No. 20-3499

In the United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

REZA ZARRAB, AKA RIZA SARRAF, CAMELIA JAMSHIDY, AKA KAMELIA JAMSHIDY, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, AKA CAN SARRAF, AKA KARTALMSD, MEHMET HAKAN ATILLA, MEHMET ZAFER CAGLAYAN, ABI, SULEYMAN ASLAN, LEVENT BALKAN, AND ABDULLAH HAPPANI,
Defendants,

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York
No. 1:15-cr-867-10, Hon. Richard M. Berman

BRIEF FOR *AMICI CURIAE*
INGRID (WUERTH) BRUNK AND WILLIAM S. DODGE
IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors of international law and foreign relations law who have written extensively about the respective roles of the judicial and executive branches in determining questions of immunity.

Professor Ingrid (Wuerth) Brunk is the Helen Strong Curry Chair in International Law and Director of the Cecil D. Branstetter Litigation & Dispute Resolution Program at Vanderbilt Law School. She served as Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States* from 2012 to 2018 and is Co-Editor-in-Chief of the *American Journal of International Law*.

Professor William S. Dodge is the Martin Luther King, Jr. Professor of Law and the John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. He served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and as Co-Reporter for the American Law Institute's *Restatement (Fourth) of the Foreign Relations Law of the United States* from 2012 to 2018.

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[1] All parties have consented to the filing of this brief. *Amici* certify that no counsel for a party authored this brief in whole or in part, that no party or party's counsel contributed money intended to fund the preparation or submission of the brief, and that no person other than *amici* or their counsel contributed money intended to fund the preparation or submission of the brief.

Amici's scholarship addresses an important question in this case: If a federal court must decide whether a litigant is entitled to foreign sovereign immunity, and the Foreign Sovereign Immunities Act ("FSIA") does not apply, is the court bound by the executive branch's determination of whether immunity applies? *Amici* have analyzed that issue at length in their published work and concluded that the answer is no. *See* Ingrid (Wuerth) Brunk, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915 (2011); William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 Fordham L. Rev. 677 (2021). Where the FSIA does not prescribe a statutory rule, sovereign immunity is properly governed by the common law, and the common law empowers federal courts, not the executive, to determine whether immunity is available.

Amici submit this brief to ensure that the Court has a full understanding of the issue of executive control over immunity. While the government often frames its arguments in terms of "deference," that is an inaccurate term. The government seeks the power to dictate the general rules of common law immunity and to exercise absolute control over the application of those rules to particular cases. That is not "deference." That is lawmaking.

Neither the Constitution nor any act of Congress grants such domestic lawmaking power to the executive. And, as the Supreme Court has emphasized,

"the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Medellín v. Texas*, 552 U.S. 491, 526-27 (2008). The executive undoubtedly has a role to play in immunity determinations. In particular, courts should give substantial deference to the executive's views on the content of customary international law, just as they do on the interpretation of treaties. But in our constitutional system, the Department of Justice is not the final arbiter on questions of common law immunity.

SUMMARY OF ARGUMENT

Halkbank, an entity owned and controlled by the Republic of Türkiye, was indicted in federal court for violations of federal criminal law. It claimed foreign sovereign immunity under the FSIA and the common law. The Supreme Court rejected Halkbank's FSIA argument and remanded for a new consideration of common law immunity.

In *amici*'s view, Halkbank's entitlement to common law immunity should be resolved by the federal judiciary, not controlled solely by the executive branch. That result is supported by the Constitution's system of separation of powers, Supreme Court precedent, historical practice in federal courts, and functional considerations, especially considering Congress's adoption of the FSIA.

When this case was before this Court for the first time, most of the opinion addressed statutory immunity under the Foreign Sovereign Immunities Act.

Opinion at 12-26 (ECF No. 95-1). At the end, in one sentence, the Court reasoned that, "at common law, sovereign immunity determinations were the prerogative of the Executive Branch." *Id.* at 26.

Although the Supreme Court could have affirmed this Court's holding on common law immunity, it declined to do so. Instead, it remanded that question for fresh consideration. The Supreme Court's decision not to follow this Court's reasoning and not to rule for the government based on a theory of executive control should prompt a new and comprehensive examination of the issue by this Court.

The executive control argument advanced by the government would give the government unfettered authority to determine the outcome of specific cases and even to create binding rules of decision that courts must apply when the executive stays silent. The Constitution does not give the executive power to make or apply the federal common law of foreign sovereign immunity in that manner. The President's power to recognize other nations does not include the power to make domestic law that flows from such recognition. Similarly, the President's power to settle claims through international agreements does not permit the executive to render binding immunity determinations.

As the Supreme Court has repeatedly held, "our Constitution does not contemplate vesting [lawmaking] power in the Executive alone." *Medellín*, 552 U.S. at 527. For nearly all the Republic's 250-year history — except for a brief

period from the late 1930s to 1976 — federal courts did not afford complete deference to the executive's immunity determinations. Finally, federal courts are better positioned as a practical matter than the executive to decide case-by-case common law immunity claims. The executive's views on the content of customary international law are entitled to deference, but it is the responsibility of federal courts to make and apply federal common law on sovereign immunity.

ARGUMENT

When the FSIA does not apply, the "common law" of foreign sovereign immunity governs. *Turkiye Halk Bankasi A.S. v. United States*, 143 S. Ct. 940, 951-52 (2023) ("*Halkbank*"); *Samantar v. Yousuf*, 560 U.S. 305, 325 (2010). As the Supreme Court's use of the phrase "common law" signals, it is the judiciary, not the executive branch, that develops and applies that body of law.

To be sure, courts are constrained by acts of Congress and should afford varying levels of deference to the executive on specific issues. *See* (Wuerth) Brunk, *supra*, at 968-75 (describing congressional constraints and appropriate areas of deference to the executive); Dodge & Keitner, *supra*, at 709-17 (discussing the role of the executive branch). Courts must follow applicable statutes, relevant international law, and — for certain discrete issues — the views of the executive. But the authority to develop, within these confines, the common law of immunity and to apply it to particular cases is fundamentally judicial. That

conclusion is dictated by separation-of-powers principles inherent in the Constitution's structure, the historical development and past practice of federal courts applying foreign sovereign immunity, and functional considerations.

I. FEDERAL COURTS, NOT THE EXECUTIVE, HAVE THE CONSTITUTIONAL AUTHORITY TO MAKE COMMON LAW IMMUNITY DETERMINATIONS

A. The Executive Lacks Power over Common Law Immunity

An analysis of federal power should begin with the text of the Constitution. Although the Constitution does not explicitly refer to immunity, it does grant to Congress the power "[t]o regulate Commerce with foreign Nations." U.S. Const. art. I, §§ 1, 8. The Supreme Court has held that this legislative authority gives Congress the power to decide "whether and under what circumstances foreign nations should be amenable to suit in the United States." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Congress exercised that authority when it adopted the FSIA. That statute, however, does not apply in criminal proceedings, *Halkbank*, 143 S. Ct. at 944, or to foreign officials, *Samantar*, 560 U.S. at 325. Instead, common law rules govern.

The federal judiciary — not the executive branch — develops the common law of foreign sovereign immunity and applies it in specific cases. While it is axiomatic that "[f]ederal courts, unlike state courts, are not general common-law courts," they are still empowered to develop federal common law "in a 'few and restricted' instances." *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981)

(citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). A traditional enclave of federal common law covers specific "relationships with other countries." *Atherton v. FDIC*, 519 U.S. 213, 226 (1997) (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964)); *see also Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (holding that "federal common law exists only in such narrow areas as those concerned with [for example] our relations with foreign nations"). The common law of foreign sovereign immunity fits comfortably within that category. The Supreme Court said as much in *Samantar* when it reasoned that, even if the FSIA does not apply, immunity may still be available "under the common law." 560 U.S. at 324; *see also Halkbank*, 143 S. Ct. at 951.

The executive, by contrast, lacks authority to develop and apply federal common law, including the common law of immunity, for at least three reasons.

First, the executive's power to faithfully execute the law "refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *see also Medellín*, 552 U.S. at 527-28 ("[U]nder our constitutional system of checks and balances, '[t]he magistrate in whom the whole executive power resides cannot of himself make a law.'" (quoting *The Federalist No. 47*, at 326 (J. Cooke ed. 1961) (James Madison))). *Medellín* emphasizes the point. In that case, the President issued a memorandum purporting to enforce

Article 94 of the United Nations Charter by ordering state courts to reopen criminal sentences. 552 U.S. at 525. The Court rejected the executive's attempt "unilaterally to give the effect of domestic law to obligations under a non-self-executing treaty." *Id.* at 528. "[M]aking law," held the Court, "requires joint action by the Executive and Legislative Branches." *Id.* at 527. Applying that clear principle to this case, the executive is not constitutionally empowered to make the law of foreign sovereign immunity on its own.

Second, the executive should not have the authority to intervene in specific cases to decide who gets immunity and who does not — in short, to decide cases. "Article III of the Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 578 U.S. 212, 225 (2016) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Neither Congress nor the executive may "usurp a court's power to interpret and apply the law to the [circumstances] before it." *Id.*; *see also Stern v. Marshall*, 564 U.S. 462, 483 (2011) (holding that "the judicial Power of the United States" cannot "be shared" with another branch).

Given this constitutional division of powers, the Constitution commits "resolution of 'the mundane as well as the glamorous, ***matters of common law*** and statute as well as constitutional law, issues of fact as well as issues of law' — to

the Judiciary." *Stern*, 564 U.S. at 484 (quoting *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 86 n.39 (1982) (Rehnquist, J., concurring in judgment)) (emphasis added). The power to apply the federal common law to particular cases rests with the judiciary, not the executive.

The executive has historically acknowledged this proper division of powers. With respect to foreign sovereign immunity determinations, the executive's position in its 1952 Tate Letter was that "a shift in policy by the executive cannot control the courts." *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 714 (1976) (appendix 2 to opinion of the Court reproducing letter from Acting Legal Adviser Jack B. Tate). The same principle should govern this case.

Third, the Supreme Court already rejected the executive's claim that it should control judicial application of federal common law in foreign relations cases. In *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., International*, 493 U.S. 400 (1990), the executive made the same argument with respect to the act of state doctrine that it advances for common law immunity here: that the Court should resolve the case by deferring wholly to the executive's views. *Id.* at 408. The Supreme Court unanimously rejected the executive's position, holding that "[t]he short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to

them." *Id.* at 409. This Court should apply that reasoning to common law immunity as well.

Indeed, the case against executive power is even stronger for foreign sovereign immunity than it is for the act of state doctrine. Immunity is a procedural and jurisdictional doctrine, whereas the act of state doctrine provides foreign states with a substantive defense. *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). Common law rules governing procedural and jurisdictional issues are often left to federal courts to develop when Congress has not spoken. *See, e.g.*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981) (developing federal common law of forum non conveniens).

Federal common law should be developed by federal courts, just as it is in other contexts that involve litigation against foreign sovereigns and their instrumentalities. For example, the Supreme Court has held that federal common law governs discrete issues of substantive liability in cases against foreign sovereigns. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611 (1983) ("*Bancec*"), the Court recognized that the FSIA does not address whether a state may be held substantively liable for the actions of its instrumentalities or vice versa, and so created a federal common law rule that respected the distinct legal status of separate juridical entities. *Id.* at 623. The *Bancec* test is drawn from U.S. and international practice and is designed to fill

important gaps left open by the FSIA. *Id.*; *see also Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 932 F.3d 126, 139 (3d Cir. 2019) (describing *Bancec* doctrine as "a federal common-law outgrowth of [the FSIA]").

For those reasons, the Court should reject the argument that the executive alone has the power to decide issues of federal common law with respect to foreign sovereign immunity.

B. The Recognition Power, the Claim Settlement Power, and the Vesting Clause Do Not Give the Executive the Power To Make Binding Immunity Determinations

The United States argued previously in this case that its "authority to make [immunity] determinations flows from its responsibility for conducting the Nation's foreign relations." ECF No. 63 at 48. This sweeping assertion comports with neither the Constitution's text nor the Nation's history. The Constitution provides the executive with significant powers related to foreign policy, but confers no general plenary "foreign relations" power. And none of the President's discrete powers gives him authority to make immunity determinations that bind courts.

The Reception Clause — which directs that the President "shall receive Ambassadors and other public ministers," U.S. Const. art. II, §3 — does not authorize the executive to make domestic law or decide specific cases. In *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1 (2015), the Supreme Court found

that the Reception Clause (among other things) supported "a logical and proper inference" that the executive also has the sole "power to recognize other nations." *Id.* at 12. But determining whether another nation should be recognized is not the same as determining the legal consequences that may flow from recognition. *See Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938) (noting that the executive's "action in recognizing a foreign government . . . is conclusive on all domestic courts, . . . although they are free to draw for themselves its legal consequences in litigations pending before them"). Even under the FSIA, recognition or non-recognition by the President does not automatically determine whether an entity is entitled to immunity. *See Restatement (Fourth) of the Foreign Relations Law of the United States* § 452, reporters' note 1 (2018). Instead, courts examine independently whether an entity qualifies as a "foreign state." *See, e.g.*, *Kirschenbaum v. 650 Fifth Ave.*, 830 F.3d 107, 123-25 (2d Cir. 2016).

Nor does the President's claim-settlement power provide the authority the government asserts. "The Executive's narrow and strictly limited authority to settle international claims disputes" is simply that. *Medellín*, 552 U.S. at 532. The claim-settlement power "is a particularly longstanding practice" that "goes back over 200 years, and has received congressional acquiescence throughout its history." *Id.* at 531 (quoting *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003)). By contrast, as shown below, deference to executive immunity

determinations began only in the late 1930s and ended in 1976 when, at the executive's request, Congress adopted the FSIA. Moreover, Congress affirmed the executive's power to settle claims in the International Claims Settlement Act of 1949, 22 U.S.C. §§ 1621-1627, but it has never similarly blessed executive control of immunity decisions. To the contrary, Congress enacted the FSIA to "remedy the problem" of executive control over immunity. *Opati v. Republic of Sudan*, 140 S. Ct. 1601, 1605 (2020). *Medellín* narrowly construed the claim-settlement power and declined to "stretch [it] so far as to support" the executive's attempt to make domestic law. 552 U.S. at 532. This Court should do the same here.

Finally, the Vesting Clause — which generally situates "[t]he executive Power" in the President, U.S. Const. art. II, § 1 — does not grant the executive unilateral power to make domestic law, even over issues that arguably raise international concerns. *See Medellín*, 552 U.S. at 529-30 (rejecting the executive's argument that the President's "'established role' in litigating foreign policy concerns" allows him to "establish on his own federal law or to override state law"); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 263 (2001) ("Lawmaking in support of foreign affairs goals, then, is not part of the President's residual power, and this allocation assures that the President must often look to Congress as a partner in foreign affairs endeavors.").

The Constitution gives the President many important powers related to foreign relations, but not the power to decide cases and controversies or to articulate rules of federal common law that bind domestic courts. *See* Dodge & Keitner, *supra*, at 717 ("[I]n the U.S. constitutional system, the executive branch does not make rules of federal common law; federal courts do."). Accordingly, this Court should hold that the federal judiciary, not the executive, has the final say over common law immunity decisions.

II. FEDERAL COURTS, NOT THE EXECUTIVE, HAVE DETERMINED FOREIGN SOVEREIGN IMMUNITY SINCE THE FOUNDING ERA

Federal courts have a long history, reaching back to the early days of the Republic, of resolving issues of foreign state and foreign official immunity. This Court has referred to that history indirectly by citing the Supreme Court's decision in *Verlinden*. *See, e.g.*, *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009). But the Court has not yet considered the pre-FSIA historical cases themselves.

That history dates back at least to *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). Writing for the Court, Chief Justice John Marshall held that federal courts lacked jurisdiction over "a national armed vessel . . . of the emperor of France." *Id.* at 146. Courts applying the *Schooner Exchange* decision interpreted it "as extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity.'" *Samantar*, 560 U.S. at 311 (quoting *Verlinden*, 461 U.S. at 486). Thus, for "more than a century and a half," the United States usually

"granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden*, 461 U.S. at 486.

During this period, courts welcomed the executive's views on immunity through filings called "suggestions of immunity." Courts gave some deference to the executive on limited "fact" issues such as who owned the vessel in question, *see Republic of Mexico v. Hoffman*, 324 U.S. 30, 32, 36 (1945), or "whether the government was officially sovereign" — questions that "did not resolve the immunity issue itself," G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 27 (1999). "In such cases courts regarded themselves as free to decide the immunity issue as they would any other issue of common law, basing their judgments on domestic, maritime, and international law principles." White, *supra*, at 27-28; *see, e.g.*, *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926) (granting immunity to foreign vessel despite executive's decision to decline immunity). In sum, "nineteenth-century foreign sovereign immunity decisions took as a given that courts could make independent determinations on whether a foreign sovereign was immune from suit in a particular set of circumstances." White, *supra*, at 134; *see also* (Wuerth) Brunk, *supra*, at 924-25 ("Courts [during that time] did not view themselves as bound by the executive's suggestion of immunity.").

Furthermore, cases dating back to the 1790s show that executive determinations on immunity claims by foreign government officials also did not bind the courts. Indeed, the executive expressly disclaimed the ability to do so. *See* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. Rev. 704, 713-49 (2012) (describing five eighteenth-century civil suits in federal courts against "current or former [foreign] officials" in which the executive was "forced . . . to manage [foreign] relationships by repeatedly explaining its inability to intervene").

Not until the late 1930s did practice begin to shift toward more deference to the executive, culminating in 1945 with the Court's ruling in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945). In that case, the Court found that "an important reason" to deny immunity was that "the State Department has declined to recognize it." *Id.* at 35 n.1. The Court stated in dicta that "[i]t is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35.

Contemporaneous scholarship from the period confirms that the Court's dicta in *Hoffman* was unprecedented. *See* Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 Am. J. Int'l L. 168, 168-69 (1946) (arguing that the Court in *Hoffman* abdicated one of its functions by deferring to the

executive instead of deciding immunity issues itself); Note, *The Jurisdictional Immunity of Foreign Sovereigns*, 63 Yale L.J. 1148, 1155-56 (1954) (describing 1938-1945 as a "period of transition" during which the executive's views displaced "traditional criteria" for immunity in federal courts); Note, *Immunity from Suit of Foreign Instrumentalities and Obligations*, 50 Yale L.J. 1088, 1091-93 (1941) (describing courts' confusion before *Hoffman* about what weight they should accord the executive's suggestions of immunity).

In 1952, only seven years after *Hoffman*, "the State Department announced its adoption of the 'restrictive' theory of foreign sovereign immunity." *Verlinden*, 461 U.S. at 487. The Tate Letter effectively repudiated *Hoffman*'s reasoning by recognizing that "a shift in policy by the executive cannot control the courts." *Alfred Dunhill*, 425 U.S. at 714 (quoting Tate Letter). As it turned out, *Hoffman* "embarrassed the Department of State with responsibilities for which that agency of the Government [was] quite unprepared and which it [could not] properly assume." Edwin D. Dickinson, *The Law of Nations as National Law: "Political Questions,"* 104 U. Pa. L. Rev. 451, 477 (1956); *see also Opati*, 140 S. Ct. at 1605.

In 1976, Congress endorsed the executive's post-*Hoffman* position when — at the State Department's request — it enacted the FSIA. *See* H.R. Rep. No. 94-1487, at 6 (1976). The Supreme Court has repeatedly noted that the purpose of the statute was "to free the Government from the case-by-case diplomatic pressures, to

clarify governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden*, 461 U.S. at 488; *see also Opati*, 140 S. Ct. at 1605 (noting that "Congress sought to remedy the problem" of leaving immunity determinations to the executive by adopting the FSIA). The FSIA "sets out immunity standards applicable to foreign states and their agencies, effectively eliminating the role of the State Department in cases covered by the statute." (Wuerth) Brunk, *supra*, at 928. But when the FSIA does not apply, the common law of foreign sovereign immunity still governs. *Halkbank*, 143 S. Ct. at 951; *Samantar*, 560 U.S. at 324.

The long history of the common law of foreign sovereign immunity — from its origins in *Schooner Exchange* through enactment of the FSIA — confirms that federal courts have had, and still have, the ultimate responsibility to decide whether foreign sovereign immunity applies to a given case.

III. THE *HOFFMAN* AND *PERU* DICTA SHOULD NOT BE APPLIED HERE

The executive has claimed binding authority over common law immunity decisions based on two World War II-era admiralty cases involving judicial seizures of foreign government vessels: *Hoffman* and *Ex parte Republic of Peru*, 318 U.S. 578 (1943). *See* ECF No. 63 at 47-50. In both *Hoffman* and *Peru*, the Court suggested in dicta that federal courts must follow the executive's immunity decisions in specific cases as well as its legal principles regarding immunity when

the executive remains silent. The Court should not follow those statements here, for at least three reasons.

First, the language in *Hoffman* and *Peru* was dicta. *Hoffman* involved an in rem action against a vessel that was owned by the Mexican government but in the "possession, operation, and control" of a private company. 324 U.S. at 32-33. The executive did not opine on whether the Mexican vessel was entitled to immunity. The Court noted the executive's silence on the ultimate question of immunity, *id.* at 32, which it found "controlling in the present circumstances" as indicative of a "national policy not to extend immunity" to vessels owned but not possessed by foreign states, *id.* at 38. But the Court also held that "it is plain that the distinction [between ownership and possession] is supported by the overwhelming weight of authority." *Id.* That authority by itself provided adequate grounds for the Court's decision.

In *Peru*, the Court reasoned that the executive sought immunity because it had already resolved the case through its claim-settlement power. 318 U.S. at 586-88. The Court explained that, when the Secretary of State elects "to settle claims against the vessel by diplomatic negotiations between the two countries rather than by continued litigation," the Court must accept that settlement, and the plaintiff is entitled to "the relief obtain[ed] through diplomatic negotiations." *Id.* at 587-88.

Those considerations are not present in this case, which has nothing to do with the settlement of civil admiralty cases.

Second, the Court's language on executive deference in *Peru* and *Hoffman* was sparse and vague. Although those cases suggested that the executive could act alone to determine foreign sovereign immunity without statutory authorization, they included little reasoning or analysis. In both cases, the Court noted the potential implications of judicial seizures of foreign government vessels, *Hoffman*, 324 U.S. at 34; *Peru*, 318 U.S. at 588, a concern that is not at issue in this case. It is accordingly unclear whether the Supreme Court ever intended the language in those cases to apply outside the admiralty context.

Finally, the foundations of both cases have been deeply undercut. A primary concern animating both decisions was the possibility that, absent deference, the judiciary might "embarrass the executive arm in its conduct of foreign affairs." *Hoffman*, 324 U.S. at 35; *see also Peru*, 318 U.S. at 588 (same). More recently, however, the Supreme Court unanimously rejected "embarrass[ment]" as a basis for unilateral executive control of the act of state doctrine. *Kirkpatrick*, 493 U.S. at 409. In any event, the embarrassment concern sweeps far too broadly. If potential embarrassment to the executive in foreign affairs requires deference, it would mean that the Supreme Court has incorrectly

decided subsequent cases, including (for example) *Youngstown*, *Medellín*, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

The context for immunity determinations has also changed, further undercutting the contemporary significance of the two cases. The Supreme Court's decision in *Hoffman* came only a few years after *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), which advanced an expansive conception of executive power in foreign relations. But *Curtiss-Wright* has come under intense criticism, and its approach to executive power has been eroded — if not repudiated — by *Youngstown* and other more recent cases. In *Zivotofksy*, for example, the Supreme Court noted that, despite the broad language in *Curtiss-Wright* about executive power, the holding dealt only with "congressionally authorized action, not a unilateral Presidential determination," and that "whether the realm is foreign or domestic, it is still the Legislative Branch, not the Executive Branch, that makes the law." 576 U.S. at 21; *see also id.* at 66 (Roberts, C.J., dissenting) (noting that "the expansive language in *Curtiss-Wright* casting the President as the 'sole organ' of the Nation" has been limited by subsequent cases such as *Medellín*); Ganesh Sitaraman & Ingrid (Wuerth) Brunk, *The Normalization of Foreign Relations Law*, 128 Harv. L. Rev. 1897, 1918 (2015) (describing how executive power flourished in the years following *Curtiss-Wright* but noting that the Court takes a different approach today).

IV. FEDERAL COURTS, NOT THE EXECUTIVE, ARE BEST EQUIPPED TO MAKE IMMUNITY DETERMINATIONS

In addition to the constitutional and historical arguments in favor of federal courts deciding immunity, there are compelling functional arguments. As the historical practice demonstrates, courts are both experienced with immunity claims and better equipped than prosecutors to determine whether to grant them. There is little debate over the point; Congress and the State Department expressly agreed in the lead-up to the enactment of the FSIA that courts were superior decision-makers.

The executive does, of course, have constitutional powers related to foreign affairs, some of which play an important role in immunity cases. The President, for example, has unreviewable authority to recognize foreign governments. He decides who is a sitting head of state — a determination that almost invariably leads to an entitlement to status-based immunity. (Wuerth) Brunk, *supra*, at 971-75; Dodge & Keitner, *supra*, at 711. As discussed above, the executive may also be entitled to deference on factual questions about which it has superior information, such as who owns a particular foreign vessel or who controls a particular foreign corporation.

The executive is also better positioned than courts in many instances to determine the content of customary international law. (Wuerth) Brunk, *supra*, at 971; Dodge & Keitner, *supra*, at 711-12. Just as in the context of treaty

interpretation, the executive's views should be entitled to significant weight, although they are "not conclusive." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982); *see also Restatement (Third) of the Foreign Relations Law of the United States* § 112 cmt. c (1987) ("Courts give particular weight to the position taken by the United States government on questions of international law . . . .").

Deference to the government on the content of international law follows in part from the government's expertise in matters related to international law and practices. It also follows from the government's important position in developing foreign policy, including decisions about the desirable content of international legal norms. *See* Ingrid (Wuerth) Brunk, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 Am. J. Int'l L. 601, 617-18 (2013) (exploring policy and expertise-based reasons for deferring to the government's views on the content of customary international law).

In this case, for example, the executive may argue that state-owned corporations should not be entitled to sovereign immunity under customary international law based solely on their foreign-state ownership. *Amici* believe that this position is correct. To the best of *amici*'s knowledge, the United States is the only country that extends foreign sovereign immunity to corporations based solely on foreign-state ownership, with no requirement that the corporation exercise

sovereign functions. Customary international law requires a "general and consistent practice of states." *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987). Because other states do not afford immunity to corporations based solely on state ownership, there is no rule of customary international law that requires it. Nonetheless, the fact that the executive may advocate a legally correct position in this case is no reason to defer blindly to its views.

The brief period when courts deferred to executive immunity decisions confirms the perils of doing so. Before the FSIA, foreign governments pressured the executive, sometimes successfully, to resolve cases in their favor, even if the law was against them. *See Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 34-35 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State) ("Leigh Statement") (articulating "substantial disadvantages"). The executive sometimes made inconsistent immunity determinations not aligned with its overall policy. *Id.* at 59-60 (statement of Peter Trooboff, Covington & Burling). "Complicating matters further, when foreign nations failed to request immunity," or the executive failed to act on the request, courts were left with little guidance and "governing standards were neither clear nor uniformly applied." *Altmann*, 541 U.S. at 690-91.

Executive control resulted in unfair, inconsistent, and unpredictable outcomes, in part because parties often had little or no factual or legal input into immunity decisions. *See* Leigh Statement at 34 ("[W]e in the Department of State and Legal Advisor's Office do not have the means of really conducting a quasi-judicial hearing to determine whether, as a matter of international law, immunity should be granted in a given case."). In short, "the old executive-driven, factor-intensive, loosely common-law-based immunity regime" resulted in "bedlam." *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141 (2014).

Reserving common law immunity determinations to the judiciary avoids those problems. In other foreign relations contexts, courts have routinely developed and applied common law doctrines without any of the difficulties created by executive control over immunity. *See, e.g.*, *Celestin v. Caribbean Air Mail, Inc.*, 30 F.4th 133, 135 (2d Cir. 2022) (act of state doctrine); *EM Ltd. v. Banco Cent. de la Republica Argentina*, 800 F.3d 78, 82 (2d Cir. 2015) (*Bancec* test); *Konowaloff v. Metro. Museum of Art*, 702 F.3d 140, 141 (2d Cir. 2012) (act of state doctrine). Courts are equally competent to develop and apply common law rules in the immunity context too.

Granting absolute deference to the executive's immunity determinations, by contrast, would create a seriously flawed system without constitutional, prudential, or functional support. This Court should instead hold that the judiciary has the

power and obligation to develop the common law of foreign sovereign immunity and make case-specific immunity decisions by considering applicable statutes, relevant international law, and — for certain discrete issues — the opinions of the executive. *See* (Wuerth) Brunk, *supra*, at 967-75 (describing "how the courts should make immunity determinations pursuant to federal common law"); Dodge & Keitner, *supra*, at 693-96 (suggesting a restrained approach to developing federal common law); *see also, e.g.*, *Samantar*, 560 U.S. at 320 (examining "international practice when interpreting the [FSIA]"). To hold otherwise — that the executive has exclusive power over common law immunity decisions — would violate basic separation-of-powers principles, impose needless and unwelcome pressure on the executive, confuse courts, and create profound uncertainty and unfairness for parties raising or opposing claims of foreign sovereign immunity under the common law.

CONCLUSION

This Court should hold that the executive does not have exclusive power over common law foreign sovereign immunity decisions.

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