No. 127, Orig. (A-736)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG, Ambassador of the Federal Republic of Germany to the United States; and WOLFGANG RUDOLPH, Consul General of the Federal Republic of Germany to the United States,

Plaintiffs,

— v. —

UNITED STATES OF AMERICA and JANE DEE HULL, Governor of the State of Arizona,

Defendants.

ORIGINAL ACTION

PLAINTIFFS' REPLY TO THE UNITED STATES

Peter Heidenberger
(Counsel of Record)
Thomas G. Corcoran, Jr.
BERLINER, CORCORAN & ROWE
1101 17th Street N.W.
Washington D.C. 20036
202-293-5555

Donald Francis Donovan
Michael M. Ostrove
Daniel C. Malone
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
212-909-6000

Counsel for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog, and Consul General Wolfgang Rudolph

Dated: March 3, 1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 127, Orig. (A-736)

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG, Ambassador of the Federal Republic of Germany to the United States; and WOLFGANG RUDOLPH, Consul General of the Federal Republic of Germany to the United States,

Plaintiffs,

— v. —

UNITED STATES OF AMERICA and JANE DEE HULL, Governor of the State of Arizona,

Defendants.

ORIGINAL ACTION

PLAINTIFFS' REPLY TO THE UNITED STATES

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district encompassing the State of Arizona (collectively, "Germany"), respectfully submit this reply to the Solicitor General's letter response dated this date.

The United States offers four reasons why this Court should not grant Germany leave to file. Far from providing reasons why this Court should not grant leave, the considerations raised by the United

States reinforce the need for this Court to allow itself time for due consideration of the issues raised by Germany's motion.

First, the United States offers its view that the Vienna Convention on Consular Relations does not afford a cause of action to a foreign state for vacatur of a criminal conviction for failure to comply with the notification obligations imposed by the Convention. The United States' position is carefully limited on this point: as it made clear in its submission in *Breard v. Greene*, 118 S. Ct. 1352 (1998), the United States does not necessarily believe that a foreign state would be barred from bringing an action for "an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention." Brief for the United States as Amicus Curiae at 15, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767) and No. 125, Orig. (A-771)). Even that circumscribed view is directly inconsistent with the principle of state responsibility under international law that a state that violates an international obligation must restore the situation that would have existed but for the violation. *See, e.g., Chorzów Factory (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13). But even on the United States' view, the scope of a foreign state's cause of action under the Convention requires careful parsing of the instrument. Surely, the International Court of Justice is well-equipped to perform that task. But insofar as this Court determines to consider the question, it should not do so without full briefing and full consideration.

Second, the United States suggests, though it does not state definitively, that this case may not fall within the "core," or even any part, of the constitutional head of jurisdiction covering "all Cases affecting Ambassadors, other Public Ministers and Consuls." U.S. Constitution, art. III, sec. 2. To the contrary, the plain terms of the constitutional provisions would encompass a case arising from a violation of the Vienna Convention on Consular Relations and involving the scope of a consul's right to notification and access under

that Convention. But again, the issue, at a minimum, deserves this Court's careful consideration after full briefing.

Third, the United States suggests that an order of provisional measures issued by the International Court of Justice is not binding. Though scholars have debated the question, there is, at a minimum, abundant authority in support of the view that such an order does bind the parties in the case before the Court — a view that is also supported by every consideration of the judicial function.

> The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgement of the Court.

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* 548 (1986) (footnote omitted).

Moreover, there is little or no disagreement that, as a general principle of law, a party before an international tribunal has an obligation to take no steps that will interfere with the tribunal's capacity to decide the dispute in accordance with law. The Permanent Court of International Justice held that there is a

> principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.

Electric Company of Sofia and Bulgaria, 1939 P.C.I.J. (Judgment), Ser. A/B, No. 77, p. 199. This Court, as a court of justice, is particularly well-suited both to appreciate and to vindicate that

principle, which is as essential to a court's ability to function as it is to a regime of law.

The Court should therefore enter the stay or injunction requested as a matter of its equitable discretion regardless whether an order of provisional measures under Article 41 of the ICJ Statute is binding. Again, however, to the extent that question is relevant, the Court should decide it only after full briefing and full consideration.

Finally, the United States suggests that this Court held in *Breard* that the Eleventh Amendment barred a suit such as this one. The Court rendered no such holding. As an initial matter, the Court's order in Paraguay's case came on a discretionary motion, and therefore does not constitute binding precedent. In any event, in denying Paraguay leave to file, the Court said only that the Eleventh Amendment "might" pose a bar, and even that observation was premised on the Court's view of the facts of that case — specifically, that the violation could have had no consequence. 118 S. Ct. at 1356. Indeed, in proceedings in the Court of Appeals in *Paraguay v. Allen*, the United States both (a) expressly declined to endorse the lower courts' holding that the Eleventh Amendment barred a suit such as Paraguay's, and (b) suggested that the Eleventh Amendment might not apply to a suit by a sovereign under an international obligation of the United States, because as to such an obligation the individual states of the United States had had no sovereignty to cede. Brief for Amicus Curiae United States, *Republic of Paraguay v. Allen*, No. 96-2770 (4th Cir.) (April 1997). (We attach the relevant pages of that brief.)

As a matter of international law, this Court engages the United States' international responsibility as fully as does the executive branch of the federal government or any government of one of the federated states. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility). Given the United States' support for

the rule of law worldwide, and the influence of this Court in both the domestic and international legal orders, it would be hard to overemphasize the importance that attaches to this Court's willingness to respect — whether as a matter of binding legal obligation or court-to-court comity — a unanimous decision of the International Court of Justice. That the case may raise difficult questions only reinforces the importance of the United States' compliance with — and this Court's demonstration of respect for — the ICJ's order.

Germany again respectfully requests that the Court grant (a) its motion for leave to file an original bill of complaint and accompanying motion for provisional relief, or (b) in the alternative, grant a stay of or injunction against the execution of Germany's national pending the Court's full consideration of and due deliberation on Germany's submissions.

Dated: March 3, 1999

Respectfully submitted,

/s/

Donald Francis Donovan
Michael M. Ostrove
Daniel C. Malone
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
212-909-6000

Peter Heidenberger
(Counsel of Record)
Thomas G. Corcoran, Jr.
BERLINER, CORCORAN & ROWE
1101 17th Street N.W.
Washington D.C. 20036
202-293-5555

Counsel for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog, and Consul General Wolfgang Rudolph

CERTIFICATE OF SERVICE

I, Peter Heidenberger, Counsel of Record for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog and Consul General Wolfgang Rudolph, hereby certify under penalty of perjury that on March 3, 1999, I caused a copy of Plaintiffs' Reply to the United States to be sent by telecopy and served by first-class mail of the United States Postal Service upon, and on March 24, 1999 served in booklet form by first-class mail of the United States Postal Service upon:

The Honorable Jane Dee Hull
Governor of the State of Arizona
1700 West Washington Street
Phoenix, Arizona 85007
tel. 602-542-4331

The Honorable Janet Napolitano
Attorney General of the State of Arizona
1275 West Washington Street
Phoenix, Arizona 85007
tel. 602-542-4686

Seth P. Waxman
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530-0001
tel. 202-514-2217

Dated: March 24, 1999
Washington, D.C.

/s/
Peter Heidenberger

ATTACHMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 96-2770

THE REPUBLIC OF PARAGUAY, *et al.*,

Plaintiffs/Appellants,

v.

GEORGE F. ALLEN, Governor of the Commonwealth of Virginia, *et al.*,

Defendants/Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR *AMICUS CURIAE* UNITED STATES

INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29, the United States files this brief as *amicus curiae* supporting the judgment of dismissal in this case.

In doing so, we emphasize at the outset of this brief that the United States firmly believes in and supports consistent adherence to the consular notification provisions in Article 36 of the Vienna Convention on Consular Relations (hereafter "the Vienna Convention"), which are the subject of this appeal. These provisions are very important to the United States because they give significant protection to U.S. nationals when they reside or travel abroad.

In addition, the United States Government places high importance on federal, state, and local law enforcement officials in the United States abiding by the requirements of Article 36.

Here to, if any injury has been suffered, it is by Paraguay because its official representative did not get timely notice of Breard's detention. Dos Santos has suffered no injury as a person, and Section 1983 accordingly has no relevance.

Moreover, it is doubtful that Consul Dos Santos, in his official capacity, is "within the jurisdiction of the United States" within the meaning of Section 1983. As a consular officer assigned to the Paraguayan Consulate General in New York, he has functional immunities that extend to the rights he is seeking to assert here in his official capacity.

C. The Judgment Should Be Affirmed On The Foregoing Grounds, Without Reaching The Eleventh Amendment Issues Addressed By The District Court.

The district court dismissed this case on Eleventh Amendment grounds, finding that the immunity of Virginia cannot be overcome here. However, the Eleventh Amendment constitutional issues posed are quite complex, and can be avoided completely since Supreme Court precedent shows so clearly that Paraguay's case is not cognizable, and a cause of action is not available under Section 1983.

The judgment of dismissal can be affirmed on any ground with support in the record, even if it was rejected by the district court. See *Granfinanciera, v. Nordberg*, 492 U.S. 33, 38-39 (1989). In this instance, the judgment should be affirmed on the alternative grounds we have urged.

The Supreme Court has instructed that the appellate courts can avoid complicated jurisdictional issues when the law otherwise clearly requires dismissal. See, *e.g.*, *Norton* v. *Mathews*, 427 U.S. 524, 528-32 (1976). This principle has recently been applied to avoid ruling on the Eleventh Amendment specifically. See *Smith* v. *Avino*, 91 F.3d 105, 108 (11th Cir.

1996) (bypassing difficult Eleventh Amendment issue because judgment for the party raising the jurisdictional issue could be affirmed on easier merits ground).

As the district court here recognized, the Eleventh Amendment bars a suit by a foreign nation against a state stemming from a commercial dispute. See *Monaco* v. *Mississippi*, 292 U.S. at 330-32. And the Supreme Court ruled recently in *Seminole Tribe* v. *Florida*, 116 S. Ct. 1114 (1996), that Congress cannot under the Indian Commerce Clause override a state's Eleventh Amendment immunity from suit. Those decisions do not address the question whether the federal government can, by statute or through a duly ratified treaty adopted under the foreign affairs power, authorize a foreign government to sue a state in order to enforce its consular notification rights under a treaty of the United States.[11] As noted earlier, the Supreme Court has stated: "In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the State of New York does not exist." *United States* v. *Pink*, 315 U.S. 203, 234 (1942) (quoting *United States* v. *Belmont*, 301 U.S. 324, 331 (1937)). See also *Monaco*, 292 U.S. at 331-32. The Court might also need to consider Justice Sutherland's discussion in *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-18 (1936), that the foreign relations power of the federal government predates the Constitution itself and does not stem from the agreement of the states to cede certain enumerated powers to a central government.[12]

---

[11] *Cf. Diaz-Gandia* v. *Dapena-Thompson*, 90 F.3d 609, 616 (1st Cir. 1996) (Eleventh Amendment analysis in *Seminole Tribe* does not control question of Congress' ability to waive state's immunity under the War Powers).

[12] *Cf. Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opin., Black, J.) ("The Court was concerned with the Tenth Amendment which reserves to the States or the people all power not (continued...)

There is no need to consider here whether a treaty or statute could override a State's immunity from suit if the Eleventh Amendment applies in a situation such as this because appellants have pointed to no treaty or statute that purports to do so. The question that would be presented, then, is whether the Eleventh Amendment does apply in this case in the first place. *That* difficult question can be avoided if the judgment below is affirmed as the grounds set forth above.

Moreover, the district court concluded that Paraguay has not raised a proper claim against Virginia officials under the *Ex Parte Young* doctrine, which allows suits for continuing violations of federal law despite the Eleventh Amendment. Although the United States takes no position here on that issue, we note that Paraguay's opening appellate brief has raised questions about this conclusion in light of precedent from both the Supreme Court and this Court. Once again, these questions regarding application of the *Ex Parte Young* doctrine can be avoided completely through resort to the non-justiciability points we have made.

---

[12](...continued)
delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier" (footnote omitted)).