No. 24-699

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

CORPORACIÓN CIMEX, S.A. (CUBA), *et al.*,

Respondents.

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

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

INTRODUCTION

In its Amicus Brief, the United States casts aside settled authority on statutory abrogation of immunity and on implied repeals. In doing so, it would displace Congress' calibrated judgment in Title III to provide a cause of action against Cuban and third-country agencies and instrumentalities without jettisoning the Foreign Sovereign Immunities Act's territorial nexus requirements.

The United States relies on inferences it would draw from prefatory and ancillary provisions that cannot overcome the absence of any language in Title III regarding immunity from suit—much less provide the requisite "unmistakably clear" text on immunity required for abrogation on a textual analysis.

Its claim that the FSIA would preclude the "overwhelming majority" of Title III suits against Cuban instrumentalities falls far short of the alternative showing—negation of a statutory cause of action—required for abrogation. Further, the FSIA leaves ample room for suit, on its face and also given the extent of U.S.-Cuba commerce.

In both these ways, the United States would have the Court revisit and overturn the doctrines reaffirmed in *Department of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024) and other recent decisions. The Court's precedent should not be reconsidered.

Also weighing decisively against review is the United States not contesting that the FSIA's execution provisions would remain intact even if immunity from suit is abrogated and that they require the same showing that would allow suit under the FSIA. Whether potential claimants can seek unenforceable judgments for trafficking beyond the FSIA's limits is of little, if any, import.

ARGUMENT

I. Because the United States Does Not Show with Unmistakable Clarity that Title III Abrogates FSIA Immunity, Effect Must Be Given to Both Statutes

Settled authority requires either unmistakably clear text in Title III that abrogates FSIA immunity or that the FSIA negates Title III's statutory cause of action. Brief in Opposition ("Opp.") 9-13. Unable to point to unmistakably clear text, the United States cobbles together "many . . . provisions," which, it argues, "taken together, . . . clearly abrogate[] immunity," and which "contemplate" and "assume" "the existence of trafficking claims against Cuban agencies and instrumentalities." Amicus 13-15. Unable to claim that the FSIA precludes Title III actions, it asserts that the "overwhelming majority" of possible Title III actions against Cuban instrumentalities lie beyond the FSIA, ignoring the ample room for Title III actions under the FSIA. Amicus 16, 20-21. Both arguments are foreclosed by precedent.

Where, as here, two statutes are at issue, both *must* be given effect if "capable of co-existence," *Morton v. Mancari*, 417 U.S. 535, 551 (1974), reflecting a "strong presumption" against implied repeals or amendments.

See Opp. at 11-12; *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018). To overcome this presumption, there must be "irreconcilable conflict[]," *id.* at 511, shown only if (*i*) a provision of the later statute "expressly contradicts the original act," or (*ii*) "such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662-63 (2007) (quotations and alterations omitted). This test for implied repeals mirrors the test for waiver of immunity, which requires "unmistakably clear" text free of "any ambiguities." *Kirtz*, 601 U.S. at 49 (alterations omitted); *see* Opp. 9-10. Under this test, a statute abrogates immunity only if it (*i*) "says in so many words that it is stripping immunity," *id.*, or (*ii*) creates a cause of action that "would automatically have been dismissed," *Fin. Oversight & Mgmt Bd. For P.R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 348 (2023) ("*FOMB*"), such that the cause of action is "negate[d]." *Kirtz*, 601 U.S. at 50 (quoting *FOMB*). If "multiple plausible interpretations" exist, immunity is not waived. *FOMB*, 598 U.S. at 345-46 (quotations omitted). Both lines of cases require, in substance, the same showing, which the United States (like Petitioner) comes nowhere near meeting.

A. The United States Has Not Shown Abrogation on the Face of Title III's Text

1) The United States Concedes Lack of Express Language Abrogating Immunity

The United States points to no text in Title III that "expressly contradicts" the FSIA—there is none. Silence on immunity from suit, dispositive in itself for a textual

argument, takes on added weight because Congress withdrew a provision adding Title III to the FSIA's enumerated exceptions to immunity, readily available drafting that Congress has used every time it amends the FSIA. *See* Opp. 17-20. Contrary to the United States' suggestion that Congress's choice be ignored, Amicus 20, its discarding statutory language is necessarily meaningful. Opp. 17-20. To the same effect, Congress did not add to the liability provision the "notwithstanding any other provision of law" language used in two sub-parts, 22 U.S.C. §§ 6082(a)(7)(A)-(B), of the same section.

2) The United States Concedes that Title III's Operative Provisions Do Not Suffice; Its Reliance on Title III's "Findings" Is Unavailing

The United States acknowledges that Title III might not abrogate the immunity of third-country instrumentalities. Amicus 14 n.5. Its leaving open this possibility necessarily means that, under its view, abrogation cannot be accomplished by the provisions establishing liability—which make no distinction between Cuban and third-country instrumentalities, *see* 22 U.S.C. §§ 6082(a)(1)(A), 6023(11)—but that Congress relied on non-operative provisions to abrogate immunity.

The United States looks to Title III's "Findings," which assertedly refer to holding the Cuban Government accountable. Amicus 15-16. Such prefatory provisions do not modify operative provisions, *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 167-73 (2016), much less meet the stringent test of unmistakable clarity to abrogate immunity.

Even if considered, the "Findings" do not suggest abrogation of the immunity of Cuban instrumentalities but not that of third countries—a distinction on which the United States' position depends, since it is unwilling to interpret Title III as abrogating third-country immunity. The "Findings" equally aim at third-country entities trafficking in confiscated property. They find Cuba offers foreign investors the opportunity to profit from confiscated property; condemn their taking advantage of these opportunities; and grant U.S. nationals a remedy "to deter" *those* traffickers, including "governments and private entities," from "exploiting Castro's wrongful seizures." 22 U.S.C. §§ 6081(5)-(11). Nor do these "Findings" suggest abrogation of immunity at all, for Cuban or third-country instrumentalities.

Underlying its failed attempt to limit abrogation to Cuba is the United States' recognition (like the dissent's below) of the great difficulty in concluding Congress intended abrogation at all if it strips third-country instrumentalities of FSIA immunity. This would be a radical departure from domestic and international law with substantial foreign relations implications, as third-country instrumentalities would face Title III exposure for an extraordinarily broad range of commercial engagement with Cuba lacking the FSIA-mandated territorial nexus. Opp. 20-21.[1] Far more than the attenuated to non-existent

1. In addition to its nexus standards differing from the FSIA's, the Fifth Amendment is not available when an instrumentality's presumption of separate status from the State is overcome. *See TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 300-01 (D.C. Cir. 2005). *See also Fuld v. Palestine Liberation Organization*, 606 U.S. 1 (2025) (Fifth Amendment may not require territorial nexus for certain federal causes of action).

support assertedly found in Title III's "Findings" is needed to conclude that Congress reached such a fraught judgment.

3) Miscellaneous Operative Provisions Addressed Neither to Immunity Nor Liability Are Irrelevant

The United States seeks support in various provisions contemplating suits against Cuban instrumentalities. Amicus 15. Its premise is flawed: that suits against Cuban instrumentalities are contemplated says nothing about whether those suits must satisfy the FSIA, which does not provide absolute immunity. Nor do the provisions' text support the inference: none mention immunity or liability and none are undermined by the FSIA remaining applicable. There is not so much as tension, much less the irreconcilable conflict required for abrogation.

The same goes for Title III allowing the President to "suspend the right to bring an action" under Title III "if the President determines . . . [that] suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." 22 U.S.C. § 6085(c)(2); Amicus 17-18. It too is silent on immunity and allows suspension for reasons unrelated to immunity (*e.g.*, that suits against private third-country companies might impair securing their governments' cooperation on Cuba, a principal goal of LIBERTAD, *see* Title I, and the reason for President Clinton suspending Title III[2]).

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2. https://clintonwhitehouse6.archives.gov/1996/07/1996-07-16-president-statement-on-helms-burton-waiver-exercise.html.

In positing Title III abrogation of the FSIA in favor of Executive control over immunity, the United States invokes judicial deference to the political branches on foreign policy, Amicus 13, 18, but Congress legislated in the FSIA that immunity be determined by statute rather than Executive discretion. *CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd*, 145 S. Ct. 1572, 1577-78 (2025). Nothing in Title III establishes that Congress so radically changed course. Under the separation of powers, if the FSIA's application runs contrary to the Executive's preferences, it may ask Congress to "respond by enacting additional legislation;" "it is not [the judiciary's] role to rewrite the FSIA[.]" *Turkiye Halk Banksi A.S. v. United States*, 598 U.S. 264, 279-80 (2023).

4) The FSIA's Execution Provisions Defeat the United States' Premise that Title III Pursues Its Remedial Goals at All Costs

The United States leaves uncontested Respondents' demonstration that abrogation of immunity from suit would not affect the FSIA execution provisions and that they require the same circumstances that would establish an FSIA exception to immunity from suit. Amicus 23-24; Opp. 22-23. This defeats the United States' argument that Congress swept aside the FSIA in pursuit of its remedial purpose to provide "compensation" and a "judicial remedy" to Title III claimants. Amicus 12, 15.

With the FSIA execution provisions standing, the United States' position produces a patently incoherent statutory scheme that cannot be attributed to Congress, especially when, as here, a coherent, straightforward reading of the statute is possible: there is no abrogation of

FSIA immunity from suit just as there is no abrogation of execution immunity. That Congress, in a statute expressly meant to provide actual compensation, legislated to enable claimants to obtain unenforceable judgments cannot be seriously entertained, notwithstanding the Executive, many years later, seeing unexplained "foreign policy" benefits in such pyrrhic victories. Amicus 23.

B. The United States Has Not Shown Abrogation on the Alternative Ground that the FSIA Negates Title III's Cause of Action

To find abrogation in LIBERTAD establishing liability, it is necessary for the FSIA to result in "automatic[]" "dismiss[al]" of Title III suits against Cuban instrumentalities, such that abrogation is "absolutely necessary" if Title III is to have "any meaning." *Supra* 2-3. Dispositively, this is facially foreclosed because the FSIA permits Title III lawsuits under specified circumstances.

The United States looks beyond the text of the two statutes. This is impermissible, and also fails on its own terms. The United States claims "the overwhelming majority of suits against Cuban agencies and instrumentalities are unlikely to satisfy an FSIA exception." Amicus 21. "Overwhelming majority" is not negation and does not satisfy *Kirtz*. Opp. 9-10.[3]

It also is unmanageable. "Overwhelming majority" would replace the clear *Kirtz* standard—which requires

3. In relying on the "overwhelming majority of suits," the United States recognizes that Petitioner's position that negation is shown where "at least *some*" suits would be barred, Pet. 20 (emphasis original), is untenable.

"automatic[]" "dismiss[al]" if there is immunity, and has only been applied where immunity would result in such automatic dismissal—with imprecision (what percentage is enough) and speculation (how to make the calculation).

Moreover, demonstrably, there are ample possibilities for Title III lawsuits under the FSIA. This is shown by at least thirty Title III actions; in each, the FSIA's commercial activity exception could readily have been invoked to add the Cuban counterparties on the alleged trafficking transactions as co-defendants with the U.S.-based defendant on the ground that the latter's activities were the "direct effect" of their Cuban counterparties' use of confiscated property in those transactions. (That the Cuban parties were not sued is explained by the dim prospects for collecting upon any judgment. Opp. 29-31).

These suits are for a broad range of activities authorized by U.S. regulations: arranging lodging at hotels; use of port facilities for ships carrying U.S.-origin agricultural and other cargo, or travelers; and landing aircraft carrying cargo or passengers at an airport. Three additional Title III lawsuits, against alleged Cuban instrumentalities, are for processing family remittances; retail sale of U.S. products; delivery of U.S. family gift parcels; and export of Cuban products to the United States.[4]

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4. *See* 31 C.F.R. §§ 515.533, 572 and 15 C.F.R. § 746.2 for the corresponding authorizations. U.S. regulations also permit, *inter alia*: Cuban import of U.S.-origin items for use by the Cuban private sector (which now accounts for a majority of retail activity, https://www.reuters.com/world/americas/first-time-decades-cubas-private-sector-outweighs-state-2025-07-29), and items sold directly to persons for their personal use. 15 C.F.R. § 740.21.

Authorized commerce is extensive, touching many different confiscated properties. For example, since 2014, over $2.6 billion of agricultural products have been purchased, and then warehoused and sold at locations throughout Cuba, and 7.1 million trips made from the U.S. to Cuba. In 2009-19, $1-2 billion in remittances *per year* were distributed at hundreds of different locations.[5]

Authorized commerce provides ample opportunity for suit under the commercial activity exception; the expropriation exception adds suits when an instrumentality's trafficking has no U.S. nexus, provided it otherwise engages in U.S. commerce.

The United States ignores all this and relies on patently incorrect assertions about the embargo. Amicus 16. It does not prevent Cuban firms from commerce with the United States; far from it, as shown. LIBERTAD's codification provision, 22 U.S.C. § 6032(h), does not require Cuban-U.S. commerce to be kept so low that "vanishingly few (if any)" Title III lawsuits could proceed if the FSIA applied; the above conclusively demonstrates otherwise. Every Administration has maintained that it allows the President to continue authorizations in effect at LIBERTAD's enactment *and* maintains Presidential

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For a list of actions, *see* https://static1.squarespace.com/static/563a4585e4b00d0211e8dd7e/t/614e1ca6e252570b075431a0/1632509095195/Libertad+Act+Filing+Statistics.pdf.

5. *See* U.S. Department of Agriculture, https://www.fas.usda.gov/regions/cuba; U.S. Department of Transportation, Analysis of Air Carriers: T-100 International Market (All Carriers), https://transtats.bts.gov; Congressional Research Service, *Cuba: U.S. Restrictions on Travel and Remittances* 20 (Dec. 2022).

authority under the embargo regulations to add or expand authorizations.[6]

C. The United States Necessarily Asks the Court to Revisit and Overturn Settled Doctrine

Paying only the slightest lip-service to precedent, the United States, necessarily and transparently, would have the Court revisit and overturn the doctrines so firmly and recently reaffirmed in *Kirtz*, *FOMB*, *Epic Sys. Corp.*, *Nat'l Home Builders Ass'n.*, and other decisions.

Its arguments simply cannot be reconciled with this precedent. The Court has made clear that abrogation can be found in only two ways: a statute says so in as many words, or the statutory cause of action would be subject to automatic dismissal. The United States does not, because

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6. *See*, *e.g.*, National Security Council, Statement (Jan. 5, 1999), https://1997-2001.state.gov/policy_remarks/1999/990105_dobbins_etal_cuba.html; Brief for the United States as Amicus Curiae, *Empresa Cubana del Tabaco v. General Cigar Company, Inc.*, No. 05-417 (May 2006), at 16 n.4; Commerce Department, Statement before Subcommittee on Commerce, Trade and Consumer Protection, House of Representatives (April 27, 2009); 82 Fed. Reg. 52003 (Nov. 9, 2017); 87 Fed. Reg. 35089 (June 9, 2022).

By the time LIBERTAD was under consideration, authorization for U.S.-Cuba commerce had famously waxed and waned many times. *Compare, e.g.*, 59 Fed. Reg. 44884 (Aug. 30, 1994) *with* 60 Fed. Reg. 54194-95 (Oct. 20, 1995) *and* 63 Fed. Reg. 27349 (May 18, 1998) (expanding, contracting and expanding remittances and travel); *Regan v. Wald*, 468 U.S. 222, 227 (1984) (President Carter's authorization of unrestricted travel); 22 U.S.C. § 6004(e) (1992) (authorizing telecommunications); *see also* 104 Cong. Rec. E539 (daily ed. March 7, 1995) (statement of Rep. Burton, LIBERTAD's co-sponsor).

it cannot, assert that either is the case here. Further, to the extent at all germane, which they are not, the United States relies on drawing inferences from provisions that are capable of multiple, plausible inferences and are riddled with ambiguity. It does not, because it cannot, maintain that Title III and FSIA are incapable of co-existence.

The Court's precedent is clear, firm, recent and well-grounded. It should not be reconsidered.

II. The United States Has Not Presented Convincing Reasons for Certiorari

That the U.S. position is foreclosed by settled authority is reason to deny certiorari. The United States' unstated but unmistakable request that the Court reconsider doctrines so firmly and recently reaffirmed should be rejected.

Moreover, the United States not contesting that the FSIA execution provisions remain intact reduces the question presented to whether Title III claimants may pursue unenforceable judgments for trafficking that lies beyond the FSIA immunity from suit provisions, a question of little (if any) import. Title III's efficacy does not rest on such a meaningless, purely theoretical expansion of the possibilities for suit beyond the ample room provided by the FSIA's commercial activity and expropriation exceptions.

The United States does *not* join Petitioner and *amici* in arguing for certiorari on the ground that the decision below in fact deters persons with Title III claims from bringing suit. Respondents convincingly showed that such an assertion is unfounded and fanciful. Opp. 29-31.

It does *not* argue that Petitioner needs the Court's assistance before adjudication of the commercial activity exception's application.

It does *not* claim that the question presented has broad doctrinal significance. It does *not* join Petitioner in arguing a spillover effect of the decision below on other statutes.

The United States' assertion of unexplained "foreign policy benefits" in claimants being able to obtain unenforceable judgments for trafficking beyond the FSIA's ample scope, Amicus 23, is a meager claim without any basis in LIBERTAD and only highlights the weakness of the United States' support of the Petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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