Nos. 24-699

IN THE
Supreme Court of the United States

EXXON MOBILE CORP.,
Petitioner,

v.

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

On Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

BRIEF OF *AMICI CURIAE* FOREIGN RELATIONS AND SEPARATION OF POWERS SCHOLARS IN SUPPORT OF AFFIRMANCE

Jennifer B. Condon
Counsel of Record
Joseph A. Bianco
CENTER FOR
SOCIAL JUSTICE
SETON HALL LAW SCHOOL
833 McCarter Highway
Newark, New Jersey 07102
Jenny-Brooke.Condon@shu.edu
(973) 642-8700

Counsel for Amici Curiae.

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INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are esteemed scholars of foreign relations law with particular expertise in separation of powers.[2]

Erwin Chemerinsky is the Dean of Berkeley Law and the Jesse H. Choper Distinguished Professor of Law. Prior to assuming this position, from 2008-2017, he was the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at University of California, Irvine School of Law. He is the author of nineteen books, including leading casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. He also is the author of more than 200 law review articles. In 2016, he was named a fellow of the American Academy of Arts and Sciences.

Martin S. Flaherty is the Charles and Marie Robertson Visiting Professor at the School of Public and International Affairs Princeton University and the Leitner Family Professor of Law and Founding Co-Director of the Leitner Center for International Law and Justice at Fordham Law School. He is the author of *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs*

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[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amic*i or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The academic affiliations of *amici curiae* are listed for identification purposes only.

(Princeton University Press 2019) and is a life member of the Council on Foreign Relations. Professor Flaherty is a former Chair of the Council on International Affairs and Committee on International Human Rights of the New York City Bar Association. Flaherty's publications focus upon constitutional law and history, foreign affairs, and international human rights and appear in leading law journals.

Eric M. Freedman is the Siggi B. Wilzig Distinguished Professor of Constitutional Rights, Maurice A. Deane School of Law at Hofstra University. Professor Freedman is an expert in constitutional law and history, whose work has emphasized separation of powers and remedies for Presidential misconduct. Professor Freedman is the author of *Habeas Corpus: Rethinking the Great Writ of Liberty* (2003) and *Making Habeas Work: A Legal History* (2018), both publications of New York University Press. Professor Freedman is a member of the American Law Institute and a fellow of the American Bar Foundation.

Jonathan Hafetz is a Professor of Law at Seton Hall University School of Law. He is an internationally recognized constitutional and human rights lawyer whose scholarship focuses on constitutional law, national security, international criminal law, and transnational justice. Professor Hafetz has authored numerous articles and books on constitutional and international law, including *Punishing Atrocities through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge Univ. Press 2018), and *Habeas Corpus after 9/11: Confronting*

America's New Global Detention System (NYU Press 2011). His scholarship has been cited by several courts, including the U.S. Supreme Court.

Aziz Z. Huq is the Frank and Bernice J. Greenberg Professor of Law and a scholar of U.S. and comparative constitutional law. His award-winning scholarship is published in several books and in leading law, social science, and political science journals. Before joining the Law School faculty, Professor Huq was counsel and then director of the Brennan Center's Liberty and National Security Project, litigating cases in both the U.S. Courts of Appeals and the Supreme Court. As a Senior Consultant Analyst for the International Crisis Group, he researched and wrote on constitutional design and implementation in Pakistan, Nepal, Afghanistan, and Sri Lanka.

Samuel Moyn is the Kent Professor of Law and History at Yale University, where he also serves as head of Grace Hopper College. Trained in modern European intellectual history, he works on political and legal thought in modern times and on constitutional and international law in historical and current perspective. His books addressing the history of international law and human rights include: "*The Last Utopia: Human Rights in History*" (Harvard University Press, 2010); "*Christian Human Rights*" (Penn Press, 2015), based on Mellon Distinguished Lectures at the University of Pennsylvania in fall 2014; "*Not Enough: Human Rights in an Unequal World*" (Harvard, 2018); and "*Humane: How the United States Abandoned Peace and Reinvented War*" (Farrar, Straus & Giroux, 2021).

Having studied and published extensively on constitutional and foreign relations law, including with respect to separation of powers, *Amici* have a strong interest in ensuring respect for Congress's decision in the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1330, 1602, *et seq.*, to make foreign sovereigns' immunity from judgments in U.S. courts depend upon legal determinations, rather than on the President's foreign policy judgments. They write specifically to address the erroneous contention by the United States as *Amicus Curiae* that the Cuban Liberty and Democratic Solidarity Act of 1996, Pub. L. No. 104-114, 110 Stat. 785 (codified at 22 U.S.C. § 6022 *et seq.*), known as the Helms Burton Act, reverts determinations of foreign sovereign immunity in cases arising under the statute to a pre-FSIA regime in which executive policy choices, not law, governed.

SUMMARY OF THE ARGUMENT

Before the Court is a novel and extraordinary claim to read into the Helms Burton Act a congressional intent to abrogate a 50-year-old, comprehensive legal framework governing foreign sovereign immunity. In support of that implied abrogation, the United States as *Amicus Curiae* advances the sweeping and erroneous argument that the Helms Burton Act eliminated the role of Congress and the courts in deciding matters of foreign sovereign immunity in Title III cases. Brief for the United States as *Amicus Curiae* ("U.S. Br.") 18. That misapprehension of the law must be rejected as an affront to separation of powers in an important foreign policy area.

For nearly half a century, Congress has directed courts to determine whether foreign sovereigns are immune from legal judgments in accordance with the comprehensive legal rules of FSIA. 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts ... in conformity with the principles set forth in this [Act]."). FSIA generally provides foreign sovereigns with immunity unless a court determines that a statutory exception applies. *See* 28 U.S.C. § 1604; 28 U.S.C. § 1605-1607. The statute replaced an earlier discretionary regime in which courts "deferred to the decisions of the political branches—in particular, those of the Executive Branch[.]" *See CC/Devas (Mauritius) Ltd.* v. *Antrix Corp. Ltd*, 605 U.S. 223, 228 (2025) (citation omitted). The "case-by-case determinations" produced during that prior era were "governed by fuzzy legal standards and prone to manipulation[.]" *Id.* at 229.

Two decades after FSIA's enactment, Congress passed the Helms Burton Act, creating a cause of action in Title III of the act against any person, including any foreign agency or instrumentality, which traffics in property confiscated by the Cuban government. 22 U.S.C. § 6082; 22 U.S.C. § 6023(11); *Id.* § (13)(A). The Helms Burton Act does not mention immunity or abrogating FSIA such that Title III suits would proceed only when a FSIA exception to immunity is established. *See* 22 U.S.C. § 6082; 28 U.S.C. § 1604; U.S.C. § 1605. Nevertheless, the United States contends that Congress's delegation in the act of limited authority to the President to suspend Title III cases where "necessary to the national interests" and to "expedite" a transition to Cuban democracy, 22

U.S.C. § 6085(c)(1)(B), (c)(2), means that the Executive Branch now exclusively determines the immunity of foreign sovereigns in Title III cases. There is simply no basis for inferring a Congressional intent to effect such an extraordinary realignment of the respective roles of the political branches and the courts in Title III cases.

First, Congress has clearly directed that immunity determinations are legal decisions made by courts pursuant to the comprehensive standards set by Congress and not *ad hoc* political judgments made by the President. Nothing in the Helms Burton Act indicates a Congressional intent to upend this stable and cohesive framework and thereby return to the discretionary, executive-driven regime that preceded FSIA's enactment 50 years ago.

Second, the Helms Burton Act's limited delegation to the President of authority to suspend Title III causes of action under specific standards set by Congress cannot be read as a decision to surrender foreign sovereign immunity decisions to the President where FSIA circumscribes the President's role in this area. Throughout the last two centuries, this Court has rejected sweeping claims that the Executive's foreign policy judgments automatically displace the other branches when foreign affairs are implicated. In the absence of an unambiguous decision by Congress to roll back the balance of powers struck in FSIA, the Court must do the same here and protect Congress's considered judgment in a sensitive foreign policy area that has governed for half a century.

ARGUMENT

I. CONGRESS HAS DIRECTED THAT DETERMINATIONS OF FOREIGN SOVEREIGN IMMUNITY ARE LEGAL QUESTIONS FOR THE COURTS AND NOT POLITICAL JUDGMENTS DECIDED BY THE EXECUTIVE.

For nearly fifty years, Congress has directed through FSIA that foreign sovereign immunity should be decided by law, not the *ad hoc* foreign policy judgments of the President. 28 U.S.C. § 1602. The Court's early foreign sovereign immunity jurisprudence looked to law—albeit international law—to make these immunity determinations. *See* Martin S. Flaherty*, Restoring the Global Judiciary* 77 (2019). During the nation's early history, the Court provided near absolute immunity consistent with international law norms of the 19th century. *Id.*

For example, in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), Chief Justice John Marshall found that after the French Navy captured an American merchant vessel and converted it to a warship, a lawsuit by the ship's original owner seeking its return could not go forward consistent with international law norms governing foreign sovereign immunity. *See* Flaherty*, supra* at 77 (2019)("[B]ecause the practice under the law of nations for domestic courts was not to grant suit against, among other things, foreign sovereigns…Marshall construed the relevant statutes as not granting jurisdiction."); *Verlinden B.V. v. Cent.*

Bank of Nigeria, 461 U.S. 480, 486 (1983) (collecting cases and noting that the case was later understood as conferring "virtually absolute immunity" to foreign sovereigns).

In the early 20th century, as global trade expanded and States began to participate in commercial activities, courts embraced a new "restrictive" approach to sovereign immunity guided in part by the Executive Branch's diplomatic judgments. *See, e.g.*, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574 (1926). During this period, courts deferred to the Attorney General and later the State Department as to whether a state engaged in commercial activities should receive immunity. *See, e.g.*, *Ex Parte Peru,* 318 U.S. 578, 588-89 (1943); *see also Dames & Moore v. Regan*, 453 U.S. 654, 684 (1981) (during this time "a foreign government's immunity to suit was determined by the Executive Branch on a case-by-case basis").

The State Department's announcement in 1952 that it would recommend immunity for foreign sovereigns' public acts, but not commercial activities, *see* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), 26 Dep't. State Bull. 984–85 (1952), led to a period of indeterminacy. The abandonment of an absolute rule in favor of case-by-case determinations "subject to a variety of factors, sometimes including diplomatic considerations" produced, in Justice Scalia's words, "bedlam." *Rep. of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014). "'Not surprisingly, the governing standards

were neither clear nor uniformly applied[.]'" *Id.* (quoting *Verlinden*, 461 U.S. at 487).

Congress ended this discretionary, patchwork regime in 1976 when it enacted FSIA, one of the primary purposes of which was to "withdraw from the President the authority to make binding determinations of the sovereign immunity to be accorded foreign states." *Dames & Moore*, 453 U.S. at 685. As to this goal, Congress was explicit. *See* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts…in conformity with the principles set forth in this [Act].").

The Court has repeatedly recognized that the "comprehensive" regime that followed under FSIA was intended to be exclusive and determinative. *NML Cap., Ltd.*, 573 U.S. at 141 (collecting cases). Unlike the "old executive-driven, factor-intensive, loosely common-law-based immunity regime," *id.* at 141, FSIA created a single, robust framework to decide foreign sovereigns' immunity. *See Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) ("'We think that the text and structure of the FSIA demonstrate Congress's intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.'") (quoting *Argentine Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)).[3]

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[3] Congress's choice to "transfer[] primary responsibility for immunity determinations from the Executive to the Judicial Branch," *Altmann*, 541 U.S. at 691, brought U.S. determinations of foreign immunity into conformity with the laws of virtually every other sovereign at that time. *See* H.R. 94-1487 at 7 ("As was brought out in the hearings on the bill, U.S. immunity (continued…)

Congress drew on several of its Article I powers in choosing to regulate questions of foreign sovereign immunity in this exclusive manner. This included its power to prescribe the jurisdiction of Federal courts, U.S. Const. art. I, § 8, cl. 9; to define offenses against the "Law of Nations," U.S. Const. art. I, § 8, cl. 10; to regulate commerce with foreign nations, U.S. Const. art. I, § 8, cl. 3; and to make all laws necessary and proper to execute the Government's powers, U.S. Const. art. I, § 8, cl. 18. *See* H.R. 94-1487 at 12 (1976) (citing these enumerated powers in enacting FSIA).

Given this "history of congressional participation and regulation[,]" *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J. concurring in part), *Youngstown* category three of "Justice Jackson's familiar tripartite scheme provides the accepted framework for evaluating executive action in this area." *Medellín v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.")). Applying this framework, the Court has distinguished matters over which Congress is silent or has signaled acquiescence from matters over which Congress has "resisted the exercise of Presidential authority." *Dames & Moore*, 453 U.S. at 688. Federal courts' jurisdiction to decide questions of foreign sovereign immunity is clearly such an area

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practice would conform to the practice in virtually every other country—where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.").

where FSIA "withdr[ew] from the President the authority" to make foreign sovereign immunity determinations. *Id.* at 685. Accordingly, after FSIA, the President's powers with respect to foreign affairs do not supersede or remove Congress and the courts from determinations of foreign sovereign immunity. *See Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

Having given no indication in the Helms Burton Act that Congress intended to upend FSIA's allocation of power that has governed these questions for 50 years, the Court must reject the arguments of Petitioner and the United States that the President's foreign policy judgments should be elevated above FSIA. *See* Pet. for Cert. at 29 ("The court below wrongly inserted itself into an important dialogue between the political branches over foreign affairs."); U.S. Br. 18 (contending that compliance with FSIA "would under-cut the President's foreign-policy judgments"). As to questions of foreign sovereign immunity, FSIA limits the President's authority. *See Youngtown*, 343 U.S. at 637; *see also Hamdan*, 548 U.S. at 594-95 ("nothing in the text or legislative history" of the relevant statutes suggested a Congressional intent to expand or alter existing law to authorize military commissions in the manner pursued by the President) (citing *Ex parte Yerger*, 8 Wall. 85, 105 (1869) ("Repeals by implication are not favored")). In the absence of some "specific Congressional authorization" to the contrary, *Hamdan*, 548 U.S. at 595, FSIA's comprehensive standards as applied and interpreted by the courts, govern foreign sovereign immunity determinations.

II. THE LIMITED DELEGATION OF AUTHORITY TO THE PRESIDENT TO SUSPEND TITLE III CAUSES OF ACTION PURSUANT TO STANDARDS SET BY CONGRESS DID NOT SURRENDER FOREIGN SOVEREIGN IMMUNITY DECISIONS TO THE EXECUTIVE.

Nothing in the Helms Burton Act turns back the clock to the *ad hoc*, deferential, and policy-driven approach to foreign sovereign immunity that ended 50 years ago with passage of FSIA, including Congress's delegation of limited authority to the President to suspend Title III cases. 22 U.S.C. § 6085(c)(1)(B), (c)(2). The Court should reject the United States' argument that this provision reset foreign sovereign immunity law to that prior deferential period. U.S. Br. 18 (citing the President's Title III suspension authority and arguing that the "availability of suits depends on presidential foreign-policy judgments" and "resembles the pre-FSIA regime").

Again, because foreign sovereign immunity is "a field with a history of congressional participation and regulation[,]" *Hamdan*, 548 U.S. at 638 (Kennedy, J., concurring), the Court must consider the limits imposed by FSIA when construing the President's Article III suspension powers. *Id.* at 638-39 (citing statutory limits in the Uniform Code of Military Justice and concluding that the President's power to establish military commissions fell "within Justice Jackson's third category").

Congress's delegation of specific authority to the President in 22 U.S.C. § 6085(c)(1)(B), (c)(2)

provides a limited executive role in Title III cases. Not only did Congress not mention abrogating FSIA, Congress made clear that the President's suspension powers were cabined to pausing Title III cases only when the standards set by Congress are met. That is, the President must determine that stopping such lawsuits is "necessary to the national interests" and will "expedite" transitions to Cuban democracy, 22 U.S.C. § 6085(c)(1)(B), (c)(2). Those provisions address the factual conditions that Congress determined could justifiably prevent Title III litigation from proceeding, not the substantive criteria for declaring foreign sovereigns immune from legal judgments—a question of a different order already addressed by FSIA. *See* 28 U.S.C. §§ 1604, 1605-1607.

This analysis accords with *Dames & Moore v. Regan,* 453 U.S. at 684-85, where the Court, following the *Youngstown* framework, considered Congress's regulation of foreign sovereign immunity in FSIA and whether the President possessed a separate power to settle claims of U.S. litigants against foreign governments through executive agreements. The Court held that Congress had acquiesced in the President's settlement power which coexisted with FSIA's conferral of "personal and subject-matter jurisdiction in the federal district courts" over claims against foreign sovereigns. *Id.* at 684 (citing 28 U.S.C. § 1330). The Court reasoned that the President's authority was only a power "to 'suspend' the claims, not divest the federal court of 'jurisdiction'" under FSIA. *See id.* at 684-85.

Indeed, the Court has declined to view the conferral of specific and limited executive powers like those in the Helms Burton Act as surrenders of Congress's constitutional authority over lawmaking. *See Medellín*, 552 U.S. at 530 (executive "authority expressly conferred by Congress" to represent the United States internationally did not authorize the President "to establish on his own federal law") (citing *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). And in other contexts, "both separation of powers principles and a practical understanding of legislative intent" warrants the Court's reluctance "to read into ambiguous statutory text the delegation claimed to be lurking there." *West Virginia v. Env't Prot. Agency*, 597 U.S. 697, 723 (2022) (internal quotation omitted) (noting that typically Congress does not "use oblique or elliptical language…to make a 'radical or fundamental change' to a statutory scheme") (quoting *MCI Telecomm. Corp. v. Am. Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)).

To similarly preserve separation of powers here, the Court must reject the claim that the limited delegation of authority to the President in the Helms Burton Act eliminated the role of Congress and the courts in deciding matters of foreign sovereign immunity in Title III cases. *See* U.S. Br. 18. Reading such a radical and fundamental change to FSIA's comprehensive scheme for determining foreign sovereign immunity into the limited suspension powers conferred by the Helms Burton Act would subvert the separation of powers that is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

The foreign policy consequences of sovereign immunity decisions and of litigation under the Helms Burton Act do not change this analysis. The Framers explicitly rejected a political system that vests "plenary control over external affairs in the executive"—a choice and understanding "basic to America's system of checks and balances." Louis Fisher, *The Law of the Executive Branch: Presidential Power* 261 (2014). Indeed, arguments associating "all of 'foreign policy' with the President" disregard the intent of the Framers and ignore the Constitution's text. *Id.*

The Court has therefore consistently rejected the notion that the executive has unbounded authority in matters of foreign affairs that displaces the exercise of constitutional powers by the other branches. Flaherty, *supra* at 77-82, 87-90. From the nation's beginning, the Court showed no hesitancy in enforcing "restrictions against the executive" in the foreign affairs context "regardless of whether the constraints derived from the Constitution, statutes, treaties, or the customary law of nations…[and] regardless of the executive's assessment of the foreign affairs consequences." *Id.* at 77-82.

For example, in *Little v. Barreme*, Justice Marshall writing for a unanimous Court, determined that the President's military instructions to American naval captains during the 1790s undeclared war with France went beyond Congress's authorization. 6 U.S. (2 Cranch) 170 (1804). Justice Marshall, having written in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) just one year before that the political branches have unreviewable authority over matters committed

to their exclusive discretion, adjudicated the legal issues in the case notwithstanding the foreign policy context. *Little*, 6 U.S. (2 Cranch), at 178-79. The Court deemed Captain Little's seizure unlawful and ordered him to pay damages, even though he was only following the President's orders. *See id.*

In the modern era, the Court has continued to reject the notion that the President's powers over foreign affairs diminish Congress's role over proper subjects within its legislative powers. *See Medellín*, 552 U.S. at 530; *Hamdan*, 548 U.S. at 594-95. Accordingly, when Congress legislates pursuant to its constitutional authority—even in matters touching foreign relations—the President must "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. The President may not disregard the law in the name of the Executive's foreign-affairs powers. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

For this reason, too, the limited grant of authority in 22 U.S.C. § 6085(c)(1)(B), (c)(2) to the President to suspend litigation does not empower the Executive to disregard FSIA. That limited suspension power does not mean that the President now exclusively determines the immunity of foreign sovereigns in Title III cases.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Jennifer B. Condon
Counsel of Record
Joseph A. Bianco
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, New Jersey 07102
Jenny-Brooke.Condon@shu.edu
(973) 642-8700

Counsel for Amici Curiae

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