No. 16-1094

IN THE

Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, *et al.*,

Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Plaintiffs maintain that §1608(a)(3)'s requirement of a mailing "addressed and dispatched . . . to the head of the ministry of foreign affairs" does not require the mailing to contain the address of the minister or to be sent there. Only through such a strained interpretation of §1608(a)(3) can Plaintiffs justify having process mailed to Sudan's Embassy in Washington, rather than to the address of the foreign minister in Khartoum.

And having process — and specifically the jurisdiction-asserting summons — mailed to Sudan's Embassy was a particularly indefensible choice given that the Vienna Convention makes diplomatic missions categorically "inviolable" from all assertions of sovereignty as well as all other indignities and interferences. Plaintiffs, who until now have consistently conceded that the Convention prohibits all forms of service "on" an embassy (by mail or otherwise), now suddenly maintain that the Convention does *not* in fact prohibit service on the embassy by mail. Pls.' Br. 17, 37-38. But this belated argument is based on a misreading of the Convention's text and negotiating history; in fact, that history shows that allowing service by mail on an embassy was an idea entertained by the negotiators but ultimately rejected, along with all other proposed exceptions to the "inviolability" of diplomatic missions.

Furthermore, Plaintiffs cannot seriously dispute that the FSIA's legislative history shows that Congress purposefully decided to foreclose service by mail on embassies precisely "so as to avoid questions

of inconsistency with section 1 of article 22 of the Vienna Convention." H.R. Rep. No. 94-1487, at 26 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6625. Congress reached this decision because "the drafters of the Vienna Convention had construed Article 22 as prohibiting the service of any process or writ, 'even by post, within the premises of a diplomatic mission.'" 122 Cong. Rec. 17,469 (1976).

As a diversion from their weak arguments on the merits, Plaintiffs undertake to frame the issue before the Court as one relating to the FSIA's terrorism exception. Amici supporting Plaintiffs even argue that forbidding service by mail through an embassy would be "undermining an important weapon in the war on terror." *E.g.*, Counterterrorism Amicus Br. 5. Such concerns are not merely overblown, but utterly baseless. The issue before this Court relates to the proper method of service of process under §1608(a)(3) in *any* action against a foreign sovereign, not just actions under the FSIA's terrorism exception. Indeed, the issue more commonly arises in actions arising under other FSIA exceptions to immunity. *See, e.g.*, *Barot*, 785 F.3d at 28 (arising under commercial-activities exception). Requiring faithful adherence to the requirements of §1608(a)(3) will in no way undermine the terrorism exception or any other FSIA exception to immunity, particularly because service is *always* possible through diplomatic channels under §1608(a)(4). Lastly, while Plaintiffs are undeniably sympathetic, their status as victims of terrorism cannot justify bending a statutory rule of general application.

ARGUMENT

I. The Text Of §1608(a)(3) Is Naturally Read To Require That Process Be Mailed To The Head Of The Ministry Of Foreign Affairs In The Foreign State

Plaintiffs insist that §1608(a)(3) "is silent as to the location *where* the service packet should be sent" (Pls.' Br. 22), but Plaintiffs are mistaken. A requirement that a mailing be "addressed and dispatched . . . to" a particular person is naturally read as requiring the mailing be inscribed with the person's address and sent there.

Contrary to Plaintiffs' suggestion (Pls.' Br. 19), dictionary definitions confirm this point. The current version of the Oxford Dictionary of English specifically defines the verb "address" in the context of a mailing: "write the name and address of the intended recipient on (an envelope, letter, or parcel)." *Address, v.*, Oxford Dictionary of English 19 (3d ed. 2010). Plaintiffs' own handpicked definitions are not to the contrary. Pls.' Br. 19 (including "to put the directions for delivery on" (citation omitted)). Notably, the definition Plaintiffs provide from the Oxford English Dictionary 105 (1st ed. 1933) is incomplete, omitting these very next words: "*To address a letter* to one: To write and send it; in modern usage also, *techn.* to write on the outside the name and residence of the person to whom it is addressed, to 'direct' it."

Ordinary usage is the same. When holiday cards or business letters are being prepared for mailing, they are ordinarily not considered "addressed" until

they bear not only the intended recipient's name but also his or her address. While the word "addressed" may have varied meanings in other contexts, in the context of mailing an item, the item is not "addressed" unless it bears the postal address as well as the name.

As for "dispatch," Plaintiffs acknowledge that the word denotes sending in an expeditious manner. Pls.' Br. 19. The most expeditious manner of delivery, of course, is directly to the location of the intended recipient, rather than to an intermediate location for forwarding. Thus, §1608(a)(3)'s use of "dispatched" only reinforces that the mailing must be sent to the minister's address. Indeed, under Plaintiffs' construction of §1608(a)(3), the word "addressed" appears to be superfluous, as any mailing that is "dispatched" (sent expeditiously) to a person presumably would contain the person's name. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) ("[C]ourts must give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)).

If Plaintiffs' construction of §1608(a)(3) were sound, the service package could properly be mailed to a variety of locations, not just the foreign state's embassy in the United States. If the foreign state's U.S. embassy is "expeditious" enough, then any other of the foreign state's scores of embassies around the world ought to be "expeditious" enough, too. They all "serve[] as a component and extension of the foreign ministry, with a direct line of reporting and communication to the foreign minister," as Plaintiffs assert. Pls.' Br. 20.

Indeed, Plaintiffs at one point seem to acknowledge the implications of their construction of §1608(a)(3): "As long as the packet is directed to the correct individual and sent in an expeditious manner, Congress was agnostic about the location where the packet is sent." Pls.' Br. 23. Perhaps recognizing the implausibility of this position, Plaintiffs later suggest that a qualifying destination would have to be one "that is likely to have a direct line of communication to the foreign minister." *Id.* at 34. But that limitation is hardly meaningful or discernable, as many of a foreign state's offices inside or outside of its home territory might have a "direct line of communication to the foreign minister."

Even the Second Circuit was unwilling to go this far: "We do not suggest that service could be made on a minister of foreign affairs via other offices in the United States or another country maintained by the country in question, such as *e.g.*, a consular office, the country's mission to the United Nations, or a tourism office." JA214 n.3. But the Second Circuit did not articulate any principled reason why service could not be accomplished "via" innumerable other destinations; the Second Circuit simply did not want to endorse the logical implications of its interpretation of §1608(a)(3).

Plaintiffs point out that the word "addressed" appears in §1608(a)'s definition of "notice of suit" and is used there in the sense that the notice must be directed to the foreign state. Pls.' Br. 20-21. But there the word is not being used in the context of the mailing of a package. *See Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) ("In law as in life, . . . the

same words, placed in different contexts, sometimes mean different things. We have several times affirmed that identical language may convey varying content when used . . . even in different provisions of the same statute."). In §1608(a)(4), which calls for the service package to be sent by a mailing "addressed and dispatched" to the Secretary of State, the word "addressed" is used in the context of a mailing, and even Plaintiffs do not dispute that the mailing must be sent to the Secretary's address. Pls.' Br. 22.

Speaking of §1608(a)(4), Plaintiffs argue that its reference to the "Secretary of State *in Washington, District of Columbia*" contrasts with the supposed "silence" in §1608(a)(3). Pls.' Br. 22, 30-31 (emphasis added). But, far from contrasting, both provisions are naturally read to require the mailing to the head of the ministry of foreign affairs (called the Secretary of State here) in the nation's capital city. The greater specificity in §1608(a)(4) is understandable given that it is referring to one head of a ministry of foreign affairs, whereas §1608(a)(3) is referring to many scattered around the globe.

Plaintiffs dispute that the specification of the Secretary of State "in Washington, District of Columbia" was necessary to distinguish the federal Secretary from state counterparts, suggesting that no one would try to serve a foreign state through a secretary of state from one of the fifty states. Pls.' Br. 30. Experience suggests otherwise. *See, e.g.*, *Magness*, 247 F.3d at 611 (vacating default judgment based on attempted service of foreign state through Texas Secretary of State). Indeed, secretaries of state

among the fifty states commonly have a role in service of process on out-of-state entities. *See, e.g.*, Tex. Bus. Orgs. Code Ann. §5.251; N.Y. Bus. Corp. Law §304(a); 805 Ill. Comp. Stat. 5/5.25(b).

Plaintiffs also argue that specifying the Secretary of State "in Washington, District of Columbia" did not resolve any ambiguity because, Plaintiffs say, "the District of Columbia has a Secretary of State of its own." Pls.' Br. 30-31. In fact, the District of Columbia does not have its own "Secretary of State," but rather a "Secretary of the District of Columbia," and even that office did not exist at the time of the FSIA's enactment. *See* D.C. Mayor's Order 84-77 (Apr. 16, 1984) (establishing the office of the Secretary of the District of Columbia).

Notably, Plaintiffs provide no rebuttal whatsoever to the argument that their approach to statutory interpretation would permit a mailing to the Secretary of State not only at the State Department headquarters but, because indirect delivery is not expressly foreclosed by §1608(a)(4), also "via" some intermediary as long as it was "in Washington, District of Columbia."

Plaintiffs are plainly mistaken in asserting that "every court to have considered the question" has found that §1608(a)(3) does not specify the location for the mailing. Pls.' Br. 21. In fact, the D.C. and Fifth Circuits have found that §1608(a)(3), by its terms, requires process to be mailed to the foreign minister's office and *not* to the foreign state's embassy in Washington. *See* Sudan Br. 25-26 (collecting cases); U.S. Br. 14 (same); *see also* Pls.' Br.

32 (acknowledging cases requiring mailing to foreign ministry).

Plaintiffs also maintain that permitting service by mail on an embassy would minimize the "undesirable" resort to service through diplomatic channels (Pls.' Br. 24), but such comments only expose Plaintiffs' misunderstanding of how §1608(a) operates. Service by diplomatic channels, as contemplated in §1608(a)(4), is the only service method that may be *imposed* upon a foreign state under international law. *See, e.g.*, United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 22, *opened for signature* Jan. 17, 2005, 44 I.L.M. 803; Int'l Law Profs. Amicus Br. 13-16 & n.10 (discussing U.N. Convention and other states' laws on service of process on foreign states). All other means of service under §1608(a) are dependent upon a foreign state providing some form of consent to another method of service: §1608(a)(1) through a "special arrangement"; §1608(a)(2) through an agreed-upon "international convention"; and §1608(a)(3) through a signed receipt from the ministry of foreign affairs. If the foreign state has not consented to service under (a)(1)-(3), a plaintiff can *always* resort to the fail-safe method of (a)(4) to accomplish service consistent with international law. As the United States observes, Plaintiffs (and the Second Circuit) are mistaken in assuming that service under (a)(3) "should be available in most circumstances." U.S. Br. 9, 19.

Plaintiffs assert that a mailing to the foreign minister at the ministry ordinarily would be accepted and signed for by a mailroom employee, so the use of

intermediaries is unavoidable. Pls.' Br. 27, 29. But, assuming that is the case, Plaintiffs ignore the vast difference between a mailroom employee in the minister's own ministry and a mailroom employee in one of the foreign state's far-flung diplomatic missions. *Cf.* 28 U.S.C. §1608(b)(2) (expressly permitting service on an agency or instrumentality's "agent authorized by appointment or by law to receive service of process in the United States," and having no counterpart in §1608(a)(3)).

Plaintiffs are incorrect that there is "nothing unnatural" about a hypothetical §1608(a)(3) that provides: "addressed and dispatched to the head of the ministry of foreign affairs of the foreign state concerned at the foreign state's American embassy" (Pls.' Br. 25). Such a provision would indeed be unnatural, as it would call for a package to be addressed and dispatched to a location where the minister of foreign affairs is not present. In the absence of a contrary indication, a requirement that a mailing be "addressed and dispatched" to someone is naturally understood to require the mailing to be sent to that person's address. *See Samantar*, 560 U.S. at 314-19 (holding that interpretation that is not expressly foreclosed by text of FSIA is nonetheless unsound given context).

Admittedly, §1608(a)(3) could have added "in the foreign state" or "in the foreign state's capital." *See* Pls. Br. 31 n.4. But that would have risked redundancy for the sake of clarity. Plaintiffs provide examples from the U.S. Code where Congress has taken that step (Pls.' Br. 22-23), but a statute does not *require* such redundancy where the terms are

already sufficiently clear. Notably, for all their canvassing of the U.S. Code, Plaintiffs are unable to identify a single section that allows service by mail to a place other than the intended recipient's address.

Plaintiffs do not dispute that under §1608(c)(2) the foreign state's 60-day clock begins to run upon the signature of the postal receipt. Pls.' Br. 27-28. Rejecting the idea that this trigger contemplates receipt by the foreign minister rather than by some distant intermediary, Plaintiffs blithely suggest that the foreign state can seek to vacate an entry of default or even default judgment, if the package does not reach the minister in time. *Id.* Sections 1608(a)(3) and (c)(2) are most naturally read together to require a mailing to the foreign ministry and the running of the 60-day clock upon signature there.

The terms of 22 C.F.R. §93.1(e) are not to the contrary, despite Plaintiffs' suggestion otherwise (Pls.' Br. 28). That regulation contemplates service by diplomatic means under §1608(a)(4), which in certain circumstances may be upon the embassy, and such service is consummated upon delivery to the embassy. *See also* Letter from L. Yelin to Clerk of Court, *Kumar*, 880 F.3d at 144 (No. 16-2267) ("In some unusual circumstances, or if the foreign state so requests, the State Department will transmit process to a foreign state's embassy in the United States."). Notably, §1608(a)(4), in contrast to §1608(a)(3), does not require delivery to the foreign minister but delivery "through diplomatic channels to the foreign state" and §1608(c)(1) provides that service under (a)(4) is deemed to have been made upon transmittal.

Finally, while acknowledging that §1608(a)(3) must be followed strictly (Pls.' Br. 34; Sudan Br. 20, 24; U.S. Br. 18), Plaintiffs assert that they followed the provision "to the letter" and that it would be "the height of unfairness" to vacate their default judgment. Pls.' Br. 35. But, Plaintiffs' service package misidentified Sudan's minister of foreign affairs, was improperly addressed to Sudan's embassy rather than to the actual minister in Khartoum, and apparently was never even delivered to the embassy. Sudan Br. 7; JA74-75. And, when Plaintiffs' counsel prepared their mailing in 2010, they knew from their representation in the 2004 *Rux* case in the Eastern District of Virginia that Sudan disputed the legality of service by mail on its embassy and that Sudan had substantial arguments in its favor. Moreover, in choosing to file this case in the District of Columbia, Plaintiffs' counsel were proceeding in the face of the D.C. Circuit's *Transaero* case, under which service is to be sent to the foreign ministry. *See* 30 F.3d at 154. Under these circumstances, vacating the default judgment, which was based on a one-day evidentiary hearing (JA89), is hardly unfair.

II. The Vienna Convention Prohibits Mailing Service Of Process To A Diplomatic Mission

Throughout this case, Plaintiffs have consistently conceded that, under the Vienna Convention (and thus under §1608(a)(3)), process may not be served, by mail or otherwise, "on" an embassy; for this reason, Plaintiffs have argued that they served process "via" or "care of" — but not "on" — Sudan's Embassy in the United States. *See, e.g.*, Plaintiffs'

Opposition to Petition for Rehearing 2, *Harrison v. Republic of Sudan*, 802 F.3d 399 (2d Cir. 2015) ("Plaintiffs-Appell[ees] do not dispute that service directly on an embassy or consular official is improper . . . ."); Pls.' Pet. Opp'n 6 ("If service were permitted directly on an embassy or consular official, *which it is not* . . . ." (emphasis added)); *id.* at 14 (stating that "numerous procedural errors, including improperly directly serving the Embassy" by "mailing," led to dismissal for improper service in *Ellenbogan v. The Canadian Embassy*, Civ. No. 05-01553(JBD), 2005 WL 3211428 (D.D.C. Nov. 9, 2005)); *id.* at 17 ("The Vienna Convention Prohibits Service on an Embassy or Consular Official, Not Service Via Mail Forwarded by an Embassy" (heading)). The Second Circuit accepted Plaintiffs' argument, holding that the Vienna Convention (and §1608(a)(3)) prohibited service "on" an embassy, including by mail, but not "via" or "care of" an embassy. JA222 ("[S]ervice on an embassy or consular official would be improper. But that is not what happened here."); *id.* (acknowledging that "the FSIA's legislative history makes clear that service by mail on an embassy is precluded under the Act" (citation omitted)).

In a dramatic reversal that betrays the weakness of their prior position, Plaintiffs abandon their longstanding reliance on the purported distinction between service "on" versus service "via" an embassy, and instead argue for the first time that the Vienna Convention *permits* service on an embassy by mail. *See, e.g.*, Pls.' Br. 37 ("The Convention does not limit service of process by mail."); *see also generally id.* at 16-17; 35-49. This argument is waived. *See Buck v.*

Davis, 137 S. Ct. 759, 780 (2017) (holding that respondent waived argument "not advanced in District Court, before the Fifth Circuit, or in [his] brief in opposition to [the] petition for certiorari"). Plaintiffs' new argument is also meritless.

In arguing that the text of the Convention permits service by mail to an embassy, Plaintiffs misread Article 22. Pls.' Br. 37-38. The inviolability accorded in the first sentence of Article 22(1) is not limited to the second sentence's express prohibition on unauthorized entry. Pls.' Br. 37. Article 22(2) specifically imposes on the receiving state a "special duty" to protect a mission against "any intrusion or damage" and to prevent "any disturbance of the peace of the mission or impairment of its dignity." These provisions, and parallel ones protecting diplomatic agents (Article 29), have caused Circuit courts *uniformly* to prohibit service of process upon an inviolable mission or diplomat, even as agent for another. *See* Sudan Br. 37 (citing *Autotech*, 499 F.3d at 748; *767 Third Ave.*, 988 F.2d at 301); *see also Kumar*, 880 F.3d at 157, 159 n.11; *Tachiona v. United States*, 386 F.3d 205, 224 (2d Cir. 2004) (accepting U.S. Government's representation that, even when served as agent, "service of process on a person entitled to diplomatic immunity both interferes with that person's representative functions and constitutes an affront to his or her dignity"); *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980-81 (D.C. Cir. 1965) (accepting U.S. Government's concern that permitting service of process upon Ambassador as agent for his state "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions").

Plaintiffs invoke "common sense" (Pls.' Br. 38), but common sense only confirms that a jurisdiction-asserting summons — signed by a U.S. court clerk, bearing the court's seal, and demanding the appearance of the defendant (Fed. R. Civ. P. 4(a)(1)) — is an exercise of U.S. sovereignty likely to disrupt operations at the embassy and impair its dignity. Sudan Br. 37-38.

A journal source cited by Plaintiffs (Pls.' Br. 38) (and one of their amici) underscores this point: "What could perhaps constitute an infringement would be if the writ had the form of a binding order directed against a foreign state, e.g. to appear in court or to reply within a certain period of time, but then it would be the content of the writ that creates the problem and not the way it is conveyed to the mission." Rolf Einar Fife & Kristian Jervell, *Elements of Nordic Practice 2000: Norway*, 70 Nordic J. Int'l L. 531, 554 (2001).

It is no answer for Plaintiffs to state that, if service by mail upon an embassy is an infringement, "it is hard to see why service of process by mail at a foreign ministry would be permissible" (Pls.' Br. 38). The foreign ministry in the foreign state's capital is not a "mission" under the Vienna Convention and does not enjoy inviolability under Article 22 or otherwise.

Plaintiffs likewise cannot brush aside the inviolability of the embassy's diplomatic correspondence under Article 27(2) of the Convention (Pls.' Br. 38). The receiving state cannot dictate what an embassy transmits to the foreign minister, even if a mail clerk at the embassy happens to sign a return

receipt. Sudan Br. 45-47.

Finally, even under Plaintiffs' narrow conception of inviolability, the purported service of process here was an infringement. The mail carrier delivering a service package issued by a U.S. court clerk and requiring a return receipt is necessarily acting as an "agent[] of the receiving State" (Vienna Convention, art. 22(1)) in entering the embassy premises for delivery and signature, even if a mail carrier dropping off routine mail arguably is not.

Plaintiffs also misread the negotiating history of the Vienna Convention (Pls.' Br. 40-41), oddly latching onto a proposal to allow service by mail even though the proposal was ultimately rejected and withdrawn. That rejection and withdrawal is established on the United Nations' official record by Japanese representative Mr. Takahashi, who stated in 1961, accurately and without objection, that the "unanimous interpretation" of the Committee of the Whole was that "no writ could be served, even by post, within the premises of a diplomatic mission." U.N. Conference on Diplomatic Intercourse & Immunities, *Summary Records of Plenary Meetings & of Meetings of the Committee of the Whole*, at 141, U.N. Doc. A.CONF.20/14, U.N. Sales No. 61.X.2 (1962) [hereinafter U.N. Conf. Summary Records]. Plaintiffs (and their amici) go to great lengths to dispute the official record of the 1961 Conference, primarily by relying on the ILC's 1958 negotiations and report and a flawed account by a U.S. representative who attended the 1961 Conference.

Plaintiffs first wrongly assert that even the "prevailing understanding of the drafters at the ninth

session" of the ILC in 1957 was that judicial notices could be served through the post (Pls.' Br. 40). In fact, the 1957 summary records make clear that *only* Sir Gerald Fitzmaurice, from the United Kingdom, suggested that service on a mission by post would be acceptable. Summary Records of the Ninth Session, [1957] 1 Y.B. Int'l L. Comm'n 65, U.N. Doc. A/CN.4/SER.A/1957. The ILC disregarded Sir Fitzmaurice's suggestion and approved the categorical commentary: "No process may be served at the premises of the mission." *Id.* at 64-66.

And the 1957 records are not "obsolete" (Pls.' Br. 39). Indeed, U.S. courts, including this Court, have relied upon these records. *See, e.g.*, *Perm. Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 201 (2007); *Swarna v. Al-Awadi*, 622 F.3d 123, 135 (2d Cir. 2010); *767 Third Ave.*, 988 F.2d at 301.

While Plaintiffs are correct that the ILC in 1958 entertained the possibility of allowing service by mail (Pls.' Br. 40), the 1958 discussion and the commentary are at least ambiguous, because many of the ILC members appear to have been grappling with the problem of serving a diplomatic agent who did not have immunity in the particular suit, rather than service on the state itself. *See* Summary of Observations Received from Governments & Conclusions of the Special Rapporteur, at 38, U.N. Doc. A/CN.4/116 (May 2, 1958) (U.S. statement and Special Rapporteur's response); Summary Records of the Tenth Session, [1958] 1 Y.B. Int'l L. Comm'n 130-32, U.N. Doc. A/CN.4/SER.A/1958 [hereinafter 1958 ILC Yearbook Vol. I]. That concern was understandable given that service on a diplomatic

agent, if not permitted through diplomatic channels, may in some countries be impossible. *See, e.g.*, *Reyes v. Al-Malki* [2017] UKSC 61, [15] (noting that service on a diplomatic agent through diplomatic channels is not "a legally effective mode of service" in the U.K.). But the summary records of the 1961 Vienna Conference show that work on the Vienna Convention "did not end" in 1958 and that the Committee of the Whole ultimately rejected *any* exception to the inviolability of a mission, including service by mail. *See generally* U.N. Conf. Summary Records at 135-43.

In 1961, the Japanese delegation to the Vienna Conference proposed a new paragraph to then Article 20 ("4. No writ may be served by a process server within the premises of the mission.") because the permissibility of service by mail on a mission, as contemplated in the 1958 commentary, was in Japan's view, not evident from Article 20's text. *See* U.N. Conference on Diplomatic Intercourse & Immunities, *Annexes, Final Act, Vienna Convention on Diplomatic Relations, Optional Protocols, Resolutions*, at 22, U.N. Doc. A/CONF.20/14/Add.1 (Vol. II), U.N. Sales No. 62.X1.1 (1962) [hereinafter U.N. Conf. Annexes] (reproducing U.N. Conference on Diplomatic Intercourse & Immunities, *Japan: amendment to article 20*, U.N. Doc. A/CONF.20/C.1/L.146 (Mar. 14, 1961)). The Japanese delegation intended the amendment to permit service by post by negative implication (*id.*), as Plaintiffs themselves recognize (Pls.' Br. 41).

Ultimately, the Japanese representative withdrew the amendment "on the understanding that it was

the unanimous interpretation of the Committee [of the Whole] that no writ could be served, even by post, within the premises of a diplomatic mission." U.N. Conf. Summary Records at 141.

The Conference records confirm broad opposition to the Japanese amendment as well as to *all* other exceptions to inviolability, even those related to life-or-death emergency. *See, e.g.*, U.N. Conf. Summary Records at 136-37, 140-41 (describing statements of representatives from Bulgaria, Sweden, Argentina, Colombia, Guatemala, Italy, Romania, and Senegal (all resoundingly rejecting exceptions to mission inviolability)). This voluminous record powerfully contradicts Plaintiffs' assertion that Mr. Takahashi's statement "has no support in the underlying conference records." Pls.' Br. 42.

Moreover, Plaintiffs' assertion that several members of the Committee of the Whole indicated "support of service by post on diplomatic premises" (*id.*) is demonstrably incorrect. Only the Turkish representative expressed any support for service by post; the Norwegian and Soviet representatives opposed the Japanese amendment. *See* U.N. Conf. Summary Records at 140; *id.* at 137 (stating Norwegian "delegation considered it preferable *not to introduce* into the convention a provision such as that proposed by Japan, in view of the difficulty of finding a satisfactory formula" (emphasis added)); *id.* (concluding that the Soviet Union favored wording improvements only and "would vote against all other amendments to article 20").

Plaintiffs misplace reliance on a report written by a U.S. representative at the Vienna Conference, Mr.

Ernest Kerley. *See* Pls.' Br. 42 (citing Ernest Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse and Immunities*, 56 Am. J. Int'l L. 88, 102 (1962)). Mr. Kerley wrote that Mr. Takahashi "stated that discussion within the Committee had established a unanimous consensus that service *could be* effected by mail" (*id.* (emphasis added)), when, in fact, the official Conference records indicate Mr. Takahashi said the opposite (U.N. Conf. Summary Records at 141 (stating he was withdrawing his proposed amendment "on the understanding that it was the unanimous interpretation of the Committee that no writ could be served, even by post")). Later authors blindly relied upon Mr. Kerley's account. *See* Pls.' Br. 45 (citing Richard Crawford Pugh & Joseph McLaughlin, *Jurisdictional Immunities of Foreign States*, 41 N.Y.U. L. Rev. 25, 32 n.35 (1966) (citing Kerley, *supra*, at 102); Andreas Lowenfeld, *Claims Against Foreign States—A Proposal for Reform of United States Law*, 44 N.Y.U. L. Rev. 901, 934 n.99 (1969) (same)).

Nor is Mr. Takahashi's statement inconsistent with Mr. Yokota's statement in 1958, as Plaintiffs assert (Pls.' Br. 42-43 (citing 1958 ILC Yearbook Vol. I at 131)). Mr. Yokota stated that Japan allowed service by mail, and Mr. Takahashi proposed to make clear "one way or the other" that Article 20 allowed it or did not. U.N. Conf. Annexes at 22.

Significantly, the State Department in 1974 credited Mr. Takahashi's statement in drafting the FSIA: his statement is cited as support for the State Department's understanding that service of process

by mail on an embassy was precluded by Article 22(1). 71 Dep't of State Bull. 429, 458-59 (1974) (quoting Diplomatic Note of July 11, 1974 (citing U.N. Conf. Summary Records at 141, where Mr. Takahashi's statement is found)); *see also* Sudan Br. 52-53.

Plaintiffs next turn to the views of U.S. treaty partners, which Plaintiffs agree are entitled to "considerable weight" in interpreting the terms of a treaty. Pls.' Br. 43. Yet Plaintiffs rely almost exclusively on a decision from a court of a single treaty party, in a case that does not even involve service of process on a foreign state. Pls.' Br. 43. Indeed, the U.K. Supreme Court, in *Reyes* [2017] UKSC 61, *distinguished* service upon states from service upon diplomatic agents, stating that, under U.K. law, service on states "must be effected" through diplomatic channels, while service on a diplomatic agent through diplomatic channels was "not even a legally effective mode of service" in the United Kingdom. *Id.* at [15].

In assessing service on diplomatic agents, the U.K. Supreme Court (*Reyes* [2017] UKSC 61 [13]) adopted the analysis of the U.K. Court of Appeal, which relied on the D.C. District Court's 1973 opinion in *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.D.C. 1973). *See Reyes v. Al-Malki* [2015] EWCA (Civ) 32 [87]-[88], [91]. But *Renchard* was decided *before* the FSIA was enacted, does not address the Vienna Convention at all, and is therefore irrelevant to the question of service of process on a foreign state.

To the extent that *Reyes* can be read as

supporting service of compulsory process by mail upon an embassy, the case, decided in 2017, does not inform this Court about the consensus meaning of mission inviolability in 1976 when Congress looked to the Vienna Convention in revising and enacting §1608(a)(3). And even today, *Reyes* is contrary to the views of many other treaty partners, specifically Sudan's amici (including the United States) and courts of other foreign nations. *See, e.g.*, Sudan Br. 46-47 (citing amicus briefs); Int'l Law Profs. Amicus Br. 11-12 (citing cases); U.S. Br. 21-23; *see also United States v. Zakhary*, [2015] F.C. 335 (Can. Ont.) (holding that service of complaint sent by registered mail to the U.S. consulate in Toronto violated service provisions of Canada's State Immunities Act and Article 22 of the Vienna Convention). Plaintiffs attempt to malign and minimize the considered views of Sudan's amici (Pls.' Br. 45, n.11). Yet these states have a keen interest in seeing §1608(a)(3) interpreted correctly, as they (unlike the United Kingdom) cannot be served under §1608(a)(2) because they are not signatories to any "applicable international convention on service of judicial documents," such as the Hague Convention.

These treaty partners' views are significant: Plaintiffs fail to recognize (Pls.' Br. 47) that Sudan *does* directly assert a violation of the Vienna Convention. As Sudan explained, because the Vienna Convention itself "forms part of U.S. law" (as both a self-executing treaty and as enacted by the Diplomatic Relations Act of 1978), the Second Circuit "was required to reject a method of service of process that violated the terms of the Vienna Convention." Sudan Br. 31-33 (citing *Tabion*, 73 F.3d at 539; *767*

Third Ave., 988 F.2d at 302); *see also* Sudan Pet. 25-27 ("The Panel Opinion Places the United States in Violation of The Vienna Convention" (heading)). And thus, contrary to Plaintiffs' assertions, the views of the United States interpreting the Vienna Convention are also directly relevant here and indisputably entitled to "great weight." *Water Splash*, 137 S. Ct. at 1512.

Section 1604 of the FSIA further confirms that §1608 should be interpreted in view of this consensus on Article 22. Sudan Br. 33-35. By its text, §1604 makes "jurisdiction" over a foreign state "[s]ubject to existing international agreements," and "jurisdiction" depends on the existence of an immunity exception *and* effective service of process under §1608. 28 U.S.C. §1330(b). Plaintiffs misplace reliance on the deletion of this provision from §1608 (Pls.' Br. 36-37), which simply removed redundancy. The FSIA's legislative history only reinforces that Congress intended the *entire act* to be "subject to existing international agreements." H.R. Rep. No. 94-1487, at 10 ("[T]he reference to existing international agreements is essential to make clear that this bill would not supersede the special procedures provided in existing international agreements . . . .").

III. Legislative History Confirms That Congress Intended For §1608(a)(3) To Preclude Mailing Process To A Diplomatic Mission

Plaintiffs wishfully assert that the legislative history "sheds little light" on whether §1608(a)(3) allows service of process on an embassy (Pls.' Br. 50), but this could not be further from the truth. The House Report does not by any stretch limit its

discussion to "the discrete issue" of service directed to an ambassador; it states explicitly that §1608 was revised to preclude "service on *an embassy* by mail," to address the State Department's concern that service mailed to an embassy would violate the Vienna Convention. H.R. Rep. No. 94-1487, at 26 (emphasis added).

Moreover, the language in §1608(a)(3) was amended to track the language in place at the time for serving an individual *in a foreign country*, further suggesting that §1608(a)(3) requires the service package to be mailed to the ministry of foreign affairs in the foreign country and not to the embassy in the United States. *See* U.S. Br. 31 (citing H.R. Rep. 94-1487, at 24; Fed. R. Civ. P. 4(i)(1)(D) (1976)).

The State Department's role in drafting the FSIA is precisely why "special attention" should be given to the views of the United States here. *See Helmerich*, 137 S. Ct. at 1320; *cf.* Pls.' Br. 46. And the purportedly inconsistent historical position of the United States on the meaning of Article 22 (from nearly half a century ago) is of no consequence given the clear position of the United States on the legality of service mailed to an embassy at the time the FSIA was enacted. *See* Sudan Br. 52-54.

IV. U.S. Interests Would Be Undermined If Mailing Process To A Diplomatic Mission Were Permitted Under §1608(a)(3)

Plaintiffs are off base in second-guessing the determination of the United States as to where its interests lie (Pls.' Br. 18, 51-52). Given diplomatic and reciprocity concerns, the United States has

reasonably determined that it has a substantial interest in having the FSIA's service provisions (and the Vienna Convention) applied strictly in U.S. courts, and in avoiding a U.S. precedent endorsing service on or "via" an embassy, even though the United States insists on service through diplomatic channels or under the Hague Service Convention. U.S. Br. 10, 24-26. Finally, Plaintiffs and their amici have no justification to charge the United States with abandoning its veterans, when the United States is simply reiterating legal positions it has espoused consistently in amicus briefs in a host of FSIA cases over the years.

CONCLUSION

For the foregoing reasons and those stated in Sudan's opening Brief, this Court should reverse the decision of the Second Circuit.

Respectfully submitted,

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