No. 03-6033

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADELLA CHIMINYA TACHIONA, *et al.*, Plaintiffs-Appellees,
Conditional Cross-Appellants
v.
ROBERT GABRIEL MUGABE, *et al.*,
Defendants,
v.
UNITED STATES OF AMERICA
Intervenor-Appellant-Cross-Appellee

On Appeal from the United States District Court
for the Southern District of New York
The Honorable Victor Marrero

BRIEF OF AMICI CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY AND INTERNATIONAL LAW AND HUMAN RIGHTS LAW SCHOLARS IN SUPPORT OF PLAINTIFFS'-APPELLANTS' MOTION TO DISMISS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

Pursuant to FRAP 26.1, *Amici* make the following disclosures:

1. Is the party a publicly held corporation or other publicly held entity?

NO.

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity?

NO.

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation?

NO.

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IDENTITY AND INTEREST OF AMICI

Pursuant to Federal Rule of Appellate Procedure ("FRAP") 29, this *Amici Curiae* brief is respectfully submitted by the Center for Justice and Accountability and international law and human rights law scholars. CJA is a nonprofit organization dedicated to the protection and promotion of human rights through law. Each of the law professor signatories has studied or written extensively on international law or human rights law.

William J. Aceves is Professor of Law and Director of the International Legal Studies Program at California Western School of Law. Professor Aceves is a member of the Executive Committee of the American Branch of the International Law Association and Chair of the Extradition and Human Rights Committee. He is a member of the Litigation Advisory Council of the Center for Justice and Accountability and a Cooperating Attorney with the Center for Constitutional Rights.

Sarah H. Cleveland is the Marrs McLean Professor of International Law at the University of Texas School of Law. A member of the faculty since 1997, she teaches and

writes primarily in the areas of human rights, international law, constitutional law, and foreign relations law. She has served as an investigator or legal adviser in human rights situations around the globe, including in Cuba, Kenya, and Namibia, and has testified before the U.S. Congress on human rights and refugee issues.

Jane G. Rocamora is a Supervising Attorney at the Harvard Immigration and Refugee Clinic at Greater Boston Legal Services. Ms. Rocamora has spent more than two decades litigating civil, criminal, and human rights cases. She also serves as a member of the Board and Litigation Advisory Council of the Center for Justice and Accountability.

Amici have a strong interest in this case, as the assertion by the United States that it has exclusive authority to determine the scope of immunity for foreign heads of state has serious implications for the constitutional separation of powers and threatens to politicize head-of-state immunity determinations.

AUTHORITY TO FILE BRIEF

FRAP 29(a) authorizes *amici* to file this brief with leave of Court.

SUMMARY OF ARGUMENT

The United States contends that it suffered injury when the district court "decided on its own" that Defendants Robert Mugabe and Stan Mudenge could be served with process on behalf of their political party, the Zimbabwe African National Union-Patriotic Front ("ZANU-PF"), contrary to the "suggestion" of the U.S. Department of State. United States' Response to Plaintiffs'-Appellees' Motion for Dismissal of the United States' Appeal, *et al*., ("U.S. Response") at 6 (emphasis added). *Amici* challenge the Executive Branch's extraordinary assertion that it is vested with constitutionally binding authority to determine the scope of immunity to which a foreign head of state may be entitled.

The scope of head-of-state immunity is not well settled either in the common law or by the Vienna Convention on Diplomatic Relations ("Vienna Convention"). *See In re Doe*, 860 F.2d 40, 44 (2d Cir. 1988) (noting that "scope of [head-of-state] immunity is in an amorphous and undeveloped state"); Sir Anthony Watts, *The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers*, 247 Recueil des Cours (Academie de Droit International) (1994) 9, at 52, 64 (head-of-state immunity is an area of the law in which "judicial decisions have not been consistent" and "which is in many respects still unsettled, and on which limited state practice casts an uneven light"). In particular, neither the common law doctrine of head-of-state immunity nor the Vienna Convention precludes heads of state from being served with process on behalf of third parties. In the absence of a clear statement in the law, the burden – or prerogative – of interpretation rests with the courts, not with the Executive. As the district court properly noted, the scope of head-of-state immunity is a matter for "reasoned judicial interpretation in the light of experience and by sound application of the emerging common law, rather than by reflexive expansion of the executive branch's categorical reading of a limited doctrinal exception." *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 304-05 (S.D.N.Y. 2001) ("*Tachiona I*").

Accepting the United States' claim of constitutional injury would effectively foreclose judicial review of executive interpretations of the meaning and scope of head-of-state immunity, and would deprive the federal courts of their proper constitutional role. As stated by the district court, to remove judicial review of such interpretations would "make[] a mockery of constitutional separation of powers." *Tachiona v. Mugabe*, 186 F. Supp. 2d

383, 393 (S.D.N.Y. 2002) ("*Tachiona II*").

THE UNITED STATES DOES NOT SATISFY CONSTITUTIONAL STANDING REQUIREMENTS TO BRING THIS APPEAL

To establish constitutional standing for appellate review, an intervening party must show: (1) it has suffered an actual or imminent injury because of the lower court's judgment; (2) a causal connection between the injury and the judgment (as opposed to injury caused by the underlying facts); and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 and n.1 (1992); 15A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3902 (2d ed. 1992). Here, the United States has not established even the first prong of the standing test: it has suffered no constitutional injury, because the district court acted within its authority when it reached a conclusion different from the one urged by the Executive regarding the scope of head-of-state immunity.

A. There Is No Constitutional Injury In Fact, Because the District Court Acted Properly in Reviewing the Executive's Suggestion Regarding the Scope of Defendants' Inviolability.

While courts traditionally have given deference to the Executive in matters implicating foreign affairs, deference has never required blind acceptance. Indeed, while courts generally consider the Executive's suggestion of head-of-state immunity as conclusive, a court may nevertheless reject the assertion of immunity where the Executive's determination lacks merit. *See Republic of Philippines v. Marcos*, 665 F.

Supp. 793, 797-98 (N.D. Cal. 1987) (rejecting State Department suggestion of head-of-state immunity on behalf of Philippine Solicitor General, where extension of doctrine to such official would have been "a radical departure from past custom").

There also is no authority for the proposition that a court construing a treaty must follow the interpretation suggested by the Executive Branch. Although courts give "great weight" to the views of the Executive in interpreting treaties, they have not hesitated to reject the views of the Executive when its proposed interpretation of a treaty is unreasonable or runs contrary to the apparent intent of the high contracting parties. *See Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122 (1988) (rejecting Executive interpretation of Warsaw Convention where text of treaty was clear); *see also Perkins v. Elg*, 307 U.S. 325 (1939) (rejecting Executive interpretation of U.S.-Sweden naturalization treaty as unreasonable); *Johnson v. Browne*, 205 U.S. 309 (1907) (rejecting Executive's interpretation "contrary to the manifest meaning" of extradition treaty); *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 22 F. Supp. 2d 521 (E.D. Va. 1998) (rejecting Executive's assertion that U.S.-Spain treaty gave Executive the authority to represent Spain's interests in court).

Indeed, the U.S. Supreme Court has noted that "courts interpret treaties for themselves," *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961), and that the construction given by the Executive is "not conclusive." *Sumitomo Shoji America, Ltd. v. Avagliano*, 457 U.S. 176, 184 (1982). As the district court stated, to accept the Executive's determination as conclusive would "equate[] deference to submission, and would conflate 'great weight' with surrendered judicial independence." *Tachiona II*, 186 F. Supp. 2d at

393.

The level of judicial deference due the Executive Branch depends, in part, on the degree to which its assertion of authority is consistent with the express or implied will of Congress. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (the closer the Executive comes to contradicting Congressional will, the closer its foreign policy powers come to reaching their "lowest ebb"). Congress's most relevant statement on immunity, the Foreign Sovereign Immunities Act ("FSIA"), was intended to remove the Executive from determinations of the scope of sovereign immunity. *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 487-90 (1983) (holding FSIA intended "to free the [Executive] from the case-by-case diplomatic pressures, to clarify the governing standards, and to assur[e] litigants that decisions are made on purely legal grounds and under procedures that insure due process."). As the Ninth Circuit has observed:

> The principal change envisioned by the statute was to remove the role of the State Department in determining immunity. Sovereign immunity could be obtained only by the provisions of the Act, and only by the courts interpreting its provisions; "suggestions" from the State Department would no longer constitute binding determinations of immunity.

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990).

In *Vulcan Iron Works, Inc. v. Polish Am. Mach. Corp.*, 479 F. Supp. 1060, 1068 (S.D.N.Y. 1979), the court held that the Executive does not have "unbridled discretion" with respect to suggestions of diplomatic immunity, and suggested that for the same reasons Congress in the FSIA transferred sovereign immunity determinations from the Executive to the Judiciary, issues of diplomatic immunity "ought to be resolved by the

courts rather than the State Department." *Id.* at 1067-68. For the same reasons, the United States' assertion of binding authority to determine the scope of head-of-state immunity is inconsistent with the intent of Congress in adopting the FSIA.

Even assuming that the head-of-state immunity doctrine survived intact and distinct from the FSIA, *see Tachiona I*, 169 F. Supp. 2d at 289, and that it remains generally within the province of the Executive to suggest those entitled to enjoy its protection, this case presents circumstances not contemplated by the traditional head-of-state immunity doctrine. Judicial deference, therefore, is inappropriate here, and the district court's decision caused the United States no injury.

B. Issues Concerning the Scope of Head-of-State Immunity Are Properly Matters for Judicial Discretion.

This Court has noted that the scope of head-of-state immunity is in an "amorphous and undeveloped state." *In re Doe*, 860 F.2d at 44; *see also Tachiona II,* 186 F. Supp. 2d at 388-89 and nn.6-7 (citing sources in accord). No definitive statement exists in any international agreement, principle of customary international law, or corresponding domestic jurisprudence delineating "the range of privileges and immunities -- and thus the full meaning of inviolability -- that apply to heads of state." *Id.* at 391. In the absence of guidance on this specific issue, the United States lacks any basis to argue that it enjoys exclusive authority to expand the common law doctrine of head-of-state immunity. As the district court correctly noted, "[n]othing in the evolution of the common law doctrine suggests that [it] also encompassed conferring upon the State Department the function of defining the full reach of the concept of inviolability as it pertains to heads of state." *Tachiona I*, 169 F. Supp. 2d at 304.

The practice of U.S. courts makes clear that it is within the province of the judiciary, particularly given the absence of relevant legislation or general guidelines from the Executive, to adjudicate areas of ambiguity regarding the scope of head-of-state immunity on a case-by-case basis. *See Marcos*, 665 F. Supp. at 797-98 (rejecting Executive suggestion of head-of-state immunity for Philippine Solicitor General); *see also, e.g., In re Doe,* 860 F.2d at 44-45 (noting, if issue had to be decided, existence of "respectable authority for denying head-of-state immunity to a former head of state for private or criminal acts").

The United States has not suffered injury by the district court's exercise of judicial discretion in determining the scope of a head-of-state's inviolability in novel circumstances not addressed by treaty, statute, regulation, caselaw, or custom.[1]

CONCLUSION

For all of the foregoing reasons, *Amici* respectfully urge the Court to reject the United States' assertion of standing to appeal the district court's exercise of independent constitutional judgment in determining whether the doctrine of head-of-state immunity barred Defendants from being served with process on behalf of a third party.

Respectfully submitted,

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Dated: July 29, 2003

CERTIFICATE OF COMPLIANCE

The undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). Exclusive of exempted portions, the brief contains:

2,001 words

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury that:

On July 29, 2003, I served a true copy of the following documents:

MOTION INFORMATION STATEMENT

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF PLAINTIFS'-APPELLANTS' MOTION TO DISMISS

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS'-APPELLANTS' MOTION TO DISMISS

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[1] In support of its standing argument, the United States relies on cases that are irrelevant to the circumstances presented here. U.S. Response, at 8. Neither *Nixon v. Adm'r of General Servs.*, 433 U.S. 425 (1977), nor *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153 (1953), involved standing challenges. In both cases, the Executive already had established a concrete, individualized injury. In *Nixon*, a former President had standing to challenge a statute regulating the disposition of presidential materials as infringing upon his presidential privilege. 433 U.S. at 439. In *Chapman*, the Secretary of Interior had standing to challenge the Federal Power Commission's grant of a license to a power company to develop a hydroelectric station on a site that had been withdrawn from the Commission's licensing jurisdiction. 345 U.S. at 154-56.