No. 24-699

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

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

Respondents.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

To that end, the Chamber routinely files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including cases involving the proper interpretation and application of the Foreign Sovereign Immunities Act (FSIA) and the Cuban Liberty and Democratic Solidarity Act of 1996 (*i.e.*, the Helms-Burton Act). Such cases include *CC/Devas (Mauritius) Limited, et al. v. Antrix Corp. Ltd.*, *et al.*, No. 23-1201 & 24-17 (Petition for cert. filed May 6, 2024), and *Havana Docks Corp. v. Royal Caribbean Cruises, Ltd.*, 119 F.4th 1276, 1278 (11th Cir. 2024).

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[1] Pursuant to Supreme Court Rule 37.2, ten days before this brief was due, *amicus* notified counsel of record for the parties of its intention to file this brief. Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

The Chamber's members have a strong interest in ensuring that both the FSIA and the Helms-Burton Act are interpreted and applied fairly and consistent with Congress's clear intentions. And the Chamber has unique views on the issues presented in this case. The Chamber is well suited to provide the Court with its perspective that the D.C. Circuit misinterpreted and misapplied both statutes in a way that significantly harms American businesses and conflicts with longstanding, clearly expressed federal policy.

SUMMARY OF ARGUMENT

This is precisely the type of case against precisely the type of defendant that Congress had in mind when it enacted the Helms-Burton Act. *See* 22 U.S.C. § 6021 *et seq*. Before Fidel Castro seized power in 1959, Standard Oil Company (now known as Exxon Mobil Corporation) owned subsidiaries with extensive operations and millions of dollars' worth of property in Cuba. Less than two years after Castro's power grab, however, the Cuban government wrongfully confiscated that property without paying a penny. Cuba then transferred Petitioner's assets to state-owned oil companies, including Respondents in this case. For decades Respondents have used and profited from that expropriated property.

There is no dispute that what the Cuban regime did to Exxon was both wrong and a clear violation of well-established international law. It is equally clear that Exxon should be entitled to a judicial remedy for the significant losses it incurred due to the Cuban government's illegal confiscations of its property.

Congress created such a remedy in 1996, when it passed the Helms-Burton Act. Title III of the Act permits American victims of wrongful takings by Castro's regime to sue and obtain damages from "any person"—including "any agency or instrumentality of a foreign state"—who "traffics" in confiscated property by (among other things) profiting from that property. 22 U.S.C. § 6023(13)(A); *see id.* § 6023(11) (defining "person").

The facts of this case are a perfect fit for that cause of action: Respondents are "instrumentalit[ies]" of the Cuban government that profited from Exxon's wrongfully confiscated property, and Exxon is an American victim of those wrongful confiscations by the Cuban government. Exxon promptly filed this action against Respondents five-plus years ago—as soon as the suspension on Title III claims lapsed in May 2019—and Exxon's property was wrongfully expropriated in 1960. Exxon has waited far too long for redress.

But if allowed to stand, the decision below will further delay and potentially deny Exxon and countless other victims the day in court that Congress carefully sought to afford them when it enacted Title III. The D.C. Circuit held that Exxon's Title III claims against the Cuban instrumentalities cannot proceed to the merits unless those claims fall independently within an exception to immunity under the FSIA. *Exxon Mobil Corp. v. Corporacion CIMEX, S.A.*, 111 F.4th 12, 19 (D.C. Cir. 2024) (*Exxon*). If no exception applies, then Respondents will be immune from suit, and Exxon—a clear intended beneficiary under the Helms-Burton Act—will receive no compensation. In any event, establishing such an exception often

requires Title III plaintiffs with otherwise meritorious claims to engage in costly and protracted jurisdictional discovery and motions practice, as Exxon's experience in this case shows. For plaintiffs with less patience and financial wherewithal, the need to overcome sovereign immunity will operate as a significant deterrent against pursuing Title III claims against Cuba and its instrumentalities.

According to the D.C. Circuit, such unjust outcomes are mandatory because Congress did not abrogate Cuban instrumentalities' sovereign immunity when it passed the Helms-Burton Act. *Exxon*, 111 F.4th at 19. The D.C. Circuit's decision, however, is fundamentally at odds with this Court's analogous decisions in cases involving federal sovereign immunity. *Dep't of Agric. Rural Dev. Rural Hous. Serv. v. Kirtz*, 601 U.S. 42 (2024); *see Exxon*, 111 F.4th at 40 (Randolph, J., dissenting) (explaining that the majority's reasoning would mean that "Cuban agencies enjoy more protection from lawsuits than agencies of the United States"). This Court's words in *Kirtz* apply with equal force here: "Dismissing suits like [Exxon's] would effectively 'negat[e]' suits Congress has clearly authorized." *Id.* at 51 (quoting *Fin. Oversight & Mgmt. Bd. for P. R. v. Centro De Periodismo Investigativo, Inc.*, 598 U.S. 339, 348 (2023)). There is simply no reason to believe that Congress wanted Title III claims against Cuba and its instrumentalities to be severely limited to only those involving facts that also satisfy a FSIA exception.

The Chamber agrees with Exxon that this Court's review is warranted to correct the D.C. Circuit's error. The Chamber does not repeat Exxon's persuasive

arguments in this brief. Rather, it submits this brief to offer two arguments to the Court as it considers Exxon's petition for a writ of certiorari to review the D.C. Circuit's decision. First, if allowed to stand, the decision below would significantly harm American businesses in two consequential ways. On the one hand, the D.C. Circuit's opinion makes it much harder, much more costly, and much more time-consuming for U.S. victims of the Cuban government's wrongful expropriations to vindicate their rights to redress under Title III. And on the other hand, by shielding the Cuban state and its instrumentalities from suit under the Act, the D.C. Circuit's opinion creates clear incentives for Title III plaintiffs to sue U.S. businesses with attenuated connections to confiscated property, rather than suing the culpable foreign actors, like Respondents. The significant harm the D.C. Circuit's opinion will cause American businesses alone justifies the Court's review. Second, the D.C. Circuit's decision conflicts with this Court's immunity precedents and the policies underlying the Helms-Burton Act. For these reasons, the Court should grant the Petition and reverse.

ARGUMENT

I. The D.C. Circuit's Decision Harms U.S. Businesses.

The five-year history of Title III litigation shows that the private cause of action is not working as Congress intended. The D.C. Circuit's decision will exacerbate that regrettable trend and harm American businesses in the process. The court's interpretation of the interplay between the FSIA and Title III will

make it much more difficult, costly, and arduous for American businesses to obtain a judicial remedy from the agencies and instrumentalities of the Cuban government that have spent decades profiting from wrongfully confiscated property. And those barriers have created—and will continue to create—powerful incentives for Title III plaintiffs to target American businesses with negligible connections to such property because the foreign actors that directly participated in and benefited from the confiscations will be shielded from suit in the United States under the FSIA.

A. The D.C. Circuit's Decision Makes It Harder, More Costly, and More Time-Consuming for U.S. Businesses to Vindicate Their Title III Rights.

Congress passed the Helms-Burton Act to give victims of the Cuban government's confiscations of property (like Exxon) a "judicial remedy" in American courts. 22 U.S.C. § 6081(11). In doing so, Congress abrogated any sovereign immunity that instrumentalities of the Cuban government may have had under the FSIA—as explained persuasively in the underlying Petition and Judge Randolph's dissent. If the D.C. Circuit's contrary decision is allowed to stand, it will place substantive, time-consuming, and costly barriers on those victims' ability to obtain the redress that Congress intended to make available to them through the Helms-Burton Act—especially from the direct perpetrators and beneficiaries of the wrongful confiscation of their property.

First, the D.C. Circuit's decision will make it increasingly difficult—if not impossible—for many Title III plaintiffs to obtain relief. Requiring Title III plaintiffs to establish an independent exception to immunity would erect difficult, if not insurmountable, hurdles to plaintiffs in the many instances where the trafficking is being done by instrumentalities of the Cuban government. *See* 28 U.S.C. § 1604.

This case is an ideal vehicle because it illustrates the artificial barriers the D.C. Circuit's approach creates for Title III plaintiffs. As illustrated below, while the FSIA contains several exceptions to sovereign immunity, only two—the expropriation and commercial activity exceptions—are potentially applicable in this case. The D.C. Circuit held that the FSIA's expropriation exception does not apply here, leaving Exxon (and others) with a narrow path to proceed to the merits of their Title III claims against Cuban agencies and instrumentalities: the commercial activity exception.

By its design, however, the commercial activity exception often will be ill-suited to Title III cases brought against Cuban state instrumentalities. The exception abrogates the sovereign immunity of a foreign state or instrumentality in an action based on the foreign state's commercial activities, but in all cases it requires a nexus between those commercial activities and the United States. 28 U.S.C. § 1605(a)(2). Under the first clause of that exception, a foreign state loses sovereign immunity where it

carries on commercial activities in the United States. The second clause abrogates immunity for "an act performed in the United States in connection with a commercial activity of the foreign state" outside the United States. And under the third clause, immunity is abrogated where the foreign state has committed acts outside the United States in connection with a commercial activity which has a "direct effect" in the United States.

As Congress surely knew when it enacted the Helms-Burton Act, the Cuban embargo will make it difficult in many cases—though not necessarily this one—for a Helms-Burton plaintiff to satisfy this exception when the trafficker is an agency or instrumentality of the Cuban government, which are within the classes of persons expressly subjected to liability under the Act. This is so because the Cuban embargo prohibits much commercial activity by Cuban instrumentalities that would most obviously have a "direct effect" in the United States. *See* 28 U.S.C. § 1605(a)(2). Having adopted measures to strengthen the existing Cuban embargo in the Helms-Burton Act itself, Congress was well aware that the Act would make it more difficult to show that Cuban instrumentalities' commercial activity had a direct effect in the United States. Yet Congress enacted Title III to provide a full and effective judicial remedy to victims of the Cuban government's expropriation and explicitly provided that Cuban agencies and instrumentalities are "persons" subject to suit under Title III. It makes little sense to assume, as the D.C.

Circuit majority did, that Congress intended for Title III claims to be limited to fact patterns that satisfy the commercial-activity exception at the same time Congress was severely restricting all such commercial activity between the United States and Cuba. *See generally Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 124 (2d Cir. 2000) (explaining that Congress codified the Cuban embargo, which had been previously reflected in the Cuban Asset Control Regulations, through the Helms-Burton Act with the purpose of "prevent[ing] any Cuban national or entity from attracting hard currency into Cuba by selling, assigning, or otherwise transferring rights subject to United States jurisdiction").

Second, even in cases like this one, where the FSIA may leave a narrow path for Title III plaintiffs to proceed against Cuban instrumentalities, the D.C. Circuit's requirement that those plaintiffs make a threshold showing that a FSIA exception applies will make it much more time-consuming and expensive for Title III plaintiffs to obtain relief. That is because contested issues related to sovereign immunity, which determines the existence of subject matter jurisdiction, must be resolved (both in the trial court and on appeal) at the outset of a case. *Exxon*, 111 F.4th at 19, 22. That approach will require victims of Cuban expropriation to engage in costly and protracted litigation (including extensive jurisdictional discovery) at the threshold of an action to determine whether a FSIA exception applies. Litigating these issues will at the very least considerably delay

American businesses' opportunities to be heard on their meritorious Title III claims and obtain relief, while also driving up the cost of the litigation to a point where many Title III plaintiffs may not be able to even file their claims. There of course would be no need or reason to litigate those issues if Title III of the Helms-Burton Act itself abrogates the sovereign immunity of Cuban-government instrumentalities—*i.e.*, the sole question presented in the Petition. Once again, Exxon's experience in this case—including the D.C. Circuit's remand for even more FSIA-related discovery and litigation over threshold jurisdictional issues—exemplifies the tremendous cost and delay associated with litigating immunity questions.

Exxon's property was wrongfully confiscated more than six decades ago, and it filed this litigation five years ago—on the earliest date it could do so. Even though Title III plainly permits Exxon to file suit against Cuban instrumentalities, Exxon has been caught up in years of litigation over Respondents' entitlement to sovereign immunity. Without this Court's intervention, Exxon will be required to go back to the district court for complex and costly jurisdictional discovery about whether the exception applies here. These types of inefficiencies benefit no one but those directly responsible (and most culpable) for the underlying confiscations and are unnecessary given the language in Title III clearly abrogating Respondents' immunity. *See* U.S. Chamber of Commerce Inst. for Legal Reform, *Tort Costs in America: An Empirical Analysis of the Costs and*

Compensation of the U.S. Tort System (Nov. 2022) (examining "the costs of the legal system and the efficiency with which it delivers compensation to injured parties" and concluding that the American "tort system is relatively inefficient at delivering compensation to claimants"). Many other American businesses that are victims of the Cuban government's wrongful confiscations will not have the resources or desire to spend hundreds of thousands or millions of dollars litigating threshold immunity issues for years before their Title III claims can even reach the merits. *See* Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIA. L. REV. 111, 113 (1991) ("[B]ecause litigation is costly, not every victim will find it profitable to bring suit. Some victims will bear their losses without seeking compensation through the tort system. The victims who choose to bring suit will do so on the basis of an arbitrary standard: whether the anticipated damage award exceeds the cost of litigating. . . [T]he probability of winning a lawsuit becomes an important consideration in the decision to bring suit."). The costs and delays associated with litigating FSIA exceptions are significant impediments to Title III litigation against Cuban agencies and instrumentalities.

The net effect of the D.C. Circuit's decision is to erect substantive, costly, and time-consuming barriers to Title III lawsuits by American businesses against Cuban instrumentalities and agencies. The barriers will harm American business and prevent

them from vindicating their Title III right to a judicial remedy against agencies and instrumentalities of the Cuban government.

B. The D.C. Circuit's Decision Creates Backward Incentives for Title III Plaintiffs to Sue U.S. Businesses with Attenuated Connections to Confiscated Property Rather than Culpable Foreign Actors.

Jurisdictional barriers to suing Cuban agencies and instrumentalities under Title III have had a related, unintended consequence of harming American businesses by placing a Title III target on their backs. Although Title III claims have been permitted only since May 2019, when President Trump allowed the suspension to lapse, the early Helms-Burton cases have demonstrated that the legislation has not worked as Congress intended. These cases show that, in practice, the Cuban state entities that directly participated in and benefited from the wrongful confiscation of property from American citizens are largely insulated from liability, while less culpable domestic businesses—which lack the sovereign immunity and jurisdictional protections that foreign state instrumentalities enjoy—have been subjected to costly and potentially ruinous litigation. If upheld, the D.C. Circuit's decision will only exacerbate this concerning trend by further encouraging Title III plaintiffs to pursue the path of least resistance by targeting U.S. businesses instead of the Cuban state actors who were responsible for the expropriations

and who profit from the trafficking of the expropriated assets.

As a result of the comprehensive U.S. trade embargo against Cuba, which prohibits most transactions between U.S. companies and Cuban nationals, American businesses have largely been prevented from conducting trade or commerce with Cuban interests since the embargo was put in place in 1962. *See, e.g.*, *Havana Club Holding*, 203 F.3d at 124. Therefore, those who directly own or operate expropriated property in Cuba that is the subject of Title III claims are necessarily either Cuban government and Cuban state-owned entities or, alternatively, foreign private companies.

In certain instances, including in Exxon's case, the Cuban government or its instrumentalities—indeed, the parties directly culpable for the expropriations that have harmed Title III plaintiffs—continue to own or operate the confiscated property. Yet, in the face of clear authorization from Congress under Title III for plaintiffs to seek damages directly from those wrongdoers, the D.C. Circuit's ruling affords Cuban state-owned entities presumptive immunity from the potential liability that the Act was expressly enacted to create.

In most other cases, private foreign corporations that have taken over or operate expropriated property lie beyond the personal jurisdiction of U.S. courts. Foreign companies are, by definition, incorporated abroad, and it is often unlikely that claims of trafficking in Cuban property will arise out of whatever contacts those companies have with the

United States. *See Herederos De Roberto Gomez Cabrera, LLC v. Teck Res. Ltd.*, 43 F.4th 1303 (11th Cir. 2022) (affirming dismissal of Helms-Burton claim against Canadian mining company that operated mines confiscated by the Cuban government for lack of personal jurisdiction); *Rodriguez v. Imperial Brands plc*, No. 20-23287-CIV, 2023 WL 9228332, at *8 (S.D. Fla. Nov. 28, 2023), report and recommendation adopted in part, 2024 WL 1505535 (S.D. Fla. Apr. 8, 2024) (dismissing Helms-Burton claims against tobacco company for lack of personal jurisdiction); *see also N. Am. Sugar Indus. Inc. v. Xinjiang Goldwind Sci. & Tech. Co.*, 645 F. Supp. 3d 1352, 1359 (S.D. Fla. 2022), vacated and remanded, 124 F.4th 1322 (11th Cir. 2025) (remanded for further proceedings on jurisdiction following district court's dismissal of Helms-Burton claims for lack of personal jurisdiction against three foreign companies and two U.S. companies arising out of a shipment of wind turbine blades from China to Cuba).

These jurisdictional hurdles—*i.e.*, the ability of Cuban instrumentalities to claim immunity from suit, coupled with challenges associated with establishing personal jurisdiction over foreign entities—have resulted in the opposite of what Congress intended. In recent years, American businesses with incredibly attenuated relationships to confiscated property have become the primary targets of Helms-Burton lawsuits. Meanwhile, the direct perpetrators who are most culpable for the confiscations and exploiting wrongly confiscated property for commercial gain (*i.e.*, the Cuban government and its agencies and instrumentalities) have been able to avoid accountability.

Viewed in this light, the D.C. Circuit's decision renders many U.S. companies, whose business activities can be linked—however remotely—to expropriated property in Cuba, the targets of Title III plaintiffs who are otherwise unable to seek recourse against foreign entities. This is clear from numerous examples of Title III cases that have been filed against American businesses (in various sectors) since May 2019.

Title III Claims Against Cruise Lines. Plaintiffs have targeted U.S.-based cruise lines with costly and protracted Title III litigation based on the cruise lines' use of docks in Cuba. Several of these cases resulted in the entry of significant, nine-figure judgments against the cruise line operators. *See* Nora Gámez Torres, *Cruise lines ordered to pay over $400 million for 'trafficking' in confiscated property in Cuba,* MIAMI HERALD (Jan. 1, 2023), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article270608727.html; *Cruise lines to appeal U.S. court's big award to owner of Havana dock*, REUTERS (Jan. 3, 2023), https://www.reuters.com/business/autos-transportation/cruise-lines-appeal-us-courts-big-award-owner-havana-dock-2023-01-03/. Those judgments were subsequently vacated on appeal but only after the defendants spent years defending themselves in protracted, costly civil litigation. *See Appeals Court Sets Aside $440M Havana Damages Award Against Cruise Lines*, MARITIME EXECUTIVE, (Oct. 22, 2024), https://maritime-executive.com/article/appeals-court-sets-aside-440m-havana-damages-award-against-cruise-lines. These cases

demonstrate the magnitude of potential liabilities that American companies may face under Title III when plaintiffs decide to target them in lieu of more difficult-to-reach foreign actors.

Title III Claims Against Airlines. Title III cases have similarly been filed against U.S.-based airlines for their use of airports in Cuba. *See* Carl Juste, *Firm files Helms-Burton lawsuit against airlines*, MIAMI HERALD (Sept. 25, 2019), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article235484402.html. These cases further demonstrate that plaintiffs have used Title III to target American companies with attenuated connections to the confiscation of property.

Claims Against Online Travel Agencies. In an even more extreme example, other Title III plaintiffs have targeted American travel agencies for facilitating travel bookings at properties that were expropriated by the Cuban government and later developed into hotels. *See* Nora Gámez Torres, *Castro confiscated his apartments in Cuba. American diplomats and now tourists stay in them*, MIAMI HERALD (Jan. 10, 2022), https://www.miamiherald.com/news/nation-world/world/americas/cuba/article257093227.html. These cases are another example of costly Title III litigation targeting American businesses with extremely remote and attenuated connections to confiscated property.

Cases Against Online Retailers. Title III plaintiffs have also targeted American online retailers for selling goods that were produced on

property confiscated by the Cuban government decades ago—another example of the backward manner in which Title III lawsuits have been used to target American businesses. Gergana S. Sivrieva, *The Helms-Burton Act Backfires: Surprising Litigation Trends Following Title III's Long-Feared Activation*, 42 N. ILL. UNIV. L. REV. 1, 69-75 (2021).

* * *

These cases show that if permitted to stand, the D.C. Circuit's decision will amplify the perverse incentives for plaintiffs to target American companies with Title III claims. As Congress made clear, the purpose of the Act was "to provide protection against wrongful confiscations" of the property of U.S. nationals, 22 U.S.C. § 6081(10), and to discourage "transactions involving [this] confiscated property, and in so doing to **deny the Cuban regime the capital generated by such ventures[.]**" H.R. Rep. No. 104-202, pt. 1, at 39 (1995) (emphasis added); *see also* 22 U.S.C. §§ 6022, 6081(6). But by further insulating the state-owned actors that were the intended targets of Title III litigation, the D.C. Circuit's decision will only encourage plaintiffs to pursue domestic companies, thus exposing U.S. businesses to litigation expense and potentially enormous liability despite the fact that the purposes of the Act was to provide those harmed by acts of the Cuban government a right to seek recourse in the U.S. courts against those directly responsible (*i.e.*, the Cuban government and its instrumentalities), and to further deny the Cuban government the benefits of the expropriated property.

Critically, the Helms-Burton Act permits plaintiffs to seek pre-filing interest from the date of the confiscation of the property (*i.e.*, in 1960) to the date the complaint was filed, *see* 22 U.S.C. § 6082(a)(1)(B), and further provides for treble damages, *see* 22 U.S.C. § 6082(a)(3)(A). These punitive measures were intended to punish those entities directly profiting from the confiscated property, not to subject American companies to claims worth multiples of the entire value of the confiscated property (after inflation adjustment). As discussed above, such substantial damages claims, which are now being directed largely towards American companies, are completely untethered to the U.S. businesses' incidental connections to the properties at issue and to the statute's purpose.

Simply put, by further erecting a barrier to suing the responsible state-owned parties and by forcing plaintiffs to overcome the strong protections of foreign sovereign immunity, the D.C. Circuit's decision creates a substantial risk that plaintiffs with valid Title III claims will pursue the path of least resistance and focus their claims on U.S. companies. By disincentivizing the pursuit of the foreign instrumentalities the Act expressly targeted, this ruling effectively immunizes the very state-owned entities that are directly responsible for the wrongdoing while simultaneously putting American companies directly in the line of fire. These concerns harm American businesses and warrant this Court's review of the decision below.

II. The D.C. Circuit's Decision Conflicts with this Court's Immunity Precedents and Policies Underlying the Helms-Burton Act.

As the Petition persuasively demonstrates, the D.C. Circuit's decision cannot be reconciled with this Court's decision in *Department of Agriculture Rural Development Rural Housing Service v. Kirtz*, 601 U.S. 42, 49-50 (2024), which found that federal and state sovereign immunity was abrogated by substantively identical language in a different statute passed by the same Congress in the same Session. *Amicus* agrees with those arguments and does not repeat them here.

Amicus does, however, want to highlight the manner in which the D.C. Circuit's interpretation of the interplay between the Helms-Burton Act and this Court's existing FSIA jurisprudence conflicts with the policies underlying the Helms-Burton Act.

As Congress made clear in the text of the Helms-Burton Act, the statute's purpose was "to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime." 22 U.S.C. § 6022(6).

Congress specifically noted, however, that "[t]he international judicial system, as currently structured, lacks fully effective remedies for the wrongful confiscation of property and for unjust enrichment . . . at the expense of the rightful owners of the property." *Id.* § 6081(8). The FSIA, which provides certain protections for foreign sovereigns and their agencies and instrumentalities, is clearly part of that "international judicial system." The Act therefore provided "a judicial remedy in the courts of the United States" "to

deter" trafficking in the confiscated property and to help victims of Cuban expropriation overcome the obstacles under the international judicial system to vindicate their rights. *See* 22 U.S.C. § 6081(2), (11).

When properly viewed in this context, the D.C. Circuit misconstrues, and indeed contorts, the relationship between the Helms-Burton Act and the FSIA in a manner that undermines the purpose of the Act.

First, as Judge Randolph persuasively explained in dissent, the D.C. Circuit's interpretation of the Helms-Burton Act effectively creates a rule that Congress must make an *ultra-clear* statement to abrogate foreign sovereign immunity. *Exxon*, 111 F.4th at 40 (Randolph, J., dissenting). This requirement, however, is not supported by any of this Court's prior FSIA cases, and incorrectly treats the FSIA differently as compared to other statutes. Moreover, by finding that the Helms-Burton Act does not contain sufficiently clear language to abrogate sovereign immunity—even though this Court held that nearly-identical language suffices to abrogate the U.S. government's immunity in *Kirtz*—the D.C. Circuit's decision leads to the illogical result that "Cuban agencies enjoy more protection from lawsuits than agencies of the United States" or of the 50 States. *Id.* That plainly is not what Congress intended either under the Helms-Burton Act or under the FSIA—and would indeed be a "shock" to Congress, as Judge Randolph observed. Nothing in the FSIA purports to afford foreign sovereigns greater immunity than federal or state governments have in American courts. The D.C. Circuit's "ultra-clear statement" approach will harm American business in

cases brought against foreign states or instrumentalities and place those states at a competitive disadvantage.

Second, one of the stated purposes of the Act is to "deter" the Cuban government and its instrumentalities from continuing to use and exploit confiscated property. 22 U.S.C. § 6081(11). But by rendering the instrumentalities of the Cuban government presumptively immune under the FSIA—and thus not subject to suit for trafficking in confiscated property—the D.C. Circuit's decision effectively revokes the private right of action granted to victims of expropriation under the Act in many cases, which in turn undermines the statute's goal of deterring the continued trafficking in confiscated property by the most culpable parties—*i.e.*, the Cuban government and its agencies and instrumentalities.

Finally, as explained in Section I, in practice, the Helms-Burton Act has been applied and enforced in such a way that it has caused substantial harm to U.S. businesses at the expense of more culpable foreign actors that are not subject to suit in the United States—either because those courts lack personal jurisdiction or because those foreign actors are entitled to sovereign immunity (or both). If allowed to stand, the D.C. Circuit's decision would serve only to further incentivize plaintiffs to focus their claims exclusively on domestic parties. This is also clearly not what Congress intended when it specifically identified "any agency or instrumentality" of the Cuban government in Title III as targets of damages claims under the newly created judicial

remedy. 22 U.S.C. § 6023(11). The Court should right the ship in this case, before it is too late.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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January 30, 2025