No. 11-945

In the Supreme Court of the United States

EMPRESA CUBANA EXPORTADORA DE ALIMENTOS Y PRODUCTOS VARIOS, DBA CUBAEXPORT, PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Under a longstanding embargo, Cuban entities like petitioner must obtain authorization from the Secretary of the Treasury in order to register or renew the registrations of United States trademarks. Petitioner registered and renewed its HAVANA CLUB trademark registration pursuant to a general license issued by the Secretary, which was explicitly subject to modification or revocation at any time. A statute enacted in 1998 prohibited transactions or payments under that general license with respect to trademarks previously associated with confiscated businesses or assets. In 2005, petitioner attempted to renew its HAVANA CLUB registration, but the United States Patent and Trademark Office denied the renewal application, based in part on the conclusion of the Treasury Department's Office of Foreign Assets Control that the 1998 statute rendered the general license inapplicable. The questions presented are as follows:

1. Whether the statutory modification of the general license was "retroactive" to the extent that it precluded petitioner from relying on the general license to renew its trademark registration in 2005.

2. Whether the 1998 statute reflected Congress's clear intent to bar petitioner from invoking the general license as a basis for trademark registration renewal.

3. Whether application of the statute to prevent renewal of petitioner's trademark registration violates principles of substantive due process.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 638 F.3d 794. The opinion of the district court (Pet. App. 29a-72a) is reported at 606 F. Supp. 2d 59. A prior opinion of the district court (Pet. App. 75a-107a) is reported at 516 F. Supp. 2d 43.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2011. Petitions for rehearing were denied on August 31, 2011 (Pet. App. 108a-111a). On October 25, 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 27, 2012, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1962, in response to the expropriation of United States property in Cuba and other acts by the Castro regime deemed antagonistic to the interests of this country, President Kennedy imposed an embargo on trade with Cuba. See Proclamation No. 3447, 3 C.F.R. 26-27 (1962), 22 U.S.C. 2370 note. "[O]ver the years," the terms of the embargo and related restrictions "have waxed and waned." *Emergency Coal. to Defend Educ. Travel* v. *United States Dep't of the Treasury*, 545 F.3d 4, 6 (D.C. Cir. 2008). The current terms and restrictions are reflected in the Cuban Assets Control Regulations (CACR), 31 C.F.R. Pt. 515, which were promulgated by the Treasury Department under Section 5(b) of the Trading With the Enemy Act (TWEA), 50 U.S.C. App. 1 *et seq.*[1]

The CACR were first promulgated in 1963 and are administered by the Treasury Department's Office of Foreign Assets Control (OFAC). See *United States* v.

[1] In 1977, Congress limited the President's authority under the TWEA to times of war. See Act of Dec. 28, 1977, Pub. L. No. 95-223, § 101, 91 Stat. 1625; *Regan* v. *Wald*, 468 U.S. 222, 227-228 (1984). The 1977 amendment, however, included a "grandfather clause," which authorized the President to annually renew his authority under Section 5(b) of the TWEA with respect to any country that had been subject to sanctions on July 1, 1977. See 50 U.S.C. App. 5 note; *Wald*, 468 U.S. at 228-229. Since 1978, Presidents have annually renewed their authority with respect to Cuba. See, *e.g.*, *Memorandum on Continuation of the Exercise of Certain Authorities Under the Trading With the Enemy Act*, 2011 Daily Comp. Pres. Doc. 1 (Sept. 13, 2011) (most recent renewal of the President's TWEA authority to continue economic sanctions against Cuba); see also *Wald*, 468 U.S. at 229.

Brodie, 403 F.3d 123, 127 (3d Cir. 2005); *Empresa Cubana del Tabaco* v. *Culbro Corp.*, 399 F.3d 462, 465 (2d Cir. 2005), cert. denied, 547 U.S. 1205 (2006). The CACR broadly prohibit transactions involving property in which Cuba or any Cuban national has "any interest of any nature whatsoever, direct or indirect," "except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him)." 31 C.F.R. 515.201(b). The property and property interests governed by those restrictions include interests in intellectual property. See 31 C.F.R. 515.311.

Notwithstanding that broad prohibition, the regulations permit the Secretary of the Treasury (Secretary) to authorize certain transactions, including by issuing a general or specific license. See 31 C.F.R. 515.201. A general license sets forth the terms of the authorization in an OFAC publication or regulation. See 31 C.F.R. 515.317. A specific license is an individualized authorization granted to a particular applicant or relating to a particular transaction. See 31 C.F.R. 515.318. All licenses "may be amended, modified or revoked at any time." 31 C.F.R. 501.803; see *Regan* v. *Wald*, 468 U.S. 222, 234 (1984).

As first promulgated in 1963, the CACR included a general license authorizing "[t]he filing in the United States Patent Office of applications for * * * trademarks registration." 31 C.F.R. 515.527(a)(1) (1964); see 28 Fed. Reg. 6982 (July 9, 1963). As amended in 1995, the CACR included a general license authorizing "[t]ransactions related to the registration and renewal" of trademarks. 31 C.F.R. 515.527(a) (1996); see 60 Fed. Reg. 54,196 (Oct. 20, 1995). In 1998, Congress modified that regulatory authorization by enacting the following provision:

> Notwithstanding any other provision of law, no transaction or payment shall be authorized or approved pursuant to [31 C.F.R. 515.527] with respect to a mark, trade name, or commercial name that is the same as or substantially similar to a mark, trade name, or commercial name that was used in connection with a business or assets that were confiscated unless the original owner of the mark, trade name, or commercial name, or the bona fide successor-in-interest has expressly consented.

Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 211(a)(1), 112 Stat. 2681-88 (Section 211 or 1998 Act). Section 211(c) of the 1998 Act required the Secretary to amend the CACR to conform to the new legislative requirement, 112 Stat. 2681-88, and the Secretary complied by adding Subsection (a)(2) to 31 C.F.R. 515.527. See 64 Fed. Reg. 25,813 (May 13, 1999); Pet. App. 112a-113a (reproducing current 31 C.F.R. 515.527(a)(2)). OFAC retains the authority to issue a specific license in appropriate circumstances, even when the general license is unavailable. See 31 C.F.R. 501.801(b)(1).

2. Petitioner is a Cuban state-owned export corporation chartered by the Cuban Ministry of Foreign Commerce. See Pet. 2; Pet. App. 3a, 33a. In 1976, under the general license provided by 31 C.F.R. 515.527, petitioner sought and obtained from the United States Patent and Trademark Office (USPTO) a certificate of registration for a United States trademark that included the name HAVANA CLUB. Pet. App. 2a-3a. Under a general trademark statute then in effect, the certificate of registration was scheduled to "remain in force for twenty years." 15 U.S.C. 1058(a) (1976). When that registration was set to expire in 1996, one of petitioner's affili-

ates sought to renew it for an additional ten-year period, invoking the general authorization then provided by 31 C.F.R. 515.527(a). See Pet. App. 5a, 34a. "[U]pon payment of the prescribed fee and the filing of a verified application," 15 U.S.C. 1059(a) (1994), the USPTO granted the renewal application. Pet. App. 5a. During the ten-year renewal period, there was extensive litigation between petitioner's affiliate, the purported assignee of the HAVANA CLUB registration, and Bacardi-Martini USA, Inc. (and related entities), which distributed its own "Havana Club" rum in the United States.[2]

Beginning in 2005, petitioner attempted to tender payment for, and obtain from the USPTO, a second renewal of its HAVANA CLUB registration, which was scheduled to expire in 2006. Pet. App. 6a-7a, 34a-35a. Under the OFAC regulation implementing the 1998 Act, however, "[n]o transaction or payment" was authorized by the general license in 31 C.F.R. 515.527(a)(1) (1999) if the "mark" was "the same as or substantially similar to a mark * * * that was used in connection with a business or assets that were confiscated," absent express consent of the original owner or a successor-in-interest. See 31 C.F.R. 515.527(a)(2) (1999). That description covers the HAVANA CLUB trademark.[3]

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[2] See, *e.g.*, *Havana Club Holding, S.A.* v. *Galleon, S.A.*, 62 F. Supp. 2d 1085 (S.D.N.Y. 1999), aff'd 203 F.3d 116 (2d Cir.), cert. denied, 531 U.S. 918 (2000); *Havana Club Holding, S.A.* v. *Galleon, S.A.*, No. 96 CIV. 9655, 1998 WL 150983 (S.D.N.Y. Mar. 31, 1998); *Havana Club Holding, S.A.* v. *Galleon S.A.*, 974 F. Supp. 302 (S.D.N.Y. 1997); *Havana Club Holding, S.A.* v. *Galleon S.A.*, 961 F. Supp. 498 (S.D.N.Y. 1997).

[3] In 1960, the Cuban government "confiscated the businesses and facilities owned by the distiller José Arechabala, S.A. [JASA]. Among

In seeking renewal of the HAVANA CLUB trademark registration, petitioner did not initially rely on the general license provision. Pet. App. 114a-117a, 122a-125a.[4] Instead, petitioner's counsel sought a specific license from OFAC to authorize payment of the registration renewal fee. *Ibid.* After consulting with the Department of State, OFAC denied petitioner's application for such a specific license. *Id.* at 128a-129a. OFAC noted that "renewal of the HAVANA CLUB trademark [registration] * * * would be prohibited unless specifically licensed." *Id.* at 128a; see C.A. J.A. 273-276. OFAC declined to grant that specific license in accordance with guidance provided by the State Department, the provisions of the CACR, and OFAC's own considerations of the facts underlying the application. See Pet. App. 128a-129a (explaining that the State Department had "inform[ed] [OFAC] that it would be inconsistent with U.S. policy to issue a specific license authorizing transactions related to the renewal of the HAVANA CLUB trademark [registration]"); see also *id.* at 126a-127a. Petitioner's request to renew the trademark registration was accordingly denied by the USPTO.

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the company's assets at that time were several U.S. trademark registrations for the rum brand HAVANA CLUB." Pet. App. 6a n.2. Petitioner argued below that JASA's business had not been "confiscated" within the meaning of Section 211(a)(1) because JASA was insolvent when its assets were seized by the Cuban government, but the court of appeals rejected that contention. See *id.* at 18a-19a. Although the petition for a writ of certiorari alludes to that dispute (Pet. 5-8), petitioner does not seek further review of the court of appeals' case-specific finding.

[4] In a subsequent letter to the USPTO, petitioner argued that the trademark registration should be renewable under the general license. See C.A. J.A. 119-122; see also Pet. App. 35a-36a & n.5.

3. Petitioner brought this suit, alleging, *inter alia*, that Section 211(a)(1) and its implementing regulation violate petitioner's right to substantive due process because they "retroactively deprive" petitioner of a "protected property interest." Pet. App. 69a. The district court rejected petitioner's constitutional challenge and granted summary judgment in favor of the government. See *id.* at 29a-72a.

4. On appeal, petitioner again argued that Section 211(a)(1) and its implementing regulation are impermissibly retroactive in violation of substantive due process principles. See Pet. C.A. Br. 2, 20, 22-35. Petitioner also briefly argued that Section 211(a)(1) should "be construed to apply prospectively only" to avoid the purported constitutional difficulty. *Id.* at 36-38.

a. The court of appeals affirmed. Pet. App. 1a-28a. The court first noted that, "by its terms," Section 211(a)(1) applies to "not just registration of new trademarks but also renewals of previously registered trademarks." *Id.* at 7a, 8a. Section 211(a)(1), the court explained, applies to "transactions" and "payments," and the renewal of an existing trademark registration is a "transaction" that requires a "payment." *Id.* at 7a. The court further explained that the relevant statutory provision "specifically cross-references [31 C.F.R. 515.527] * * * [which] expressly listed both registrations and renewals as 'transactions.'" *Id.* at 8a.

The court of appeals then considered whether Section 211(a)(1) operates retroactively. Pet. App. 8a-13a. The court recognized that the presumption against retroactivity applies when a statute "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed," *id.* at 9a n.4 (quoting *Fernandez-Vargas* v. *Gonzalez*, 548 U.S. 30, 37

(2006)), or when it "affect[s] a party's vested rights," *id.* at 9a. Because the court understood petitioner to be relying solely on the latter "branch" of retroactivity doctrine, *id.* at 9a n.4, it focused on whether applying the statute to the HAVANA CLUB trademark would affect petitioner's vested rights.[5] *Id.* at 8a-9a; see *id.* at 11a (noting that this Court has "used the term 'vested right' in considering this branch").

The court of appeals concluded that application of the 1998 Act to petitioner's 2005 renewal application would not deprive petitioner of any vested right. The court explained that, when petitioner first registered its trademark in 1976, the CACR "generally bar[red] U.S. transactions involving Cuban-owned companies." Pet. App. 10a. The court further explained that petitioner's 1976 registration (and any subsequent renewal) depended on an exception to that general rule, and that the law in effect in 1976 made clear that the exception "may be amended, modified, or revoked at any time." *Ibid.* (quoting 28 Fed. Reg. at 6985). The court concluded that, while petitioner "perhaps had an expectation that it would be able to renew its trademark if the regulatory exception was not revoked," petitioner "did not have a vested right" to a renewal. *Id.* at 10a-11a. Applying Section 211(a)(1) according to "its plain terms," the court held that the statute applies to "both new registrations and renewals of marks (such as [petitioner's]) that were first registered before 1998." *Id.* at 13a.

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[5] The court of appeals determined, in the alternative, that petitioner could not prevail under the other retroactivity "branch" because Section 211(a)(1) "did not increase [petitioner's] liability or impose any new duties with respect to past conduct or completed transactions." Pet. App. 9a n.4.

Finally, the court of appeals rejected petitioner's substantive due process argument. Pet. App. 13a-15a.[6] The court concluded that Section 211(a)(1) "is rationally related to the legitimate government goals of isolating Cuba's Communist government and hastening a transition to democracy in Cuba," *id*. at 14a, "both in its substance and its application to renewal of pre-1998 trademarks," *id.* at 15a.

b. Judge Silberman dissented. Pet. App. 21a-28a. Acknowledging that the majority "may well be correct" that petitioner's constitutional claim lacks merit, *id.* at 22a, Judge Silberman would have applied the presumption against retroactivity to hold that Section 211(a)(1) applies only when a trademark is initially registered after 1998, *id.* at 22a-28a.

5. No member of the court of appeals called for an en banc vote, and the court denied rehearing. Pet. App. 108a-111a. In his dissent from the denial of panel rehearing, Judge Silberman explained that he "did not call for an en banc vote because the case, as a whole, is not that important." *Id.* at 109a.

ARGUMENT

The court of appeals correctly held that Section 211(a)(1) applies both to new trademark registrations and to subsequent renewals of registrations; that the statute applies, in particular, to post-1998 renewals of trademarks that were first registered before the law's enactment; and that the statute, so construed, does not

[6] Because the court of appeals rejected petitioner's substantive due process argument on its merits, it did not consider the government's separate contention that petitioner "has no substantive due process rights because it is a foreign national without a substantial connection to the United States." Pet. App. 15a n.6.

violate petitioner's substantive due process rights. The court's decision does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has considered the meaning or validity of Section 211(a)(1) since it was enacted more than a decade ago. Further review is not warranted.

1. The court of appeals correctly held that the 1998 Act applies to petitioner's attempt, which began in 2005, to renew the HAVANA CLUB trademark registration. As the court explained, application of the statute to post-enactment renewals does not constitute retroactive operation and therefore does not implicate the presumption against retroactive legislation.[7] See Pet. App. 8a-13a. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 269 (1994) (internal citation omitted). Rather, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id.* at 280. That determination requires a "commonsense, functional judgment about 'whether the new provision attaches new legal consequences to events completed before its enactment,'" *Martin* v. *Hadix*, 527 U.S. 343, 357-358 (1999) (quoting *Landgraf*, 511 U.S. at

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[7] Petitioner asserts that "[t]he majority opinion recognized that OFAC's application of the statute was retroactive." Pet. 9 (citing Pet. App. 8a-9a). That is incorrect. Based on its conclusion that Section 211(a)(1) did not take away or impair any vested right of petitioner, Pet. App. 11a-13a, the court held that "the presumption against retroactivity does not apply in this case," *id.* at 13a.

270), and a court should be guided by "familiar considerations of fair notice, reasonable reliance, and settled expectations," *Landgraf*, 511 U.S. at 270.

In 1976, when petitioner first registered the HAVANA CLUB trademark in the United States, it did so pursuant to a general license that authorized the transaction, notwithstanding the general prohibition embodied in the Cuban embargo. The registration was expressly conditioned on obtaining authorization from the Secretary. At that time, a general license codified at 31 C.F.R. 515.527(a)(1) (1976) authorized trademark registrations. The regulatory scheme then in effect made clear, however, that the license (like all licenses) could be "amended, modified, or revoked at any time." 31 C.F.R. 515.805 (1976). In 1996, the registration was renewed pursuant to the general authorization then codified in 31 C.F.R. 515.527(a) (1996), which included the same reservation of rights, see 31 C.F.R. 515.805 (1996). By the time petitioner sought a second renewal in 2005, however, the 1998 Act prohibited any "transaction or payment" with respect to petitioner's mark from being "authorized or approved" under that general license. § 211(a)(1), 112 Stat. 2681-88. Application of that statutory bar to petitioner's post-1998 renewal application was not retroactive in any legally relevant sense.

a. Petitioner suggests (Pet. 24-28) that the 1998 Act operates retroactively because it impairs rights petitioner possessed when it first registered the HAVANA CLUB trademark. As the court of appeals recognized, petitioner misunderstands the nature of the relevant "branch" (Pet. App. 8a) of the retroactivity analysis. Consistent with the law in effect in 1976, petitioner's original registration "remain[ed] in force" until 1996, 15 U.S.C. 1058(a) (1976), and, consistent with the law in effect in 1996, the registration was renewed for a "period[] of ten years," *i.e.*, until 2006, 15 U.S.C. 1059(a) (1994). The 1998 Act had no impact on either the initial registration period or the subsequent ten-year renewal period. Rather, the statute's first application to petitioner's HAVANA CLUB trademark occurred when petitioner sought a second renewal of the registration several years after the statute had taken effect.

Whether phrased in terms of a "vested" right or a "substantive" right (see Pet. 19-24), petitioner never "possessed" any "right" to renew its trademark registration in perpetuity. Contrary to petitioner's contention (*e.g.*, Pet. 26), no trademark registration renewal is automatic. By statute, renewal requires the "payment of the prescribed fee" and the timely "filing of a written application" that includes specified information. 15 U.S.C. 1059(a). Although current law allows trademark registrations to be "renewed in perpetuity," *Qualitex Co.* v. *Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995), that simply means that unlimited renewals are permitted *so long as* all of the statutory requirements are met at the time of each renewal.

Here, one of the legal prerequisites to renewal of the HAVANA CLUB registration was authorization from the Secretary. In both 1976 and 1996, that authorization was conferred through a general license, but that license remained "expressly revocable at any time." Pet. App. 10a. As this Court recognized in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), when a general license can be "amended, modified, or revoked at any time," *id.* at 673 (quoting 31 C.F.R. 535.805 (1980)), the recipient is "on notice of the contingent nature of its interest," *ibid.* Any expectation petitioner may have had regarding renewal of its trademark registration was always dependent on the Secretary's authorization; it was never "more substantial than [an] inchoate expectation[] [or an] unrealized opportunit[y]." *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 44 n.10 (2006); see *Landgraf*, 511 U.S. at 270 (explaining that courts should be guided by "considerations of fair notice, reasonable reliance, and settled expectations"). Accordingly, when petitioner registered the HAVANA CLUB trademark in 1976 and when the registration was renewed in 1996, petitioner had no cognizable right to any renewal—let alone perpetual renewal.

b. The court of appeals also recognized that a statute may operate retroactively if it "increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." Pet. App. 9a n.4 (quoting *Fernandez-Vargas*, 548 U.S. at 37). The court stated, however, that it did not "understand" petitioner "to [have] advance[d]" such an argument. *Ibid.* Although petitioner now seeks to invoke that aspect of retroactivity doctrine (Pet. 14-18), it does not explain how the 1998 Act "imposes a 'new disability' or 'new legal consequences' in respect to past events." Pet. 17 (quoting *Fernandez-Vargas*, 548 U.S. at 37).

In arguing that the 1998 Act attaches new legal consequences to pre-enactment conduct, petitioner refers interchangeably to "the Cuban government's 1960" confiscation and petitioner's "1976 registration of the" HAVANA CLUB trademark. Pet. 14; see Pet. 18. Petitioner offers no sound basis for concluding that the 1998 Act imposes a "new legal consequence" on its 1976 trademark registration. To the extent petitioner relies on the 1960 confiscation for this "branch" (Pet. App. 8a) of the retroactivity analysis, its argument proves too much. The crux of petitioner's retroactivity argument (and that of the dissent below) is that application of Section 211(a)(1) to new trademark registrations would be "prospective," but that the statute's application to post-1998 renewals of pre-1998 trademark registrations would be "retroactive." See Pet. C.A. Br. 20, 38; Pet. App. 22a. Any prohibition that Section 211(a)(1) may impose on new registrations, however, is equally triggered by confiscation events predating the 1998 Act. If that fact were sufficient to make the statute retroactive as applied to petitioner's renewal application, the law would be equally retroactive as applied to new trademark registrations—a conclusion that petitioner conspicuously declines to endorse.[8]

[8] *Vartelas* v. *Holder*, No. 10-1211 (Mar. 28, 2012), is not to the contrary. *Vartelas* involved a 1996 statute that severely restricted the reentry, after brief trips abroad, of lawful permanent resident aliens who have been convicted of certain crimes. See slip op. 1-4. The Court held that the statute did not authorize the removal of an alien who had been convicted in 1994 and sought to re-enter this country in 2003. The Court found that Vartelas's removal pursuant to the 1996 statute would constitute retroactive application of the law because it would attach a "new disability" to Vartelas's pre-1996 offense and conviction. See *id.* at 8-11.

For at least three reasons, *Vartelas* does not support petitioner's argument in this case. First, the Court in *Vartelas* recognized that a statute may operate prospectively if it is designed to address present dangers, even if its application turns in part on events that predated the law's enactment. See slip op. 12-13 n.7. The 1998 Act is properly regarded not as imposing additional punishment for prior confiscatory acts, but instead as furthering *current* United States foreign policy by increasing the isolation of the Castro regime. See p. 22, *infra*. Second, the 1998 Act did not in terms prohibit the USPTO from granting petitioner's renewal application. Rather, it rendered the general license unavailable and thereby left in place the general regulatory ban on transactions in property in which Cuba or a Cuban national has an interest, subject to the possibility of a specific license. Third, if *Vartelas* were read to imply that Section 211(a)(1) is retroactive in this case because

2. The presumption against retroactivity is a "judicial default rule[]" that applies only when Congress has not prescribed the temporal reach of a statute. *Landgraf*, 511 U.S. at 280; see *Fernandez-Vargas*, 548 U.S. at 37 ("We first look to 'whether Congress has expressly prescribed the statute's proper reach,' and, in the absence of language as helpful as that we try to draw a comparably firm conclusion about the temporal reach specifically intended by applying 'our normal rules of construction.'") (quoting *Landgraf*, 511 U.S. at 280; *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997)). "[W]here the congressional intent is clear, it governs." *Landgraf*, 511 U.S. at 264 (citation omitted). Even if application of Section 211(a)(1) to this case were deemed to be retroactive, Congress's intent to apply the statute to post-1998 renewal applications is sufficiently clear to rebut the presumption against retroactivity.

As the court of appeals recognized, Section 211(a)(1) applies by its terms to "both new trademark registrations and renewals of previously registered trademarks." Pet. App. 8a; see *id.* at 13a. The statute provides that, under the conditions specified, "no transaction or payment shall be authorized or approved pursuant to [31 C.F.R. 515.527]." § 211(a)(1), 112 Stat. 2681-88. The regulation cited in the statute authorized persons subject to U.S. jurisdiction (such as USPTO) to engage in specified "[t]ransactions related to the registration and renewal" of trademarks, notwithstanding the general ban on transactions in property in which Cuba or Cuban nationals have an interest. 31 C.F.R.

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it attaches new disabilities to the pre-1998 confiscations, Section 211(a)(1) would be equally retroactive as applied to new trademark registrations. As explained in the text, petitioner does not endorse that conclusion.

515.527(a) (1998); see 31 C.F.R. 515.201(b)(1) (1998) (defining "transaction" to include "dealings" in "any property"); 31 C.F.R. 515.311(a) (1998) (defining "property" to include trademarks). And a trademark registration cannot be renewed without a "payment." 15 U.S.C. 1059(a) (Supp. IV 1998). By its plain terms, the 1998 Act barred the Secretary from thereafter invoking the general license in 31 C.F.R. 515.527 to authorize or approve any transaction or payment relating to the "registration and renewal" of trademarks, under the conditions specified.

Petitioner identifies no plausible contrary interpretation of the statutory text. Petitioner conceded below that Section 211(a)(1) bars use of the general license to authorize initial registration of any trademark previously used in connection with a confiscated business or asset, even if the confiscation occurred before the statute's enactment. See Pet. C.A. Br. 20, 38. That appropriate concession reflects the fact that the 1998 Act regulates the transactions and payments associated with trademark registration, not the prior confiscatory acts. It also reflects an awareness that the 1998 Act could not have achieved its intended purpose if it had been limited to trademarks associated with property confiscated after the law's enactment. Petitioner identifies no textual basis, however, for construing Section 211(a)(1) to distinguish between initial trademark registrations and registration renewals, both of which involve "transaction[s]" and "payment[s]," and both of which are "authorized or approved pursuant to" the same general license.

Petitioner's current statutory argument also runs directly contrary to the attack on Section 211(a)(1) that petitioner principally advanced below. In the court of appeals, petitioner referred to the 1998 Act as the "Bacardi Bill," Pet. C.A. Br. 10, and argued that "all" of its provisions "were aimed at advancing Bacardi's interest in the HAVANA CLUB trademark at the expense of its adversaries, [petitioner and its affiliates]," *id.* at 10-11. See also, *e.g.*, *id.* at 31, 35 (alleging that Section 211 was enacted "to protect the private interests of Bacardi by penalizing those of [petitioner]" and to procure "the cancellation of [petitioner's] HAVANA CLUB Registration"); *ibid.* (describing Section 211's "objective" as "'clearing the path' for Bacardi's seizure of the HAVANA CLUB trademark"); Pet. C.A. Reply Br. 15 ("Section 211 was designed to serve only Bacardi's private interests."); Pet. C.A. Reh'g Pet. 5 (stating that Section 211 was enacted "as a result of lobbying by Bacardi"). In the district court, petitioner similarly maintained that "Section 211 and the amended regulation that copies it actually are aimed at one and only one trademark: HAVANA CLUB." Pet. Mem. in Supp. of Summ. J. 9; see Pet. Mem. in Opp'n to Mot. to Dismiss 6 ("Although couched in general language, [Section 211]—dubbed the 'Bacardi bill'—actually was aimed at Cubaexport's HAVANA CLUB registration.").[9]

Perhaps for that reason, petitioner's primary argument below was that the 1998 Act violated its substantive due process rights, not that the statute was inapplicable to its attempt to renew the HAVANA CLUB trademark registration. See Pet. C.A. Br. 22–35 (substantive due process argument); *id.* at 36-38 (constitutional avoidance argument). In this Court, petitioner makes no effort to reconcile its prior contention that

[9] The United States agrees that Section 211(a)(1) was clearly intended to apply to the registration renewal at issue here, but it does not otherwise endorse petitioner's description of congressional purpose.

Congress focused specifically on the HAVANA CLUB trademark with its present contention that Section 211(a)(1) does not cover that very mark. The presumption against retroactivity is a rule of statutory construction intended to effectuate, not thwart, congressional intent.[10]

3. The court of appeals' interpretation of Section 211(a)(1) does not conflict with any decision of this Court or any other court of appeals. Indeed, no other court has considered the meaning or validity of Section 211(a)(1) since the statute was enacted more than a decade ago. As Judge Silberman recognized in declining to call for an en banc vote, this case "as a whole, is not that important." Pet. App. 109a. Further review is not warranted.

a. Contrary to petitioner's contentions (Pet. 16-24), the decision below does not conflict with any decision of this Court. Although petitioner asserts (Pet. 16) that the court of appeals erred in focusing on the absence of "vested" rights, petitioner recognizes that this Court's retroactivity decisions attach significance to that concept. See *INS* v. *St. Cyr*, 533 U.S. 289, 321 (2001) ("A

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[10] Amici argue that another canon of construction, "the *Charming Betsy* doctrine," counsels against reading Section 211(a)(1) as applying to the renewal of existing trademark registrations. See Republic of France Amicus Br. 17-20; NFTC Amicus Br. 14-16. That argument was not raised below, the court of appeals did not consider it, and petitioner does not advance it. Moreover, the ruling from the World Trade Organization's Dispute Settlement Body (WTO) referenced by petitioner (Pet. 35-36) involved different provisions in the 1998 Act. See Appellate Body Report, *United States—Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R (Jan. 2, 2002). In the same proceeding, the WTO expressly found that the provision at issue in this case (Section 211(a)(1)) was "not inconsistent" with the international legal obligations raised in that proceeding. *Id.* ¶ 360(a) and (b).

statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws.") (internal quotation marks and citation omitted); *Fernandez-Vargas*, 548 U.S. at 37 (explaining the proper "sequence of analysis when an objection is made to applying a particular statute said to affect a vested right"); see also *Vartelas* v. *Holder*, No. 10-1211 (Mar. 28, 2012), slip op. 7; *Hughes Aircraft Co.* v. *United States*, 520 U.S. 939, 946-947 (1997); *Landgraf*, 511 U.S. at 269 & n.23, 271-272, 273-274. Petitioner contends, however, that this Court has used the term "vested" to mean simply "substantive" or "existing," and that the court of appeals improperly used the term in "some stronger sense." Pet. 15. That argument lacks merit.

Contrary to petitioner's suggestion (Pet. 16-17), the court of appeals recognized that a statute may operate retroactively even if it does not impair vested rights. As discussed above, and as petitioner later acknowledges (Pet. 17), the court observed that the impairment of rights was simply one "branch" of retroactivity doctrine. See Pet. App. 9a n.4. The court focused primarily on that "branch" only because it understood petitioner to be relying exclusively on that theory. *Ibid.*

Petitioner is also wrong in asserting that the court of appeals equated a "vested" right with a "right that could not be undone by subsequent government action." Pet. 10; see Pet. 15, 22. Instead, the court contrasted a law that impaired "vested rights," which would have retroactive effect, with "a law that merely 'upsets expectations based in prior law,'" which would not. Pet. App. 10a-11a (quoting *Landgraf*, 511 U.S. at 269). That distinction is entirely consistent with this Court's case law. See *Fernandez-Vargas*, 548 U.S. at 44 n.10 (The term "'vested rights[]' * * * describes something more substantial than inchoate expectations and unrealized opportunities."). Under the law in effect in 1976 (when petitioner registered its HAVANA CLUB trademark), in 1996 (when the registration was renewed), and in 2005 (when petitioner sought a second renewal), petitioner's entitlement to registration or renewal depended on its compliance with specified conditions, including procuring the Secretary's authorization. Petitioner had no "right" (vested, substantive, existing, or otherwise) to renew its registration without first satisfying those conditions, and no "right" to insist that the conditions for renewal would remain unchanged.

b. The court of appeals' ruling does not conflict with any decision of another court of appeals. In the 14 years since Section 211(a)(1) was enacted, no other court has considered its meaning or validity, and the only civil litigation relating to any aspect of Section 211 has apparently involved the HAVANA CLUB trademark. Cf. Pet. 12, 31 (acknowledging that Section 211 is narrow in scope). And while petitioner contends that the decision below (which was issued in March 2011) will "necessarily affect other litigants in other cases under other statutes," Pet. 31, the court of appeals' retroactivity analysis has not yet been cited by a single court.

c. Petitioner's invocation of foreign-policy interests (see Pet. 35-37) is also misplaced. "[T]he nuances of foreign policy 'are much more the province of the Executive Branch and Congress than of th[e] Court.'" *Itel Containers Int'l Corp.* v. *Huddleston*, 507 U.S. 60, 76 (1993) (quoting *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)). The United States' economic relationship with Cuba is a bilateral issue, and the United States has the sovereign right to carry out its economic relationships with other countries in accordance with its own national interests and values. Section 211(a)(1) embodies a policy decision made by Congress about the circumstances under which the general license should be unavailable. And, when asked by OFAC for foreign-policy guidance on petitioner's application for a specific license, the State Department made an independent determination that issuing the license would be inconsistent with U.S. foreign policy. See Pet. App. 126a-129a. Thus, contrary to petitioner's contention, the Executive Branch did "exercise its independent foreign policy judgment." Pet. 36.

4. Finally, petitioner contends (Pet. 32-35) that the court of appeals erred in rejecting petitioner's substantive due process challenge. That argument lacks merit and does not warrant further review.

Petitioner's due process argument is premised on the assertion that the 1998 Act operates retroactively by barring petitioner's attempt to rely on the general licence to renew its trademark registration in 2005. And petitioner faults the court of appeals for failing to apply the "test[]" for determining the constitutionality of "retroactive legislation." Pet. 32-33. But the court of appeals concluded that Section 211(a)(1) was not "retroactive legislation" at all. Pet. App. 8a-13a. Although petitioner disagrees with that conclusion, it does not explain how the court's constitutional analysis was flawed under that view of the 1998 Act.

In any event, the court of appeals correctly explained why Section 211(a)(1)'s application to petitioner's trademark registration renewal request would be constitutional even if the statute's operation were viewed as retroactive. As the court explained, "[i]f a statute applies retroactively," then "the 'retroactive aspects of [the] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." Pet. App. 14a (quoting *United States* v. *Carlton*, 512 U.S. 26, 31 (1994)). "[T]hat burden," however, "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Ibid.* (quoting *Carlton*, 512 U.S. at 31); *ibid.* (citing *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 547-550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part)); see Pet. 32 (citing *Carlton* and *Eastern Enterprises*).

In this case, "[t]he [1998] Act reinforces the Castro regime's isolation by denying Cuban-affiliated entities the use of U.S. trademarks related to businesses and assets confiscated by the Cuban government." Pet. App. 14a. As the court of appeals explained, "by barring renewal of trademarks that had previously been registered (not just new registrations), the 1998 Act applies to a greater number of such trademarks." *Ibid.* Thus, "both in its substance and its application to renewal of pre-1998 trademarks," the 1998 Act "is rationally related to a legitimate government interest." *Id.* at 15a.

Petitioner's contrary arguments do not withstand scrutiny. Petitioner contends that, even if its renewal application had been granted, it could not actually "make 'use' of, or otherwise profit from," the United States trademark "so long as the embargo is in place." Pet. 34. But petitioner has already attempted to profit from its registration by assigning its rights to a related entity, who then invoked the registration in a legal dispute with Bacardi in United States courts. See note 2, *supra*. Petitioner also notes (Pet. 34-35) that Cuban entities are allowed to register trademarks and renew trademark registrations not covered by Section

211(a)(1), *i.e.*, trademarks that are not the same as or substantially similar to marks associated with businesses or assets that were confiscated. But it was eminently reasonable for Congress and the Executive Branch to allow trademark registration and renewal by Cuban entities generally, while disallowing registration or renewal for the marks that are most closely associated with the particular conduct (uncompensated expropriation) that the United States wishes to condemn. See *FCC* v. *Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993).[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Although petitioner mentions the Takings Clause in the question presented (Pet. ii), the body of the petition does not present any separate takings claim. See Sup. Ct. R. 14.2 (requiring that all contentions in support of granting a petition for a writ of certiorari be set forth as provided in Sup. Ct. R. 14.1(h), which requires a "direct and concise argument amplifying the reasons relied on for allowance of the writ"). Petitioner also failed to develop any distinct takings claim in its opening brief in the court of appeals, see Gov't C.A. Br. 22 n.6, and the court of appeals did not address the question.