No. 21-1450

IN THE
Supreme Court of the United States

TÜRKIYE HALK BANKASI A.Ş, AKA HALKBANK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF PROFESSORS INGRID (WUERTH) BRUNK AND WILLIAM S. DODGE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INGRID (WUERTH) BRUNK
VANDERBILT UNIVERSITY LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203

William S. Dodge
UNIVERSITY OF CALIFORNIA, DAVIS, SCHOOL OF LAW
400 Mrak Hall Drive
Davis, CA 95616

BARRETT J. ANDERSON
Counsel of Record
COOLEY LLP
10265 Science Center Drive
San Diego, CA 92121
(858) 550-6000
banderson@cooley.com

Adam Gershenson
COOLEY LLP
500 Boylston Street
Boston, MA 02116

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Constitutional Provisions & Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATEMENT OF INTEREST[1]

Amici are professors of international law and foreign relations law who have written extensively about the respective roles of the judicial and executive branches in determining questions of immunity.

Professor Ingrid (Wuerth) Brunk is Helen Strong Curry Chair in International Law and Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program at Vanderbilt Law School. She served as Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States* from 2012 to 2018 and is Co-Editor-in-Chief of the *American Journal of International Law*.

Professor William S. Dodge is John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. He served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and as Co-Reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* from 2012 to 2018.

Amici's scholarship addresses an important question in this case: if a federal court must address whether a litigant is entitled to foreign sovereign immunity, and the Foreign Sovereign Immunities Act ("the FSIA") does not apply, is the court bound by the executive branch's case-specific determination of whether immunity applies?

---

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amici* and their counsel made a monetary contribution to this brief's preparation and submission. The parties consented in writing to this filing.

Amici's answer is no. *See* Ingrid (Wuerth) Brunk, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915 (2011); William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 Fordham L. Rev. 677 (2021). Whether foreign sovereign immunity applies in a non-FSIA case "is properly governed by the common law," *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010), and the common law empowers federal courts, not the executive, to determine whether foreign sovereign immunity is available in a particular case. But the court of appeals answered differently, finding (with scant analysis) that, "at common law, sovereign immunity determinations were the prerogative of the Executive Branch." Pet. App. 24a. The district court, for its part, reached the same result. *Id.* at 38a.

While *amici* submit this brief in support of neither party, they believe the appellate and district courts got this issue wrong. *Amici* worry that if these rulings were left unaltered or, worse yet, adopted by the Court, they would arrogate to the executive an astonishingly broad power: to supply binding rules of decision in domestic cases involving foreign sovereign immunity claims. Neither the Constitution nor any congressional authorization grants such domestic lawmaking power to the executive, and "the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Medellin v. Texas*, 552 U.S. 491, 526–27 (2008) (citation omitted). The executive undoubtedly has a role to play in immunity determinations, but it is not that of final arbiter.

Amici have an interest in ensuring that the Court has full information to evaluate this important issue so that it can provide lower courts with the guidance they need to appropriately consider and weigh the executive's views on foreign sovereign immunity. *Amici* thus urge the Court to reverse the portion of the court of appeals' decision holding that the executive's case-by-case immunity determinations are binding on federal courts.

SUMMARY OF ARGUMENT

Petitioner, an entity owned and controlled by the Republic of Turkey, was indicted in federal court for violations of federal criminal law. In response, Petitioner asserted the defense of foreign sovereign immunity under the FSIA and the common law. Assuming that there is subject-matter jurisdiction and that the FSIA does not apply, Petitioner's entitlement to common-law immunity is an issue to be addressed by the federal judiciary, not one controlled solely by the executive branch. That result is supported by the Constitution's system of separation of powers, this Court's precedent, historical practice in federal courts, and functional considerations, especially considering Congress's adoption of the FSIA. *See* (Wuerth) Brunk*, supra* (arguing federal courts should develop the federal common law of foreign sovereign immunity).

The appellate court's ruling that it was bound by the executive's immunity determinations would afford the executive unfettered authority to determine the outcome of specific cases and even – if the language of mid-20th cases is followed – to create binding rules of decision that courts must apply even in cases where the executive stays silent. But the Constitution does

not give the executive power to make or apply the federal common law of foreign sovereign immunity. The President's power to recognize other nations does not include the power to make domestic law that flows from such recognition. Similarly, the President's power to settle claims through international agreements does not permit the executive to render binding immunity determinations. As this Court has repeatedly held, "our Constitution does not contemplate vesting [lawmaking] power in the Executive alone." *Medellin*, 552 U.S. at 527. For nearly all of the Republic's 250-year history – except from the late 1930s to 1976 – federal courts did not afford complete deference to the executive's immunity determinations. Finally, federal courts are better positioned as a practical matter than the executive to decide case-by-case common-law immunity claims.

The court of appeals thus erred when it ceded all common-law decision-making over immunity and gave binding deference to "the prerogative of the Executive Branch." Pet. App. 24a. This Court should correct the court of appeals' decision before it spreads through the federal judiciary and causes mischief to the Constitution's "single, finely wrought and exhaustively considered, [legislative] procedure." *I.N.S. v. Chada*, 462 U.S. 919, 951 (1983).

Although this case involves a criminal proceeding, what the Court decides with respect to deference to the executive will also affect civil cases in which the executive claims a similar authority to make determinations in specific cases and to articulate binding rules of federal common law. *See* Brief for the United States as *Amicus Curiae* at 11, *Mutond v.*

Lewis, 141 S. Ct. 156 (2020) (No. 19-185) ("Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit.").

ARGUMENT

The "common law" of foreign sovereign immunity governs in cases against foreign entities when the FSIA does not apply. *Samantar*, 560 U.S. at 325. As this Court's use of the phrase "common law" signals, it is the judiciary, not the executive branch, that develops and applies that body of law. To be sure, courts are constrained on one side by acts of Congress and on the other side should afford varying levels of deference on specific issues to the executive. *See* (Wuerth) Brunk, *supra*, at 968–75 (describing congressional constraints and appropriate areas of deference to the executive). Courts follow applicable statutes, relevant international law, and – for certain discrete issues – the views of the executive. But the authority to develop, within these confines, the common law of immunity and to apply it to particular cases – the power at issue in this case – is fundamentally judicial, not executive. That conclusion is dictated by separation-of-powers principles inherent in the Constitution's structure, the historical development and past practice of federal courts applying foreign sovereign immunity, and functional considerations.

I. Federal Courts, Not the Executive, Have the Constitutional Authority to Make Common-Law Immunity Determinations

A. Congressional Power Over Foreign Sovereign Immunity

An analysis of federal power begins, as it must, with the text of the Constitution. Although the Constitution does not explicitly refer to immunity, it does grant to Congress "[a]ll legislative Powers" in certain delineated areas, including the power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, §§ 1, 8. The Court held this legislative authority gives "Congress . . . the undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983).

Congress exercised that authority when adopting the FSIA. *Id.* at 497–98. But that statute does not apply to every foreign sovereign immunity determination. It does not, for example, govern immunity claims raised by officials of foreign governments. *Samantar*, 560 U.S. at 325. And one of the questions in this case is whether the FSIA applies in criminal cases. "Even if a suit is not governed by the [FSIA], it may still be barred by foreign sovereign immunity under the common law." *Id.* at 324.

B. Judicial Power to Make and Apply the Common Law of Foreign Sovereign Immunity

The federal judiciary – not executive branch officials – develops that common law and applies it in specific cases. While it is axiomatic that "[f]ederal

courts, unlike state courts, are not general common-law courts," they are still empowered to develop federal common law in a "few and restricted instances." *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 313 (1981) (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Those limited instances arise "[w]hen Congress has not spoken to a particular issue" that implicates significant federal concerns. *Id.* (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). A traditional enclave of federal common law covers some specific "relationships with other countries." *Atherton v. F.D.I.C.*, 519 U.S. 213, 226 (1997) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (holding "federal common law exists only in such narrow areas as those concerned with [for example] our relations with foreign nations"). The common law of foreign sovereign immunity fits comfortably within that category. This Court said as much in *Samantar* when it reasoned that, even if the FSIA does not apply, immunity may still be available "under the common law." 560 U.S. at 324.

The Court's decision in *Sabbatino* illustrates the application of federal common law in narrowly defined areas of foreign relations law. That case concerned the applicability of the "act of state doctrine," which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." 376 U.S. at 400–01. At issue was Cuba's expropriation of sugar that was physically located in Cuba but owned by U.S. nationals. *Id.* at 400–08. Cuba sold

the sugar to a U.S. purchaser who did not pay Cuba for it. Cuba sued for conversion and the U.S. purchaser argued that Cuba's sugar seizure was invalid under international law. *Id.* This Court ruled for Cuba under the act of state doctrine, which it reasoned applied as a matter of federal common law in part because it reflected "the proper distribution of functions between the judicial and political branches." *Id.* at 427–28.

The Court's reasoning in *Sabbatino* applies here. The act of state and foreign sovereign immunity doctrines are more than just analogous; they spring from the same roots. The Court has already recognized that "[t]he separate lines of cases enunciating both the act of state and sovereign immunity doctrines have a common source" as "judicially created to effectuate general notions of comity among nations and among the respective branches of the Federal Government." *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972). Both doctrines relate to the extension or application of judicial power to foreign sovereigns and their property: foreign sovereign immunity limits a court's jurisdiction, and the act of state doctrine selects the applicable law. *See* Restatement (Fourth) of Foreign Relations Law § 441, reporters' note 3 (Am. L. Inst. 2018). The Court should therefore take the same common-law approach in this case that it embraced in *Sabbatino*.

While the act of state doctrine is narrow, it is also well-settled. The Court reaffirmed the doctrine's existence and constitutional grounding in *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.,*

International, 493 U.S. 400, 404–05 (1990). The doctrine has also been routinely applied by lower courts. *See, e.g.*, *Petroleos de Venezuela S.A. v. MUFG Union Bank, N.A.*, 51 F.4th 456, 466–67 (2d Cir. 2022) (analyzing act of state doctrine's applicability); *Royal Wulff Ventures LLC v. Primero Mining Corp.*, 938 F.3d 1085, 1088 (9th Cir. 2019) (affirming district court's dismissal of case under act of state doctrine); *see also* Restatement (Fourth) § 441 (restating act of state doctrine).

C. The Executive's Lack of Power Over Common-Law Immunity

The executive, by contrast, lacks authority to develop and apply federal common law, including the common law of immunity. However, the court of appeals in this case assigned the "prerogative" of deciding whether common-law immunity applied to the executive and found that the decision to prosecute Petitioner "necessarily manifested the Executive Branch's view that no foreign sovereign immunity existed." Pet. App. 24a; *see also id.* at 38a. The appellate court erred for three reasons.

First, the executive's power to faithfully execute the law "refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Medellin*, 552 U.S. at 527–28 ("[U]nder our constitutional system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'" (quoting The Federalist No. 47, at 326 (J. Cooke ed. 1961) (James Madison))). The Court's *Medellin* opinion emphasizes the point. In that case, the President issued a memorandum purporting to

enforce Article 94 of the United Nations Charter by ordering state courts to reopen criminal sentences. *Id.* at 525. The Court rejected the executive's attempt "unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty." *Id.* at 528. "[M]aking law," held the Court, "requires joint action by the Executive and Legislative Branches." *Id.* at 527. Applying that clear principle to this case, the executive is not constitutionally empowered to make the law of foreign sovereign immunity on its own.

Second, the court of appeals' (cursory) reasoning would give the executive the authority to intervene in specific cases to decide who gets immunity and who does not; in short, to decide cases. But "Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Neither Congress nor the executive may "usurp a court's power to interpret and apply the law to the [circumstances] before it." *Id.* (internal quotation marks omitted); *see also Stern v. Marshall*, 564 U.S. 462, 483 (2011) (ruling "the judicial Power of the United States" cannot "be shared' with another branch). "[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (emphasis in original).

Given this constitutional division of powers, the Constitution commits "resolution of 'the mundane as well as the glamorous, *matters of common law* and statute as well as constitutional law, issues of fact as well as issues of law'—to the Judiciary." *Stern*, 564 U.S. at 484 (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) (Rehnquist, J., concurring in judgment)) (emphasis added); *see also Marbury*, 5 U.S. at 177 ("Those who apply [a] rule to particular cases, must of necessity expound and interpret that rule."). The power to apply the federal common law to particular cases thus rests with the judiciary, not the executive.

The executive has historically acknowledged this proper division of powers. With respect to foreign sovereign immunity determinations, for example, the executive's position in its 1952 Tate Letter was that "a shift in policy by the executive cannot control the courts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (appendix 2 to opinion of the Court reproducing letter from Acting Legal Adviser Jack B. Tate). The same principle should govern this case.

Third, the Court already rejected in a similar context the executive's claim that it should control judicial application of a judicial foreign relations doctrine. In the *Kirkpatrick* case, the executive made the same argument with respect to the act of state doctrine that it advances for common-law immunity here: that the Court should resolve the case by deferring wholly to the executive's views. 493 U.S. at 408. The Court unanimously rejected the executive's position, holding "[t]he short of the matter is this:

Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *Id.* at 409 (emphasis added). The Court should apply that reasoning to common-law immunity.

Indeed, the case against executive power is even stronger for foreign sovereign immunity than it is for the act of state doctrine. Immunity is a procedural doctrine allowing a party to "raise[] a jurisdictional defense," whereas "the act of state doctrine provides foreign states with a substantive defense on the merits." *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004); *see also* Restatement (Fourth) § 441, reporters' note 3 (distinguishing act of state doctrine from foreign sovereign immunity). Common-law rules governing procedural and jurisdictional issues are often left to federal courts to develop when Congress has not spoken, *see Reyno v. Piper*, 454 U.S. 235 (1981) (developing federal common law of *forum non-conveniens*), even in arguably "substantive" areas of the law such as preclusion, *see Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (developing federal common-law rules of preclusion).

While it is true that federal common law governing procedural issues in federal courts does not apply in state courts, there is ample support for the federal judiciary's power to make rules of immunity that bind state courts in cases against foreign sovereign defendants. The federal government has a strong interest in cases involving foreign sovereigns. *Verlinden*, 461 U.S. at 493 (holding "the primacy of federal concerns is evident" in foreign sovereign immunity); *Schooner Exch. v. McFaddon*, 11 U.S.

(7 Cranch) 116, 147 (1812) (ruling vessel "in the service of a foreign sovereign . . . should be exempt from the jurisdiction of the country"). And immunity is required in some instances by customary international law. *See Jurisdictional Immunities of the State (Ger. v. It.)*, 2012 I.C.J. 97 (Feb. 3) (holding customary international law requires immunity from claims based on conduct of armed forces during armed conflict). As this Court noted in *Sabbatino*, "rules of international law should not be left to divergent and perhaps parochial state interpretations." 376 U.S. at 425. Federal common law thus binds the states with respect to foreign sovereign immunity.

This federal common law should be developed by federal courts, just as they do in other contexts that involve litigation against foreign sovereigns and their instrumentalities. For example, this Court has held that federal common law governs discrete issues of substantive liability in cases against foreign sovereigns that are otherwise governed by state law. *See First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 633 (1983). In the *Bancec* decision, the Court recognized that the FSIA does not address whether a state may be held substantively liable for the actions of its instrumentalities or *vice versa*, and thus created a federal common-law rule that respected the distinct legal status of separate juridical entities. *Id.* at 623. The *Bancec* test is drawn from U.S. and international practice and is designed to fill important gaps left open by the FSIA. *Id.* And, like the act of state doctrine, the *Bancec* test is routinely applied by lower courts. *See, e.g.*, *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 139 (3d Cir. 2019)

(describing *Bancec* doctrine as "a federal common-law outgrowth of [the FSIA]").

For these reasons, the court of appeals' ruling that the executive alone has the power to decide issues of federal common law with respect to foreign sovereign immunity is incorrect.

D. The Recognition Power, the Claim Settlement Power, and the Vesting Clause Do Not Apply

The court of appeals' cursory sentence on common-law immunity determinations did not address these separation-of-powers issues. Respondent, for its part, argued below that its "authority to make such determinations flows from its responsibility for conducting the Nation's foreign relations." Brief for United States at 48, *United States v. Türkiye Halk Bankasi A.Ş*, 16 F.4th 336 (2021) (No. 20-3499) ("U.S. App. Ct. Br."). This sweeping assertion does not comport with the Constitution's text nor the Nation's history. The Constitution provides the executive with significant powers related to foreign policy, but confers no general, plenary "foreign relations" power. And none of the President's discrete powers give him the authority to make immunity determinations that bind courts.

For example, the Reception Clause—which directs that the President "shall receive Ambassadors and other public ministers," U.S. Const. art. II, § 3—does not authorize the executive to make domestic law or decide specific federal cases. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, the Court found that the Reception Clause (among other things) supported "a logical and proper inference" that the executive also

has the sole "power to recognize other nations." 576 U.S. 1, 12 (2015). But determining whether another nation should be recognized is not the same as determining the legal consequences that may flow from recognition. *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938) (noting executive's "action in recognizing a foreign government . . . is conclusive on all domestic courts, . . . although they are free to draw for themselves its legal consequences in litigations pending before them"). Notably, under the FSIA, recognition by the President does not automatically provide immunity to a recognized state, nor does non-recognition mean that entity in question is not a "state" for statutory purposes. *See* Restatement (Fourth) § 452, reporters' note 1. Instead, courts examine independently whether the entity qualifies as a "foreign state" under the statute notwithstanding the President's exclusive recognition power. *See Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 123–25 (2d Cir. 2016) *abrogated on other grounds by Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018).

Nor does the President's claim-settlement power provide the authority that Respondent asserts here. "The Executive's narrow and strictly limited authority to settle international claims disputes" is simply that. *Medellin*, 552 U.S. at 532. The claim-settlement power "is a particularly longstanding practice . . . that goes back over 200 years, and has received congressional acquiescence throughout its history." *Id.* (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003)). In contrast, the judiciary's arguable deference to executive immunity determinations only

began in the late 1930s (based on *dicta*) and ended in 1976 when, at the executive's express request, Congress adopted the FSIA. Although Congress affirmed the executive's power to settle claims in the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621–1627, it has never similarly blessed executive control of immunity decisions. To the contrary, Congress enacted the FSIA to "remedy the problem" of executive control over immunity. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). And the Court in *Medellin* narrowly construed the claim-settlement power and declined to "stretch [it] so far as to support" the executive's attempt to make domestic law. 552 U.S. at 532. It should do the same here.

Finally, the Vesting Clause—which generally situates "[t]he executive Power" in the President, U.S. Const. art. II, § 1—does not grant the executive unilateral power to make domestic law even over issues that arguably raise international concerns. *See Medellin*, 552 U.S. at 529–30 (rejecting executive's argument that President's "'established role' in litigating foreign policy concerns" allows him to "establish on his own federal law or to override state law"); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 263 (2001) ("Lawmaking in support of foreign affairs goals, then, is not part of the President's residual power, and this allocation assures that the President must often look to Congress as a partner in foreign affairs endeavors.").

The Constitution gives the President many important powers related to foreign relations, but not the power to decide cases and controversies or to

articulate rules of federal common law that bind domestic courts. *See* Dodge & Keitner, *supra*, at 717 ("[I]n the U.S. constitutional system, the executive branch does not make rules of federal common law; federal courts do."). Accordingly, this Court should hold that the federal judiciary, not the executive, has the final say over common-law immunity decisions.

II. Federal Courts, Not the Executive, Have Determined Foreign Sovereign Immunity Since the Founding Era

Federal courts have a long history, reaching back to the early days of the Republic, of resolving issues of foreign state and foreign official immunity. That history dates back at least to 1812, when this Court comprehensively evaluated a foreign sovereign immunity claim in its ruling in *Schooner Exchange*, 11 U.S. at 141–47. Chief Justice John Marshall wrote the opinion, holding that federal courts lacked jurisdiction over "a national armed vessel . . . of the emperor of France." *Id.* at 146. Courts applying the *Schooner Exchange* decision interpreted it "as extending virtually absolutely immunity to foreign sovereigns as 'a matter of grace and comity.'" *Samantar*, 560 U.S. at 311 (quoting *Verlinden*, 461 U.S. at 486). Thus, for "more than a century and a half," the United States usually "granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486.

During this period, courts welcomed the executive's views on immunity *via* filings called "suggestions of immunity." Courts gave some deference to the executive on limited "fact" issues such

as who owned the vessel in question, *see Republic of Mexico v. Hoffman*, 324 U.S. 30, 32, 36 (1945), or "whether the government was officially sovereign"—issues that "did not resolve the immunity itself," G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 27 (1999). "In such cases courts regarded themselves as free to decide the immunity issue as they would any other issue of common law, basing their judgments on domestic, maritime, and international law principles." *Id.* at 27–28; *see also, e.g.*, *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926) (granting immunity to foreign vessel despite executive's decision to decline immunity). In sum, "nineteenth-century foreign sovereign immunity decisions took as a given that courts could make independent determinations on whether a foreign sovereign was immune from suit in a particular set of circumstances." White, *supra*, at 134–35; *see also* (Wuerth) Brunk, *supra*, at 924–25 ("Courts [during that time] did not view themselves as bound by the executive's suggestion of immunity.")

Furthermore, cases dating back to the 1790s show that executive determinations on immunity claims by foreign government officials also did not bind the courts. Indeed, the executive expressly disclaimed the ability to bind the judiciary in these circumstances. *See* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. Rev. 704, 713–49 (2012) (describing five eighteenth-century civil suits in federal courts against "current or former [foreign] officials" in which executive was "forced . . . to

manage [foreign] relationships by repeatedly explaining its inability to intervene").

Not until the late 1930s did the practice begin to shift toward more deference to the executive, a process culminating in 1945 with the Court's ruling in *Hoffman*. In that case, the Court recognized that – as shown by its ruling in *Berizzi Brothers* – it had not always deferred to the executive's immunity decisions, but nevertheless found that "an important reason" to deny immunity in the case at bar was "that the State Department has declined to recognize it." 324 U.S. at 35 n.1. The Court stated in *dicta* that "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35. Courts since the *Hoffman* case have interpreted this *dicta* to mean that the executive possessed exclusive power over immunity determinations. *See, e.g.*, *Bank Markazi*, U.S. at 325 (quoting *Hoffman*, 324 U.S. at 35).

Contemporaneous scholarship from the period confirms that the Court's reasoning in *Hoffman* was unprecedented. *See* Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168, 168–69 (1946) (arguing the Court in *Hoffman* abdicated one of its functions by deferring to executive instead of deciding immunity issues); Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L.J. 1148, 1155 (1954) (describing 1938–45 as "period of transition" during which executive's views displaced "traditional criteria" for immunity in federal courts); Note, *Immunity from Suit of Foreign Instrumentalities and Obligations*, 50

Yale L.J. 1088, 1091–93 (1941) (describing courts' confusion before *Hoffman* about what weight they should accord executive's suggestions of immunity).

In 1952, only seven years after *Hoffman*, "the State Department announced its adoption of the 'restrictive' theory of foreign sovereign immunity," under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487. "This change threw 'immunity determinations into some disarray,' because 'political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory.'" *Samantar*, 560 U.S. at 312 (quoting *Altmann*, 541 U.S. at 690).

The executive also effectively repudiated *Hoffman*'s reasoning by recognizing as part of its new policy in the 1952 Tate Letter that "a shift in policy by the executive cannot control the courts." *Alfred Dunhill*, 425 U.S. at 714. As it turned out, the *Hoffman* decision "embarrassed the Department of State with responsibilities for which that agency of the Government [was] quite unprepared and which it [could not] properly assume." Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions"*, 104 U. Pa. L. Rev. 451, 477 (1956); *see also Opati*, 140 S. Ct. at 1605.

In 1976, Congress endorsed the executive's post-*Hoffman* position when – at the State Department's request – it enacted the FSIA. This Court has repeatedly noted that the purpose of the statute was

"to free the Government from the case-by-case diplomatic pressures, to clarify governing standards, and to assure litigants that decisions are made on purely legal grounds and under procedures that insure due process." *Verlinden*, 461 U.S. at 488 (cleaned up); *see also Opati*, 140 S. Ct. at 1605 (noting "Congress sought to remedy the problem" of leaving immunity determinations to the executive by adopting the FSIA). The FSIA "sets out immunity standards applicable to foreign states and their agencies, effectively eliminating the role of the State Department in cases covered by the statute." (Wuerth) Brunk, *supra*, at 927. The FSIA did not occupy the field, however, because suits "may still be barred by foreign sovereign immunity under the common law." *Samantar*, 560 U.S. at 324.

The long history of the common law of foreign sovereign immunity – from its origins in *Schooner Exchange* through enactment of the FSIA – further demonstrates that federal courts have had, and still have, the ultimate responsibility to decide whether foreign sovereign immunity applies to a given case.

III. The *Hoffman* and *Ex Parte Peru* Cases Should Not Be Applied Here

The executive argued to the court of appeals that it has binding authority over common-law immunity decisions based on two World War II-era admiralty cases involving judicial seizures of foreign government vessels: *Hoffman* and *Ex parte Republic of Peru*, 318 U.S. 578 (1943). U.S. App. Ct. Br. at 47–50. In both of these decisions, the Court stated in *dicta* that federal courts must follow the executive's legal principles regarding immunity determinations as well

as its immunity decisions in specific cases, even when the executive does not take a position on whether immunity is warranted. The Court should not follow either case here, for at least three reasons.

First, neither *Hoffman* nor *Peru* applies. The language in *Hoffman* affording law-making power to the executive was *dicta*. *Hoffman* involved an *in rem* action against a vessel owned by the Mexican government but "in 'the possession, operation, and control'" of a private company. 324 U.S. at 32–33. The executive did not opine on whether the Mexican vessel was entitled to immunity. The Court noted the executive's silence on the ultimate question of immunity, *id.* at 32, which it found "controlling in the present circumstances" as indicative of a "national policy not to extend immunity" to vessels owned but not possessed by foreign states, *id.* at 38. But the Court also held that "it is plain that the distinction [between ownership and possession] is supported by the overwhelming weight of authority." *Id.* That alternative authority by itself provided adequate grounds for the Court's decision.

In *Peru*, the Court reasoned that the executive sought immunity because it had apparently already resolved the case through its claim-settlement power. 318 U.S. at 586–88. The Court reasoned that, when the Secretary of State elects "to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation," the Court must accept that settlement and "the plaintiff is entitled to the relief obtained through negotiations." *Id.* at 587. Those considerations are not present in

this case, which has nothing to do with the claim settlement of civil admiralty cases.

Second, the foundations of both cases have been deeply undercut. A primary concern animating both decisions was the possibility that, absent deference, the judiciary might "embarrass the executive arm in its conduct of foreign affairs." *Hoffman*, 324 U.S. at 35; *Peru*, 318 U.S. at 588 (same). This Court explicitly rejected "embarrassment" as a basis for unilateral executive control of the act of state doctrine. *Kirkpatrick*, 493 U.S. at 409. In any event, the embarrassment concern sweeps far too broadly as a basis to award the executive sole constitutional power to make law and intervene to decide specific cases. It would mean that the Court has incorrectly decided subsequent cases in which it limited executive power despite the potential to embarrass the President, including (for example) *Youngstown*, *Medellin*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

The context for immunity determinations has also changed, further undercutting the contemporary significance of the two cases. The Court's decision in *Hoffman* came only a few years after *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304 (1936), which advanced an expansive concept of executive power in foreign relations. But the *Curtiss-Wright* case has come under intense criticism and its approach to executive power has been eroded – if not repudiated – by *Youngstown* and other more recent cases. In *Zivotofksy*, for example, this Court noted that despite the broad language in *Curtiss-Wright* about executive power the holding dealt only with

"congressionally authorized action, not a unilateral Presidential determination" and that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." 576 U.S. at 21; *see also id.* at 66 (Roberts, C.J., dissenting) (noting "the expansive language in *Curtiss–Wright* casting the President as the 'sole organ' of the Nation" has been limited by subsequent cases such as *Medellin*); *see generally*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 438 (1998) (describing withering criticism of *Curtiss-Wright*); Ganesh Sitaraman & Ingrid (Wuerth) Brunk, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897, 1918 (2015) (describing how executive power flourished in the years following *Curtiss-Wright*, including in cases like *Korematsu v. United States*, 323 U.S. 214 (1944), but that the Court takes a different approach today).

Third, the Court's language on executive deference in *Peru* and *Hoffman* was sparse and vague. Although those cases suggested the executive could act alone to determine foreign sovereign immunity without statutory authorization, they included little reasoning or analysis. As described above, the executive lacks power under basic separation-of-powers doctrine to make domestic law, and there is no unbroken historical practice showing that the executive controlled immunity decisions. *See* Section I.C, *supra*. The lack of constitutional analysis makes these two cases unpersuasive.

The absence of analysis also makes it difficult to evaluate the extent to which the Court ever intended *Hoffman* and *Peru* to apply outside of admiralty. In

both cases, the Court noted the potential implications of judicial seizures of foreign government vessels, *Hoffman*, 324 U.S. at 34; *Peru*, 318 U.S. at 588, a concern that is not at issue in this case. With the decisions containing no real constitutional analysis, they provide weak support at best for any claim that the executive has plenary authority over common-law immunity decisions in any and all future cases that may arise in unrelated contexts.

If necessary, the Court should explicitly overrule the executive-control language in *Hoffman* and *Peru*. "[*S*]*tare decisis* is 'not an inexorable command,'" *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478 (2018) (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)), and "is at its weakest when [the Court] interpret[s] the Constitution," *id.* (quoting *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). None of the factors apply that might support *stare decisis* for the *Hoffman* or *Peru* decisions. *See id.* at 2478–79. The quality of their reasoning is low; neither contains much reasoning at all. Their workability is suspect; even the State Department advocated for the FSIA on the basis that the judiciary was better positioned than the executive to determine foreign sovereign immunity. They are no longer consistent with this Court's jurisprudence, as shown by the *Samantar* ruling that the FSIA governs immunity for foreign states while the common law covers all else. The law of foreign sovereign immunity has significantly developed since the Court decided both cases. And reliance interests are minimal; the Court has not applied the reasoning in either case to grant or deny immunity in over seventy years. *Stare*

decisis thus should not compel adherence to the *dicta* in either *Hoffman* or *Peru*.

IV. Federal Courts, Not the Executive, Are Best Equipped to Make Immunity Determinations

In addition to the constitutional and historical arguments in favor of federal courts deciding immunity, there is also a compelling functional argument. As demonstrated by the historical practice and development of foreign sovereign immunity, courts are both experienced with immunity claims and better equipped than prosecutors to determine whether to grant them. There is little debate over the point; Congress and the State Department expressly agreed in the lead-up to the enactment of FSIA that courts were superior.

The executive does, of course, have constitutional powers related to foreign affairs, some of which play an important role in immunity cases. The President, for example, has unreviewable authority to recognize foreign governments. He decides who is a sitting head of state—a determination that almost invariably leads to an entitlement to status-based immunity. (Wuerth) Brunk, *supra*, at 971–75; Dodge & Keitner, *supra*, at 711. The executive is also better positioned than courts in many instances to determine the desirable content of customary international law, and courts developing and applying common-law immunity should afford deference to the executive's views on that issue. (Wuerth) Brunk, *supra*, at 971; Dodge & Keitner, *supra*, at 711–12. As discussed above, the executive may also be entitled to deference on factual questions about which it has superior information,

such as who owns a particular foreign vessel or who controls a particular foreign corporation.

But such powers are limited, and with good reason. The executive is poorly positioned to make final immunity determinations that bind the courts. That is true for myriad reasons, as shown by the brief period when courts deferred to executive immunity decisions. Foreign governments pressured the executive, sometimes successfully, to resolve cases in their favor, even if the law was against them. *See To Define the Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 34–35 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State) ("Leigh Statement") (articulating why executive control over immunity claims produced "substantial disadvantages"). The executive sometimes made inconsistent immunity determinations not aligned with its overall policy. *Id.* at 59–60 (statement of Peter Trooboff, Attorney, Covington & Burling, Washington, D.C.). "Complicating matters further, when foreign nations failed to request immunity," or the executive failed to act on the request, courts were left with little guidance and "'governing standards were neither clear nor uniformly applied.'" *Altmann*, 541 U.S. at 690–91 (quoting *Verlinden*, 461 U.S. at 487–88). Executive control resulted in unfair, inconsistent, and unpredictable outcomes, especially because plaintiffs often had little or no influence in executive immunity decisions. *See* Leigh Statement at 34 ("[W]e in the Department of State and Legal Advisor's Office do not have the means of really conducting a quasi-judicial

hearing to determine whether, as a matter of international law, immunity should be granted in a given case."). In short, "the old executive-driven, factor-intensive, loosely common-law-based immunity regime" that existed for immunity decisions before the FSIA was "bedlam." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014).

Deference to the executive's immunity determinations created a seriously flawed system without constitutional, prudential, or functional support—a system that the Court should not re-create today. The Court should instead hold that the judiciary has the power and obligation to develop the common law of foreign sovereign immunity and make case-specific immunity decisions, which courts should do by considering applicable statutes, relevant international law, and – for certain discrete issues – the opinions of the executive. *See* (Wuerth) Brunk, *supra* at 967–75 (describing "how the courts should make immunity determinations pursuant to federal common law"); *see also, e.g.*, *Samantar*, 560 U.S. at 320 (examining "international practice when interpreting the [FSIA]").

To hold otherwise – that the executive has exclusive power over common-law immunity decisions – would violate basic separation-of-powers principles, impose needless and unwelcome pressure on the executive, confuse courts, and create profound uncertainty and unfairness for parties raising or opposing claims of foreign sovereign immunity under the common law.

CONCLUSION

The court of appeals' ruling that the executive possesses exclusive power over common-law foreign sovereign immunity decisions should be reversed.

Respectfully submitted,

INGRID (WUERTH) BRUNK
VANDERBILT UNIVERSITY
LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203

William S. Dodge
UNIVERSITY OF
CALIFORNIA, DAVIS,
SCHOOL OF LAW
400 Mrak Hall Drive
Davis, CA 95616

BARRETT J. ANDERSON
Counsel of Record
COOLEY LLP
10265 Science Center Drive
San Diego, CA 92121
(858) 550-6000
banderson@cooley.com

Adam Gershenson
COOLEY LLP
500 Boylston Street
Boston, MA 02116

November 21, 2022