No. 16-1094

IN THE
Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve process upon the head of the ministry of foreign affairs under 28 U.S.C. § 1608(a)(3) by a mailing "through," "via," or "care of" the foreign state's diplomatic mission in Washington, D.C.

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors and scholars at U.S. law schools who teach, research, and write about international law, both public and private. They share a common view that United States courts must properly apply international treaties to which the United States is a party, thereby adhering to its international legal obligations.

INTRODUCTION

This case involves a $314 million default judgment rendered against a foreign sovereign based upon two crucial conclusions of law: (1) that a foreign embassy is a proper conduit for service of process under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a)(3); and (2) that acceptance of a mail parcel by an embassy's mail room constitutes "consent of the head of the mission" to receive service of process under the Vienna Convention on Diplomatic Relations ("VCDR"), 23 U.S.T. 3227, TIAS 7502 (1972). Each of these conclusions of law is erroneous and jeopardizes long-held principles of international law, practice, and diplomacy critical to the foreign policy of the United States. *Amici curiae* submit this brief to elaborate on the reasons why an embassy is not a proper

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have provided the Clerk letters granting blanket consented to the filing of *amicus* briefs pursuant to Supreme Court Rule 37.2.

conduit for service of process on a foreign sovereign and why a mail room's acceptance of a parcel cannot constitute consent to service by other means.

The FSIA provides that service on a foreign state under 28 U.S.C. § 1608(a)(3) must be made by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." The statute thus identifies a specific recipient, and the question is whether the recipient—the "head of the ministry of foreign affairs"—should be served where he or she is actually located—"the ministry of foreign affairs"—or may be served at a location where that official is rarely if ever present—namely, the foreign sovereign's diplomatic mission in the United States.

Amici agree with Petitioner that the plain reading of the statute is that service must occur at the ministry of foreign affairs. It is well accepted that the provisions of § 1608(a) require "strict compliance." *See, e.g.*, *Kumar v. Republic of Sudan*, 880 F.3d 144, 154 (4th Cir. 2018) (observing that "based on §1608(a)'s four precise methods for service of process and how that language contrasts with §1608(b), subsection (a) requires strict compliance"). Yet there is nothing "strict" about allowing service to be sent *via* or *through* agents (such as foreign diplomatic personnel) when that is not specifically allowed by the statute. Even if, *arguendo*, the statute was ambiguous, delivery of service to, via, or through a foreign sovereign's diplomatic mission is both contrary to international law and practice, and the commitments assumed by the United States in the VCDR.

Specifically, service of process on a foreign embassy runs afoul of article 22(1) of the VCDR, which provides that:

> [t]he premises of [a diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

This inviolability of diplomatic missions is a fundamental and longstanding principle of international law, and indisputably includes a prohibition on serving process on an embassy. These principles have been codified in the VCDR as well as the Vienna Convention on Consular Relations, 21 U.S.T. 77, TIAS 6820 (1969), and are routinely followed in actual practice by all states, including the United States. Moreover, customary international law specifically requires that service be made on the ministry of foreign affairs of the served state, and not upon an embassy of that state.

The Second Circuit attempted to circumvent the VCDR's prohibition of service of process on an embassy by means of semantics: arguing that serving the "head of the ministry of foreign affairs" at the embassy was not service *on* an embassy but instead service *via* an embassy.[2] Adoption of this reasoning would elevate form over substance, as the VCDR could be circumvented simply by adding a "To:" line. It would also represent a serious erosion of mission inviolability. It could impair the

[2] In *Kumar v. Republic of Sudan*, the Fourth Circuit specifically found the Second Circuit's "artificial, non-textual distinction" to be based on "weak and unconvincing" reasoning. *See* 880 F.3d at 159 & n.11.

performance of diplomatic functions and impinge upon the dignity of foreign embassies in the United States, contrary to the text, practice, and purpose of the VCDR. The United States does not recognize such service on American embassies abroad, JA203, but would be significantly impeded in objecting to such service if this Court were to adopt the Second Circuit's reasoning.

There is, moreover, a longstanding rule of statutory construction that this Court should avoid any construction of a statute that would conflict with treaties and international law. *See, e.g.*, *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). In addition, in adopting the FSIA, Congress clearly intended it to comply with principles of international law and practice regarding the inviolability of a foreign state's diplomatic mission. *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Accordingly, there is but one proper construction of 28 U.S.C. § 1608(a)(3): service of process must be sent to the "head of the ministry of foreign affairs" at the ministry of foreign affairs, and may not be served *on*, *via*, or *through* a foreign embassy.

As a further independent ground to reverse, the Second Circuit's decision was based upon a finding that acceptance of the service package by the embassy mailroom "surely constituted 'consent'" under the VCDR. JA223. But the VCDR does not just require "consent" of a mailroom employee, but the "consent of the head of the mission" in order to overcome the mission's inviolability under the

VCDR. The "head of the mission," however, is a defined term in the VCDR, denoting the foreign sovereign's Ambassador or *chargé d'affaires* (an individual who heads an embassy in the absence of the ambassador). VCDR, art. 1(a), 14. Because there is no evidence in this case that the "head of the mission" was ever made aware of the service package, much less consented to the embassy's receipt of service, the premises of the mission remained inviolable, and no delivery of service could properly be made on it. The Second Circuit's decision to the contrary, which infers "consent" from a mail room employee's "acceptance of the service package," is an unprecedented and dangerous expansion of consent under the VCDR.

In order to ensure compliance with obligations under the VCDR and longstanding, widely accepted principles of international law and practice, this Court should reverse the decision of the Second Circuit and hold that service under 28 U.S.C. § 1608(a)(3) must be made on the ministry of foreign affairs. In the alternative, this Court should nonetheless reverse the decision of the Second Circuit and find that no effective service was made here in the absence of any evidence that there was "consent of the head of the mission" to serve process on the embassy, as required by the VCDR.

ARGUMENT

I. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS DISALLOWS SERVICE OF PROCESS ON A STATE VIA ITS EMBASSY.

The VCDR, adopted in 1961 and ratified by the United States in 1972,[3] represents an essential instrument for the conduct of foreign relations. Among other things, it codified what had long been an established tenet of customary international law, namely the principle of diplomatic immunity from civil and criminal proceedings.[4] Virtually every country on earth is a party to the VCDR,[5] and respect for the principle of diplomatic immunity and the inviolability of diplomatic premises is a firmly established practice of international diplomacy. Indeed, as discussed below, foreign courts uniformly reject attempts to serve process on, via, or through diplomatic missions.

The VCDR states that it is intended to "contribute to the development of friendly relations among nations," and that the privileges and immunities that it provides help to "ensure the efficient performance of the functions of diplomatic missions as representing states." VCDR, preamble. Article 3 of the VCDR identifies five essential functions provided by diplomatic missions:

> (a) Representing the sending State in the receiving State;

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[3] 23 UST 3227, TIAS 7502 (1972).

[4] Anderson, Matthew Smith, *The Rise of Modern Diplomacy 1450-1919*, at 53-54 (Longman, 1993).

[5] 191 states are party to the VCDR. *See* United Nations Treaty Collection, *Vienna Convention on Diplomatic Relations* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en (last visited August 22, 2018).

> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
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> (c) Negotiating with the Government of the receiving State;
>
> (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and
>
> (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

The VCDR recognizes that respect for the privileges and immunities of diplomatic missions is essential in order for the sending state to properly perform these diplomatic functions. VCDR, preamble. For example, diplomatic agents enjoy complete immunity from the criminal jurisdiction of the host state, and immunity from all civil and administrative jurisdiction, except in narrow circumstances in which they are acting outside of their official capacity. *See* VCDR, art. 31(1).

Of particular relevance to the present case is the VCDR's guarantee that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art.

22(1). As the U.S. State Department explains, no entry can be made without permission and consent, "even to put out a fire."[6] This principle would be seriously undermined if anything less than explicit consent were effective to avoid the diplomatic mission's inviolability.

Moreover, the VCDR places a "special duty" on the host state to "take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." VCDR, art. 22(2).

U.S. courts are cognizant that service of process upon a diplomat or diplomatic mission "might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity." *See Tachiona v. United States*, 386 F.3d 205, 223-224 (2d Cir. 2004) (rejecting service on diplomatic personnel). For example, in the *Hellenic Lines* case, which arose before the FSIA was enacted, the D.C. Circuit rejected service on an ambassador on behalf of "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit found that such service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions," and therefore concluded that "the purposes of diplomatic immunity forbid service in this case." *Id.* at 980-81.

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[6] *See* U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited August 22, 2018).

In *Hellenic Lines*, the court agreed with the Department of State that diplomatic personnel would be "hampered in the performance of [their] duties if . . . [they] were diverted from the performance of [their] foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances." *Id.* at 980 n.5. Further, "[t]he sending state might well protest to the Department that the United States had failed to protect the person and dignity of its official representative" and that "[o]ther governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice." *Id.*[7]

By considering service of process to be effective merely by mailing it to an embassy, the Second Circuit's decision results in an uninformed and non-consensual waiver of the mission's inviolability. Further, foreign diplomatic personnel will be required to divert time and attention from their diplomatic duties to determine what they should do with a letter mailed to an individual who is not located at the embassy.[8] Indeed, there may be

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[7] While the *Hellenic Lines* case entailed service by a United States Marshal, a concurring judge observed that "although service of process on an ambassador by registered mail might avoid some of the problems inherent in personal service by a marshal, it would raise others." *Id.* at 982-83 (Washington, J., concurring) (quotation omitted).

[8] And in this case, to an individual who was no longer even employed with the Ministry of Foreign Affairs. Pet. Br. at 7 (noting that the

nothing indicating to the mailroom clerk that such a letter should receive special treatment or requires an immediate response from the embassy. The mailroom personnel may reject the mailing prior to signing for it, but would need to do so without knowing its contents. By contrast, delivery of service to a foreign state's ministry of foreign affairs directed to the head of that ministry delivers the service letter to the seat of the foreign government where it may be given the appropriate attention that it deserves, without any confusion or delay in transmission.

Pursuant to the Second Circuit's decision, however, once the embassy has acknowledged receipt of the mailing, foreign diplomatic personnel are then "expected"—and indeed, required upon pain of default by the foreign sovereign—to act as couriers for the United States courts and ensure that the mailing is actually delivered overseas to the Minister of Foreign Affairs, including by using the foreign state's secure diplomatic pouch to accomplish delivery. JA214 & n.3. Ultimately, given that there could be hundreds of millions or billions in default judgments if the embassy fails to properly handle the mailing, they would need to become far more reticent about accepting mail deliveries, and may end up adopting specific policies limiting the mail that they are willing to receive. For embassies to limit their communications with the host state in order to avoid complicated issues of service—or worse yet, massive default judgments—would undermine their ability to perform their diplomatic mission.

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addressee was no longer "the Minister of Foreign Affairs of Sudan at the time the package was sent.").

Service is also different from simply mailing a letter. It is a uniquely governmental function that represents an assertion of jurisdiction over the recipient, ordering it to appear and defend itself before a U.S. court. Even delivery of service by mail is uniformly viewed as an affront to the foreign sovereign and a breach of the inviolability of diplomatic premises. *See* Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 124 (4th ed. 2016) ("The view that service by post on mission premises is prohibited seems to have become generally accepted in practice.").

As the United States further observed in its *amicus* brief requesting reconsideration by the Second Circuit, the Second Circuit's decision also impinges upon the dignity of the diplomatic mission, as it "dictate[s] the internal procedures of the embassy of another sovereign" by "instructing it to use its [diplomatic] pouch to deliver items to its officials on behalf of a third party." JA203. Diplomatic agents are not couriers or agents for delivery of parcels to their home country, and should not be required to act as such by U.S. law.

That service on a foreign state via its embassy is not in accord with the text or the principles of the VCDR is further supported by the international practice of rejecting any attempt to serve process on a foreign state via its embassy or diplomatic personnel. *See, e.g., Kuwait Airways Corp. v. Iraqi Airways Co. & Republic of Iraq* [1995] 1 WLR 1147 (UKHL) (United Kingdom's highest court rejecting service on the Iraqi embassy with a "request . . . to forward the writ . . . to the Iraqi Ministry of Foreign

Affairs"); *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, [2015] 126 O.R. (3d) 545 (Can. Ont. C.A.) (Canadian appellate court rejecting service on the Kyrgyz Embassy and noting that "service on an embassy is not available as a means of effecting service on a foreign state"); *see also Sebina v. South African High Commission* 2010 3 BLR 723 IC (Botswana court rejecting personal service ostensibly accepted by the South African High Commission[9]); *Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 (Malaysian court rejecting personal service upon the Queen by leaving papers at the Canadian High Commission). Such international practice confirms that other signatories to the VCDR do not allow for service on, via, or through an embassy, opinions which are "entitled to considerable weight" in interpreting a treaty. *See Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (interpreting a treaty in part by conducting a "review of the international case law").

Significantly, neither Plaintiff in this case nor the Second Circuit has cited to *any* state party to the VCDR that allows service of process on a foreign state via its embassy. So far in this case, six separate parties to the VCDR—Sudan, the United States, the United Arab Emirates, Saudi Arabia, Libya, and Austria—have all written to indicate that they agree that service of process via an embassy is not allowed by the treaty. As this Court has previously explained, "[w]hen the parties to a treaty

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[9] States in the Commonwealth of Nations refer to their diplomatic missions as High Commissions rather than embassies.

both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must*, absent extraordinarily strong contrary evidence, *defer to that interpretation*." *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982) (emphasis added). The parties to the VCDR agree that the treaty does not allow service of process either *on* or *via* an embassy, and this Court should defer to that interpretation.

Requiring foreign embassies to handle service is detrimental to the important purposes that diplomatic missions serve in the United States, and undermines one of the fundamental principles of international diplomacy—the inviolability of diplomatic missions. It also diverges from the understanding of the parties to the VCDR, who agree that service via an embassy is not allowed. The United States also has a strong interest in treating foreign embassies as it wants its own embassies to be treated abroad. If the Second Circuit's reasoning is adopted by this Court, then the United States would be subject to similar modes of service (and potential default judgments) on its embassies around the world.

II. CUSTOMARY INTERNATIONAL LAW SPECIFICALLY CONTEMPLATES SERVICE OF PROCESS ON A STATE'S MINISTRY OF FOREIGN AFFAIRS.

Customary international law on diplomatic immunity has recently reaffirmed that foreign sovereigns should be served via delivery to a state's ministry of foreign affairs. In 2004, the United Nations General Assembly adopted, without dissent, the Convention on Jurisdictional Immunities of

States and their Property ("the 2004 Convention"). G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004). While the 2004 Convention has not yet entered into force, the European Court of Human Rights and the French Supreme Court—the *Cour de Cassation*—have recognized that its principles constitute customary international law. *See Wallishauser v. Austria*, Application No. 156/04, Judgment, 19 November 2012 (ECtHR) (finding that the 2004 Convention constitutes customary international law binding on both Austria and the United States for purposes of service of process on a foreign sovereign); *La société NML Capital v. La République argentine*, Cour de cassation [supreme court for judicial matters] 1e civ., March 28, 2013, Judgment No. 394 (acknowledging that the 2004 Convention reflects customary international law). Article 22 of the 2004 Convention, much like the FSIA in 28 U.S.C. § 1608(a)(1) and (2), allows for service by special arrangement or international convention. But if neither of these means is available, then the 2004 Convention contemplates "transmission through diplomatic channels *to the Ministry of Foreign Affairs* of the State concerned," and provides that "Service of process . . . is deemed to have been effected *by receipt of the documents by the Ministry of Foreign Affairs*." 2004 Convention, art. 22(1)(c)(i),(2) (emphasis added).[10]

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[10] Further support for the conclusion that this principle constitutes customary international law is found in statutes and international treaties which similarly require service on the foreign state's ministry of foreign affairs. *See, e.g.*, European Convention on State Immunity, ETS No. 074, Art. 16(2) ("The competent authorities of the State of the forum shall transmit [service] . . . to the Ministry of Foreign Affairs of the defendant

The 2004 Convention was based upon earlier work done by the International Law Commission, which in 1991 published draft articles on jurisdictional immunities.[11] The commentary to the ILC Draft Articles—which are substantially similar to the 2004 Convention—explains that "[s]ince the time of service of process is *decisive* for practical purposes . . . in the case of transmission through diplomatic channels *or by registered mail*, service of process is deemed to have been effected on the day of receipt of the documents *by the Ministry of Foreign Affairs*." ILC Yearbook, 1991, Vol. II, Part 2, p. 60, § 3 (emphasis added). The commentary further notes that "too liberal or generous a regime of service of process . . . could result in an *excessive number of judgments in default* of appearance by the defendant State." *Id.* § 1 (emphasis added).

Customary international law thus recognizes that, absent other specifically agreed upon means, the only effective way to serve process on a foreign sovereign—including by "registered mail"—is by service on "the Ministry of Foreign Affairs." This is confirmed by the practice of foreign courts discussed above in refusing to allow service on embassies and

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State."); UK State Immunity Act 1978, Ch. 33, § 12(1) ("Any writ or other document required to be served for instituting proceedings against a State shall be served by being transmitted . . . to the Ministry of Foreign Affairs of the State."); Singapore State Immunity Act 2014, Ch. 313, § 14(1) (same); Malawi Immunities and Privileges Act 1984 § 14(1) (same); Gamal Badr, *State Immunity: An Analytical and Prognostic View* 214 (1984) (recognizing the same under the laws of Pakistan).

[11] *See* ILC Draft Articles on Jurisdictional Immunities of States and Their Property, ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §§ 1-3.

instead requiring service on the ministry of foreign affairs. *See supra* at 12. Neither the 2004 Convention nor the ILC Draft Articles even mention the possibility of serving process on a foreign state via that state's embassy. They thereby reaffirm the VCDR's prohibition on the use of embassies for service of process upon a foreign state.

III. THIS COURT SHOULD CONSTRUE THE FSIA SO AS NOT TO CONFLICT WITH INTERNATIONAL LAW.

As discussed above, serving process *on* or *via* an embassy is a violation of the VCDR, and customary international law requires delivery to the ministry of foreign affairs. The VCDR was ratified by the United States in 1972,[12] while the FSIA was adopted in 1976.[13] As a later enacted statute, the FSIA will supersede the VCDR *only* "if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled." Restatement (Third) of the Foreign Relations Law of the United States § 115 (Am. Law Inst. 1986); *see also* Restatement (Fourth) of Foreign Relations Law: Jurisdiction Treaties § 109 TD No 1 (2016)) ("Where fairly possible, courts will construe federal statutes to avoid a conflict with a treaty provision.").

As Chief Justice Marshall long ago explained, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner*

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[12] 23 UST 3227, TIAS 7502 (1972).

[13] PL 94–583 (HR 11315), PL 94–583, October 21, 1976, 90 Stat 2891.

Charming Betsy, 6 U.S. 64, 81 (1804). This rule of statutory construction has repeatedly been applied by this Court to interpret acts of Congress in order to avoid conflict with earlier treaty provisions and customary international law. *See Weinberger v. Rossi*, 456 U.S. 25, 33 (1982) (construing the words of a statute in accordance with "principles of international law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963) (construing the National Labor Relations Act not to apply to foreign-flagged vessels in order to avoid a conflict with international law); *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884) (interpreting later immigration laws in accordance with earlier treaty rights governing the ability of a resident alien to reenter the country).

As Justice Rehnquist explained in *Weinberger v. Rossi*, in construing a statute, "some affirmative expression of congressional intent to abrogate the United States' international obligations is required in order to construe" the statute to conflict with earlier treaties. 456 U.S. at 32. Similarly, in *Benz v. Compania Navera Hidalgo, S.A.*, this Court observed that several proposals had been made to extend the Seaman's Act to foreign ports, but that "[a] storm of diplomatic protest resulted," with eight countries joining "in vigorously denouncing the proposals." 353 U.S. 138, 146 (1957). The Court observed that it would not "read into the Labor Management Relations Act an intent" to apply the law in breach of international law, and observed:

> For us to run interference in such a delicate field of international relations *there must be present the affirmative*

> *intention of the Congress clearly expressed*. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.

Id. at 147 (emphasis added).

In this case, five separate foreign sovereigns have already protested the Second Circuit's decision at the Petition for Certiorari stage. These sovereigns have observed that allowing service of process via an embassy will create "international discord" and invite "retaliative action." *See, e.g.*, Brief of the Kingdom of Saudi Arabia as *Amicus Curiae* in Supp. Of the Pet. For Cert., Apr. 10, 2017, at 17 ("If the United States allows service of process by mailings to embassies, that practice will inevitably have reciprocal consequences outside the United States . . . .").

In this case, there was absolutely no affirmative indication of an intent by Congress to use the FSIA to abrogate the protections of the VCDR. Indeed, in drafting the FSIA, Congress was attempting to codify the principles of sovereign immunity "recognized in international law." *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. Further, the House Report noted that changes to the statute precluded a mailing "to a diplomatic mission of the foreign state . . . so as to avoid questions of inconsistency with section 1 of Article 22 of the Vienna Convention." *Id.* at 26. The legislative history thus reveals a specific intent to avoid conflict with the VCDR, rather than

any "affirmative expression" of an intent to supersede the VCDR.

Given the clarity of both the legislative history and the international discord that would result, this Court should apply its longstanding rule of statutory construction and construe the FSIA in accordance with the VCDR and customary international law to provide that service under 28 U.S.C. § 1608(a)(3) must be made on the foreign state's ministry of foreign affairs and cannot be made on a foreign state's embassy in the United States. It should be up to the legislature, rather than the courts, to make any changes to the statute.

IV. SERVICE OF PROCESS ON AN EMBASSY REQUIRES "CONSENT OF THE HEAD OF THE MISSION."

The above analysis should conclude this Court's consideration of the case. If, however, this Court were not to adopt the above construction of the FSIA, there is an independent ground upon which the Second Circuit's decision should be reversed and delivery of service to the Sudanese embassy should be found to violate the requirements of the VCDR.

The Second Circuit's analysis of the FSIA allowed for the possibility of delivery to the "head of the ministry of foreign affairs" *via* the foreign embassy. But as the Second Circuit itself acknowledged in its opinion on rehearing, delivery to a foreign embassy cannot take place "except with the consent of the head of the mission." JA223 (quoting VCDR, art. 22(1)). The Second Circuit's holding thus rests on its determination that the "Embassy's

acceptance of the service package surely constituted 'consent'" under the VCDR. *Id.* (emphasis added).

But this determination is incorrect as a matter of interpretation of the VCDR, which does not simply require some form of "consent," but specifically requires the consent "*of the head of the mission*." *See* VCDR, art. 22(1) (emphasis added). The "head of the mission" is a specific individual defined by the text of the VCDR as the person "charged by the sending State" with that duty. VCDR, art. 1(a). Specifically, the "head of the mission" may only take up his post after "present[ing] his credentials" to the receiving State. VCDR, art. 13(1). "Heads of mission" are explicitly identified as one of three classes: "ambassadors," "envoys," or "*chargés d'affaires*." VCDR, art. 14.[14]

The VCDR contains guidance regarding the "members of the staff of the mission," which includes the "members of the diplomatic staff, of the administrative and technical staff and of the service staff." VCDR, art. 1(c). The "administrative staff" is employed in the "administrative . . . service of the mission." *Id.*, art. 1(f). Only the "diplomatic staff," however, "should in principle be of the nationality of the sending State." *Id.*, art. 8(1). The U.S. State Department explains that "[w]hile Americans work at embassies and consulates, most of the staff comes from the host country,"[15] and the State Department

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[14] Other heads of mission of equivalent rank are also allowed by the VCDR, including nuncios and internuncios from the Holy See, High Commissioners within the Commonwealth, etc.

[15] U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited August 22, 2018).

fills positions such as "Mailroom Clerk" in its embassies with host country nationals.[16] Thus, the individual receiving the mail is not the "head of the mission" or even a member of the diplomatic staff, but possibly not a national of the foreign state at all. Such an individual is neither competent nor authorized to make decisions regarding acceptance of legal process on behalf of the foreign state.

Courts interpreting similarly worded treaties have required the consent of the specified individual for purposes of accepting service of process. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[17] In

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[16] See, e.g., *United States Mission Vacancy Announcement: Mailroom Clerk*, https://ca.usembassy.gov/wp-content/uploads/sites/27/2016/04/16-44-Mailroom-Clerk-Toronto.pdf (last visited July 25, 2015) (offering a position as a "Mailroom Clerk" in charge of "unclassified mail" at the U.S. Embassy in Ottawa, Canada to host-country nationals).

[17] As the Eleventh Circuit noted, similar treaty provisions requiring consent by a specified individual are found in Headquarters Agreements between sovereign states and international organizations around the world. *Prewitt*, 353 F.3d at 923 n.12. One such example is the United Nations Headquarters Agreement, which states that "The headquarters district shall be inviolable. . . . The service of legal process, including the seizure of private property, may take place within the headquarters district *only with the consent of* and under conditions approved by *the Secretary-General*." *See* United

Prewitt, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at 919. "The pleadings were signed for, stamped 'received' by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office." *Id.* at 919-20. Possibly relying on the ineffective service, "the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint." *Id.* at 920. As in this case, when the defendant failed to appear, the trial court rendered a default judgment. *Id.* OPEC then made a special appearance to challenge service, and the Eleventh Circuit determined, based on the wording of the treaty, that the acceptance of a service mailing by OPEC did not constitute the "consent of . . . the [OPEC] Secretary General" and that service was therefore ineffective. *Id.* at 925.

The D.C. Circuit followed this reasoning in *Freedom Watch*, where the plaintiff attempted to deliver service "by hand to OPEC headquarters in Vienna, where an individual ostensibly accepted service." 766 F.3d at 77. The D.C. Circuit found that without the consent of OPEC's Secretary General, service was ineffective, despite the ostensible acceptance of a service package by an employee. *Freedom Watch*, 766 F.3d at 80.

In the *Hellenic Lines* case, the D.C. Circuit explained what "consent" in this context would

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Nations Headquarters Agreement, Art. III, § 9, *available at* 22 U.S.C. § 287 (emphasis added).

require. As noted above, *Hellenic Lines* involved an attempt to serve an ambassador with a complaint against "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit noted that "an ambassador may be served if he consents to service," but posited that the burden of securing such consent "should rest on the party seeking service." *Id.* n.3. The concurrence noted that the plaintiff would need to make a "showing that the Ambassador has consented, or is authorized, to accept service on behalf of the government which he represents for diplomatic purposes in this country." *Id.* at 981-82 (Washington, J., concurring). The concurrence also stated that "informal inquiries" had been made as to "whether the Embassy of Tunisia would be willing to accept service of summons in this case," and determined that it was "unwilling to accept service of process." *Id.* at 982. Thus, without express advance consent from the embassy, process could not be served on the foreign state via the embassy or its personnel. *Id.* at 983.

The Second Circuit's finding that acceptance of registered mail by a mailroom employee constitutes implied "consent" by the "head of the mission" is squarely at odds with the text of the VCDR, the holdings of *Prewitt* and *Freedom Watch*, and the dicta from *Hellenic Lines* that actual consent by the specified individual is required. Securing such consent prior to delivery would obviate many of the foreign policy concerns present in this case, as a senior diplomatic official from a foreign government would have agreed to service of process, and would be taking responsibility for ensuring service to the Head of the Ministry of Foreign Affairs.

Amici curiae believe that the FSIA should be construed to require service to be sent to the ministry of foreign affairs, in accordance with customary international law. It would, however, be in accord with the VCDR if this Court were to instead find that service can be made on an embassy if there is specific "consent by the head of the mission" to accept such service, with the burden on the plaintiff to specifically establish such "consent by the head of the mission." However, because the certified mail return provided by the Respondents in this case does not indicate any consent, or indeed any involvement, by the Sudanese Ambassador, the plaintiff has failed to establish proper service of process on Sudan.

CONCLUSION

For the foregoing reasons, *amici curiae* international law professors respectfully request that the decision of the Second Circuit be reversed.

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