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May 6, 2022

VIA ECF

David J. Smith, Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Bengochea v. Carnival Corporation*, No. 20-12960-BB
Appellees' Supplemental Letter Brief

Dear Mr. Smith:

Appellee Carnival Corporation ("Carnival") submits this letter brief responding to the "Brief for the United States as Amicus Curiae" (the "USA Br."), as directed by the Court in its April 15, 2022 Order. Appellee in Case No. 20-14251, Royal Caribbean Cruises Ltd. ("Royal Caribbean"), joins in this letter brief.

The Government agrees with every judicial decision to have considered § 6082(a)(4)(B) of the Helms-Burton Act, including the decision below and this Court's own opinion in *Gonzalez v. Amazon.com, Inc.*, 835 F. App'x 1011, 1012 (11th Cir. 2021): where a plaintiff's claim is based on property confiscated before March 12, 1996, but the plaintiff inherited that claim after that date (as Bengochea did here), the plaintiff cannot bring suit under Title III of the Act. This conclusion follows inescapably from the plain text of the statute, and precludes Bengochea's suit.

Pursuant to this Court's instructions, the Government also addressed the lawful-travel exclusion under the Act, which Carnival raised in the district court below. If the Court reaches the lawful-travel issue in this case or in another Helms-Burton case, the Court should interpret the exclusion in a manner that preserves the Executive's primary role in enforcing the Cuba sanctions and authorizing travel to Cuba. As discussed below, the Court should not interpret the exclusion in a manner that would create a secondary system in which unaccountable private plaintiffs (and their attorneys) can second-guess Executive enforcement determinations by bringing lawsuits in which individual travelers and travel providers bear the burden of proving their innocence while facing potentially ruinous treble-damage liability.

I. BENGOCHEA'S SUIT IS BARRED BECAUSE HE IS THE "UNITED STATES NATIONAL" BRINGING THIS ACTION AND HE ACQUIRED THE CLAIM AFTER 1996.

The Government agrees with Carnival's interpretation of § 6082(a)(4)(B), and that of every court to have considered this provision. Where a claim is based on property confiscated before March 12, 1996, a plaintiff who inherits their claim after March 12, 1996 cannot bring a Title III action. This follows from the plain text of the provision: "In the case of property confiscated before March 12, 1996, a United States national may not bring an action under this section on a claim to the confiscated property unless such national acquires ownership of the claim before March 12, 1996." 22 U.S.C. § 6082(a)(4)(B). Bengochea's suit is barred because (1)

the term "United States national" in 22 U.S.C. § 6082(a)(4)(B) refers to the plaintiff bringing the action, not the original claimant to the confiscated property, and (2) Bengochea did not acquire ownership of the claim before March 12, 1996.

A. The term "United States national" under the statute refers to the plaintiff bringing the action.

The Government agrees with Carnival that the "'United States national' in §§ 6082(a)(4)(B) and (C) is best interpreted to refer to the plaintiff who 'bring[s]' suit, regardless of whether that person is someone from whom Cuba expropriated property, . . . or someone else who owns a claim to property expropriated by Cuba." USA Br. 22. Thus, logically enough, in determining whether a "United States national" may "bring an action" in accordance with § 6082(a)(4)(B), the Court must look at the "United States national" who is actually "bring[ing] an action" and determine whether "such national" acquired ownership before March 12, 1996. This is the plain language of the statute, and it is how Bengochea pleaded and briefed his own claim until he arrived in this Court.

There is no doubt who is "bring[ing] an action" in this case: one need only look at the Complaint, which identifies Javier Garcia-Bengochea—*and no one else*—as the one bringing the action. D.E. 1. Bengochea's filings in this Court similarly identify him as the one bringing the action. As discussed below, while

Bengochea is a United States national, he unquestionably did not "acquire[] ownership of the claim before March 12, 1996," so his claim is barred.

B. The term "acquire" under the statute includes acquisitions by inheritance.

It is undisputed that Bengochea did not acquire ownership of the claim that forms the basis of this action until he inherited it in 2000, upon the death of his cousin Desidiero Parreño, a Costa Rican national. D.E. 61 at 3; D.E. 120 at 3 n.3. Accordingly, he did not "acquire[] ownership of the claim before March 12, 1996." § 6082(a)(4)(B). Crucially, this is true *whether or not* the term "acquire" includes inheritances.

On the one hand, if "acquire" includes inheritances, then Bengochea's suit is barred because he inherited, and thus "acquired," the claim after March 12, 1996. Carnival agrees with the Government that the plain meaning of "acquire" includes acquisitions by inheritance. *See* USA Br. 25 ("[O]ne may 'acquire' something by 'inheriting' it."); *see also id.* (collecting dictionaries from the time of enactment); Carnival's Appellee Br. 41–42 (collecting dictionary and caselaw definitions).

On the other hand (and equally fatal for Bengochea, although potentially worse for other Title III plaintiffs), if the word "acquire" does not include acquisitions by inheritance, then Bengochea *never* "acquire[d]" his claim, and similarly fails to satisfy § 6082(a)(4)(B). This is so because the statute says

Bengochea may not bring an action "unless" he "acquires ownership of the claim before March 12, 1996," and Bengochea does not claim he acquired ownership in a manner *other* than the inheritance in 2000. Such an interpretation would also bar any other plaintiffs who may have acquired their claims only through inheritance, even those who inherited claims before March 12, 1996 (at least for property confiscated prior to that date). Either way, however, Bengochea's suits against Carnival and Royal Caribbean are plainly barred, and the decision below should be affirmed.

II. THE LAWFUL TRAVEL EXCLUSION MUST BE INTERPRETED IN LIGHT OF THE EXECUTIVE'S PRIMARY ROLE IN AUTHORIZING TRAVEL TO CUBA.

As requested by the Court, the Government's Brief addresses the lawful-travel exclusion of the Act, § 6023(13)(B)(iii). The Government correctly explains that this exclusion incorporates the comprehensive regulatory regime governing travel to Cuba, which "ensures that potentially sensitive foreign policy questions regarding the lawfulness of travel to Cuba are decided by the political branches." USA Br. 33. If the Court reaches this issue in this case,[1] or in other litigation involving the Act,

[1] In the district court, Carnival moved to dismiss Bengochea's complaint on lawful-travel grounds: because Bengochea failed to plead "that the use of the dock is not incident to lawful travel or not necessary to the conduct of such travel," he failed to plead "trafficking" as that term is defined in the Act. D.E. 14 at 4. The district court incorrectly rejected this argument, erroneously concluding that although the lawful-travel exception appears in the definition of "trafficking," the exception is an affirmative defense. D.E. 41 at 5–8. Carnival did not raise this issue on appeal

Carnival agrees with the Government that the exclusion must be interpreted in light of this "background legal framework regulating lawful travel to Cuba," *id.* at 31, preserving the primary role of the Executive in authorizing such travel. Nonetheless, as discussed below after a brief background regarding the exclusion, the text, structure, and purpose of the Act indicate that this is part of Plaintiff's pleading burden, not an affirmative defense to be proven by Defendants.

A. Background: the lawful-travel exclusion preserves longstanding Executive discretion and flexibility to authorize travel to Cuba.

For decades, the United States has maintained a policy of allowing certain forms of purposeful travel to Cuba, under the close supervision and control of the Executive Branch. As this Court has recognized, "Congress has reposed considerable power in the President to adjust our Nation's sanctions against the Cuban Government[,]" including "periodic tightening and loosening of sanctions related to travel." *Odebrecht Const., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1284 (11th Cir. 2013). Pursuant to this authority and their Article II responsibilities, Presidents of both parties have carefully adjusted the scope of permissible travel and related activities in order to further the United States' foreign policy aims in Cuba. *See generally* Congressional Research Service, Cuba: U.S.

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because any of the three arguments presented in Carnival's Appellee Brief (including the § 6082(a)(4)(B) argument above) are easily sufficient to affirm the decision below.

Restrictions on Travel and Remittances (May 17, 2018 update), at App'x A pp. 19–20.[2] Sometimes the President has tightened travel restrictions to deprive the Cuban government of funds that might flow from increased travel; other times, the President has loosened the restrictions, contending that cultural exchange between American and Cuban citizens is the best way to bring about positive change in Cuba. *Id.* at 16–17.

Consistent with this background, the Government's Brief recognizes the need to "ensure[] that potentially sensitive foreign policy questions regarding the lawfulness of travel to Cuba are decided by the political branches." USA Br. 33 (citing *Regan v. Wald*, 468 U.S. 222, 242 (1984)). The Government's Brief references the President's pervasive control over such travel, and offers extensive discussion about various guidance—both formal and informal—offered by Executive agencies to help the public determine the bounds of the lawful-travel exclusion. USA Br. 35–36.

Much of this authority for adjusting, monitoring, and enforcing the Cuba travel sanctions is reposed in the Office of Foreign Assets Control ("OFAC"), which "has promulgated a graduated and carefully balanced enforcement and compliance regime that provides it with maximum discretion and options required to enforce

[2] *Available at* https://crsreports.congress.gov/product/pdf/RL/RL31139/84.

federal law to achieve U.S. foreign policy goals in the area of relations with Cuba." *ABC Charters, Inc. v. Bronson*, 591 F. Supp. 2d 1272, 1287 (S.D. Fla. 2008). As the Government's Brief explains, OFAC has issued "general" and "specific" licenses over time to permit certain forms of travel to Cuba. USA Br. 32. Moreover, the Government explains that "OFAC provides a variety of resources to assist the public in determining whether a transaction would be incident to lawful travel to Cuba," including both formal statements (such as promulgated regulations and interpretive guidance) and informal guidance (such as online FAQs and a "telephone 'hotline' that the public may call"). *Id.* at 35–36. Critical to OFAC's ability to further the nation's foreign-policy goals is flexibility: by carefully exercising its enforcement discretion and working cooperatively, even informally, with private travelers and travel providers, OFAC can maintain the essential balance between enforcing the Cuba sanctions without chilling the types of travel that the Executive may wish to encourage now or in the future. *ABC*, 591 F. Supp. 2d at 1287 ("The OFAC investigatory and enforcement regime is conservatively and carefully calibrated to allow the federal government maximum flexibility and discretion.").

Congress preserved this Executive discretion in the Helms Burton Act. Although Title III of the Act created a private right of action against "traffickers" in confiscated property, Congress was careful to ensure that this action would not interfere with the Executive's ability to permit or restrict travel to Cuba. Thus, the

Act excludes from the definition of "traffics" those "transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel." § 6023(13)(B)(iii). The Conference Report on the bill made clear that this exclusion "remove[s] *any* liability for . . . *any* activities related to lawful travel to Cuba." H.R. Rep. No. 104-468, at 44 (1996) (Conf. Rep.), 1996 WL 97265 (emphasis added). As the Government explains, the exclusion "does not explicitly cross-reference the Cuban Assets Control Regulations," but "in light of the highly restricted nature of travel to Cuba, the statute implicitly invokes that regulatory regime" through this exclusion. USA Br. 33.

The lawful-travel exclusion thus plays an essential role in the Act, excluding travel-related conduct from the reach of the Act unless the Executive has determined that the travel was unlawful. The exclusion ensures that private litigation does not undermine or constrain the Executive's enforcement discretion in this sensitive and continuously adjusted area of foreign policy. A crabbed interpretation of this exclusion, in which litigants can reexamine the lawfulness of any travel to Cuba, would have a dangerous chilling effect, establishing what would amount to a private enforcement regime for the Cuba travel sanctions—traditionally the province of the Executive. In that case, private litigants could bring suit against any American travelers to Cuba who use confiscated property—perhaps a cruise terminal, hotel,

airport, or restaurant—and force the travelers to prove their innocence under the travel sanctions to a court, entirely outside the Executive's control, or even second-guessing the Executive's determinations. *See United States v. Plummer*, 221 F.3d 1298, 1309–10 (11th Cir. 2000) (in light of "the President's constitutionally vested role as the nation's authority in the field of foreign affairs" and "extensive" authority delegated by Congress to President, "courts have on several occasions rejected attempts to 'second-guess' the [Cuban Asset Control Regulations]"). Moreover, the post-hoc penalty in such an action for any use of the alleged confiscated property is potentially ruinous, up to three times the value of the confiscated property measured at the time of confiscation (plus interest) or today. *See* § 6082(a)(1)(A), (a)(3).

Nothing in the text or history of the Act indicates that Congress intended to deputize private attorneys general to enforce travel sanctions in this manner. Indeed, the express focus of Title III is "trafficking," § 6082, a verb associated with trading in contraband, rather than staying at a hotel or disembarking on a cruise terminal. *E.g.*, Black's Law Dictionary (11th ed. 2019) (defining "traffic" as: "To trade or deal in (goods, esp. illicit drugs or other contraband)"). The only textual reference in the Act linking the definition of "traffics" to travel is the lawful-travel exclusion itself, which *narrows* the definition and *excludes* such travel. § 6023(13)(B)(iii).

Nor can the inclusion of a single word, "lawful," be understood as establishing this onerous private-enforcement regime, undoing decades of purely Executive

control over travel to Cuba and transferring enforcement of the sanctions regime to plaintiffs and their attorneys. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001). Interpretations that would entangle the judiciary in foreign affairs, or intrude on the President's Article II responsibility to enforce the laws, are particularly disfavored. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021) ("Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant's general compliance with regulatory law."); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116–17 (2013) (noting "the danger of unwarranted judicial interference in the conduct of foreign policy" in construing cause of action that might affect Executive discretion in foreign affairs); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319–20 (1936) (noting that "participation in the exercise of the [foreign affairs] power is significantly limited" because "[i]n this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation."); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1317 (11th Cir. 2001) ("[I]n the area of foreign relations, prudential considerations militate even more strongly in favor of judicial noninterference."); *Plummer*, 221 F.3d at 1309 (explaining that the "authority

delegated by Congress to the President under the TWEA is extensive" whereas "the role of the judiciary in foreign affairs is limited"); *Laufer v. Arpan LLC*, 29 F.4th 1268, 1296 (11th Cir. 2022) (Newsom, J., concurring) (noting Article II conflict with allowing "[u]naccountable private parties (and their fee-conscious lawyers)" to make "enforcement decisions that are not only different from those that Executive Branch officials might make but are also unchecked by the sorts of political and legal constraints that bind government enforcers"). Here, far from expressly authorizing such an intrusion into Executive enforcement determinations and discretion, the statutory text does not even define "lawful travel," does not mention any procedure for assessing the "lawfulness" of one's travel, and does not offer any standards by which "lawful" travel might be distinguished from "unlawful" travel. The word "lawful" is best understood as emphasizing that nothing in the act would authorize travel that the Executive chose to prohibit.

Similarly, the legislative history offers no support for the idea that Congress intended to subject all American travelers and travel providers to private actions in which they bore the burden of proving innocence ("lawfulness") under the Cuba sanctions. To be sure, the private cause of action created by Title III was discussed extensively, but the record reveals that legislators understood that the Act would principally affect *foreigners*, rather than creating a sea change in the regulation of

Americans' travel to Cuba.[3] The contemporaneous statements of President Clinton, who signed the Act into law, are similar.[4] Instead of discussing how travelers might face treble damages after a post-hoc judicial assessment of the "lawfulness" of their travel, the Conference Report notes only that the exclusion "remove[s] any liability for . . . any activities related to lawful travel to Cuba." H.R. Rep. No. 104-468, at 44.

The lawful-travel exclusion preserves Executive discretion and control over travel to Cuba, and the Act should be interpreted accordingly.

B. Lawful travel is part of the definition of "traffics" under the Act, and thus Plaintiff's burden to plead and prove.

Because the lawful-travel exclusion ensures that private litigation does not interfere with Executive enforcement discretion, Congress textually incorporated it into an element of the claim that plaintiffs must plead and prove, rather than putting

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[3] *E.g.*, 142 Cong. Rec. 1497 (1996) (Sen. Snowe) ("In title III, the bill permits American citizens to bring suit against foreign persons who traffic in their confiscated property in Cuba."); *id.* (Sen. Grams) (referring to Title III's "intended purpose of limiting foreign investment in Cuba"); *id.* at 1499 (Sen. Hatch) ("Foreign investors are free to take the place of the Kremlin powerbrokers, but they cannot trade in stolen property without consequence."); *id.* at 1500 (Sen. Boxer) ("The measure creates a new cause of action in U.S. courts allowing citizens to sue any foreign national who traffics in confiscated Cuban property."); *id.* at 1500 (Sen. Kerrey) (referring to "[p]rovisions of title III and IV which give United States citizens the right to sue foreign companies that operate in Cuba").

[4] William J. Clinton, Statement on Action on Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 2 Pub. Papers 1136, 1137 (July 16, 1996) ("Title III allows U.S. nationals to sue foreign companies that profit from American-owned property confiscated by the Cuban regime.").

the burden on defendants to prove lawful travel as an affirmative defense. The text of Title III provides a private cause of action against "any person that . . . traffics in property which was confiscated by the Cuban Government on or after January 1, 1959," subject to certain limitations (including the acquisition bar described above). 22 U.S.C. § 6082(a)(1)(A). The term "traffics" is expressly defined in terms of both what is, and what is not, considered trafficking. In relevant part, the definition states:

> **(13) Traffics**
>
> (A) As used in subchapter III, and except as provided in subparagraph (B), a person "traffics" in confiscated property if that person knowingly and intentionally--
>
> (i) sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property,
>
> (ii) engages in a commercial activity using or otherwise benefiting from confiscated property, or
>
> (iii) causes, directs, participates in, or profits from, trafficking (as described in clause (i) or (ii)) by another person, or otherwise engages in trafficking (as described in clause (i) or (ii)) through another person,
>
> without the authorization of any United States national who holds a claim to the property.
>
> (B) The term "traffics" does not include…
>
> (iii) transactions and uses of property incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel ….

§ 6023(13). To state a valid cause of action under the Act, of course, the plaintiff must plead that the defendant "trafficked" as that term is defined—and thus must plead *both* parts of the definition: that the conduct falls within the list of conduct in subparagraph (A), and is not excluded from the definition in subparagraph (B).

In interpreting similar statutes, this Court and others have held that plaintiffs generally bear the burden of pleading the elements of their claim, whether those elements are defined in terms of what is affirmatively included in the definition (as in subparagraph (A)), or in negative terms of what is excluded from the definition (as in subparagraph (B)). *E.g.*, *United States v. Fries*, 725 F.3d 1286, 1292 (11th Cir. 2013); *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1112 (11th Cir. 2008). For example, in *Thomas*, the Court addressed the Driver's Privacy Protection Act ("DPPA"), which creates a cause of action against "person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, *for a purpose not permitted* under [the DPPA]." 18 U.S.C. § 2721(a) (emphasis added). In a different section, the DPPA lists the "permissible uses" for such information. § 2721(b). Reading those provisions together, the Court held that the plaintiff must plead that the defendant's conduct did not fall within the enumerated permissible uses, and refused to treat such "permissible uses" as affirmative defenses. 525 F.3d at 1112; *accord Howard v. Criminal Info. Servs., Inc.*, 654 F.3d 887, 890–91 (9th Cir. 2011).

The *Thomas* Court relied on the text and structure of the statute, which incorporated the permissible uses as an element of the claim, rather than as an exception to liability. 525 F.3d at 1112. The Court explained that Congress could have, hypothetically, framed the permissible uses as an exception to liability by writing, "for example: 'A person who knowingly obtains, discloses, or uses personal information, from a motor vehicle record, *shall be liable to the individual to whom the information pertains, except as provided in 18 U.S.C. § 2721(b).*'" *Id.* (italics in original). The same logic applies to the Helms Burton Act: Congress expressly identified certain conduct that is permissible even when dealing with confiscated property, and incorporated those permissible uses into the definition of "traffics," rather than enumerating these as exceptions to liability. *Id.* at 1112–13.

Similarly, numerous courts have held that plaintiffs alleging a violation of the Fair Debt Collection Practices Act ("FDCPA") must allege that the defendant is a "debt collector" as defined in the statute, and that the defendant does not fall within one of the exclusions listed in that definition. *E.g.*, *Johnson-Gellineau v. Stiene & Assocs., P.C.*, 837 Fed. Appx. 8, 11 (2d Cir. 2020) (rejecting argument that "statutory exceptions to the definition of 'debt collector' are affirmative defenses"); *Brumberger v. Sallie Mae Servicing Corp.*, 84 F. App'x 458, 459 (5th Cir. 2004); *Sharp v. Premiere Credit of North Am., LLC*, No. 3:16-CV-849, 2017 WL 11025885, at *11 (M.D. Fla. Jan. 30, 2017).

The Government's Brief does not address this caselaw. Instead, it cites *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 91 (2008), a statute that created exceptions to liability, rather than defining elements of the claim in terms of what is excluded. USA Br. at 38. The statute in *Meacham* defined unlawful practices in several subparagraphs, then contained a separate subparagraph stating that certain actions "otherwise prohibited" would "not be unlawful" under certain conditions. 29 U.S.C. § 623(f)(1). The Court held that this structure established an affirmative defense, noting that "exemptions [are] laid out apart from the prohibitions," 554 U.S. at 91, consistent with this Court's holding in *Thomas*. Similarly, in *Federal Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 44–45 (1948), Congress defined unlawful price discrimination in one sentence, then included a separate "proviso" stating that "nothing herein" would prohibit certain types of price differentials—and then, in the next subsection, *expressly* allocated the burden to defendants for rebutting a prima facie case of price discrimination. *Id.* (citing 15 U.S.C. § 13(a)–(b)). The Government also cites *Schaffer ex rel. Scahffer v. Weast*, 546 U.S. 49, 57 (2005), which cuts against the Government's argument: there, the Supreme Court *refused* to shift the burden of proof to defendants, *despite* the plaintiff's argument that the relevant facts were uniquely known to defendants in such cases, *id.* at 60.

The Government also argues that plaintiffs cannot bear the burden of pleading on this issue because "it is unlikely that a plaintiff would have sufficient knowledge

to allege in good faith, even on 'information and belief,' that the defendant's transaction was not incident to lawful travel." USA Br. 38. Of course, plaintiffs often must plead and prove matters to which the defendant has greater knowledge. *Scahffer*, 546 U.S. at 60; *Thomas*, 525 F.3d at 1113 (same). Such pleading burdens ensure that the courts hear disputes brought in good faith, rather than fishing expeditions. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007).

This pleading burden is especially appropriate when it comes to the lawful-travel exclusion here. Consistent with the longstanding U.S. policy of allowing, and even encouraging, purposeful American travel to Cuba, Congress was careful to remove travel-related activities from the scope of the Act—ensuring that the Act would not interfere with or chill such travel and leaving the Executive Branch with flexibility to expand or contract permissible travel to Cuba. The Government's observation that plaintiffs will rarely be able to plead a Title III case involving travel-related activities is, therefore, entirely consistent with Congressional intent.

C. The lawful travel exclusion is fatal to Bengochea's claim.

As explained above, the text, structure, and history of the Act indicate that Congress intended to exclude travel-related conduct from the reach of the Title III cause of action, especially where the Executive Branch has not already found a violation of the applicable regulations. The exclusion therefore dooms Bengochea's suit: during the time period described in Bengochea's complaint, cruising to Cuba

was expressly permitted and encouraged by the Executive branch. President Obama himself, speaking from Cuba, explained that cruise travel was an important component of his administration's policy toward Cuba.

Bengochea, therefore, cannot state a claim against the cruise lines, because their uses of the Santiago cruise terminal were unquestionably "incident" to this permissible cruise travel, and unquestionably "necessary" to the conduct of those cruises to Santiago—and thus expressly excluded from the definition of "trafficking" under the Act. § 6023(13)(B)(iii) ("The term 'traffics' does not include . . . uses of property incident to lawful travel to Cuba, to the extent that such . . . uses of property are necessary to the conduct of such travel."). The Government explains that this "incident" and "necessary" language in the Act invokes the analogous language in 31 C.F.R. § 515.421, and those regulations permit incidental transactions reasonably tailored to facilitating licensed activities even when those transactions may not be absolutely necessary in a strict sense, and even where they would otherwise be otherwise prohibited. The Government's Brief, for example, highlights the example of "payments made using online platforms," which are not strictly necessary for licensed importation of goods (purchasers could find alternative payment methods), but which are nonetheless permitted when incident to a licensed transaction. USA Br. 35 (quoting § 515.421(b)(2)). Under this broad interpretation, the cruise lines' travel is plainly covered by the exclusion.

Indeed, before the suspension of Title III was lifted, Bengochea petitioned the State Department to pursue actions against the cruise lines under Title IV of the Act, which contains an identical exclusion for lawful travel. The State Department refused, "given the clear exclusion in Title IV's definition of 'traffics' of transactions and uses of property incident to lawful travel to Cuba . . . ."[5] Consistent with this message, the Government has never found that any Carnival or Royal Caribbean cruise violated applicable Cuba sanctions.

Accordingly, under any interpretation of the lawful-travel exclusion that respects the Executive Branch's longstanding authority to regulate and determine permissible travel to Cuba, Bengochea's claim must fail.

CONCLUSION

The Government's Brief confirms that Bengochea's suit is meritless, as he did not inherit his claim before the statutory bar. Bengochea's claim would also fail under the lawful travel exclusion, which is a broad exclusion that requires extensive deference to the Executive Branch. Accordingly, the decision below should be affirmed.

[5] *Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724, ECF No. 331-104, at 2 (S.D. Fla., filed Sep. 20, 2021). This Court has the equitable power to consider materials not presented in the district court to aid in making an informed decision. *Schwartz v. Millon* Air, Inc., 341 F.3d 1220, 1225 n.4 (11th Cir. 2003).

Dated: May 6, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the page limit set forth in this Court's April 15, 2022 Order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, it contains 20 pages.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

By: /s/ *Stuart Singer*
Stuart Singer

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party:

Becerra, Honorable Jacqueline, United States Magistrate Judge for the Southern District of Florida.

Boies, Schiller, Flexner, LLP, counsel for Defendant/Appellee.

Burton, Dan, movant to be *Amicus Curiae* in the district court and movant to be *Amicus Curiae* in this Court.

Carnival Cruise Lines, a division of Defendant/Appellee.

Carnival Corporation (New York Stock Exchange ticker: CCL), Defendant/Appellee. Carnival Corporation is publicly traded, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Carnival PLC, traded on the New York Stock Exchange as an ADS with ticker "CUK" and on the London Stock Exchange with the ticker "CCL," an

affiliate of Defendant/Appellee. Carnival PLC is publicly traded, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

Casey, Stephanie A., former counsel for Plaintiff/Appellant.

Colson Hicks Eidson, former counsel for Plaintiff/Appellant.

Creed & Gowdy, P.A., counsel for Plaintiff/Appellant.

Directorio Democratico Cubano, Inc., movant to file *Amicus Curiae brief*.

Dubbin & Kravetz, LLP., counsel for Proposed *Amici Curiae* Dan Burton, Robert Torricelli, and Directorio Democratico Cubano, Inc.

Dubbin, Samuel J., counsel for proposed *Amici Curiae* Dan Burton, Robert Torricelli, and Directorio Democratico Cubano, Inc.

Elayan-Martinez, Aziza F., former counsel for Plaintiff/Appellant.

Ezray, Evan, former counsel for Defendant/Appellee.

Fathom Travel Ltd., a former subsidiary of Defendant/Appellee.

Fowler, George J., counsel for Defendant/Appellee.

Garcia-Bengochea, Javier, Plaintiff/Appellant.

Gowdy, Bryan S., counsel for Plaintiff/Appellant.

Gray, Corey, counsel for Defendant/Appellee.

Jones Walker, LLP, counsel for Defendant/Appellee.

King, Honorable James Lawrence, United States Senior Judge for the Southern District of Florida.

Lipshultz, Zachary A., former counsel for Plaintiff/Appellant.

Llamas, Luis Emilio, counsel for Defendant/Appellee.

Lott, Johnathan, former counsel for Defendant/Appellee.

Maderal, Jr., Francisco, counsel for Plaintiff/Appellant.

Margol & Margol, P.A., former counsel for Plaintiff/Appellant.

Margol, Rodney S., former counsel for Plaintiff/Appellant.

Martinez, Roberto, former counsel for Plaintiff/Appellant.

Moriceau, Alisha, counsel for Defendant/Appellee.

Oliu, Pascual, counsel for Defendant/Appellee.

Robert Torricelli, Robert, movant to be *Amicus Curiae* in the district court and movant to be *Amicus Curiae* in this Court.

Schultz, Meredith, counsel for Defendant/Appellee.

Singer, Stuart H., counsel for Defendant/Appellee.

Strick, Amanda, counsel for Defendant/Appellee.

By: /s/ *Stuart Singer*
Stuart Singer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 6, 2022, a true and correct copy of the foregoing was served on all counsel of record via the court's CM/ECF System.

By: /s/ *Stuart Singer*
Stuart Singer