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David J. Smith
Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: ***Del Valle v. Expedia Group Inc.*, No. 20-12407 – Response to the United States' Amicus Curiae Brief**

Dear Mr. Smith:

Appellants respectfully submit this supplemental letter brief, pursuant to the Court's April 15, 2022 order, in response to the United States' amicus curiae brief.

The Court posed six questions regarding construction of the Helms-Burton Act, 22 U.S.C. § 6021, *et seq*. ("the Act") and invited the United States to file an amicus curiae brief answering each question. The United States filed its amicus curiae brief on April 11, 2022. As we further demonstrate below, many of those questions are inapplicable to *Del Valle*, are dehors the record on appeal and below, and were not briefed on appeal. That said, we submit this supplemental letter for the Court's consideration.

Mario Del Valle, Enrique Falla, and Angelo Pou sued under Title III of the Act, 22 U.S.C. § 6082 ("Title III") in the District Court for the Southern District of Florida to remedy the trafficking of appellees Expedia Group, Inc., Hotels.com L.P., Hotels.com GP, LLC, Orbitz LLC, Booking.com B.V., and Booking Holdings Inc.'s (the "*Del Valle* defendants") in appellants' confiscated properties on Varadero Beach, and in Matanzas, Cuba.

On the very first motion to dismiss in a case subjected to the vagaries and confusion of a worldwide pandemic and unprecedented lockdown, the district court granted appellees' motions to dismiss, without leave to amend. The order of dismissal was based almost exclusively on an unnecessarily constrained reading of the complaint's jurisdictional allegations, except for one footnote containing dicta that suggested inheritance issues as to two of the three plaintiffs. But

those issues were not presented, briefed or analyzed on defendants' motion to dismiss. Even if they had been, they could not have supported dismissal of the action, because Mario Del Valle, the lead plaintiff, was a U.S. citizen who owned his claim on March 12, 1996 (which we call Title III's "Record Date"), and was lucky enough to outlive Title III's suspension period. The order on appeal is subject to *de novo* review.

The questions the Court presented relate to citizenship, inheritance, assignment, suspension, and Title III's so-called "lawful travel exception." Although none of these issues are relevant to this appeal, were not briefed, and are not part of the record, the *Del Valle* appellants respond to the United States' amicus curiae brief by addressing each question the Court posed:

1. **Does the Term "United States National" in 22 U.S.C. §§ 6082(A)(4)(B) and 6082(A)(4)(C) Refer to the Plaintiff Bringing the Action, or the Original Claimant to the Confiscated Property, or Both?**

As the United States correctly concludes, Title III requires that only the plaintiff who brings suit be a United States national. Brief for United States as Amicus Curiae at 22, *Del Valle v. Trivago GMBH*, No. 20-12407 (11th Cir. argued Oct. 4, 2021) [hereinafter "U.S. Brief"]. 22 U.S.C. § 6082(a)(4)(B) expressly states that "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."

The United States notes that "[a]s a matter of grammar and statutory structure, the 'United States national' referred to in 22 U.S.C. § 6082(a)(4)(B) and (C) is the plaintiff bringing suit." U.S. Brief at 13-14. In its brief, the United States explained that other provisions in the Act and references to United States nationals in other parts of the Act do not conflict with the grammar and structure of § 6082(a)(4). U.S. Brief at 20. In support, the United States cited 22 U.S.C. § 6082(a)(5)(A), which states that "[i]n the case of a United States national who was eligible to file a claim with the Foreign Claims Settlement Commission under title V of the International Claims Settlement Act of 1949 but did not so file the claim, that United States national may not bring an action on that claim under this section."

Section 6082(a)(5)(A) is also evidence that Congress passed Title III so that persons who ***were not*** U.S. nationals when their property was confiscated could sue those who now traffic the property. Under § 6082(a)(5)(A), persons who were U.S. nationals when their property was

confiscated could have filed claims with the Foreign Claims Settlement Commission ("FCSC"), and may not sue under Title III if they failed to do so. If only persons who were U.S. nationals at the time of confiscation were allowed to bring claims under Title III, then it would apply only to certified claims and bar all others. That is not the case, as the United States notes. U.S. Brief at 22 n.3 ("Section 6082(a)(4) does not limit the class of United States nationals who may rely on Title III's right of action to those were the direct victims of Cuba's confiscation or those with certified claims."). In fact, 22 U.S.C. § 6083(c)(1) expressly provides that "Cuban nationals who *became* United States citizens *after* their property was confiscated" are not required to certify their claims. *Id.* (emphasis added).

Further, nowhere in this text or the rest of Title III is there any requirement for a plaintiff to have been a U.S. national at any time prior to filing, let alone before March 12, 1996. Unlike a plaintiff's acquisition of a Title III claim, which it says must have occurred before March 1, 1996, Title III says nothing about when a plaintiff must have become a U.S. Citizen (which it calls a "U.S. National"), only that a plaintiff must be a citizen when a claim is brought. 22 U.S.C. § 6082(a)(4)(B).

The same district court that issued the order on appeal in *Del Valle* misread Title III to hold, in *Gonzalez v. Amazon.com, Inc.*, 2020 WL 1169125 (S.D. Fla. 2020), that "a United States citizen must already own the claim to the confiscated property on March 12, 1996 when the Act was passed." This interpretation incorrectly reads words into Title III that are not there. *E.g.*, *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1224 (11th Cir. 2009) ("[W]e are not allowed to add or subtract words from a statute; we cannot rewrite it."). This Court affirmed the dismissal *per curiam* on another basis (assignment of the claim) without reaching this issue on appeal. At bottom, even if its assumptions about Title III were correct (they weren't) the dicta in the Order on appeal here did not and could not support dismissal of the action, let alone dismissal without leave to amend.

2. What Does the Word "Acquire[ ]" in 22 U.S.C. § 6082(A)(4)(B) Mean? Is Inheritance Encompassed in the Term "Acquire[ ]?" And if "Acquire[ ]" Does Include Inheritance, at What Point is a Claim "Acquire[d]" by an Heir Within the Meaning of the Statute?

Title III states that a U.S. national may bring an action for trafficking property confiscated before March 12, 1996, if he or she acquired ownership of the claim before that date. 22 U.S.C. § 6082(a)(4)(B). In its brief, the United States looked to the usual, ordinary, and legal definitions of the term "acquired," because the Act does not define it and courts interpret words based on their plain and ordinary meaning. U.S. Brief at 23-24 (citing *Spencer v. Specialty Foundry Prods. Inc.*, 953 F.3d 735, 740 (11th Cir. 2020)). The United States noted that a legal dictionary supports the conclusion that "inheritance" falls within the definition of "acquire," and any limiting definition is not supported by the text of the statute. U.S. Brief at 25.

Although § 6082(a)(4) is silent on the inheritance of claims, and no other provision of Title III addresses inheritance, the Act expressly defines property to mean "any property . . . whether real, personal, or mixed, and any present, ***future, or contingent right***, security, or other interest therein, including any leasehold interest." 22 U.S.C. § 6023(12)(A) (emphasis added). This definition makes clear that a plaintiff whose relatives owned property that the communist Castro regime confiscated had "future or contingent rights" and an interest in the confiscated property when Title III was enacted. The children of victims of confiscations by the Castro regime had a future or contingent right to their parents' claim when they were born, which the Act recognized.

Florida law is instructive in this context because, as the United States notes, the Act fails to address how one acquires property and there is no federal law governing such matters. U.S. Brief at 27. Accordingly, the Court should look to state law (and foreign law when applicable) to determine when a plaintiff acquired ownership. *Id.* The U.S. suggested that a court first determine, as a matter of state or foreign law, that a plaintiff acquired an interest in the property, then look to the other requirements in the Act, all of which are met here. *Id.* at 27-28.

The rights of the children of the victims of Cuba's confiscations vested and became a present interest when their parents died. Section 732.101(2), Fla. Stat., provides that "[t]he decedent's death is the event that vests the heir's right to the decedent's intestate property."

> The plain meaning of "acquires" is "[t]o gain possession or control of; to get or obtain." Acquire, BLACK'S LAW DICTIONARY 29 (11th ed. 2019); WEBSTER'S THIRD NEW INT'S DICTIONARY 18 (1993) ("[T]o come into possession, control, or power of disposal of."). That includes inheritance. If Congress meant for "acquires" to require some form of active conduct, like a purchase, it knew how to communicate that meaning. In fact, it did so in the very same section of the Act: "In the case of property confiscated on or after March 12, 1996, a United States national who, after the property is confiscated, **acquires ownership of a claim to the property by assignment for value**, may not bring an action on the claim under this section." *Id.* at citing 22 U.S.C. § 6082(a)(4)(C) (emphasis added). There would have been no reason for Congress to add the words "by assignment for value" if "acquires ownership" was already limited to assignment for value.

Glen v. American Airlines Inc., 7 F.4th 331, 336 (5th Cir. 2021); *accord Blanco de Fernandez v. Seaboard Marine, Ltd.*, 2021 WL 2173213 (S.D. Fla. 2021) (The term "acquire" in Title III includes inheritance of claims.).

In Section 6082(a)(4)(B), Congress did not seek to contradict or curtail its express finding that claimants should seek redress for trafficking. Rather, it merely sought to prohibit the buying and selling of historic claims, which the passage of the Act might otherwise have promoted.

3. How, if at All, Does the Phrase "Assignment for Value" in 22 U.S.C. § 6082(A)(4)(C) Affect the Pool of Eligible Claimants Compared to the Pool of Eligible Claimants Under 22 U.S.C. § 6082(A)(4)(B)?

The phrase "assignment for value" is only relevant to claims regarding property confiscated after the record date of March 12, 1996. *See* 22 U.S.C. § 6082(a)(4)(C). It is not applicable to this case or any other case we know of. It does not apply to claimants who inherited property confiscated before the record date. *See* 22 U.S.C. § 6082(a)(4)(B).

If the plain language didn't settle the matter (it does), the Act's legislative history would do so. It confirms that Section 6082(a)(4)'s "provisions are intended, in part, to eliminate any incentive that might otherwise exist to transfer claims to confiscated property to U.S. nationals in order to take advantage of the remedy created by this section." H.R. Rep. No. 104-468, at 59 (1996); H.R. Rep. No. 104-202, at 40 (1996) (same). Congress was concerned about a

marketplace for Title III claims, and sought to prevent the buying and selling of such claims, but only expressly prohibited it as to property confiscated after the record date.

As the United States explains, in using the term "assignment for value," when Congress intended to limit the type of acquisitions it did so explicitly. U.S. Brief at 26. Notably, there is no limiting term or requirement in § 6082(a)(4)(B), "and so no reason to think that Congress intended to limit the ordinary meaning of the term in that provision." *Id.* This again supports the conclusion that United States nationals who inherited the claim to confiscated property before March 12, 1996 may bring suit under Title III. *Id.* at 26-27.

Nothing in the Act or in its legislative history indicates that Congress intended to limit the right of family members to file claims that were inherited. The inheritance of claims by will or operation of law is not within the scope of conduct Congress sought to foreclose. For example, the Anti-Assignment Act, 31 U.S.C. § 3727 (formerly 31 U.S.C. § 203), generally bars "a transfer or assignment of any part of a claim against the United States Government." However, for more than a century, the Supreme Court has permitted the transfer of takings claims against the United States "by operation of law," including through inheritance, because such transfers are "not within the evil at which the statute is aimed." *E.g., Erwin v. United States*, 97 U.S. 392, 396-97 (1878); *Seaboard Air Line Ry. v. United States*, 256 U.S. 655, 657 (1921).

4. **What Effect, if Any, Does the President's Ability To Suspend Title III Pursuant To 22 U.S.C. § 6085(B) Have on Defining the Class of Eligible Claimants Who Can Bring an Action Under 22 U.S.C. § 6082(A)(4)? Does the President's Ability To Suspend Title III Imply That the Statute Was Drafted To Allow the Heirs of American Citizens – Whose Property Was Unlawfully Confiscated And "Trafficked" by Third Parties – To Bring Claims Under 22 U.S.C. § 6082(A)(4)?**

The President's ability to suspend Title III pursuant to 22 U.S.C. § 6085(b) compels the conclusion that Title III was drafted to give heirs of victims of unlawful confiscations by the Cuban regime a cause of action (under 22 U.S.C. § 6082(a)(4)) against persons who traffic that property. President Clinton's signing statement made clear that liability for trafficking would be established during the suspension period. Further, this Court's decision in *Gonzalez v. Amazon.com*, 2021 WL 510234, n.1 (11th Cir. 2021), suggests that presidential suspension of Title III for almost 23 years supports equitable tolling of Title III's March 12, 1996 record date until the suspension period ended on May 2, 2019.

The United States notes that "[n]othing in the text of the statute or legislative history suggests that Congress intended the President's suspension authority to alter the substantive provisions of the statute or to expand the scope of the provisions defining the class of United States nationals who may sue under Title III." U.S. Brief at 29. However, the United States fails to acknowledge that equitable tolling has been applied in cases where the plaintiff was misled or lulled into inaction, timely asserted her rights by mistake in the wrong forum, or was in some extraordinary way prevented from asserting her rights, *E.g., Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988) (Employee was misled or lulled into inaction by employer, and employee's appeal to state agency had raised issues before the court in a timely claim in the wrong forum).

Equitable tolling also applies, when, as here, plaintiffs have been prevented from asserting their rights by government action that as much as locked the courthouse doors. *See, e.g., Osbourne v. United States*, 164 F.2d 767, 769 (2d Cir. 1947) (U.S. merchant seaman's injury action was prevented by his internment as a prisoner during WW II.); *Frabutt v. New York, Chicago & St. Louis R.R. Co.*, 84 F. Supp. 460 (W.D. Pa. 1949) (Italian survivors of deceased U.S. citizen were prevented by WWII from bringing FELA claim against decedent's employer); *Hanger v. Abbott*, 73 U.S. 532 (1867) (Civil war prevented contract action in Arkansas).

Osbourne relied on the Supreme Court's *Hanger* decision, where the limitations period for a suit on a debt owed before the Civil War was equitably tolled in an action brought after the war, noting that the "plaintiff's rights and remedies had been suspended, as the courts had not then been open to the parties." *Osbourne*, 164 F.2d at 768. As or more extreme than *Osbourne* and *Hanger* are the cases arising under Title III, where plaintiffs' rights and remedies had "been suspended" and "the courts" had "not then been open to the parties," because of nearly 23 years of presidential suspension until May 2, 2019. ***Nobody*** could bring a Title III action during that suspension period, which barred plaintiffs' parents from bringing claims during their lifetimes.

Title III cannot equitably grant immortality to the claims of corporations, but bar the claims of real people who inherited their claims during the suspension period. To decide that plaintiffs may purchase Exxon shares today and acquire an indirect interest in Exxon's claim, yet

have no right to pursue their own personal claims, cannot be squared with the Act's statutory language and purpose, let alone principles of fundamental fairness. Moreover, where the plaintiff is a corporation, even a family-owned, closely held corporation, courts in Title III actions have been uninterested in knowing whether anyone bought or inherited shares during the suspension period, because the plaintiff is immortal, even though its owners are not. *E.g., Havana Docks Corp. v. Carnival Corp.*, WL 8895241 (S.D. Fla. 2019).

In short, Congress did not intend for Title III to protect entities (whose owners may change daily) without also protecting real people (whose deaths inspired the Act's passage, and whose ownership interests pass on when they die). Even if there were any doubt on this point, equitable tolling would apply, to prevent Title III's suspension period from wiping out the personal claims of people who were prevented from bringing them by that suspension period, whether they owned them on the record date or inherited them during the suspension period.

5. **What Effect, If Any, Does the Lawful Travel Exception, 22 U.S.C. § 6023(13)(B)(iii), Have on the Plaintiffs' Claims? What Effect, If Any, Does the Possibility That the Office Of Foreign Assets Control (OFAC) Can Change the Permissible Reasons For Travel to Cuba Have on the Lawful Travel Exception?**
6. **What Does the Phrase "Incident To Lawful Travel" in 22 U.S.C. § 6023(13)(B)(iii) Mean? Who Or What Defines "Lawful Travel" (E.G. OFAC)? What Guidance Should Persons And Entities Look To in Determining Whether Their Activities Are "Incident To Lawful Travel?"**

The short answer as to the *Del Valle* appeal is none. The United States said it took no position on the effect of the so-called "lawful travel exception" on this case because the issue is underdeveloped in the record and no district court decisions have applied the lawful travel exclusion. U.S. Brief at 36. This avoided conceding the obvious—this exception is an affirmative defense that won't even be alleged until defendants answer the complaint after remand. Further, even assuming *arguendo* that non-tourist, lawful travelers to Cuba might need to book rooms, it is not essential that they book rooms in hotels, let alone hotels built on property stolen from the *Del Valle* plaintiffs, or that they book rooms through online booking agencies such as the *Del Valle* defendants.

That said, this question is premature and irrelevant to the *Del Valle* appeal, because, as the United States concludes, plaintiffs do not "bear the burden to plead specific allegations that

would establish that the defendant's travel-related transactions were not 'incident to lawful travel.'" U.S. Brief at 37. Instead, the lawful travel exception is an affirmative defense that a defendant must plead and prove.[1] *E.g., Garcia-Bengochea v. Carnival Corp.*, 407 F. Supp. 3d 1281, 1287 (S.D. Fla. 2019); *Havana Docks Corp. v. Carnival Corp.*, 2019 WL 8895241, at **2-4 (S.D. Fla. 2019). Further, the *Havana Docks* court recently issued a comprehensive order on this issue. *See Havana Docks v. Carnival Corp.,* 2022 WL 831160, *87 (S.D. Fla. Mar. 21, 2022). In that Order, Judge Bloom thoroughly surveyed United States law governing travel to Cuba—including the statutory constraints imposed by Congress—and found as a matter of law that the conduct of four cruise lines did not fall within the "lawful travel" exception. *Id.* at **3 – 8, **59 – 78.

The United States' amicus brief describes the structure and purpose of the Cuban Assets Control Regulations ("CACR") and, in some respect, their interplay with federal law. *See* U.S. Brief at 31-32. Plaintiffs agree with the United States that "[t]ravel to Cuba by persons subject to U.S. jurisdiction is highly restricted under federal law." U.S. Brief at 15. The United States, however, does not adequately discuss the statutory limits on travel to Cuba imposed by Congress, which the Executive Branch may not exceed.[2] Given that the Court is interpreting a

[1] Because the *Del Valle* order on appeal granted a motion to dismiss, this affirmative defense was neither presented nor reached below. For a thoroughgoing analysis of Questions 5 and 6, Plaintiffs respectfully refer the Court to four pending cases in the Southern District of Florida that extensively briefed and argued this affirmative defense on motions for summary judgment. *Havana Docks Corp. v. Carnival Corp.*, No. 19-cv-21724-Bloom/McAliley (S.D. Fla.); *Havana Docks Corp. v. MSC Cruises et al.*, No. 19-cv-23588-Bloom/Louis (S.D. Fla.); *Havana Docks Corp. v. Royal Caribbean Cruises*, No. 19-cv-23590-Bloom/Louis (S.D. Fla.); *Havana Docks Corp. v. Norwegian Cruise Line, Ltd.*, No. 19-cv-23591-Bloom/Louis (S.D. Fla.). After extensive briefing and argument, on a full record, the *Havana Docks* court recently rejected defendants' lawful-travel defense, entered summary judgment for the plaintiff on liability, and set the case for trial on damages commencing in September 2022. *See Havana Docks v. Carnival Corp.,* 2022 WL 831160, *87 (S.D. Fla. March 21, 2022).

[2] *See Legal Env't Assistance Found., Inc. v. U.S. E.P.A.*, 118 F.3d 1467, 1473 (11th Cir. 1997) ("The power of an administrative [agency] to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute."); *United States v. Marte*, 356 F.3d 1336, 1341-42 (11th Cir. 2004).

federal statute, understanding that statutory framework is essential to determining what "travel to Cuba" is "lawful" under the Act. *See, e.g., United States v. Dominguez,* 997 F.3d 1121, 1124 (11th Cir. 2021) ("We start with the text and its ordinary public meaning at the time of enactment.").

The central purpose of Title I of the Act was to "Strengthen[] International Sanctions Against the Castro Government." *See, e.g.,* 22 U.S.C. §§ 6031 - 6046. One of the principal ways Congress accomplished this was by codifying—in the text of the Act—"all *restrictions* on . . . travel to or from, Cuba," including "all *restrictions* under [the CACR]," that were "in effect on March 1, 1996." *Id.* § 6023(7) (definition of "Economic Embargo of Cuba"); *id.*, § 6032(h) ("Codification of Economic Embargo") (emphases added). The effect of this codification was to define by statute—and set a ceiling on—the permissible forms of travel to Cuba under United States law. *See Regan v. Wald*, 468 U.S. 222, 236 (1984) ("If Congress had wished to freeze existing *restrictions* [on travel to Cuba], it could easily have done so explicitly. The fact that it did not do so, but instead used the generic term 'authorities,' indicates that Congress intended the President to retain some flexibility to adjust existing embargoes.") (emphasis added); *see also Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) ("We normally assume that Congress is 'aware of relevant judicial precedent' when it enacts a new statute."). By codifying—in the text of the Act—the restrictions on travel to Cuba "in effect on March 1, 1996," Congress defined for itself the meaning of "lawful travel to Cuba" under the Act. 22 U.S.C. §§ 6023(7)(A), 6023(13)(B)(iii), 6032(h); *Dominguez,* 997 F.3d at 1124.

Congress therefore did not delegate authority to OFAC to administer, interpret or issue regulations implementing the Act's lawful travel exception. Instead, the Act did the opposite: by codifying into law the embargo as it existed on March 1, 1996, Congress curtailed OFAC's authority to amend and loosen restrictions on travel to Cuba. *Compare* 22 U.S.C. §§ 6023(7)(A), 6032(h), *with Wald*, 468 U.S. at 236. Thus, this is not a situation where deference is due to an agency's interpretation of "a 'statute which it administers.'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1629 (2018) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 841 (1984)). Far from it. The CACR itself provides that "[n]o license or authorization contained in or issued pursuant to this part shall be deemed to authorize any transaction prohibited by any

law other than the Trading With the Enemy Act, the Foreign Assistance Act of 1961, or any proclamation, order, regulation or license issued pursuant thereto." 31 C.F.R. § 515.101(b) (entitled: "Relation of this part to other laws and regulations") (citations omitted); *see also Epic Sys.*, 138 S. Ct. at 1629 ("[O]n no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.").

Beyond the Act, additional statutory constraints on OFAC's authority to license travel to Cuba appear in the Cuban Democracy Act of 1992 and the Trade Sanctions Reform and Export Enhancement Act of 2000 ("TSRA"). *See, e.g.,* 22 U.S.C. § 6005(b)(2) ("Except as *specifically authorized* by the Secretary of the Treasury, a vessel carrying . . . passengers to or from Cuba . . . may not enter a United States port.") (emphasis added); *id.*, § 7209(b) (revoking Executive Branch's authority to license travel to Cuba for "tourist activities").

Although the United States argues that "[t]ravel to Cuba is lawful only if, at the time of the travel, the travel-related transactions were authorized by an OFAC license," U.S. Brief at 34, merely possessing a license does not end the analysis. No OFAC license may conflict with existing law or exceed statutory authority, and defendants' licenses do both. *See Catalyst Pharms., Inc. v. Becerra*, 14 F.4th 1299, 1312 (11th Cir. 2021) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Marte*, 356 F.3d at 1341 ("[W]here a regulation conflicts with a statute, the statute controls."); *Real v. Simon*, 510 F.2d 557, 564-65 (5th Cir. 1975) (invalidating CACR license that "does not have the support of logic," "has no basis in law and must be set aside and annulled"). To the extent OFAC's 2015 to 2019 CACR amendments were valid and otherwise inform the meaning of the Act, they must be construed in harmony with the statutory limits imposed by Congress. *See Havana Docks*, 2022 WL 831160, at **60, 68, 73 (construing regulations to avoid "disharmony between the TSRA and the CACR"); *see also* U.S. Brief at 15, 31, 33, 37 (stating that travel to Cuba is "highly restricted," and that OFAC issues "narrow licenses").

Among the statutory limits imposed by Congress is the TSRA which, in 2000, four years after passage of the Act, revoked the Executive Branch's authority to license travel to Cuba for "tourist activities." 22 U.S.C. § 7209(b). The CACR is in accord, having prohibited tourist travel

to Cuba at all times since the Act was passed in 1996.[3] Thus, Congress and OFAC could not have been more clear in stating that tourist travel is unlawful and not a permissible reason for travel to Cuba. 31 C.F.R. § 515.560(f) ("***Nothing in this section authorizes transactions in connection with tourist travel to Cuba***.") (emphasis added). To prevail on their lawful travel defense, the *Del Valle* defendants must plead and prove that they did not sell travelers hotel rooms at beachfront resorts in Varadero, Cuba in connection with tourist travel to Cuba, and that their sale of beachfront resort rooms was *necessitated by* (incident to) ***non-tourist*** travel.[4] Resolving that question requires factual development through the discovery process, which hadn't even commenced when the order at issue appeal was entered. Thus, this issue is not presented at all on this appeal.

For the Court's consideration, Plaintiffs will, however, briefly respond to the United States' proposed (inaccurate) interpretation of the lawful travel exception. According to the United States:

> "transactions and uses of property" are "incident to lawful travel to Cuba, to the extent that such transactions and uses of property are necessary to the conduct of such travel," [22 U.S.C.] § 6023(13)(B)(iii), if the transactions and uses of property are "ordinarily incident to a licensed transaction" involving travel to Cuba 'and necessary to give effect thereto," 31 C.F.R. § 515.421(a).

United States Brief at 34. This is not what the Act says, and the United States would replace the language enacted by Congress in the Act with a regulation promulgated by OFAC in 2015, *nineteen years after* the law's enactment. *Id.* (quoting 31 C.F.R. § 515.421(a) ("Any transaction ordinarily incident to a licensed transaction and necessary to give effect thereto is also authorized . . .")). Yet, as demonstrated above, OFAC was not delegated any authority to administer or interpret the Act. Moreover, the authorization in section 515.421 does not purport to interpret or apply to the Act. *See* 31 C.F.R. § 515.101(b). That regulation, therefore, does not inform the

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[3] *See* 31 C.F.R. § 515.560(a)(2), (b)(2) (1996); *id.* § 515.419(b) (1996); *id.* § 515.560(g) (2000); *id.* § 515.565(c) (2000); *id.* § 515.560(f) (2015-2019); *id.* § 515.565(c) (2015 – Nov. 2017); *id.* § 515.565(f) (Nov. 2017 to June 2019).

[4] *Cf. United States v. Fuentes-Coba,* 738 F.2d 1191, 1195 (11th Cir. 1984) ("The precedent and practice of this court demands an interpretation of the [TWEA] and [CACR] with 'a common sense regard for regulatory purposes and plain meanings.'").

meaning of the Act. *See Epic Sys.*, 138 S. Ct. at 1629 ("[O]n no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron*'s essential premises is simply missing here.").

The language Congress actually adopted creates a defense to trafficking only for "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." 22 U.S.C. § 6023(13)(B)(iii). The defense has three elements: (1) the travel to Cuba must be "lawful" under the Act; (2) the transactions and uses of confiscated property must be "incident" to lawful travel; and the defense applies (3) "to the extent that" the transactions and uses of the confiscated property are "necessary to the conduct of such travel." *Id.* The United States' proposed interpretation would essentially dispense with the third element, necessity.

"Necessary" is a word of restriction that has an ordinary meaning of "'indispensable, requisite, essential, needful; that cannot be done without,' or 'absolutely required.'" *See, e.g., Vorchheimer v. Philadelphia Owners Assoc*., 903 F.3d 100, 105-06 (3d Cir. 2018) (alteration omitted; quoting dictionaries, and holding that "[f]irst, 'necessary' means 'required.' It is a high standard.").[5] "Like ordinary English speakers, the common law uses 'necessary' in this strict sense of essential or indispensable." *Id.* at 107. As the one court to interpret the necessity element has held, "the Act employs the strict definition of the word necessary" in the lawful travel exception. *Havana Docks*, 2022 WL 831160, **75–78.

[5] *Accord Harmony Haus Westlake, L.L.C. v. Parkstone Prop. Owners Ass'n*, 851 F. App'x 461, 465 (5th Cir. 2021) (same); *Cinnamon Hills Youth Crisis Center, Inc. v. St. George City*, 685 F.3d 917, 924 (10th Cir. 2012) (Gorsuch, J.) ("What does it mean to be 'necessary'? The word implies more than something merely helpful or conducive. It suggests instead something 'indispensable, 'essential,' something that 'cannot be done without.'") (citation omitted); *GTE Serv. Corp. v. F.C.C.*, 205 F.3d 416, 421-24 (D.C. Cir. 2000) (holding that "[s]omething is necessary if it is required or indispensable to achieve a certain result," and "a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word, *i.e.,* so as to limit 'necessary' to that which is required to achieve a desired goal"; rejecting agency "interpretation of 'necessary' under [47 U.S.C.] § 251(c)(6)" as "used or useful," which "goes too far and thus 'diverges from any realistic meaning of the statute.'").

Legislatures know how to loosen or tighten the degree of necessity through the use of qualifying language. For example, "when Congress wants to loosen necessity to mean just 'sufficiently important,' it uses the phrase 'reasonably necessary'" or "it pairs 'necessary' with a looser term to include what is merely fitting or preferable." *Vorchheimer*, 903 F.3d at 106-07 (citing *Ayestas v. Davis*, 138 S. Ct. 1080, 1093 (2018); *Havana Docks*, 2022 WL 831160, at *76. Examples of looser, qualifying words are "reasonably," "ordinary," "proper" and "appropriate."[6] Conversely, when Congress wishes to tighten the degree of necessity it qualifies necessary with words of limitation. An example of this strict, qualifying language is the phrase "to the extent." *See United States v. Church of Scientology of Boston, Inc*., 933 F.2d 1074, 1075-79 (1st Cir. 1991) (Breyer, J.) (strictly interpreting statutory phrase "to the extent necessary" in tax code to impose a "rather high preliminary legal hurdle"); *United States v. Holmes*, 614 F.2d 985, 988 (5th Cir. 1980) (same; holding that "[t]he 'extent necessary' syntax is certainly more restrictive than the 'may be relevant' language"); *accord John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 96-97, 104-05, 109 (1993) (statutory phrase "to the extent that" should be treated by courts as "words of limitation"); *Clark v. Rameker*, 573 U.S. 122, 130-33 (2014) (similar).[7]

In the Act, Congress created a defense to trafficking for lawful travel "***to the extent that*** such transactions and uses of property are necessary to the conduct of such travel." 22 U.S.C. § 6023(13)(B)(iii) (emphasis added). Through its use of words of limitation ("to the extent that"), and the absence of qualifying words of discretion, Congress employed the word necessary in its

[6] *See, e.g., CSX Corp. v. United States*, 18 F.4th 672, 679 (11th Cir. 2021) ("bona fide and necessary expenses incurred or reasonably expected to be incurred" in 26 U.S.C. §3231(e)(1)(iii) "does not means strictly needed") (citing *Comm'r v. Tellier*, 383 U.S. 687, 689 (1966) ("'ordinary' and 'necessary' expenses within the meaning" of 26 U.S.C. § 162(a) requires "that the expense be 'appropriate and helpful'")).

[7] *See also John Hancock*, 510 U.S. at 109 ("The Legislature provided an exemption 'to the extent that' a contract provides for guaranteed benefits. By reading the words 'to the extent' to mean nothing more than 'if,' the Department has exceeded the scope of available ambiguity.").

ordinary, strict sense, *i.e.*, required, essential or indispensable. *Havana Docks*, 2022 WL 831160, at *76; *Church of Scientology*, 933 F.2d at 1075-79; *Vorchheimer*, 903 F.3d at 106-07.[8]

Finally, as the *Havana Docks* court found, construing the word necessary in its looser sense would mean that "traffickers in confiscated property may avoid liability by simply showing that using the property was convenient," helpful, important or appropriate. *Havana Docks*, 2022 WL 831160, at **75–77. This is contrary to the purpose and structure of the Act (as well as its plain language), and would leave entirely to the trafficker's discretion whether to use property confiscated by the Cuban Government. *See AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 388-92 (1999) (vacating agency's permissive reading of statutory term "necessary," which, among other things, "allows entrants, rather than the Commission, to determine whether access to proprietary elements is necessary"). Indeed, under any less restrictive meaning of necessity than its ordinary, strict meaning, a trafficker's use of confiscated property would always be "necessary" so long as it was not "inappropriate," "inconvenient" or "unhelpful" to traffic in the stolen property.

Such a standard would be so permissive as to capture all uses of confiscated property, which is irreconcilable with the Necessary Element being set out in a separate clause, as a separate element of the defense, to restrict the use of confiscated property in the conduct of travel to Cuba. *See Clark*, 573 U.S. at 131 ("Petitioners' reading would write out of the statute the first element. It therefore flouts the rule that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'"); *AT&T Corp.*, 525 U.S. at 388-90 (rejecting permissive reading of "necessary," and holding that "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included [the necessary element] in the statute at all"); *Church of Scientology*, 933 F.2d at 1077 (rejecting permissive interpretation of

[8] In its original form, the lawful travel exception applied "to the degree that such transactions and uses of property are necessary to the conduct of such travel." *See* 141 Cong. Rec. S15055-01 at S15056, 1995 WL 598669 (Oct. 11, 1995). Congress later amended that language to ensure that the exception applied only "to the extent that such transactions and uses of property are necessary to the conduct of such travel." H.R. Conf. Rep. 104-468, 1996 WL 97265 at *8 (Mar. 1, 1996).

"necessary" because it would "basically make the 'and' (and the entire 'extent necessary' section [of the statute]) redundant").[9]

In short, if the Court were to reach the issue, Plaintiffs respectfully request that the Court interpret the necessity element in 22 U.S.C. § 6023(13)(B)(iii) according to its ordinary meaning and strict sense in the language adopted by Congress, *i.e.,* required, indispensable, or essential.

Thank you for the opportunity to discuss these questions. We stand ready to discuss them further, at your convenience.

Respectfully submitted,

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[9] *See also Maracich v. Spears*, 570 U.S. 48, 60 (2013) ("An exception to a 'general statement of policy' is 'usually read narrowly in order to preserve the primary operation of the provision,'" and "[u]nless commanded by the text," such "exceptions ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design.") (citation omitted).