NO. 17-1011

In the
Supreme Court of the United States

BUDHA ISMAIL JAM, et al.,

Petitioners,

v.

INTERNATIONAL FINANCE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF BIPARTISAN MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ANNE M. VOIGTS
KING & SPALDING LLP
601 S. California Ave.
Suite 100
Palo Alto, CA 94304
(650) 422-6700
avoigts@kslaw.com

NIKESH JINDAL
Counsel of Record
JEREMY M. BYLUND
JUSTIN A. TORRES
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 737-0500
njindal@kslaw.com

Counsel for Amici Curiae

* additional counsel listed on inside cover

July 31, 2018

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

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INTEREST OF THE *AMICI CURIAE*[1]

Senator Bill Nelson, a Democrat, is the senior United States Senator from Florida. He has been a member of the Senate since 2001. Prior to that, he was a member of the U.S. House of Representatives, representing Florida's 9th and 11th congressional districts, from 1979 to 1991.

Representative Ileana Ros-Lehtinen, a Republican, is the most senior U.S. Representative from Florida and represents the state's 27th congressional district. She has been a member of Congress since 1989, and she served as chair of the House Foreign Affairs Committee from 2011–13. She retains the title of chair emeritus of the Committee.

Representative Alcee L. Hastings, a Democrat, represents Florida's 20th congressional district and has been a member of Congress since 1993. Since 2007, he has served as either the chair or ranking member of the Commission on Security and Cooperation in Europe (CSCE), also known as the U.S. Helsinki Commission.

Representative Mario Diaz-Balart, a Republican, represents Florida's 25th congressional district and has been a member of Congress since 2003.

Representative Debbie Wasserman Schultz, a Democrat, represents Florida's 23rd congressional

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

district and has been a member of Congress since 2005.

Representative Jeff Duncan, a Republican, represents South Carolina's 3rd congressional district and has been a member of Congress since 2011.

Representative Carlos Curbelo, a Republican, represents Florida's 26th congressional district and has been a member of Congress since 2015.

Representative Darren Soto, a Democrat, represents Florida's 9th congressional district and has been a member of Congress since 2017.

Amici are uniquely positioned to address the importance of canons of construction and the background principles of statutory interpretation against which Congress legislates. Congress relies on those canons when legislating, and its ability to rely on that interpretive background promotes necessary legislative efficiency and consistency.

Here, in particular, those canons dictate that the scope of immunity for international organizations under the International Organizations Immunities Act ("IOIA") mirror the scope of immunity currently afforded to foreign sovereigns. This is the only interpretation that gives effect to Congress's intent. Moreover, only this interpretation avoids the substantial constitutional difficulties raised by assuming, as the D.C. Circuit did here, that Congress delegated to the President the broad power to define the jurisdiction of federal courts as to a whole class of defendants.

SUMMARY OF THE ARGUMENT

In 1945, Congress stated in section 2 of the International Organizations Immunities Act that "[i]nternational organizations . . . shall enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). At the time, courts generally deferred to the political branches about the scope of immunity, and foreign sovereigns often enjoyed absolute immunity from suit in federal courts. But after the IOIA's passage, Congress enacted the Foreign Sovereign Immunity Act ("FSIA") to narrow that immunity substantially, making foreign sovereigns liable to suit for their commercial activities. *See* 28 U.S.C. § 1605(a)(1)–(2). The question in this case is whether, in narrowing that immunity, Congress also meant to narrow the immunity of international organizations that "enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b).

The D.C. Circuit, adhering to an earlier circuit case that bound the panel, said no. But the Third Circuit, confronted with the same question in 2010, said yes. Applying the "reference canon"—which holds that a reference to a general body of law includes all subsequent developments in that body of law occurring after the initial reference—the Third Circuit concluded that "the FSIA's exception for suits arising out of a government's commercial transactions . . . is equally applicable to international organizations and is incorporated into the IOIA." *Oss Nokalva, Inc. v. European Space Agency*, 617 F.3d 756, 766 (3d Cir. 2010). The Third Circuit's approach is the right one.

The reference canon, on which the Third Circuit relied, is a well-established principle of statutory construction on which Congress relies when drafting legislation. This canon has been described in the leading treatise on statutory interpretation since at least the early years of the last century, and this Court has relied on it dozens of times since at least 1880. Accordingly, the canon was an established part of the legal landscape against which Congress enacted the IOIA in 1945. Absent any strong textual indication to the contrary, it should govern this Court's construction of the statute. Any other outcome would place into question settled interpretations of many other statutes where courts interpret Congress's use of general references to include subsequent enactments and modifications.

Moreover, this construction of the IOIA avoids a glaring constitutional problem with the D.C. Circuit's reasoning. The D.C. Circuit relied heavily—indeed, almost exclusively—on a provision of section 1 of the statute, which gives the President the power, by executive order, to "withhold or withdraw" or "condition or limit the enjoyment" of immunities provided for by the IOIA, "in the light of the functions performed by any such international organization." 22 U.S.C. § 288. This provision, the D.C. Circuit claimed, demonstrates that Congress delegated to the President the power to take into account post-enactment updates to foreign sovereign immunity and to apply those updates to international organizations. From that, it drew the conclusion that section 2's view of foreign sovereign immunity was frozen in amber in 1945 and did not take into account post-enactment modifications to that immunity.

As a textual matter—indeed, as a matter of plain common sense—that conclusion is wrong. Nothing in either section explicitly states that the scope of international organization immunity is limited by the state of the law in 1945. To the contrary, the more natural reading of section 2 is that the IOIA incorporates the law of foreign sovereign immunity as it exists at the time the claim of immunity is made. Likewise, the most natural reading of section 1 is that Congress delegated to the President the power to make case-by-case determinations about the immunity of international organizations in the interests of American foreign policy.

But there is *no* reason to believe that Congress delegated to the President its entire power to expand or contract the jurisdiction of federal courts in a broad swathe of cases involving international organizations. Article III gives that power exclusively to Congress, and Congress should not be presumed to have delegated it to the President absent clear, convincing textual evidence that this is what Congress intended. There is no such clear statement in the IOIA, which should be interpreted in a way that avoids the substantial separation-of-powers concerns that would be generated by such a broad delegation of Congressional power.

The decision below should be reversed.

ARGUMENT

Under the IOIA, international organizations enjoy the same immunity to suit that is enjoyed by foreign governments. 22 U.S.C. § 288a(b). This reference is general—that is, it refers not to a specific

statute, but to a body of law. Under the reference canon, a well-established principle of statutory construction, such references include subsequent enactments and amendments to that body of law. The D.C. Circuit's decision to ignore the import of the reference canon in this case depends on a troubling misreading of the statute raising serious constitutional difficulties. This Court should reject it.

I. The Reference Canon Is A Fundamental Principle Of Statutory Construction.

As this Court recently observed, "[p]art of a fair reading of statutory text is recognizing that 'Congress legislates against the backdrop' of certain unexpressed presumptions." *Bond v. United States*, 134 S. Ct. 2077, 2088 (2014) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)). "As Justice Frankfurter put it in his famous essay on statutory interpretation, correctly reading a statute 'demands awareness of certain presuppositions.'" *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). And those "presumption[s] about a statute's meaning" include canons of construction. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Simply put, Congress is presumed to legislate against the well-established backdrop of those canons. These "tools of statutory construction" are crucial in determining the "expressed intent of Congress," embodied in the plain meaning of statutory texts. *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).

The reference canon is a long-standing canon of statutory construction, predating the 1945 promulgation of the IOIA. In 1904, a leading treatise, J.G. Sutherland's *Statutes and Statutory Construction* (2d ed. 1904) ("Sutherland"),[2] discussed this canon. According to Sutherland, the reference canon has two components: first, "[w]here one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provision adopted, . . . [s]uch adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent." *Id*. at 787–88. But, when "the reference is, not to any particular statute or part of a statute, but to the law generally which governs a particular subject. . . [t]he reference . . . means the law as it exists from time to time or at the time the exigency arises to which the law is to be applied." *Id*. at 789. This Court approvingly cited section 405 of Sutherland in 1938. *See Hassett v. Welch*, 303 U.S. 303, 314 n.17 (1938).

By the time the IOIA was passed, federal and state courts had repeatedly adopted Sutherland's distinction between specific references and general ones. *See, e.g.*, *In re Argyle-Lake Shore Bldg. Corp.*,

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[2] Sutherland is a leading authority on statutory construction. *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts 204 (2012) (identifying Sutherland as "a leading American treatise"). A Westlaw search shows that this Court has cited various editions of Sutherland in more than 70 opinions from 1929 through 2018. *See, e.g.*, *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1141 (2018); *Posados v. Warner, Barnes & Co.*, 279 U.S. 340, 344 (1929).

78 F.2d 491, 494 (7th Cir. 1935); *United States v. Manahan Chem. Co.*, 23 C.C.P.A. 332, 335 (C.C.P.A. 1936).[3] This abundance of case law leaves no doubt: When Congress enacted the IOIA in 1945, it did so against the backdrop of a well-established body of law directing that the scope of "general" references in statutes be delineated by "the law generally which governs a particular subject," meaning "the law as it exists . . . at the time the exigency arises to which the law is to be applied," not the law as it existed at the time of enactment. Sutherland, *supra*, at 789.

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[3] *See also*, *George Williams Coll. v. Vill. of Williams Bay*, 242 Wis. 311, 316, 7 N.W.2d 891, 894 (Wis. 1943); *State ex rel. Timken Roller Bearing Co. v. Indus. Comm'n*, 136 Ohio St. 148, 24 N.E.2d 448, 450 (Ohio 1939); *State ex rel. Walsh v. Buckingham*, 58 Nev. 342, 80 P.2d 910, 913 (Nev. 1938); *Johnson v. Laffoon*, 257 Ky. 156, 77 S.W.2d 345, 347 (Ky. 1934); *Hecht v. Shaw*, 112 Fla. 762, 765, 151 So. 333, 333 (Fla. 1933); *In re Heiman's Will*, 35 N.M. 522, 2 P.2d 982, 982 (N.M. 1931); *Appeal of Free*, 301 Pa. 82, 85, 151 A. 583, 584 (Pa. 1930); *Dabney v. Hooker*, 1926 OK 751, 121 Okla. 193, 249 P. 381, 384 (Okla. 1926); *Boise City v. Baxter*, 41 Idaho 368, 238 P. 1029, 1033 (Idaho 1925); *State v. Beckner*, 197 Iowa 1252, 198 N.W. 643, 644 (Iowa 1924); *Vallejo & N.R. Co. v. Reed Orchard Co.*, 177 Cal. 249, 254, 170 P. 426, 428 (Cal. 1918); *State v. Leich*, 166 Ind. 680, 78 N.E. 189, 190 (Ind. 1906); *Culver v. People*, 161 Ill. 89, 97, 43 N.E. 812, 814 (Ill. 1896); *Cole v. Donovan*, 106 Mich. 692, 694, 64 N.W. 741, 741 (Mich. 1895); *Gaston v. Lamkin*, 115 Mo. 20, 21 S.W. 1100, 1103 (Mo. 1893); *Newman v. City of North Yakima*, 7 Wash. 220, 221–22, 34 P. 921, 921–22 (Wash. 1893); *Harris v. White*, 81 N. Y. 532, 545, 36 Sickels 532, 545 (N.Y. 1880).

II. Under the Reference Canon, the IOIA Dynamically Incorporates the Law of Foreign Sovereign Immunity.

The text of the IOIA, as informed by the reference canon, evinces Congress's intent to tie the scope of international organizations' immunity to that of foreign governments. As the latter evolves, so too does the former. Thus, in determining whether an international organization has immunity, the appropriate analysis looks to the foreign governments' immunity as it exists at the time the claim of immunity is invoked, not as it was in 1945. Under that analysis, international organizations are entitled to the same immunity as foreign governments—no more, no less.

To determine the meaning of the IOIA, the "inquiry begins with the statutory text." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018). Section 2 of the IOIA states that "[i]nternational organizations . . . shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). The reference, clearly, is to a *body* of law—the law governing the immunity of foreign sovereigns—and not to a specific statute, enacted at a particular time. It is thus a general reference, "not to any particular statute or part of a statute, but to the law generally which governs a particular subject." Sutherland, *supra*, at 789. Indeed, no one disagrees that section 2 is a general reference. *See Jam v. Int'l Fin. Corp.*, 860 F.3d 703, 708 (D.C. Cir. 2017) (Pillard, J., concurring) (noting the general reference and stating that "[w]hen a statute incorporates

existing law by reference, the incorporation is generally treated as dynamic, not static: As the incorporated law develops, its role in the referring statute keeps up"); *OSS Nokalva*, 617 F.3d at 764 ("[W]e interpret the IOIA in light of the Reference Canon to mean that Congress intended that the immunity conferred by the IOIA would adapt with the law of foreign sovereign immunity."); Kevin M. Whiteley, *Holding International Organizations Accountable Under the Foreign Sovereign Immunities Act: Civil Actions Against the United Nations for Non-Commercial Torts*, 7 Wash. U. Global Stud. L. Rev. 619, 635–39 (2008) (IOIA "fails to mention any particular statute either by title or section number. Doing so would have definitively made the IOIA a statute of specific reference as defined and exemplified above. Instead, the IOIA refers to the law on a subject generally: immunity for foreign governments.").

Of course, interpretive canons are not always dispositive; they "must yield 'when the whole context dictates a different conclusion.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) (quoting *Norfolk & Western R. Co.*, 499 U.S. 117, 129 (1991)). But nothing in the plain text of the IOIA points to a different conclusion. *See OSS Nokalva*, 617 F.3d at 764 ("If Congress wanted to tether international organization immunity to the law of foreign sovereign immunity as it existed at the time the IOIA was passed, it could have used language to expressly convey this intent.").

Rather, the D.C. Circuit declined to apply the reference canon because it found that section 1 of the

IOIA "sets forth an explicit mechanism for monitoring the immunities of designated international organizations: the President retains authority to modify, condition, limit, and even revoke the otherwise absolute immunity of a designated organization." *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1341 (D.C. Cir. 1998) (citing 22 U.S.C. § 288). The applicable provision states:

> The President shall be authorized, in the light of the functions performed by any such international organization, by appropriate Executive order to withhold or withdraw from any such organization or its officers or employees any of the privileges, exemptions, and immunities provided for in this subchapter (including the amendments made by this subchapter) or to condition or limit the enjoyment by any such organization or its officers or employees of any such privilege, exemption, or immunity.

22 U.S.C. § 288. The D.C. Circuit viewed this provision as showing Congress's intent to peg immunity under the IOIA to the law of immunity as it existed in 1945, while delegating to the President the power to make any subsequent changes to the scope of immunity for foreign sovereigns or organizations. *Atkinson*, 156 F.3d at 1341. Not so.

On its face, section 1 simply delegates to the President the power to exempt *specific* organizations and their officers from otherwise generally applicable immunities, in light of the organization's functions. The giveaway, as Judge Pillard noted (*see Jam*, 860 F.3d at 709) is the provision's use of the singular "*any*

such international organization," which clearly implies that the President will make case-by-case determinations of an organization's immunity based on the criteria laid out in the statute. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 210 (1988) (use of the singular in statutory construction "is intended to authorize case-by-case inquiry"); *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223 (1978) (statutory provision that refers to "particular cases . . . seem[s] to require a showing that the factors made relevant by the statute are present in each distinct situation"). As the Third Circuit noted, "nothing in the statutory language or legislative history . . . suggests that the IOIA provision delegating authority to the President to alter the immunity of international organizations precludes incorporation of any subsequent change to the immunity of foreign sovereigns." *OSS Nokalva*, 617 F.3d at 763.

Applying the reference canon, the IOIA adopts the law of foreign sovereign immunity "at the time the exigency arises to which the law is to be applied," which includes post-1945 amendments and modifications. Sutherland, *supra*, at 789; *see also Jam*, 860 F.3d at 709 (Pillard, J., concurring). The result is that FSIA's modifications to foreign sovereign immunity, including the provision that foreign sovereigns are no longer immune from suit if the "action is based upon a commercial activity carried on in the United States," 28 U.S.C. § 1605(a)(2), apply with equal force to international organizations subject to the IOIA. Such a holding would not only be consistent with the intent of Congress, as indicated in the text of the IOIA, but

also with the position regularly taken by the United States in litigation. The United States has argued across several administrations that the IOIA incorporates the FSIA limitations on immunity. Br. for the United States as Amicus Curiae at 5, *Broadbent v. Org. of Am. States*, 628 F.2d 27 (D.C. Cir. 1980) (No. 78-1465); Br. for the United States as Amicus Curiae at *5 n.3, *Taiwan v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 1997 WL 33555046 (9th Cir. May 28, 1997) (No. 97-70375); Br. for the United States as Amicus Curiae at *14, *Corrinet v. United Nations*, 1997 WL 33702375 (9th Cir. Mar. 12, 1997) (No. 96-17130).

III. The D.C. Circuit's Interpretation of the IOIA Raises Serious Constitutional Concerns.

Besides the plain text of the IOIA, there is another reason to reject the D.C. Circuit's interpretation of the statute: it potentially raises serious constitutional concerns about a sweeping delegation of Congress's Article III power to regulate federal courts' jurisdiction.

It is axiomatic, of course, that Congress has the power to set the jurisdiction of the lower federal courts. *See* U.S. Const. art. III, § 1. *See also Case of Sewing Mach. Co.*, 85 U.S. (18 Wall.) 553, 559–60 (1873) (Article III "remits to Congress the duty to create . . . the necessary Federal tribunals; to prescribe under what circumstances and in what mode their jurisdiction shall be exercised; and also to determine from time to time, in view of the condition of the country, under what restrictions it shall be exercised."); *United States v. Curry*, 47 U.S. (6 How.)

106, 113 (1848) ("The power to hear and determine a case like this is conferred upon the court by acts of Congress."). This power to determine what cases can be heard includes the power to "determine when, and under what conditions, federal courts can hear them." *Bowles v. Russell*, 551 U.S. 205, 212–13 (2007). And it includes the power to permit or constrain cases against certain classes of defendants. *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (law prohibiting suits "relating to" a particular property "is well within Congress' authority and does not violate Article III"). *Cf.* Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (providing that the district courts "shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls").

Though couched in terms of immunity to suit, the IOIA is nonetheless a jurisdictional statute: it extends federal court jurisdiction to hear suits against a class of defendants. *See Patchak*, 138 S. Ct. at 905 ("[T]his Court does not require jurisdictional statutes to 'incant magic words.'") (quoting *Sebelius v. Auburn Reg. Med. Center*, 568 U.S. 145, 153 (2013)). In this case, the D.C. Circuit held that international organizations' immunity is governed by the state of the law in 1945, and that "Congress was content to delegate to the President the responsibility for updating the immunities of international organizations in the face of changing circumstances." *Atkinson*, 156 F.3d at 1341. *See also Jam*, 860 F.3d at 705 ("Congress anticipated the possibility of a change to immunity of international organizations, but explicitly delegated the responsibility to the

President to effect that change.") (citing *Atkinson*, *supra*).

This was error. Section 1's at-best ambiguous language provides no clear basis for determining that Congress intended to delegate to the President its Article III power to set federal courts' jurisdiction in terms broadly applicable to a whole class of defendants. Rather, separation-of-powers concerns "caution [this Court] against reading legislation, absent clear statement," as delegating one branch's constitutionally prescribed power to another. *Kucana v. Holder*, 558 U.S. 233, 237 (2010). In light of Article III's explicit and unconditioned vesting in Congress of the power to set the jurisdiction of federal courts, only upon the most explicit textual evidence should Congress be understood to have delegated that power to the President. *See Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) ("'In traditionally sensitive areas, . . . the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'" (citations omitted)); *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992) (interpretive presumptions and clear statement requirements "can protect important constitutional values against accidental or undeliberated infringement").

Section 1 contains no such "clear statement" that Congress was delegating to the President the broad authority to adjust the immunity of whole classes of defendants to take account of later developments in

foreign sovereign immunity. Accordingly, the Court should apply the reference canon and avoid the serious constitutional issues that would be raised by adopting the D.C. Circuit's view of section 1.

IV. Failure to Recognize General References as Dynamic Would Impede Congress's Ability To Legislate Effectively

Congress's ability to effectively legislate depends in substantial part upon its ability to rely on general, dynamic references. General references serve as Congressional shorthand, increasing legislative consistency and efficiency. Misconstruing general references as static and bound to the state of the law at the time a statute was enacted would strip Congress of an important, frequently employed statutory tool. Numerous provisions across the U.S. Code contain references to general bodies of law that Congress intended to be dynamic references that would include subsequent changes to the referenced law.

Here, there is ample reason to believe that Congress would want the status of foreign sovereigns and international organizations to be the same in the federal courts. *See* 91 Cong. Rec. 12,432 (Dec. 20, 1945) ("[O]rganization[s] made up of a number of foreign governments, as well as our own . . . should enjoy the same status as an embassy of . . . [a foreign] government."). As petitioners argue, international organizations are created by sovereign states and "are comprised 'entirely or principally of states.'" Pet. Br. 32 (quoting Restatement (Third) of Foreign Relations Law § 221 (1987)). Foreign states act through these organizations. Accordingly, there is no

reason that international organizations should be immune to suit in cases where the states that created them are not. To do so would permit those states "to evade legal accountability merely 'by acting through international organizations.'" *Id*. at 32–33 (quoting *OSS Nokalva*, 617 F.3d at 764).

In this regard, *amici* agree wholeheartedly with the reasoning of the Third Circuit, which held that the contrary position leads to an "anomalous result":

> If a foreign government, such as Germany, had contracted with [the injured party], it would not be immune from suit because the FSIA provides that a foreign government involved in a commercial arrangement such as that in this case may be sued, as [the defendant] acknowledged at oral argument. We find no compelling reason why a group of states acting through an international organization is entitled to broader immunity than its member states enjoy when acting alone. Indeed, such a policy may create an incentive for foreign governments to evade legal obligations by acting through international organizations.

617 F.3d at 764. *See also Jam*, 860 F.3d at 710 (Pillard, J., concurring) ("Neither the IOIA nor our cases interpreting it explain why nations that collectively breach contracts or otherwise act unlawfully through organizations should enjoy immunity in our courts when the same conduct would not be immunized if directly committed by a nation acting on its own.")

Moreover, the IOIA is not the only statute where Congress has sought to ensure conformity across disparate bodies of the law by using general references. For example, Congress has directed that certain Federal Rules of Civil Procedure apply to contested cases before the Patent and Trademark Office ("PTO"). *See* 35 U.S.C. § 24 ("The provisions of the Federal Rules of Civil Procedure relating to the attendance of witnesses and to the production of documents and things shall apply to contested cases in the Patent and Trademark Office."). Confronted with the question of how to interpret the reference in § 24, then-Judge Gorsuch; writing for the Tenth Circuit, held: "So, you might ask, could it be that § 24 allows the parties to [PTO] proceedings only those powers Rule 45 specified back in 1975 rather than those it specifies today? We think not." *El Encanto, Inc. v. Hatch Chile Co., Inc.*, 825 F.3d 1161, 1164 (10th Cir. 2016) (citing Norman J. Singer & J.D. Shambie Singer, 2B Sutherland Statutory Construction § 51:8 (7th ed. 2015)).

Another area of law where Congress sought conformity with an evolving body of law was worker's compensation. Congress applied certain provisions of the Longshoremen's and Harbor Workers Compensation Act to coal mine operators. Black Lung Benefits Act, 30 U.S.C. § 932(a). When subsequent changes were made to the Longshoremen's Act, courts had to grapple with whether those changes also applied to coal mine operators. The Seventh Circuit determined that because Congress had made a general reference to the Longshoremen's Act, subsequent amendments did apply. *Dir., Off. of Workers' Compen. Programs,*

U. S. Dept. of Lab. v. Peabody Coal Co., 554 F.2d 310, 323–31 (7th Cir. 1977). Several other Courts of Appeals have followed suit and found the amendments applicable to coal mine operators. *Clark v. Crown Const. Co.*, 887 F.2d 149, 153 (8th Cir. 1989); *Dir., Off. of Workers' Compen. Programs, U.S. Dept. of Lab. v. Natl. Mines Corp.*, 554 F.2d 1267, 1273 (4th Cir. 1977); *Dir., Off. of Workers' Compen. Programs, U. S. Dept. of Lab. v. E. Coal Corp.*, 561 F.2d 632, 638 (6th Cir. 1977).

Congress also uses general references to incorporate foreign law into the U.S. Code. In criminalizing piracy, for example, Congress provided for life imprisonment for "[w]hoever, on the high seas, commits the crime of piracy *as defined by the law of nations*." 18 U.S.C. § 1651 (emphasis added). The Fourth Circuit, where many piracy prosecutions are brought due to the U.S. Navy Brig at Norfolk, has been called on to interpret the scope of that reference to international law. The Fourth Circuit "rejected the theory that the meaning of piracy for purposes of § 1651 'was fixed in the early Nineteenth Century.'" *United States v. Said*, 798 F.3d 182, 189 (4th Cir. 2015) (quoting *United States v. Dire*, 680 F.3d 446, 467 (4th Cir. 2012)). Instead, the court "concluded that '§ 1651 incorporates a definition of piracy that changes with advancements in the law of nations.'" *Id*. (quoting *Dire*, 680 F.3d at 469).

While piracy in the 1800s was defined to require a "robbery at sea," it now has a much broader meaning that includes many acts of violence on the high seas. *Dire*, 680 F.3d at 458–59, 469. Under the dated conception of piracy, many hostile acts on the

high seas would go unpunished. In *Dire,* the defendants attacked the U.S.S. Nicholas because they thought from afar that the ship was a vulnerable freighter. *Id.* at 449. Defendants argued that their acts were not piracy because in the early 1800s piracy required a "robbery." Under the current international standard for piracy, however, their acts were held to qualify as piracy because the current definition includes "[a]ny illegal acts of violence" by the crew of a private ship on the high seas against another ship. *Id.* at 458–59, 469.

Piracy law highlights the wisdom of continuing to construe general references as dynamic. Courts would have to look back more than two hundred years to the state of international law on piracy when the Act of 1790 was passed if the reference were a static one. *Id.* at 455, 458–59, 469. While that inquiry is not impossible, the divergence in law over the course of the centuries would put the United States dangerously out of step and leave many hostile acts unpunishable in the courts of the United States.

This Court also treats general references to state law as dynamic. Under the Rules of Decisions Act, 28 U.S.C. § 1652, Congress designated the "laws of the several states" as the rules of decision for civil actions in federal courts sitting in diversity. *Id.* This Court held in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996) that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." To obtain this result, of

course, requires applying the law of the state at the time of the litigation, not as it existed at the time the Rules of Decisions Act was passed.

As these examples show, viewing these general references as static would ignore Congress's intent and strip it of a sensible statutory tool that allows it to couple one body of law with another and to have them evolve in tandem. It makes sense that Congress would choose to apply a complex and highly reticulated statutory framework to related contexts. It makes *little* sense to assume that having made that choice, Congress would not want changes in one area to apply to the other, related areas. There is no reason to believe that, having made the choice to link two bodies of law, Congress would intend to allow developments in the referenced body of law to uncouple the two.

References to general bodies of law are an efficient tool to simplify complex areas of the law by coupling one to another. By contrast, reading these statutes as creating static cross-references would just increase duplication and redundancy across the Code because Congress would have to repeat the same provisions across separate sections and titles. Moreover, if general references to foreign or state law were interpreted as static, Congress would be faced with the herculean task of constantly monitoring the referenced law and constantly making changes to the U.S. Code. As such, Congress must be permitted to rely on general references to increase consistency and efficiency, just as it has in the past. And, when Congress invokes this shorthand, courts should give effect to lawmakers' intent.

CONCLUSION

For the foregoing reasons, the decision of the D.C. Circuit should be reversed.

Respectfully submitted.

ANNE M. VOIGTS
KING & SPALDING LLP
601 S. California Ave.
Suite 100
Palo Alto, CA 94304
(650) 422-6700
avoigts@kslaw.com

SAMUEL J. DUBBIN, P.A.
DUBBIN & KRAVETZ, LLP
1200 Anastasia Avenue
Suite 300
Coral Gables, FL 33134
(305) 371-4700

NIKESH JINDAL
Counsel of Record
JEREMY M. BYLUND
JUSTIN A. TORRES
KING & SPALDING LLP
1700 Pennsylvania Ave. N.W.
Washington, D.C. 20006
(202) 737-0500
njindal@kslaw.com

Counsel for Amici Curiae

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