15-455-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DELAMA GEORGES, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DESILUS GEORGES AND ALL OTHERS SIMILARLY SITUATED, ALIUS JOSEPH, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF MARIE-CLAUDE LEFEUVE AND ALL OTHERS SIMILARLY SITUATED, LISETTE PAUL, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF FRITZNEL PAUL AND ALL OTHERS SIMILARLY SITUATED, FELICIA PAULE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, JEAN RONY SILFORT, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

UNITED NATIONS, UNITED NATIONS STABILIZATION MISSION IN HAITI, EDMOND MULET, FORMER UNDER-SECRETARY-GENERAL OF THE UNITED NATIONS STABILIZATION MISSION IN HAITI, BAN KI-MOON, SECRETARY-GENERAL OF THE UNITED NATIONS,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York

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INTRODUCTION

This case presents an issue of first impression for U.S. courts: whether the United Nations ("UN") may benefit from immunity under the Convention on the Privileges and Immunities of the United Nations ("CPIUN"), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 16 (SA-14-37), when it has not complied with its obligation under that treaty to provide modes to settle claims arising from its tortious acts.

The case is a class action lawsuit arising out of the largest cholera epidemic in the world. This epidemic, which has killed and sickened hundreds of thousands of people, was caused by the UN's discharge of untreated human waste into Haiti's largest river system. The CPIUN generally grants the UN immunity from suit and service of process, but also unequivocally requires the UN to "make provisions for appropriate modes" to settle private law claims such as those that the Plaintiffs in this case—Haitian and American victims of the cholera epidemic—have against the organization for the harms it caused. § 29(a). The UN violated this requirement by refusing to make any such provisions for the cholera victims' claims.

The UN's violation of Section 29 of the CPIUN renders immunity under the treaty unavailable for two reasons: ***First***, compliance with Section 29 is a condition precedent to the UN's entitlement to immunity, which has not been

satisfied here. ***Second***, failure to comply with Section 29 constitutes a material breach of the treaty such that the UN is not entitled to the treaty's protections. Accordingly, the decision of the U.S. District Court for the Southern District of New York to dismiss the case on the grounds that the UN, as well as its co-defendants the UN Stabilization Mission in Haiti ("MINUSTAH"), a UN subsidiary; UN Secretary-General Ban Ki-Moon; and Edmond Mulet, former Special Representative of the Secretary-General (collectively, "Defendants"), were entitled to immunity was incorrect as a matter of law. The District Court's application of immunity where Plaintiffs have been denied all alternative means to seek redress was also erroneous because it violated the U.S. Plaintiffs' constitutional rights to access the courts. The decision results in an expansive application of immunity previously unrecognized by U.S. courts and unintended by the drafters of the CPIUN.

In reaching its decision, the District Court improperly relied on *Brzak v. United Nations*—a case that is inapposite here because it did not address the legal consequences of the UN's breach of the CPIUN. *See* SA-1-8 (Oetken, J.) (citing *Brzak v. United Nations*, 597 F.3d 107, 112 (2d Cir. 2010)). *Brzak* was brought by employees of a UN agency who had access to, and used, an internal claims review process. Those plaintiffs argued that the UN had waived its immunity pursuant to Section 2 of the CPIUN, not that it was no longer entitled to immunity after having

violated Section 29. Thus, although in *Brzak* this Court recognized the "absolute immunity" generally available to the UN under the CPIUN, the Court did not have occasion to consider whether that immunity remains available even when the CPIUN has been violated and no alternative remedy whatsoever exists.For any and all of the foregoing reasons, Plaintiffs respectfully urge this Court to reverse the District Court's dismissal and to remand the case to proceed forward on its merits. Such a ruling would preclude UN immunity in the narrow circumstance where the organization has refused to provide *any* mode to settle private law claims by tort victims in violation of the CPIUN. It would not unduly expose the UN to the threat of vexatious litigation, as the UN would simply need to comply with its promise under the treaty to guarantee its immunity.

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(B), which vests that court with jurisdiction over "any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which … any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State," and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291. In an Order entered on January 9, 2015, the District Court directed the case to be dismissed, and denied as moot Plaintiffs' motion regarding service of process. SA-1-8. Judgment was so entered on January 15, 2015. SA-9-10. On February 12, 2015, Plaintiffs filed a timely Notice of Appeal. A-502-504.

STATEMENT OF ISSUES

1. Whether the District Court erred in ruling that Defendants UN and MINUSTAH are entitled to immunity despite having violated their treaty obligation to provide a mode to settle private law claims.

2. Whether the District Court erred in ruling that Defendants Ban and Mulet are entitled to immunity in this case simply because they "hold diplomatic positions."

3. Whether the District Court erred in failing to address the U.S. Plaintiffs' argument that granting immunity in this instance violates their constitutional rights to access the federal courts.

STATEMENT OF THE CASE

FACTS

A. The Outbreak of Cholera and Resulting Harms

Haiti had no reported cases of cholera until 2010, when Defendants discharged contaminated human waste into Haiti's largest river system. This contamination triggered a massive cholera epidemic throughout Haiti and past its borders, including cases in the United States, Cuba, and the Dominican Republic. A-15-16.

In October 2010, MINUSTAH deployed personnel to Haiti as part of a regular military rotation for its mission, which has been in Haiti since 2004. A-28. The deployment consisted of 1,075 troops from Nepal, where cholera is endemic. A-30. Despite knowledge of cholera's prevalence in Nepal, Defendants did not test or treat the personnel for the disease before deploying them. A-30-31, 41.

Defendants stationed the Nepalese personnel on three military bases in a region where the local population is particularly reliant on raw water sources. A-32. Waste from the toilets of all three bases was disposed of at the MINUSTAH base in the village of Meille. A-34. The Meille base is situated along the banks of a tributary of the Artibonite River, Haiti's largest waterway. A-32. The base's sanitation infrastructure was wholly inadequate. Its piping was cracked, and open-air disposal pits were dug directly into the ground on a hill that sloped towards the tributary. A-32-34. Although the pits regularly overflowed in the rain, Defendants

made no attempt to remedy the situation or to prevent contamination of the local environs. A-34-35. In mid-October 2010, cholera-infected human waste flowed from MINUSTAH's sanitation system into the Meille tributary, and from there contaminated the waterways that tens of thousands rely on for drinking, bathing, and agriculture. *Id*.

Cholera swept through the whole of Haiti within weeks, causing its victims to suffer excruciating diarrhea and vomiting so profuse and severe that some people wasted away within hours. A-35-37. As of May 2014, the epidemic had killed over 8,500 people, and sickened over 702,000 others—approximately seven percent of Haiti's population. A-152. By comparison, if an epidemic affected the same percentage of the U.S. population, the number of people sickened would be equivalent to the entire populations of New York and Connecticut combined.[1]

Immediately after the outbreak, evidence emerged that cholera had originated from the MINUSTAH base. A-39. Journalists who visited the base shortly after the outbreak documented broken pipes channeling waste from the base into the tributary, and reported that the smell of feces was so strong that they had to cover their mouths and noses in order to breathe. A-39-41.

[1] Judicial notice may be taken that as of 2014, the combined population of New York and Connecticut was 23.35 million, or just under seven percent of the country's overall population. *See* U.S. Census Bureau, QuickFacts Beta, http://www.census.gov/quickfacts/table/PST045214/00 (last visited May 26, 2015) (population of the United States and U.S. states).

Rather than undertaking a *bona fide* investigation and containing the disease, Defendants responded by covering up key evidence and misleading the public about the UN and MINUSTAH's responsibility. A-38-45. Despite clear knowledge of the substandard sanitary conditions of the Meille base, Defendants repeatedly denied any connection to the outbreak and refused to conduct, or to allow others to conduct, a timely investigation. A-38-43. MINUSTAH also issued several statements asserting that all Nepalese soldiers deployed to Haiti in October 2010 underwent medical testing and that none tested positive for cholera when, in fact, no such tests were conducted. A-41. Despite privately acknowledging that the statements were false, Defendants never retracted them. *Id.*

That Defendants' acts were the direct and proximate cause of Haiti's cholera epidemic is indisputable. Since the outbreak, several independent epidemiologists have conclusively established that the cholera in Haiti originated from the UN base. A-45-54. Experts in genetic analysis have matched the cholera strain in Haiti to the one in Nepal. *Id.* In January 2011, Defendant Ban finally appointed a panel of experts to investigate the source. A-46. Those experts concluded that "the preponderance of the evidence and the weight of circumstantial evidence does lead to the conclusion that personnel associated with the Mirebalais MINUSTAH facility were the most likely source of introduction of cholera into Haiti." A-53-54. Despite this evidence, the UN continued to deny responsibility. A-54.

The cholera epidemic has resulted in profound injuries and widespread suffering in Haiti and other countries where members of the Haitian diaspora reside, including the United States. Without the Defendants' tortious actions, none of these deaths and injuries would have occurred.

B. Defendants' Failure to Provide Access to Extrajudicial Remedies

On November 3, 2011, approximately 5,000 victims of cholera, all members of the proposed Plaintiff class, filed administrative claims with the UN for compensation and remediation, pursuant to the UN's obligations under Section 29 of the CPIUN. A-55. The claimants also sought the establishment of a claims commission to hear those claims, as expressly required by paragraphs 54 and 55 of the Status of Forces Agreement between the UN and Government of Haiti ("SOFA"), which implements Section 29 for MINUSTAH's operations in Haiti. Agreement Between the United Nations and the Government of Haiti Concerning the Status of the United Nations Operations in Haiti, U.N.-Haiti, ¶¶ 54-55, July 9, 2004, 2271 U.N.T.S. 235 (SA-38-50) (third-party claims for "personal injury, illness or death … attribute[able] to MINUSTAH … shall be settled by a standing claims commission to be established for that purpose").

The UN did not respond to those claims for fifteen months. During that time, an additional 1,386 people died from cholera and close to an additional 170,000 people were infected. A-55.

Finally, on February 21, 2013, Defendant UN's Legal Counsel responded with a two-page letter, two sentences of which discussed the claims. A-414-415. The letter stated, without further explanation, that the claims were "not receivable" because they implicated matters of "politic[s]" and "policy." A-415. The claimants responded on May 7, 2013, with a detailed letter explaining why the UN was legally required to provide remedies and requesting that the UN meet with them, engage a mediator, and/or establish a standing claims commission pursuant to the SOFA. A-55-56. On July 5, 2013, the UN summarily denied their requests without further explanation. A-56. Numerous informal attempts by Plaintiffs and others to engage the UN between 2011 and the filing of this lawsuit were met with stonewalling and silence. A-182-183.

PROCEDURAL HISTORY AND DECISION BELOW

Having exhausted administrative and diplomatic avenues for a remedy, Plaintiffs filed this class action lawsuit against Defendants in the U.S. District Court for the Southern District of New York on October 9, 2013. A-5. In their complaint, Plaintiffs asserted nine causes of action, including, *inter alia*, common law negligence, recklessness, wrongful death, negligent supervision, and negligent infliction of emotional distress. A-66-79. Plaintiffs sought injunctive relief, including remediation of Haiti's waterways and provision of sanitation

infrastructure needed to control the continuing epidemic, as well as damages for the deaths and injuries caused. A-79.

Plaintiffs attempted persistently to effect service on Defendant UN through process servers, facsimile, and mail. A-84-111. Despite verbal confirmation from UN personnel that process had been received, the UN never returned an acknowledgement of service or answered the summons. A-91. In February 2014, Plaintiffs filed Certificates of Service of Process with respect to MINUSTAH, Ban, and Mulet, and moved for affirmation of service with respect to the UN. A-5-6. Defendants neither entered an appearance in the case nor responded to the motion.

On March 7, 2014, the U.S. Government filed a Statement of Interest pursuant to 28 U.S.C. § 517, alleging, *inter alia*, that the District Court lacked subject-matter jurisdiction, and arguing that the case should be dismissed on the grounds that Defendants are immune from suit and service under the CPIUN. A-118-127. Plaintiffs submitted an opposition to the Statement of Interest on May 15, 2014, arguing that the UN's rejection of the administrative claims in February 2013 breached its obligations under the CPIUN, and that this breach precludes the application of immunity under the CPIUN in this case. A-136-200. After an additional round of briefing on these issues, the District Court held oral argument on October 23, 2014. A-13.

In an Order entered on January 9, 2015, the District Court relied on *Brzak v. United Nations* to hold that Defendants were immune from suit, directed the case to be dismissed for lack of subject-matter jurisdiction pursuant to Rule 12(h)(3) of the Federal Rules of Civil Procedure, and denied as moot Plaintiffs' motion regarding service of process. SA-4-8. Judgment was so entered on January 15, 2015. SA-9-10. The January 9 Order forms the basis for this appeal, notice of which was timely filed on February 12, 2015. A-502-504.

SUMMARY OF ARGUMENT

The District Court erred in holding that Defendants are entitled to immunity from suit under the CPIUN in this case. Two provisions of the CPIUN are relevant here: Section 2, granting the UN immunity; and Section 29, requiring the UN to make provisions for modes to settle private law disputes. The District Court erroneously enforced Section 2 while disregarding the UN and MINUSTAH's failure to comply with Section 29—even though doing so contradicts the language and purpose of the treaty. Its decision also contravenes the law on treaty interpretation, and is inconsistent with the decisions of other courts.

The UN and MINUSTAH cannot lawfully hide behind the CPIUN when they refuse to comply with their obligations under that treaty. Their refusal to provide a claims commission or other mechanism to address the claims of cholera victims violated Section 29. This violation prevents the UN and MINUSTAH

from being entitled to immunity in this case for two reasons. ***First***, compliance with Section 29 is a condition precedent to the organizations' entitlement to immunity that has not been satisfied. ***Second***, failure to comply with Section 29 constitutes a material breach of the treaty such that the organizations are not entitled to the treaty's protections. The District Court thus erred by granting the UN and MINUSTAH immunity in this case, effectively finding the violation of Section 29 to be of no consequence.

In holding that the organizations are entitled to immunity despite their breach, the District Court relied exclusively on this Court's decision in *Brzak.* However, that case is not applicable to the facts of this case. *Brzak* did not concern, or even touch upon, a breach of Section 29 and the legal consequences of that breach on the UN's entitlement to immunity. *Brzak* addressed only whether alleged inadequacies in the UN's internal claims process for employees constituted an express waiver of immunity under Section 2's waiver exception. The question raised in this case—whether the UN and MINUSTAH's complete failure to comply with Section 29 bars their entitlement to immunity under Section 2—is one of first impression and is not governed by this Court's holding in *Brzak.*

This error caused the District Court improperly to determine that Defendants Ban and Mulet are also entitled to immunity from suit in this case. Immunity of individual officers under the CPIUN is entirely derivative of immunity accorded to

the organization. Because the violation of Section 29 renders immunity unavailable to the UN and MINUSTAH, that breach also renders immunity unavailable to their officers.

Separately, the application of immunity in this case violates the constitutional right to access courts, an entitlement of the U.S. citizen Plaintiffs. Granting immunity in this case impermissibly infringes on that right, which includes the right to bring a well-pleaded civil lawsuit for recognized causes of action. The District Court committed reversible error when it violated the U.S. Plaintiffs' constitutional rights by dismissing the case, without any analysis of this constitutional claim.

Accordingly, the District Court's decision should be reversed. The case should be remanded to proceed on the merits and for a decision on Plaintiffs' motion for affirmation of service.

STANDARD OF REVIEW

This Court reviews *de novo* the District Court's dismissal of a complaint for lack of subject-matter jurisdiction. *Liranzo v. United States*, 690 F.3d 78, 84 (2d Cir. 2012). It also reviews *de novo* legal conclusions which grant or deny immunity. *Van Aggelen v. United Nations*, 311 F. App'x 407, 408 (2d Cir. 2009); *Peninsula Asset Mgmt. (Cayman), Ltd. v. Hankook Tire Co.*, 476 F.3d 140, 141 (2d Cir. 2007).

ARGUMENT

I. THE DISTRICT COURT ERRED IN FINDING THAT DEFENDANTS UN AND MINUSTAH ARE ENTITLED TO IMMUNITY DESPITE HAVING VIOLATED THEIR DUTY TO PROVIDE A MODE OF DISPUTE SETTLEMENT.

Section 29 of the CPIUN provides that the UN "***shall*** make provisions for appropriate modes of settlement of … disputes of a private law character to which the [UN] is a party." (Emphasis added.) Neither the District Court nor the Government disputed that the UN failed to comply with this mandatory obligation when it refused to receive the cholera victims' claims. Nonetheless, the District Court decided to enforce only Section 2 of the CPIUN, which provides that the UN "shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity." *See* SA-4-6.

That decision was erroneous because Section 29 is both a condition precedent to Section 2 immunity and a material term of the treaty as a whole. Thus, although the UN and its subsidiaries are generally entitled to broad immunity from suit pursuant to Section 2, as a matter of law they are not so entitled when they have violated Section 29. The District Court's application of Section 2, despite the violation of Section 29, is legally insupportable.

This Court should interpret the relevant provisions of the CPIUN using general rules of treaty construction. *See Societé Nationale Industrielle Aerospatiale v. U.S. Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 533 (1987). In

interpreting a treaty, a court should first look to the "text of the treaty and the context in which the written words are used." *Id.* at 533-34 (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)); *accord* Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention") art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."); *see also Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308-10 (2d Cir. 2000) (in interpreting treaties, U.S. courts should apply the rules found in the Vienna Convention, which provides "an authoritative guide to the customary international law of treaties"). Therefore, this Court's interpretation of the CPIUN should be guided by the history and negotiations from which that treaty arose, subsequent practice in relation to that treaty, and relevant rules of international law. *Societé Nationale*, 482 U.S. at 533-34; s*ee also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999); Vienna Convention art. 31(2)-(3).

A. The CPIUN Creates a Balanced Immunity Regime that Preserves Tort Victims' Ability to Seek Redress.

The CPIUN establishes a balanced framework in which the UN is afforded broad protection from national courts, but only in exchange for its promise to provide appropriate modes of settlement of private law claims. This is evident in the plain text of the treaty, which contains both Section 2 and Section 29. It is also

evident in the history of the treaty. The UN's founders recognized the need to protect the nascent organization from vexatious litigation in its many member states. But the founders also understood the importance of limiting UN immunity to ensure that the organization could simultaneously fulfill its responsibilities to innocent third parties harmed by its operations, and to further its central aims of promoting human rights—which include the right to due process and the availability of effective remedies. *See* A-202-204 (Study on Privileges & Immunities, laying the groundwork for the UN's immunity framework and stressing that "[i]t should be a principle that no immunities and privileges, which are not really necessary, should be asked for"); *id.* ("Any excess or abuse of immunity and privilege is as detrimental to the interests of the international organisation itself as it is to the countries who are asked to grant such immunities.").

This understanding of the CPIUN's immunity framework is reinforced by an examination of the UN Charter. While not self-executing in the United States and, therefore, not directly enforceable in U.S. courts, *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250 n.24 (2d Cir. 2003), the UN Charter is the original source of UN immunity and, as such, provides an important lens through which to interpret the CPIUN. The UN Charter provides that the organization and its affiliates are entitled to immunities to the extent they "are necessary for the fulfillment of [the

organization's] purposes." Art. 105, para. 1. Thus, the Charter authorizes an immunity whose scope must be consistent with the UN's purposes. Those purposes are expressly identified in the Charter to include, *inter alia*, "promoting … respect for human rights," and the settlement of international disputes "in conformity with the principles of justice and international law." *Id.* art. 1.

The UN Charter instructs that the details of the UN's immunity regime would be determined in a later convention—what came to be the CPIUN. *Id.* art. 105, para. 3. Rather than grant the UN functional immunity for certain types of acts, as the Charter does, the CPIUN instead balances the broad immunity set forth in Section 2 with the protection of individuals' ability to seek redress set forth in Section 29. As the Government itself admitted to the District Court, "the drafting history [of the CPIUN] reflects a bargain between the UN and its member states in which, *in exchange* for Section 2, which establishes the UN's absolute immunity, the UN, in Section 29, agreed to provide for dispute resolution mechanisms for third-party claims." Letter from Ellen Blain to J. Oetken (July 7, 2014) (Dkt. No. 42) at 9 (emphasis added).

As the only provision in the CPIUN that safeguards the rights of individual claimants, Section 29 is the linchpin created by the CPIUN's drafters to ensure that the UN's immunity is consistent with the UN Charter and international law. The inclusion of Section 29, along with Section 2, implements the Charter's mandate

that the organization promote human rights. Indeed, as early as 1954, in determining that the UN General Assembly could not refuse to pay an award for compensation to an aggrieved staff member under Section 29, the International Court of Justice ("ICJ") found that

> [i]t would … hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the [UN] to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes….

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Op., 1954 I.C.J. 47, 57 (Jul. 13). Although the ICJ addressed the claim of a staff member and not a third-party plaintiff, its reasoning applies with equal force here.

The inclusion of Section 29 in the CPIUN also ensures that the UN's immunity regime comports with customary international law that protects a universal right to due process and effective legal remedies. The Introductory Note to the CPIUN presented on the UN's website expressly recognizes as much, noting that

> The *de facto* "absolute" immunity of the United Nations is mitigated by the fact that article VIII, section 29, of the Convention requires the United Nations to "make provisions for appropriate modes of settlement…." [This] obligation … can be regarded as an acknowledgment of the right of access to court as contained in all major human rights instruments.

A-207; *see also* Legal Consequences of the Construction of a Wall, Advisory Op., 2004 I.C.J. 136, ¶¶ 152-53 (July 9) (identifying the obligation to provide remedies as customary international law).

Relatedly, Section 29 also ensures that UN immunity does not conflict with the right to access court commonly found in the constitutions of the UN's member states, including that of the United States. *See* A-222, 231-246. Thus, although Section 2 protects the UN with broad immunity, Section 29 guarantees that the CPIUN does not neglect the interests of individuals such as Plaintiffs. The District Court, however, erroneously failed to take into account this balanced framework by enforcing Section 2 without regard for Section 29.

B. The UN and MINUSTAH Violated Their Legal Obligation to Provide Appropriate Modes of Settlement of the Plaintiffs' Claims Under Section 29 of the CPIUN.

1. The UN's Immunity Regime Contains Mandatory Obligations to Provide Tort Victims Access to Remedies.

The plain language of Section 29 of the CPIUN imposes a ***non-discretionary*** legal obligation on the UN to provide modes of dispute resolution for private law claims. The UN has repeatedly affirmed its assumption of this obligation in its resolutions, statements, and practice throughout its seventy-year history. For example, in its official legal opinion concerning the liabilities of the UN, the UN Office of Legal Affairs specified that "[p]ursuant to [CPIUN], article VIII, section 29, the United Nations is *required* to make provisions for appropriate modes of settlement." A-249 (emphasis added). The UN also confirmed that when it incurs liabilities of this kind, "[a]s a matter of international law, it is clear that the Organization … is obligated to pay in regard to such liabilities." A-252.

In addition to this general obligation set forth in Section 29 of the CPIUN, the UN and MINUSTAH have undertaken specifically to protect the rights of individuals to seek remedies for harms resulting from MINUSTAH's malfeasance in Haiti. Paragraphs 54 and 55 of the SOFA, which governs MINUSTAH's operations in Haiti, provide that

> [t]hird-party claims for … personal injury, illness or death arising from or directly attributed to MINUSTAH, … which

> cannot be settled through the internal procedures of the United Nations … *shall* be settled by a standing claims commission.

(Emphasis added.) These mandatory provisions implement the UN's obligations under CPIUN Section 29 for its operations in Haiti. *See* A-262 (report of the UN Secretary General noting that "in conformity with section 29 … [the UN] has undertaken … to settle by means of a standing claims commission claims resulting from damage caused by members of the force…"). The SOFA provisions also ensure that when the UN does not settle a claim through an internal process, the claim may be heard and decided by an independent adjudicator. A-277 (report of the UN Secretary General instructing that "a procedure that involves a neutral third party should be retained in the text of the [SOFA] as an option for potential claimants" so as not to make the UN "a judge in its own case").

2. The UN Violated CPIUN Section 29 When It Decided that the Administrative Claims Were "Not Receivable."

Plaintiffs' claims—which arise out of the widespread personal injury and death resulting from Defendants' negligence and recklessness—are precisely the types of claims that trigger the UN's obligation under Section 29. Yet the UN rejected the claims as "not receivable," providing as its sole explanation:

> With respect to the claims submitted, consideration of these claims would necessarily include a review of political and policy matters. Accordingly, these claims are not receivable pursuant to Section 29 of the [CPIUN].

A-415. The UN's justification for rejecting the claims is facially invalid for each of at least three reasons: (1) there is no exception at law for claims that may involve a review of political and policy matters; (2) even if such an exception did exist, Plaintiffs' claims do not require such a review; and (3) Plaintiffs' claims are indisputably private law claims that the UN is obligated to settle. The UN's refusal to consider the Plaintiffs' claims, or to provide a mode to settle them, thus constitutes a violation of Section 29, which the District Court ignored.

The UN's contention that the claims were "not receivable" because they "would include a review of political and policy matters" is untenable because the plain text of the CPIUN, relevant case law, and the UN resolutions and statements that define the scope of the UN's obligation to provide a mode of settlement of private law claims, do not—either expressly or implicitly—provide for such an exception. *See, e.g.*, CPIUN § 29; SOFA ¶ 54; A-263 (Report of the Secretary-General). The sole exception set forth is for claims concerning damages that result from "operational necessity,[2] which is not at issue here. CPIUN § 29; SOFA ¶ 54; A-263. Notably, the UN did not cite a single authority to support the existence of a

[2] The UN's liability is not triggered when injuries arise out of "operational necessity", a situation requiring the following findings: (1) a good-faith conviction that an operational necessity exists; (2) the operational need must be strictly necessary and not a matter of mere convenience or expediency; (3) the act must be in pursuance of an operational plan; and (4) the damage caused must be proportional to what is strictly necessary. A-263.

"political and policy" exception in its response. Indeed, it appears that a so-called "political and policy" exception had never before been articulated until the UN cited it in response to Plaintiffs' claims. Bruce Rashkow, *Immunity of the United Nations, Practice and Challenges*, 10 Int'l Org. L. Rev. 332, 344 n.27 (2014) (noting that "as the head of the [UN] legal office that routinely handled claims against the Organization for some ten years, I did not recall any previous instance where such a formulation was utilized…").

Even if such an exception were to exist under international law, Defendants' argument that Plaintiffs' claims would fall within it defies law and logic. Surely no "policy" or "political" decision of the UN required discharging contaminated sewage into Haiti's central river system. Moreover, Plaintiffs did not request that the UN review or revise its policies or political decisions in Haiti. Rather, Plaintiffs ask only that the UN comply with its obligation to provide a settlement process and remedies for the serious harms it caused.

Finally, if the UN's response is read as contending that the claims fall outside the scope of the UN's Section 29 duties because they are not of a private law character, such a contention has no basis in law. That argument plainly contradicts the UN's own definition of private law claims as including claims for personal injury or death incurred by civilians in a peacekeeping context. For example, a report of the Secretary General on the topic cites "claims for

compensation submitted by third parties for personal injury or death and/or property loss or damage incurred as a result of acts committed by members of a United Nations peace-keeping operation" as examples of the most common types of "disputes or claims of a 'private law' character" that fall within the scope of Section 29. A-370; *see also* A-249-250 (legal opinion of the UN Office of Legal Affairs explaining that claims of personal injury resulting from UN peacekeeping forces are a type of private law claim that the UN has settled amicably or submitted to arbitration in accordance with Section 29).

The Plaintiffs' claims alleged that the UN and MINUSTAH recklessly managed their property by discharging untreated, contaminated human waste from their base into the Meille tributary. A-152. Plaintiffs sought remedies for these tortious acts. A-153. The UN had the same duty of care to prevent contamination of the waterways around its base as any property owner would have. In violating that duty and causing the cholera epidemic, the UN committed a private law tort that is recognized as compensable under the UN framework. Numerous independent international law scholars have studied Plaintiffs' claims and affirmed that they are private law claims. *See, e.g.*, Frédéric Mégret, La résponsabilité des Nations Unies aux temps du choléra, 47:1 Belg. R. Int'l L. 161 (2013) (surveying the definition of private law and rejecting the notion that the cholera claims could be characterized as anything but private law claims); Transnational Development

Clinic, Yale Law School *et al*., Peacekeeping Without Accountability: The United Nations' Responsibility for the Haitian Cholera Epidemic 31 (2013) ("A demand for individual redress for the introduction of cholera is a prototypical 'dispute of a private law character.'").

Without a legally tenable or applicable "political and policy" exception, it is undeniable that the UN and MINUSTAH violated their legal obligation under Section 29 of the CPIUN by refusing to consider Plaintiffs' claims. Moreover, if the UN determined that the claims could not be resolved through an internal settlement, it was then under an obligation, pursuant to the SOFA, to refer those claims to a standing claims commission for independent adjudication. *See* SOFA ¶¶ 54-55. It refused to do so, in further violation of Section 29 of the CPIUN and paragraphs 54 and 55 of the SOFA.

C. By Violating Section 29, the UN and MINUSTAH Failed to Satisfy a Condition Precedent to Their Entitlement to Immunity Under Section 2.

The District Court properly recognized that Section 29 is mandatory, deciding that the use of the word "shall" means that the requirement is "obligatory." SA-6. But the Court erred in failing to address the legal consequences arising from a breach of this mandatory obligation.

Defendants' breach of Section 29 renders immunity unavailable under Section 2 because satisfaction of the former provision is a condition precedent to

the latter. It is well established that the failure to comply with a condition precedent in an agreement prevents a party from taking advantage of a right provided under the same agreement. *See, e.g.*, *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 51 (2d Cir. 2004) ("A condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises.") (citation and internal quotation marks omitted).

In determining the legal relationship between Section 29 and Section 2, this Court should look to the CPIUN's text and drafting history, the UN's post-ratification practice regarding those sections, the views of experts in international law, and the practice of foreign courts. Vienna Convention art. 31(2)-(3). For the reasons stated below, all of these sources compel the conclusion that the UN's immunity does not exist when the UN disregards its obligation to afford tort victims access to alternative dispute resolution.

1. Section 2 and Section 29 Are Expressly Linked in the CPIUN's Text.

Section 2 should not be read in isolation, but rather should be read in the context of the full text of the CPIUN, including Section 29. *Societé Nationale*, 482 U.S. at 533-34; Vienna Convention art. 31; Competence of the ILO in Regard to International Regulation, Advisory Op., 1922 P.C.I.J. (ser. B) No. 2, 23 (Aug. 12) ("[A] [t]reaty must be read as a whole, and … its meaning is not to be determined

merely upon particular phrases…."). It is clear from the text of the CPIUN, when read as a whole, that Section 2 and Section 29 are linked.

Immunity provided by Section 2 pertains to the UN *qua* the organization. As a counterweight to the grant of immunity "from all forms of legal process" provided to the organization in Section 2, Section 29(a) requires the UN to provide modes to settle all disputes "to which the United Nations is a party." CPIUN § 2; §29; A-207 (Introduction to the CPIUN). As further evidenced by the CPIUN's drafting history and the UN's own practice described below, organizational immunity and the obligation to provide for alternative dispute resolution have always been understood to go hand-in-hand. *See supra*, § I.C.2 & .3.

This connection between immunity and the obligation to provide for dispute resolution is reinforced in Section 29(b). Section 29(b) refers to this connection expressly, requiring the provision of modes to settle "disputes involving any official of the United Nations *who by reason of his official position enjoys immunity*…." (Emphasis added.) This express reference to immunity is a logical corollary to the fact that UN officials are entitled to immunity only in certain instances (in contrast to the broad immunity granted to the organization).[3] Taken

[3] UN officials are entitled to immunity only for acts performed in their official capacity. *See* CPIUN § 18.

together, Sections 29(a) and 29(b) explicitly link the obligation to provide appropriate modes of settlement with the immunity provisions of the CPIUN.

2. The CPIUN's Drafting History Confirms that Section 29 Is a Condition Precedent to Section 2 Immunity.

To determine the relationship between Section 2 and Section 29, the Court should also consult the drafting history and negotiations from which the treaty arose. *Societé Nationale*, 482 U.S. at 534; *Choktaw Nation v. United States*, 318 U.S. 423, 432-33 (1943); Vienna Convention art. 31(2). The drafters of the CPIUN understood immunity to be conditioned on compliance with the obligation to provide modes of settlement for private law disputes. The Study on Privileges and Immunities, which preceded the CPIUN's drafting, served as the foundational document upon which the treaty was based. There, the UN's Preparatory Committee stated that the UN must provide aggrieved individuals with access to an alternative dispute settlement process as a condition precedent to immunity:

> [W]here the United Nations or a specialised agency concludes contracts with private individuals or corporations, it should include in the contract an undertaking to submit to arbitration disputes arising out of the contract, *if it is not prepared to go before the Courts*.

A-203 (emphasis added). The drafters also stated that undertaking an obligation to afford access to alternative dispute settlement was a standard practice among other international organizations, stressing that "[m]ost of the existing specialised agencies [of the UN] have already agreed to do this." *Id.*

Based on this understanding, in every draft of the treaty, including the final version, the drafters imposed on the UN an unequivocal obligation to settle claims. The first draft of the CPIUN included a predecessor to Section 29, which required the UN to refer contract disputes concerning it or its officers to an international tribunal, under the heading "Control of Privileges and Immunities of Officials,"[4] a title that further underscores the conditional nature of Sections 2 and 29. A-303-304. One week later, the drafting committee produced its first full draft of the CPIUN. That draft included a near verbatim version of what is now Section 29, which obligated the UN to provide appropriate modes of settlement for all types of private law claims. A-325. The Committee unanimously adopted and incorporated this article into the final text of the CPIUN. A-327-328.

This early emphasis on codifying the UN's obligation to provide appropriate modes of settlement confirms the drafters' intention that affording access to alternative modes of dispute resolution is a critical pre-condition to any entitlement to immunity by the UN and its officers.

[4] Though the heading only refers to officials, the text of the clause applied specifically to the UN: "[t]he Organization shall make provision for the determination of an appropriate international tribunal…." A-303.

3. The UN's Own Practice Unambiguously Confirms that Section 29 Is a Condition Precedent to Immunity.

The UN's post-ratification interpretations of, and practice pursuant to, Section 29 are particularly instructive. Vienna Convention art. 31(3)(b). That practice demonstrates that entitlement to immunity is premised on the provision of alternative dispute settlement. In explaining the regime "envisaged by the [CPIUN] and implemented by the United Nations" to the ICJ, the UN reassured the court that:

> *[t]he immunity of the United Nations, or its agents, does not leave a plaintiff without remedy* [because] … in the event that immunity is asserted, a claimant seeking a redress against the Organization *shall* be afforded an appropriate means of settlement [under Section 29].

Difference Relating to Immunity from Legal Process, ICJ, Verbatim Record, ¶ 13 (Dec. 10, 1998) (emphasis added). The UN also emphasized that the immunity accorded under Section 2 is "offset by an obligation in Article VIII [Section 29] to make remedies available to private parties who might otherwise be harmed by the immunity of the Organization and its agents." *Id.* ¶ 5.

Similarly, in *Brzak*, the UN represented to the U.S. District Court for the Southern District of New York that to "ensure[] the independence of the United Nations and its officials from national court systems … the *uniform* practice is to … provide[] the appropriate mechanisms to resolve *all* complaints of a private law nature." Memorandum of Law in Support of the Motion of the United Nations to

Dismiss and to Intervene at 4-5, Brzak v. United Nations, No. 06-CV-3432 (RWS) (S.D.N.Y. Oct. 2, 2007) (emphasis added). The UN further explained that offering alternative means of settlement of all claims "eliminates the prospect of impunity" that would attach to unfettered immunity. *Id.*

Thus, as the UN itself has repeatedly and forcefully asserted, the provision of alternative dispute settlement under Section 29 is part and parcel of its entitlement to immunity from national courts. By failing to provide Plaintiffs with the remedy of dispute resolution to which they are entitled under Section 29, the UN has failed to satisfy the condition precedent to immunity from Plaintiffs' lawsuit under Section 2.

4. The Provision of Alternative Dispute Resolution Is Universally Understood to Be a Condition Precedent to Immunity.

Although this case presents an issue of first impression in U.S. courts, foreign signatories to the CPIUN have repeatedly held that the availability of alternative dispute settlement is a material condition to international organizations' entitlement to immunity. While not binding on this Court, these foreign courts' views provide persuasive authority for this case, per the direction of the U.S. Supreme Court. *See generally Abbott v. Abbott*, 560 U.S. 1, 16 (2010) ("In interpreting any treaty, the opinions of our sister signatories … are entitled to considerable weight.") (citations and internal quotation marks omitted); *United States v. Stuart*, 489 U.S. 353, 369 (1989) ("The practice of treaty signatories

counts as evidence of [a] treaty's proper interpretation, since their conduct generally evinces their understanding of the agreement they signed.") (citations omitted).

There is growing consensus among foreign courts that the availability of immunity for the UN and other international organizations for private law matters depends on whether the organization has provided access to alternative remedies. *See, e.g.*, A-341-343 (decision of French *Cour d'Appel* in *UNESCO v. Boulois*, refusing to grant immunity, where a UN agency failed to adhere to an arbitration clause, because granting immunity under such circumstances would result in a denial of justice); A-344-347 (discussing *Stavrinou v. United Nations*, a decision of Supreme Court of Cyprus confirming that applicant had access to internal dispute settlement system, before granting immunity to UN peacekeepers in Cyprus); A-348-352 (decision of Italian court in *Drago v. International Plant Genetic Resources Institute*, finding that satisfying the remedy provision in the statute of the defendant international organization is a prerequisite to the immunity provision in the same statute, and so immunity was unavailable where the organization had failed to provide an adequate remedy); A-358-363 (decision of Italian court in *Maida v. Administration for International Assistance*, refusing to enforce immunity of UN agency because agency did not afford access to adequate dispute settlement).

This consensus has been documented by international law scholars. *See, e.g.*, Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 Int'l Org. L. Rev. 121, 144 (2010) ("[T]here is undeniably a tendency in domestic courts to make the immunity of an international organization dependent on its putting in place effective internal complaints mechanisms, or making recourse to administrative tribunals available."); August Reinisch & Ulf Andreas Weber, *In the Shadow of Waite and Kennedy*, 1 Int'l Org. L. Rev. 59, 72 (2004) (observing a "clearly discernible trend in recent immunity decisions ... to consider the availability of alternative fora when deciding whether to grant or deny immunity.").

5. Interpreting Section 29 as a Condition Precedent Is Consistent with International Law.

Finally, the relationship between Section 29 and Section 2 should be interpreted in a manner consistent with relevant international law. Vienna Convention art. 31(3)(c). Analyses of international law experts are authoritative on matters of international law. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) ("[T]he works of jurists and commentators who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects ... are resorted to by judicial tribunals ... for trustworthy evidence of what the law really is."); *see also* Restatement (Third) For. Rel. § 103(2)(c) (1987) ("In

determining whether a rule has become international law, substantial weight is accorded to ... the writings of scholars.").

Numerous international law experts have observed that international organizations' immunity is conditioned on the provision of alternative dispute resolution. *See, e.g.*, A-359 ("[C]ourts should deny immunity to the UN where it has failed to provide alternative means of dispute settlement."); A-330 ("[T]he availability of proper alternative means of redress for private parties dealing with the organization can be considered a precondition for granting immunity from suit."); Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organizations and Immunity from Jurisdiction, to Restrict or to Bypass*, 51 Int'l & Comp. L. Q. 1, 3 (2002) ("According to the dominant theory, it is the existence of these alternative means of dispute resolution that justifies maintaining the absolute character of the immunity of international organisations.").

This observation is consistent with the right under international law to an effective remedy, which guarantees access to both a legal process and reparations for injuries. *See, e.g.*, Legal Consequences of the Construction of a Wall, 2004 I.C.J. 136, ¶¶ 152-53 (identifying the obligation to provide remedies required under customary international law); International Covenant on Civil & Political Rights, art. 2(3), Dec. 16, 1966, S. Exec. Doc. E, 95-2, 999 U.N.T.S. 171 (any person whose rights are violated under the Covenant "shall have an effective remedy"); *id.*

art. 14(1) ("everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal…" to determine his or her "rights and obligations in a suit at law."); *see also* UN Human Rights Comm., General Comment No. 32, UN Doc. CCPR/C/GC/32, ¶ 18 (Aug. 23, 2007) (interpreting article 14 and finding that immunities that limit access to tribunals violate international law "if the access left to an individual would be limited to an extent that would undermine the very essence of the right [to access court]").

For these reasons, Section 29 is a condition precedent to Section 2. Defendants are not entitled to immunity as a defense to this tort action when they have failed to comply with this condition. In ruling that the UN and MINUSTAH were entitled to immunity—despite having failed to satisfy Section 29—the District Court departed from the plain text of the CPIUN, the treaty's drafting history, the UN's and other signatories' subsequent practices, and relevant international law. The District Court's dismissal should, therefore, be reversed.

D. By Violating Section 29, the UN and MINUSTAH Materially Breached the CPIUN Such That They Are Not Entitled to Immunity Under It.

The District Court's finding of immunity was erroneous not only because Section 29 is a condition precedent to Section 2, but also because Section 29 is a material term to the CPIUN as a whole. A party is in "material breach" of a treaty

when it violates "a provision essential to the accomplishment of the object or purpose of the treaty." Vienna Convention art. 60(3)(b).

Section 29, by its nature, is such a provision because dispute settlement provisions are generally considered essential under international law. *See* Bruno Simma & Christian J. Tams, The Vienna Conventions on the Law of Treaties: A Commentary (Olivier Corten & Pierre Klein eds. 2011) (prior draft of the Vienna Convention expressly listing dispute settlement clauses as an example of an essential clause); Sir Humphrey Waldock, Second Report on the Law of Treaties, *in* 1963, 2 Y.B. Int'l L. Comm'n 36, 75 (identifying dispute settlement clauses as quintessential clauses that may be essential in nature, and whose violations give rise to material breach). Moreover, Section 29 is essential to the CPIUN's object and purpose of establishing a balanced regime that preserves victims' rights to due process and effective remedies while granting immunity to the UN and its officers.

Neither Defendants nor the Government have contested the material nature of Section 29 to the treaty as a whole. In fact, both the UN and the Government, on several occasions, have affirmed the importance of Section 29 to the CPIUN regime as a whole. *See, e.g.*, *supra*, § I.A & I.C.3.

Accordingly, by refusing to receive and adjudicate Plaintiffs' claims as required by Section 29, Defendants materially breached the CPIUN. Under both

U.S. and international law, a party in material breach of an agreement is no longer entitled to the performance of duties owed to it under the same agreement.

Under U.S. law, one party's failure to perform its material obligations under contract operates to discharge the duties of the other party. *E.g.*, Restatement (Second) of Contracts, § 237 cmt. A (1987); *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 186 (2d Cir. 2007). This legal principle governs the interpretation of a treaty such as the CPIUN. *See Bank of N.Y. v. Yugoimport SDPR J.P.*, 780 F. Supp. 2d 344, 359 (S.D.N.Y. 2011) (quoting *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921)) ("Treaties are to be interpreted upon the principles which govern the interpretation of contracts ….").

Similarly, under international law, a material breach of a treaty by one party excuses performance by the other parties. As summarized by the UN's Special Rapporteur on the Law of Treaties, "non-performance of a treaty obligation by one party to the treaty will, so long as such non-performance continues, justify an equivalent and corresponding non-performance by the other party or parties."). A-390. *See also, e.g.*, *Gabcikovo-Nagymaros Project* (Hung. v. Slovk.), 1997 I.C.J. 7, 56 (Sept. 25); *Diversion of Water from the Meuse* (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 4 (June 28) (no breach of a bilateral treaty if the other party had previously breached similar provisions of the same treaty); *Tacna-Arica Question* (Chile v. Peru), 2 R.I.A.A. 921, 943-44 (1925) (wrongs committed by

one party to a bilateral treaty that would operate to frustrate the purpose of that agreement would release the other party from its obligations under the agreement).

Thus, the District Court misapplied the law when it afforded immunity under the CPIUN to the UN and MINUSTAH, which had materially breached that treaty. The District Court thereby granted immunity in a way that the UN's founders neither intended nor authorized and, to the contrary, cautioned against. *See supra*, § I.A.

E. The District Court Erred in Holding that Jurisdiction Turns on the UN's Waiver of Immunity.

In concluding that this case was barred by the CPIUN, the District Court relied entirely—and improperly—on this Court's decision in *Brzak v. United Nations*. SA-4 ("The Second Circuit's decision in *Brzak v. United Nations* requires that Plaintiffs' suit against the UN be dismissed for lack of subject matter jurisdiction pursuant to Rule 12(h)(3)."). In *Brzak*, this Court held that purported inadequacies in the dispute resolution system available to UN employees could not be construed to constitute an express waiver of immunity under Section 2 of the CPIUN. 597 F.3d at 112.

Brzak does not govern the issues raised by the instant case for at least three reasons: (1) *Brzak* concerned the interpretation of a waiver of immunity pursuant to Section 2, not the legal consequences of breach of Section 29; (2) the plaintiffs in *Brzak* were afforded a claims settlement process and challenged the *adequacy* of

that process; and (3) *Brzak* concerned an internal UN employment dispute involving specific policy reasons for withholding judicial review that are not applicable here.

In *Brzak*, this Court did not consider whether compliance with Section 29 is a condition precedent to Section 2 immunity, or whether the UN is entitled to immunity under the CPIUN when in breach of its duties under the same treaty. These are questions of first impression. It was an error for the District Court to rule otherwise.

1. Waiver Is a Wholly Distinct Legal Concept from Conditionality and Breach, and Is Not at Issue Here.

Brzak addresses access to dispute settlement only insofar as the plaintiffs in that case argued that "Defendant UN, by failing to establish 'appropriate modes of settlement' has expressly waived the defendants' immunities…." Brief of the Appellants at 26, Brzak v. United Nations, No. 08-2799 (2d Cir. Sept. 3, 2008) (hereinafter, "*Brzak* Appellants' Brief"). Accordingly, the decision in *Brzak* was confined to consideration of the scope of waivers under Section 2. *See* 597 F.3d at 112 (holding that, to be effective, a waiver of immunity under Section 2 must be "express," and that inadequacies in the UN's internal dispute system do not constitute an express waiver).

In this case, by contrast, waiver is not at issue—Plaintiffs never alleged waiver, and made clear to the District Court that their arguments with respect to

immunity are not based on waiver. A-429-431, 456. Plaintiffs' arguments concerning the legal consequences of the breach of Section 29 are wholly unrelated to whether Defendants have or have not waived immunity. Section 2 does establish express waiver as an exception to a general rule of immunity. But, by definition, conditions precedent and exceptions are not mutually exclusive—the former prevent the operation of a provision in a contract or statute until a specific act or event has occurred; the latter exclude something from the scope of the provision entirely. *See Eastman Kodak Co. v. Altek Corp.*, 936 F. Supp. 2d 342, 348 (S.D.N.Y. 2013); 13 Williston on Contracts § 38:5 (4th ed. 2014); Black's Law Dictionary 355, 682-83 (10th ed. 2014) (defining "condition precedent" and "exception").

There is nothing unusual about a provision, such as Section 2, that contains an exception and is also subject to a condition precedent. The Federal Tort Claims Act, for example, provides that the United States may be subject to tort suits, 28 U.S.C. § 1346(b)(1), except in certain enumerated circumstances, 28 U.S.C. § 2680. But the Act also requires that plaintiffs meet certain conditions precedent before initiating such suits, 28 U.S.C. § 2675(a). Thus, the fact that Section 2 contains an express exception to immunity (waiver) has no bearing on whether compliance with Section 29 is a condition precedent to Section 2 immunity.

Similarly, the existence of the waiver exception has no bearing on the legal consequences of the material breach of the CPIUN.

Therefore, the Court's holding in *Brzak* does not apply to this case, and the issues presented here should be evaluated independently thereof.

2. Brzak *Differs from This Case Because It Did Not Involve a Breach of Section 29.*

Brzak is further distinguishable from the instant case because the plaintiffs in that case were challenging the adequacy of the internal UN system for adjudicating employee claims. The *Brzak* plaintiffs were employees of the UN High Commissioner for Refugees, a UN agency, and enjoyed access to the employee grievance systems. 597 F.3d at 110. Plaintiff Cynthia Brzak had filed a successful complaint alleging sexual harassment with the UN's Office of Internal Oversight Services, which had recommended that the UN discipline the perpetrator. After that recommendation was allegedly not implemented, Ms. Brzak filed an appeal in the UN Administrative Tribunal, but voluntarily withdrew it before a decision was rendered. *Id.* at 110; *Brzak* Appellants' Brief at 25-26 n.14.

Plaintiff Nasr Ishak assisted Ms. Brzak in pursuing her harassment complaint. After allegedly being denied a promotion in retaliation for his assistance, Mr. Ishak sought a review of that decision, and was granted the promotion two months later. *Ishak v. Secretary-General of the United Nations*, Judgments U.N. Appeals Trib., No. 2011-UNAT-152, ¶ 7 (July 8, 2011). Mr.

Ishak's subsequent hearings before the UN's employment dispute tribunals revealed that, as he had already obtained the promotion, he had no remaining grievances. *Id.* ¶ 1.

Both plaintiffs thus enjoyed access to the UN's internal claims process. They subsequently filed suit in the U.S. District Court for the Southern District of New York, arguing that the various modes of settlement afforded to them were not "appropriate" under Section 29, and should, therefore, be interpreted as a waiver of UN immunity. *Brzak* Appellants' Brief at 25.

In contrast, Plaintiffs in this case are third-party victims of Defendants' tortious conduct—not UN employees—and have been refused any access to any claims procedures. Because Defendants UN and MINUSTAH have refused to receive Plaintiffs' administrative claims, and rejected their attempts to pursue an alternative dispute settlement process, the organizations have completely failed to fulfill their duties under Section 29.

This case is, therefore, materially different from the challenge to the adequacy of Section 29 remedies at issue in *Brzak.* The question raised in this case—whether the UN and MINUSTAH's complete failure to comply with Section 29 bars their entitlement to immunity under Section 2—is one of first impression and is not governed by this Court's holding in *Brzak*.

3. Policy Reasons for Granting Immunity in Employment Cases Such As Brzak Do Not Apply Here.

Furthermore, there are unique policy concerns associated with exercising national court jurisdiction over employment disputes that do not arise in other disputes. The immunity of international organizations is important in employee suits to protect against judicial interference with the organizations' internal administration. *See, e.g.*, *Mendaro v. World Bank*, 717 F.2d 610, 618 (D.C. Cir. 1983) (restricting immunity may sometimes further "the purposes and operations of the Bank, [but granting jurisdiction in employment cases] would lay the Bank open to disruptive interference with its employment policies in each of the [many countries in which it operates]"); *Broadbent v. Org. of Am. States*, 628 F.2d 27, 34-35 (D.C. Cir. 1980) ("The unique nature of the international civil service is relevant… An attempt by the courts of one nation to adjudicate the personnel claims of international civil servants would entangle those courts in the internal administration of those organizations.").

Thus, in *Mendaro v. World Bank*, the U.S. Court of Appeals for the D.C. Circuit distinguished between immunity for actions arising out of an international organization's "external relations" from those arising out of its "internal operations, such as its relationship with its own employees." 717 F.2d at 618-21. The court concluded that the policy reasons for interpreting immunity broadly in employment cases do not apply where suits are brought by non-employees. *Id.*;

see also Lutcher S.A. Celulose e Papel v. Inter-Am. Dev. Bank, 382 F.2d 454 (D.C. Cir. 1967) (rejecting an international organization's claim to immunity where the suit arose from its external activities).

Moreover, UN staff members have notice of, and impliedly consent to, the UN's internal process for resolving their claims against the UN when they accept employment at the organization. Plaintiffs, as third-party tort victims, were given no such choice. They were harmed as unaffiliated, innocent bystanders of Defendants' actions in Haiti, and have been left without any forum to resolve their claims other than a national court such as the District Court. Thus, the policy considerations underlying this Court's decision in *Brzak*, and similar case law concerning the avoidance of judicial interference with the UN's internal administration, are not relevant here. And no judicial involvement would occur whatsoever if the UN merely complied with its obligations to provide external dispute resolution.

F. THE DISTRICT COURT ERRED IN DEFERRING TO THE GOVERNMENT'S UNREASONABLE INTERPRETATION OF THE CPIUN.

In reaching its decision granting Defendants immunity, the District Court also erred by deferring to the Government's unreasonable interpretation of the CPIUN. *See* SA-7. In its Statement of Interest, the Government posited a selective reading of the CPIUN that contradicts well-settled rules of treaty interpretation and

would result in a complete denial of access to any remedial process for Plaintiffs. A-122. This unreasonable position was not entitled to deference by the District Court.

The Government's Statement of Interest focused solely on Section 2, thereby offering a distorted reading of the CPIUN that effectively renders Section 29 meaningless. A-121-123. In so doing, the Government departed from well-established rules of treaty interpretation requiring provisions to be read in the context of the treaty as a whole. *See* Vienna Convention art. 31.

The Government's interpretation also controverted the general canon of construction that requires treaties to be interpreted in a way that gives effect to all legal obligations established by the plain language of a treaty, which in the case of the CPIUN includes Section 29. *See Factor v. Laubenheimer*, 290 U.S. 276, 303-04 (1933) ("This phrase, like all the other words of the treaty, is to be given a meaning, if reasonably possible, and rules of construction may not be resorted to to render it meaningless or inoperative."); *Galli v. Metz*, 973 F.2d 145, 149 (2d Cir. 1992) ("[A]n interpretation that gives a reasonable and effective meaning to all terms of a contract is generally preferred to one that leaves a part unreasonable or of no effect.") (internal quotation marks and citations omitted). Here, the Government's interpretation of the CPIUN disregards the obligatory nature of

Section 29, thereby giving it no effect and misconstruing the object and purpose of the treaty.

Moreover, the Government's reading of the CPIUN would result in extreme and untenable consequences—the complete denial of access to any remedial process for Plaintiffs. This contravenes the treaty's careful balance between immunity and access to alternative dispute resolution. For the foregoing reasons, the Government's interpretation of the CPIUN is unreasonable.

The District Court erred in deferring to this unreasonable interpretation of the CPIUN. While courts may generally afford "great weight" to the Government's interpretation of a treaty, *see, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 513 (2008), such deference is due only when that interpretation is reasonable. *See Am. Civil Liberties Union v. Dep't of Defense*, 543 F.3d 59, 88 (2d Cir. 2008) ("Respect is ordinarily due the *reasonable* views of the Executive Branch concerning the meaning of an international treaty…") (emphasis added) (citations and quotation marks omitted), *vacated on other grounds,* 558 U.S. 1042 (2009). *See generally Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 (1982) (ruling that the role of the court is to give effect to the intent of the treaty parties; although the meaning attributed to the treaty provisions by the State Department is given great weight, it is not conclusive). Accordingly, a court should disregard the Government's interpretation of a treaty when it is unreasonable. *See, e.g.*,

Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1103 (9th Cir. 1990) (finding that an individual was covered by the Foreign Sovereign Immunities Act, despite the Government's Statement of Interest presenting its view that the statute does not apply to individuals), *abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305 (2010).

The District Court, therefore, committed reversible error by deferring to the Government's unreasonable interpretation of the CPIUN when determining that Defendants UN and MINUSTAH are entitled to immunity in this case.

II. THE DISTRICT COURT ERRED IN FINDING THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO IMMUNITY.

The District Court further erred in holding that Defendants Ban and Mulet are immune from suit, *see* SA-7-8, because UN officers are not entitled to immunity under the CPIUN when the UN itself is not entitled to immunity under the CPIUN. Section 19 of the CPIUN provides that certain UN officers "shall be accorded … the privileges and immunities exemptions and facilities accorded to diplomatic envoys, in accordance with international law." That immunity, however, is entirely derivative of the immunity accorded to the UN. *See* Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity 540 (1999) (explaining that "the privileges and immunities of officials stem directly from the immunity of the international organization"). Section 20 of the CPIUN specifies

that those "[p]rivileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves."

The immunity accorded to "diplomatic envoys" in general is similarly derivative, thus reinforcing the derivate nature of the immunity in the CPIUN. *See* Vienna Convention on Diplomatic Relations pmbl., Apr. 18, 1961, 23 U.S.T. 3227, 3230, 500 U.N.T.S. 95 ("[T]he purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions."); *United States v. Cty. of Arlington*, 669 F.2d 925, 930 (4th Cir. 1982) ("The privilege extended to an individual diplomat is merely incidental to the benefit conferred on the government he represents."); *cf.* Restatement (Second) of Torts § 895D cmt. j (2015) ("As a general rule, the immunity of a public officer is coterminous with that of his government.").

As a result, in the same way that foreign officials do not enjoy immunity for official acts when the foreign state they represent is not immune, Ban and Mulet cannot be immune when the UN itself is not immune. *See Guevara v. Peru*, 468 F.3d 1289, 1305 (11th Cir. 2006) (finding that individual foreign official defendants "are not entitled to sovereign immunity because the sovereign itself is not"), *rev'd and remanded on other grounds*, 608 F.3d 1297 (11th Cir. 2010). Because, as described above, the UN and MINUSTAH are not entitled to immunity in this case, neither are Ban and Mulet.

III. THE DISTRICT COURT ERRED IN GRANTING IMMUNITY THAT VIOLATED THE U.S. PLAINTIFFS' CONSTITUTIONAL RIGHTS TO ACCESS THE COURTS.

The District Court committed further reversible error because it violated the U.S. citizen Plaintiffs' constitutional rights to access the federal courts by applying immunity in this case.[5] A U.S. law or treaty must conform to constitutional parameters. Reid *v. Covert*, 354 U.S. 1, 16 (1957) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). The Constitution protects U.S. citizens' right to seek a judicial remedy for a legally cognizable injury. Infringements on this right are permissible only if they pass strict scrutiny. Whereas the CPIUN on its face, as well as other forms of immunity, may pass strict scrutiny, the application of UN immunity in this case was not narrowly tailored to serve a compelling government interest. Therefore, the District Court's grant of immunity violated the U.S. citizen Plaintiffs' constitutional right of judicial access.

A. The U.S. Citizen Plaintiffs Have a Fundamental Right to Access the Courts that Is Protected Under the U.S. Constitution.

The right of access to courts is a "fundamental" right protected under the U.S. Constitution. *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004). This

[5] The U.S. citizen Plaintiffs include Delama Georges and all other similarly situated U.S. citizens that he seeks to represent.

right—essential to the guarantee of justice for all in our nation—is deeply rooted in the foundation of our legal system, originating from the Magna Carta and later incorporated into the Anglo-American legal tradition. *See, e.g.*, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *Ashby v. White*, 92 Eng. Rep. 126, 136 (King's Bench 1703).

The right of access to the courts is "among the most precious of the liberties safeguarded by the Bill of Rights" because it is indispensable to the vindication of all other rights. *United Mine Workers, Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). *See also Chambers v. B.&O. R.R.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force .... [I]t is the right conservative of all other rights, [that] ... lies at the foundation of orderly government," and "is one of the highest and most essential privileges of citizenship."); *Marbury*, 5 U.S. at 163 ([T]he very essence of civil liberty ... consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and "[o]ne of the first duties of government is to afford that protection.").

The right is rooted in various constitutional provisions. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002). *See also Monsky v. Moraghan*, No. 97-7015, 1997 U.S. App. LEXIS 36158, at *11 (2d Cir. Oct. 2, 1997) ("It is well established that all persons enjoy a constitutional right of access to the courts,

although the source of this right has been variously located in the First Amendment…, the Privileges and Immunities Clause ... and the Due Process Clauses ....”). For example, the Supreme Court has held that “[t]he due process clause requires that every man shall have the protection of his day in court,” recognizing that depriving someone of access to the courts conflicts with fundamental notions of fairness that are the cornerstones of our legal system. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921). The Supreme Court has also concluded that “[t]he right of access to the courts is … one aspect of the right of petition [protected under the First Amendment],” which ensures plaintiffs are not foreclosed from seeking redress of their grievances. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

This right of access has been made available specifically to civil plaintiffs such as the U.S. victims in this case. *See Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741-43 (1983) (noting that “[t]he right of access to a court is too important”, and as such prohibits enjoining “[t]he filing and prosecution of a well-founded” tort lawsuit); *Hikel v. King*, 659 F. Supp. 337, 340 (E.D.N.Y. 1987) (finding that the “right of access to the courts includes ... the right to bring an ordinary civil case”).

B. Immunity in This Case Violates the U.S. Plaintiffs' Constitutional Rights to Access the Courts.

1. Infringement of the Right to Access the Courts Is Subject to Strict Scrutiny.

In light of the great importance placed on the right to access courts, this right is afforded the highest level of protection. An infringement is generally subject to strict scrutiny. *See Lane*, 541 U.S. at 529 ("[A] variety of basic rights, including the right of access to the courts at issue in this case … call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applied to sex-based classifications."); *Guttman v. Khalsa*, 669 F.3d 1101, 1121-22 (10th Cir. 2012) ("In *Lane,* the Court addressed the right of access to the courts—a fundamental right that may not be encroached upon unless the infringing provision survives strict scrutiny."); *Ryland v. Shapiro*, 708 F.2d 967, 972 (5th Cir. 1983) ("[I]t is clear that, under [various provisions of] our Constitution, the right of access to the courts is guaranteed and protected from unlawful interference and deprivations by the state, and only compelling state interests will justify such intrusions."). This is particularly true for the right of access to bring civil claims, which are most often protected under the First Amendment's right to petition—infringements of which also are routinely subject to strict scrutiny. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 896-97 (1984); *NAACP v. Button*, 371 U.S. 415, 438-44 (1963).

2. Granting Immunity in This Case Is Not Narrowly Tailored to Achieve a Compelling Government Interest.

Under strict scrutiny, the Government "has the burden of proving that [the] classifications 'are narrowly tailored measures that further compelling governmental interests.'" *Johnson v. California*, 543 U.S. 499, 505 (2005) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)); *Republican Party of Minn. v. White*, 536 U.S. 765, 774-75 (2002). In this case, the Government offered no argument to establish that granting immunity to Defendants UN and MINUSTAH would meet that standard.

a) The Burden on the Right of Access Is Not Narrowly Tailored Because Plaintiffs Have Been Denied Any Alternative Remedy.

The application of immunity in this case, where Plaintiffs have been denied access to alternative dispute resolution, does not use the least restrictive means and, therefore, does not pass constitutional muster. By granting Defendants immunity and dismissing the case, the District Court did not merely burden the Plaintiffs' right to access a judicial remedy. Rather, the Court completely abrogated that right and denied Plaintiffs any opportunity for redress, given that Defendants had foreclosed all potential avenues other than a domestic court by rejecting Plaintiffs' administrative claims. Thus, quite the opposite from being narrowly tailored, the infringement on Plaintiffs' right of access was as broad as it could possibly be.

An infringement on the right of access is not narrowly tailored when there is no alternative means of redress. *See Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 643 (1999) (noting that due process is violated where there is "no remedy, or only inadequate remedies"); *N.Y. Central R.R. Co. v. White*, 243 U.S. 188, 201 (1917) ("[I]t perhaps may be doubted whether the state could abolish all rights of action, on the one hand, or all defenses, on the other, without setting up something adequate in their stead."). For example, "[t]he utter exclusiveness of court access and court remedy … was a potent factor" in a Supreme Court decision to strike down as unconstitutional a state law that required litigants to pay court fees as a prerequisite to bringing an action for divorce, because a marriage could only be dissolved through a divorce action. *United States v. Kras*, 409 U.S. 434, 445 (1973) (discussing *Boddie v. Connecticut*, 401 U.S. 371 (1971)).

Similarly, even where statutes expressly preclude judicial review, the Supreme Court has refused to bar claims for which there is no alternative forum of review. *See Truax*, 257 U.S. at 330 (striking down a statute that immunized certain action from any legal sanction because "[t]o give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless, is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law"); *Webster v. Doe*, 486 U.S. 592,

603 (1988) (permitting judicial review of claims despite the existence of a jurisdiction-stripping statute); *Oestereich v. Selective Serv. Sys. Local Bd.*, 393 U.S. 233, 238-39 (1968) (same).

By contrast, where courts have upheld infringements on the right of court access, the plaintiffs were not entirely foreclosed from pursuing a remedy. *See, e.g.*, *Garcia v. Wyeth-Ayerst Labs.*, 385 F.3d 961, 967-68 (6th Cir. 2004) (upholding a state statute granting immunity to drug manufacturers only in certain situations). Relatedly, the Supreme Court has noted that a statute which "takes away no substantive right but simply changes the tribunal [*i.e.*, the forum] that is to hear the case" is usually not fatally problematic. *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 576-77 (2006) (citations and internal quotation marks omitted), *superseded by* Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, 120 Stat. 2600. *See also Int'l Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1166 (D. Del. 1975) ("In view of the alternate opportunities to air its grievances, [the plaintiff] will not be denied due process if precluded from proceeding in this Court.").

This case differs from previous cases in which courts have granted absolute immunity because Plaintiffs would suffer from the total lack of any means of redress, and not simply from the alleged inadequacy of such a process. In previous cases involving the immunity of the UN, its subsidiaries, and its officers, U.S.

citizen plaintiffs—primarily UN employees or former employees—have had alternative methods of dispute resolution available to them through the UN's internal processes. *See, e.g.*, *Brzak*, 597 F.3d 107; *Boimah v. United Nations General Assembly*, 664 F. Supp. 69 (E.D.N.Y. 1987). Therefore, while the UN, its subsidiaries, and its officers were found to be immune from the jurisdiction of the courts in those cases, they were not immune from all liability whatsoever.

Brzak, the only decision to consider the constitutionality of UN immunity, does not govern this case. In *Brzak*, this Court considered a broad facial challenge to the CPIUN. This case is far more limited. It concerns the constitutionality of applying immunity under the CPIUN when injured individuals lack access to the alternative dispute resolution that would render immunity narrowly tailored. As discussed in Section I.E, *supra*, the U.S. plaintiff in *Brzak* was a UN employee who availed herself of the UN's internal dispute resolution system. Thus, this Court did not find that dismissal of her suit on immunity grounds unconstitutionally infringed upon her right of access. *See* 597 F.3d at 114. By contrast, Plaintiffs in this case have been fully denied access to any such alternative dispute process that would render the Defendants' immunity narrowly tailored.

b) The Government Presented No Justification to Foreclose Plaintiffs' Access to the Court.

Even if this Court were to find that immunity is narrowly tailored in this case, there is no compelling interest for allowing Defendants to evade the Court's jurisdiction. The District Court's decision to grant Defendants immunity effectively sanctioned impunity from all liability, which is not what the United States agreed to when it ratified the CPIUN. The CPIUN is a treaty whose provision of immunity from national court jurisdiction is conditioned on ensuring that the UN would still assume responsibility for torts such as the introduction of cholera to Haiti. Impunity is not granted under the CPIUN. Impunity is also not granted under the SOFA, which explicitly—in paragraphs 54 and 55—preserves organizational liability for private law claims. Moreover, impunity was not envisioned at the time of the UN's formation, as is evident from the UN Charter, which provides only for functional immunity. *See* art. 105(1). Granting impunity here would undermine the limitations on immunity clearly stated in these treaties.

In addition, the interest often cited for granting the UN immunity—ensuring that the organization has the ability to proceed without fear of interference in the performance of its functions—does not apply in this case. That interest has been recognized in employment disputes involving the UN, which, if heard in national courts, could "open[] the door to divided decisions of the courts of different member states passing judgment on [the organization's] rules, regulations, and

decisions." *Mendaro*, 717 F.2d at 616 (citation omitted). That interest may also apply where victims seek review of the UN's execution of its mandate in some way, such as those cases concerning the failure of UN peacekeepers to adequately protect a population in wartime. *Cf.* Stichting Mothers of Srebrenica and Others v. Netherlands, App. No. 65542/12, Eur. Ct. H.R. (2013) (decision of European Court of Human Rights declining to review whether the UN failed to protect civilians from massacre). That interest is not applicable here, where the improper dumping of cholera-infected waste into Haitian waters by the UN and MINUSTAH does not relate to their internal administration and was not part of their mandate in Haiti. Immunity in this case does not preserve the organizations' ability properly to carry out their mandate, but rather allows them to evade the rule of law altogether.

Furthermore, granting Defendants immunity in this case contravenes the principle deeply rooted in our nation's jurisprudence that no officer or organization is above the law. *See, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731, 759 n.2 (1982). The immunity granted to the UN by the District Court is different in kind from the immunity typically afforded to foreign sovereigns and to the U.S. Government and its officers. Sovereign immunity is restrictive, not absolute, immunity. The Foreign Sovereign Immunities Act establishes certain circumstances (including when a state commits tortious acts) in which foreign states may be sued in U.S. courts. 28 U.S.C. § 1605(a). The U.S. Government has also established

exceptions to its sovereign immunity by consenting to be sued, *inter alia*, for the tortious acts it commits. *See* 28 U.S.C. § 1346(b)(1). As such, these immunities may be narrowly tailored to serve a compelling Government interest.

Similarly, although officers of the U.S. Government have absolute immunity from certain types of liability, they do not have absolute immunity from all forms of liability. For example, Executive Branch officers, including the President, have absolute immunity only for official acts and are held responsible for abuses of their discretionary powers. *Clinton v. Jones*, 520 U.S. 681, 694-95 (1997); *Butz v. Economou*, 438 U.S. 478, 485 (1978) ("The single submission by the United States … is that all of the federal officials sued in this case are absolutely immune from any liability or damages, even if, in the course of enforcing the relevant statutes, they infringed respondent's constitutional rights, and even if the violation was knowing and deliberate … [W]e are quite sure that [this position] is unsound, and consequently reject it."). These immunities protect the officers' ability to perform their functions for the public good, and thereby serve a compelling interest. By contrast, immunity in this case only protects Defendants' ability to engage in reckless conduct which clearly did not further the public good.

For these reasons, immunity as applied by the District Court does not pass strict scrutiny. Reversing the District Court's decision to grant immunity is

necessary to avoid impermissibly violating the U.S. Plaintiffs' rights to access the federal courts.

CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed, and the case remanded to proceed on its merits and for a decision on the motion for affirmation of service.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 13,783 words.

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May 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2015, two (2) true and correct copies of the foregoing document was served via mail, on the following:

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