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May 6, 2022

VIA CM/ECF

David J. Smith
Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth St., N.W.
Atlanta, Georgia 30303

Re: **Supplemental Letter Brief**

***Javier Garcia-Bengochea v. Carnival Corporation, a foreign corporation d/b/a Carnival Cruise Line,* Case No. 20-12960-BB**

***Javier Garcia-Bengochea v. Royal Caribbean Cruises, Ltd.,* Case No. 20-14251-BB**

Dear Mr. Smith:

Pursuant to the Court's order of April 15, 2022, this letter is Plaintiff-Appellant Javier Garcia-Bengochea's supplemental brief responding to the brief of the United States. This letter uses the same headings used in the Government's brief.

"The United States Government has an obligation to its citizens to provide protection against wrongful confiscations by foreign nations and their citizens, including the provision of private remedies." 22 U.S.C. § 6081(10).[1] Congress enacted the LIBERTAD Act because it was frustrated with the Executive Branch's failure to seek redress for American properties confiscated by the Castro regime and other Latin American governments. *See* Daniel W. Fisk, "Cuba in US Policy: An American Congressional Perspective," *Canada, the US, and Cuba: Helms-Burton and its Aftermath* 29 (Center for International Relations, Queens University, Kingston, Ontario, Canada, 1999) ("In many instances, the US State Department

[1] Unless otherwise indicated, all statutory citations are to Title 22.

was the subject of [American] citizen complaints as much as the foreign government that had actually taken the property."). Indeed, the State Department consistently opposed the LIBERTAD Act. *Id.* at 33.

Unable to kill the LIBERTAD Act a quarter century ago through the democratic lawmaking process, the Executive Branch today seeks to kill the Act for a substantial number of claimants by advising this Court to adopt a judicial interpretation that will immunize past and future traffickers of many confiscated properties from liability—contrary to Congress's express finding. *See* § 6081(11) ("United States nationals who were the victims of these confiscations should be endowed with a judicial remedy in the courts of the United States that would deny traffickers any profits from economically exploiting Castro's wrongful seizures."). While the Government gives lip service to Congress's enacted findings and policies (Gov't Br. 1), it effectively seeks to thwart those findings and policies. Its proposed construction of the Act will mean that approximately 5,000 certified claimants (85% of such claimants)—and countless uncertified claimants—will never obtain any compensation from those, like the cruise lines, who aid and abet the communist regime and who unjustly use for their own commercial benefit the properties that Castro unlawfully confiscated from American citizens. This Court should reject the Government's interpretation.

I. The Meaning of "United States National" and "Acquire" and the Law Governing Property Acquired by Inheritance.

A. The Meaning of "United States national" in 22 U.S.C. § 6082(a)(4)(B) & (C).

The Court asked the Government whether "the term 'United States national' in…§§ 6082(a)(4)(B) and 6082(a)(4)(C) refer[s] to the plaintiff bringing the action, or the original claimant to the confiscated property, or both." Order 3 (Dec. 20, 2021). These two provisions—along with paragraph (5) of § 6082—specify which United States nationals "may not bring an action." § 6082(a)(4)(B)&(C). As the Government concedes, a neighboring provision—§ 6082(a)(1)(A)—"specifies which class of United States nationals *may sue* under Title III." Gov't Br. 18 (emphasis added). Before determining which United States nationals "may not bring an action" under § 6082(a)(4)(B)&(C) (or § 6082(5)), a court first should understand which United States nationals may bring an action under § 6082(a)(1)(A). As the Government concedes, under that provision, the only persons who may bring an action are "'United States national[s] *who own[ ] … claim[s]*" to "property … confiscated by the Cuban Government on or after January 1, 1959." Gov't Br. 18 (emphasis added) (quoting § 6082(a)(1)(A)).

Who owns the certified claims and thus may sue? The Government gives inconsistent, conflicting advice to the Court on how to answer this question. On the one hand, the Government advises that "courts should look to *state law (or foreign law,* when applicable*)* to determine when a plaintiff acquired, by inheritance or otherwise, a claim to property at issue in an action under Title III." Gov't Br. 27 (emphasis added). On the other hand, the Government advises that the LIBERTAD Act—a federal law—"creates rules governing the '[e]vidence of ownership' of a claim to property confiscated by Cuba. 22 U.S.C. § 6083(a)." Gov't Br. 4. One of these rules, the Government concedes, is that "[t]he Foreign Claims Settlement Commission's certification of a claim is '*conclusive proof of ownership of an interest*' in the property for purposes of suit under Title III. *Id*. § 6083(a)(1)." *Id.* (emphasis added).

What is the "conclusive proof of ownership" of the certified claims in this case? "According to the Commission's records, Albert [Parreño]—not Plaintiff—owns the certified claim." Appellant's Reply Br. 31 (citing Appellant's Br. 13 n.6; *Carnival* Doc. 1-1.). The Government does not deny this assertion from our reply brief, which Appellant reiterated to the Government in a letter of January 28, 2022 ("Letter").[2]

The conclusive nature of the Commission's factual and legal determinations as to the ownership of a certified claim is so ironclad—under § 6083(a)(1) and other provisions in Title 22—that no executive or judicial official may question or undermine that determination in any way. As Judge Bloom recently explained in another LIBERTAD action:

> Title III of the LIBERTAD Act states that "the court shall accept as conclusive proof of ownership of an interest in property a certification of a claim to ownership of that interest that has been made by the [Commission]" § 6083(a)(1). The LIBERTAD Act is consistent with the limitation on judicial review of certified claims.
>
> The [Claims] Act states that "[t]he decisions of the [Commission] with respect to claims shall be final and conclusive on all questions of law and fact, and shall not be subject to review by the Attorney General or any other official of the United States or by any

[2] If the Court so directs, Appellant will file his counsel's letter to the Government of January 28, 2022. The arguments herein are largely from that letter. The Government's brief fails to address salient points made in that letter, such as the letter's discussion of the OFAC Notice of July 29, 2008.

> court by mandamus or otherwise." 22 U.S.C. § 1622g; *see Haven v. Polska*, 215 F.3d 727, 734 n.8 (7th Cir. 2000) (citing § 1622g for the proposition that "[Commission] decisions may not be reviewed by a federal court."). Similarly, the [Claims] Act states that "[t]he action of the [Commission] in allowing or denying any claim...shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise." 22 U.S.C. § 1623(h)….Accordingly, under the plain terms of the LIBERTAD Act and [the Claims] Act, the Court must accept as true the [Commission's] certification of an ownership of an interest in confiscated property made in favor of Havana Docks.

Havana Docks Corp. v. Carnival Corp., 2022 WL 831160, at *51 (S.D. Fla. Mar. 21, 2022). To reiterate, the Commission has found, as matter of fact and law, that Albert Parreño—not Plaintiff—owns the certified claim, *Carnival* Doc. 1-1, and neither this Court nor any official in the Executive Branch may question that finding.

In his counsel's letter to the Government, Appellant highlighted a 2008 notice issued by the Department of Treasury's Office of Foreign Assets Control (OFAC), which the Government has failed to address in its brief:

> [OFAC] has been made aware of certain inquiries regarding issues related to the sale and/or purchase of claims against Cuba certified by the…Commission….The Cuban Assets Control Regulations, 31 C.F.R. Part 515…prohibit all persons subject to U.S. jurisdiction from dealing in property in which Cuba or a Cuban national has or has had an interest, unless authorized pursuant to a general or specific license issued under the Regulations or otherwise exempt….*Accordingly, the transfer of a certified Cuban claim is generally prohibited absent authorization by OFAC*. OFAC may consider licensing the transfer of such a claim under certain circumstances, provided that any transactions are limited to persons subject to U.S. jurisdiction.

OFAC Notice (July 29, 2008) (emphasis added) (https://home.treasury.gov/system/files/126/fcsc.pdf). As the letter informed the Government, "OFAC never has approved the transfer of the ownership of Albert Parreño's certified claim." Letter 6. Furthermore, the Government was told that Appellant was "unaware of OFAC approving the transfer of the ownership of any other certified Cuban claim," and the undersigned requested that, "[i]f OFAC or any other agency of the government has approved the transfer of any certified Cuban

claim," he "be provided copies of records of such approvals to the extent permitted by law." *Id.* The Government has not provided any such records.

Although the Government discusses its authority under 31 C.F.R. Part 515 as it relates to lawful travel to Cuba (Gov't Br. 31-37), its brief fails to address—at all—its prior position in 2008 based on 31 C.F.R. Part 515 that certified claimants (like Albert Parreño) were "generally prohibited" from transferring their certified claims. Instead, the Government now says—contrary to its 2008 position—"there [is not] any generally applicable federal law governing" "how one comes to acquire an interest" in a claim to confiscated property. Gov't Br. 27. Because the Government's present position contradicts its earlier position, it is not persuasive and merits no deference. *Cf. Skidmore v. Swift & Co.*, 32 U.S. 134, 140 (1944) (noting the weight given to an agency judgment depends upon, among other things, "its consistency with earlier and later pronouncements").

Section 6083(a)(1) and the Commission's own records conclusively establish that Albert Parreño owns the certified claim. *Carnival* Doc. 1-1. In turn, Albert Parreño—not Plaintiff—is the "United States national who owns the claim" and thus is the person to whom a trafficker is liable under subparagraph (1)(A) of § 6082(a). And that paragraph is directly incorporated into subparagraph (4)(A) of § 6082(a), which authorizes that "actions may be brought under paragraph (1) with respect to property confiscated before, on, or after March 12, 1996." 22 U.S.C. § 6082(a)(4)(A). But there are two limitations—in adjoining subparagraphs (4)(B) and (4)(C) of § 6082(a)—to which such actions may be brought.

Reasonably read, the "United States national who owns the claim" per subparagraph (1)(A) of § 6082—which is incorporated into subparagraph (4)(A) of § 6082—must be same United States national subject to the limitations in subparagraphs (4)(B) and (4)(C) of § 6082. In other words, because Albert Parreño is the United States national who owns the claim per § 6083(a)(1), to whom liability is owed per § 6082(a)(1)(A), and in whose name an "action[] may be brought" per § 6082(a)(4)(A), the limitations on actions specified in § 6082(a)(4)(B)-(C) must likewise be referring to the same United States national (Albert Parreño) and not to his legal representative (Plaintiff).

The Government's brief never tries to reconcile §§ 6082(a)(1)(A), 6082(a)(4)(A), and 6083(a)(1) with § 6082(a)(4)(B)-(C). The whole-text canon requires a court to consider, obviously, the whole text—and not ignore critical provisions like the Government has ignored §§ 6082(a)(1)(A), 6082(a)(4)(A), and 6083(a)(1). *See* Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167. Another canon that springs from the

whole-text canon is the presumption against ineffectiveness. *Id.* § 24, at 168. This presumption "ensures that a text's manifest purpose is furthered, not hindered." *Id.* § 4, at 63. As the Government correctly states, "Title III of the statute creates a judicial remedy for certain United States nationals whose property was confiscated by Cuba after the Castro regime came to power in 1959." Gov't Br. 2. The Government's reading of § 6082(a)(4)(B)-(C), however, effectively deprives a judicial remedy for approximately 85% of the certified claimants.

The Department of Justice's website identifies 5,913 certified Cuban claims. https://www.justice.gov/fcsc/claims-against-cuba. All but two were certified before 1996. *Id.* Thus, as a practical matter, subparagraph (4)(B)—which limits the actions that can be brought for property confiscated before March 12, 1996—is the provision that applies to almost all the certified claims. Individuals hold roughly eighty-five percent of the certified claims. Appellant's Br. 21.[3] As previously noted, no evidence or record exists that the Government has ever approved the transfer of these certified claims, whether by inheritance or otherwise—despite the Government's 2008 assertion that its approval was required for any transfer (OFAC Notice (July 29, 2008)). One can safely assume that few of the individual certified claimants were still living when the LIBERTAD Act was enacted in 1996 (approximately 36 years after Castro expropriated their properties), and those few individuals who were alive then were almost certainly deceased when LIBERTAD actions could be filed in 2019 (approximately 59 years after the expropriations).

Accordingly, the Government's reading of § 6082(a)(4)(B)-(C) doesn't just hinder the LIBERTAD Act's purpose; instead, it kills the judicial remedy that Congress created for individual certified claimants. Thus, not surprisingly, former congressmen who were primarily responsible for the LIBERTAD Act's passage have filed an amicus brief taking a position directly contrary to the Executive Branch's position. They recognize, as should this Court, that the LIBERTAD Act will become a dead letter for the vast majority of certified claims if the Court adopts the Government's interpretation of § 6082(a)(4)(B)-(C). *Cf. United States v. Atl. Research Corp.*, 551 U.S. 128, 136-37 (2007)(unanimously rejecting the Government's interpretation of a CERCLA provision in part because it "would reduce the number of potential plaintiffs to almost zero, rendering [the CERCLA provision] a dead letter."); *Berenguela-Alvarado v. Castanos*, 950 F.3d 1352, 1358-59 (11th Cir. 2020) ("This Court has held that these affirmative defenses should be construed narrowly so as to prevent them from swallowing the rule and rendering the Convention a dead letter." (internal quotations omitted)).

[3] Citations to Appellant's brief are to his principal brief in case number 20-12960.

Finally, the Government's assertion—that the provisions in paragraph (5) of § 6082 "identify classes of United States nationals for purposes different from those of" paragraph (4) of § 6082 (Gov't Br. 20)—is misplaced. As the Government concedes, *both* subparagraphs (4)(B) and (C) and paragraph (5) "set limits" on actions authorized by paragraph (1) and subparagraph (4)(A). Gov't Br. 20. Our reply brief more fully explains how the term "United States national" as used in paragraph (5) must be referring to a United States national whose property was confiscated *circa* 1960 and whose claims to just compensation were, or could have been, processed by the Commission from 1965 to 1972. Reply Br. 31-33; *see also* Appellant's Br. 20 (discussing the 1965-72 period when the Commission adjudicated claims). The Government's footnote—highlighting an example of an American owner of expropriated property dying after the expropriation but before the Commission was able to certify any claims (Gov't Br. 22 n.3)—is of no consequence. The term "United States national" as used in these provisions is referring to the American owner of expropriated property or his successors in interest who could have obtained certified claims from the Commission when it adjudicated claims from 1965 to 1972. The term "United States national"—at least in the context of certified claims—cannot be referring to Americans who, decades later, may have inherited such a certified claim.

B. The Meaning of "Acquires" in 22 U.S.C. § 6082(a)(4)(B), the Import of "Assignment for Value" in 22 U.S.C. § 6082(a)(4)(C), and the Law Governing Inheritance.

As an initial matter, if the United States national in § 6082(a)(4)(B)&(C) is the certified claim owner recognized by the Commission's records, then the answers to Questions 2 and 3 are of no consequence to Albert Parreño's certified claim or the other 5,910 claims certified before 1996—which account for 99.96% of the existing certified claims. These 5,911 certified claims were "acquired" by the original claim owner no later than the date of their certification, which occurred from 1965 to 1972. *See* Appellant's Br. 3-5, 13, 20, 34.

1. The Government recites various dictionary definitions. Gov't Br. 24-25. Then, it concedes that "dictionaries contain *more restrictive definitions* of the term 'acquire' *that might not encompass 'inheritance*.'" Gov't Br. 25 (emphasis added). Yet, it asserts in conclusory fashion that "nothing in the statute suggests that Congress intended to limit the ordinary usage of 'acquire[],' which includes acquisition by inheritance." Gov't Br. 25 (footnote omitted). In response, we point the Court to our principal brief where we explained why the context of the statute dictates that "acquire" be given a more restrictive meaning that excludes inheritance. Appellant's Br. 36-44. For example, we argued that to construe "acquire" to include

"inherit" would mean that heirs are guilty of trafficking when they inherit an interest in confiscated property. *Id.* at 40 (discussing use of "acquires" in 22 U.S.C. § 6023(13)(A)(i)). Such a result is "absurd" and "monstrous." *Cf. Ruhlen v. Holiday Haven Homeowners, Inc.*, 28 F.4th 226, 229 (11th Cir. 2022) (explaining Justices Scalia's and Story's view of the absurdity canon). The Government has failed to address this argument.

In a footnote, the Government argues that "if the term 'acquire[]' in § 6082(a)(4)(B) does not include acquisitions by inheritance," then the person "bringing suit"—here, Plaintiff—would be unable to "to assert a claim under Title III because the statute provides that a United States national 'may not bring an action … *unless* such national *acquires* ownership of the claim before March 12, 1996.'" Gov't Br. 25 n. 4 (quoting 22 U.S.C. § 6082(a)(4)(B) (emphases added by the Government)). But as the Government concedes, the correctness of this argument depends on the Government also being correct that the person who brings the suit (Plaintiff)—rather than the certified claim owner (Albert Parreño)—is the "United States national" for purposes of § 6082(a)(4)(B). The latter argument, however, is incorrect for the reasons we have previously argued. Because "acquires" does not include "inherits," Plaintiff does not fall within the ambit of subparagraph (4)(B), and thus subparagraphs (4)(A) and (1)(A) govern and permit Plaintiff to bring an action on behalf of the claim's owner. *See* § 6082(a)(4)(A) ("*Except as otherwise provided in this paragraph [(a)(4)]*, actions may be brought under [paragraph (a)(1)] with respect to property confiscated before, on, or after March 12, 1996.") (emphasis added); § 6082(a)(1)(A) (making traffickers of confiscated property liable to the "United States national *who owns the claim*" (emphasis added)).

2. The Government's argument on the impact of the "assignment for value" phrase in § 6082(a)(4)(C) rests on the premise "there is no indication that Congress intended the term 'acquires' to carry anything other than its ordinary meaning in § 6082(a)(4)(B)," which the Government says includes "acquires by inheritance." Gov't. Br. 25-26. This premise is wrong for reasons we have previously argued in this letter and in our principal brief. Appellant's Br. 36-44. Among other things, we have argued that the "district court placed an outsized importance on the 'assignment for value' difference between subparagraphs (B) and (C) by misapplying an offshoot of the consistent-usage canon." *Id.* at 42. The Government has failed to address this argument.

3. The Government is also mistaken when it argues that—in the context of *certified* claims—"state law (or foreign law, when applicable)…determine[s] when a plaintiff acquired, by inheritance or otherwise, a claim to property at issue in an

action under Title III." Gov't Br. 27. The role of state or foreign law to such a determination is very limited and subordinate to a host of federal laws (the Claims Act, federal regulations, international law, [4] and federal common law).

The "claim to [confiscated] property" specified in the LIBERTAD Act, § 6082(a)(1)(A), is akin to a takings claim, but it is not a takings claim under the Fifth Amendment or any state-law analogue. Instead, international law and the Claims Act—not state or foreign law—established this takings claim where, as here, the confiscated property had been owned (before the confiscation) by a United States national. Appellant's Br. 15-20. Thus, Albert Parreño may have "acquired" his takings claim under international law in 1960 when Cuba expropriated his property, or at the latest, he "acquired" his takings claim under the Claims Act in 1970 when the Commission granted his request to certify his claim. And as the Government asserted in its 2008 OFAC notice, none of the certified claims could be transferred—per federal regulations—absent a license authorizing such a transfer, and no evidence of any such license exists. In short, federal laws govern the acquisition of certified claims like Albert's claim.

By contrast, in the context of confiscated properties owned by Cuban citizens that gave rise to *uncertified* claims, neither international law nor the Claims Act nor federal regulations govern the acquisition of such claims. *See* Appellant's Br. 17. Instead, Cuban citizens victimized by Castro's confiscation of their properties may have a claim under the 1940 Cuban constitution (which Castro promised to reinstate), the Fundamental Law of 1959, or perhaps some other Cuban law. *See* Oscar Garibaldi and John D. Kirby, *Property Rights in the Post-Castro Cuban Constitution*, 3 U. Miami Int'l & Comp. L. Rev. 225, 229-31 (1995) (https://repository.law.miami.edu/umiclr/vol3/iss1/7/); Jose A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and A Survey of Restitution Schemes for A Post-Socialist Cuba*, 22 Loy. L.A. Int'l & Comp. L. Rev. 321, 326-28, 335, 337 (2000); *see also* Codigo Civil, Title II, Art. 349 (July 31, 1889) ("No one shall be deprived of his property, except by competent authority and with sufficient cause of public utility, always after the proper indemnity.") (translated by Division of Customs and Insular Affairs, U.S. War Department (1899)); Julienne E. Grant et al., *Guide to Cuban Law and Legal Research*, 45.2 Int'l J. of Legal Information 76, 83, 84 (2017) (noting 1889 Spanish Civil Code was still in force after Castro seized power). And perhaps American state

[4] *See* Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1559-60 (1984) (noting the "general agreement that international law, as incorporated into domestic law in the United States, is federal, not state law").

law or a foreign country's laws play some role in how such uncertified claims are transferred or acquired, depending, for example, on where the Cuban victim or his descendants have lived since Castro's confiscation.

But this case concerns a *certified* claim. In this case, American federal laws—the Claim Act, federal regulations, international law, and federal common law—primarily (if not exclusively) govern the acquisition of certified claims. The LIBERTAD Act, however, did not establish any *claim to property* (certified or uncertified), nor does it prescribe the rules for acquiring or transferring such claims. Instead, the LIBERTAD Act established an *action against traffickers of confiscated property*.[5] *See* § 6082(a)(1)(A) ([A]ny person that … traffics in property which was confiscated by the Cuban Government…shall be liable to any United States national who owns the claim to such property….").

Like so many federal laws, the LIBERTAD Act may have gaps. One possible gap is that, even though § 6083(a)(1) and the Commission's records conclusively establish that Albert Parreño, a decedent, owns the certified claim, the LIBERTAD Act does not specifically address either the survivability of certified claims owned by decedents or who shall represent a deceased certified claim owner. When a

[5] The words "claim" and "action" as used in the LIBERTAD Act are not synonymous. The word "claim" refers to a "claim to confiscated property," meaning a takings claim that is established by a body of law other than the LIBERTAD Act. In contrast, the word "action" refers to the cause of action established by the LIBERTAD Act that allows claim owners to hold liable persons who traffic in confiscated property (but who, unlike the regime, did not actually confiscate the property). In 1996, the Department of Justice mistakenly used the two terms interchangeably. Specifically, when summarizing § 6082(a)(4)(B), the Department stated that "the U.S. national bringing the *claim* must have owned the *claim* before March 12, 1996." Dep't of Justice, *Summary of the Provisions of Title III of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996*, AG Order No. 2029, 61 Fed. Reg. 24,955, 24,966, ¶ 3(a) (May 17, 1996) (emphasis added). The actual statutory text states, "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." § 6082(a)(4)(B) (emphasis added). The word "action" refers to the action for trafficking established by the LIBERTAD Act, whereas the word "claim" refers to the takings claim for the confiscated property that exists under some other source of law (i.e., international law for Castro's American victims and Cuban law for his Cuban victims)—independent and irrespective of the LIBERTAD Act.

federal law has gaps, the courts or executive agencies (or both) fill those gaps. *See, e. g., Clackamas Gastroenterology Assocs., P. C. v. Wells*, 538 U.S. 440, 447 (2003) (noting that "congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text" and then approving an executive agency's adoption of a common-law rule for filling a gap in a federal statute). The Claims Act, its regulations, and the federal common law best fill any such gaps in the LIBERTAD Act—with a bit of help from state or foreign law.

The law has long recognized that a claim for just compensation due to a government taking of property is not extinguished simply because the claim's owner dies; instead, the claim passes to the decedent's heirs. *See* John D. Lawson, *Rights, Remedies, and Practice* § 3894, at 6130 & n. 16 (1890) (citing *City of Booonville v. Ormod's Adm'r*, 26 Mo. 193 (1858)); *see also Solari v. U.S.*, 91 F. Supp. 765 (Ct. Cl. 1950) (awarding just compensation to the heirs of deceased landowners whose property rights were taken by the government while the landowners were living). This principle is consistent with the federal common-law rule that actions involving property rights survive the death of a party. Appellant Br. 22. This principle is also consistent with statutory and regulatory provisions under the Claims Act that recognize any compensation paid by a foreign government for taking an American citizen's property may be paid to a deceased citizen's legal representative—such as an executor, administrator, heir, or legatee. Appellant's Br. 21-22; 22 U.S.C. § 1626(c)(1); 31 C.F.R. § 250.4(b)(2). State or foreign law apply only in a limited manner—to determine the executor, administrator, heir, etc. who is the legal representative of a deceased American certified claim owner—to fill any gaps in the LIBERTAD Act, the Claims Act and its regulations, and the federal common law.

In sum, the Government's suggestion that state or foreign law govern the acquisition of certified claims—while omitting any mention of its 2008 OFAC notice or its regulation (31 C.F.R. § 250.4(b)(2))—shows that the Government misunderstands the differences between certified and uncertified claims. Multiple federal laws govern the establishment and acquisition of *certified* claims, and state or foreign law apply only to determine the legal representative of a deceased certified claim owner, as directed by 31 C.F.R. § 250.4(b)(2). On the other hand, Cuban law governs the establishment of *uncertified* claims arising out of Castro's confiscation of Cuban-owned property, and American state law or foreign law may determine the acquisition or transfer of such claims.

II. The Effect of the President's Suspension Authority

The short answer to the Court's question is: Yes, the President's suspension authority does imply that the LIBERTAD Act was enacted to allow the heirs of American citizens to bring LIBERTAD actions.

As a threshold matter, the Court's question to the Government incorrectly cited subsection (b) of 22 U.S.C. § 6085; that subsection granted the President the prerogative to suspend the *effective date* of Title III of the LIBERTAD Act. Subsection (c) is the applicable subsection; it granted the President the prerogative to suspend *the right to bring an action* under Title III of the LIBERTAD Act. The Government is correct when it states that "President Clinton allowed Title III to *go into effect*" and thus did not exercise his suspension authority under subsection (b). Gov't Br. 28 (emphasis added). President Clinton instead exercised his authority under subsection (c) by "suspend[ing] *the right of action*, and the Executive Branch extended that suspension every six months until…2019." *Id.* at 28-29 (emphasis added). The Court's opinion should clearly distinguish between these "two different suspension authorities." Gov't Br. 28.

Once Title III of the Act took effect in 1996, "no person" was permitted—under subsection (c) of § 6085—to "*acquire* a property interest in any potential or pending action under [Title III of the LIBERTAD Act]." 22 U.S.C. § 6085(c)(1)(A) (emphasis added). Reading the word "acquire" to mean "inherit" in subsection (c) of § 6085—as the Government does in § 6082(a)(4)(B)-(C)—leads to absurd results. Under that reading, any owner of a claim to confiscated property who died after August 1, 1996 was unable to devise his claim to an heir for purposes of a LIBERTAD action because—based on the Government's interpretation of "acquire"—such an heir would be "acquir[ing] a property interest" in a "potential or pending [LIBERTAD] action" if he were to receive by inheritance a claim to confiscated property. *Cf.* § 6085(c)(1)(A). Effectively, the Government's interpretation of "acquire" means that § 6085(c)(1)(A) extinguishes a LIBERTAD action once the claim's owner died.

Given the President's ability to suspend the right to bring an action and the fact that presidents did suspend the right for a 23-year period, not many LIBERTAD actions brought by individuals, if any, could be prosecuted to conclusion because, after all, individuals eventually do die. The Government's reading of the Act hinders the Act's purpose by making it impossible for the approximately 5,000 certified claims owned by individuals to be compensated from LIBERTAD actions. Appellant's Br. 10, 34.

As the congressmen responsible for enacting the LIBERTAD Act have said:

> It would have made no sense for Congress to establish in the Helms-Burton Act such a compensatory and deterrent remedy in 1996 for confiscations that arose two generations earlier, *which law also included the ability of the President to suspend the right to bring a lawsuit*, and then say that Congress did not intend the remedy to be available to the heirs who inherited the claim 40+ years after the confiscation. Such a result would be completely incompatible with Congress's purpose and actions.

Former Congressmen Amicus Br. 3 (emphasis added); *see also id.* at 10 ("Congress did not intend for the remedy to be nullified when the time came that a President would no longer suspend the right to bring an action under Title III.").

III. The "Incident to Lawful Travel" Exclusion

The "incident to lawful travel" defense is not at issue in Appellant Garcia-Bengochea's appeals, although the cruise lines raised the defense in the district court. The district court correctly rejected this defense at the pleadings stage because "the lawful travel exception is an affirmative defense to trafficking that must be established by [the defendant], not negated by Plaintiff." *Garcia-Bengochea v. Carnival Corp.*, 407 F. Supp. 3d 1281, 1286 (S.D. Fla. 2019). The Government agrees with the district court. Gov't Br. 37 ("A plaintiff does not bear the burden to plead specific allegations that would establish that the defendant's travel-related transactions were not 'incident to lawful travel.'"). The cruise lines have not challenged the district court's ruling in their appeals.

Appellant agrees with the Government that "the application of the lawful travel exclusion is underdeveloped in the records" of the cases pending before this Court. Gov't Br. 30. The Southern District of Florida recently entered a non-final order—in a case involving several cruise lines—that eventually will be a more appropriate vehicle for this Court to address the lawful-travel defense. *See Havana Docks*, 2022 WL 831160.

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In conclusion, neither the Government nor the cruise lines can or do deny that:

1. A trafficker is liable under the LIBERTAD Act to the United States national who owns the claim. § 6082(a)(1)(A)

2. The Commission's determination is conclusive, irrebuttable proof of a certified claim's ownership. § 6083(a)(1).

3. The certified claim at issue here is now, and has always been, owned by Albert Parreño, a deceased American.

4. No evidence exists that the Government has licensed any transfer of Albert Parreño's certified claim, as required by the Government's 2008 OFAC notice, either to Plaintiff or anyone else.

What is disputed is who—if anyone—may prosecute LIBERTAD actions to seek compensation for the certified claims owned by Albert Parreño and the approximately 5,000 other certified claims owned by deceased Americans. In effect, the Government's proposed interpretation means:

- No one may prosecute such actions.
- The cruise lines and the other traffickers of properties confiscated by Castro will never have to pay a penny on such claims.

The Government's interpretation doesn't just hinder the Act's purpose; it kills the remedy that Congress intended for those individual Americans who were victimized by the Castro regime and its aiders and abettors. By contrast, our interpretation allows the legal representatives of such deceased Americans to obtain the justice that they never were able to obtain during their lifetimes.

Very respectfully,

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