The New Jersey appellate court's approach infringes upon exclusive executive authority and contravenes all applicable precedent. Individual States lack the authority to administer the Cuban embargo and disregard the CACR. "The authority delegated by Congress to the President under TWEA is extensive." *Miranda*, 766 F.2d at 3. The Supreme Court has reiterated that "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'" *Id.* at 4 (citing *Regan v. Wald*, 468 U.S. 222, 242 (1984)). In one iteration or another, for over fifty years, "the Cuban embargo has sought to deter commercial and financial dealings between Cuba and the United States, that is, any transactions in which Cuba has 'any interest of any nature whatsoever, direct or indirect.'" *Sanders v. Szubin*, 828 F. Supp. 2d 542, 545 (E.D.N.Y. 2011) (quoting 31 C.F.R. § 515.201(a)).

"Under the CACR, travel-related transactions involving Cuba are severely restricted." *Uritsky*, 2004 U.S. Dist. LEXIS 8971, at *7. "Except as specifically authorized by the Secretary of the Treasury, CACR prohibits all 'transactions involving property in which [Cuba] or any national thereof, has . . . any interest of

any nature, direct or indirect[.]” *Id.* at *8 (quoting 31 C.F.R. § 515.201(b)). “The regulations prohibit spending money relating to Cuban travel unless the traveler has either a general or specific license issued by OFAC.” *Id.* (citing 31 C.F.R. §§ 515.201(b)(1), 515.560(a)). A general license authorizes a broad class of transactions which the regulations would otherwise prohibit, and a specific license authorizes an individual transaction not authorized by a general license. *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 357 (11th Cir. 1984) (citations omitted). OFAC considers applications for licenses on an individual basis and advises each applicant of its decision. *Id.* OFAC’s decision to approve or disapprove an application constitutes a final agency action. *Id.* (citing 31 C.F.R. § 515.803).

As relevant here, “[a]ny person having an interest in a transaction or proposed transaction may apply for a specific license.” *Id.* (citing 31 C.F.R. § 515.801(b)(2)). “A ‘transaction’ generally includes ‘any payment or transfer’ of property to Cuba or a national thereof.” *Id.* (citing 31 C.F.R. § 515.309). “More specifically, a ‘transfer’ includes ‘the issuance, docketing, filing, or the levy of or under any judgment, decree, attachment, execution, or other judicial or administrative process or order.’” *Id.* (citing 31 C.F.R. § 515.310). “The Regulations, in connection with § 5(b) of the TWEA, make it unlawful to effect any of the described transactions unless a license authorizing the transaction has been issued by [OFAC] acting on behalf of the Secretary of the Treasury[.]” *Id.* (citing 31 C.F.R. § 515.701(a)) (citations omitted).

In the within case, the parties obtained no license

from OFAC before they traveled to Cuba. Alvarez merely “called a cousin.” Pet. App. 2a. The appellate division found this was sufficient because it ultimately resulted in Alvarez’s acquisition of an alleged Cuban marriage certificate. Pet. App. 6-7a. There is persuasive authority suggesting that calling a cousin is not a valid substitute for an OFAC license. *See U.S. v. 100 Cuban Cigars*, 35 F. Supp. 2d 405, 410 (E.D. Pa. 1999) (“no . . . instruction . . . authorizes a transaction prohibited under [31 C.F.R. § 515.502(b)] unless the . . . instruction . . . specifically refers to this part.”).

In *100 Cuban Cigars*, the United States Customs Service seized the cigars David G. Weisenthal brought back from Cuba. *Id.* at 406. Weisenthal admitted he did not have a license to import Cuban items, but he argued that he did not violate any regulations because he appropriately relied on a Customs Service brochure given to him by a customs official. *Id.* at 409. Although the brochure’s “instructions” permitted him to import cigars from Cuba, the fact that it was not an OFAC instruction was fatal to his case. *Id.* at 409-10. The court opined that “even the most honest and reasonable intentions cannot save Weisenthal’s cigars.” *Id.* at 410. The same logic applies to this case to defeat any notion that Alvarez having called her cousin in any way validates the parties’ alleged Cuban marriage.

In sum, the findings of the appellate division that Alvarez could circumvent OFAC licensing requirements by calling a cousin in Cuba contravenes the “traditional deference to executive judgment ‘[in] this vast external realm[.]’” *Regan*, 468 U.S. at 243 (quoting *United States v. Curtiss-Wright Export Corp.*,

299 U.S. 304, 319 (1936)) (citing *Haig v. Agee*, 453 U.S. 280, 306-07 (1981); *Zemel v. Rusk*, 381 U.S. 1, 14-15 (1965)). Alvarez could have applied for an OFAC license in order to get married in Cuba, *see* 31 C.F.R. § 515.801(b)(1), but she did not. Despite this crucial fact, the appellate court overruled the trial court and essentially granted Alvarez the necessary OFAC license to validate her marriage. The conflict spawned by such a ruling can be resolved only by this Court's review.

b. A Marriage Obtained in Cuba Without an OFAC License is Void Pursuant to the Federal Regulations

Under two separate interpretations of the federal regulations, the parties' "Cuban marriage" is null and void. Although the applicable regulations do not specifically discuss marriage, it should be treated similarly to other proceedings or transactions that explicitly require an OFAC license to be valid.

In the first instance, the regulations explicitly state that "any transfer" in violation of "any provision of this part or of any regulation, ruling, instruction, license, or other direction or authorization" and involves "any property" in which a "designated national has or has had an interest" is "null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property." 31 C.F.R. § 515.203(a).

A "transfer" is defined as an act done with the intent to create any right with respect to any property,

and includes agreements, contracts, and the acquisition of any interest of any nature whatsoever by reason of a judgment or decree of any foreign country. 31 C.F.R. § 515.310. “Property” includes money and “contracts of any nature whatsoever[.]” 31 C.F.R. § 515.311. A “designated national” means Cuba and any national thereof. 31 C.F.R. § 515.305.

Taken together, these particular regulations prohibit two American-born citizens from marrying in Cuba absent an OFAC license, and further provide that such an event would be “null and void.” 31 C.F.R. § 515.203(a), (c). First, a marriage, as a type of contract that both confers rights and constitutes a “transfer,” and further is itself considered “property,” meets the applicable criteria. *See* 31 C.F.R. §§ 515.310, 515.311; Pet. App. 18a (stating the term “marital contract”). Second, Cuba must have an interest in this purported marriage that occurred in its jurisdiction. In support of this, note that Cuba is not a signatory to the 1961 Hague Convention Treaty Abolishing the Requirement of Legalization of Foreign Public Documents. Pet. App. 8a (citing HCCH, *12: Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, <<https://www.hcch.net/en/instruments/conventions/status-table?cid=41>>). Thus, Cuban public documents cannot be verified in the United States. Because only the Cuban government can verify Alvarez’s purported Cuban marriage certificate, Cuba necessarily has an interest in marriages occurring within its jurisdiction.

In the second application, the regulations recite: “[a]ll dealings in, including, without limitation, transfers, withdrawals, or exportations of, any

property or evidences of indebtedness or evidences of ownership of property by any person subject to the jurisdiction of the United States” and “[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States” are prohibited transactions “except as specially authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him)” if “such transactions involve property in which any foreign country designated under this part, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect[.]” 31 C.F.R. § 201(b)(1)–(2). Further, “[a]ny transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraph (a) or (b) of this section is hereby prohibited.” 31 C.F.R. § 201(c). Noting that Cuba must have an interest in peoples’ Cuban marriages, these extremely broad regulations prohibit two American-born citizens from marrying in Cuba. *See* 31 C.F.R. § 201(b)(1)–(2).

Taking this one step further, per 31 C.F.R. § 515.203(e):

Unless licensed or authorized by § 515.504 or otherwise licensed or authorized pursuant to this chapter any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is null and void with respect to any property in which on or since the ‘effective date’ there existed the interest of a designated foreign country or national thereof.

[(Emphasis added).] “For the purpose of this section

the term ‘property’ includes . . . contracts, . . . and evidences of any of the foregoing.” 31 C.F.R. § 515.203(f).

As such, 31 C.F.R. §§ 515.201(b) and 515.203(e) covers the parties’ marriage in accordance with the definitions provided *supra*, 14-15. Not only is a marriage a contract that confers various rights, but a marriage, specifically the purported marriage of these parties, is also a “judicial process.” *See* Pet. App. 18a. Documents were allegedly submitted for translation in Cuba, and an officiant purportedly interpreted Cuban law and conducted a proceeding that allegedly deemed the parties married. Pet. App. 2-3a, 16a. But contrary to whatever may have occurred in Cuba, the result under the federal regulations is that the parties’ marriage must be rendered “null and void.” *See* 31 C.F.R. § 515.203(a). The existence of a purported marriage certificate in no way validates an otherwise federally prohibited transaction between two American-born citizens in Cuba that involved dealings with the Cuban government.

The New Jersey court’s last word rejected any notion that American-born, United States citizens must abide by any and all federal authority in this regard. When the appellate division recited that “none of the penalties provide a party’s marriage shall be deemed void if a party is found in violation of 31 C.F.R. § 515.560 or any other regulation in 31 C.F.R. § 515,” the court erroneously disregarded 31 C.F.R. §§ 515.201 and 515.203. *See* Pet. App. 7-8a. The court took no position as to whether the parties’ marriage was “null and void” under these aforementioned regulations, and instead issued a blanket recitation of

inapplicability. This approach undermines United States foreign policy.

State courts must defer to OFAC's regulatory authority. New Jersey's appellate division decision to cast aside federal regulations and permit American-born, United States citizens to get married in Cuba without an OFAC license can now only be remedied by this Court's review.

2. The Question Presented Is Exceptionally Important And Warrants Review

Exclusive executive authority must remain vested therewith, and the States cannot be permitted to regulate such important issues of foreign policy.

Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress *authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs.*

[*Zemel*, 381 U.S. at 17 (quoting *Curtiss-Wright Corp.*, 299 U.S. at 324).]

This case presents a question with significant practical consequences affecting United States foreign policy determinations made by individual States. If allowed to stand, the New Jersey court's decision to license the parties' conduct in Cuba chips away at

exclusive federal authority to regulate the Cuban embargo. New Jersey has entirely departed from and cast aside OFAC's CACR, and with that, the important political purposes those regulations serve. This case created a sharp rift in foreign policy, and is an optimal vehicle for settling the issue arising when State action conflicts with federal regulations.

The United States District Court for the Southern District of Florida tackled a comparable situation in *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272 (S.D. Fla. 2008), and *ABC Charters, Inc. v. Bronson*, No. 08-21865-CIV-GOLD/MCALILEY, 2009 U.S. Dist. LEXIS 31283 (S.D. Fla. Apr. 14, 2009). The former involved litigation at the preliminary injunction stage, and the latter represented the court's final determination. In this saga, travel industry entities sued the Commissioner of the Florida Department of Agriculture and Consumer Services on the basis that amendments to the Florida Sellers of Travel Act (Travel Act) legislation was unconstitutional and violated Foreign Affairs Power. *ABC Charters, Inc.*, 591 F. Supp. 2d at 1280-82. In short, the amendments affected, above and beyond the federal regulations already in place, plaintiffs' abilities as federally licensed entities to provide travel-related services to Cuba. *Id.* at 1281.

The court recognized OFAC's control over licensing and authorization for these entities to operate in accordance with the United States government's foreign policy goals. *Id.* at 1286. The court went so far as to quote OFAC guidelines in reaching the determination that "OFAC has promulgated a graduated and carefully balanced enforcement and

compliance regime that provides it with maximum discretion and options required to enforce federal law to achieve U.S. foreign policy goals in the area of relations with Cuba” and the “OFAC investigatory and enforcement regime is conservatively and carefully calibrated to allow the federal government maximum flexibility and discretion.” *Id.* at 1286-87.

As to Foreign Affairs Powers, the court noted “[t]he exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two.” *Id.* at 1295 (quoting *American Ins. Ass’n v. Garamendi*, 539 U.S. 396, 421 (2003)) (citing *Zschoernig v. Miller*, 389 U.S. 429, 442 (1968) (Stewart, J. concurring)). Moreover, “our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.” *Id.* at 1295 (citing *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) (citation omitted) (alteration omitted)).

The court granted a preliminary injunction on the basis that the Travel Act amendments encroached on federal foreign affairs powers, the Foreign Commerce Clause, and Interstate Commerce Clause, and was preempted in all respects. *Id.* at 1295-1307 (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100, 114 (1941); *Milk Control Bd. of Pa. v. Eisenberg Farm Prods.*, 306 U.S. 346, 351-52 (1939); *Houlton Citizens’*

Coal v. Town of Houlton, 175 F.3d 178, 188 (1st Cir. 1999)). The court reasoned the State of Florida had “undertaken to upset that balance through the passage of the Sellers of Travel Act” and noted “[t]here are already in place federal regulations designed to achieve the government’s interest in protecting national security[,]” and therefore found it likely plaintiffs would be able to prove the amendments’ preemption and unconstitutionality. *Id.* at 1304-05.

The court in its later decision upheld the restraints disavowing of the Travel Act amendments and ultimately concluded “[t]he State of Florida is not entitled to adopt a foreign policy under our Constitution or interfere with the exclusive prerogative of the United States to establish a carefully balanced approach to relations with foreign countries, including Cuba.” *ABC Charters, Inc.*, 2009 U.S. Dist. LEXIS 31283, at *17. This perfectly encapsulates the delicate approach taken by the courts in Florida as contrasted by the conclusory approach taken by the appellate division in the within case in New Jersey. Unlike the appellate division in this case, the Florida District Court correctly recognized that “Congress has enacted an extensive web of federal laws to regulate business with and travel to Cuba through the passage of laws such as the [TWEA] and regulations enforced by [OFAC].” *ABC Charters, Inc.*, 591 F. Supp. 2d at 1307.

Flexibility in the underlying regulations is necessary for the exercise of executive discretion, and not so that the States can self-regulate. *ABC Charters* occurred during the presidency of Barack H. Obama, wherein on April 13, 2009, some travel restrictions

were lifted and Cuban Americans were permitted to travel freely. *ABC Charters, Inc.*, 2009 U.S. Dist. LEXIS 31283, at *16 (citation omitted). Those policies have now been largely reversed. See WhiteHouse.Gov, *Fact Sheet on Cuba Policy* (June 16, 2017) <<https://www.whitehouse.gov/articles/fact-sheet-cuba-policy/>>. Under President Donald J. Trump, the current policy “enhances travel restrictions to better enforce the statutory ban on United States tourism to Cuba. Among other changes, travel for non-academic educational purposes will be limited to group travel. The self-directed, individual travel permitted by the Obama administration will be prohibited.” *Id.* Further, notwithstanding the Cuban embargo inclusive of OFAC regulations, the U.S. Department of State has enacted a Level 3 travel advisory due to recent issues impacting employees of the U.S. embassy in Havana. See U.S. Department of State, *Cuba Travel Advisory* (Mar. 2, 2018) <tinyurl.com/cubatraveladvisory> (“Reconsider travel to Cuba due to attacks targeting U.S. Embassy Havana employees resulting in the drawdown of embassy staff. . . . Because our personnel’s safety is at risk, and we are unable to identify the source, we believe U.S. citizens may also be at risk.”).

The very nature of the United States’ shifting policies toward Cuba highlights the importance of the individual States avoiding all actions that “would undermine the power of the federal government to act on behalf of the entire nation with respect to our relations with Cuba.” *ABC Charters, Inc.*, 2009 U.S. Dist. LEXIS 31283, at *16-17. Not only did the New Jersey court essentially license an activity that would otherwise fall under the purview of OFAC, the court

actually placed the burden on Tortora to disprove the validity of the parties' "marriage." Pet. App. 6-9a. Incongruously, this means the appellate division obligated Tortora to obtain a license from OFAC and go to Cuba to investigate the legitimacy of the purported Cuban marriage certificate if he wished to contest the parties' alleged marriage. Going even further, the appellate division remanded the matter and struck his affirmative defenses contesting the validity of the parties' marriage. Pet. App. 9a. Accordingly, even OFAC's denial of a license to retroactively authorize the parties' marriage or permit Tortora to investigate Alvarez's purported marriage certificate would have no effect in the New Jersey State Court proceedings.

The final word at the State court level is that the parties are married and Tortora is unable to argue otherwise. The appellate division's opinion deeming the parties married warrants reversal in favor of reinstatement of the trial court's order dismissing Alvarez's complaint for divorce.

In sum, the New Jersey court's decision instigates a new, widely-recognized conflict on the question of whether and to what extent States have the authority, if any, to impact the entire country's approach to foreign affairs. That question is an important and recurring one, and this case is the ideal vehicle for resolving it. Further review is undeniably warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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