IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 20-14251-BB

JAVIER GARCIA-BENGOCHEA,

Plaintiff/Appellant,

vs.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLEE'S SUR-REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Appellee, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1-1, identifies the following people and entities as having an interest in the outcome of this appeal:

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Royal Caribbean Cruises Ltd. (Ticker: RCL), pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, states that it has no parent corporation and no publicly owned corporation owns 10% or more of its stock.

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SUR-REPLY ARGUMENT ON ARTICLE III STANDING

Dr. Garcia-Bengochea's Reply makes two primary arguments relating to Article III standing. First, he argues that he has pleaded a tangible injury traceable to Royal Caribbean's challenged conduct even though his complaint says otherwise and he does not dispute the fact that he is no worse off as a result of any conduct by Royal Caribbean. Second, he argues that he has found a historical analogue for his action under Title III of the Helms-Burton Act. Both arguments fail.

I. THE ALLEGED HARM IS NOT TANGIBLE OR FAIRLY TRACEABLE TO ROYAL CARIBBEAN.

To have Article III standing, "[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). That the Helms-Burton Act provides a cause of action for a statutory violation does not create Article III standing, as the U.S. Supreme Court reiterated last month. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("Congress may enact legal prohibitions and obligations. And Congress may create causes of action for plaintiffs to sue defendants who violate those legal prohibitions or obligations. But under Article III, an injury in law is not an injury in fact.").

Dr. Garcia-Bengochea argues that he has suffered a tangible harm in the form of financial loss because he has not been compensated for the Cuban Government's

expropriation of the Terminal and La Maritima or Royal Caribbean's brief use of the property. Reply at 3, 5. This argument fails for two reasons.

First, Dr. Garcia-Bengochea's complaint does not allege that Royal Caribbean caused him to suffer a financial loss. Rather, the complaint alleges that Royal Caribbean is "liable" to Dr. Garcia-Bengochea simply because Congress—through the Helms-Burton Act—allows a claim to be asserted against anyone who merely uses property previously confiscated by the Cuban Government (DE 1, ¶¶15-16, 20). However, Congress' mere creation of a cause of action is not a concrete injury-in-fact, much less a tangible one. *Spokeo, Inc.*, 136 S. Ct. at 1549.

Second, Dr. Garcia-Bengochea's argument rests on the faulty premise that Royal Caribbean is somehow liable for the acts of the Cuban Government as an accomplice. However, as shown below in Section II.A., accomplice liability is inapplicable because Royal Caribbean is not alleged to have facilitated the original wrongdoing, whether that wrongdoing is the expropriation itself, or the lack of compensation for the expropriation, both of which occurred in 1960. [1]

[1] In fact, the Helms Burton Act defines the term "confiscated" as the seizure or expropriation of property by the Cuban Government "without the property having been returned or adequate and effective compensation provided." 22 U.S.C. § 6023(4). Thus, by definition under the Act, the loss of compensation occurred at the time of the expropriation and not nearly 60 years later when Royal Caribbean briefly used the property.

As to traceability, Dr. Garcia-Bengochea argues that he does not have to prove that Royal Caribbean's conduct is the sole cause of his injury and that traceability is established because "[t]he cruise lines have ***contributed*** to Plaintiff's injury," which Dr. Garcia-Bengochea says—for the first time in his Reply—is "the lack of compensation for the expropriated property (not the expropriation itself)." Reply at 8-9 (emphasis added).

Putting aside that this is not the "injury" alleged in the complaint, any financial losses due to expropriation without compensation is attributable solely to the Cuban Government's decision in 1960 to take the Terminal without compensation, which loss was capable of being calculated by the Foreign Claims Settlement Commission in 1970 precisely because the injury had already occurred. Reply at 4. Thus, this is not an issue of independent versus contributing causation, as Dr. Garcia-Bengochea frames it. The Cuban Government's action is the *only* cause. *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976) ("[T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court."); *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) ("A plaintiff has standing only if he can 'allege personal injury fairly traceable to the ***defendant's*** allegedly unlawful

conduct . . . .'") (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)).

Additionally, any contention that Royal Caribbean's conduct in using the Terminal made or makes the Cuban Government less likely to compensate people from whom it confiscated property depends entirely upon guesswork as to how the Cuban Government might have acted or still might act. That is decidedly incapable of creating standing. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413-14 (2013) ("In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment. . . . We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors.").

Notably, Dr. Garcia-Bengochea never addresses the fact that Royal Caribbean's limited, post-confiscation use of the property did not affect his situation or circumstances. He does not explain—because he cannot explain—how his circumstances would be any different if Royal Caribbean's ships had not docked at the Terminal, almost sixty years after the Cuban Government took it. *McNamara v. City of Chicago*, 138 F.3d 1219, 1221 (7th Cir. 1998) ("A plaintiff who would have been no better off had the defendant refrained from the unlawful acts of which the plaintiff is complaining does not have standing under Article III of the Constitution to challenge those acts in a suit in federal court."). This fact alone extinguishes any

"traceability" argument as standing does not exist where the "alleged injury occurred before, existed at the time of, and continued unchanged after the challenged . . . action." *California Ass'n of Physically Handicapped, Inc. v. F.C.C.*, 778 F.2d 823, 827 (D.C. Cir. 1985). There must still exist *some* "causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. Here, there is none.

Finally, Dr. Garcia-Bengochea cannot rely on foreign policy to circumvent standing requirements. Article III standing does not just check the power of the judiciary to resolve only concrete disputes; it also "checks the power of the legislative branch by prohibiting it from using the Judiciary as an adjunct to its own powers." *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 462 (6th Cir. 2019), cert. denied, 140 S. Ct. 1117 (2020). Simply put, "Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury." *Id*. at 465.

Because Dr. Garcia-Bengochea has not suffered a tangible injury that is fairly traceable to Royal Caribbean's conduct, this case should be dismissed.

II. THERE IS NO HISTORICAL ANALOGUE FOR AN ACTION UNDER TITLE III OF THE HELMS-BURTON ACT.

As Congress itself recognized, a cause of action under Title III of the Helms-Burton Act is "unique." 142 Cong. Rec. H1645-02, H1660. No historical analogue for Dr. Garcia-Bengochea's action exists, and his attempt to find one is unavailing.

A. Neither accomplice after-the-fact liability nor trover/conversion is analogous.

Dr. Garcia-Bengochea argues that his action under Title III is similar to "accomplice after-the-fact liability" (a phrase used by him, but not the decisions he cites) or trover/conversion. He is wrong. To begin, there is nothing called "accomplice after-the-fact liability." Someone can be an accomplice in the actual underlying wrong (either participating in the wrong or providing assistance beforehand). *See Com. v. Ortiz*, 679 N.E.2d 1007, 1009, 424 Mass. 853, 856 (1997) (discussing accomplice liability at common law as requiring either presence and intent at the time of the original crime or assistance before the original act); *People v. Beaudet*, 298 N.E.2d 647, 32 N.Y.2d 371, 375 (1973) (defining accomplice as one who has "taken part in the preparation or perpetration of the crime"). But Royal Caribbean did not act as the Cuban Government's accomplice in confiscating the property in 1960; nor does the complaint allege any such thing. Indeed, the complaint did not even allege that Royal Caribbean existed in 1960.

Someone can be an accessory after-the-fact when he/she commits an act either to aid the completion of a wrong or to assist the wrongdoer in evading capture. *See Com. v. Perez*, 437 Mass. 186, 190, 770 N.E.2d 428 (2002) ("At common law, the liability of an accessory after the fact was derived from the liability of the principal, the accessory being considered 'an ***accomplice in the original crime***.' ") (emphasis added) (quoting *Com. v. Devlin*, 366 Mass. 132, 136, 314 N.E.2d 897 (1974)). But

docking ships at a pier in 2017 does not make Royal Caribbean an accessory to an expropriation carried out and fully executed by the local government in 1960.

In trying to create support for "accomplice after-the-fact liability," Dr. Garcia-Bengochea quotes *Judson v. Cook* for the proposition that "all who aid, command, advise or countenance the commission of a tort by another, or who approve of it after it is done, if done for their benefit, are liable in the same manner as they would be if they had done the same tort with their own hands." 11 Barb. 642, 644 (N.Y. 1852). But *Judson* concerns a joint tortfeasor who actively participated in divesting the plaintiff of his property. *Id*. That decision is inapplicable here because Dr. Garcia-Bengochea does not and cannot allege that Royal Caribbean participated in any manner in the 1960 expropriation of the Terminal.

As shown below, not even the decisions cited in *Judson* support accessory after-the-fact liability here, where the Cuban Government took the Terminal and, nearly sixty years later, Royal Caribbean—with nothing more—merely docked its ships there. *See, e.g., Guille v. Swan*, 19 John. 381, 382 (N.Y. 1822) ("If an act done cause immediate injury, whether it be intentional or not, trespass lies; and if done by the co-operation of several persons, all are trespassers, and all may be sued jointly, or one is liable for the injury done by all; but it must appear that they acted in concert, or that the act of the one sued, ordinarily and naturally, produced the acts of the

others.");[2] *Coats v. Darby*, 2 N.Y. 577, 577, 2 Comst. 517, 517 (N.Y. 1849) (holding that a party who directs or incites the commission of a trespass is guilty as a principal); *Bishop v. Ely*, 9 Johns. 294 (N.Y. Sup. Ct. 1812) (holding that the defendant who was the owner of the wagon and present in the wagon as a passenger when the driver hit and killed plaintiff's horse was jointly liable for trespass). *Morgan v. Varick*, also cited by *Judson*, is inapposite. That case simply holds that a plaintiff who is not in possession cannot maintain a trespass action until he regains possession. No. 1832 WL 2840, 8 Wend. 587, 590 (N.Y. Sup. Ct. 1832).

Also inapplicable are notions of subsequent ratification. As held in decisions from the *Judson* era, "an act done, ***for another***, by a person, ***not assuming to act for himself, but for such other person***, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and established rule of law." *Wilson v. Tumann*, 6 Man. & Gr. 236, 242 (1843) (emphasis added). This "established rule of law" is why Dr. Garcia-Bengochea's reliance on *Bishop v. Viscountess Montague*, 78 Eng. Rep. 1051, Cro. Eliz. 824 (1604), is misplaced. As Dr. Garcia-Bengochea concedes, the bailiff took the oxen for "***his***" viscountess, believing that the owner of the oxen owed money to

[2] The example *Guille* provides for an act that "ordinarily and naturally, produced the acts of another" is where someone throws a flaming ember into a crowd, which lands on a person who flings it off so that the ember lands elsewhere and explodes. 19 John. at 382. The liability for any damages lies with the original thrower. *Id*.

the bailiff's viscountess. Reply at 17. Here, the Cuban Government did ***not*** take the Terminal in 1960 for or on behalf of Royal Caribbean but rather on its own behalf.

Finally, Dr. Garcia-Bengochea's reliance on trover/conversion is misplaced. Reply, 17-18. Nothing in the authorities cited in the Reply supports the notion that Royal Caribbean's use of the Terminal, almost sixty years after it was confiscated, constitutes trover/conversion. According to those authorities, to sustain an action for trover, "the plaintiff must, at the time of conversion, have had the *actual possession*, or the *right* to *immediate possession*" of the property. Chitty, Joseph, *Treatise on Pleadings and Parties to Actions*, Vol. I, Ch. II at 171 (16th Am. Ed. 1876) (emphasis original). Royal Caribbean's use of the Terminal in 2017 is not trover/conversion because the Cuban Government's confiscation of the Terminal in 1960 extinguished the then-owners' ownership and possession of the property. *See Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1255 (11th Cir. 2006). Thus, trover/conversion does not provide an analogue for Dr. Garcia-Bengochea because he was not in possession of the Terminal in 2017.

B. The Trespass Act of 1783 is inapplicable.

In December 1782, while the Articles of Confederation were in effect, the United States Government entered into a Treaty of Peace with Britain. 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 287, 315 (Julius Goebel, Jr. ed., 1964) (hereinafter "LPAH"). In March 1783, despite having been

notified of the treaty, the New York state legislature enacted the Trespass Act of 1783. *Id*. at 287, 291, 315.

Under the Trespass Act, a New York citizen who fled due to the British occupation, and whose property had been occupied by the British while the citizen was absent, could assert a trespass action against those who occupied the property during the citizen's absence. *Id*. at 295, 296; *see also* Henry B. Dawson, Introduction to *The Case of Elizabeth Rutgers versus Joshua Waddington: Determined in the Mayor's Court, in the City of New York, August 7, 1786*, at xiv-xv (1866) (it "[s]hall and may be lawful for any Person or Persons, who are, or were Inhabitants of this State, and who, by Reason of the Invasion of the Enemy, left his, her or their Place or Places of Abode" to "bring an Action of Trespass against any Person or Persons who may have occupied, injured or destroyed" his or her property) (quoting the Trespass Act). Alexander Hamilton denounced the Trespass Act as violating several provisions of the Treaty with Britain as well as the law of nations, under which "the use of abandoned property was justifiable in time of war when it was authorized by the military commander in charge." LPAH at 296, 300-01, 304-05.[3]

[3] The law of nations was part of the common law that was incorporated in the New York State Constitution in 1777. *Id*. at 285 (discussing the New York State Constitution of 1777 and its incorporation of existing common law).

The bellwether case involving the Trespass Act was *Rutgers v. Waddington*, on which Dr. Garcia-Bengochea heavily relies. Rutgers, a widowed Patriot, fled New York City when it was captured by the British in 1776. *Id*. at 289. In doing so, she left behind a brew- and malt-house, which a British Commissary "signed over" to two loyalist British merchants. *Id*.

While the merchants occupied the property rent-free for a short period, they subsequently paid rent to a British agent during the occupation. *Id*. at 291. In advance of the British evacuation of the city, a British military commander ordered the merchants to pay rent to Rutgers. *Id*. In 1784, when rent still had not been paid (due to the parties' inability to agree to the amount of back rent), Rutgers sued the British merchants under the Trespass Act, seeking back rent for their occupation of the property. *Id*. at 290. Hamilton defended the loyalist British merchants.

The court hearing the action determined that the law of nations precluded suit under the Trespass Act for the time period that the merchants were occupying the abandoned property under the immediate authority of a British military commander. *Id*. at 308. Thus, Dr. Garcia-Bengochea is wrong in describing the Trespass Act as allowing suits for "private persons' use of the Americans' expropriated properties [that] benefitted the foreign sovereign." Reply at 22. The court ruled the exact opposite. Otherwise, the court held that the law of nations did not bar suit because the law of nations applies only where the property is taken by the army. LPAH at

308. Rutgers was awarded back rent only for the portion of her action that was not barred (and for which no rent had been paid by the merchants). *Id*. at 310.

Crucially, the Trespass Act did not change the element of a common law trespass action requiring the plaintiff to have the right of possession in order to sue. Dr. Garcia-Bengochea tacitly concedes this at pages 20-21 of the Reply, where he notes the substantive overlap between the Trespass Act and common law trespass *quare clausum fregit*, which—as addressed in Royal Caribbean's answer brief—requires the plaintiff to be in possession. *See Wilson v. Bibb*, 31 Ky. (1 Dana) 7, 11 (Ky. 1833) ("We know of no case where a person out of possession at the time of the trespass committed, has sustained the action of trespass *quare clausum fregit*, when he never regained the possession after the trespass."); *Conner v. President and Trustees of New Albany*, 1 Blackf. 88, 89 n.2 (Ind. 1820) ("To maintain trespass q.c.f., the general doctrine in the English books is that the plaintiff must be in actual possession at the time the injury is committed . . . .").

Nothing in the reports or authorities provides or even suggests that Rutgers forfeited or otherwise lost her ownership or right of possession to the property as a result of fleeing and abandoning her property. In stark contrast, as this Court held, the Cuban Government's confiscation of the Terminal terminated the then-owners' ownership of, and right of possession to, the Terminal. *Glen*, 450 F.3d at 1255.

In addition, Trespass Act suits were limited to individuals who "occupied, injured or destroyed" property abandoned by a patriot. Dawson, Introduction, at xiv-xv. The Trespass Act did not encompass claims brought against third parties simply doing business with the merchants (such as customers, distributors, etc.) or otherwise using the property in a limited way, which is what Title III of the Helms Burton Act purports to do.

Making an action under the Trespass Act even more dissimilar from one under Title III is that Rutgers's damages were limited to rent for the period of time that her premises were occupied by the loyalists without authorization from the British military; whereas Dr. Garcia-Bengochea seeks to recover three times the total value of the Terminal, and ***not*** what Royal Caribbean would have been charged to use the Terminal for two years. The Trespass Act simply is not an analogue for an action under the Helms-Burton Act.

CONCLUSION

Any injury suffered by Dr. Garcia-Bengochea occurred at the time the Cuban Government expropriated the property in 1960. Royal Caribbean's limited, post-confiscation use of the property almost 60 years later in no way changed Dr. Garcia-Bengochea's circumstances. Thus, Dr. Garcia-Bengochea has not suffered a tangible injury that is fairly traceable to Royal Caribbean's conduct. Nor is there

any historical analogue for a cause of action under Title III of the Helms Burton Act. Accordingly, the Court should dismiss this case for lack of standing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY under Federal Rule of Appellate Procedure 32(g)(1) that this document complies with the word limit set forth in this Court's July 14, 2021 Order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4, it contains 3,297 words. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

By: /s/ Scott D. Ponce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of July 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF System.

By: /s/ Scott D. Ponce