No. 24-699

In the Supreme Court of the United States

EXXON MOBIL CORPORATION,
PETITIONER,

v.

CORPORACIÓN CIMEX, S.A. (CUBA), ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Cuban instrumentalities spend the vast majority of their opposition deep in the weeds on the merits. Most of what they say is wrong, but all of it can wait for plenary briefing. At this stage, respondents do not dispute that the question presented has real diplomatic and political ramifications. They do not dispute that the nature of the question forecloses the possibility of a circuit split, and that the divided decision below is the closest substitute. Nor do they dispute that this case is an appropriate vehicle.

Instead, respondents offer derision: regardless of what this Court says about their sovereign immunity, they will never have to pay any judgment, so the question is academic. That assertion is wrong, and

respondents' confidence in their ability to successfully blow off billion-dollar judgments is impossible to square with their aggressive litigation of the threshold immunity question. Regardless, even if Helms-Burton Act plaintiffs may face other hurdles to recovery, that is no reason to let stand an additional hurdle that Congress did not erect. Indeed, as multiple amici confirm, whether such plaintiffs may sue Cuban instrumentalities in federal court has significant and immediate practical consequences for many American companies. It certainly matters to Exxon, which is currently pursuing unnecessary and burdensome jurisdictional discovery as this lawsuit enters its sixth year.

In the end, what is really at stake is the ability of victims like Exxon even to pursue long-overdue justice for the illegal confiscation of their property. The decision below closes the door to many such victims, despite Congress's clear statutory language to the contrary and the Executive's express authorization of such suits.

I. THE DECISION BELOW IS WRONG

Most of the opposition argues (at 9-28) about how best to construe *Department of Agriculture Rural Development Rural Housing Service* v. *Kirtz*, 601 U.S. 42 (2024), and how to apply various textual canons. The divided panel split over many of those same issues. Pet. App. 8a-15a, 41a-51a. These are core statutory-interpretation issues that this Court is well situated to tackle after plenary briefing.

In all events, the decision below was wrong, as are respondents here. Respondents cannot explain why this Court's unanimous construction of a substantively

identical statute in *Kirtz* does not directly control. Respondents also lack good answers to the other textual indicators that Title III of the Helms-Burton Act abrogates foreign sovereign immunity. Their additional counterarguments, most of which even the majority below did not adopt, are likewise unpersuasive.

A. The decision below cannot be squared with *Kirtz*. Just last Term, this Court held that the Fair Credit Reporting Act (FCRA) "effects a clear waiver of [the federal government's] sovereign immunity" because it "authorizes . . . suits for money damages against '[a]ny person'" who violates the statute and "defines the term 'person' to include 'any . . . governmental . . . agency.'" *Kirtz*, 601 U.S. at 50 (citations omitted). As *Kirtz* explained, the Court has repeatedly found that similarly worded statutes clearly abrogate sovereign immunity, even though they do not "discuss sovereign immunity in so many words." *Ibid.*; *see Nevada Dept. of Hum. Res.* v. *Hibbs*, 538 U.S. 721, 726 (2003) (FMLA); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 74 (2000) (ADEA).

Respondents do not (and cannot) deny that Title III's language is substantively identical to the language of the FCRA, FMLA, and ADEA. They do not contest that Congress expected many Title III actions to be brought against Cuban-owned entities, *see, e.g.*, 22 U.S.C. §§ 6064(a), 6082(d), and intended to provide a remedy for "the use of wrongfully confiscated property *by governments*," *id.* § 6081(8) (emphasis added). Nor do they dispute that there are many ways Cuban instrumentalities might traffic in confiscated property under Title III that will never satisfy an exception to the Foreign Sovereign Immunities Act. So respondents seemingly concede that if the FSIA controls in

Title III actions, Congress would have authorized many suits "against a sovereign with one hand, only to bar [them] with the other." *Financial Oversight & Mgmt. Bd. for Puerto Rico* v. *Centro de Periodismo Investigativo, Inc.*, 598 U.S. 339, 348 (2023) (*FOMB*). *Kirtz*'s core lesson is that Congress does not write such self-defeating laws.

Respondents nevertheless try to distinguish the *Kirtz* line of cases in two ways. First, they argue (at 9) that foreign sovereign immunity is "statutory," whereas *Kirtz*, *Hibbs*, and *Kimel* involved "common law" immunity. But federal and state sovereign immunity are not mere common law; they are "an essential component of our constitutional structure." *Dellmuth* v. *Muth*, 491 U.S. 223, 228 (1989). So if anything, it should be *easier* for Congress to supersede foreign sovereign immunity than state or federal sovereign immunity. *See* Pet. 26. Respondents invoke (at 11-13) the canon against implied repeals. But even assuming that canon makes sense here, it requires a "clearly expressed congressional intention," *Epic Systems Corp.* v. *Lewis*, 584 U.S. 497, 510 (2018), no different from the "unmistakably clear" "intention" to abrogate immunity that the Court has repeatedly found in statutes like Title III. *Kimel*, 528 U.S. at 73.

Second, respondents contend (at 10) that Title III should be read to abrogate sovereign immunity only if immunity would otherwise block every conceivable lawsuit against Cuban instrumentalities. But the Court did not demand that sort of total preclusion in *Kirtz* or any other case. If it had, the Court could not have found that the ADEA or FMLA abrogates state sovereign immunity, because a State's immunity from damages is not absolute. Respondents point to

FOMB, but the Court did not adopt a total-preclusion rule there either. Instead, it explained that abrogation was appropriate where "[r]ecognizing immunity" would preclude "*a host of claims* Congress" has authorized—that is, a meaningful set of claims, not every possible one. 598 U.S. at 349 (emphasis added).

B. Respondents have no good answers to the several other provisions in Title III that confirm Congress intended to abrogate sovereign immunity. *See* Pet. 20-24.

Start with Section 6082(c)(1). That provision characterizes Title III actions as "action[s] brought under section 1331," which is the general federal-question jurisdiction provision—not the FSIA jurisdiction provision, 28 U.S.C. § 1330. Pet. 22. Respondents contend (at 26) that Section 6082(c)(1) does not "speak[] to immunity from suit . . . with the requisite clarity and certainty." But Exxon has never argued that Section 6082(c)(1) standing alone is sufficient; it merely corroborates that Congress intended to abrogate immunity by expressly authorizing Title III suits against foreign instrumentalities.

Respondents have no better answer to the neighboring Section 6082(c)(2). That provision, which states that service of process on foreign instrumentalities in Title III suits "shall be made in accordance with" the FSIA's service rules, would be redundant if the FSIA had not otherwise been displaced. Pet. 22. Respondents object (at 27-28) that the provision still does work on their reading by making clear that "the FSIA service provisions must be followed by state courts" in Title III actions. But the FSIA's service rules already apply "in the courts of the United States *and of the States*." 28 U.S.C. § 1608(a) (emphasis

added). Respondents alternatively suggest (at 28) that Section 6082(c)(2) "makes [the FSIA's] service provisions applicable to actions against 'individuals acting under color of law,' not otherwise within the FSIA's ambit." But to the 1996 Congress, such individuals *were* "within the FSIA's ambit": at that time, the unanimous rule was that the FSIA "extended immunity to individual officials acting in their official capacity." *Chuidian* v. *Philippine Nat. Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (overturned by *Samantar* v. *Yousuf*, 560 U.S. 305 (2010)).

C. The Cuban instrumentalities offer their own suite of textual and contextual arguments in support of the decision below. None is nearly as clear an interpretive clue as the provisions discussed above.

Respondents note (at 19) that in other statutes, Congress has "*expressly* amend[ed] FSIA § 1605's exceptions to immunity." *Kirtz* already rejected a similar argument about the FCRA: "the fact that Congress chose to use certain language to waive sovereign immunity in one amendment" "hardly means [Congress] was foreclosed from using different language to accomplish the same goal." 601 U.S. at 52.

Respondents also invoke (at 18) legislative history, observing that an early draft of the Helms-Burton Act would have amended the FSIA to add an express Title III exception. Even if legislative history is relevant here, *but see Kirtz*, 601 U.S. at 49, it teaches the opposite lesson. If Congress's change to the earlier language was intended to pull back the abrogation of sovereign immunity and gut one of the main goals of the bill, surely at least one legislator would have noted as much. But none did. In fact, Senator Helms specifically outlined the "conditions" in the final bill

"that an American claimant must satisfy before he can even get into court"—and said nothing about satisfying the FSIA's immunity exceptions. 141 Cong. Rec. 27722 (1995). The more compelling inference is thus that the final bill achieved the same abrogation in a different way, rendering the earlier language unnecessary.

Next, respondents contend (at 13-16) that on Exxon's reading "there would be no subject-matter jurisdiction" in a Title III suit against a foreign instrumentality. Not so. If Title III displaces the FSIA, then federal-question jurisdiction lies under 28 U.S.C. § 1331—which, again, is exactly what Congress said in Section 6082(c)(1), *see* p. 5, *supra*. Respondents point to this Court's statement in 1989 that Congress intended the FSIA to be the "sole basis for obtaining jurisdiction over a foreign state," notwithstanding "other grants of subject-matter jurisdiction in Title 28 such as § 1331." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 437 (1989). But that is just the question presented in a different package. As already explained, the intent of the 1976 Congress with respect to then-existing causes of action does not prevent a later Congress from creating a new cause of action for which Section 1331 provides jurisdiction. *See* Pet. 27-28.

Along the same lines, respondents argue (at 22-23) that interpreting Title III to abrogate foreign sovereign immunity would "create an incoherent statutory scheme" because plaintiffs would still need to satisfy the FSIA's immunity exceptions to (i) establish personal jurisdiction and (ii) execute any judgment. They are wrong on both counts. Respondents invoke the FSIA's personal-jurisdiction provision, 28 U.S.C.

§ 1330(b). But because Helms-Burton Act claims are brought under Section 1331, Title III plaintiffs may establish personal jurisdiction the same way as in any non-FSIA suit, under Fed. R. Civ. P. 4(k)(2).*

The same holds true for execution immunity: Title III displaces it, just as it displaces the FSIA's other special immunities. Again, that is why Congress felt the need to specify that the FSIA's unique service-of-process rules would remain applicable. Regardless, Title III is hardly "incoherent" if FSIA execution immunity applies. As respondents recognize (at 30), Congress might have anticipated that judgment creditors would "look[] to property outside the United States" to satisfy judgments. Respondents invoke (at 30) Title III blocking statutes in the European Union, United Kingdom, and Canada. But those statutes obviously were not in force when Congress enacted Title III, nor do they cover everywhere Cuban instrumentalities might have property.

Last, respondents argue (at 20) that Title III's abrogation of sovereign immunity would disrupt the "delicate balance Congress struck" in the FSIA. That just begs the question whether Congress opted for a different balance in the specific context of the Helms-Burton Act. *See* Pet. 19. Respondents try (at i, 21) to

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* Although Rule 4(k)(2) requires that the exercise of personal jurisdiction be "consistent with the . . . Constitution," respondents do not claim that there would be any constitutional problem here. Indeed, they recognize (at 28 n.5) that Cuban instrumentalities may be "so closely tied to the State" that they are not entitled to due-process protections. It is also an open question whether foreign entities are entitled to such protections in the first place. *See Fuld* v. *Palestine Liberation Org.*, No. 24-20.

amplify the supposed "friction" Title III creates by pointing out that it could be applied to instrumentalities of countries other than Cuba. While technically true, that has zero practical relevance. Respondents still "have identified no instance in which Cuba has sold or transferred confiscated property to another foreign sovereign's instrumentality that then trafficked in that property." Pet. App. 47a n.3 (Randolph, J., dissenting). And if a foreign instrumentality is profiting from or otherwise helping the Cuban government exploit Americans' stolen property, Title III can cover that rare situation without encroaching on the FSIA's general reach.

II. THE DECISION BELOW WARRANTS THIS COURT'S REVIEW

A. The Question Presented Is Important

Whether the Helms-Burton Act abrogates foreign sovereign immunity is an important question with significant political and diplomatic stakes. Indeed, the wisdom of Title III as a policy matter remains a subject of ongoing debate. Shortly before leaving office, President Biden suspended the Title III cause of action on a prospective basis. Two weeks later, Secretary of State Rubio reversed the suspension. Press Release, U.S. Dep't of State, *Restoring A Tough U.S. Cuba-Policy* (Jan. 31, 2025), https://www.state.gov/restoring-a-tough-u-s-cuba-policy. And respondents themselves cite (at 30) a recent United Nations resolution regarding Title III. All of that is happening because the law actually *does* something diplomatically significant: it authorizes suits against another country's instrumentalities to seek justice for American victims of Communist Cuba's theft.

1. Respondents mostly respond (at 29-33) by invoking *other* legal barriers that are not before the Court and have not been adjudicated in this case. They contend (at 29) that, as a practical matter, the question presented is unimportant because there is a "slim to non-existent chance of recovering on any [Title III] judgment," even if Cuban instrumentalities cannot claim sovereign immunity. Those separate, as-yet-unadjudicated barriers should not trouble the Court.

For starters, Exxon and other Title III plaintiffs obviously disagree; that is why they have brought suits. Congress presumably disagreed too—after all, it generally "does not enact useless laws." *United States* v. *Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring in part and concurring in the judgment). The Executive's repeated suspensions and recent back-and-forth likewise suggest that it does not view Title III as toothless. And if respondents are so sure that any judgment against them will be unenforceable, it is unclear why they have wasted so many party and judicial resources litigating sovereign-immunity issues for the past six years.

Respondents also point (at 30-31) to the relative dearth of Title III actions as proof that potential plaintiffs see it their way. But multiple amici confirm—including from their own experience as certified claimants—that the "sheer cost and burden of establishing jurisdiction under the FSIA" "discourage[s] many claimants from even trying." King Ranch Amicus Br. 11-12; *see* Chamber of Commerce Amicus Br. 10-11. Worse still, the application of the FSIA to Cuban instrumentalities does more than deter suits against the real wrongdoers; it creates a "perverse

incentive[] for plaintiffs to target American companies" instead, to avoid FSIA complexity. Chamber of Commerce Amicus Br. 14-17.

2. When respondents actually turn to the question presented, they downplay (at 33-35) its importance, too. They argue (at 34) that the court of appeals did not adopt an "*ultra-clear* statement" rule, Pet. App. 48a, for abrogating foreign sovereign immunity. But respondents' whole argument (at 11) is that Congress can depart from the FSIA's general standards only with "express repeal language"—exactly the magic-words requirement they claim the decision below avoided. Respondents also suggest (at 13) that the D.C. Circuit was simply following the lead of other circuits that have "applied the FSIA to post-FSIA statutory causes of action," but none of the statutes at issue in those other cases looks anything like the FCRA or Title III, and no party even suggested that the FSIA had been displaced.

Respondents fail to minimize (at 35) the other possible spillover effects of the decision below. *See* Pet. 29-30. Contrary to respondents' argument, many businesses in the United States must keep records and submit to inspections because they manufacture commonplace chemicals that could be made into weapons. *See* 22 U.S.C. §§ 6701(6), 6726, 6745, 6761(a). To the extent any such businesses are owned by foreign sovereigns, they would be immune from penalties for violations under the D.C. Circuit's approach. And respondents are simply wrong about the coverage of the opioid trafficking statute: it expressly contemplates penalties against "an entity that is owned or controlled by . . . a foreign government or any political subdivision, agency, or instrumentality of

a foreign government." 21 U.S.C. §§ 2312, 2313(b), 2314(a)(1).

B. This Case Is An Excellent Vehicle

This case is an ideal vehicle for resolving whether Title III abrogates foreign sovereign immunity. Respondents identify no threshold or practical barriers to this Court's review. They do not dispute the enormous amount of money that Exxon has on the line. And they do not suggest that there is any hope for further percolation outside the District of Columbia. Absent this Court's intervention, the divided decision below is likely to be the final word on Title III.

Respondents briefly argue (at 28-29) that the Court should not take the case in this interlocutory posture. But that is no substantial vehicle problem. As already noted, this Court routinely addresses FSIA immunity issues arising on interlocutory appeal. *See* Pet. 32-33 (collecting cases). And other than one throwaway suggestion (at 28) that this "is not the only or most arduous of the issues to be litigated," respondents say nothing to diminish the unnecessary and extensive jurisdictional discovery that Exxon must conduct under the FSIA. *See* Pet. 33.

At bottom, the petition presents a clean legal issue concerning a threshold question of foreign sovereign immunity. There will no doubt be other hurdles to recovery for Exxon, but that is true of all lawsuits against foreign instrumentalities (and, for that matter, of most lawsuits). That is no reason to leave standing an immunity hurdle that Congress has "unmistakably" set aside. *Kirtz*, 601 U.S. at 49.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 15, 2025