No. 18-1427

In The
Supreme Court of the United States

MARIE LAVENTURE, et al.,

Petitioners,

v.

UNITED NATIONS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

Pursuant to this Court's Rule 44.2, Petitioners Marie Laventure, et. al., petition for rehearing of the Court's order denying certiorari in this case, in light of *Franchise Tax Board of California v. Hyatt*, 587 U.S. ___, 139 S. Ct. 1485 (2019) (hereinafter, "*Hyatt III*"), which was decided by this Court after the filing of the petition for certiorari in this case.

Hyatt III, which overturned this Court's precedent in *Nevada v. Hall*, 440 U.S. 410 (1978), primarily deals with the interstate immunity of U.S. States. Particularly significant to Petitioners' case, however, *Hyatt III* affirmed that the immunity retained by U.S. States is an absolute immunity granted under the authority of the U.S. Constitution, subject to the conditions and restrictions contained therein. As this retention (and in certain cases, as *Hyatt III* held, expansion) of immunity through the Constitution is analogous to the grant of absolute immunity to the United Nations ("UN") by signatories to the Convention of Privileges and Immunities of the United Nations ("CPIUN"), the holding in *Hyatt III* underscores a central premise of Petitioners' argument to this Court: if a U.S. State can expressly waive its absolute immunity through a legislative enactment assuming tort liability in a certain category of cases, so too can any entity with similarly bestowed absolute immunity, including the UN. In other words, the law of absolute immunity, including express waiver, does not change simply because it is the UN's absolute immunity at issue. To the extent this Court, or the lower courts, discounted Petitioners'

arguments, presuming that the immunity of the U.S. States is somehow *different* in this regard, this petition for certiorari should be reheard in light of the clarity brought to the issue by this Court's ruling in *Hyatt III*.

Petitioners recognize that this Court rarely grants rehearings, but Petitioners believe this represents the type of "intervening circumstance of substantial and controlling effect" under Rule 44.2 where rehearing is appropriate. Petitioners' case is important not only because it deals with a level of human tragedy rarely seen before this Court, but also because these elemental principles of law should be clarified. In the alternate, Petitioners request this Court grant certiorari, vacate the decision of the Second Circuit and remand in light of the holding in *Hyatt III* for further proceedings related to the nature of UN immunity and whether it differs from that of entities like U.S. States which—as is now abundantly clear in the wake of *Hyatt III*—share a similar absolute immunity.

This Court should note that the decisions of the lower courts completely ignored Petitioners' arguments related to this issue. Indeed, not a single sentence in either the district court or Second Circuit decision explained how it is plausible that an entity with absolute immunity can subsequently accept liability but intend such acceptance to apply only in a forum that does not exist. It is both impossible under the definition of the term "liability" and absurd in result. As Chief Justice Roberts pointed out in his concurrence to another decision issued by this Court during the pendency of this petition: "if you find yourself in a place

as absurd as that, you might want to consider whether you've taken a wrong turn along the way." *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 2433 (2019). We respectfully ask that this Court do exactly that.

GROUNDS FOR REHEARING

Hyatt III held that immunity of U.S. States in each other's courts is not based on the immunity afforded foreign sovereigns through the international law principle of comity, but rather on absolute immunity, which was both retained in part from pre-Constitutional common-law immunity, and newly conferred upon the States in other respects, when the 13 original U.S. colonies came together to form a union governed by the U.S. Constitution. The majority in *Hyatt III* affirmed that "the State's sovereign immunity is a historically rooted principle embedded in the text and structure of the Constitution," 136 S. Ct. 1499, and that "[t]he States retained . . . aspects of sovereignty, 'except as altered by the plan of the Convention or certain constitutional Amendments,'" *id*., at 1489, quoting *Alden v. Maine*, 527 U.S. 706, 713 (1999). In other words, as stated in the dissent, the majority in *Hyatt III* held that, in enacting the Constitution, "the Framers transformed the immunity of the States from a permissive immunity predicated on comity and consent into an absolute immunity" that the parties to the Constitution must accord one another. *Id.*, at 1504.

Thus *Hyatt III* confirms that the U.S. Constitution retained (and in some respects, expanded) the absolute immunity of the U.S. States in a manner similar to the way the CPIUN conferred absolute immunity on the UN. It therefore must be the case that—in the absence of a treaty provision to the contrary—the UN's absolute immunity operates in the same manner as that of U.S. States, including as to express waiver through the assumption of liability, subject to the terms and conditions of such acceptance of liability.[1]

To be clear, the immunity of U.S. States in their own domestic courts preexisted the U.S. Constitution's retention of that immunity, while the immunity of the UN is a creature of treaty enacted by independent sovereigns. Nevertheless, if the U.S. Constitution is a compact that defined the States' absolute immunity going forward (later made more explicit through the enactment of the Eleventh Amendment), the analogy holds. Moreover, it is important to recognize that neither the UN nor U.S. States are, technically, sovereigns. *Hyatt III* confirms that U.S. States, through the U.S. Constitution, retain only "aspects of sovereignty" they held prior to the Constitution's ratification, 136 S. Ct. 1489. This absolute immunity of States is retained "either literally or by virtue of their admission into the Union upon an equal footing with the other States. . . ." *Alden*,

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[1] Immunity and express waiver thereof, it should be noted, are not matters of customary international law but U.S. law, since there is no "norm that is specific, universal and obligatory" in the "law of nations" as to immunity or its waiver. See *Jesner v. Arab Bank, PLC*, 584 U.S. ___, 138 S. Ct. 1386, 1409 (2018).

at 713, but in any event is not the immunity of a sovereign, but rather granted by Constitution. Similarly, in the case of the UN, while the organization "is an international person. . . . [t]hat is not the same thing as saying that it is a [sovereign] State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State." *ICJ Advisory Opinion of 11 April 1949*, I.C.J. Rep. 174, 179 (1949).

A. Few facts before the Court are in dispute.

As described in the petition for certiorari, there is little dispute as to the facts of this case. The UN has apologized and admitted responsibility for the death of approximately 10,000 people in Haiti and the sickening of a million more. Among those injured as a result of the UN's actions are United States citizens, including several of the lead plaintiffs in this action. There is also no dispute that, in two reports issued in 1996 and 1997, the United Nations expressly assumed liability for private law damages caused by UN forces in circumstances such as those present in this case.[2] In the same reports, the Secretary-General described potential procedures for the settling of third party claims through a "Standing Claims Commission," a body that—as the Secretary-General admits in the same

[2] The two reports in questions are:

(1) UN Report A/51/389 (September 20, 1996), found at https://undocs.org/A/51/389; and

(2) UN Report A/51/903 (May 21, 1997), found at https://undocs.org/A/51/903

(both last accessed October 18, 2019).

reports—had never existed in the history of the UN and might never be established. It is unquestionable that nowhere in either report does the Secretary-General ever explicitly state that the liability accepted in the reports was restricted to these non-judicial internal claims processes. The Second Circuit just assumed such limitation by implication, despite the fact that presenting a claim before these non-existent Claims Commissions is, quite obviously, an impossibility. It is simply implausible to suggest, therefore, that this waiver was limited to forums that are, for all intents and purposes, imaginary. This Court wouldn't accept such illogic or impossibility from a legislative enactment of a U.S. State, the U.S. government, or a foreign sovereign. So why would the Court accept this conclusion simply because it concerns the UN? The only plausible conclusion is that, through its agreement to be liable, the UN intended an express waiver of immunity in the limited circumstances outlined in the reports, a waiver effective before any court of otherwise competent jurisdiction to hear the case. Nothing else makes sense.

That these reports were then legislatively adopted by the General Assembly in UN Resolution A/52/247 (July 17, 1998) further reinforces the obligatory nature of the UN's assumption of liability.[3] Petitioners know of no other instance in UN history where liability was legislatively adopted by the UN General Assembly in a similar manner, and it is without question that

[3] UN Resolution A/52/247, found at https://undocs.org/A/res/52/247 (last accessed October 17, 2019).

Resolution A/52/247 is binding upon the UN in the same manner that a statute is binding upon a State, or a treaty upon its signatories. This is because the UN has long "distinguish[ed] between resolutions and decisions which are purely recommendatory in nature and resolutions and decisions which are binding on Member States."[4] If, therefore, it is a waiver of immunity, it is as binding upon the UN as a statute is binding upon the parties to whom it relates.

B. Entities with absolute immunity have a long history of waiving immunity through the acceptance of liability, limited to the terms of said acceptance itself.

In its petition for certiorari, Petitioners cite seven separate federal statutes and more than 20 state statutes that waive absolute immunity from the jurisdiction of the courts through the assumption of liability, demonstrating that when entities with absolute immunity undertake to expressly waive this immunity,

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[4] See "Questions Relating To The Voting Procedure And Decisionmaking Process Of The General Assembly," 9 May 1986, as reported in United Nations Juridical Yearbook, 1986, Part Two: Legal activities of the United Nations and related intergovernmental organizations, page 275 ("Such legally binding resolutions or decisions include . . . decisions relating to the budget of the Organization and other decisions relating to the internal administration and management of the Organization. Once a legally binding resolution or decision of this type is validly adopted, it is binding on all Member States. . . ."). http://legal.un.org/docs/index.asp?path=../unjuridicalyearbook/pdfs/english/volumes/1986.pdf&lang=EF&referer=http://legal.un.org/unjuridicalyearbook/volumes/1986/ (last accessed October 18, 2019).

they commonly do so by accepting liability. This is not to say that entities with absolute immunity don't also waive that immunity simply by agreeing to be subject to the jurisdiction of certain courts. Rather, it is to point out that agreeing to accept liability is just as much an express waiver, and is indeed quite common in instances where entities with absolute immunity waive their immunity. Indeed, long-standing precedent of this Court in other areas of immunity holds that "magic words" are not needed to show an express waiver by a party with absolute immunity. See, e.g., *FAA v. Cooper*, 566 U.S. 284, 291 (2012).

New York's highest court deftly summarized what happens when an entity with absolute immunity agrees to accept liability:

> In the assumption of liability and the creation of a remedy to enforce a liability, heretofore absent by reason of the sovereignty of the tort feasor, the sovereign has not generously dispensed charity . . . [i]t declares that no longer will the [entity] use the mantle of sovereignty to protect itself from such consequences as follow negligent acts . . . [i]t admits that in such negligence cases the sovereign . . . promises that in future it will voluntarily discharge its moral obligations in the same manner as the citizen is forced to perform a duty which courts and Legislatures have so long held, as to him, to be a legal liability. It transforms an unenforceable moral obligation into an actionable legal right. . . ." *Jackson v State of New York*, 261 N.Y. 134, 138, 184 N.E. 735 (1933).

In keeping with *Hyatt III*, therefore, if the absolute immunity of the UN is akin to that granted to U.S. States under the Constitution, any notion that the UN could not expressly waive its immunity by agreeing to be liable without restricting such waiver to a particular binding forum is simply wrong. And this Court has long held that "wherever, by either the common law or the statute law . . . a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters. . . ." *Dennick v. Railroad Co.*, 103 U.S. 11, 18 (1881).

Again, unless there is a different set of rules that apply to the UN, it is highly plausible to assert that in agreeing to be liable, the UN has expressly waived its immunity under the CPIUN to any court otherwise competent to hear the claim, particularly since any other explanation is completely implausible. Thus, as described in the petition for certiorari, the plaintiffs in this action have far exceeded the standard to survive a motion to dismiss.

C. Waiver of immunity in advance is, without question, allowed under CPIUN §2

This Court should note that some international legal scholars take issue with the notion that a waiver under CPIUN §2 can be effectuated in advance. This is wrong on its face: entities with absolute immunity routinely waive immunity prospectively through legislation, contracts and other agreements. Indeed, U.S.

States do so all the time, in a manner quite similar to the UN's statutory waiver in A/52/247.

More than this, however, such a view prohibiting advance waiver is clearly *not* the law of the United States, since it would add words to the CPIUN that are completely absent.[5] "[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989), quoting *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71, 5 L. Ed. 191 (1821).

Moreover, the language in the CPIUN does not say "a" particular case or "each" particular case, but rather "any" particular case. There is considerable authority from this Court holding that "any" is a purposefully broad and expansive term. Consider the recent decision in *SAS Institute Inc. v. Inancu*, 584 U.S. ___, 138 S. Ct. 1348 (2018):

> . . . the word "any" naturally carries "an expansive meaning." When used (as here) with a

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[5] Article II, §2 of the Convention of Privileges and Immunities of the United Nations ("CPIUN"), 21 U.S.T. 1418, specifies in its entirety:

> The United Nations, its properties and assets wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

> "singular noun in affirmative contexts," the word "any" ordinarily "refer[s] to a member of a particular group or class without distinction or limitation" and in this way "impl[ies] every member of the class or group." (citations omitted). 138 S. Ct. at 1354.

See also *United States v. Gonzales*, 520 U.S. 1, 5 (1997).

It follows that the term "any particular case," unadorned with any other language or qualifier, should be read to include a group, section or division of things. Thus, advance waiver of immunity for a group or category of cases is, without question, allowed. To rule otherwise would add words that do not appear in the treaty, in direct contravention of the law of this Court.

CONCLUSION

Petitioners' argument is straightforward: If the absolute immunity granted to the UN is the same as that granted to the U.S. States and other entities with absolute immunity (as *Hyatt III* reinforces), and if said entities may waive such immunity by accepting liability in a legislative enactment, then the same must be true of the UN. And in the case before this Court, there is no other plausible explanation for the UN's actions—unless this Court believes it is plausible that a legislative body would use the term "liability" in a statutory enactment but relegate such acceptance to a forum that does not exist. This is both impossible and absurd on its face, since the term liability has no definition

that would allow for it, under U.S. law, the common law, or in the official reports of the UN itself.

Petitioners further argue that they have more than met their burden under Federal Rule of Civil Procedure 12(b)(1) and 12(h)(3) through an affirmative, plausible showing that immunity has been expressly waived in the circumstances in this case, thereby creating (at the very least) a rebuttable presumption that must be overcome by the opposing party. The burden of proof to survive a motion to dismiss does not change because the UN is a party, nor because express waiver is at issue. "Magic words" are not needed.

Absurd results, statutory enactments that are impossible to perform, imaginary forums, words that do not mean what they say—these are principles that should not be accepted by this Court. The UN does not exist so far above the sovereigns that created it that accepted rules of law bend and warp beyond all recognition. Petitioners urge this Court to grant this petition for rehearing.

Respectfully submitted,

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October 30, 2019

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

_____

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