No. 24-699

In The Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

CORPORACIÓN CIMEX, S.A. (CUBA), *et al.*,

Respondents.

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

BRIEF OF FOREIGN INTERNATIONAL LAW SCHOLARS AND JURISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Curiae are foreign scholars and professors of public international law who have published numerous works on the issues that are central to this case. They have also participated as counsel and experts in proceedings involving matters of sovereign immunity before international and national courts and tribunals, including the International Court of Justice.

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[1] Pursuant to Supreme Court Rule 37(6), *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person other than *amici curiae* or their counsel made any monetary contribution toward the preparation and submission of this brief.

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Interest (Oxford University Press, 2020) and co-edited (with Austen Parrish) the *Research Handbook on Extraterritoriality and International Law* (Edward Elgar, 2022). He chairs the Dutch Advisory Council on International Law ("CAVV)", which advises the Dutch Foreign Ministry.

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As experts on the law of immunity, *amici curiae* respectfully submit this brief in the hope of assisting the Supreme Court in its consideration of the case, by setting out their understanding of the relevant rules of public international law on sovereign immunity. For the reasons set out in this brief, *amici* believe that the opinion of the Court of Appeals for the D.C. Circuit with respect to the relationship between the Foreign Sovereign Immunity Act 1976 and the Helms-Burton Act 1996 and its Title III is in line with customary international law and should be affirmed.

INTRODUCTION & SUMMARY OF ARGUMENT

The issue at the heart of this case is the relationship between the Foreign Sovereign Immunity Act 1976 ("FSIA") and the Helms-Burton Act 1996 ("HBA"), in particular, Title III to the HBA. While the Court will understandably consider this relationship primarily as a matter of domestic statutory interpretation, foreign sovereign immunity law—a field of international law carrying significant international and reciprocal consequences—constitutes the subject-

matter of this case. The FSIA was enacted in substantial part to codify and regularize U.S. practice on foreign sovereign immunity, to reduce foreign-relations friction, and, in doing that, to reflect and domesticate the customary international law of sovereign immunity. For this reason, and in making its determination in this case, consideration of the international legal aspects of foreign sovereign immunity may be of aid. This is particularly so as domestic court rulings on foreign sovereign immunity do not merely have internal effects, but also function internationally, and may influence how other states and their courts treat the immunity of the United States, its agencies and instrumentalities when operating abroad.

In this brief, *amici* outline the customary international law rules on immunity applicable to foreign states and their agencies or instrumentalities, in the hope that this brief may assist the Supreme Court in deciding the case in two ways. First, given that the FSIA in part reflects and domesticates the international law of immunity, an exposition of that international law may assist the Court. Indeed, the *Restatement (Fourth) of the Foreign Relations Law of the United States*, recognizes the relevance of the customary international law of jurisdictional immunity "to interpreting the FSIA and to understanding its significance."[2] Second, *amici* set out the implications of a

[2] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. c. (AM. L. INST. 2018).

finding that another domestic statute implicitly overrides the FSIA and the international law on sovereign immunity. *Amici* argue that the Court should be hesitant in accepting that Title III of the HBA implicitly overrode the FSIA in a manner inconsistent with international law, simply because it was later-in-time. Doing so would also necessarily imply that Congress enacted a statute that was contrary to the international legal obligations of the United States without explicitly saying so. In this respect, *amici* argue that the Court should affirm the decision of the Court of Appeals for the D.C. Circuit.

The rules of sovereign immunity constitute fundamental norms of international law. As the ICJ held in 2012 in *Jurisdictional Immunities of the State*:

> [T]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.[3]

Granting immunity to foreign states, their representatives, agencies and instrumentalities is not merely a matter of convenience or comity. It is a binding international obligation. Indeed, the ICJ found in

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[3] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99 (Feb. 3) 123-24 ¶ 57.

Jurisdictional Immunities of the State that, "in claiming immunity for themselves or according it to others, States generally proceed on the basis that *there is a right to immunity under international law*, together with *a corresponding obligation* on the part of other States to respect and give effect to that immunity."[4]

This is confirmed by the *Restatement (Fourth) of the Foreign Relations Law of the United States*, according to which, "[u]nder international law and the law of the United States, a state is immune from the jurisdiction of the courts of another state, subject to certain exceptions."[5] Domestic and regional courts, including the UK Supreme Court ("UKSC"), the Dutch Court of Appeals,[6] the Canadian Supreme Court,[7] the Supreme Court of Appeal of South Africa,[8] and the

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[4] *Id.* (emphasis added).

[5] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451. As this Court stated in *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, "[t]he [FSIA] for the most part embodies *basic principles of international law* long followed both in the United States and elsewhere." 581 U.S. 170, 179 (2017) (emphasis added).

[6] Dutch Court of Appeals of 's-Hertogenbosch: *Cerbuco v. Family Brewers* (23 July 2024), ECLI:NL:GHSHE:2024:2380 (Neth.), ¶¶ 3.5.2–3.5.3.

[7] *Schreiber v. Federal Republic of Germany and the Attorney General of Canada*, Supreme Court [2002] 3 S.C.R. 269, 275 [1] (LeBel J.) (Can.) ("Originating from international customary law, the principle of sovereign immunity and the exceptions thereto are incorporated into domestic law by the enactment of the federal *State Immunity Act* … ").

[8] Supreme Court of Appeal of South Africa: *East Asian Consortium BV v. MTN Group Limited and Others* (225/2023) [2025] ZASCA 50 (20 April 2025) ¶ 40.

European Court of Human Rights,[9] have also repeatedly referred to sovereign immunity in these terms. For instance, in *Benkharbouche* before the UKSC, Lord Sumption (writing for the Court) stated that "[s]tate immunity is a mandatory rule of customary international law which defines the limits of a domestic court's jurisdiction" and that "[i]t derives from the sovereign equality of states' and the principle '*[p]ar in parem non habet imperium*.'"[10] The latter, which finds an early expression in the judgment of Chief Justice Marshall in *Schooner Exchange v. McFaddon*,[11] essentially dictates that one sovereign state cannot sit in judgment of another sovereign.[12] In *Jones v. Saudi*

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[9] *Jones and Others v. United Kingdom*, App. Nos. 34356/06 and 40528/06, Eur. Ct. H. R. ¶ 202 (Jan. 14, 2014), https://hudoc.echr.coe.int/fre?i=001-140005 ('The Court has previously accepted that the grant of immunity to the State reflects [generally recognised rules of public international law.").

[10] *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 [17] (Lord Sumption) (UK).

[11] *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 116 (1812) ("The full and absolute territorial jurisdiction being alike the attribute of every sovereignty and being incapable of conferring extraterritorial power, does not contemplate foreign sovereigns, nor their sovereign rights as its objects.") and at 137 ("This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.").

[12] *Sabeh El Leil v. France*, App. No. 34869/05, Eur. Ct. H. R., Grand Chamber ¶ 52 (June 29, 2011), https://hudoc.echr.coe.int/eng?i=001-105378 ("State immunity was developed in international law out of the principle *par in parem non*

Arabia, Lord Hoffmann, relying on previous caselaw, put it in these terms:

> [S]tate immunity is not a "self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt" and which it can, as a matter of discretion, relax or abandon. It is imposed by international law without any discrimination between one state and another.[13]

It is true that the term "comity" is occasionally used when referring to a state according immunity to another state before its courts. This may be seen to imply that immunity is accorded as a matter of courtesy, not as a matter of law. However, as is clear from the cited authorities, the rules of immunity are a matter of binding international law. According to the UKSC, any relevant domestic rules "are rooted in the concept of mutual respect for the sovereignty and

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habet imperium, by virtue of which one State could not be subject to the jurisdiction of another."); previously, also in *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H. R., Grand Chamber ¶ 54 (Nov. 21, 2001), https://hudoc.echr.coe.int/eng?i=001-59885; UK House of Lords (as it then was): *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26 [14] (Lord Bingham of Cornhill) ("Based on the old principle *par in parem non habet imperium*, the rule of international law is … that (save in cases recognised by international law) a state has no jurisdiction over another state.").

[13] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26 [101] (Lord Hoffmann) (UK).

independence of states."[14] They may be intended to "promote international comity,"[15] but this comity is required by fundamental principles of international law: the principle of sovereign equality of states and the principle of non-interference in the internal affairs of other states.[16]

The mandatory rules of sovereign immunity are grounded in customary international law. They are also reflected in international conventions, such as the 1972 European Convention on State Immunity,[17] and the 2004 UN Convention on Jurisdictional Immunities of States and Their Property ("UNCSI").[18] While the latter is not yet in force, it has been considered as "the most authoritative statement available on the current international understanding of the

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[14] *'Maduro Board' of the Central Bank of Venezuela v. 'Guaidó Board' of the Central Bank of Venezuela* [2021] UKSC 57 [165] (Lord Lloyd-Jones) (UK).

[15] *Id.*

[16] *Id.*, [166] (Lord Lloyd-Jones) (citing *R v. Bow Street Metropolitan Stipendiary Magistrate, Ex p. Pinochet Ugarte (No. 3)* [2000] UKHL, 1 AC 147 at 269F (Lord Millett) (UK)); also affirmed by the International Court of Justice in *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, 2018 I.C.J. 292, 321, ¶ 93 (June 6) ("As the Court has previously observed, the rules of State immunity derive from the principle of sovereign equality of States.").

[17] European Convention on State Immunity, ETS No. 074 (adopted 16 May 1972, entered into force 11 June 1976).

[18] United Nations Convention on Jurisdictional Immunities of States and Their Property, UN Doc A/RES/59/38 (adopted 2 December 2004, not yet in force) (16 December 2004) [hereinafter UNCSI].

limits of state immunity in civil cases."[19] Many of its provisions, including those discussed below, reflect customary international law, and the Convention has been relied upon by international and domestic courts.[20]

Additionally, while in many states, the customary rules of sovereign immunity apply directly before domestic courts, in certain jurisdictions these norms have been domesticated through the adoption of legislation. The United States' adoption of the FSIA is one example of this practice. Other examples can be found in the UK State Immunity Act 1978, South Africa's Foreign States Immunities Act of 1981, Pakistan's State Immunity Ordinance of 1981, Canada's State Immunity Act of 1985, the 2009 Act on the Civil Jurisdiction of Japan with respect to Foreign States, and most recently the 2023 Foreign State Immunity Law

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[19] *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia)* [2006] UKHL 26 [26] (Lord Bingham) (UK).

[20] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 128, ¶ 66, 129–30, ¶ 69; *Oleynikov v. Russia*, App. No. 36703/04, Eur. Ct. H.R. ¶ 66 (Mar. 14, 2013), https://hudoc.echr.coe.int/eng?i=001-117124 ; *Sabeh El Leil v. France*, App. No. 34869/05, Eur. Ct. H.R., Grand Chamber ¶ 18 (June 29, 2011), https://hudoc.echr.coe.int/eng?i=001-105378 ; *Cudak v. Lithuania*, App. No. 15869/02, European Eur. Ct. H.R. ¶¶ 67-67 (Mar. 23, 2010), https://hudoc.echr.coe.int/eng?i=001-97879 ; French Court of Cassation: *Société NML Capital v. Argentina and Total Austral*, Decision No 395 of 28 March 2013 (11-10.450), ECLI:FR:CCASS:2013:C100395, ¶ 7.

of the People's Republic of China, which largely reflects the UNCSI.

This domestic legislation, where it exists, ought to be interpreted in line with the international law of state immunity. This is because international law requires compliance with its rules, without demanding that the rules be applied domestically in any particular manner, that is, through precedent, legislation, or direct application. Any interpretation that results in divergence from the provisions of international law could engage the international responsibility of the acting state, including when that state is acting through its courts. Here, were it to be accepted that the HBA and its Title III have implicitly overridden the FSIA in circumstances not falling under one of the accepted exceptions to immunity under customary international law, this could lead to the United States violating its international legal obligations. Moreover, such a move could set in motion a process of change of the international law of state immunity, in directions that may not have been intended or considered by the appropriate organs of the acting state. After setting out the relevant rules of the customary law of state immunity, we return to this latter issue in a section regarding the implications of the decision of the Supreme Court in the case before it.

ARGUMENT

A. Exercising Jurisdiction over a Foreign State Agency or Instrumentality, including a State-owned Enterprise, Could Implead a Foreign State Either Directly or Indirectly, Violating its Immunity.

Under international law, it is the foreign state that benefits from sovereign immunity. It does so in two circumstances, reflected in Article 6(2) of the UNCSI: (1) when the foreign state is directly impleaded in a case and (2) when a case or claim indirectly impleads a foreign state.

In the first scenario (*direct impleading*), a key question is who constitutes part of the "state" for the purposes of immunity. While national practice may differ to an extent in this area, it is accepted that state-owned enterprises, as agencies and instrumentalities of the state, may be covered by immunity under customary international law.

The UNCSI reflects this in Article 2(1)(b), which provides a definition of the "state" for the purposes of the convention. According to sub-paragraph (iii), "agencies and instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State" constitute emanations of the state and are thus entitled to immunity. The term "state agencies and instrumentalities" is

itself broad, and such entities may take a variety of forms, including "public corporations established by charter or decree, or companies under private law in which the government is a majority shareholder."[21]

To be covered by immunity under the UNCSI, such agencies and instrumentalities must satisfy the conditions of Article 2(1)(b)(iii): they must be "entitled to perform and [be] actually performing acts in the exercise of sovereign authority." The first condition, namely whether an agency or instrumentality is "entitled to perform…acts in the exercise of sovereign authority" is a matter to be examined under the domestic law of the state concerned.[22] The second condition, that is whether an agency or instrumentality is "actually performing acts in the exercise of sovereign authority," is a factual inquiry.[23] As outlined in a seminal treatise on the topic, when ascertaining whether such entities are entitled to immunity under international law, two factors have proven important, namely "the extent to which the State retains control, and the nature of the agency's acts."[24]

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[21] HAZEL FOX AND PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 352 (3d ed. 2015).

[22] This was the understanding in the Sixth Committee of the General Assembly at the time. *See id.* at 357. See also the analysis in Tom Grant, *Article 2*, *in* THE UNITED NATIONS CONVENTION ON JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY: A COMMENTARY 46 (Christian J. Tams, Roger O'Keefe & Antonios Tzanakopoulos, eds. 2013).

[23] FOX & WEBB, *supra* note 21, at 357–58.

[24] *Id*. at 352.

National practice partly follows and partly deviates from the UNCSI's treatment of state agencies and instrumentalities, including state-owned enterprises, for the purposes of immunity, but again recognizes that such entities may enjoy sovereign immunity. Under Section 14 of the UK State Immunity Act, "separate entities," meaning those that "are distinct from the executive organs of the government of the State and capable of suing or being sued," enjoy jurisdictional immunity before UK courts when a case relates to acts performed "in the exercise of sovereign authority" and the state itself would have enjoyed immunity in the same circumstances.[25] Taking a different approach but still accepting that such entities are covered by immunity under international law, the FSIA includes "agencies and instrumentalities" in the definition of a "foreign state" and grants them immunity, defining such entities as those that possess separate legal personality and which constitute either "an organ of a foreign state, or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof."[26]

In any event, a claim involving a state agency or instrumentality, including a state-owned enterprise, even where the latter may not by itself be covered by immunity, could still implicate the foreign

[25] State Immunity Act 1978, §§ 14(1)–(2) (UK).
[26] 28 U.S.C. §§ 1603(b)(1)–(2).

state's sovereign immunity under customary international law (**second scenario**: *indirect impleading*). Under international law, it is assumed that proceedings are initiated against another state not only when that state is directly named as a party in the proceedings in question (as in the first scenario of direct impleading), but also if the proceedings are intended to affect the "property, rights, interests or activities" of another state (indirect impleading). Article 6(2) of the UN Convention provides that

> [a] proceeding before a court of a State shall be considered to have been instituted against another State if that other State: (a) is named as a party to that proceeding; or (b) *is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State*.[27]

Both scenarios of direct and indirect impleading are treated equally. The reason for that is that a state's sovereignty is similarly infringed, whether it is directly sued in foreign proceedings or whether its sovereign property, rights, interests, and so on are affected by such foreign proceedings.

In both scenarios, pursuant to Article 6(1) of the UN Convention, the forum State "shall give effect to State immunity under Article 5 by refraining from exercising jurisdiction in a proceeding before its courts

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[27] UNCSI, *supra* note 18, art. 6(2) (emphasis added).

against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State under Article 5 is respected." As members of the United Nations International Law Commission recognized at the time of preparation of the provision of Article 6, without paragraph 2 "a claimant might circumvent a State's immunity … by instituting proceedings which, although implicating the State by affecting its property or other interests, did not name the State as respondent."[28]

Domestic courts in several states have recognized the customary international law status of the doctrine of indirect impleading.[29] In a recent judgment in a case involving the immunity of the Republic of Cuba, and which had been instituted against a foreign private corporation, the Dutch Court of Appeals found that Cuba's jurisdictional immunity precluded

[28] Grant, *supra* note 22, at 107.

[29] Dutch Court of Appeals of 's-Hertogenbosch: *Cerbuco v. Family Brewers* (23 July 2024), ECLI:NL:GHSHE:2024:2380 (Neth.)¶¶ 3.8.7–3.8.12; Belgium: Court of Appeals of Brussels, *Touax and Touax Rom v. Belgium*, Nr. C.13.0528.F, Judgment of 16 May 2013; Supreme Court of Appeal of South Africa, *East Asian Consortium B.V. v. MTN Group Limited and Others* (225/2023) [2025] ZASCA 50 (29 April 2025); United Kingdom: *Belhaj and Anor v. Straw and Others* (Rev 1) [2017] UKSC 3 ; *United States of America and Republic of France v. Dollfus Mieg et Cie SA and Bank of England* [1952] UKHL, AC 582; *Rahomtoola v. HEH The Nizam of Hyderabad and Others* [1958] UKHL, AC 379 (UK).

the Court of Appeals from exercising jurisdiction.[30] This was because the public acts of the Republic of Cuba were at the center of the dispute and reviewing them was a prerequisite for granting the claims.[31]

In similar circumstances, a suit brought against a corporation implicating Cuba's nationalization of real property was considered by Spanish courts as necessarily requiring a determination of the legality of the act of nationalization. The Spanish courts demanded that Cuba be added as a respondent, otherwise the case could not proceed. Once this was done, however, the Spanish courts declined to exercise jurisdiction based on Cuba's immunity.[32] In effect, this was an acknowledgement that Cuba had been indirectly impleaded by the suit which had been brought against the corporation.

Likewise, the Supreme Court of Appeal of South Africa found that the doctrine of indirect impleading encompassed situations where "the legal rights of the foreign state would be affected because the judgment and order of the court may diminish or

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[30] Dutch Court of Appeals of 's-Hertogenbosch: *Cerbuco v. Family Brewers* (23 July 2024), ECLI:NL:GHSHE:2024:2380 (Neth.), ¶¶ 3.7.2, 3.7.5, 3.8.1, 3.8.3 [in Dutch].
[31] *Id.*
[32] *Central Santa Lucia LC v. Melia Hotels International SA and Others*, Jdo Primera Instancia N. 24 Palma de Mallorca, Auto 00036/2023 (27 January 2023) (Spain).

otherwise adversely affect the foreign states' [sic] entitlement to these rights, or their exercise."[33]

Under international law, whether a state-owned corporation is an instrumentality or an *alter ego* of a foreign state, domestic courts should refrain from exercising jurisdiction and should give effect to the foreign state's immunity when the relevant proceedings concern the foreign state's property, rights, interests, or activities. In particular, the rule on indirect impleading covers a foreign state's property, however derived, which is used for economic development activities, deputizing state-owned enterprises for this purpose. If domestic courts were to exercise jurisdiction over the corporation in such circumstances, they would infringe the foreign state's sovereign choices to organize and regulate its economy in any particular manner.

In this connection, it is immaterial whether the foreign state's property has been derived or is being used in a manner that is unlawful under the domestic law of the forum state. As the Court of Appeals for the

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[33] *East Asian Consortium BV v. MTN Group Limited and Others* (225/2023), Supreme Court of Appeal [2025] ZASCA 50 (20 April 2025) [55] (S. Afr.). On the circumstances in which a foreign state may be indirectly impleaded, see also *Belhaj and Anor v. Straw and Others (Rev 1)* [2017] UKSC 3 [196] (Lord Sumption) (UK), and the analysis in FOX & WEBB, *supra* note 21, at 307; Nicolas Angelet, *Immunity and the Exercise of Jurisdiction: Indirect Impleading and Exequatur*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 86–87 (Tom Ruys, Nicolas Angelet and Luca Ferro, eds. 2019).

D.C. Circuit appears to have accepted in *Cimex*,[34] and as the ICJ has confirmed in *Jurisdictional Immunities of the State*,[35] the rules of immunity are procedural in nature. This means that immunity cannot be affected by the (alleged) illegality of the impugned act. If immunity were limited to lawful conduct, it would become entirely meaningless—not to mention unworkable—as the conduct would have to be assessed as lawful before being declared immune and thus not subject to assessment. This particular aspect is addressed in more detail in the next section.

B. Where Immunity is Applicable, it is a Procedural Bar to Jurisdiction and Does Not Affect Substantive Liability or the Existing Cause(s) of Action.

The existence of a cause of action under international or domestic law is not affected by the rules of state immunity. At the same time, the existence of such a cause of action cannot itself affect the rules of state immunity. The two sets of rules operate at different levels: the substantive and the procedural, respectively. They do not come into contact and therefore cannot be in conflict with one another.

International courts have confirmed, time and again, that where sovereign immunity applies, it

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[34] *Exxon Mobil Corp. v. Corp. Cimex, S.A.*, 111 F.4th 12, 23 (D.C. Cir. 2024). See further in Section B, below.

[35] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 122, ¶ 53, 124, ¶58 (Feb. 3).

operates as a procedural bar to the domestic court's exercise of jurisdiction, rather than as absolution from substantive liability. This distinction was articulated by the ICJ in the *Arrest Warrant* case, where the Court considered the immunity of a sitting Minister of Foreign Affairs in criminal proceedings. According to the Court:

> While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.[36]

The distinction was further explained in the *Jurisdictional Immunities* case, where the ICJ engaged with state immunity in civil proceedings:

> The rules of State immunity are *procedural in character* and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought *was lawful or unlawful*.[37]

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[36] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, 2002 I.C.J. 3, 25, ¶ 60 (Feb. 14).
[37] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 140, ¶93 (Feb. 3) (emphasis added).

In *Al-Adsani v. UK*, the European Court of Human Rights made an explicit distinction between the existence of a cause of action under domestic law and the applicability of immunity as a procedural bar to jurisdiction. It held, "[t]he grant of immunity is to be seen not as qualifying a substantive right but as a procedural bar on the national courts' power to determine the right."[38]

The impact of these rulings on the issue at hand can thus be conceptualized as follows: Whether a foreign state's expropriation of property, or trafficking in such property, is lawful or unlawful, either under international law or under the domestic law of the forum state, is without relevance on the issue of immunity. As such, the question of lawfulness or unlawfulness of the impugned act under any applicable law cannot affect the entitlement of the foreign state to immunity before the courts of the forum state.

Further, any cause of action created under the domestic law of the forum state does not conflict with the rules of immunity, so that resort may be had to legal rules that resolve that conflict, such as the *lex posterior* rule, the *lex specialis* rule, or the *lex superior* rule. Whether a cause of action exists under the law is a matter of substance; it cannot thus be in conflict with a procedural rule, like a rule of immunity, which

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[38] *Al-Adsani v. United Kingdom*, App. No. 35763/97, Eur. Ct. H. R., Grand Chamber, ¶ 48 (Nov. 21, 2001), https://hudoc.echr.coe.int/eng?i=001-59885.

debars jurisdiction but does not affect the underlying substantive rules. As such, there is no cause to resort to conflict resolution rules, when no conflict of norms exists. The rules of immunity are procedural in nature and simply preclude the exercise of jurisdiction by the courts of the forum, leaving the underlying conduct or the available cause of action untouched.

In *Cimex*, the D.C. Circuit adopted a similar analysis with respect to the relationship between the FSIA (as regards jurisdiction of courts of the forum state and the entitlement to immunity of foreign states) and Title III of the HBA (which creates a substantive cause of action).[39] In particular, the D.C. Circuit noted that while "Title III [of the HBA] speaks in terms of establishing 'liability' for persons (potentially including foreign states) who 'traffic[] in property which was confiscated by the Cuban Government,'" it says nothing "about the existence of jurisdiction over a foreign sovereign."[40] Referring further to Supreme Court precedent, the D.C. Circuit noted that "'whether there has been a waiver of sovereign immunity" and "whether the source of substantive law upon which the claimant relies provides an avenue of relief" are "two 'analytically distinct' inquiries.'"[41] This analysis of the Court of Appeals tracks the position under international law on immunity.

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[39] *Exxon Mobil Corp*., 111 F.4th at 23.
[40] *Id.* at 23.
[41] *Id.*

C. Foreign States are Presumptively Immune before Domestic Courts Except Where an Accepted Exception under Customary International Law Applies, or Where Immunity is Expressly Waived.

Once it is accepted that a foreign state, including via its agencies or instrumentalities, is either directly or indirectly impleaded in a domestic suit, as discussed in Section A above, the international obligations procedurally debarring the jurisdiction of the courts of the forum state "kick in." This means that the foreign state presumptively enjoys immunity from jurisdiction (and execution) unless certain conduct or transaction on its part falls within one of the accepted exceptions under customary international law. This principle is reflected in Article 5 of the UNCSI which outlines the enjoyment of immunity as the general principle that is then subject to exceptions,[42] while it also structurally underlies the FSIA, as this Court has consistently confirmed.[43] It may also be overcome where the foreign state expressly waives its jurisdictional immunity. The Court of Appeals in *Cimex*

[42] Article 5 of the UNCSI is the first provision in Part II of the Convention entitled "General Principles." See also the analysis in FOX & WEBB, *supra* note 21, at 304; Grant, *supra* note 22, at 103.

[43] *Republic of Hungary v. Simon*, 604 U.S. 115, 121 (2025); *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 176 (2021).

followed this approach,[44] which is in line with customary international law.

Starting from the accepted exceptions under customary international law, these reflect the restrictive doctrine of immunity, also codified in the UNCSI and the FSIA.[45] The most significant of these exceptions is that commercial transactions of the foreign state, or *acta jure gestionis* (non-sovereign acts) are not covered by immunity.[46]

It bears noting that, as this Court has also previously recognized,[47] the exception provided for under Section 1605(a)(3) of the FSIA, namely that foreign states are not immune in cases involving "rights in property taken in violation of international law" ("expropriation exception"), is not generally recognized under customary international law.[48] This is because acts of expropriation or nationalization of property or natural resources are generally considered as public

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[44] *Exxon Mobil Corp.*, 111 F.4th at 26 ("Because Exxon's Title III action is subject to the FSIA's 'baseline principle of immunity for foreign states and their instrumentalities,' the action must fit within one of the FSIA's 'exceptions to that principle.'").
[45] *Simon*, 604 U.S. at 121.
[46] UNCSI, *supra* note 18, art. 10(1); *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 124, ¶¶ 60–61 (Feb. 3).
[47] *Simon*, 604 U.S. at 122; *Philipp*, 592 U.S. at 183 ("[T]he exception is unique; no other country has adopted a comparable limitation on sovereign immunity.").
[48] As Fox and Webb observe, the FSIA is the only national legislation that recognizes an expropriation exception to immunity. FOX & WEBB, *supra* note 21, at 248.

acts of the state (*acta jure imperii*) in exercise of its sovereign authority.[49] Spanish courts have recently affirmed this in a case involving Cuba's immunity for acts of nationalization of real property.[50] However, for the purposes of the domestic legal system, Congress expressly provided for such an exception to immunity, in line with its constitutional power to do so.[51] Internationally, the application of such an exception may, as explained above, lead to either a violation of international law or to its modification, if other states start accepting such an exception as applicable.

On the other hand, and aside from the recognized exceptions under customary international law, immunity may be expressly waived by the foreign state. Article 7 UNCSI reflects this principle: "[a] State cannot invoke immunity from jurisdiction in a proceeding … with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case," as such consent can be given in a variety of ways, and in particular by "(a) international agreement; (b) in a written contract; or (c) by a declaration before the court or

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[49] FOX & WEBB, *supra* note 21, at 399–400; XIAODONG YANG, STATE IMMUNITY IN INTERNATIONAL LAW 298 (2012).

[50] *Central Santa Lucia LC v. Melia Hotels International SA and Others*, Jdo Primera Instancia N. 24 Palma de Mallorca, Auto 00036/2023 (27 January 2023) (Spain).

[51] Although, as this Court has accepted, even on this issue Congress did not intend to generate a "radical departure" from accepted principles of customary international law on immunity. *See Helmerich & Payne*, 581 U.S. at 181; *Philipp*, 592 U.S. at 183.

by a written communication ...."[52] It follows that unless a recognized exception applies or an express indication of consent on the part of the foreign state exists, state immunity persists and bars the jurisdiction of any domestic court in the case.

D. The Implications of Overriding Sovereign Immunity are Significant.

The preferred construction is to interpret Title III of the HBA harmoniously with the FSIA.[53] This follows not only from ordinary principles of statutory interpretation, but also from this Court's own *Charming Betsy* doctrine: "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[54]

Such a harmonious construction affirming the FSIA and the international rules of immunity may, in some instances, leave claimants without a domestic remedy. But the absence of redress—and irrespective of the merits of the underlying claim—is not in itself a legal basis for departing from immunity. The ICJ held in *Jurisdictional Immunities of the State* that there is "no basis in State practice" for "mak[ing] the

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[52] UNCSI, *supra* note 18, art. 10(1)(a)–(c).

[53] See the analysis by the Court of Appeals for the D.C. Circuit in *Exxon Mobil Corp*., 111 F.4th at 22-24, including: "Title III *harmoniously* coexists with the FSIA if it allows for actions against foreign sovereign entities who traffic in expropriated property in those circumstances in which the FSIA allows for jurisdiction over the foreign sovereign—i.e., when an FSIA exception applies." (emphasis added).

[54] *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress."[55] If the principle applied in that case, which concerned crimes committed by the Third Reich in Italy during the Second World War, then it applies equally to the issues at stake here.

The Court may also wish to bear in mind the external consequences of construing Title III of the HBA as implicitly displacing the FSIA. As the *Restatement (Fourth)* notes, "the FSIA and cases applying it may also contribute to the content, interpretation, and development of international law."[56] State immunity is sustained by mutual restraint, and judicial practice in major forum states can influence how immunity is understood and applied elsewhere. A decision perceived internationally as permitting a targeted withdrawal of immunity may be invoked as precedent by foreign litigants, courts, or legislatures when considering the immunities of the United States, its agencies and instrumentalities. This risk is further sharpened if the denial of immunity is understood abroad not as an application of the accepted exceptions to immunity under customary international law, but as a form of leverage and pressure. That is, a construction of the law that appears to endorse denial of immunity as

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[55] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 143, ¶ 101 (Feb. 3).

[56] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. c.

pressure may be particularly attractive to foreign actors seeking to justify reciprocal restrictions on the immunity of the United States.

The point is practical as well as doctrinal: the United States regularly relies on foreign domestic courts to uphold its immunity in matters as diverse as employment disputes connected to U.S. military bases and embassies abroad and litigation concerning deployment-related injuries.[57] In a field as sensitive and reciprocal as foreign sovereign immunity, the Court may therefore wish to require clear Congressional direction before adopting a construction that would displace the FSIA's immunity framework.[58]

This Court has consistently recognized that reciprocal effects matter for the United States. In *Bolivarian Republic of Venezuela v. Helmerich & Payne*, for instance, the Court made the point that lowering the threshold for the application of the expropriation exception of the FSIA could, amongst other consequences, also "cause friction with other nations,

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[57] *See, e.g.*, UK House of Lords: *Holland v. Lampen-Wolfe* [2000] UKHL 40; Supreme Court of the Northern Territory (Australia): *United States of America v. Williamson and Others* [2024] NTCA 6.

[58] As the Court has done in other instances potentially engendering international friction. *See, e.g.*, *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 327 (2016) ("[A]llowing recovery for foreign injuries in a civil RICO action creates a danger of international friction that militates against recognizing foreign-injury claims without clear direction from Congress.").

leading to reciprocal actions against this country."[59] There, the Court ascribed due weight to the U.S. Government's view that the proposed construction of the expropriation exception, "would "affron[t]" other nations, producing friction in our relations with those nations and leading some to reciprocate by granting their courts permission to embroil the United States "in 'expensive and difficult litigation, based on legally insufficient assertions that sovereign immunity should be vitiated.'"[60] This is because what the United States applies to other states in its courts, other states may then also apply to the United States, sometimes under statutory or doctrinal approaches that expressly contemplate reciprocity.[61]

The Court need not resolve questions of foreign policy to take this interpretative context into account. Where Congress intends to depart from the immunity afforded to foreign states under the FSIA and customary international law, it can do so expressly. Indeed, as noted above, there have been cases where Congress—as the democratically elected legislature—

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[59] *Helmerich & Payne*, 581 U.S. at 171-72. See also *Simon*, 604 U.S. at 132-33, where this Court accepted that "[t]here is further good reason for the Court not to read §1605(a)(3) so broadly as to permit a commingling theory alone: the United States' 'reciprocal self-interest' in receiving sovereign immunity in foreign courts" and to "avoid … 'retaliatory or reciprocal actions' in [foreign] courts." *See also Philipp*, 592 U.S. at 184-85.

[60] *Helmerich & Payne*, 581 U.S. at 183.

[61] As does, for example, Article 21 of China's Foreign State Immunity Law of 2023.

expressly decided to create exceptions to immunities that international law does not recognize.

Here, however, Congress has not spoken clearly. Thus, the Court ought to hesitate before adopting a construction that risks placing U.S. practice at odds with international immunity norms and the United States' self-interest abroad.

Finally, in this connection, the institutional caution advocated by the ICJ is instructive. In *Jurisdictional Immunities of the State*, the ICJ observed that "national courts … are unlikely to be well placed to determine when that point has been reached", that is, when the absence of alternative avenues of redress could justify further limitations on immunity.[62] In the case at hand, that might be more or less evident. But the Court may wish to consider how any departure from established immunity baselines could be deployed in the future in cases brought in foreign courts against the United States, its agencies and instrumentalities.

CONCLUSION

For the reasons stated in this brief, the decision of the Court of Appeals for the D.C. Circuit should be affirmed.

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[62] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. 99, 144, ¶ 102 (Feb. 3).

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