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

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Petitioner mistakenly frames the Question Presented as pertaining only to Cuban agencies and instrumentalities. Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, including its provision establishing liability for trafficking in confiscated property, is expressly applicable to "any agency or instrumentality of a foreign state." *See* 22 U.S.C. § 6023(11); 22 U.S.C. § 6082(a)(1).

Accordingly, the Question Presented is properly framed as follows:

Whether Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 abrogates the immunity from suit provisions of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1604-1605, and replaces 28 U.S.C. § 1330 with 28 U.S.C. § 1331, thereby allowing a Title III action against any agency or instrumentality of a foreign state (whether Cuban or third-country) regardless of whether the action satisfies any of the FSIA's enumerated exceptions to immunity.

RULE 29.6 DISCLOSURE

No amendments are required to the Rule 29.6 Disclosure in Respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

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BRIEF FOR RESPONDENTS

INTRODUCTION

The Foreign Sovereign Immunities Act ("FSIA") is a comprehensive statute that provides foreign state agencies and instrumentalities with jurisdictional immunity from suit, subject to enumerated exceptions, and limits subject-matter jurisdiction to when an enumerated exception is met. Two exceptions to immunity—the commercial activity and expropriation exceptions—provide avenues for suit on the cause of action established by Title III, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Helms-Burton Act"). Title III does not amend the FSIA to add an exception for Title III actions.

At issue is whether Title III—despite not amending the FSIA, which provides avenues for Title III suits—abrogates FSIA immunity and provides an alternative source of subject-matter jurisdiction. If so, the result, *inter alia*, would be to eliminate the FSIA territorial nexus requirements that are central to the FSIA. Actions against agencies and instrumentalities (together, "instrumentalities") for "trafficking" in "confiscated" Cuban property would be allowed where there is no nexus between the trafficking *or* trafficker and the United States.

The issue is resolved by application of this Court's settled jurisprudence on statutory interpretation and abrogation of immunity. Title III does not expressly amend the FSIA or make it inapplicable. Nor does the FSIA negate Title III's cause of action, making it meaningless, a dead-letter, because Title III actions can be brought under

FSIA exceptions. Thus, there is no irreconcilable conflict between the two statutes. This should end the matter.

Petitioner and the Government as *amicus curiae* resort to Title III's purposes, not text, and the extent to which they are achieved. They argue that, if the FSIA's territorial nexus applies, Title III will fall too short of its goals because of the embargo's limitations on commerce with Cuba. They ask the Court to close the claimed gap by finding abrogation. It is exactly the sort of argument this Court has rejected, and would have the Court assume the legislature's role: it would require the Court, outside of the statutory text of the FSIA and Title III, to assess how far (if at all) Title III will fall short if the FSIA applies; and whether to close the gap, taking into account the complex, competing considerations that U.S. law has always balanced in determining immunity.

The argument, untenable for this reason, is also founded on a false premise. The embargo is not fixed. Title III concededly grants the Executive the authority to relax its restrictions in its discretion. The current regulations provide numerous and broad authorizations, as did the regulations at various times before Helms-Burton's passage, and there is now, as there was at various times before Helms-Burton, substantial U.S.-Cuba commerce.

Petitioner and the Government ask the Court to measure the embargo's effects without the embargo having been argued below, no record developed and Respondents denied the opportunity to meet the assertions made now. This is neither feasible nor proper.

Petitioner and the Government focus entirely on abrogation for Cuban instrumentalities. This too is founded on a false premise. There is no textual distinction between Cuban and third-country instrumentalities; abrogation either applies to the instrumentalities of any state or none, and Petitioner and the Government are unwilling to argue it applies to third-country instrumentalities.

To be sure, Helms-Burton is far-ranging legislation with ambitious goals. Spanning four Titles, it seeks political change in Cuba and compensation for U.S. nationals who lost property there. It addresses U.S. relations with third-countries, seeking concerted pressure on Cuba.

However, no less than with other legislation, it cannot be assumed that Title III pursues its goals at all costs. By a bevy of express limiting provisions, Title III makes clear that it does no such thing. And, the very provision that Petitioner and the Government seek to insert in the statute—an amendment to the FSIA for Title III actions—was withdrawn after strong Administration objections.

The FSIA's immunity from suit provisions have been amended fifteen times, its execution immunity provisions twelve. Petitioner and the Government are free to ask Congress for an amendment creating a Title III immunity exception, as was previously put before Congress. They also can ask Congress for what the Government vainly seeks in Title III, a return to the pre-FSIA immunity regime, where the President would have discretion to decide immunity for Title III actions. But, they cannot obtain by judicial interpretation what Congress has not legislated.

Petitioner should be remitted to district court to continue litigation of its unresolved allegation that the FSIA's commercial activity exception is met. Similarly, others may proceed against Cuban and third-country instrumentalities under the FSIA commercial activity and expropriation exceptions.

STATUTORY PROVISIONS INVOLVED

The Appendices to the Petition and Brief in Opposition provide the relevant provisions.

STATEMENT OF THE CASE

The Foreign Sovereign Immunities Act

In *Argentine Republic v. Amerada Hess Shipping Corp.*, the Court held the FSIA was a "comprehensive statutory scheme" addressing immunity, subject-matter and personal jurisdiction, and thus the "sole basis" for jurisdiction over foreign states. 488 U.S. 428, 434-35 & n.3 (1989). The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter," 28 U.S.C. § 1604, and ties subject-matter and personal jurisdiction to meeting an enumerated exception. *Id.*, § 1330.

When there is a territorial nexus with the United States, the FSIA provides two avenues for suit against instrumentalities on the Title III cause of action, trafficking in confiscated Cuban property. 22 U.S.C. § 6082(a)(1).

The commercial activity exception allows for suit when the action is based "upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Title III trafficking is "commercial activity" within the exception's scope. Pet. App. 16a-18a.

The "expropriation" exception allows suit when the action puts in issue "rights in property taken in violation of international law," and "that property or any property exchanged for such property is owned or operated" by the instrumentality, and the instrumentality "is engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). The exception covers not just expropriation but "own[ing] or operat[ing]" expropriated property, *i.e.*, Title III trafficking. Unlike the commercial activity exception, the expropriation exception does not require a nexus between the trafficking and the United States, only a nexus of the trafficker with the United States.

The commercial activity and expropriation exception's territorial nexus requirements are central to the balance struck by Congress in the FSIA between immunity and accountability, limited and expansive jurisdiction. *See CC/Devas (Mauritius) Ltd. v. Antrix Corp. Ltd.*, 605 U.S. 223, 233 (2025).

The Helms-Burton Act

Petitioner's action is for Title III trafficking in Cuban property owned by Esso Standard Oil, S.A. ("Essosa"), Petitioner's Panamanian subsidiary at the time of expropriation in 1960. Petitioner alleges that Cuba

transferred Essosa's property to Cuban entities within the FSIA's scope as "agenc[ies] or instrumentalit[ies]," 28 U.S.C. § 1603(b): an oil refinery and terminals to Respondent Unión Cuba-Petróleo ("CUPET") and service stations to Respondent Corporación Cimex, S.A. (Cuba) ("CIMEX"). Respondent Corporación Cimex, S.A. (Panama) is sued as CIMEX's *alter ego*. Petition 5-6, Pet. App. 53a-54a, 57a-59a.

Title III does not expressly amend the FSIA provisions on immunity from suit or jurisdiction. Rather, it establishes a new cause of action: "any person" that "traffics" in "confiscated" Cuban property is "liable" to "any United States national who owns the claim to" the property. 22 U.S.C. § 6082(a)(1)(A). "Person" includes both private persons and "any agency or instrumentality of a foreign state," *Id.* § 6023(11). Title III leaves open the FSIA's avenues for actions against instrumentalities.

Petitioner and the Government nonetheless maintain that Title III abrogates FSIA immunity, with its territorial nexus requirements, and replaces Section 1330, which limits jurisdiction to FSIA's enumerated exceptions, with 1331 jurisdiction for actions against instrumentalities.

Before, during, and after Title III's passage, Congress abrogated or otherwise legislated on immunity by *express* amendment of the FSIA more than twenty-seven times (and, once, by another express waiver of immunity). Following this unvaried practice, Helms-Burton was introduced with a provision expressly amending FSIA § 1605 to add an exception for Title III actions; after Administration objections, it was withdrawn. In contrast, an express amendment of the FSIA's execution immunity

provisions was enacted. 22 U.S.C. § 6082(e), *codified at* 28 U.S.C. § 1611(c) (cited hereafter as Section 6082(e)).

Petitioner and the Government posit that abrogation can be considered without regard to third-country instrumentalities. The Title III provision establishing liability expressly applies to instrumentalities of "a foreign state," not the Cuban State, 22 U.S.C. §§ 6023(11); 6082(a)(1)(A). The broad definition of "traffics," § 6023(13), encompasses typical third-country trade with and investment in Cuba. Title III's "Findings," § 6081, expressly and prominently target third-country persons for that trade and investment.

Focusing only on actions against Cuban instrumentalities, Petitioner and the Government argue the *embargo*'s effect on the possibilities for satisfying the FSIA's territorial nexus requirements. The embargo is not fixed. Helms-Burton concededly grants the Executive the authority to relax its restrictions in its discretion. Brief for the United States as *Amicus Curiae* ("U.S. Br.") 34. The current embargo regulations provide numerous and broad authorizations, as did the regulations at various times before Helms-Burton's passage. There is now, as there was at times before Helms-Burton, substantial commerce.

22 U.S.C. § 6085(c)(1), relied upon by Petitioner and the Government, authorizes the President to "suspend the right to bring" Title III actions upon reporting to Congress that it "is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba." By its terms, the provision does not delegate to the President the authority to *take away*

immunity from suit with enumerated exceptions that Congress provided in the FSIA, but only to *add* complete protection by preventing suits altogether.

Abrogation is not needed for Title III to do substantial work with respect to instrumentalities. It makes them liable on a new, expansive cause of action unknown to U.S. or customary international law. It allows them to be sued by persons who became U.S. nationals after confiscation, 22 U.S.C. §§ 6023(13), (15); 6082(a)(1)(A). (As nationals of the country that took their property, they have no claims under customary international law.) It makes inapplicable the Act of State Doctrine, § 6082(a)(6), which doomed trafficking claims under any body of law. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251 (11th Cir. 2006).

Title III includes numerous limiting provisions, in addition to not expressly amending FSIA immunity from suit. *See*, *e.g.*, 22 U.S.C. §§ 6023(11) (states, as distinct from instrumentalities, not liable); 6023(13) (trafficker must know property was confiscated); 6082(e) (expansion of FSIA execution immunity); 6084 (disallows actions for trafficking older than two years); 6085(c) (Presidential suspension of effective date and right to bring action).

On the merits there would be substantial questions, *inter alia*, of whether Petitioner "owns the claim to" the Essosa property, Title III, § 6082(a)(1)(A), and whether taking Essosa's property for violation of Cuban law—refusal to refine State oil—is within Title III's scope.

Procedural History and the Decisions Below

Pursuant to Presidential authority conferred by Title III, 22 U.S.C. § 6085(c), the right to bring Title III actions was suspended until President Trump let the suspension lapse on May 2, 2019. Petitioner then brought the instant suit.

On Respondents' Fed. R. Civ. P. 12(b)(1) motion, the district court (Mehta, J.) found the FSIA commercial activity exception satisfied with respect to CIMEX. Pet. App. 75a-88a, 108a. Petitioner alleged that it paid out Western Union family remittances, and sold foodstuffs imported by a Cuban third-party from the U.S., at service stations on Essosa properties. Pet. App. 57a-58a, 84a-86a.

On interlocutory cross-appeals, the court of appeals, in an opinion by Chief Judge Srinivasan, agreed that this use of Essosa property satisfied the commercial activity exception's "direct effect" requirement, provided it caused a difference in total U.S. remittances or exports to Cuba, or, alternatively, CIMEX caused the importer to buy from the U.S. It remanded for fact-finding. Pet. App. 30a-40a. The district court, in a ruling not raised on appeal, preliminarily found that Petitioner had not shown "direct effect" with respect to CUPET but allowed discovery. Pet. App. 88a-94a, 104a.

On the expropriation exception, the courts below held that Petitioner's action did not put in issue "rights in property taken in violation of international law" because Essosa, not Exxon, owned the property and continued in business outside of Cuba. Pet. 18a-24a, 95a-102a. This mooted Petitioner's allegation that CIMEX and CUPET "[are] engaged in a commercial activity in the United States."

As did the district court, the court of appeals held that Title III does not abrogate FSIA immunity from suit. Distinguishing *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024), it explained that the FSIA does not nullify Title III because the commercial activity and expropriation exceptions allow Title III suits to go forward. Pet. App. 10a. It found confirmation in Title III amending the FSIA execution, but not its immunity from suit, provision and other textual markers. Pet. App. 11a-13a.

The court further found that, since a "host of sensitive diplomatic and national-security judgments" "pervade waivers of sovereign immunity," "Congress's balancing of those considerations" in the FSIA must be "respect[ed]" in the absence of Title III text showing Congress unambiguously made a new judgment, and that any ambiguity must be resolved in favor of immunity. Pet. App. 12a, 14a (quotations omitted).

Judge Randolph dissented on abrogation without reaching other issues. Pet. App. 41a-51a. He relied principally on *Kirtz*, Title III's purported purposes, and characterization of Title III as more specific than the FSIA.

SUMMARY OF ARGUMENT

Title III does not expressly amend the FSIA's immunity from suit provisions or otherwise address immunity from suit. The FSIA does not foreclose Title III actions because it provides avenues for suit. This is dispositive.

Petitioner and the Government erroneously rely on *Kirtz* to argue that Title III providing a cause of action against foreign instrumentalities abrogates the FSIA's restrictive immunity regime. *Kirtz*'s logic, however, commands the opposite result. *Kirtz* rests on and is limited to the common-sense notion that Congress does not enact "dead-letters," statutory causes of action dead on arrival. Under *Kirtz*, if retaining immunity would "negate" Congress' authorization to sue government defendants because all such suits would be automatically dismissed, then language applying the cause of action to government entities abrogates immunity. In keeping with the clear statement rule that immunity is not abrogated if any plausible interpretation of the statute would preserve it, this reasoning applies only where the government entity enjoys absolute immunity—not the case here.

Precedent confirms that where a statutory cause of action expressly targets government actors with less-than-absolute immunity, as in 42 U.S.C. § 1983 and the Torture Victim Protection Act, less-than-absolute immunity is retained. Equally, Petitioner and the Government's attempted transformation of *Kirtz* is foreclosed by settled implied repeal jurisprudence, which requires finding an irreconcilable conflict between statutes such that both cannot be given effect—not the case here.

Petitioner and the Government make a gambit to rescue their untenable *Kirtz* argument. They turn away from text to Title III's claimed purpose of obtaining compensation from Cuban instrumentalities for Americans' property, and to the embargo purportedly halting "virtually all commerce" between the U.S. and Cuba. They posit that the embargo so limits the possibilities for meeting the

FSIA's territorial nexus requirements that the FSIA must be swept aside to accomplish Title III's purposes. Finally, they argue that *Kirtz*'s "negation" test does not really require "negation"—but rather is met where too many suits would be barred by immunity even though it is less-than-absolute. From this, Petitioner and the Government insist that immunity is abrogated as to Cuban instrumentalities, urging the Court to defer or deem irrelevant the ramifications for third-country instrumentalities.

Each of the numerous maneuvers necessary to this gambit collapse under scrutiny. Their consequentialist reasoning would dispense with a cornerstone of the law of immunity: that abrogation must be unmistakably clear in the text. Their argument from purpose and the extent it is accomplished fails because purpose cannot change the meaning of operative text; errs by presuming Title III pursues its goals at all costs; and ignores its many limiting provisions confirming it does no such thing. Their attempted singling out of Cuban instrumentalities is foreclosed by the statute's text: making liable any instrumentality of *a* foreign state. Nor is their claim that Title III suits against third-country instrumentalities has "zero practical relevance" sustainable, because the breadth of trafficking liability ensures that any instrumentality engaged in commerce with Cuba could face suit.

Critically, their proposed transformation of the *Kirtz* "negation" test and reliance on the embargo would have the Court assume Congress' role: it requires, first, a sprawling empirical inquiry into the embargo's effect on Title III and then a policy judgment: whether to sidestep

those effects by abrogation, taking into consideration the complex, competing considerations U.S. law has always balanced in determining immunity.

The major premise underlying these maneuvers, about the effect of the embargo, likewise collapses under scrutiny. Petitioner and the Government treat the embargo as fixed, halting "virtually all" U.S.-Cuba commerce. Petitioner's Brief ("Br.") 7. This argument cannot be sustained either as a matter of statutory interpretation or empirically. Helms-Burton codifies Executive authority to authorize otherwise prohibited transactions, thereby expanding possibilities for Title III actions against Cuban instrumentalities under the FSIA. And the Executive has exercised that authority, such that today, as at times prior to Helms-Burton, there exist broad exceptions allowing transactions with Cuba—and hence possibilities for Title III actions satisfying the FSIA—and substantial commerce. In any event, the embargo argument, premised as it is on its effect on commerce, should not be considered: it was not made below and there is no record on which to base decision.

Powerfully underscoring the dispositive absence of clear text abrogating FSIA immunity, the FSIA has been amended numerous times, always expressly, and comparable language was included but then withdrawn from Title III during its consideration. Contrary to the unsupported, implausible suggestion it was thought "unnecessary," the provision was withdrawn after strenuous Administration objections. Moreover, Title III expressly amends the FSIA in other ways, 22 U.S.C. § 6082(e) (execution provisions), and overrides the Act of State Doctrine, § 6082(a)(6), heightening the presumption

that Congress would have used the readily available (and indeed, withdrawn) language to abrogate the FSIA for Title III actions.

That the FSIA is a comprehensive, carefully calibrated statute striking a delicate balance in the sensitive area of foreign relations between immunity and accountability, limited and expansive jurisdiction, requires scrupulous care not to go beyond what Congress has provided by clear text. Abrogating immunity would risk foreign policy consequences not unmistakably deemed acceptable by Congress.

The Government argues that the suspension provision, which authorizes the President to suspend the right to bring Title III actions, 22 U.S.C. § 6085(c)(1), manifests and confirms abrogation because it places immunity in the President's hands, to be managed as a matter of Executive discretion akin to the pre-FSIA regime.

This attempt at reallocating immunity between the branches is flatly contradicted by statutory text: Congress allowed the Executive to suspend the right to bring suits, which in no way supports the Government's view that it also allowed the Executive to override its immunity legislation by choosing *not* to suspend suits. It also contravenes Congress' choice at the heart of the FSIA for immunity to be determined by legal provisions applied by courts—a choice that Congress did not revisit in Title III.

ARGUMENT

I. Congress Did Not Abrogate FSIA Immunity and Limits on Subject-Matter Jurisdiction When Creating the Title III Cause of Action

A. Title III Does Not Abrogate FSIA Immunity Because Its Cause of Action Can Be Brought Under the FSIA's Exceptions to Immunity

To establish Title III abrogates immunity, Petitioner has two pathways, neither of which it can meet. First, Petitioner could identify a textual provision that amends FSIA immunity or otherwise addresses immunity from suit; however, there is neither. Second, Petitioner could show there is *no* "plausible interpretation of the statute that preserves sovereign immunity," *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 599 U.S. 382, 388 (2023) (quotations omitted), which, under settled precedent, requires showing Title III's cause of action is a "dead-letter," a statutory cause of action dead on arrival. However, this too is impossible because the FSIA facially provides pathways for Title III suits. The Court need inquire no further.

In arguing otherwise, Petitioner relies heavily on *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024), urging this Court to fundamentally transform its modest holding. *Kirtz* rests on and is limited to the common-sense notion that Congress does not enact dead-letter provisions. This logic is inapplicable here.

In *Kirtz*, "recognizing immunity" would "negate[]" Congress's authorization because "[t]he very suits

allowed against governments would" be "*automatically* [] dismissed," *Fin. Oversight and Mgmt Bd. for P.R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 348 (2023) ("*FOMB*") (emphasis added), *cited in Kirtz*, 601 U.S. at 50. The statutes in the *Kirtz* line, Br. 22-23, applied to government entities whose immunity is absolute absent consent or Congressional abrogation. Thus, the Court read language making the cause of action applicable to government entities to abrogate their absolute immunity from suit.

Kirtz's "negation" rule draws a simple, clear line that commands the opposite result here: where retaining immunity would render meaningless application of the cause of action to government entities, text providing for suit against such entities is not "'susceptible of multiple plausible interpretations.'" *FOMB*, 598 U.S. at 346, *quoting Sossamon v. Texas*, 563 U.S. 277, 287 (2011). In *Kirtz*, a Fair Credit Reporting Act ("FCRA") claim could never proceed against the government unless the Court read the FCRA's text defining suable "persons" as a waiver of immunity.

In contradistinction, Title III and the FSIA may be read together because the FSIA facially provides two avenues for Title III actions, the commercial activity and expropriation exceptions. Retaining FSIA immunity would thus not render meaningless application of the cause of action to instrumentalities because they enjoy only restrictive, not absolute, immunity. There is no precedent for applying *Kirtz*'s "negation" standard to find abrogation outside its context of an otherwise *absolutely* immune defendant.

Petitioner and the Government harp on the relevant Title III text being nearly "identical" to the FCRA's, Br. 15, 50; U.S. Br. 19, but this merely shows they are the ones advocating an impermissible "magic words" requirement. Br. 18. They ignore the "fundamental" rule that "words of a statute must be read in their context." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); Antonin Scalia, A Matter of Interpretation 37 (1997) ("In textual interpretation, context is everything[.]"). The "presumption of consistent usage readily yields to context," *Util. Air*, 573 U.S. at 320 (quotations omitted), and "the meaning of one statute may be affected by other Acts[.]" *Brown & Williamson*, 529 U.S. at 133. This applies even where language in one statute "resembl[es]" and partially replicates another, *McLaughlin Chiropractic Assocs., Inc. v. McKesson Corp.*, 606 U.S. 146, 164 (2025).

The difference in context—here, in the background immunity, between absolute immunity and restrictive immunity with statutory exceptions—is dispositive.[1]

Kirtz merely repeats the longstanding rule that a statute abrogates immunity only when the "language of the statute" is "unmistakably clear" and "unequivocal." *Kirtz*, 601 U.S. at 49 (quotations omitted). Under this rule, "[i]f there is a plausible interpretation of the statute that preserves sovereign immunity, Congress has not unambiguously expressed the requisite intent." *Lac du*

1. Judge Randolph's finding it "shock[ing]" if "Cuban agencies enjoy more protection from lawsuits" than U.S. agencies, Pet. App. 48a, overlooks that the FSIA reflects Congress' judgment in the area of foreign relations, a different judgment than it made in the distinct domestic context of the FCRA.

Flambeau, 599 U.S. at 388 (quotations omitted). Petitioner cannot meet this standard: no statutory language forecloses a reading that leaves FSIA immunity intact because the FSIA's exceptions allow Title III actions.

B. Petitioner and the Government's Position Contradicts the Court's Jurisprudence on the Compatibility of Statutory Causes of Action with Less-Than-Absolute Immunity Regimes

This Court and lower courts have uniformly rejected arguments that a statutory cause of action enacted against the backdrop of a less-than-absolute immunity regime abrogates immunity. Petitioner and the Government ignore their position's contradiction with this well-established precedent and the sea change in the immunities law it would portend.

The Court has rejected arguments that 42 U.S.C. § 1983 abrogated common law immunities when it created a cause of action expressly against government actors for rights violations. It held Section 1983 must "be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976); *see also Tenney v. Brandhove*, 341 U.S. 367, 376 (1951) (rejecting abrogation of immunity "by covert inclusion in the general language" creating cause of action). In reasoning equally relevant here, the Court emphasized context: "§ 1983 cannot be understood in a historical vacuum;" "members of the 42d Congress were familiar with ... [immunity] defenses[.]" *Rehberg v. Paulk*, 566 U.S. 356, 362 (2012) (quotation omitted). Again equally relevant here, the absence of "specific provisions" in Section 1983 addressing immunity

was dispositive. *Id.* Thus, Section 1983 defendants may assert preexisting immunities.

This precedent forecloses Petitioner's formulaic argument that a statutory cause of action plus express language making it applicable to instrumentalities *always* equals wholesale abrogation of immunity. Br. 17. Petitioner inveighs that Congress contemplated *some* suits against instrumentalities, Br. 2, 10, 27, 45, but this undisputed proposition in no way supports abrogating FSIA immunity because the FSIA allows some suits to proceed. Congress provided a cause of action, not a guarantee of success. Indeed, the same was true of Section 1983, where immunity was retained despite expressly naming state actors and despite the fact that some contemplated suits were barred by immunity. *Procunier v. Navarette*, 434 U.S. 555, 560-61 (1978).

Similarly, despite the Torture Victim Protection Act ("TVPA") expressly creating a cause of action against foreign government officials, lower courts concluded, in reasoning likewise applicable here, that the TVPA did not abrogate common law immunities.[2] Analogously, prior to *Samantar v. Yousuf*, 560 U.S. 305 (2010) (holding FSIA inapplicable to individuals), they ruled the TVPA did not abrogate FSIA immunity. *Matar*, 563 F.3d at 14; *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008).

Lewis v. Mutond, 918 F.3d 142 (D.C. Cir. 2019) held the TVPA action came within an immunity exception; in

2. *See*, *e.g.*, *Does 1-5 v. Obiano*, 138 F.4th 955, 961 (5th Cir. 2025); *Dogan v. Barak*, 932 F.3d 888, 896 (9th Cir. 2019); *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 (D.C. Cir. 2013); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009).

supporting *certiorari*, the Government, notably in light of its *amicus* here, disagreed with Judge Randolph's concurrence that the TVPA displaced conduct-based immunity: "[c]ontrary to Judge Randolph's opinion, the fact that the TVPA creates a cause of action does not pose a 'clear conflict' with the doctrine of conduct-based immunity for foreign officials. That statutory causes of action may coexist with common-law immunities is well-established[.]" Brief for the United States as *Amicus Curiae*, No. 19-185, at 19 (2020) (citation omitted).

C. Because Title III Can Co-Exist with the FSIA, Both Must Be Given Effect

Abrogation is also foreclosed under this Court's precedent that a later statute does not impliedly repeal a prior statute unless the two are in "irreconcilable conflict." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009). The operative text makes clear both Title III and the FSIA apply because they are plainly not in irreconcilable conflict.

That "repeals by implication are disfavored," *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133 (1974), is a "cardinal rule," *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (quotations omitted). Because courts have a "duty" to effectuate both statutes whenever they are "capable of co-existence," courts find implied repeal only if no such application is possible. *Morton*, 417 U.S. at 551. The rule applies equally "whether th[e] alteration is characterized as an amendment or a partial repeal." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 664 n.8 (2007).

Petitioner thus bears a "heavy burden" to show the "statutes cannot be harmonized," *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) (cleaned up), which it cannot meet. The requisite "irreconcilable conflict" exists only where the later statute "expressly contradicts the original act" in substance or where "such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all." *Defs. of Wildlife*, 551 U.S. at 662-63 (cleaned up). Nothing in Title III "expressly contradicts" FSIA immunity; repeal of the FSIA is not "absolutely necessary" for Title III's application to instrumentalities to have "any meaning at all."

Petitioner and the Government argue an earlier Congress cannot bind a later Congress, Br. 38-39; U.S. Br. 17-18, but this undisputed proposition is irrelevant: on the face of the statutes, Title III's cause of action is not "irreconcilable" with the FSIA, and both can be given effect.

Petitioner's argument that the "specific"—Title III—overrides the "general" FSIA, Br. 39-41, begs the question by *assuming* Title III addresses immunity. Under its reasoning, any post-FSIA statute expressly making liable foreign states "abrogates immunity for a specific set of claims," *id.* 39, but this ignores the foregoing settled authority and the fact that courts uniformly find post-FSIA statutes providing for specific causes of action expressly applicable to foreign states do not supersede the FSIA. *See Schansman v. Sberbank of Russia PJSC*, 128 F.4th 70, 89 (2d Cir. 2025) (1992 Anti-Terrorism Act); *Broidy Capital Mgmt., LLC v. State of Qatar*, 982 F.3d 582, 588 (9th Cir. 2020) (Computer Fraud and Abuse Act explicitly covering foreign state entities, 18 U.S.C.

§ 1030(e)); *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 929 (2d Cir. 1998) (applying FSIA to Sherman Act, amended after the FSIA to specify that "persons" includes foreign state instrumentalities, 15 U.S.C. § 15(b)). These decisions follow the Court's forceful rejection in the Section 1983 context that a plaintiff "need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity," *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 112 (1984)—precisely Petitioner's position.

D. Statutory History and Text Confirm That Title III Does Not Abrogate FSIA Immunity

The statutory history by 1996 and to date shows an unbroken Congressional practice of abrogating or altering immunity by *explicit* FSIA amendment (with Congress also expressly abrogating immunity in a bankruptcy provision made applicable to foreign governments). In total, Congress has amended Section 1605 (exceptions to immunity from suit) fifteen times and Sections 1610-1611 (exceptions to execution immunity) twelve times. *See* notes to 28 U.S.C.A.§§ 1602 *et seq.* Pre-Title III, Congress adopted legislation altering the immunity regime three times—twice by expressly amending FSIA § 1605, once expressly in the bankruptcy code.[3] In the *same* session that adopted Title III, Congress enacted the state sponsor

3. *See* Pub. L. No. 100-640, § 1, 102 Stat. 3333 (1988) (admiralty exception); Pub. L. No. 100-669, § 2, 102 Stat. 3969 (1988) (arbitration exception), codified at FSIA §§ 1605(b), 1605(a)(6); Pub. L. No. 95-598, § 101, 92 Stat. 24549, 2555-56 (1978) (amended Pub. L. No. 103-394, title I, § 113, 108 Stat. 4106, 4117 (1994)) (Bankruptcy Code).

of terrorism exception by express FSIA amendment. Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (1996), *codified at* FSIA § 1605(a)(7).

Such clear statutory history "confirms" that Title III does not "reach" immunity and "shows that when Congress intended to cover [immunity], it knew how to do so," *Thompson v. United States*, 604 U.S. 408, 415-16 (2025) (quotations omitted). *See also Azar v. Allina Health Servs.*, 587 U.S. 566, 576-77 (2019) (finding Congress' omission of "express[]" text in one statute when it "recently" included it in another was "intentional[] and purposeful[]") (quotations omitted). Where Congress "did not adopt [a] ready alternative"—one used every other time it amended the FSIA—the "natural implication is that they did not intend" the alternative. *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017) (quotations omitted).

The Court applied this logic in *Rubin v. Islamic Republic of Iran*, reasoning that when Congress wanted to enact a statute "rescinding immunity ... it knew how to say so." 583 U.S. 202, 215-16 (2018). Here as well, "[i]f Congress had contemplated anything similar ... there is no apparent reason why it would not have included in that provision terms similar to those [in the statute already]." *Republic of Sudan v. Harrison*, 587 U.S. 1, 13 (2019).

Indeed, the bill introduced by Rep. Burton, H.R. 927, 104th Cong. § 302(c) (Feb. 14, 1995), and reported out by subcommittee, used the very language invariably employed by Congress: it expressly amended FSIA

Section 1605 to add a Title III exception.[4] The provision was withdrawn by Rep. Burton in the amended bill he put before the full House committee, which, after approval by the committee, was adopted by the House.[5] The Senate bill had the same provision amending the FSIA, S.381, 104th Cong. § 302(c) (Feb. 9, 1995); when the bill came to the floor, Senators Dole (majority leader) and Helms (sponsor) offered a substitute bill which omitted the FSIA amendment, 141 Cong. Rec. S15055, 15062 (Oct. 11, 1995). The Dole-Helms bill failed cloture until Title III was omitted altogether. *Id.* at S15277, S15325 (Oct. 18 & 19, 1995). It then went to conference without Title III. H.R. Rep. 104-468, at 57 (1996) (Conf. Rep.).

The suggestion that the FSIA amendment was withdrawn because Congress thought liability made it "unnecessary," Br. 36; U.S. Br. 32, is unsupported and implausible. The Administration strenuously objected to the provision as "not in line with currently accepted international practice" and possibly "prompt[ing] foreign states to expose the United States to a range of judicially imposed liabilities ... and to do so based upon weak jurisdictional connections to the forum."[6] Legislators'

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4. *Markup Before the Subcomm. on the Western Hemisphere of the H. Comm. on Int'l Relations on H.R. 927*, 104th Cong. 8-9, 11, 56-59 (March 22, 1995), *reproduced* Opposition to Petition 16a.

5. *Markup Before the H. Comm. on Int'l Relations on H.R. 927*, 104th Cong. 115-17, 172, 232-33 (July 13, 1995); 141 Cong. Rec. H9398 (Sept. 21, 1995).

6. Letter, Dep't of Justice to Chair, House Judiciary Committee (June 27, 1995), copying Chair, House Int'l Relations Committee (on file with Jesse Helms Center), *available at* https://www.american.edu/centers/latin-american-latino-studies/upload/markus-letter-june-27-1995-2.pdf, *reproduced at* App. A. (cont.)

"silence" after removal only shows, *contra* Br. 36, that the immunity issue was moot because the FSIA was left unamended.

Withdrawal of the language always used to abrogate immunity is necessarily meaningful. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded[.]" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quotations omitted).

This Court has relied on Congress' failure to adopt statutory provisions to confirm the meaning of statutory text, including to find Congress preserved longstanding immunity. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 801-02 (2014) ("Congress considered [] bills to ... expressly ... abrogate[] tribal immunity for most torts and breaches of contract. But ... chose to enact a far more modest alternative[.]"); *Jones v. Harris Assocs. L.P.*, 559 U.S. 335, 340-41 (2010); *see also Harrison*, 587 U.S. at 13 n.2 (drawing inference from "proposed version of the FSIA" ultimately not adopted).

See also for Administration objections, Undersecretary of State, S. Hrg. 104-212, *Cuban Liberty and Democratic Solidarity Act: Hearings Before Subcomm. on W. Hemisphere and Peace Corps Affs. S. Comm. on Foreign Relations* II-IV, 157, 163 (May 22, 1995).

Contrary to the suggestion that the State Department's "Legal Considerations," 141 Cong. Rec. S15106-07 (Oct. 12, 1995), shows that the provision establishing liability was understood to abrogate immunity, it is undated, and could only have referred to the bill as it was pending with the express FSIA amendment: State's lengthy, formal analysis was inserted in the Record by Senator Pell only a day after the Dole-Helms substitute was introduced.

Congress not using the language always used for amending the FSIA, and withdrawal of the FSIA amendment, take on added force because this Court had already held the FSIA to be "comprehensive," *Amerada Hess*, 488 U.S. at 438; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); the "sole basis" of jurisdiction against foreign states. This placed Congress "on prospective notice of the language necessary and sufficient to confer jurisdiction," *Am. Nat'l Red Cross v. S.G.*, 505 U.S. 247, 252 (1992).

In addition to what was withdrawn, what was included provides strong support for rejecting abrogation. Title III *explicitly* amends the FSIA's execution immunity provisions, § 6082(e), while not amending its immunity from suit provisions. "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally." *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009); *see also City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 337-38 (1994) ("Our interpretation is confirmed by comparing [one provision] with another statutory exemption in [the statute]"); *Markham v. Cabell*, 326 U.S. 404, 410-11 (1945).

Title III's expressly overriding the Act of State Doctrine, § 6082(a)(6), is to the same effect. If liability worked to override immunity, *a fortiori* it would do the same with respect to Act of State (which, unlike immunity, pertains to liability); the express override of Act of State manifests that liability does neither. *Cf. POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 114 (2014) ("By taking care" expressly to mandate pre-emption of some state laws, Congress "indicated it did not intend the FDCA to preclude requirements arising from other sources");

Wyeth v. Levine, 555 U.S. 555, 574-75 (2009) (express preemption for medical devices provides "powerful evidence" that Congress did not *sub silentio* preempt prescription drugs regulations).

II. Petitioner and the Government Cannot Overcome the Absence of Textual Abrogation by Asking the Court to Measure and Close a Purported Gap Between Title III's Reach Under the FSIA and Its Goals Due to the Embargo

A. Petitioner and the Government's Claim That Title III Will Fall Short of Congressional Purposes Cannot Substitute for the Missing Statutory Text

Recognizing that the *Kirtz* analogy is untenable, and demonstrating irreconcilability between Title III and the FSIA's texts impossible, Petitioner and the Government turn to purpose-driven arguments. They argue that, under the FSIA, not enough suits can proceed under the FSIA to adequately accomplish Title III's purported goals. This is, they assert, because the embargo so limits commerce with Cuba that too few Title III actions could satisfy the FSIA's territorial nexus requirements.

This consequentialist reasoning dispenses with the requirement that abrogation be unmistakably clear in the text; requires the type of empirical inquiry appropriate and feasible only for Congress; and likewise requires a legislative, not judicial, judgment on how many suits must proceed to accomplish Title III's purported goals. It also utterly ignores that, before finding abrogation on the basis urged upon it, the Court would have to

balance the complex, competing considerations that U.S. law has always taken into account in deciding on immunity—a task not within the judiciary's province but constitutionally committed to Congress.

At the threshold, the gambit fails because Title III's purported purposes cannot be elevated over its operative text. Text must control because "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means." *Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995); *see also Luna Perez v. Sturgis Pub. Sch.*, 598 U.S. 142, 150 (2023). And, "tweak[ing] the text to improve its fit with statutory purpose risks undoing the very compromises that made the passage of legislation possible," AMY CONEY BARRETT, LISTENING TO THE LAW 217 (2025). A "clause announc[ing] an objective that Congress hoped" for "does not change the plain meaning of the operative clause." *Kingdomware Techs. Inc., v. United States*, 579 U.S. 162, 173 (2016); *see also Garland v. Cargill*, 602 U.S. 406, 427 (2024).

No statute can be assumed to pursue its goals at all costs, *Newport News*, 514 U.S. at 136 and Title III's text plainly evidences it did no such thing. Title III excludes from its scope states (including Cuba) as distinct from instrumentalities, 22 U.S.C. § 6023(11); authorizes suspension of Title III's effective date and right of action, § 6085(c); requires proof that the trafficker knew property was confiscated, § 6023(13); disallows actions for trafficking older than two years, § 6084; and both maintains and expands FSIA execution immunity, § 6082(e).

Strikingly, Title III leaves untouched the FSIA provisions that limit *execution* to the circumstances allowing *suit* under Section 1605. FSIA 28 U.S.C. § 1609 provides execution immunity. Section 1610(a)(2) allows execution upon property that "is or was used for the commercial activity upon which the claim is based;" this corresponds to the commercial activity exception (action is "based upon a commercial activity in the United States; or upon an act performed in the United States in connection with a commercial activity" elsewhere; or causes a direct effect in the United States). Section 1610(b)(2) allows execution on judgments under the commercial activity or expropriation exceptions (or other Section 1605 exceptions).

That a Title III plaintiff cannot obtain execution without satisfying the FSIA exceptions to immunity from suit contradicts Petitioner's assertion that Title III has pursued its stated goal of securing compensation through "fully effective remedies" without limitations, Br. 18, 30-31. This incongruous disconnect cannot easily be attributed to Congress. *See Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 277 (2023); *Gomez v. United States*, 490 U.S. 858, 874 (1989) (rejecting "incongruous" interpretation).

B. Abrogation Cannot Be Found as to Cuban Instrumentalities Without Abrogating Immunity for Third-Country Instrumentalities, Which Petitioner and the Government Are Unwilling to Argue

Petitioner and the Government are unwilling to argue that Congress *sub silentio* abrogated the immunity of

third-country instrumentalities. *See* Br. 28 n.*, U.S. Br. 18 n.5. They therefore single out for consideration Cuban, as distinct from third-country, instrumentalities. But, as there is no textual distinction between Cuban and third-country instrumentalities in Title III's operative clause (persons subject to liability include "any agency or instrumentality of a foreign state," 22 U.S.C. §§ 6023(11), 6082(a)(1)), abrogation either applies to the instrumentalities of any country or none. Moreover, the attempted distinction contradicts their *Kirtz* argument that when Congress provides a cause of action against government entities, it necessarily removes their immunity.

Not only does Title III's liability provision preclude drawing a distinction between Cuban and third-country instrumentalities, but Title III broadly defines "[t]rafficking" to encompass activities that easily reach third-country instrumentalities, including "us[ing]" confiscated property, "engag[ing] in a commercial activity using or otherwise benefiting from confiscated property;" or "caus[ing], direct[ing], participat[ing] in, or profit[ing] from" "trafficking ... by another person, or otherwise engag[ing] in trafficking ... through another person." 22 U.S.C. § 6023(13). Indeed, since Cuban instrumentalities invariably traffic by "acquir[ing]," "hold[ing] an interest in" or "possess[ing]" confiscated property, also covered by "trafficking," the expansive definition primarily functions to reach third-country parties.

Rulings on Title III's scope underline that Title III reaches the type of commercial engagement with Cuba typically carried on by third-country parties: *inter alia*, off-loading cargo at confiscated port facilities, *see N. Am.*

Sugar Indus., Inc. v. Xinjiang Goldwin Sci. & Tech. Co., Ltd., 124 F.4th 1322, 1334-36 (11th Cir. 2025); shipper's directing or benefiting from third-party use of confiscated land to store or transport cargo, *see Fernandez v. Seaboard Marine*, 135 F.4th 939 (11th Cir. 2025); and landing aircraft at confiscated airports, *see Regueiro v. American Airlines, Inc.*, 147 F.4th 1281 (11th Cir. 2025).

The Court recently rejected the cherry-picking approach urged here. In *Lac du Flambeau*, faced with a provision of the bankruptcy code abrogating immunity of "a governmental unit" that cross-referenced an "all-encompassing" statutory definition of governmental unit, the Court concluded, "Congress did not cherry-pick *certain* governments ... and only abrogate immunity with respect to those," but instead "categorically abrogated the sovereign immunity of *any* governmental unit[.]" 599 U.S. at 390 (emphasis in original).

Recourse to Title III's Findings and ancillary provisions cannot move the needle. "[A] prefatory clause does not limit or expand the scope of [an] operative clause," *D.C. v. Heller*, 554 U.S. 570, 578 (2008), and this Court has rejected attempts to limit the word "any" by implication from surrounding provisions. *Republic of Iraq v. Beaty*, 556 U.S. 848, 856 (2009).

In any event, they do not support drawing distinctions between Cuban and third-country instrumentalities; just the opposite. Title III's "Findings" *expressly and prominently* take aim at third-country traffickers: "[T]he Cuban Government is offering foreign investors the opportunity to purchase an equity interest in, manage, or enter into joint ventures using [confiscated] property ... *This* 'trafficking' in

confiscated property provides badly needed financial benefit, including hard currency, oil, and productive investment and expertise," "undermin[ing] the foreign policy of the United States." 22 U.S.C. §§ 6081(5)-(6) (emphasis supplied).

Without the Government joining it, Petitioner, like the dissent below, Pet. App. 47a, n.3, deems Title III's establishing third-country instrumentality liability without practical importance. However, what Congress expressly provided cannot be dismissed as meaningless. Further, the breadth of commercial activities covered by Title III, combined with the extent of the Cuban expropriations, allows for discounting third-country instrumentalities even as a practical matter only on the assumption that they do not engage with Cuba. But even a cursory review of publicly available material (or just the Cuban telephone book), shows that the instrumentalities of numerous countries—including Argentina, Brazil, China, Italy, Qatar, Poland, Russia and Singapore—export goods to Cuba, use Cuba airports for passengers and cargo, provide financing for projects, and otherwise are commercially engaged with Cuba and therefore exposed to Title III lawsuits.[7] It would be surprising if it were otherwise, as state-owned enterprises account for a substantial part of transnational commercial activity.[8]

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7. Just for airlines, there is Argentina (Aerolineas); China (Air China); Poland (LOT Polish Airlines); Russia (Aeroflot); and Qatar (Qatar Airways). *See*, *e.g.*, AirNavRadar, https://www.airnavradar.com.

8. *See* Przemyslaw Kowalski, *On Traits of Legitimate Internationally Present State-Owned Enterprises*, in Luc Bernier et al., The Routledge Handbook of State-Owned Enterprises 145-48 (Routledge 2020).

Petitioner and the Government claim that Title III language assumes "that plaintiffs will bring—and will be able to *win*—trafficking suits against Cuban instrumentalities." Br. 26 (emphasis added); *see also* Br. 27; U.S. Br 19. But so too, of course, third-country instrumentalities, and this may well happen in both cases, when the FSIA allows for suit.

In addition to undermining the claim of abrogation as to Cuban instrumentalities, third-country instrumentalities must be considered because, since the text makes no distinction, the decision here "will necessarily govern suits" against them in the future. *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 349 (2016).

C. The Embargo Does Not Establish Abrogation As to Cuban Instrumentalities

Petitioner and the Government argue that the embargo so reduces the possibilities for satisfying FSIA nexus requirements that they must be found abrogated as to Cuban instrumentalities to adequately achieve Title III's purposes.

The Court should not entertain the embargo argument at all, as it was not made below. There is no record, and Respondents were denied the opportunity to respond to the assertions made now. Playing catch-up before this Court on such a sprawling inquiry is both unfair and impossible. For the Court not considering arguments in such circumstances, *see*, *e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277, n.23 (1989); *Stanley v. City of Sanford, Fla.*, 606 U.S. 46, 64-65 (2025).

In any event, the argument fails because it is not based on text but on assumed legislative purposes, and because it replaces a clear legal test, capable of and appropriate for judicial application—one found met *only* where immunity would result in "automatic[]" "dismiss[al]," *FOMB*, 598 U.S. at 348—with standardless speculation as to how few suits would survive, and how few is too few. It throws to the wind the command that abrogation of sovereign immunity "must be unmistakably clear in the language of the statute," *Kirtz*, 601 U.S. at 49 (quotations omitted). It would impermissibly dilute and blur an "inquiry" that "[n]eccsarily ... trains on statutory text." *Id.* It requires that courts undertake assessments ill-suited to the judiciary and to make policy judgments exclusively within Congress's province.

The differing formulations employed for the argument stack imprecision atop speculation: that "many," "most," or a "much larger set of claims than were at issue in *Kirtz*" will be barred, Br. 18, 25, 26, 31, 33; that "rare," "few," "unlikely," "exceedingly unlikely," or "vanishingly rare" claims will survive. U.S. Br. 3-4, 15-16, 21-24, 33.[9]

The proposed inquiry and policy judgments are for Congress, not the courts. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 382 (2023) ("Judges cannot displace the cost-benefit analyses embodied in democratically adopted legislation;" nor "undertake"

9. The Government badly misstates *Kirtz*'s rejection of an argument that "allowing federal agencies a sovereign-immunity defense would not foreclose *every* suit," U.S. Br. 33 (emphasis in original; quotations omitted). The rejected argument was one not made here—that suits against "private [parties]" could proceed, and thus the statutory text retained meaning. *Kirtz*, 601 U.S. at 54.

balancing of competing policy concerns); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195-96 (1997) (emphasizing Congress, not the judiciary, has institutional competence for empirical assessment).

Helms-Burton, Section 6032(h) independently defeats the embargo argument. While prohibiting the President from ending the embargo until specified political changes in Cuba, Helms-Burton's "codification" of the embargo *continues* the President's authority found in the embargo regulations to authorize otherwise prohibited transactions, as the Government concedes. U.S. Br. 34.[10] There can be no abrogation on the basis that the embargo too severely stifles commerce when Congress built into the statute the Executive's authority to relax the embargo in its discretion.

This Court's implied repeal jurisprudence makes clear that this ongoing authority defeats abrogation. In assessing whether irreconcilable conflict exists between two statutory regimes involving regulatory authority, the Court looks not to a snapshot of regulations in effect at a specific time but rather to the regulatory structure—accounting for possible future developments. *See Gordon v. N.Y. Stock Exch.*, 422 U.S. 659, 689-91 (1975); *see also Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 273 (2007) (reaffirming *Gordon*'s reliance on "potential future" regulatory actions).

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10. *See also*, *e.g.*, National Security Council, Statement (Jan. 5, 1999), https://1997-2001.state.gov/policy_remarks/1999/990105_dobbins_etal_cuba.html; Dep't of Treasury, Press Release (March 15, 2016), https://home.treasury.gov/news/press-releases/jl0379; OFAC, Frequently Asked Question No. 1056 (June 8, 2022), https://ofac.treasury.gov/faqs/1056.

Helms-Burton's authorizing the Executive to change the embargo fatally undermines the attempt to limit an evaluation of the embargo's impact to 1996, a moment when, assertedly, opportunities for commerce were at a low ebb. U.S. Br. 22-23; Br. 7, 25. Title III established the President could exercise licensing authority to expand commerce.[11]

Indeed, the authority Helms-Burton preserved had previously been used to "alternately loosen[] and tighten[]" the embargo. *Regan v. Wald*, 468 U.S. 222, 243 (1984). President Carter permitted unrestricted travel, *id.*, at 227; in 1994, specific licenses were issued allowing U.S. telecommunications companies to pay Cuba for direct telephone service, *Alejandre v. Telefonica Larga Distancia, de P.R., Inc.*, 183 F.3d 1277, 1280-81 (11th Cir. 1999); in October 1995, while Title III was debated, Western Union was licensed to send remittances, OFAC License No. C-15160 (Oct. 16, 1995), and a policy of granting specific licenses for expanded travel was implemented. 60 Fed. Reg. 54194-97 (Oct. 20, 1995).

Petitioner and the Government's embargo argument also fails because their assertions regarding the embargo's sweep are grossly overdrawn. Even in the absence of a record, the following shows the possibilities for, and actual

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11. That there was no meaningful commerce at the time of Helms-Burton's passage is far from established. *See Enforcement of Penalties Against Violations of the U.S. Embargo on Cuba: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Int'l Relations*, 104th Cong. 4 (March 5, 1996) (Rep. Menendez, co-sponsor of Helms-Burton: "each year" U.S. firms "do $300 million in business;" over $1 billion *per year* estimated to flow to Cuba from both authorized and unauthorized transactions.)

conduct of, innumerable transactions touching countless Cuban properties and belies the false claim that the 1962 embargo which "halted virtually all commerce between the two countries ... remains in effect today, with several minor modifications." Br. 7.

The current embargo regulations authorize more than 100 different categories of transactions, over seventy (70) by General License in the Cuban Assets Control Regulations, 31 C.F.R. Part 515, subpart E, or License Exceptions in the Export Administration Regulations, 15 C.F.R. §§ 740.9-740.21, 746.2, and over thirty (30) by specific license on application. They include, without limitation: remittances; export of agricultural commodities (a broad, varied category including, *e.g.*, bulk grains, retail foodstuffs, beverages and products made of wood); export of drugs and medical devices; eleven categories of U.S. entities establishing a physical presence and joint ventures in Cuba (*e.g.*, exporters, shippers, environmental organizations, educational institutions); participation in pharmaceutical development in Cuba and sale in the U.S.; exports related to Cuban infrastructure in transportation and power generation/distribution; exports through Cuban state instrumentalities for private sector use (including vehicles and machinery); and imports through state instrumentalities of a wide range of goods produced by the private sector. *See* 31 C.F.R. §§ 515.533-591; 15 C.F.R. Part 740; § 746.2.

It is illustrative that, in each of the thirty-five Title III lawsuits brought against U.S. or third-country defendants, plaintiffs could easily have invoked an FSIA exception to sue the Cuban counterparty in authorized

Cuba-U.S. transactions.[12] So too could innumerable other U.S. nationals bring suit against the Cuban party in comparable trafficking transactions

Since 1996, there have been at least $8 billion in authorized exports, *annual* authorized remittances in excess of $500 million; and 10 million trips from the U.S.[13] Petitioner's position is the opposite of what it was below, where it stated there have been billions in U.S. remittances distributed at hundreds of locations; that the U.S. "is the largest provider of food and agricultural products to Cuba;" and that "100 American companies [] since 2001, have exported products to Cuba on a commercial basis." ECF No. 47-2, at 16-43, No. 19-cv-1277 (D.D.C. Sept. 29, 2020). King Ranch states there are "billions of dollars in remittances and goods flowing to and from [the U.S.]." *Amicus* Brief 23-24.

Just as they ignore Presidential authority to relax the embargo and grossly overstate the embargo's sweep, Petitioner and the Government grossly minimize the breadth of the FSIA's exceptions to suit. The commercial activity's nexus requirement, "direct effect," is satisfied, *inter alia*, whenever the defendant alters the flow of money, goods or persons within, out of or into the United

12. *See*, for description of the actions, U.S. Chamber of Commerce *Amicus*, at 17-20; *supra*, pp. 30-31.

13. *See*, *e.g.*, U.S. International Trade Commission, Dataweb, https://dataweb.usitc.gov/trade/search/Export/HTS; Manuel Orozco, Challenges and opportunities of marketing remittances to Cuba (2002) and Remittances to and the Marketplace in 2024 (2024); U.S. Department of Transportation, Analysis of Air Carriers: T-100 International Market (All Carriers), https://transtats.bts.gov.

States. Pet. App. 31a, 37a. The effect need only be not "purely trivial." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992). It can be through intervening and independent decisions of third-parties that are intended, encouraged, induced, enabled or simply foreseeable. Pet. App. 32a-34a, 37a-40a. It need not involve the plaintiff. Pet. App. 33a-34a.

The expropriation exception's nexus, that the instrumentality "is engaged in a commercial activity in the United States," can be unrelated to the expropriated property or Cuba. There is no "substantiality" requirement. The defendant need not be present or take action in the United States. Buying U.S. goods; shipping goods here and contracting for services with U.S.-based persons, *inter alia*, suffice. *See*, *e.g.*, *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 947 (D.C. Cir. 2008); *Altmann v. Republic of Austria*, 317 F.3d 954, 969 (9th Cir. 2002), *aff'd*, 541 U.S. 677 (2004).

III. That the FSIA Is Comprehensive and Carefully Calibrates Immunity and Jurisdiction in the Sensitive Area of Foreign Relations Reinforces the Imperative for Clear Text Absent Here

That the FSIA is a "comprehensive," *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014), "carefully calibrated scheme," *Turkiye*, 598 U.S. at 273, for both immunity and jurisdiction reinforces the imperative for clear text absent here.

A. Immunity

In "th[e] careful balance" struck by Congress, *Rubin*, 583 U.S. at 208-09, in the "sensitive" area of "foreign relations" *Verlinden*, 461 U.S. at 493, the territorial nexus required by the commercial activity and expropriation exceptions is central. *See CC/Devas*, 605 U.S. at 233; *Republic of Hungary v. Simon*, 604 U.S. 115, 133 (2025); *Verlinden*, 461 U.S. at 490 & n.15.

Ignoring the FSIA's text and this Court's repeated recognition of their importance, Petitioner asks the Court to do away with the FSIA territorial nexus requirements as "often turning on arcane and tangential questions of fact"—the "happenstance of a Cuban entity's necessarily tenuous commercial connections with the United States—which have little to do with the plainly illegal expropriation itself." Br. 31. But, of course, that could be said of almost all claims against foreign states and instrumentalities; the FSIA requires plaintiffs to not only assert wrongful conduct, but—with only a few exceptions where Congress *unmistakably* provided otherwise, *see* 28 U.S.C. § 1605A; 18 U.S.C. § 2334(e)(1)—a territorial nexus.

The Government recently emphasized that the FSIA's "non-Constitutional" territorial nexus requirements are "critically important." *CC/Devas*, Brief as *Amicus Curiae*, at 13, 32, No. 23-1201 (2024). The "substantial contact" "requir[ed]" to meet Section 1605's exceptions, *Verlinden*, 461 U.S. at 490, is the statutory "'embodiment' of due process" for foreign states Congress considered appropriate, *CC/Devas*, 605 U.S. at 236, *quoting* H.R. Rep. No. 94-1487, at 13 (1976) ("The requirements of minimum jurisdictional contacts ... are embodied in the provision.").

Preserving Congress' "non-Constitutional" territorial nexus requirements has assumed even greater importance following *Fuld v. Palestine Liberation Org.*, 606 U.S. 1 (2025)'s rejection of "minimum contacts" as a Fifth Amendment requirement. That Congress did not expressly jettison the FSIA's territorial nexus requirements stands in stark contrast to the language used to displace the minimum contacts test, *see id.* at 8 (quoting statutory language which identifies named defendants who "shall be deemed to have consented to personal jurisdiction" on certain claims in specific circumstances) (quotations omitted).

The Court has been particularly insistent on explicit textual language to abrogate or modify FSIA immunity for reasons that are compellingly present here, when Congress' clear and fundamental choices would be discarded. *See Rubin*, 583 U.S. at 215 ("Out of respect for the delicate balance that Congress struck in enacting the FSIA, we decline to read into the statute a blanket abrogation of attachment and execution immunity" absent express language); *Simon*, 604 U.S. at 128 ("The plain text of the expropriation exception" "contains no such exception").

In *Philipp*, the Court emphasized that "[w]e interpret the FSIA as we do other statutes affecting international relations: to avoid, where possible, 'producing friction in on our relations with [other] nations and leading some to reciprocate by granting their courts permission to embroil the United States in expensive and difficult litigation.'" *Fed. Republic of Germany v. Philipp*, 592 U.S. 169, 184 (2021), *quoting Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 183

(2017). For this reason among others, the Government has hitherto been emphatic that "[t]o the extent there is ... ambiguity" about immunity, "it should be resolved against jurisdiction. *Amicus* Brief, *Philipp*, No. 19-351, at 26 (2020) (cleaned up).

Eliminating the territorial nexus requirements would raise serious international law concerns as well. The Justice and State Departments were of the view that its elimination would "move[] beyond the accepted practice of sovereign states;" "not [be] in line with currently accepted international practice," App. 5a-7a (Justice Dep't), "difficult to defend under international law," S. Hrg. 104-212 at 163 (State Dep't). The expropriation exception—which covers "own[ing] or operat[ing]" expropriated property, *i.e.*, Title III trafficking—"requires a commercial nexus with the United States" in order to "conform fairly closely with international law," *Simon*, 604 U.S. at 133, 138. The Court has consistently considered and weighed heavily customary international law in its interpretation and application of the FSIA. In addition to *Simon, see, e.g. Helmerich*, 581 U.S. at 180-81; *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199-200 (2007). *A fortiori*, it should do so with respect to Title III.

The risk of foreign policy consequences not unmistakably judged by Congress to be acceptable is compounded here. Title III's cause of action is extraterritorial, risking international friction. *See, e.g.*, *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. at 348 (need for caution "at its apex" given "evident" "risk" of foreign relations discord); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Unique to the United States, the

Title III cause of action generated a firestorm, with the EU, Canada, and Mexico lodging strenuous objections, enacting blocking measures, and initiating treaty dispute proceedings, and the OAS's Inter-American Juridical Committee finding Title III violated customary international law.[14] That Title III's cause of action applies extraterritorially reinforces the need to scrupulously require unambiguous statutory text to abrogate immunity; the normal imperative that Congress, not the courts, balance competing considerations in setting immunity is even more compelling in this heightened context.

Finally, to find abrogation despite the absence of clear text would subvert the FSIA's function to provide clarity and predictably, which the Court has carefully preserved. *See*, *e.g.*, *CC/Devas*, 605 U.S. at 233 ("[W]e decline to add in what Congress left out: the FSIA was supposed to clarify the governing standards, not hide the ball.") (quotations omitted); *Helmerich*, 581 U.S. at 183 ("clarity is particularly important" "in respect to a [FSIA] jurisdictional matter").

Petitioner and the Government accuse the court below and Respondents of requiring an impermissible "ultra-clear statement." Br. 4, U.S. Br. 30. Their missive is misplaced, as all that is required is to follow this Court's repeated instructions that interpretation requires reading language in context. That the context here is a

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14. *See* Theresa Papademetriou, European Union: Helms-Burton Act (Library of Congress 1997), https://lccn.loc.gov/2019670771; 35 I.L.M. 398-400 (EU Demarche); *id.*, at 1326-34 (OAS); 20 Hastings Int'l. and Comp. L. Rev. 713, 718-20 (William S. Dodge, *The Helms-Burton Act and Transnational Legal Process*), 799 (Canada), 809 (Mexico) (1997).

comprehensive statute dealing not only with immunity but subject-matter and personal jurisdiction in the context of sensitive foreign relations issues reinforces the need for unambiguous text to warrant displacing wholesale the FSIA's jurisdiction and immunity regime.

B. Subject-Matter Jurisdiction

The FSIA not only addresses immunity, it provides in 28 U.S.C. § 1330 the "sole and exclusive" basis for federal jurisdiction over states and their instrumentalities, supplanting all other bases of federal jurisdiction, including Section 1331. *Amerada Hess*, 488 U.S. at 435 n.3 & 437 (quotations omitted).[15] Thus, Petitioner and the Government must show not only that Title III overrides immunity but also that it supplants Section 1330 and provides another basis for federal jurisdiction. No such showing is possible. This is dispositive, as Section 1330 provides subject-matter jurisdiction only if an enumerated FSIA exception to immunity applies—not the claimed Title III abrogation.

It does not do the trick to argue that Title III abrogates immunity. Immunity and jurisdiction are "wholly distinct;" an exception to immunity does not provide jurisdiction, nor *vice versa*. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786 n.4 (1991). And

15. Petitioner's bid to limit *Amerada Hess* to causes of action extant in 1976 hardly merits discussion. Br. 40-41. The very authority Petitioner cites confirmed the FSIA applies to all civil actions. *See Turkiye*, 598 U.S. at 278 ("[T]he FSIA displaces general grants of subject-matter jurisdiction in Title 28[.]") (quotations omitted); *see also Schansman*, 128 F.4th at 89 (rejecting Petitioner's argument).

Amerada Hess, decided pre-Title III, explicitly holds that the FSIA repealed Section 1331 as a basis for jurisdiction in actions against foreign states and instrumentalities.[16] Thus, Petitioner and the Government must establish that Title III not only abrogates immunity but also displaces Section 1330 jurisdiction and reintroduces Section 1331 for Title III actions against foreign instrumentalities, reversing this Court's holding in *Amerada Hess.*

In arguing that Section 1330 was discarded and replaced by Section 1331, Petitioner and the Government rely on 22 U.S.C. § 6082(c)(1) using the phrase "any other action brought under Section 1331 of Title 28;" it is, however, simply an imprecise shorthand in a provision generally prescribing use of Title 28's procedural provisions and the Federal Rules of Civil Procedure in Title III actions. *See* Point IV, *infra*. Far more than such oblique and indirect language is needed to effectuate so momentous a change as displacing Section 1330 and restoring general federal-question jurisdiction. *See Epic Sys.*, 584 U.S at 515 (rejecting attempt to alter "fundamental details of a regulatory scheme in vague terms or ancillary provisions" because Congress "does not ... hide elephants in mouseholes.") (quotations omitted).

Moreover, implied repeals of jurisdictional provisions are particularly disfavored. Even where a party claimed

16. It is not enough to say that Section 1330 is now repealed—although Title III clearly does not do that; Petitioner would also need to find an affirmative restoration of Section 1331 jurisdiction. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, § 56 (2012) ("[A] repeal of a repealer does not revivify the statutory corpse.").

that the Congressional objective in a specific statute required displacing a general jurisdictional grant, and where the language of the specific statute was susceptible to that reading (unlike here), a unanimous Court replied "jurisdiction conferred by [the general statute] should hold firm against mere implication flowing from subsequent legislation." *Mims v. Arrow Fin Serv., LLC*, 565 U.S. 368, 383 (2012) (quotation omitted). The same principle applies here.

C. Title III's Suspension Provision Does Not Support Abrogation

Petitioner and the Government argue that Title III's suspension provision providing that the President "may suspend the right to bring an action" manifests or confirms abrogation. 22 U.S.C. § 6085(c)(1)(B). It does not.

It is true in some general practical sense that the President can use the suspension authority to "effectively immuniz[e] Cuban [and third-country] agencies and instrumentalities at the President's discretion," U.S. Br. 26, by preventing them from being sued at all. But a Presidential decision *not* to suspend Title III's right of action does not operate to deprive instrumentalities of the immunity accorded by legislation, the FSIA. The suggestion that it somehow does gets the provision backwards: the suspension authority authorizes the President to provide *broader* protection to instrumentalities than afforded by the FSIA by not allowing suit altogether but says nothing to authorize the President stripping immunity protections when suits are brought.

For this clear, textual, logical reason, the suspension provision does not, as the Government claims, return the immunity regime to pre-FSIA days. Under the pre-FSIA regime, the President was accorded, *in the absence of legislation*, the power to make immunity decisions binding on the courts; there is now legislation, the FSIA. Further, the President's suggestion of immunity had no bearing on subject-matter jurisdiction: pre-FSIA, it was provided by general grants of jurisdiction in Title 28, but is now conferred exclusively by Section 1330. And, immunity was deemed a matter of substantive law, not jurisdiction. *See Turkiye*, 598 U.S. at 270-71, *citing Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945).

In the FSIA, Congress emphatically rejected the "old executive-driven" system with a "comprehensive set of legal standards," *NML*, 573 U.S. at 141 (quotations omitted), "free[ing] the Government from the case-by-case diplomatic pressures." *Verlinden*, 461 U.S. at 488. There is no textual support for concluding that Congress did an about-face in Title III. The suspension provision is not even "a wafer-thin reed on which to rest such sweeping [Executive] power," *Biden v. Nebraska*, 600 U.S. 477, 499 (2023); it is, rather, an irrelevancy.

Indeed, when Congress accorded the President the power to override a state's immunity, it expressly amended the FSIA. *See* 28 U.S.C. 1605A (creating exception for designated state sponsors of terror) and the three examples cited by the Government, U.S. Br. 26-27. In *Beaty*, the Executive discretion to waive a provision of the FSIA with respect to Iraq was *expressly* provided in statutory language allowing the President to "make inapplicable" to Iraq "any other provision of law that

applies to countries that have supported terrorism," which facially and "straightforward[ly]" encompassed the FSIA's terrorism exception. *Beaty*, 556 U.S. at 856 (quotations omitted). There is no such language here.

Independently, there is no textual foundation for selective use of the suspension provision to make "Cuba specific foreign policy determinations" on immunity. U.S. Br. 28. The cause of action and suspension are framed in general terms, not providing for suspension of particular claims or excepting Cuba or another nation for policy reasons. Moreover, another provision of the statute—not at issue here—*does* explicitly provide for the suspension of the right of action "against the Cuban government" specifically if certain conditions are met. 22 U.S.C. § 6064(a). That Congress in the same statute explicitly created a Cuban-specific suspension, indicates that it did not do so for the Title III suspension power at issue here. *City of Chicago*, 511 U.S. at 337-38.

Petitioner and Government would place immunity in the hands of the President—exactly where Congress decided it should not be.

D. Invocation of Executive Foreign Affairs Powers Cannot Displace the FSIA

The Government repeatedly invokes the President's foreign affairs powers, arguing that applying the FSIA would "override the President's foreign policy judgment." U.S. Br. 15. That the question here arises in the foreign affairs context does not justify loosening this Court's settled requirements for finding immunity abrogated, nor displacing Congress' constitutional powers to regulate

the jurisdiction of federal courts and to legislate rules governing foreign immunity. No less than in *Republic of Austria v. Altmann*, "the issue" before the Court concerns "a pure question of statutory construction ... well within the province of the Judiciary," and, "while the United States' views on such an issue are of considerable interest to the Court, they merit no special deference." 541 U.S. 677, 701-02 (2004). And, there can be no doubt that Congress is well within its constitutional authority to establish jurisdiction and immunity by statute without delegating authority to the Executive. *Verlinden*, 461 U.S. at 496-97

That Congress has addressed and balanced the complexities in foreign immunity determinations by prescribing they are to be made by courts according to legislated standards heightens the need to rebuff any effort to take for the Executive what belongs to Congress. Since Congress has legislated legal standards, Executive power to switch immunity on and off in the interests of foreign policy is "at its lowest ebb." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

As Justice Scalia admonished in rejecting another Executive claim that applying the FSIA would "threaten harm to the United States' foreign relations:" "[t]hese apprehensions are better directed to that branch of government with authority to amend the [FSIA]." *NML*, 573 U.S. at 146 (quotations omitted).

IV. Relying on a Hodge-Podge of Factors Cannot Supply the Requisite Clear Language

Petitioner and the Government finally resort to arguing that a hodgepodge of Title III's provisions "taken together, clearly abrogate Cuban agencies' and instrumentalities' immunity." U.S. Br. 17, drawing on Title III's procedural requirements provision alongside the already discussed purposes, Findings, and suspension provision. This is another acknowledgement that the *Kirtz* test is not met. *Cf. City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306-07 (2013) ("[A]pplication of some sort of totality-of-the-circumstances test" is "not a test at all but an invitation to make an *ad hoc* judgment regarding congressional intent."). *Kirtz* found that a statute abrogates immunity in only two circumstances: explicit waiver or the provision of a cause of action that would be negated by immunity. Contrary to settled jurisprudence, Petitioner and the Government urge a third: that immunity can be waived based on implications drawn from a statute's ancillary provisions.

The first subsection of Title III's "Procedural Requirements" provision, 22 U.S.C. § 6082(c)(1), manifestly addresses the procedures applied in Title III actions rather than jurisdiction and immunity. It implements Congressional judgment that "uniform application" of procedural rules is "essential to effectuate [the] purposes" of the statute, *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361-63 (1952) (displacing "local rule of procedure"), as this Court has recognized Congress did in other contexts. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 147-55 (1987) (displacing state procedural rules in RICO actions); *Oscar Mayer &*

Co. v. Evans, 441 U.S. 750, 762 (1979) (same with ADEA). Given the sensitivities of Title III actions, Congress unsurprisingly ensured application of uniform procedural rules by state as well as federal courts.

Additional considerations confirm this reading. Settled authority requires greater clarity to confer subject-matter jurisdiction, *Lightfoot v. Cendant Mortg. Corp.*, 580 U.S. 82 (2017) (emphasizing lack of "explicit grant of jurisdiction" to conclude statute merely referenced "outside sources of jurisdictional authority"). Moreover, Congress has repeatedly used the term "Procedural Requirements," but *never* to define subject-matter jurisdiction.[17] *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (calling headings "informative" "tool[]" "for the resolution of a doubt") (quotations omitted); *see also Thompson*, 604 U.S. at 415 (looking to use of term in "other statutes"). Prior to this provision's introduction, the bill vested exclusive jurisdiction in federal courts. In eliminating that provision, the Conference adopted Section 6082(c) expressly as part of a "substitute," *see* H.R. Rep. No. 104-468, at 61 (1996), confirming this provision addressed new concerns posed by state-court actions.

The foregoing is unchanged by the use of the descriptive phrase "any other action brought under section 1331 of title 28." The only plausible reading is that Congress was referring to the broad sweep of federal statutory cases to which Title 28 and the federal rules apply. Indeed, all but three Title III actions have been brought under Section 1331. Further, it is simply implausible Congress

17. *See, e.g.*, 26 U.S.C. § 6751; 29 U.S.C. § 464(c); 15 U.S.C. § 2688.

effectuated such a transformative change to a foundational feature of litigation against foreign states through such oblique and indirect language. *Supra*, p. 45.

The second subsection of "Procedural Requirements," mandating use of the FSIA's service rules in an action against "an agency or instrumentality of a foreign state in the conduct of a commercial activity, or against individuals acting under color of law," 22 U.S.C. § 6082(c)(2), does not support abrogation. Petitioner emphasizes surplusage, Br. 28-29 ("the entire paragraph would have been unnecessary" if the FSIA applied); the Government argues it "supplants" the FSIA's service provision. U.S. Br. 25. These arguments omit important textual language which is manifestly not surplusage, ignoring the provision's obvious purpose: making Section 1608 apply to "individuals acting under color of law" while ensuring courts do not invoke *expressio unius est exclusio alterius* to find it inapplicable to instrumentalities.

Petitioner cannot avoid this interpretation by claiming "the unanimous rule" in 1996 was that "individuals acting under color of law" were covered by the FSIA. *See* Cert. Reply 6, *citing Chuidian v. Philippine Nat. Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990). By 1996, only one district court had addressed the issue. *See Herbage v. Meese*, 747 F. Supp. 60, 68 (D.D.C. 1990). Petitioner is confusing "acting under color of law" with "official capacity," but even on the latter, the law was uncertain, with the Government adhering to the view that the FSIA did not cover "official capacity." *Compare El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996), *with Xuncax v. Gramajo*, 886 F. Supp. 162, 175 (D. Mass. 1995); *see also Chuidian*,

912 F.2d at 1101-02 (finding "official capacity" covered by FSIA but noting "ambigu[ity] as to its extension to individual foreign officials" and "significant support" for U.S. Government view that individuals not covered).

Modest redundancy to avert misreading is a common feature of legislation. *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Redundancies across statutes are not unusual[.]"); *Rimini Street, Inc. v. Oracle USA, Inc.*, 586 U.S. 334, 346 (2019). Petitioner's surplusage argument also ignores that the immediately preceding subsection, Section 6082(c)(1), makes Title 28 and the Federal Rules applicable to all Title III actions. That includes the FSIA's service provision, Section 1608, and, independently, Fed. R. Civ. P. 4(j)(1) (requiring service *under FSIA* for foreign instrumentalities). Thus, even without Section 6082(c)(2), the FSIA's service provision would apply. "[W]hen both interpretations involve the same redundancy, the canon against surplusage simply does not apply." *Bufkin v. Collins*, 604 U.S. 369, 387 (2025). In any event, whether the FSIA's service provision was replaced by Section 6082(c)(2) has nothing to do with immunity or jurisdiction.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX — LETTER OF THE UNITED STATES DEPARTMENT OF JUSTICE, OFFICE OF LEGISLATIVE AFFAIRS, DATED JUNE 27, 1995, TO THE CHAIR, JUDICIARY COMMITTEE, HOUSE OF REPRESENTATIVES, COPY TO THE CHAIR, INTERNATIONAL RELATIONS COMMITTEE, HOUSE OF REPRESENTATIVES

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 27, 1995

Honorable Henry J. Hyde
Chairman
Committee on the Judiciary
U. S. House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This provides the views of the Department of Justice on the Amendment to the Amendment in the Nature of a Substitute to H.R. 927, the "Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995" (June 14, 1995) (the "Act"). These views are intended to supplement the views of the Administration as reflected in the enclosed letter of April 28, 1995, from the Department of State to Chairman Gilman of the Committee on International Relations.

Appendix

I. Constitutional Concerns

The provisions of the Act noted below interfere, to a greater or lesser degree, with the President's exclusive authority under our Constititution to conduct and manage our relations with other countries. The Constitutional infirmities can be remedied, however, by making the provisions precatory.

Section 102(b) requires the Secretary of State to ensure that United States diplomatic officials abroad understand and communicate to foreign government officials the reasons for the U.S. economic embargo against Cuba and urge more foreign government cooperation with the embargo.

Section 104(a) requires the Secretary of the Treasury to instruct the U.S. Executive Directors to each international financial institution to speak and vote in a stipulated manner on a request for Cuban membership in such institutions.

Section 110(b) requires the President to take the necessary steps to encourage the Organization of American States to create a special emergency fund for the purpose of deploying human rights observers, election support and election monitors in Cuba.

Section 201 purports to set forth the policy of the U.S. toward a transition government and a democratically-elected government in Cuba.

Section 202(e) requires the President to seek the agreement of other countries, international financial institutions and multilateral organizations to provide a transition government and a democratically elected government in Cuba with assistance comparable to that provided for in the Act, and work with such countries and organizations to coordinate such assistance.

Section 202(g) requires the President to take the necessary steps to enter into a preliminary agreement with a "democratically-elected government" in Cuba that provides for extension of the North American Free Trade Agreement or similar type of trade agreement to that country.

Section 202(h) requires the President to take the necessary steps to communicate to the Cuban people the plan for assistance developed in the Act.

The courts have repeatedly noted that the President is "exclusively responsible" for the "conduct of diplomatic and foreign affairs." *Johnson v. Eisenstrager*, 339 U.S. 763, 789 (1950). *See also Haig v. Agee*, 453 U.S. 280, 293-94 (1981) (recognizing "the generally accepted view that foreign policy was the province and responsibility of the Executive"); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976) ("the conduct of (foreign policy) is committed primarily to the Executive Branch").

The President uses our diplomatic personnel abroad, our representatives to international financial and

multilateral institutions and other Executive branch officials to execute his foreign policy. While Congress has the authority to appropriate funds for their activities, the nature and scope of their activities is a function of the President's foreign affairs power. Accordingly, the sections mentioned above unconstitutionally interfere with the President's foreign affairs power.

II. Litigation Concerns

The Department of Justice is opposed to sections 302(d) and (e) of the Act. Section 302(d) would amend the Foreign Sovereign Immunities Act ("the FSIA"), 28 U.S.C. 1605, by adding a new exception to the immunity of foreign states from the jurisdiction of U.S. courts. The new exception would remove foreign state immunity for an action "brought with respect to confiscated property (other than property which is a facility or installation to the extent that it is used by an accredited diplomatic mission for official purposes) under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1995." Section 302(a), in turn, would subject to liability "any person, including any agency or instrumentality of a foreign state in the conduct of a commercial activity, that traffics in confiscated property" a claim to which is owned by a United States national. Section 302(e) would allow the property of a foreign state to remain immune from attachment and from execution in actions brought pursuant to this section, "to the extent the property is a facility or installation used by an accredited diplomatic mission for official purposes."

Appendix

The intent of sections 302(d) and (e) with respect to the immunity of foreign states is unclear. The lack of clarity and possible confusion derives in part from the use of the undefined word "person" in section 302. A foreign state can easily be construed as a "person" for many purposes, including for purposes of section 302. If the intention of this section is to *exclude* from its sweep foreign states and only include agencies or instrumentalities of foreign states which "traffic" in confiscated property in the conduct of a commercial activity, the section does not clearly so state. Indeed, if the intent of the section is to reach only agencies or instrumentalities which traffic in confiscated property in the conduct of commercial activity, other aspects of sections 302(d) and (e) become problematic. It is not usual that property which is a facility or installation used by an accredited diplomatic mission for official purposes -- and thus retains sovereign immunity under the Act -- simultaneously will be property of an agency or instrumentality of a foreign state used in the conduct of a commercial activity. The language of sections 302(d) and (e) thus bolster an interpretation of section 302(a) which would include states and their agencies and instrumentalities generally within the definition of person. However, if the intention of section 302(a) is to subject foreign states and their agencies and instrumentalities to the liability regime contained in section 302(a), then the phrase "including any agency or instrumentality of a foreign state in the conduct of a commercial activity" is surplusage.

Insofar as the intention of section 302 is to subject generally foreign states and/or their agencies and

instrumentalities to the liability regime contained in section 302, we believe that the new exception moves beyond the accepted practice of sovereign states, that claims based upon it will be difficult to administer and enforce, and that the Act may entice foreign states to expose the United States to similar judicially imposed liabilities for conduct disapproved by the foreign state.

First, the Foreign Sovereign Immunities Act already contains an exception to the immunity of foreign states for confiscations which violate international law. This exception applies in cases in which rights in property are taken in violation of international law and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state, or in cases in which that property or property exchanged for it is owned or operated by a foreign state agency or instrumentality which is engaged in commercial activity in the United States. The FSIA exception -- which itself has not received wide emulation by other sovereigns -- thus requires a clear nexus between the use of the property and the United States, or the activities of the owner of the property and the United States. The Act appears to remove immunity from foreign states and their agencies or instrumentalities when they have done nothing in violation of their own domestic laws, and when there is no connection to the United States save the identity of the plaintiff. Liability follows upon any use of or interest in the property, no matter how fleeting and wherever the property may be located. (This is true under either a broad construction of the Act to include

states and agencies and instrumentalities generally, or under a narrow construction which includes only agencies or instrumentalities of foreign states which traffic in the conduct of commercial activities.)

Thus, the section represents a potentially sweeping extension of U.S. court jurisdiction over foreign sovereigns or their agencies and instrumentalities, and an exception which is not in line with currently accepted international practice. This in turn may lead to additional difficulties for U.S. litigants:

A. Foreign states or their agencies or instrumentalities may choose not to enter appearances in U.S. courts in cases in which both the substance of the law and the exercise of jurisdiction is seen as unacceptable by international standards. This choice, in turn, may result in a proliferation of default judgments with all the difficulties such judgments pose in litigation involving foreign states or their agencies and instrumentalities.

B. Foreign states or their agencies and instrumentalities may be unwilling to cooperate in discovery and other fact-finding, and the extra-territorial reach of U.S. courts to compel such cooperation in cases within the scope of the Act is extremely limited.

C. Judgments entered on the basis of section 302(d) are unlikely to be entitled to recognition or enforcement if the judgment holder seeks recognition or enforcement abroad.

D. These disadvantages are further aggravated by the retrospective sweep of the Act. The Act permits actions with respect to property confiscated before, on, or after the date of its enactment. Section 302(a)(4). Not only is evidence of property rights in older claims likely to be stale -- if obtainable at all -- but limited prescription periods are engrained in the law of most countries. In addition, there is no requirement of exhaustion of local remedies in the Act. Thus, the Act permits extremely old claims against foreign sovereigns or their agencies or instrumentalities with no requirement that the plaintiff has provided the defendant an opportunity to consider the claim in its own tribunals.

We are also concerned about the possibility that the Act will prompt foreign states to expose the United States to a range of judicially imposed liabilities for conduct disapproved by the foreign state, and to do so based upon weak jurisdictional connections to the forum, broad grounds of substantive liability, and regardless of the age of the claim. This concern is heightened by the provision for treble damages contained in section 302(a)(3). The United States is currently engaged as a party in some 1100 court cases in approximately 80 jurisdictions. Plaintiffs bringing suit against the United States in foreign courts often seek punitive or "moral and exemplary" damages over and above their actual injury. We strenuously -- and successfully -- resist these claims on the grounds that international law does not permit a domestic court to assess such non-compensatory damages against foreign sovereigns. Our position is buttressed by the FSIA, which prohibits application of punitive damages to foreign states.

Provision of treble damages against foreign states, as appears to be contemplated under one interpretation of the Act, thus may lead to significant additional liabilities visited upon the United States by foreign courts.

The Department of Justice has limited its comments regarding litigation concerns to the application of provisions of Title III in cases involving foreign states or their agencies and instrumentalities, in view of its responsibility for defending suits abroad against the United States government and its agencies and instrumentalities. We have not addressed application of such provisions in cases involving suits against non-governmental foreign persons, which was discussed in the Department of State views letter. We note, however, that many of the difficulties we have identified for U.S. litigants in connection with suits against foreign states or their agencies or instrumentalities would similarly apply in cases of suits against foreign persons.

III. Foreign Claims Settlement Commission Concerns

The Administration has noted its broad concerns about the provisions of Title III that would provide for the creation of a new cause of action against foreign persons under specified circumstances. In addition to those concerns, we note that sections 302 and 303 contemplate the use of Foreign Claims Settlement Commission (FCSC) certifications and determinations of claims as evidence of ownership and value of the property in Cuba of owners who sue traffickers in their property in U.S. District Court. However, the bill does not specify what would happen if

a claimant obtained a judgment against a trafficker and was paid, but then became entitled to compensation under a government-to-government agreement. Even if some form of offset were specified, its implementation could interfere with the orderly administration of the FCSC's program. In any event, the existence of private lawsuits and awards would complicate the prospects of reaching a claims agreement with Cuba.

We appreciate this opportunity to provide our views to the Committee. Please do not hesitate to contact me if you have any questions or concerns.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

s/ Kent Markus
Kent Markus
Acting Assistant Attorney General

Enclosure

cc: Honorable Benjamin A. Gilman
Chairman
Committee on International Relations
U.S. House of Representatives