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June 26, 2023

Via ECF

The Honorable Mark Langer
Clerk, United States Court of Appeals
for the District of Columbia Circuit
333 Constitution Ave., N.W.
Washington, DC 20001

Re: No. 21-7127, *Exxon Mobil Corporation, Plaintiff-Appellee/Cross-Appellant v. Corporación CIMEX, S.A. (Cuba), Corporación CIMEX, S.A. (Panama), and Unión Cuba-Petróleo, Defendants-Appellants/Cross-Appellees*

Dear Mr. Langer:

Defendants Corporación CIMEX, S.A. (Cuba), Corporación CIMEX, S.A. (Panama) and Unión Cuba-Petróleo respectfully submit this response to Plaintiff Exxon Mobil Corporation's citation of *Lac Du Flambeau Band of Lake Superior Chippewa Indians et al. v. Coughlin*, No. 22-227, 599 U.S. __ (U.S. June 15, 2023) as supplemental authority (Doc. No. 2004475).

Just as with its two prior citations of recent Supreme Court decisions as supplemental authority (Doc. No. 1999278, Defendant's response Doc. No. 1999802; Doc. No. 1996644, Defendants' response, Doc. No. 1997675), Exxon simply ignores the express teachings of the Court's decision and would turn the decision on its head.

In *Coughlin*, the Court reaffirmed the "well-settled rule" that "[to] abrogate sovereign immunity, Congress must make its intent … unmistakably clear in the language of the statute." *Id*. at 3 (internal quotations and citations omitted). This "clear statement rule is a demanding standard." *Id*. at 4. The Court found the rule satisfied because the statute at hand abrogated immunity *in haec verba*, and the language Congress employed to identify the entities whose immunity was abrogated was "all-encompassing." *Id.* at 5.

There is nothing in Title III that comes even close to satisfying the rule that the Supreme Court articulated and applied. And, moreover, the Court instructed that, where there is a "plausible interpretation of the statute that preserves sovereign immunity," abrogation cannot be found. *Id.* at 4 (internal quotations and citations omitted). There is such an interpretation here: Congress made agencies or instrumentalities subject to Title III suit but only within the pre-existing confines of the Foreign Sovereign Immunities Act. *See* Defendants' Response Brief, at 72 (Doc. No. 1979859, at 94), and counsel's discussion of *Mowrer v. U.S. Dep't of Transp.*, 14 F.4th 723 (D.C. Cir. 2012) at oral argument.

Exxon's observation that *Coughlin* "illustrates that Congress can, and does, abrogate foreign sovereign immunity outside of the FSIA" gets it nowhere. The question is whether Congress did so in Title III, not whether it could have.

Respectfully submitted,

/s/ Michael Krinsky

Counsel for Defendants-Appellants/Cross-Appellees