Case No. 16-1094

In the Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

*Respondent*s.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

Mitchell R. Berger
Pierre H. Bergeron*
Benjamin J. Beaton
Colter L. Paulson
SQUIRE PATTON
BOGGS (US) LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-5601
pierre.bergeron@squirepb.com

Counsel for Amicus the Kingdom of Saudi Arabia

August 22, 2018

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Treaties of the United States

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the Kingdom of Saudi Arabia (the "Kingdom") is a foreign sovereign and an international ally of the United States.[1] It submits this brief to assist the Court in understanding the crucial importance of the inviolability (and attendant immunity from service of process) of embassies and other missions of foreign states to the United States. The Second Circuit's decision squarely violates international law principles codified in the Vienna Convention on Diplomatic Relations and companion treaties; decades of practice under the consistent decisions of the U.S. court of appeals and customary international law; and the United States government's own longstanding position as expressed in its brief in this case, in diplomatic communications, and to courts around the world.

The Kingdom has a robust diplomatic presence in the United States through its embassy in Washington, its consulates in New York, Houston and Los Angeles, and its United Nations mission in New York. As much as any foreign state, the Kingdom has a strong interest in preserving the inviolability of foreign missions, including the longstanding prohibition against serving legal process at mission premises. That prohibition, rooted in international law, is reflected in U.S.

---

[1] This brief is filed under the blanket consent letters submitted by the parties on August 10, 2018. Counsel of record for each party has received notice of *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission.

domestic law through the Foreign Sovereign Immunities Act ("FSIA") provisions regulating how legal process may be served in actions against a foreign state. Strict adherence to these principles has a direct and recurring practical impact on the Kingdom, which (along with its agencies and instrumentalities) often faces improper attempts at service of legal process at its U.S. embassy, consulates, and U.N. mission. *See, e.g.,* Summons, *862 Second Ave. LLC* v. *2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Nov. 2, 2016), ECF No. 1 (service of summons and complaint attempted by delivery to receptionist at the Kingdom's Consulate General in New York). As the Kingdom does not have a standing special arrangement, and is not a party to any convention providing for service of process in U.S. legal matters, the Kingdom has a particular interest in ensuring that U.S. litigants adhere to the service methods provided in the FSIA, 28 U.S.C. §1608(a), which do not disturb the mission-inviolability protections of the Vienna Convention.

Allowing service of process by delivery to an embassy or mission would also create a host of practical problems for the Kingdom and other foreign sovereigns, not least of which would be complicating efforts to ensure an organized and timely response to U.S. litigation. The Second Circuit's decision is especially problematic as it casts doubt on the inviolability of missions to the United Nations in New York. For these reasons, the Kingdom urges this Court to reverse the decision of the Second Circuit and affirm the inviolability

protections Congress established in Section 1608(a) for embassies and missions.

SUMMARY OF ARGUMENT

This Court should reverse the Second Circuit's aberrational holding, which is at odds with decades of law and consistent practice under the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608 (2017). The Second Circuit held that service of process on a foreign state can be made "via" its U.S. embassy. The Vienna Convention prohibits such transgression on the inviolability of a foreign mission, and the FSIA in these circumstances authorizes service only on a sovereign state's minister for foreign affairs.

The inviolability of foreign missions under Article 22 of the Vienna Convention codifies longstanding custom and practice that serve as the foundation of modern diplomacy. The United States, the Kingdom, and countries across the globe have long taken the position that, as a result of the inviolability of foreign missions, service of process cannot be made on an embassy or mission. In fact, upon the urging of the State Department, Congress modified an earlier version of Section 1608 of the FSIA to eliminate provisions that would have allowed service via a foreign state's embassy.

Disregarding this test and history, the Second Circuit held that plaintiffs attempting to sue a foreign state under the Foreign Sovereign Immunities Act may serve process "by sending a copy of the summons and complaint and a notice of

suit … to the head of the ministry of foreign affairs of the foreign state," 28 U.S.C. §1608(a)(3) (emphasis added), through the expedient of merely sending the legal papers "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C. This artificial distinction between service "on" an embassy (which the decision below recognized as improper) and service "via" an embassy violates both the Vienna Convention and the FSIA. Service "via" an embassy is nothing but semantics when, as in this case, the district court found that service was effective when the *embassy* received the package—not when it was received by the minister for foreign affairs. That holding allows American plaintiffs to either commandeer a foreign sovereign's diplomatic pouch, a practice forbidden by Article 27 of the Vienna Convention and international practice, or else to risk a lack of notice entirely if the mailing does not reach the foreign minister. The decision below also directs courts to violate Section 1608(a)(3)'s requirement that service be "addressed and dispatched" to the foreign minister.

As explained by the United States here and below, the Second Circuit's decision contradicts the Executive Branch's longstanding and unbroken position on service based on the inviolability of embassies under the Vienna Convention. U.S. Br. 7-9; Pet App. 135a-147a. The U.S. regularly refuses to acknowledge service by mail on its embassies and other international facilities, properly requiring that official notice of the case be submitted by diplomatic channels. This position is substantially undermined by the Second Circuit's decision.

Finally, the Second Circuit's decision raises practical difficulties that could cause serious diplomatic friction. A plaintiff may never learn when service is complete as embassies may not indicate whether and when the service of process has arrived at the office of the foreign minister. Embassies may also feel constrained to discard or reject all forms of legal correspondence, limiting communication in general and in particular the assistance they may receive from lawyers. And foreign courts may allow reciprocal service to be completed on the United States through its own overseas embassies and missions.

The Kingdom respectfully urges this Court to reverse the decision of the Second Circuit.

ARGUMENT

I. The Inviolability Provisions of the Vienna Convention Are Critical to Diplomacy and Foreign Relations.

The Second Circuit's decision extinguishes a critical component of the inviolability for embassies and missions ensured by the Vienna Convention.[2] The Vienna Convention is one of the most universally accepted sources of international law, and it resulted from an American-led effort to codify customary rules of diplomatic relations dating back to the sixteenth century. The practice of granting inviolability to diplomatic premises, persons, and communications, of course, stretches back millennia.

---

[2] Similar protections for the inviolability of consulates are codified in the Vienna Convention on Consular Relations, art. 31, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

See United States v. *Enger*, 472 F. Supp. 490, 504 (D.N.J. 1978) ("The ancient Greeks, as the first to regularize diplomatic relations, included in their practice the exchange of ambassadors and concomitant personal inviolability."); Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* (4th ed. 2016) at 110-11 ("The sovereign State—under the Vienna Convention the receiving State—is under a duty to abstain from exercising any sovereign rights, in particular law enforcement rights, in respect of inviolable premises, persons, or property. The receiving State is also under a positive duty to protect inviolable premises, persons, or property from physical invasion or interference with their functioning and from impairment of their dignity.").

The centerpiece of the Vienna Convention is its codification of diplomatic protection with the "categorical" and "strong" word for the special type of immunity applicable to embassies: "inviolable." *767 Third Avenue Associates* v. *Permanent Mission of the Republic of Zaire to the United Nations*, 988 F.2d 295, 298, 302 (2d Cir. 1993) ("[F]ederal courts must defer to the language of Article 22."). Inviolability is a necessary precondition to open discourse between nations and a key to diplomacy. As the International Court of Justice explained in the case initiated by the United States during the Iran hostage crisis, "[t]here is no more fundamental prerequisite for the conduct of relations between States than the inviolability of diplomatic envoys and embassies, so that throughout history nations of all creeds and cultures have observed reciprocal obligations for that purpose." *Case Concerning*

United States Diplomatic and Consular Staff in Tehran (U.S. v. *Iran)*, 1979 I.C.J. 7, 19 (Dec. 15).

The inviolability provisions of Article 22 of the Vienna Convention negate the prospect of service of process on an embassy. Instead, service can be accomplished by direct mail to the head of the ministry of foreign affairs of the foreign state under Section 1608(a)(3), unless the foreign state refuses to accept service (as is the practice of the United States, as explained below). In that case, service via diplomatic channels may be accomplished under Section 1608(a)(4) through the State Department.[3] The Department of State will ensure "transmission through diplomatic channels to the Ministry of Foreign Affairs of the state concerned." David P. Stewart, *The UN Convention on Jurisdictional Immunities of States and Their Property*, 99 AM. J. INT'L L. 194, 208 (2005).

Early drafts of the Vienna Convention contemplated specifying certain exceptions to inviolability, but most were ultimately rejected to avoid creating exceptions that might later swallow the rule. *See* Rene Värk, *The Siege of the Estonian Embassy in Moscow: Protection of a Diplomatic Mission and Its Staff in the Receiving State*, XV JURIDICA INT'L 144, 146 (2008). Indeed, records from the negotiation show that one delegate withdrew a proposed clarification regarding service once he was satisfied that "it was the unanimous interpretation

---

[3] *See* U.S. State Department, Bureau of Consular Affairs, *How do I effect service on a foreign state or political subdivision?*, *at* https://travel.state.gov/content/travel/en/legal-considerations/judicial/service-of-process/foreign-sovereign-immunities-act.html (last visited Aug. 22, 2018).

of the Committee that no writ could be served, even by post, within the premises of a diplomatic mission." United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, Austria, March 2 – April 14, 1961, Vol. I: Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole (1962), U.N. Doc. A.Conf.20/14, at 141.

This understanding that no writ could be served by mail on an embassy was also enacted directly into U.S. law through 28 U.S.C. § 1608(a)(3). *See Autotech Technologies LP* v. *Integral Research & Development Corp*., 499 F.3d 737, 748-49 (7th Cir. 2007) (rejecting "service through an embassy" as violating both the Vienna Convention and § 1608(a)(3)). In fact, Congress amended the initial draft of the nascent Foreign Sovereign Immunities Act "to exclude the possibility" of service by "mail to the head of mission" in response to the State Department's position on that issue. Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* at 124-25; *see also* Arthur Rovine, *Contemporary Practice of the United States Relating to International Law*, 69 AM. J. INT'L L. 146, 146-47 (1975) (noting State Department position that Vienna Convention signatories "would have a basis for objection to the propriety of process served in this manner under Article 22"); H.R. Rep. No. 94-1487, at 11, 26 (1976), as reprinted in 1976 U.S.C.C.A.N. 6604, 6609, 6625 ("A second means of [service of process of] questionable validity, involves the mailing of a copy of the summons and complaint to a diplomatic mission of the foreign state. Section 1608 precludes this method so as to avoid questions of inconsistency

with section 1 of article 22 of the Vienna Convention on Diplomatic Relations …. **Service on an embassy by mail would be precluded under this bill**.") (emphasis added).

As finally enacted by Congress, Section 1608 did not include any language about embassies or missions, keeping them properly separate from the methods of service of process under the FSIA. Indeed, the *only* reference to diplomatic or consular missions in the entire FSIA is Section 1610(a)(4)(B)'s assurance that property "used for purposes of maintaining a diplomatic or consular mission" will remain immune from attachment and execution, regardless of any judgment that may be obtained.

That Congress changed Section 1608 to *eliminate* service of process by mail on an embassy to satisfy the inviolability requirement of Article 22 shows that the Second Circuit went astray when interpreting Section 1608 to *allow* service by mail "via" the embassy. There is nothing in the FSIA that supports the creation of exceptions to the inviolability of embassies and missions under international law and the Vienna Convention.

The Vienna Convention states that the "privileges and immunities" are necessary "to ensure the efficient performance of the functions of diplomatic missions as representing States." Vienna Convention, Preamble. Like the United States, the Kingdom views the inviolability protections enshrined in the Vienna Convention as necessary to ensure the smooth functioning of embassies and missions, to avoid disputes about the propriety of service of process on a sovereign, and to maintain

continuous and cooperative diplomacy between nations.

II. The Second Circuit's Decision Misinterprets U.S. Law and Violates the Vienna Convention, Creating a Host of Practical Problems for Foreign States.

A. The Decision Below Stands in Direct Conflict With the Text of the Vienna Convention and 28 U.S.C. § 1608(a)(3).

This Court should reverse the Second Circuit's decision because it violates the United States' express obligations under the Vienna Convention and misinterprets the language of 28 U.S.C. § 1608(a)(3).

1. Inviolability under the Vienna Convention and Section 1608(a) means that foreign sovereigns are absolutely immune from service of process through their embassies, as explained above. *Kumar* v. *Republic of Sudan*, 880 F.3d 144, 158 (4th Cir. 2018) ("the legislative history, the Vienna Convention, and the State Department's considered view … mean that the statute does not authorize delivery of service to a foreign state's embassy"); *Barot* v. *Embassy of the Republic of Zambia*, 785 F.3d 26, 27-30 (D.C. Cir. 2015) (agreeing with district court's rejection of "attempted service at the Embassy in Washington, D.C., rather than at the Ministry of Foreign Affairs in Lusaka, Zambia, as the [Foreign Sovereign Immunities] Act required"); *Hellenic Lines, Ltd.* v. *Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965) (noting that "the Ambassador's diplomatic immunity would have been violated by any

compulsory service of process"). The Second Circuit circumvented this immunity by drawing an artificial distinction between service "on" an embassy and service "via" an embassy. But the proceedings in this case reveal any such distinction as meaningless. Both Plaintiffs and the district court in the underlying action treated the time of delivery to the embassy, not the time of delivery to the foreign minister's office, as the triggering event for finding that service was complete.

The lower courts held that the service package in the underlying case was delivered to the Sudanese embassy in Washington, D.C. in mid-November 2010. *Compare* Pet. App. 5a (the court of appeals stating that service occurred by November 23), 27a (the district court stating that service occurred on November 17), 134a (receipt showing delivery to Charlotte Hall, Maryland on November 18). Plaintiffs moved for entry of default on January 18, 2011 and the district court entered a clerk's default the very next day—roughly sixty days after the package purportedly arrived at the embassy. *See* Pet. App. 27a-28a. As Section 1608(d) gives a foreign sovereign sixty days to answer, the district court and Plaintiffs clearly did not believe they needed to wait even one day to account for delivery from the embassy to the office of the foreign minister in Sudan. The court of appeals similarly treated the date of delivery to the *embassy* as the date on which service was complete under Section 1608(c)(2).

The fact that default was sought and received almost exactly 60 days after the package was purportedly delivered to the embassy demonstrates that the "transmittal" of the papers from the

embassy to the foreign minister is irrelevant to service in the Second Circuit's eyes. In other words, *if the service is complete upon delivery to the embassy, rather than upon delivery to the foreign minister, then service is not "via" the embassy at all—but "on" the embassy*. This result shows that service "on" an embassy and service "via" an embassy is a distinction without any practical difference.

2. The Second Circuit's decision also transgresses Article 27 of the Vienna Convention by allowing domestic courts to commandeer another sovereign's diplomatic pouch for its own uses. The Second Circuit held that service through an embassy is preferable to the alternatives because "mail addressed to an embassy … can be forwarded to the minister by diplomatic pouch," comparing diplomatic pouches to "DHL" and other "commercial carrier[s]," and suggesting that each should be equally accessible to an American litigant. Pet. App. 14a. The notion that an American court can dictate the contents of a diplomatic pouch for *mere convenience* of a litigant is repugnant to basic norms of international law. *See also* Pet. App. 144a (the U.S. brief in the court below stating that "one sovereign cannot dictate the internal procedures of the embassy of another sovereign").

In contrast to the Second Circuit's decision, Article 27.3 of the Vienna Convention explicitly states that "official correspondence" of a mission "shall be inviolable" and that the "diplomatic bag shall not be opened or detained." U.S. law recognizes the same privileges, stating that "[d]iplomatic bags shall not be opened or detained nor shall they be subject to duty or entry."

Diplomatic and Consular Bags, 19 C.F.R. 148.83 (2018); *see also* U.S. State Department, Diplomatic Note No. 12-306 at 3 (Nov. 9, 2012), at: https://www.state.gov/documents/organization/200674.pdf (diplomatic pouches are inviolate and even "inspection of a pouch by means of an X-ray" would be "a serious breach of the clear obligations of the VCDR"). The Second Circuit ignored inviolability by holding that courts and litigants can effectively dictate the contents of a diplomatic bag. *See also* Diplomatic Note No. 12-306 at 5-41 (detailing complex procedures that must be followed for overseas transport of diplomatic bags).

In addition, the Vienna Convention states that the "diplomatic bag … may contain only diplomatic documents or articles intended for official use." *See also Yearbook of the International Law Commission 1958*, *Vol. II*, U.N. Doc. A/CN.4/SER.A/1958/Add.1 at 97 (emphasizing "the overriding importance which [the Commission] attaches to the observance of the principle of the inviolability of the diplomatic bag"). This provision of the Vienna Convention has also been enacted into U.S. law. *See* Diplomatic and Consular Bags, 19 C.F.R. 148.83 (2018) ("The contents of diplomatic bags are restricted to diplomatic documents and articles intended exclusively for official use…"). Litigation documents from private civil suits do not transform into "diplomatic documents" merely because they have been dropped off at an embassy.

Diplomatic missions of foreign states and their diplomatic bags are inviolate under both U.S. and international law. They should not be treated by U.S. courts as a "free" and secure parcel service to

transmit documents to an overseas foreign minister. This Court should accordingly reverse the Second Circuit's erroneous interpretation of the FSIA and the Vienna Convention given its impact on (among other things) diplomatic bags.

3. The Second Circuit's decision also eliminates the statutory requirement that the clerk of court address and dispatch the documents to the foreign minister. 28 U.S.C. § 1608(a)(3) explicitly requires that service be "***addressed and dispatched*** by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned" (emphasis added). The Second Circuit would allow the lower courts to address and dispatch the process to an embassy, not to the foreign minister—using the *embassy's* address and not the *minister's* address. The embassy, not the court, would then be expected to ensure that service be "addressed and dispatched" to the correct address head of the ministry of foreign affairs. Relying on the embassy to perform the statutory requirements in its place, a court following the Second Circuit's rule would violate Section 1608(a)(3) and place the United States in breach of its obligations under the Vienna Convention.

Section 1608(a) ensures that actual notice occurs in a way consistent with customary international law and the Vienna Convention. Receipt of the service packet is either *agreed to* by the foreign sovereign under subsections (a)(1) and (a)(2), is *expressly acknowledged* by the foreign sovereign under subsection (a)(3), or is delivered via *established diplomatic channels* under subsection (a)(4). This Court should not ignore Congress'

careful strictures on service and allow process to be accepted by security guards or mailroom employees at far-flung embassies or missions—a common tactic in FSIA cases. *See, e.g., Simons* v. *Lycee Francais De N.Y.*, No. 03-cv-4972, 2003 U.S. Dist. LEXIS 17644, at *6 (S.D.N.Y. Oct. 7, 2003) (rejecting claim that security guard or other embassy employees can accept service under any provision of § 1608); *Sabbagh* v. *U.A.E.*, No. 02-cv-1340, 2002 U.S. Dist. LEXIS 26380, *6 (Dec. 10, 2002) ("The Court is not persuaded that plaintiff can satisfy the strict requirements for service on a foreign sovereign under § 1608 merely by having its process server procure the consent of a low-level official at the time of service.").

Not only does the Second Circuit's decision allow any embassy employee to accept service, it also unmoors Section 1608(a)(3) from the requirement that service occur at the nation's foreign ministry. As the Fourth Circuit recently explained:

> [T]he view that subsection (a)(3) only requires a particular recipient, and not a particular location, would allow the clerk of court to send service to any geographic location so long as the head of the ministry of foreign affairs of the defendant foreign state is identified as the intended recipient. That view cannot be consistent with Congress' intent: otherwise, service via General Delivery in Peoria, Illinois could be argued as sufficient.

Kumar, 880 F.3d at 155. By requiring delivery to proper person at the proper location, Section 1608(a)(3) ensures that service is not complete

unless is its accepted by someone with the necessary knowledge and responsibility to make an official response on behalf of the sovereign.

4. Finally, the Second Circuit sought to downplay the impact of its ruling in two ways that actually further harm inviolability. It first suggested that a foreign sovereign could reject service of process mailed to an embassy, and faulted Sudan for its failure to do so. Pet App. 101a. This notion imposes an obligation of absolute prescience on low-level embassy employees who must now guess what the contents are of each letter received by the embassy. *Id*. If the mailroom employees guess wrong, they do so (under the Second Circuit's reasoning) as official representatives of the sovereign state. But if such employees were instructed to reject all legal communications, it could chill diplomatic correspondence and attorney-client discussions (if the person receiving the mail did not appreciate whether the correspondence came from the sovereign's counsel or a would-be litigant). This places an intolerable burden on embassies and the employees who work there. It also creates new and unnecessary risks for states maintaining foreign embassies in the United States.

The court below further conjectured that service by mail at the embassy is inconsequential because inviolability means little more than treating the embassy as "an extension of the sovereignty of the sending state," citing *United States* v. *Gatlin*, 216 F.3d 207, 214 n.9 (2d Cir. 2000). Pet. App. 108a. But *Gatlin* itself explains that the notion that embassy premises can be treated merely as part of the foreign state's territory is an "inaccurate fiction."

Gatlin, 216 F.3d at 214 n.9, *quoting* 1 OPPENHEIM'S INT'L LAW § 494, at 1077 nn.15-16 (R. Jennings & A. Watts eds., 9th ed. 1992). The inviolability of embassies goes beyond the deference that states give to the territorial integrity of other states. Indeed, Article 45(a) of the Vienna Convention states that "even in cases of armed conflict," states must "respect and protect the premises of the mission, together with its property and archives." Both the Kingdom and the United States expect other states to zealously "protect the premises of the mission against any intrusion" as a cornerstone of international law and diplomacy. *See* Vienna Convention, Art. 22.

The Second Circuit's decision to treat an embassy as an internal mailroom for the sending state – rather than an inviolable diplomatic presence – would represent a large step backwards from the protections enshrined in the Vienna Convention. This Court should reject both the Second Circuit's decision and its reasoning, and uphold the underlying premises of embassy inviolability reflected in both the Vienna Convention and the FSIA.

B. Vienna Convention Signatories, Including The United States, Agree That Inviolability Forbids Service on a State Through an Embassy or Other Mission.

The United States has consistently taken the position in Saudi Arabia and around the world that no service of process on its embassies, bases, training camps, or other facilities will be recognized

as valid under the Vienna Convention. Like many other signatories, the United States insists that service can only be accomplished through diplomatic channels. As highlighted by the United States, the United States absolutely refuses to recognize the propriety of service of process on United States embassies and missions abroad. U.S. Br. 12-14.

A recent example illustrates how the United States relies on the protections of the Vienna Convention to refuse service on its missions and embassies abroad. When a Jordanian national brought suit in Riyadh against his employer, the U.S. Military Training Mission in Saudi Arabia, a summons was served on an employee at its headquarters. However, the U.S. embassy responded that "under international law, before summoning a foreign entity to attend before the courts or any judicial authority in the country in which it is located, **official notice of the case must be submitted through diplomatic channels**." U.S. Diplomatic Note No. 16-0010, dated December 31, 2015 (translated text; emphasis added). It further stated that the mission "cannot accept documents with respect to legal action against the Government of the United States of America." *Id*. The United States stated that it was "not a party to this case" and that it "will not recognize as valid any award that may be issued against the Government of the United States in this case." *Id*. As explained in its brief, the United States has consistently taken this position before U.S. and foreign courts. U.S. Br. at 12-14.

The Kingdom, like most nations, agrees with the position of the United States. *See* Eileen Denza,

Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations (4th ed. 2016) at 124 ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice."); *see, e.g.,* Statement of the Canadian Department of Foreign Affairs, Trade and Development, *Service of Originating Documents in Judicial and Administrative Proceedings Against the Government of Canada in other States*, Circular Note No. JLA-1446 (Mar. 28, 2014), *available at* www.international.gc.ca/protocol-protocole/policies-politiques/circular-note_note-circulaire_jla-1446.aspx?lang=eng: ("**Service on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the Vienna Convention on Diplomatic Relations …**") (emphasis in original).

The United States risks negative reciprocal action by numerous other foreign states if this Court interprets the Vienna Convention to allow service of process on foreign missions or embassies. In particular, the longstanding U.S. position that service must be accomplished by diplomatic note may be rejected by foreign courts, resulting in service on remote U.S. missions and outposts that may not give the United States actual notice of the lawsuit. A finding that service can be completed at a local U.S. mission may lead other foreign courts to reject otherwise-valid jurisdictional challenges. Just as concerning, it may lead to default judgments and subsequent enforcement actions against the United States in both foreign and domestic courts. In short, proper service of process in accordance with the

inviolability protections of the Vienna Convention is just as important for the United States as it is for every other sovereign that relies on the inviolability of their foreign missions.

C. The Second Circuit's Decision Will Lead To Confusion, Conflict, and Delay.

The Second Circuit's decision also poses serious practical difficulties that create intolerable and unnecessary diplomatic risks. The rule forbidding service on an embassy has roots in historical practice and pragmatism. Simple and direct rules are critical to avoid confusion given the multitude of court systems around the world and to avoid the collision of legal cultures.

Some of the real problems and questions raised by the Second Circuit's decision include deciding when service is complete. Under the Second Circuit's decision, the answer remains unclear. The logic of the statute and the decision point to a date triggered by the actual receipt of the legal papers by the foreign minister, although, as noted above, the courts below treated the date of receipt at the embassy as the date of service. But it is unlikely that the plaintiff or the court could ever learn this date without further intolerable intrusions on the inviolability of the diplomatic pouch. Thus no one may know when service is complete—especially when the document may sit for days or weeks in the embassy before the next pouch is sent (and that pouch might, in some cases, might even not be sent by air). This will unnecessarily complicate deadlines for a response and involve problems of proof of

receipt. And it will ensure a multitude of disputes over the effective date of service.

Similarly, "service via embassy" would not be reliable as a practical matter. Depending on individual practice, many embassies and missions might simply discard or reject any purportedly "legal" mail as misdirected or improperly addressed. Workers in an embassy mailroom will not know which packages to accept, and may be instructed to reject any package mailed by a lawyer or a court to avoid unintentionally accepting service of process. This would call into question any number of important legal and diplomatic communications, as allies and fellow sovereigns attempt to avoid improper service by U.S. plaintiffs. This in turn could lead to a chilling of important communications between embassies, their own counsel, and lawyers for U.S. foreign nationals. In addition, mail addressed to embassies in the U.S., rather than directly to the sovereign's foreign ministry in its own land, might easily be delivered to the wrong U.S. address and not provide any notice at all (as occurred in this case with the delivery in this case to Charlotte Hall, Maryland).

In addition to the risk that foreign sovereigns will not receive actual notice of litigation, the decision below creates problems for foreign states that are attempting to ensure an organized and timely response to U.S. litigation. By imposing these new risks and requirements on embassy and mission employees, the decision increases the costs and risks of maintaining effective diplomacy and communications with the United States. Doubtless these reasons and other have led the United States

to takes the position in foreign courts that service on a mission is inappropriate and a violation of international law. *See, e.g.,* U.S. Diplomatic Note No. 16-0010, dated December 31, 2015.

The Second Circuit's rule also reveals an impossible line-drawing problem and the lack of any tolerable limiting principle. If service on (or "via") an embassy is valid, would service on a military or training base, presence post, foreign interests section, or delegation suffice? If the ability to transmit documents securely is the key, the United States has thousands of entities that might be forced to dispatch service documents worldwide. Confusion will reign supreme.

This confusion is punctuated by the conflict between the Second Circuit's decision and the position of the United States. As explained above, the United States stands on the protections in the Vienna Convention in refusing to recognize any service of process sent to (or through) its own foreign embassies and missions. The decision below undermines that position. This Court has explained that "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros Y Reaseguros* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The decision below does the opposite by devising a distinction—between service "on" and "via" an embassy—that was previously unknown in either U.S. or international diplomatic law.

The Second Circuit's novel interpretation of the United States' Vienna Convention obligations is especially concerning for all nations, including the Kingdom, with missions at the United Nations. U.N. missions enjoy "immunity from legal process of every kind." Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15, art. IV, § 11; *see also* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations ("Headquarters Agreement"), June 26, 1947, 61 Stat. 3416, 11 U.N.T.S. 11, art. III § 9 (the U.N. "headquarters district shall be inviolable"). Indeed, the United States recently submitted a Statement of Interest that service of process on several foreign states' U.N. missions (as well as the Kingdom's Consulate General in New York) "would violate the United States' obligations" under the Vienna Convention and the Headquarters Agreement. Statement of Interest of the United States at 4, *862 Second Ave. LLC* v. *2 Dag Hammarskjold Plaza Condos.*, No. 1:16-cv-08551 (S.D.N.Y. Feb. 17, 2017), ECF No. 76; *see also* Statement of Interest of the United States at 8-9, *Georges* v. *United Nations*, No. 1:13-cv-07146 (S.D.N.Y. Mar. 7, 2014), ECF No. 21 (asserting that "plaintiffs' attempts to serve the UN … were ineffective"). The Second Circuit's interpretation of diplomatic "inviolability" as not forbidding service of process on missions directly threatens settled law about U.N. missions relied upon by many nations.

The inviolability of foreign missions cannot be diluted by receiving states and their citizens, whether for security or convenience, and the United

States has a long history of remaining steadfast to preserve those ancient privileges for ambassadors and embassies. Reversal is necessary to ensure that the Second Circuit's decision does not strip an important part of the inviolability protections under the Vienna Convention. If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States, potentially unraveling important principles of the Vienna Convention and customary international law on embassy inviolability. The Kingdom respectfully requests that this Court uphold the inviolability of embassies from service of process under the Vienna Convention and 28 U.S.C. § 1608(a)(3).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Mitchell R. Berger
Pierre H. Bergeron*
Benjamin J. Beaton
Colter L. Paulson
SQUIRE PATTON
BOGGS (US) LLP
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
pierre.bergeron@squirepb.com

Counsel for Amicus the Kingdom of Saudi Arabia

August 22, 2018

*Counsel of Record