SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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EXXON MOBIL CORPORATION,)

Petitioner,)

v.) No. 24-699

CORPORACIÓN CIMEX, S.A.)

(CUBA), ET AL.,)

Respondents.)

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Washington, D.C.

Monday, February 23, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:38 a.m.

APPEARANCES:

MORGAN L. RATNER, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

CURTIS E. GANNON, Deputy Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

JULES L. LOBEL, ESQUIRE, Pittsburgh, Pennsylvania; on behalf of the Respondents.

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P R O C E E D I N G S

(11:38 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 24-699, Exxon Mobil Corporation versus Corporación Cimex, et al.

Mr. Ratner -- Ms. Ratner.

ORAL ARGUMENT OF MORGAN L. RATNER

ON BEHALF OF THE PETITIONER

MS. RATNER: Mr. Chief Justice, and may it please the Court:

If you read the Helms-Burton Act from front to back, you'll have one clear take-away, and it's the one already mentioned this morning, that the 1996 Congress wanted to put crushing diplomatic and economic pressure on the Cuban government. That includes by abrogating the sovereign immunity of Cuban instrumentalities in claims brought under Title III of that Act.

Now there's admittedly a high bar for abrogation, but this Court has said again and again that Congress doesn't need to use magic words to get there. It just needs to make its intent clear through what Kirtz called the sum total of its work, and it did that here.

Let me start with the most important piece, Section 6082(a). Congress created a cause of action and expressly applied that cause of action to foreign instrumentalities. That's a standard route to abrogation that this Court has recognized in Kirtz, Kimel, Hibbs, and Financial Oversight and Management Board.

Then Congress did three things to confirm that that was its intent. First, we know with absolute certainty that it wanted claims and judgments against Cuban instrumentalities because it repeatedly discusses them, including at 6082(a)(7), (c)(2), and (d). That was up for debate in Kimel and Kirtz. It's not up for debate here.

Second, Congress emphasized that it wanted fully effective remedies in U.S. courts, including against governments. That's 6081(8) and (11).

And, third, at the same time it authorized suits against Cuban instrumentalities, Congress also codified an incredibly restrictive embargo cutting off commerce between the United States and Cuba.

That combination makes no sense if

Congress had intended to rely on FSIA exceptions that depend on commercial activity.

I welcome the Court's questions.

JUSTICE THOMAS: Are we to treat the assertion of sovereignty the same here as we did in Kirtz?

MS. RATNER: Well, Justice Thomas, to the extent you mean is there a different test for foreign sovereigns or other kinds of sovereigns, we have not argued for a lower test. I think, arguably, the sovereign immunity asserted in suits involving states and the federal government may be on even stronger footing than the sovereign immunity of foreign governments because, when it comes to foreign governments, that's entirely a matter of comity and grace.

But our point is simply that foreign governments shouldn't be better off than all of the other types of sovereigns, states, the federal government, Indian tribes, and territories in the case that --

JUSTICE THOMAS: If we accept your argument, what would the interaction of Title III and the FSIA look like?

MS. RATNER: So there are effectively two ways to harmonize those two statutes here. One is the way that we're advancing, which is the FSIA is a general rule and the Helms-Burton Act is an additional specific abrogation. The other way of harmonizing is what Respondents have said, which is the Helms-Burton Act provides the cause of action and the FSIA provides any abrogation of immunity.

And our point is simply it -- it is not plausible to believe that Congress intended the latter rather than the former. And we know that for several reasons. I think the fact that it simultaneously enacted the embargo is a pretty glaring one. The Court often says Congress doesn't enact meaningless statutes. And the notion that it would circulate these claims over to a separate immunity regime that depends on commercial activity with the United States while simultaneously banning commercial activity in -- with the United States is a -- a pretty glaring neon sign.

JUSTICE SOTOMAYOR: Could we -- could we stop at your first point? Because what you're arguing is that the statute here

impliedly reversed -- FISA's application, correct?

MS. RATNER: So no, Justice Sotomayor, I don't think that's right. I'm happy to -- I think we reached the level of clarity necessary for that, but that's not how this Court talks --

JUSTICE SOTOMAYOR: How do you do that -- well, let's go to that.

MS. RATNER: Okay.

JUSTICE SOTOMAYOR: I mean, we do know that in Kirtz there was no statute. It was just how to read this statute, correct?

MS. RATNER: That that statute in conjunction with background principles that required a clear statement.

JUSTICE SOTOMAYOR: Background principles but not another statute. The idea of irreconcilable conflict was present in Kirtz itself, and the Court explained that if Congress enacts a cause of action against a governmental agency and there is no way to bring that claim -- those were Kirtz's words -- against any government agency, then the cause of action itself must abrogate sovereign

immunity.

But that's not the case here. In fact, you've brought a case, a claim that still survives against Cimex. And as I'm reading the record, there's been so much investment in Cuba even before the current president. Cimex itself operates Western Unions on confiscated property. There's over a hundred companies since 2001 that have exported products to Cuba. There's ongoing agricultural and other exports.

So this isn't a dead letter if we impose sovereign immunity principles here. That's very different than Kirtz, isn't it?

MS. RATNER: Justice Sotomayor, let me say a couple things about that.

First is we don't know if it's a dead letter. Nobody has actually successfully made a claim through yet. Our claim, after seven years, with one of the largest and most diverse claim, has not yet made it through.

But, more importantly, I don't think Kirtz says you need to have a dead letter. What Kirtz says is, if Congress defines a claim, specifically applies it against a government entity, and applying immunity in

that circumstance would negate claims Congress wanted, then we think that's a pretty good sign that that statute itself abrogates immunity.

JUSTICE SOTOMAYOR: You're -- you're -- you're going in a circle, counsel.

MS. RATNER: And --

JUSTICE SOTOMAYOR: You're trying to read an intent into Congress by saying they wanted a bigger claim than the one I could have. But, if a claim is still possible, what that means is that the two statutes, FSIA and Title III, can be read harmoniously --

MS. RATNER: The --

JUSTICE SOTOMAYOR: -- which is our charge, not to implicate repeal.

MS. RATNER: Justice Sotomayor, so let me address the Kirtz point, and I do want to go back to why this is not an implied repeal.

On Kirtz, again, I think it is unequivocal that this would effectively negate many, maybe most, maybe all of the claims that Congress authorized. Kirtz did not rest on a notion that 100 percent of the claims could never come through.

JUSTICE KAGAN: Well, I think it --

MS. RATNER: And it --

JUSTICE KAGAN: -- sort of did, Ms. Ratner. I mean, in Kirtz, in FMO -- OMB, it was just true that if -- if -- if read one way, there was going to be a cause of action without any ability to bring the suit.

And that was what in all those cases seemed absurd, that -- why would there be a cause of action if there's no way to bring a suit? You give with one hand, you take away with the other.

But, in this case, it's not for the reason that Justice Sotomayor suggested. The FSIA is this background law that it -- and it's trans-substantive. It assumes that there are going to be other causes of action all around but that it is the thing that -- it tells you, for purposes of all those causes of action, when are you immune and when are you not immune, and, here, the FSIA sets up a -- a series of tests when you're immune, when you're not immune.

And -- and -- and so why shouldn't we just take that as, like, okay, it's the FSIA that is the relevant statute here? The fact

that there's causes of action, of course, there's a cause of action in the -- in -- in -- in Article III, as well as in many other statutes, but we don't take that to be -- we don't look to those causes of action for purposes of deciding jurisdictional immunity for foreign agencies.

MS. RATNER: So, Justice Kagan, let me -- let me try to unpack two things from there. First, I don't want to give up on the Kirtz point because I do think, in Kimel, it was not 100 percent superfluous. The state defendants came in and argued there are state statutory waiver schemes, so the existence of a cause of action will not negate all claims against states. This Court rejected that out of hand. That's page 75 of Kimel on which Kirtz was based.

But moving to the FSIA, the notion that the FSIA is sort of a comprehensive scheme here and something, Justice Sotomayor, that you'd have to impliedly repeal, I think, is inconsistent with the Court's 2009 decision in Beaty.

And, there -- this is involving the

particular terrorism provisions as they relate to the Republic of Iraq, and, there, the situation was reversed. It was Congress allowing the President to take -- to remove a waiver of sovereign immunity, but the Court there said this is a specific targeted rule at a moment in time and a particular actor, and it doesn't need to reference the FSIA to supplement it.

JUSTICE KAGAN: Yeah. So I guess that seems right that there could be statutes which don't need -- you know, if -- if -- if -- if this statute gave you a cause of action and gave you jurisdiction under 1331, which it might, and which also said, you know, there's a -- there's -- there's an abrogation of immunity, then I am totally with you. It doesn't matter that the FSIA exists.

But, in fact, this statute does not do the last thing. So -- so, in that world, it seems as though, you know, Congress knows that there's an FSIA around which provides the jurisdictional immunity rules, and so, if -- if Congress doesn't substitute in another statute which does create a cause of action, it seems

to me the right way to read what it's doing is to say we're providing a cause of action subject to the rules we know exist about jurisdictional immunity.

MS. RATNER: Justice Kagan, I think there are two problems with that. One is doctrinal and one is statutory. The doctrinal problem is that just gets us back to a magic words requirement that the Court has refused to apply. And with respect --

JUSTICE KAGAN: No magic words. They can abrogate -- they can abrogate immunity in any words they want to, but they have to abrogate immunity to replace the FSIA.

MS. RATNER: And the -- that is exactly the question here, has Congress clearly abrogated immunity here, and we think, through the sum total of its work, the answer is yes. But I --

JUSTICE KAGAN: But a cause of action doesn't abrogate immunity. It just doesn't. There are causes of action all over the place that rely on the FSIA as providing the jurisdictional rules.

MS. RATNER: There are extremely few

causes of action that expressly apply to foreign governments, foreign agencies and instrumentalities. By our count -- our petition has them at page 30 -- there's one about chemical weapons regulations, one about nuclear weapons regulations, and one about certain drug trafficking crimes. So that is, I think, the -- the biggest universe --

JUSTICE KAGAN: I'm not even sure that that's relevant if you're relying so much on Kirtz and Kimel and so forth, where it was just a broad cause of action. So you can't kind of have it both ways there.

MS. RATNER: Justice Kagan, I am not trying to have it both ways. What I am relying on from Kirtz and Kimel is the notion that when Congress expressly calls out this group of defendants, that's when we think maybe it's saying something on abrogation as well, and --

JUSTICE JACKSON: But how -- how -- how -- how can that be squared with the language in the FSIA that says this is the exclusive statute that tells you when you abrogate?

I mean, the -- the -- the problem I

think -- and this is the point that Justice Sotomayor was raising -- is that unless Title III speaks to abrogation, I don't know how you overcome the statute that says abrogation for foreign governments, look here and apply this rule.

And you say, I think, from your original statement: Well, you can overcome that or ignore that because, in this case, Congress created a cause of action, repeatedly indicated that it wanted these kinds of suits to be brought against the government, it wanted fully effective remedies in court, and it wanted embargoes.

I understood those to be the kind of thrust of your argument. But I think it has two problems. One is that it doesn't -- it didn't speak directly to abrogation, and we know that cause of action and abrogation are two different things in light of a statute that says look over here when you're looking for the abrogation answer. So that's one problem.

And then the other problem is we had a clear statement rule in the world of jurisdiction and abrogation. So, if Congress

was relying on the kinds of things you're talking about, I don't understand how they even thought that that could possibly be enough to displace the -- the -- the -- the statement in the FSIA that says this is how you abrogate.

MS. RATNER: Justice Jackson, this would unequivocally pass the clear statement rule as applied to any other of the various sovereigns I mentioned, and then the question is are foreign sovereigns better off because their immunity is put in a statute.

JUSTICE JACKSON: No, the question is -- the question is does the Foreign Sovereign Immunity Act apply to the other sovereigns you mentioned. The answer is no.

MS. RATNER: It --

JUSTICE JACKSON: So, when we're in the world of foreign sovereigns, we have a special rule that Congress has carved out that tells us this is how you determine whether abrogation occurs for foreign sovereigns, and the only question here is whether what Congress does in Title III is enough to displace that rule as opposed to we look at this and we think Congress was setting up a cause of action in

Title III and relying on its long-established preexisting rule for how you abrogate.

MS. RATNER: Justice Jackson, what Congress did here would unequivocally be enough for any other foreign sovereign, and so then the question is, does the existence of the FSIA --

JUSTICE JACKSON: For any other foreign sovereign?

MS. RATNER: Excuse me, any other governmental sovereign.

JUSTICE JACKSON: Right. And so my --

MS. RATNER: Then the question is does the exist --

JUSTICE JACKSON: -- my -- is it enough for any other foreign sovereign?

MS. RATNER: Does the existence of the FSIA mean --

JUSTICE JACKSON: Mm-hmm.

MS. RATNER: -- that we need an even clearer statement, a clear statement above the clear statement? And -- and -- and just to go back --

JUSTICE SOTOMAYOR: No. The question is can you harmonize the two statutes. I keep

going back to that point.

Look -- look at your Iraq question, okay? There, the Court was looking at the FSIA and the presidential provision, the EWSSA. And what we read there was the FS -- FSIA has a default waiver of Iraq's sovereign immunity.

The EWSSA permits the President "to make inapplicable with respect to Iraq any provision of law that applies to countries that have supported terrorism."

The two are addressing exactly the same thing and they're saying you can do one. The President can do one. So that was clear. We were trying to harmonize those two statutes and said: Yes, the President has that power.

Here, the way to harmonize the two statutes is to say it applies only to commercial exceptions permitted by the FSIA, and, as in Kirtz or unlike as in Kirtz, the two statutes, if harmonized in that way, still make this operative --

MS. RATNER: Justice Sotomayor --

JUSTICE SOTOMAYOR: -- still permit suits against foreign sovereign entities who engage in commercial activity.

MS. RATNER: -- that is a way to harmonize them. I don't think it is a plausible one. The other way to harmonize them is by --

JUSTICE SOTOMAYOR: Once it is -- and a -- well, we go back to what's plausible. Here --

MS. RATNER: Well --

JUSTICE SOTOMAYOR: -- you have a suit that has survived a motion to dismiss. We know Western Union has business there. The suit is against an entity that's doing business with Western -- with Western Union.

There are ways. And there is money flowing into -- even with the embargo, as extreme as it is at the moment, there are still many commercial investments going on in Cuba.

MS. RATNER: So, Justice Sotomayor, the -- again, the question we're looking at is 1996, when Congress codifies an extremely restrictive embargo in 6032(h).

It adds provisions preventing circumvention in 6040, and it allows extremely few exceptions for humanitarian links. And the question is should the statute be read to allow

causes of action only in the rare circumstances where they can find a connection to one of those humanitarian links. I think that is an implausible way to harmonize the statutes.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas?

Justice Alito?

JUSTICE ALITO: If Congress didn't think that the FSIA applied to Helms-Burton actions, why would it have amended the FSIA's -- execution immunity rules for those cases?

MS. RATNER: So, Justice Alito, I think 1611(c) is a little hard to understand. It -- it can either be read as a we don't think there's a conflict here but a belt-and-suspenders we want to avoid anyone thinking there is, or it can be read as suggestive that with respect to execution immunity, the FSIA provisions apply.

I think it has to be the former way because elsewhere Congress -- expressly and selectively incorporates FSIA provisions, including in 6082(c)(2), and I -- I think in combination of that and (c)(1), where Congress

says we want to apply only the provisions of Title 28 that apply in Section 1331 cases, which does not include the FSIA, when you read those in -- in combination, I think that you can only read 1611(c) as kind of a belt-and-suspenders provision.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I -- your point is statutory history. So do I. And I take seriously the fact that the originals, both Senate and House bills here under Title III included a waiver of the SIA -- FSIA. And so it's not clear to me that when Congress took it out why we would be putting that waiver back in.

MS. RATNER: So, Justice Sotomayor, if you really dig in on the legislative history, I think it becomes clear that Congress did not change its mind on whether to abrogate. It changed its mind on whose immunity to abrogate.

So, in February of '95, the bill's --

JUSTICE SOTOMAYOR: So why did it say that directly? I know.

MS. RATNER: Well --

JUSTICE SOTOMAYOR: It -- but that's assuming that it -- it's clear that it took out the Cuban government and substituted subsidiaries and agencies, correct?

MS. RATNER: That's correct.

JUSTICE SOTOMAYOR: That's what you're relying on?

MS. RATNER: Correct.

JUSTICE SOTOMAYOR: But that still begs the question. The DOJ had made very clear that abrogating sovereign immunity of the government and its instrumentalities would be a violation of -- of international law, correct?

MS. RATNER: That's correct.

JUSTICE SOTOMAYOR: All right. So it took out any suggestion that it was abrogating sovereign immunity, dropped it from both bills, chopped -- dropped the federal government but kept foreign instrumentalities. But, from that history, why would I assume that it was intending to keep -- to abrogate immunity?

MS. RATNER: Justice Sotomayor, that is not the correct history. The history is, February of '95, the original -- original bill

abrogates immunity under the FSIA for governments themselves. Then there's an outcry about various aspects of the bill. But, August of '95, they take out that immunity provision and they add in this specific reference to claims against agencies and instrumentalities --

JUSTICE SOTOMAYOR: But that doesn't make --

MS. RATNER: -- and then, after that --

JUSTICE SOTOMAYOR: -- to take it out, to take out the waiver of FSIA, because FSIA goes both to the government and to the agents and instrumentalities, and the government's letter was complaining about the -- all of this being in violation of international law.

MS. RATNER: So, Justice Sotomayor, two quick things. One is the FSIA provision, Section 1605, although it does cover both foreign states and agencies and instrumentalities, there's no specific existing provisions carving out just agencies and instrumentalities. So, although I could write that language for you, Congress did not have a

copy-and-paste job once it got rid of foreign states.

And, second, if you are looking at that legislative history, I do think you have to look at the fact that the State Department, two months after this amendment, continued to say, well, now it applies to agencies and instrumentalities, sure, but it is still going beyond the FSIA. That likely ground the bill to a halt in the fall until Cuba shot two planes out of the sky, and all of a sudden, super-majorities of Congress passed and the President signed this law within 17 days.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch?

Justice Kavanaugh?

JUSTICE KAVANAUGH: The other side says that you need to take account of the provision that allows the President to, essentially, have an on/off switch here. And one of the amicus briefs talks about that at some length.

In other words, it would be quite extraordinary for Congress to allow billions of dollars, tens of billions, hundreds of billions

of dollars, to be decided by an on/off switch just at the President and there's really no constraints on the President's ability to do that in the statutory language, like national interest and -- and transition to democracy in Cuba.

And they say, for that reason, we shouldn't assume Congress intended to give that huge power to the President, so, therefore, choose the narrower second option as you first described them, I think, rather than the first one. Do you want to respond to that?

MS. RATNER: Yes. So, Justice Kavanaugh, I think it's exactly the opposite, which is the whole reason we needed this presidential fail-safe is because claims against the Cuban government could be so substantial that they would interfere with its progress to democracy. And that's why there are four separate suspension provisions throughout the statute that give ways to toggle on and off claims, including claims and judgments against the Cuban government specifically, as necessary to help diplomatically toward a democratic Cuba.

And there's no reason to include those if what we're talking about is a couple edge cases that are linked on to some humanitarian food exports. We -- then we don't have the wave of claims against Cuban governments that would cause a need for that kind of presidential backstop.

JUSTICE KAVANAUGH: So you don't think there's some kind of clear statement required in connection with that? That's what they, I think, are saying on page 47 and then the amicus brief also.

MS. RATNER: I -- I don't --

JUSTICE KAVANAUGH: In other words, we'd expect Congress to speak really clearly if they're going to give the President so much power and they --

MS. RATNER: I mean, first, I think Congress probably thought it was putting on more constraints. In fact, if -- if you --

JUSTICE KAVANAUGH: National interest?

MS. RATNER: -- are looking at the legislative history, the conference report said we don't think in good faith the President could actually -- impose the suspension. But

-- but leaving that to the side, again --

JUSTICE KAVANAUGH: Well, it was in place then for -- from '96 to 2017, right?

MS. RATNER: It -- it sure was. I think the President and the -- and Congress probably had differing views, but what they didn't have differing views on was the importance of this wave of claims against Cuban instrumentalities. And that's why you need to have four different suspension provisions to toggle on and off for all the diplomatic circumstances. You just don't need that if we're talking about a couple edge cases getting through.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Ms. Ratner, do you think the LIBERTAD Act abrogates sovereign immunity for agencies and instrumentalities of countries other than Cuba?

MS. RATNER: So we've stated in our brief that the answer is probably yes if that question ever came up to the Court. We have sort of a host of statutory indicia. Most of

them would apply to everyone. Some apply only to Cuban instrumentalities. I think there's probably enough that Congress would have said other nations who have instrumentalities that are knowingly and intentionally trafficking in the confiscated property, that they'd be on the hook too.

But we don't think and the government doesn't think the Court needs to answer that question given that some of the indicia are Cuba-specific, and we've never seen an -- a non-Cuba --

JUSTICE BARRETT: Well, I mean, I think the thing that's hard for you is that, you know, you have a lot on this statute that points to Cuba and that makes Cuba an exception. I think it's a different question, a slightly different question, whether the statute is clear enough if you're talking about other sovereigns. And so, even though I agree with you and the government that we wouldn't have to answer that question directly, I think it lurks in the background of deciding whether this waiver or this abrogation is clear enough.

MS. RATNER: Yeah, Justice Barrett, I

don't think the 1996 Congress would have had any qualms if other entities that were -- again, we're talking about instrumentalities, so, essentially, state-controlled companies -- were partning -- partnering with Cuban state-controlled companies knowingly and intentionally trafficking, that they would be swept in just as private parties are.

But, again, if the Court does have qualms about that, it's a purely hypothetical circumstance at this point, so we don't see any need to weigh in on it.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: So it seems to me the thrust of your argument is that we should look at this language in Title III and -- and know that it is clear that Congress meant to allow these claims and judgments to go forward because Congress wanted these claims to proceed. The -- the political and foreign policy circumstances were such that, you know, it was sort of punishing Cuba for having confiscated people's property.

And I -- I see that, but how do you

respond to all of the evidence that we have that indicates that that really wasn't -- in other words, the claims process really wasn't the primary thrust of this statute? This dovetails with what we were talking about in the earlier case, that when we see that what Congress was trying to do was to isolate Cuba economically by deterring third-party investment, then maybe, when it set up this cause of action, it really was like, I'm just going to let the regular rules operate as to whether or not you can actually bring a claim because my focus -- I'm impersonating Congress now -- my focus is on this third-party investment problem that I'm trying to solve.

You say yes, but you set up a cause of action, so that must have meant that they also intended to abrogate sovereign immunity. And I guess I don't necessarily see why that's the case.

MS. RATNER: So, Justice Jackson, the thrust of our argument is not just that Congress set up a cause of action. It is that this is woven into the architecture of the statute. When Congress talks about who would

be defendants, well, the only defendants it calls out by name are foreign instrumentalities. When it talks about specific rules for claims, the only particular claims it talks about are claims against Cuban instrumentalities.

JUSTICE JACKSON: Right.

MS. RATNER: And when --

JUSTICE JACKSON: So it -- it -- it appreciated that claims could happen. I -- I'm not faulting you or saying that that's not in there.

What I'm asking you is whether it intended for those claims to happen under the circumstances that the FSIA would allow.

MS. RATNER: And I think the answer -- the two best pieces of evidence on that --

JUSTICE JACKSON: Mm-hmm.

MS. RATNER: -- for why the answer is no, one is the embargo we've already talked about, especially the embargo as codified in 1996.

And two is Section 6032. Excuse me, Section 6082(c), which says apply the provisions of Title 1 -- Title 28 that apply in

Section 1331 actions, general federal question actions. That does not include the FSIA.

JUSTICE JACKSON: All right. Let me ask you one more and then I'm done with this part.

How does allowing this flood of claims to come in advance what I see as Congress's primary purpose? I think you get a little bit more mileage out of it if you're saying they absolutely intended to abrogate sovereign immunity with this cause of action, notwithstanding the existence of the FSIA, and they're not saying anything about that, because we know that they were trying to deter third-party investment and somehow this is going to help that.

So tell me -- help me to figure out how allowing this flood of claims is actually aimed at furthering Congress's primary purpose for this statute.

MS. RATNER: Because the primary purpose was not just third-party traffickers. The other primary purpose, probably the primary primary purpose, was the Cuban government itself as the key culprit here.

And so preserving FSIA immunity would give a Cuban instrumentality a pass when a comparable private company would be on the hook for a trafficking claim. And the Cuban -- the Cuban company would get a pass by dint of its relationship to the Cuban government. That is hard to square with a --

JUSTICE JACKSON: Maybe. Maybe. I mean, you know, there's -- there's foreign policy implications. The --

MS. RATNER: Correct. But --

JUSTICE JACKSON: -- the U.S. Government is -- is actually punishing Cuba, but --

MS. RATNER: But, Justice Jackson, this is a statute that a couple provisions earlier has accused Cuba of "cold-blooded murder." It is a couple provisions before that, has said residential property is off limits unless you're associated with the Cuban government. Then we're going after your house too. And so the --

JUSTICE JACKSON: And your point is that -- that -- that the statute is authorizing private individuals like Exxon to be like an AG

to punish the -- Cuban government for that conduct?

MS. RATNER: No, Justice Jackson. My point it -- is it is implausible that Congress would have wanted a Cuban company to fare better than a private trafficker given all of the other statutory signals.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Gannon.

ORAL ARGUMENT OF CURTIS E. GANNON
FOR THE UNITED STATES, AS AMICUS CURIAE,
SUPPORTING THE PETITIONER

MR. GANNON: Mr. Chief Justice, and may it please the Court:

Taken together, multiple provisions of the LIBERTAD Act clearly show that Congress abrogated the jurisdictional immunity of Cuban agencies and instrumentalities without regard to the Foreign Sovereign Immunities Act.

Apart from the definition of "person," other provisions clearly contemplate that Cuban agencies and instrumentalities will be defendants against whom judgments may be

obtained, but two more provisions particularly establish that the FSIA does not generally apply to Title III suits.

Section 6082(c)(1) makes it clear that such suits are brought under 28 U.S.C. 1331 rather than the neighboring section that supplies jurisdiction for suits under the FSIA itself. And then 6082(c)(2) affirmatively brings in a particular section of the otherwise ousted FSIA.

The decision below would effectively negate suits that Congress authorized, thereby compromising a mechanism that Congress and the Executive have concluded will promote U.S. and national interests and a transition to democracy in Cuba.

This Court should reverse that decision. I welcome its questions.

JUSTICE THOMAS: Should we treat the assertion of sovereign immunity here any different from the assertion of sovereign immunity in Kirtz?

MR. GANNON: I -- I think that we take comfort from the fact that we have a lot of additional provisions. I -- I don't -- I'm not

quibbling at all with the idea there still needs to be a clear statement.

And to the extent that Justice Jackson was asking questions about the fact that we have a statute here that makes this different, we're not just talking about sort of a common law background, we're trying to reconcile two different statutory schemes, I would say the point that I just made makes it clear that Congress was displacing the FSIA as the background rule here when it said that this is an action that's going to arise under 1331.

The jurisdictional provisions of this -- of -- jurisdictional immunity of the FSIA goes through Section 1330. 1330 says that jurisdiction exists when an exception to the -- to the FSIA has been satisfied.

And, here, Congress said that's not the statute that governs this action.

JUSTICE THOMAS: Do you think these two --

MR. GANNON: It said this is a federal question of jurisdiction.

JUSTICE THOMAS: So do you think that these two statutes can be reconciled?

MR. GANNON: I think that the -- I -- I think that the -- as my friend was just saying, I wouldn't reconcile them by saying that you need to go through both gates. I understand that that's a -- a normal thing to do when you're looking at two different statutory schemes.

I think Congress has already made the decision and said we want this not to be an FSIA suit and -- and they did not want this to be a Swiss cheese situation where there would have to be some incidental overlap that would allow you to get through one of the -- like the commercial activities exception here.

JUSTICE SOTOMAYOR: I'm sorry.

MR. GANNON: I mean, with --

JUSTICE SOTOMAYOR: Can -- answer the question. Could you go through both gates?

MR. GANNON: I -- I think --

JUSTICE SOTOMAYOR: Is it impossible to go through both gates?

MR. GANNON: I think, in the vast majority of suits, it probably is going to be impossible.

JUSTICE SOTOMAYOR: I didn't say -- I

didn't ask that.

MR. GANNON: I -- I -- I --

JUSTICE SOTOMAYOR: There are still a swath of cases.

MR. GANNON: -- I am not going to say that there will never be a suit where -- where the -- where the plaintiff could satisfy --

JUSTICE SOTOMAYOR: All right. Could --

MR. GANNON: -- the commercial activities exception, but I think that that's a gross mismatch between what Congress was targeting here, which is trafficking in all of this expropriated -- property, especially when the Cuban governmental entities are the main -- they -- the main culprits and beneficiaries of that trafficking conduct which Congress wanted to --

JUSTICE SOTOMAYOR: But the main -- the main culprit -- the main culprit was the Cuban government, yet Congress dropped the Cuban government as one of the potential defendants, so I don't see how there was congruity there.

Two amicus briefs, the foreign

sovereign immunity scholars and the foreign international law scholars, raise the Charming Betsy interpretation, canon of interpretation. We know Charming Betsy was at the founding and we know that Congress wanted to push the boundaries of international law with -- with Title III.

But Charming Betsy cautions us to try to construe statutes not to violate international law. Here, not only is it pushing it to a private cause of action against the Cuban government and its subsidiaries. Justice Barrett has asked your -- the Petitioner's counsel whether they could also sue other countries' agencies and instrumentalities, and see -- she said yes.

What's your position on that?

MR. GANNON: Well, I'm -- I -- I'm happy to start with the third countries question, but I also want to get back to talk about the customary international law point that you were making about Charming Betsy. And with respect to third countries, Footnote 5 in our brief doesn't take a position on this. I do think that --

JUSTICE SOTOMAYOR: Isn't it the logic of your position -- if you're saying that it --

MR. GANNON: I -- I --

JUSTICE SOTOMAYOR: -- abrogated the FSIA, why would that abrogation -- because it doesn't say it abrogates sovereign immunity with respect just to Cuba.

MR. GANNON: It -- I think that several of the provisions are Cuba-specific. The ones that specific --

JUSTICE SOTOMAYOR: Several are but not all of them.

MR. GANNON: I agree with that, Justice Sotomayor. And I think that it is clearer that there's an abrogation with respect to Cuban agencies and instrumentalities, and I think that that would be enough for the Court in this case.

But, if you think that it's all or nothing, then I would make two points that would mitigate the potential risk associated with that. First, to our knowledge, there's not a single pending Title III case that brings any claims against third-country agencies and instrumentalities. And second --

JUSTICE SOTOMAYOR: Once we say it's okay, even if we reserve the question?

MR. GANNON: They -- they make -- and second --

JUSTICE SOTOMAYOR: You know that we're inviting that litigation. But go ahead.

MR. GANNON: And I -- and my second point is, to the extent that it looks like that's going to be any sort of problem, then the President has the suspension power and he could suspend or partially suspend the right to bring Title III actions if he thought that that was going to create foreign policy problems.

And that also was part of my answer to your question about the customary international law point in Charming Betsy, which is that the administration, the executive branch, was very concerned about exactly those types of things when this statute was -- when this bill was being debated in 1995 and 1996.

And the State Department letter that my friends on the other side quote specifically said that the suits against agencies and instrumentalities would go far beyond current exemptions in the FSIA. The executive branch

was concerned about this.

And I think Congress's response to that was to say we are going to exercise our power to go beyond what the FSIA currently allows. But, if you were to adopt the Respondents' reading here, then that would not be the case because it would not be able -- be able to go beyond the FSIA if they also had to comply with the FSIA.

And the one change that I think Congress made after that point in the legislative development that is relevant to this is that at the executive branch's request, they granted the President the suspension power.

And the suspension power is a way for the President to help manage whether he thinks that the risk to foreign policy, offending foreign sovereigns, the -- whether we're going beyond what customary international law allows is worth it with respect to the U.S. national interest in expediting a transition --

JUSTICE KAVANAUGH: Which way does --

MR. GANNON: -- to democracy in Cuba.

JUSTICE KAVANAUGH: Which way does the

suspension power cut here? That's -- I'm trying to figure that out because your rhetoric and -- and Petitioner's counsel is Congress really wanted to allow these suits and not to have them subject to the gatekeeping of the FSIA.

And yet Congress gave the President unlimited power --

MR. GANNON: Well, I --

JUSTICE KAVANAUGH: -- to say no, almost unlimited power to say no, which then happened for the next 23 years. And that's really just based on national interests. Basically, it's completely up to the President.

MR. GANNON: I mean, to -- to be clear, Justice Kavanaugh, I -- I do think it's quite clear Congress gave the suspension power to the President with those qualifications, and so I don't think that there's something that we need to sort of decline to think that Congress gave him that power.

JUSTICE KAVANAUGH: No, I know -- I know that --

MR. GANNON: And, secondly, I would say that --

JUSTICE KAVANAUGH: Let me just finish. I know they gave him that power. But how does -- and this is my question -- just how should that affect how we think about the FSIA? Because it's not just, oh, Congress wanted these suits tomorrow.

MR. GANNON: Well, I -- I -- I think it suggests that they recognized that they were going past what the FSIA would otherwise allow and that, therefore, there was a need to have this extra potential governor on the speed of the process, but they were very clear that they wanted it not just to be U.S. national interests. They actually changed the phrasing of what the executive branch requested, as -- as -- as explained in the conference report and some of the -- some of the floor statements associated with the adoption of the final bill, to say that they wanted it to be U.S. national interests and it had to promote -- expedition of a transition to democracy in Cuba.

JUSTICE KAVANAUGH: That's a hundred percent in the discretion of the President, a hundred percent.

MR. GANNON: That is -- that is his

determination to make. He reports it to Congress. And that's -- that's the power that he has to suspend this. But I think that that's because what --

JUSTICE KAVANAUGH: So this transitions us back -- the statute, when you put the presidential suspension part into it, really transitions back to the -- the pre-FSIA when it's just up to the President.

MR. GANNON: Well, I -- I mean, I -- I think that --

JUSTICE KAVANAUGH: Which might be the right answer here.

MR. GANNON: Right.

JUSTICE KAVANAUGH: I'm not saying it's not the right answer.

MR. GANNON: I think what Congress has done is Congress has actually sort of created a default rule here, which is that these causes of action will proceed. These will be appropriate defendants, and the FSIA is not a separate throwing of the dice.

JUSTICE KAVANAUGH: You keep on floating that it's totally up to the President whether these claims can proceed.

MR. GANNON: The President ultimately has --

JUSTICE KAVANAUGH: Right?

MR. GANNON: -- the ability to --

JUSTICE KAVANAUGH: Isn't that right?

MR. GANNON: Yes. Ultimately has the ability to decide that because -- if he is doing it for the purposes that the LIBERTAD Act was intended to promote, which is encouraging a transition to Cuba. To the extent that these types of trafficking lawsuits are a problem, if it's because they're lawsuits against third countries --

JUSTICE KAVANAUGH: Do you think that's judicially reviewable? I mean, I'm -- this is getting in the weeds, but since you're putting so much weight on that second clause, do you think a court could review that, his determination that it was expedited --

MR. GANNON: I -- I would not expect that to be judicially reviewable. It's something that he needs to refer --

JUSTICE KAVANAUGH: That's fine.

MR. GANNON: -- to Congress. I think that -- that -- that there is political

accountability associated with that and that -- but that Congress recognized that this is going to be a situation that had been evolving for decades, that it had taken them decades to get from the -- from the Foreign Claims Settlement Commission to this, and they -- but they wanted this to go as fast as it could, with the President able to make judgments according to the way circumstances developed.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE ALITO: What are the practical implications of the interesting question in this case? Unless Cuban instrumentalities have property in the United States against which a judgment could be executed, what difference does all of this make as a practical matter?

MR. GANNON: I think that's a -- a -- an excellent question, Justice Alito, and as a practical matter, that might even -- that sort of obviates the need to even answer the question about 1610 and 1611(c). If Cimex doesn't have any assets in the United States, then -- then the execution immunity question

that you were asking sort of drops out.

But that doesn't mean that there isn't value to having a judgment. And there's nothing anomalous about having the exceptions to attach -- execution and attachment immunity be narrower than the -- than the exception to jurisdictional immunity. The Court observed that in NML Capital. And in some suits, it literally is the case that the plaintiff simply can't collect on a judgment that it got consistent with an exception to jurisdictional immunity -- FSIA unless there's a waiver of the defendant.

And -- but that that doesn't mean that there isn't value to having a judgment. It could be taken to courts in other countries. To the extent that -- that this goes beyond what customary international law allows, those other countries may be less likely to enforce depending upon what the situation is.

But, you know, I think that a company like Exxon that had, you know, tens of -- $70 million expropriated in 1960, and you see a lot of suits that come here occasionally where -- where long-lived corporations and others have

investments that they want to vindicate. They get a judgment. It may take decades for them to find property in an appropriate case where they can try to attach, but that doesn't mean that they don't think that there's some value beyond just having a certified claim from the foreign claims settlement --

JUSTICE ALITO: Yeah. Perhaps I should have asked this of Ms. Ratner and she can address it or not as she chooses when she gets up for rebuttal.

But, I -- I mean, I assume Exxon has some financial reason for doing this. And I -- it's kind of beyond me what the value of this judgment is going to be. If it can't be executed in the United States, which seems likely, and its value is dependent on registering it in a foreign country and trying to execute it there when the Helms-Burton Act goes beyond international law, that really seems like a -- a long shot, but I'm probably missing something.

MR. GANNON: I -- I mean, it -- it -- it might be a long shot, but, as I said, that's -- that's not at all anomalous under the

FSIA. The way -- the way it is designed, it is often the case that somebody can get a judgment and there -- there is literally not an applicable exception to execution immunity that is -- that -- that is satisfied merely because they already had gotten through the gate of --

JUSTICE ALITO: Thank you.

MR. GANNON: -- jurisdictional immunity.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

JUSTICE SOTOMAYOR: Do you see 6082(c) as a -- as a jurisdictional provision?

MR. GANNON: I -- yes, I think that it's -- it's -- it points us to 1331 as the basis for jurisdiction and --

JUSTICE SOTOMAYOR: But it doesn't. It says procedure -- but this section is labeled "procedural requirements," not jurisdictional. And the first subsection states that "the rules of the courts of the U.S. apply to actions under this subsection to the same extent as such provisions and rules apply to any other action brought under Section 1331."

So it's only talking about procedures. It's not talking about jurisdiction.

MR. GANNON: I think it -- what it is saying is that all the provisions of Title 28 apply as if it is a federal question jurisdiction action like any other, and it uses the word "other."

JUSTICE SOTOMAYOR: All the procedures.

MR. GANNON: And I think there's no way to read the word "other" there without making it say that this too is an action under 1331, which means that this is not an FSIA suit under 1330; it's a federal question jurisdiction suit.

There's also a separate, you know, amount in controversy requirement.

JUSTICE SOTOMAYOR: So we're still back to the original question, was the intent to repeal the FSIA. But that doesn't tell us that that was its intent.

MR. GANNON: I think, because it's pointing to the jurisdictional provision of the FSIA --

JUSTICE SOTOMAYOR: No, it's

pointing -- it's pointing to procedural requirements of 1331.

MR. GANNON: But I think that that reads out the word "other." If you wanted to just say we're going to treat this as if it is a 1331 action and use those procedures, we're going to borrow those the way it borrows other provisions from the FSIA, the very next subsection borrows its service-of-process rule, says use the rules, service shall be made in accordance with Section 1608. They feel like they have to go grab a provision of the FSIA and pull it in and make it applicable.

Here, they said Title 28's rules apply here, like it's a 1331 suit, like -- like other 1331 suits. It doesn't say it's like it's a 1331 suit. It says it is another 1331 suit. And so I think that the only way to read that is, if it's under 1331, it's not under 1330.

They could have said 1330 or 1331. They could have said depending on which defendant you have. If it's against a foreign sovereign, you would want it to be a 1330 suit. If it's against one of the -- if it's against the cruise ships from the first case this

morning, it's a federal question jurisdiction case. They didn't say that. They said it's 1331.

And -- and -- and I think that the combination of these two provisions back to back -- I -- I take the point that the -- the heading is "procedural requirements," but that it -- they're telling us building-block things about the case, which is where do you get jurisdiction and how do you get service of process and, hence, personal jurisdiction.

And so I -- I -- I do think that that shows that Congress was making the jurisdictional decision here, not just the liability-creating decision, as Justice Kagan was previously asking.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Well, I don't -- I don't know. I mean, it seems to me you're asking us to do something very unusual here, which is to take a statute which does create a cause of action and a cause of action directly against foreign sovereigns, but to say that just because you've created a cause of action against foreign sovereigns, you're also

abrogating immunity when you know that there's a Foreign Sovereign Immunities Act that is in charge of the immunity question, if you will.

And it raises the question -- you know, I'm -- this is not a magic words test. It's, like, it could have done it in a thousand different ways, but why didn't -- rather than this very peculiar, you know, reference to 1331, which it's pretty unclear what it means.

But why didn't Congress just say, like, we're -- you know, we're displacing the FSIA with respect to this, so we're abrogating sovereign immunity, or just give some indication that that's what it meant to do, other than create a cause of action, which is a completely different question in the foreign sovereign immunity context?

MR. GANNON: I think that it did both. I mean, I -- I -- I -- I -- I just have to go back to what I -- what I said in my intro, what I just said in response to Justice Sotomayor.

I think the only way to read 6082(c)(1) and (c)(2) is to say that Congress here was speaking to questions of subject matter and personal jurisdiction with respect

to foreign sovereigns. And that's the -- that's the reason, I mean, they -- they -- if -- if they wanted it to just be about other defendants, like the cruise lines --

JUSTICE KAGAN: Yeah.

MR. GANNON: -- then -- then they -- they don't need to be -- they --

JUSTICE KAGAN: So you're really saying it really hinges on those two little --

MR. GANNON: Those are the best --

JUSTICE KAGAN: Yeah.

MR. GANNON: -- indications we have that Congress is actually talking about it in the jurisdictional sense.

JUSTICE KAGAN: Yeah. So you're not making a -- a -- a point about, like --

MR. GANNON: But -- but we have all the other confirmatory provisions that my friend is relying upon.

JUSTICE KAGAN: You're -- you're not -- but you're not -- you're not saying, oh, you know, like, Kirtz definitely controls this because, whenever you have a cause of action against a government, that answers your question? You're not saying that?

MR. GANNON: That -- that is -- that is correct. I think we're -- we're asking for Kirtz plus. We think that -- we think that the cause-of-action language, I -- I don't want to minimize the importance of it, I think that the fact that -- that the -- that the -- the 1996 Congress used the same words that were -- were able to waive federal sovereign immunity when they were talking about foreign instrumentalities and agencies, I think that -- that -- that -- that is -- that is a compelling indication, but I think here it is important that we also have specific references to Cuban government agencies and instrumentalities all over the statute and we have --

JUSTICE KAGAN: And --

MR. GANNON: -- these provisions talking about what I'm calling --

JUSTICE KAGAN: Got it.

MR. GANNON: -- an ouster of the jurisdictional portion of the FSIA.

JUSTICE KAGAN: If I could take you back to Justice Alito's question, and let's assume that I think that this execution immunity provisions in the FSIA really

continue, you know, that there's no reason to think that they didn't continue on. And, indeed, the fact that this statute amended them a little bit makes clear that Congress thought that they were going to continue.

So then the point is to -- then what you're asking us to do is to read the statute in a highly unusual way in order to abrogate sovereign immunity in cases in which, even putting aside the practical issues that Justice Alito was talking about, there are -- there are legal bars to collecting on your judgment against a foreign sovereign.

So, like, why would Congress have done that?

MR. GANNON: I -- I mean -- I, you -- you could ask the same thing with respect to other parts of the FSIA's immunity exceptions that aren't echoed in -- in the attachment exceptions. And as the Court said in NML Capital, it's a smaller set of exceptions for execution and attachment immunity than it is for jurisdictional immunity.

And since then, it's the -- the mismatch has actually grown. 1605B, a new

provision that Congress added in 2016, literally has no parallel in execution immunity. And so you -- you have a -- a waiver of jurisdictional immunity with respect to acts of international terror in the United States, and there's no corresponding waiver on attachment and execution immunity. And so I --

JUSTICE KAGAN: Yeah, I mean, I guess one -- one aspect of this is, if -- if -- if sort of the thrust of the argument, and I know, you know, you're trying to hook it into these technical provisions, but if a thrust of the argument is Congress was really concerned about this -- this problem and it really wanted to go after these agencies and instrumentalities because weren't they the ultimate bad guys here, I mean, if that's really what Congress was trying to do, it -- it -- it -- it proceeded in a very odd fashion because you're not going to get anything from them anyway given that the execution immunity exists.

MR. GANNON: Well, take -- take -- take out the execution immunity. There's still going to be the basic --

JUSTICE KAGAN: Well, take it out?

That's like -- that was the question.

MR. GANNON: Well, no, I -- I'm -- well, no, but my -- my point, Justice Kagan, was going to be back to what you alluded to I thought as the practical considerations that Justice Alito raised, which is that Congress knew there were not going to be very many Cuban assets in the United States anyway. Now we have -- we have some blocked assets the federal government has been holding for decades and maybe --

JUSTICE KAGAN: But, again, it's not just the practical thing that I'm saying. What Congress did not do was to touch executive immunity, execution immunity provisions, that we're putting aside the practical concerns, we're going to prevent as a legal matter these agencies from having to cough up.

MR. GANNON: I -- I -- I think that 1611(c) is ambiguous about whether they were displacing 1610 or not. I think, as my friend pointed out, notwithstanding clauses often create this type of ambiguity, whether they're going to be -- whether there's a negative implication or whether they're just belt and

suspenders.

JUSTICE KAGAN: Yeah, I don't buy that one.

MR. GANNON: And so we -- we -- we haven't taken a position on that. But, as I'm saying, I think that it -- that it is quite --

JUSTICE KAGAN: The choice.

MR. GANNON: -- it is quite common for there to be a mismatch between these two types of provisions. And I don't think, when Congress was saying that it wanted these types of lawsuits to proceed and they wanted them to be a tool for foreign policy, that even if at the end of the day there wasn't going to be collection against actual Cuban property that was already in the United States, Cuban governmental property that was already in the United States, that doesn't mean that there isn't some power to having a federal judgment that says, look, the Cuba is actually -- people are trafficking in this expropriated property, there should be treble damages. This is something that people should be held accountable for. We haven't forgotten this. These are U.S. nationals whose property was

wrongly expropriated. We want there to be something done about it and we want there to be the poison pill that my colleague talked about earlier that would deter --

JUSTICE KAGAN: Thank you.

MR. GANNON: -- others from cooperating with the Cuban government.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

JUSTICE JACKSON: Yeah. I guess I'm just trying to puzzle through why, where you landed with Justice Kavanaugh, that Congress wanted to go back to the pre-FSIA world in this particular context such that the President was controlling when these suits go forward and when they don't.

I guess I don't understand why that doesn't put the onus on Congress even more so to be clear about its intentions in doing that in light of our -- clear statement rule.

I mean, it's -- it -- like, that's a huge thing. That's not just we want these

individual suits to go forward. I hear you saying no, what they were really trying to accomplish here was to repudiate in this particular circumstance the reason why the FSIA was put into place, which was to prevent this ad hoc, you know, President deciding when and when not to let these suits to go forward.

So, if Congress was really doing that, why wouldn't they have said it? Wouldn't --

MR. GANNON: Well --

JUSTICE JACKSON: -- wouldn't we expect that they had to have said it in order to satisfy our clear statement rule?

MR. GANNON: I -- I -- I think that what Congress did is -- is essentially exactly what they did in the Beaty case that Justice Sotomayor was reading before -- from before, which is to say the default rule here is no sovereign immunity in this context. We are adding a waiver, an abrogation of sovereign immunity for these specific circumstances. It's a narrow and --

JUSTICE JACKSON: Okay. But, first of all -- first of all, they didn't say that. They -- they didn't -- those words aren't in

the statute, but that's what you're --

MR. GANNON: Well, that's -- that's -- that's the whole first half of -- of my argument.

JUSTICE JACKSON: Yes. You're -- you're -- you're -- I appreciate, I just want to be clear, they didn't say that. You're implying that they did that from saying we want these claims to go forward, right?

MR. GANNON: Yes. And then I'm saying that the waiver power on the back end --

JUSTICE JACKSON: Yeah.

MR. GANNON: -- is something that -- that -- that provides a couple of different functions. One is that it ensures that these aren't something that's actually going to slow down a transition to democracy in Cuba, make it -- make it counter-productive; and, two, it makes it possible for the President to -- to put back in this narrow category of cases the protections of sovereign immunity that for six months at a time, I mean, he can only suspend the ability to bring new lawsuits. He can't actually just cancel out lawsuits.

JUSTICE JACKSON: I understand. But

we don't need to put --

MR. GANNON: Once the lawsuit is filed, this is not the same as the pre-1942 regime.

JUSTICE JACKSON: I -- I don't -- I understand. But we don't need to put it back in if the FSIA is doing its work to begin with on the front end, and that's the question in this case. So it's a -- it's just a little odd, I think, to --

MR. GANNON: But I --

JUSTICE JACKSON: I -- I think that a lot of these arguments are really just trying to get around the fact that what the U.S. Government did in this Title III action is pretty extraordinary in general, and we would have expected that if they were creating a cause of action like this, they would have addressed the -- the sovereign immunity question.

And in the absence of any statement about sovereign immunity, the question is, did they intend for the FSIA to be operating or did they intend that by not talking about sovereign immunity, we would read this statute to

necessarily mean that sovereign immunity is abrogated?

And it seems to me the second is more implausible. I know -- I know what Ms. Ratner said, but it seems to me that the kind of natural way of looking at this is that when Congress was silent in Title III about abrogation of sovereign immunity against the backdrop of a statute that governs how you abrogate sovereign immunity, that it was intending to allow that statute to operate. And if it wasn't, we would have expected them to say that.

MR. GANNON: Well -- and -- and I -- we have several different provisions that are, like, pulling individual provisions out of the FSIA --

JUSTICE JACKSON: Mm-hmm.

MR. GANNON: -- and incorporating them here. They're doing -- they're -- they're doing all that. We know that Congress was legislating against the FSIA. We know the executive branch had raised concerns about going beyond the FSIA.

I think that the suspension power is a

way to ameliorate those concerns, those international law concerns, and I think that what it indicates is that Congress understood that this was indeed strong medicine.

The poison pill that my colleague referred to earlier today is strong medicine, and if it -- if it is so strong that it might kill the patient, the President should be able to use his ability to evaluate foreign policy and -- and -- and -- and what's going to happen in Cuba in order to decide we're going to pull back a little on it for six months at a time.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Lobel?

ORAL ARGUMENT OF JULES L. LOBEL

ON BEHALF OF THE RESPONDENTS

MR. LOBEL: Mr. Chief Justice, and may it please the Court:

Section 1604 of the Foreign Sovereign Immunities Act provides that foreign state instrumentalities shall be immune in U.S. courts unless one of the exceptions in 1605 to 1607 are met. Nothing in Title III's text

abrogates that immunity. Title III's cause of action is not inconsistent with that restrictive non-absolute immunity. Congress considered whether to create another exception to immunity and decided not to when the object -- executive objected.

This Court should not read in an exception where Congress did not enact one. Rather, the Court must harmonize the two statutes if there is any way possible to do so. And, here, it is obvious that it's possible. Title III allows lawsuits against foreign instrumentalities where one of the FSIA's exceptions are met.

Petitioner therefore pivots to a practical argument that because of the embargo's heavy restrictions on trade with Cuba, few Title III suits could succeed. That policy argument can't substitute for the absence of an explicit textual abrogation or an irreconcilable conflict between the two statutes.

But, moreover, Petitioner's factual premise is just wrong. Helms-Burton gave the President the power to ease the embargo. And

there are now 70 general licenses that have resulted in $8 billion of exports from the United States, billions of dollars in remittances, and millions of travelers flowing to Cuba in the last two decades.

Finally, Petitioner concedes that under Title III's text, if there is abrogation for Cuban entities, there is abrogation for all the instrumentalities of all countries that trade with Cuba.

I welcome the Court's questions.

JUSTICE THOMAS: Could you give an example of an action that -- a Title III action that could be brought consistent with a -- an exception under FSIA?

MR. LOBEL: Sure. There are now 50 Cuban importers that import millions of dollars of goods from the United States, grains, chickens, all sorts of goods under general licenses. They enter into a contract with an American exporter. The American exporter ships the goods. The Cuban importer pays the money to the exporter. That is a direct effect.

All of those Cuban importers could be sued if they're using expropriated property.

The ports, the docks, as we heard this morning, the airports, the warehouses, their offices, all of those are likely to be on expropriated property. That's one.

Second, the case you heard this morning, Havana -- when the cruise ships went into Havana -- to the docks in -- in Havana, there were six Cuban instrumentalities that either owned or operated those docks. Havana Docks could have sued any one of those.

And there are innumerable cases. But the key point is that the -- Helms-Burton gave the President the power to expand or contract the embargo. And various presidents have used that to either ease the embargo or expand it.

And you cannot fix in time whether or not this was going to happen in 1995, 1996, or now. There has been an enormous expansion of trade with Cuba, and that expansion allows for the -- possibilities of many suits.

But back to Justice Sotomayor's question before, I don't think this Court can evaluate how many suits there would be, whether it's too few, whether it's too many, what to do about it if it's too few. That's the job of

Congress.

This Court's job is to evaluate the text and see if there's an irreconcilable conflict. And as I think in their answer --

JUSTICE GORSUCH: Mr. Lobel, on -- on that -- I'm sorry to interrupt, but you keep mentioning irreconcilable conflict. And I think Ms. Ratner might respond, well, my duty is to show a clear abrogation of sovereign immunity, not that there -- that there is some way to reconcile these two statutes. That only comes in when we get to implied repeals under our case law, Carcieri versus Salazar.

And we're not dealing with, she would say, an implied repeal here. We're dealing with an express repeal. And she has evidence, and you may find that insufficient or -- or -- or adequate, but -- and we can have that argument, but I -- I think what she would resist you -- your suggestion that she has to show a super-super-clear abrogation, not only show that Congress abrogated sovereign immunity but that it also made clear its intention to displace the FSIA.

Thoughts?

MR. LOBEL: Well, there are two statutes, so they have to make clear -- they have -- they have to -- you have to reconcile the two statutes. But --

JUSTICE GORSUCH: Well, no, not -- not necessarily. Carcieri says you have to reconcile them when there -- when one's an implied repeal.

MR. LOBEL: Right.

JUSTICE GORSUCH: And, again, I think her argument would be I'm not arguing about -- well, she would say that too, of course, because she wouldn't give up anything. Fair enough.

MR. LOBEL: But --

JUSTICE GORSUCH: But I think she'd say: My primary argument is that there's an express repeal. And so yes, in other circumstances, you go to the FSIA, but, here, why couldn't Congress, for example -- I mean, I think we've talked about it in Title III -- if it had said we abrogate sovereign immunity, nobody would be talking about trying to reconcile that with the FSIA, right? We --

MR. LOBEL: Correct.

JUSTICE GORSUCH: -- just wouldn't be taking that.

MR. LOBEL: But --

JUSTICE GORSUCH: We would be taking the statute on its own terms. And she's saying that's essentially what happened here.

Now you may disagree with that, but this reconciling of things really is kind of a side show, isn't it?

MR. LOBEL: You're right that I disagree with it. There is undisputably no express repeal.

JUSTICE GORSUCH: Oh, oh, fair enough. I -- I -- I --

MR. LOBEL: Undisputably, there's no express repeal.

JUSTICE GORSUCH: But you'd agree with me, though, that if it -- if it were an express repeal --

MR. LOBEL: If there were an express repeal --

JUSTICE GORSUCH: -- we wouldn't be talking about reconciling things?

MR. LOBEL: Correct. Correct.

JUSTICE GORSUCH: Okay. All right.

MR. LOBEL: If there wasn't -- and what Kirtz said about an express repeal is, if the statute said in so many words that it was stripping sovereign immunity --

JUSTICE GORSUCH: And that's the real question before us, isn't it?

MR. LOBEL: But that's not here.

JUSTICE GORSUCH: Okay. No, I understand that point.

MR. LOBEL: If that's the real question, we win undeniably.

JUSTICE GORSUCH: Well --

MR. LOBEL: There is no express appeal that anybody could read --

JUSTICE GORSUCH: I -- I think it --

MR. LOBEL: -- in the statute.

JUSTICE GORSUCH: -- would probably be deniable by -- by Ms. Ratner at least.

MR. LOBEL: Okay. Yes, I'll agree with that.

JUSTICE GORSUCH: And -- and -- and by the U.S. Government it turns out too.

MR. LOBEL: And maybe the U.S. Government.

JUSTICE GORSUCH: Yeah, so I --

MR. LOBEL: But hopefully none of -- none of the Justices.

(Laughter.)

JUSTICE GORSUCH: Well, right. Exactly. Let's talk about that, though. And -- and I understand the toggling on-and-off switch by -- by the President can cut both ways. But one way in which it could cut against you potentially is, why would Congress have put that in there except for if it thought that the FSIA didn't apply and it was kind of reverting to the old world in which courts would ask the State Department whether or not a suit should proceed as a matter of comity and grace?

MR. LOBEL: One, it's not -- they didn't put it in there because the FSIA -- they thought the FSIA applied. This statute --

JUSTICE GORSUCH: I agree with you.

MR. LOBEL: -- Title III violated international law, extended U.S. -- jurisdiction in many controversial ways. And the President, Secretary of State Warren -- Christopher, said the statute in general, Title III in general, should not be enacted because

of the very cases that you saw -- that you saw -- the very case you saw this morning.

But, again, they could sue if the Foreign Sovereign Immunities doesn't -- Act doesn't apply, they can sue Russian airlines, they can choose Chinese airlines, they could sue Qatari airlines, they could sue any --

JUSTICE GORSUCH: Mr. Lobel, if I might --

MR. LOBEL: Yeah.

JUSTICE GORSUCH: -- redirect you to the question.

MR. LOBEL: Okay. I'm sorry.

JUSTICE GORSUCH: Yeah. Why would -- why would Congress have put that toggle switch in giving the President the opportunity to turn on and off liability if it weren't concerned that there would be Charming Betsy international law possible concerns and it was essentially saying, isn't it kind of an acknowledgment we're not doing the FSIA; we're kind of doing the old regime, the ancient regime, where the State Department tells us whether or not a suit should proceed?

MR. LOBEL: Two responses. One is

they were worried about private -- suits going on -- suits against --

JUSTICE GORSUCH: Private entities.

MR. LOBEL: -- not instrumentalities but private parties all around the world.

JUSTICE GORSUCH: I -- I take that point.

MR. LOBEL: That was -- and that's why they wanted the President to have the right not to suspend the FSIA but to suspend the cause of action generally. They didn't say you can suspend the cause of action against foreign instrumentalities or -- they said you can suspend the cause of action because the cause of action itself was very controversial.

And, second, they didn't want the President to toggle on and off on -- on immunity. They just said the President can suspend the cause of action, but they didn't say anything about whether the President --

JUSTICE KAVANAUGH: But the effect is the --

MR. LOBEL: -- could override immunity.

JUSTICE KAVANAUGH: -- the effect is

the same. I mean, looking at the structure of the statute, to pick up on Justice Gorsuch's questions, the President has a huge role in this statute.

And -- and I -- so that's looking at the text. And then you look at the real world of what's happened since the enactment of the statute and the President's been front and center every six months for 23 years, right?

MR. LOBEL: Right.

JUSTICE KAVANAUGH: And that effect was those suits couldn't go forward. And the question I think I have, looking at that and looking at the real world, is similar to Justice Gorsuch's, but it seems like it would be odd to put the President front and center and then, on top of that, the FSIA, as opposed to the whole idea was Charming Betsy, international law, Cuba, the President is the person in our constitutional structure who can weigh all that as to Cuba and the President's going to have the power, and that's how it's operated and we don't go through this FSIA alternative that Congress had previously enacted.

So that's one way to look at it.

MR. LOBEL: Right. The President textually is given the power to suspend the cause of action. The text says nothing about the President's power to suspend immunity.

Now, of course, if you --

JUSTICE KAVANAUGH: Well, what's the difference between those two things --

MR. LOBEL: The difference is --

JUSTICE KAVANAUGH: -- in -- in practice?

MR. LOBEL: -- in practice, is that you cannot suspend the cause of action. You could suspend the cause of action, nobody can be sued.

JUSTICE KAVANAUGH: Right.

MR. LOBEL: If you don't suspend --

JUSTICE KAGAN: Including private parties.

MR. LOBEL: Including private parties.

JUSTICE KAGAN: So this is a suspension that doesn't just have to do with foreign sovereigns.

MR. LOBEL: Exactly.

JUSTICE KAGAN: This suspension goes

way wider than that.

MR. LOBEL: Correct.

JUSTICE KAGAN: So it's -- it's not clear that the suspension has anything to do with FSIA rules.

MR. LOBEL: I don't think it did. It had to do with the fact that the cause of action itself was very controversial, and the President --

JUSTICE SOTOMAYOR: And the -- and the amount of resources against which attachment could occur is vastly greater against private entities, right?

MR. LOBEL: Correct. That's why the private entities were sued.

JUSTICE SOTOMAYOR: Because more of them -- including other foreign governments, have more property in the U.S., correct?

MR. LOBEL: No question about that. But back to --

JUSTICE SOTOMAYOR: So the suspension, given what Justice Alito pointed out to, which is there's going to be very little assets of Cuban agency or the Cuban government in the U.S., most of the assets are going to be in the

private lawsuits.

MR. LOBEL: Correct. But back to Justice Gorsuch's question because I think it's central --

JUSTICE ALITO: But before you do that, I don't want to interrupt the chain of -- of questioning, but I thought you told me -- at least -- well, you didn't tell me, but I thought you told us that the receipt by a U.S. importer of money from a Cuban instrumentality would fall within the commercial activity exception of the FSIA.

MR. LOBEL: Correct. By a U.S. exporter of goods to Cuba --

JUSTICE ALITO: Yeah, a U.S. exporter.

MR. LOBEL: -- and they would receive money back in the United States.

JUSTICE ALITO: Yeah. Okay. But then you just, you know, two minutes ago, one minute ago, you said there would be very little property here to be executed on.

MR. LOBEL: Oh, no. If it was against a Cuban entity. If it's against a Cuban entity, they couldn't execute --

JUSTICE ALITO: Okay.

MR. LOBEL: -- but it would fall within the FSIA's commercial exception because it would be clearly a direct effect.

But back to Justice Kavanaugh, they -- the text gives the President the power to suspend the cause of action against anybody --

JUSTICE KAVANAUGH: Mm-hmm.

MR. LOBEL: -- private entities, cruise lines, Cuban entities, or any third -- any third-country's entities.

It does not give the President --

JUSTICE KAVANAUGH: So it's even broader. I mean --

MR. LOBEL: Yeah.

JUSTICE KAVANAUGH: Yeah.

MR. LOBEL: But it -- it -- it -- it does not give the President the power to suspend immunity or to override immunity. What the President could do is say: No suits can be brought.

The President does not have the power to say that once suits are brought, and if they are brought against a foreign government entity, I'm suspending the FSIA.

JUSTICE KAVANAUGH: That's a fair

point. I just think it's structurally trying to figure out how this fits together is why I'm asking these questions.

MR. LOBEL: Well -- well, but that's the way to harm -- the provision --

JUSTICE KAVANAUGH: Mm-hmm.

MR. LOBEL: -- allows for the suspension of the cause of action but doesn't give the President any power whatsoever about a -- an immunity except --

JUSTICE JACKSON: And the point --

MR. LOBEL: -- to prevent these causes of action.

JUSTICE ALITO: Does -- does --

JUSTICE JACKSON: And the point I was making with the SG is that if it did, if the Congress's intention was to give that -- the President a toggle switch with respect to sovereign immunity, wouldn't we have expected to see that in the statute? Because that's like an extraordinary thing.

MR. LOBEL: Exactly, Your Honor. And as Justice Jackson alludes to, Congress made a -- a considered, comprehensive determination that we didn't want the President to be doing

this because it led to all sorts of bad things. I mean, all sorts of --

JUSTICE ALITO: Just the -- just --

JUSTICE JACKSON: That was the point of the FSIA to begin with, right?

MR. LOBEL: Yeah.

JUSTICE KAVANAUGH: Why do you think the presidential provision is in there given the FSIA?

MR. LOBEL: Because -- because Title III itself was incredibly controversial. And the President argued not just that the foreign sovereign immunities exception should not be in, but Title III shouldn't be in.

And, actually, Warren Christopher, the Secretary of State, made his -- sent a letter to the House on September 20 excoriating Title III. It's bad for this reason. It's bad for that reason. He didn't mention one reason, foreign sovereign immunity, and that's because they knew they took out the exception two months thereafter.

JUSTICE BARRETT: Well, maybe that's also because, you know, the Cuba -- Cuba and its instrumentalities were the most culpable.

I mean, so you're going to go after the private entities because that's where the money is, but maybe -- maybe Congress and the executive weren't as concerned about the sovereign immunity question when they were talking about Cuba.

MR. LOBEL: Right. But -- but the question isn't Cuba's culpability. As the argument has shown, what Congress was interested in was deterring trade and transactions with Cuba.

And if you look at the findings, 6081(5), (6), (7), (11), it's all about deterring third countries from entering into joint ventures, entering into trade with Cuba. And so that's what -- but I don't think, in any event --

JUSTICE BARRETT: Well, because it didn't want Cuba to continue to profiteer and make money off of the property that it had expropriated.

MR. LOBEL: Correct.

JUSTICE BARRETT: Yeah.

MR. LOBEL: But that says nothing about sovereign immunity.

JUSTICE BARRETT: Yeah. I mean, I'm not -- well, I'm not fighting with you about that point. I'm just saying that I don't think this whole reliance on the Christopher statement to the House does that much for you, but anyway.

MR. LOBEL: Well, no. I'm -- I'm just -- I used the Christopher statement only to rebut the argument that Congress still must have thought or that the President still thought that there was an abrogation of immunity.

The fact that Christopher never mentioned that three months later after they took out the exception meant that the President no longer thought there was an abrogation of immunity and, therefore, didn't argue against it at that point.

JUSTICE ALITO: Just to be clear where we stand, you've made some statements during your argument that seem to me to suggest that you think that the mere fact that Congress did not say expressly that it was abrogating sovereign immunity is sufficient, that's the end of it? We don't need to look any further

than that? Is that your argument?

MR. LOBEL: No.

JUSTICE ALITO: Okay.

MR. LOBEL: You --

JUSTICE ALITO: So then the question is what we can infer from what we see in the statute, right --

MR. LOBEL: I don't think so.

JUSTICE ALITO: -- in the -- in the relevant context?

MR. LOBEL: No, I don't think it's what you can infer. I think there's two ways that you've said in Kirtz and FOMB that you can -- abrogate immunity and that you can abrogate the FSIA, either some express language, which you don't have, or providing a cause of action against a government -- government entities -- in this case, it would be foreign government entities -- which would be rendered a dead letter, which we rendered meaningless. We --

JUSTICE ALITO: Well, that's an interesting reading of Kirtz, but there's nothing in the opinion that talks to that.

MR. LOBEL: Well, certainly, there's something in FOMB, which Kirtz relies on, which

says that --

JUSTICE ALITO: Kirtz itself doesn't say anything about that, does it?

MR. LOBEL: It says "negate." And I think that reading Kirtz in any other way would both be inconsistent with your precedent and would leave this Court in all of those situations down -- down a path of determining what's not a dead letter? Is it like in the expropriation exception, is it that there are 1 percent of claims that can succeed? How are you going to determine that?

JUSTICE ALITO: Well, if we knew that Congress thought that the immunity conferred by the Foreign Sovereign Immunities Act would wipe out 99.999 percent of the potential claims that could be asserted under Helms-Burton, wouldn't it be a fair inference that it did not intend to -- to preserve the foreign sovereign immunities immunity?

MR. LOBEL: I think that the -- the text governs because you can't determine whether it would knock out 99.99 percent. You can't --

JUSTICE ALITO: Well, what's the

difference between a hundred and 99.9 or whatever? I mean --

MR. LOBEL: Well --

JUSTICE ALITO: -- in the case of a hundred, you're inferring they wouldn't have -- they wouldn't have created a cause of action against a -- an instrument -- a foreign government instrumentality if it was a dead letter. It's an inference.

And I don't understand why the inference stops the minute you can find one in a million claims that might get through.

MR. LOBEL: Even if I agreed with you that -- that you can make that inference, that's not the case here. There are many claims that could --

JUSTICE GORSUCH: Well, first of all, do -- do you agree with Justice Alito we can make that --

MR. LOBEL: I do not. I do not.

JUSTICE GORSUCH: So we can only make that inference if a hundred percent of cases are eliminated?

MR. LOBEL: If you look at the statute and you look at the two -- and you look at the

FSIA and you look at Title III --

JUSTICE GORSUCH: No, no, no. I'm asking -- forget about the FSIA. We've -- we've dealt with that.

MR. LOBEL: Mm-hmm.

JUSTICE GORSUCH: We're just dealing with -- with what -- what's required to abrogate sovereign immunity, and you're saying: Okay, you can either use the magic words, or you can create a cause of action that would completely be useless otherwise.

MR. LOBEL: Correct.

JUSTICE GORSUCH: Zero percent of cases.

MR. LOBEL: That's right.

JUSTICE GORSUCH: You agree with those two things?

MR. LOBEL: I do.

JUSTICE GORSUCH: But, once we get to 99.9 percent of cases, you say that same inference is unavailable.

MR. LOBEL: Because I think it's impossible to tell, looking at the statutes, how many -- not in -- not in this case, but more generally, whether or not -- how many

cases are too few, whether or not they're going to succeed.

If you could say we know for certain that 99.9 percent of all the cases are going to fail, maybe then.

JUSTICE GORSUCH: All right.

MR. LOBEL: But you'll never know for certain.

JUSTICE GORSUCH: Okay, okay, okay. So now we're at 99.

MR. LOBEL: Right.

JUSTICE GORSUCH: Okay. How about 90?

MR. LOBEL: That's exactly my point. That is at the --

JUSTICE GORSUCH: No, but you conceded 99.

MR. LOBEL: No, no. That -- that's why I didn't concede 99.

JUSTICE GORSUCH: Well, you didn't at first.

MR. LOBEL: I said maybe.

JUSTICE GORSUCH: Oh, maybe.

MR. LOBEL: Maybe.

JUSTICE GORSUCH: Oh, maybe. Okay. All right.

(Laughter.)

MR. LOBEL: But the reason that I don't want to concede 99 is because then you'd say what about 90? And the answer to that is the answer that Justice Scalia gave in the NML case. If you think that too many cases are being excluded, go to Congress. Get Congress to enact a new statute.

JUSTICE GORSUCH: Well, then it's magic --

MR. LOBEL: Don't amend this statute.

JUSTICE GORSUCH: Then we're magic words, right?

MR. LOBEL: No.

JUSTICE JACKSON: It --

MR. LOBEL: I -- I can give -- I can give you an example where the FSIA -- Congress could provide a cause of action without explicitly abrogating the FSIA and it should be abrogated under Kirtz.

Let's say there was a spate of automobile -- accidents in some country or some reason in the -- region of the world where all the instrumentalities -- all the automobile accidents were caused by foreign

instrumentalities, and Congress enacted a statute, there was some ether going around in the Congress, and they forgot that the FSIA existed, which clearly isn't here. They were staring the FSIA in the face.

But let's say they said there will be a cause of action for any American national injured in an automobile accident that occurs in another country. That would be barred by 1605 -- 16 -- that would be barred by the FSIA's tort exception because it requires that the tort occur in the United States.

JUSTICE JACKSON: Mr. Lobel, isn't the real reason why we have to keep the Kirtz avenue narrow is because, if you don't do that, you end up end-running Congress's intentions with respect to enacting the FSIA? That we have a statute that Congress, as Justice Kagan said at the beginning, thought about the universe of claims that could be brought against foreign governments, said we don't want this being done in an ad hoc fashion anymore, so we're going to create a statute that lays out what we, the Court, has said subsequently is the exclusive way in which you get to sue a

foreign government.

Kirtz comes along and we see this kind of one circumstance in which we might conceive of an exception to application of the statute that Congress has created for this purpose, and it is this dead letter, you know, if you have a cause of action, but there's no way you could ever, you know, abrogate sovereign immunity -- or a -- a cause of action against a government, but you could never recover. Then you go, okay, that really does have to be interpreted as a situation in which Congress did intend for sovereign immunity to be abrogated, notwithstanding the FSIA.

But, if you get broader than that, if we're in 99 percent of the cases, 97 percent, 96, then you could have a rule operating outside of the FSIA to do the very thing that Congress didn't want the FSIA -- or didn't want to have -- happen, which is why it enacted the FSIA. So this exception has to be, like, really tiny or else we don't give effect to Congress's expressed intent to have the FSIA be the exclusive avenue for abrogating sovereign immunity.

MR. LOBEL: Exactly, Your Honor. Exactly.

JUSTICE ALITO: Well, the FSIA may -- may have been the exclusive avenue when the FSIA was enacted. But the Congress that enacted the FSIA does not have the right to control what later Congresses do.

MR. LOBEL: Correct.

JUSTICE ALITO: So I don't know where that --

JUSTICE JACKSON: And that's why --

JUSTICE ALITO: I don't know where that -- I don't -- I --

JUSTICE JACKSON: -- that's why we -- that's Justice Gorsuch's point, right? Later Congresses can say with respect to each statute this -- don't apply the FSIA here. And they can say that. But what -- what's happening here is that we are now implying that later Congresses intended that. But that -- that language doesn't appear in this statute, but we're having a two-hour argument as to whether or not we should interpret it, and -- and I don't understand that.

MR. LOBEL: Right. And it's not

any --

CHIEF JUSTICE ROBERTS: Justice --

MR. LOBEL: -- magic words. They just need to --

CHIEF JUSTICE ROBERTS: I think Justice Alito had a question.

MR. LOBEL: Oh, sure.

JUSTICE ALITO: No, that's all right. Go ahead.

CHIEF JUSTICE ROBERTS: Okay.

MR. LOBEL: Well, just one last point. They claim that you can harmonize the statute, the two statutes, by reading a tiny exception into the FSIA. And I agree with Justice Jackson that once you start reading that tiny exception in, it -- it -- it will expand. The camel's tent -- nose will be under the tent.

But that does not harmonize these two statutes. The rule that specific can -- can override a general in this context doesn't apply when there's an implied repeal question. Their reading of the statute is that you have a narrow exception, a narrow repeal of the FSIA, and that's still an implied repeal.

As this Court said in Home Builders,

it doesn't matter whether you call it an exception, an amendment, an implied amendment; it's still an implied repeal.

And it contradicts the FSIA. The FSIA 1604, paragraph 16 -- Section 1604 says foreign states shall be immune unless one of the exceptions apply. They want to read the statute exactly how, Justice Alito, you didn't allow them to -- to read the statute in Home Builders. Just add another exception. Just add another criteria which is not in the statute.

JUSTICE ALITO: In 1996, were in -- in 1996, were there instrumentalities of the Cuban government that were engaging in commercial activity in the United States?

MR. LOBEL: There definitely were. You don't have to take my word for it. Secretary -- the Under Secretary of State Peter Tarnoff testified before the Senate committee dealing with this exact statute, the Helms-Burton Act, and said, in many respects, the trade with Cuba is substantial.

And he was right. There were $65 million of medicines and medical supplies. Not

just humanitarian goods. Medicines, medical supplies. There were 20 -- over 20,000 travelers in 1993, 50,000 travelers in 1994. And there were a quarter of a billion dollars according to Exxon's testimony -- exhibits in the district court of remittances going to Cuban entities in 1994, and as the court of appeals held here, those remittances could be the basis of lawsuits under Title III.

And I don't think you can fix it to 1995/1996 in any event because the statute gives the President the power to expand trade with Cuba. And so whatever the case was in 1995, given that Congress gave the President the power to expand trade, they must have anticipated that trade might be expanded.

In fact, in Section 112 of the statute, it explicitly anticipates that the remittance policy will be expanded.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

JUSTICE THOMAS: Just so I'm clear, pre-FSIA, could Title III work as it's written?

MR. LOBEL: Pre-FSIA?

JUSTICE THOMAS: Yeah.

MR. LOBEL: It could because pre-FSIA, 1952 to 1976, it could because there was a restrictive regime of immunity, which wouldn't have rendered Title III suits meaningless.

Prior to 1952, it probably wouldn't -- it probably meets the Kirtz -- the Kirtz exception.

JUSTICE THOMAS: So this is basically a statutory case?

MR. LOBEL: It is clearly a statutory case. You've got to interpret these two statutes harmoniously.

CHIEF JUSTICE ROBERTS: Justice Alito?

Justice Sotomayor?

JUSTICE SOTOMAYOR: Under Kirtz's language, you either have an express waiver or -- but a -- but a implied waiver of sovereign immunity that is "unmistakably clear" in the language of the statute.

And then what Kirtz says to -- when there's a cause of action against a government on a claim, it has to be clear enough to effectively "negate a claim Congress has clearly authorized," correct?

MR. LOBEL: Mm-hmm.
JUSTICE SOTOMAYOR: You're relying on the negation question?
MR. LOBEL: Correct.
JUSTICE SOTOMAYOR: And my colleague said, well, doesn't the amount of the negation -- how much is enough? And the point is, however, you're saying we don't know how much, but there's a meaningful amount, correct?
MR. LOBEL: Correct.
JUSTICE SOTOMAYOR: This is not 1 percent?
MR. LOBEL: It's not 1 percent. In any event, it was a hypothetical question.
JUSTICE SOTOMAYOR: Right.
MR. LOBEL: But, here, there are hundreds of claims, thousands of claims probably, that could be brought.
JUSTICE SOTOMAYOR: And if you go as far as Petitioner wants, there's hundreds of, maybe thousands of claims against foreign governments and foreign entities, correct?
MR. LOBEL: Yes. The statute says -- doesn't say Cuban -- claims against Cuban entities. It says any instrumentality of a

foreign state -- of a -- of a foreign state. That's the text the statute.

JUSTICE SOTOMAYOR: So we could be expanding this even more?

MR. LOBEL: Correct. You --

JUSTICE SOTOMAYOR: Thank you.

MR. LOBEL: You'd be allowing plaintiffs to sue every instrumentality in the world that does any trade with Cuba.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch, anything?

Justice Kavanaugh?

Justice Barrett?

Justice Jackson?

Thank you, counsel.

MR. LOBEL: Thank you.

CHIEF JUSTICE ROBERTS: Rebuttal, Ms. Ratner?

REBUTTAL ARGUMENT OF MORGAN L. RATNER
ON BEHALF OF THE PETITIONER

MS. RATNER: Thank you. Four points.

First, Justice Alito, to your question about why this practically matters, the first is yes, there are not significant assets of Cuban instrumentalities in the United States.

We have the ability to seek those assets worldwide, which is pretty standard fare in dealing with international judgments.

The second is that Exxon is a company that plays the long game. We've had this claim for over 60 years now, and so there may be changes in the future that affect what assets we can recover on.

Second point, I hate to complicate the presidential suspension authority further, but I do want to be clear that there are two suspension authorities that are specific to the Cuban government -- excuse me, to Cuban instrumentalities, that's 6064(a) and 6082(d), so this can't be dismissed as just potentially suspensions relating to private entities' claims.

Third point. I think the food and medicine importer -- importer examples really underscore the extreme mismatch here of a Congress that shut down commerce and allowed a few humanitarian examples -- food imports, family-oriented remittances, medicine imports -- and now, under Respondents' theory, those are the only hook. Those are the only

claims that you can bring against Cuban instrumentalities, are the very thing that Congress decided to have a little more solicitude for. I think that creates an incredible mismatch with what they were trying to do here.

Finally, I -- I want to underscore we are not asking for this Court to have some broad rule that once a sovereign is covered by a cause of action, that's enough.

Again, we have pointed to all of these overlapping provisions. This is the express and only defendant called out. There are rules specific to these claims and judgments. There are multiple overlapping suspension authorities. And there are jurisdictional provisions that take this claim out of the FSIA.

So that is the sum total, that -- and that is enough for a background statute like the FSIA, just as it would be enough for a background constitutional or common law immunity protection. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 1:10 p.m., the case was submitted.)

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