15-455

In the
United States Court of Appeals
for the
Second Circuit

Delama GEORGES et al.,

Plaintiffs-Appellants

- v . -

UNITED NATIONS et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION OF CONSITUTIONAL LAW SCHOLARS AND PRACTITIONERS FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Counsel for Amici Curiae

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, certain constitutional law scholars respectfully move this Court for leave to file the accompanying BRIEF OF CONSTITUTIONAL LAW SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS ("Brief") in the above-captioned matter. Form T-1080 is attached to this Motion. A full list of *Amici* is set forth in the Appendix to the Brief. In support of this motion, *Amici* state as follows:

INTERESTS OF *AMICI CURIAE*

Prospective *amici curiae* are scholars and practitioners of United States constitutional law.[1] Together, *Amici* have substantial experience researching, publishing, teaching, and litigating in the field of constitutional law, particularly on the constitutional right of access to the courts. *Amici* have a strong interest in ensuring that immunity does not infringe on individual constitutional rights, specifically the fundamental right of access to the courts. They submit their brief in support of Plaintiffs-Appellants' position that immunity should not be accorded to

[1] The list of *Amici* is set forth in the Appendix to their Brief. The Appellants have consented to the participation of *Amici* in this case. Because the Appellees have not appeared in this case, their consent could not be requested pursuant to Fed. R. App. P. 29 and Local Rule 29.1. *Amici Curiae* represent that no party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

the Defendants-Appellees in this case, where doing so would unconstitutionally impinge on Plaintiffs-Appellants' fundamental right of access to the courts.

THE PROPOSED *AMICI CURIAE* BRIEF IS DESIRABLE AND THE MATTERS ASSERTED THEREIN ARE RELEVANT TO THE DISPOSITION OF THE CASE

The pending case raises the issue of whether United Nations immunity from the jurisdiction of U.S. courts infringes on the constitutional right of access to the courts. As scholars of Constitutional law, *Amici* possess deep knowledge of how the courts have interpreted and protected this right. *Amici* seek to provide the Court with a discussion and analysis of the jurisprudence governing the right of access to the courts, and specifically wish to emphasize that immunity in this case would unconstitutionally bar Plaintiffs-Appellants' access to the courts.

Counsel for the Plaintiffs-Appellants consent to the filing of the Brief. Because Defendants-Appellees have not entered an appearance in this case, their consent to the filing of the Brief has not been obtained. Accordingly, this motion is necessary. No party will be prejudiced if *Amici* are permitted to file their Brief. Should Defendants-Appellees desire to respond to anything in the Brief, they have the opportunity to do so.

CONCLUSION

Amici curiae are well-positioned to offer advice to this Court on matters of constitutional law and the fundamental right of access to the courts, and believe that their expertise will be of assistance to this Court in resolving the issues raised by this case. In view of the foregoing, *Amici* respectfully requests that the Court grant this motion for leave to file the accompanying *amici curiae* brief in the above captioned matter.

DATED: June 3, 2015

Respectfully submitted,

/s/ Steven D. Schwinn

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Constitutional Law Scholars
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CERTIFICATE OF SERVICE

I hereby certify that on the 3d day of June, 2015, a true and correct copy of the foregoing document was served via mail, on the following:

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New York, NY 10017

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Copies of the same have also been sent via electronic mail to the following:

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Respectfully submitted,

/s/ Steven D. Schwinn
Steven D. Schwinn

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-455 Caption [use short title] Georges v. United Nations

Motion for: Constitutional Law Scholars and Practitioners For Leave To File A Brief as Amici Curiae in Support of Plaintiffs-Appellants

Set forth below precise, complete statement of relief sought:

Leave to file a brief as amici curiae in support of Plaintiffs-Appellants

MOVING PARTY: Amici
☐ Plaintiff ☐ Defendant
☐ Appellant/Petitioner ☐ Appellee/Respondent

OPPOSING PARTY: United Nations

MOVING ATTORNEY: Steven D. Schwinn
[name of attorney, with firm, address, phone number and e-mail]
The John Marshall Law School
315 South Plymouth Court
Chicago, Illinois 60604

OPPOSING ATTORNEY: unknown
Unknown
(Counsel for Appellants failed to enter an appearance)

Court-Judge/Agency appealed from: United States District Court for the Southern District of New York

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☐ Yes ☑ No (explain): Counsel failed to enter an appearance

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this Court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney: Steven D. Schwinn **Date:** June 3, 2015 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

Form T-1080 (rev. 12-13)

15-455

In the
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

BRIEF OF CONSTITUTIONAL LAW SCHOLARS AND PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SUPPORTING REVERSAL

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June 3, 2015

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amici* make the following disclosures:

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

NO.

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

NO.

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

NO.

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INTERESTS OF *AMICI CURIAE*

Prospective *amici curiae* are scholars and practitioners of United States Constitutional law.[1] Together, *Amici* have substantial experience researching, publishing, teaching, and litigating in the field of Constitutional law, particularly on the constitutional right of access to the courts. *Amici* have a strong interest in ensuring that immunity does not infringe on individual constitutional rights, specifically the fundamental right of access to the courts. They submit their brief in support of Plaintiffs-Appellants' position that immunity should not be accorded to the Defendants-Appellees in this case, where doing so would unconstitutionally impinge on Plaintiffs-Appellants' fundamental right of access to the courts.

[1] The list of *Amici* is set forth in the Appendix to this Brief. The Appellants have consented to the participation of *Amici* in this case. Because the Appellees have not appeared in this case, their consent could not be requested pursuant to Fed. R. App. P. 29 and Local Rule 29.1. *Amici Curiae* represent that no party or party's counsel authored this Brief in whole or in part. No party or party's counsel contributed money that funded the preparation or submission of this Brief. No person other than *Amici* and their counsel contributed money that funded the preparation and submission of this Brief.

ARGUMENT

The right to access to the courts is an ancient and fundamental right in our constitutional tradition. It traces its roots to Magna Carta. Magna Carta, Chapters 39 and 40; *see also* William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 349-75 (1997) (tracing the history of Chapters 39 and 40). It is also reflected in early state constitutions. *See, e.g.,* Md. Const. art. XIX ("That every man, for any injury done to him in his person or property, ought to have remedy by course of the Law of the land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the land."). Although it is not specifically mentioned in the Federal Constitution, the Supreme Court has recognized the right since 1803. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."). Today, the Supreme Court locates the right in various provisions of the Constitution, including due process and equal protection. *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996).

In perhaps its most succinct form, the right means that the government may not "bolt the door to equal justice." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956). The government might do that by imposing access fees at trial or on appeal, *see, e.g.,*

Boddie v. Connecticut, 401 U.S. 371, 382 (1971); stripping the courts of jurisdiction, *see, e.g., Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim"); or even by blocking physical access to the courtrooms. *Tennessee v. Lane*, 541 U.S. 509, 531 (2004). But however the government "bolts the door to equal justice," the Supreme Court evaluates a barrier to the fundamental right to access to the courts by balancing two competing interests. On the one hand, the Court "inspects the character and intensity of the individual interests at stake . . . ." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996). On the other, the Court evaluates "the [government's] justification for its exaction . . . ." *Id*.

In this case, the district court "bolt[ed] the door to equal justice" by granting absolute immunity to the United Nations, the United Nations Stabilization Mission in Haiti, and two of their officers (together, the "UN"). The court's grant of absolute immunity means that the plaintiffs in this case have no way to access the courts, and no means to protect their significant interests. Thus, the "character and intensity" of the plaintiffs' interests are significant, and the court's application of absolute immunity infringes on the plaintiffs' fundamental right to access to the courts. At the same time, the government has failed to offer any justification for absolute immunity for the UN as applied in this case. Therefore, on balance, the

court's grant of absolute immunity to the UN in this case violates the plaintiffs' fundamental right to access the courts.

I. THE DISTRICT COURT'S GRANT OF ABSOLUTE IMMUNITY TO THE UN INFRINGES ON THE PLAINTIFFS' FUNDAMENTAL RIGHT TO ACCESS TO THE COURTS.

At the first step, in "inspect[ing] the character and intensity of the individual interests at stake," *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996), the Court evaluates three access-to-the-courts factors to determine whether a barrier infringes on the fundamental right to access to the courts. First, the Court evaluates the degree of interference of the government's barrier to full access to the courts. The greater the barrier's interference with full access, the more likely the barrier infringes on the fundamental right to access. Next, the Court examines the strength of the underlying interests of those subject to the government barrier and thus denied access. The stronger the interests, the more likely the government barrier infringes on the fundamental right to access. Finally, the Court evaluates the alternative or non-judicial avenues that are available for relief. If the plaintiffs lack alternatives, then the government barrier more likely infringes on the fundamental right to access. Based on these factors, the Court assess the "character and intensity" of the interests and determines, at the first step, whether the barrier infringes on the fundamental right to access to the courts.

In this case, all three factors show that the "character and intensity" of the plaintiffs' interests are significant, and that the district court's grant of absolute immunity to the UN infringes on the plaintiffs' fundamental right to access to the courts. First, the court's application of absolute immunity creates a total barrier to access for the plaintiffs, in that it completely bars them from the courts. Next, the plaintiffs' interests in life, family, health, and basic subsistence, among others, are significant, and comparable to the high-level interests that the Court has protected in its jurisprudence on the fundamental right to access. Finally, the plaintiffs have no alternative to the courts, because the UN has refused to engage outside of the courts and to honor its obligations to provide relief. As a result of the UN's refusal, the plaintiffs have nowhere else to turn to protect their significant interests in the on-going cholera epidemic.

Because the three access-to-the-courts factors so strongly favor the plaintiffs, together they show that the court's grant of absolute immunity to the UN infringes on the plaintiffs' fundamental right to access the courts.

A. The Court's Grant of Absolute Immunity Creates an Insurmountable Barrier to Access to the Courts.

The first factor that the Court considers in evaluating the individual interests is the degree of interference by the government's barrier to full access to the courts. On the one hand, a government barrier can operate as a "partial" barrier to

access, as when the government denies a litigant a court-appointed attorney in a case involving a significant interest or fundamental right. When this happens, the Court assesses the "partial" barrier on a case-by-case basis. *See, e.g., Lassiter v. Dep't of Social Servs. of Durham Cty.*, 452 U.S. 18, 26-27 (1981) (holding that the courts should assess a mother's request for court-appointed counsel in a termination-of-parental-rights proceeding on a case-by-case basis). But on the other hand, when a government barrier denies a litigant *all* access to the courts, as here, the barrier weighs heavily in favor of finding a violation of the fundamental right to access to the courts.

Thus, for example, in *Tennessee v. Lane*, the Court wrote that a physical barrier to the courts for some litigants infringed on those litigants' fundamental right to access to the courts. In particular, the Court held that Title II of the Americans with Disabilities Act, which bans discrimination on the basis of disability in all state services and programs, including state courts, was "congruent and proportional to its object of enforcing the right of access to the courts" (and therefore valid legislation under Section 5 of the Fourteenth Amendment). *Tennessee v. Lane*, 541 U.S. 509, 531 (2004). The Court said that the congressional record sufficiently reflected physical barriers to access to the courts for individuals with disabilities: "Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by

reason of their disability. . . . Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses." *Lane*, 541 U.S. at 527. In other words, physically inaccessible courthouses worked a flat prohibition on *all* access to the courts by the physically disabled, and Congress was justified in banning inaccessible courthouses in order to enforce the fundamental right to access to the courts. *See also Webster v. Doe*, 486 U.S. 592, 603 (1988) (noting that a jurisdiction stripping statute that denied all judicial relief for a colorable constitutional claim would raise a "serious constitutional question").

The district court's grant of absolute immunity to the UN is the same kind of barrier to *all* access to the courts as the physical barriers were in *Lane*. Just as the physical barriers in *Lane* barred all access to the courts for all purposes, the court's application of absolute immunity bars all access to the courts for the named plaintiffs and their families who were killed, injured, or otherwise harmed by the cholera epidemic and who continue to suffer from the epidemic. The court's grant of immunity based on Section 2 of the CPIUN is a sweeping claim that leaves no room for access to the courts (or any other forum, for any other kind of relief). This absolute bar to any form of judicial review is the same kind of absolute barrier to access that Congress addressed in Title II of the ADA and that the Court addressed in *Lane*.

This absolute bar weighs heavily in favor of finding that the district court's grant of absolute immunity violates the right to access.

B. The Plaintiffs' Interests Are Significant.

The next factor that the Court considers in assessing the individual interests is the weight of the individual litigants' underlying interests in the case. When these individuals' underlying interests are significant, as here, the government barrier to access more likely interferes with the fundamental right to access to the courts.

For example, the Supreme Court in *Mayer v. Chicago* struck a transcript fee for an appeal of a conviction of a petty offense resulting in a $500 fine, but no jail time, for the defendant. *Mayer v. Chicago*, 404 U.S. 189, 197 (1971). The transcript fee was a barrier to access to the courts for the defendant, an "impecunious medical student," because he could not afford to pay it and therefore could not appeal his conviction. *Id*. The Court said that while the penalty involved no term of confinement for the defendant, it could affect his professional prospects and even bar him from the practice of medicine. *Id*. at 190.

Similarly, the Court in *Lindsey v. Normet* struck a double-bond requirement for tenants seeking to appeal their evictions. *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972). Just like the transcript fee in *Mayer*, the double-bond requirement was a

barrier to access to the courts, because it prevented a tenant who could not afford it from appealing an eviction and protecting his or her underlying interest in housing. *Id*. at 79. The Court held that while the Constitution did not require appellate review, if the state nevertheless provided appellate review the double-bond requirement violated equal protection, because it applied only to tenants facing eviction, and to no other litigants. *Id*.

Finally, the Court in *Little v. Streater* required the state to pay for blood tests sought by an indigent litigant to allow him to contest a paternity suit. *Little v. Streater*, 452 U.S. 1, 16-17 (1981). Without the blood tests, the putative father was unable under state law to lodge an effective defense. The Court wrote that the putative father's interests in the case were "substantial," even if not fundamental: "Apart from the father's pecuniary interest in avoiding a substantial support obligation and liberty interest threatened by the possible sanctions for noncompliance, at issue is the creation of parent-child relationship." *Id*. at 13.

In each of these cases involving important (though not fundamental) interests, the Court struck fee barriers that operated as absolute bars to equal access. *See also Boddie v. Connecticut*, 401 U.S. 3713, 382 (1971) (striking a filing fee for divorce, where the underlying interest (the right to dissolution of a marriage) was significant or fundamental, the fee created an absolute barrier to access, and the litigant could not safeguard the right in an alternative forum);

M.L.B. v. S.L.J., 519 U.S. 102, 123-24 (1996) (striking a record preparation fee for an appeal of a termination of parental rights, where the underlying interest (parental rights) was fundamental, the fee created an absolute barrier to access, and the litigant could not protect her parental rights in any other forum).

The plaintiffs' interests in this case easily equal or exceed the interests in a professional career, *Mayer*, 404 U.S. at 197; housing, *Lindsey*, 405 at 74-79 (1972); and avoiding erroneously created parent-child relationship and erroneously imposed child support. *Little*, 452 U.S. at 13. Indeed, the plaintiffs' interests in this case are no less than life itself. The plaintiffs seek injunctive relief to stop the cholera epidemic from getting worse and to remediate the waterways in order to prevent more deaths and illnesses. They also seek support toward health, basic subsistence, and the ability to send their children to school. (Pls' App. A-60, A-64, A-65.) Thus, the plaintiffs have significant interests in life, health, and basic subsistence, among others, in this case.

These are no mere economic interests of the kind in *United States v. Kras*, 409 U.S. 434, 444-45 (1973), or *Ortwein v. Schwab*. 410 U.S. 656, 660-61 (1973). In *Kras* the Court upheld a $50 fee to secure a discharge in bankruptcy. The Court said that bankruptcy discharge involved no "fundamental interest," and debt forgiveness did not require access to the courts. *Kras*, 409 U.S. at 444-45 (1973). Similarly, in *Ortwein* the Court upheld a $25 filing fee for litigants who sought

judicial review of an agency reduction in their welfare benefits. *Ortwein*, 410 U.S. at 660-61. But the plaintiffs' interests in this case far exceed the mere economic interest in discharging debt or filing for welfare benefits. Again, the individual plaintiffs' interests in this case include life, family, health, and basic subsistence, among other significant interests involved in stopping and mitigating the effects of the cholera epidemic.

The individual plaintiffs' interests in this case are significant. And taken together with the other two access-to-the-courts factors—the absolute barrier to access created by the district court's application of absolute immunity and the lack of alternative, non-judicial forms of relief—the significance of the plaintiffs' interests means that the court's application of absolute immunity infringes on their fundamental right to access the courts.

C. The Plaintiffs Have No Other Alternative Avenue for Relief.

Finally, the third factor that the Court considers in evaluating the individual interests at stake is the availability of alternative and non-judicial forms of relief. When the plaintiffs lack alternatives to vindicate and protect their underlying interests, as here, this means that the government's barrier more likely infringes on their fundamental right to access to the courts.

Thus in cases where individuals lacked alternative ways, outside the judiciary, to protect their significant interests, the Court ruled that the government's barrier violated those individuals' fundamental right to access to the courts. For example, in *Boddie v. Connecticut*, the Court struck the filing fee for divorce in part because the litigant had no other way, outside the courts, to obtain a divorce. *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971); *see also Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (striking an appellate fee in a case where the litigant had no other way, outside the courts, to appeal his conviction); *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972) (striking the double-bond requirement to appeal an eviction in a case where the litigant had no other way to appeal an eviction); *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (striking a blood test fee in a case where a father had no other way, outside the courts, to contest paternity); *United States v. Kras*, 409 U.S. 434, 444-45 (1973) (upholding a filing fee for bankruptcy, because the litigant had other ways, outside the judiciary, to discharge debt).

Just like the litigants in these cases, the plaintiffs here also lack alternative ways to protect their significant interests outside of the judiciary. The UN's and MINUSTAH's failures to own up to their obligations under Section 29 of the CPIUN, the SOFA, and the UN Charter leave the plaintiffs with no alternative remedies outside of this Court. (*See generally* Appellants' Brief at 15-47.) Stated differently, this Court has "monopoly" power over the plaintiffs' interests, just as

the courts in *Boddie* had "monopoly" power over divorce. *Boddie*, 401 U.S. at 375. Because the plaintiffs lack any alternative or non-judicial way to protect their significant interests, the government's blanket assertion of immunity on behalf of the UN infringes on the plaintiffs' fundamental right to access to the courts.

In sum, because each of the three access-to-the-courts factors so strongly favor the plaintiffs, together they show that the "character and intensity" of their interests are significant, and that the district court's grant of absolute immunity to the UN infringes on the plaintiffs' fundamental right to access to the courts.

II. THE GOVERNMENT HAS FAILED TO ARTICULATE A STRONG INTEREST.

At the second step in the access-to-the-courts analysis, the Court examines "the [government's] justification for its exaction . . . ." *M.L.B. v. S.L.J.*, 519 U.S. 102, 120-21 (1996). In this case, the government has not asserted a justification for the district court's application of absolute immunity for the UN. In other words, it has not given a reason for erecting this absolute barrier that works to "bolt the door to equal justice." *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

Indeed, as explained fully in the Appellants' brief, the district court's application of absolute immunity in favor of the UN conflicts with the more careful design for immunity established by the UN's Founders. (Appellants' Brief at 15-19.) The sweeping application of absolute immunity also conflicts with legal

obligations of the UN and MINUSTAH to settle private-law claims and establish a commission for harms arising out of their operations in Haiti. (Appellants' Brief at 20-38.) And the application of absolute immunity is based upon an unduly cramped reading of the CPIUN. (Appellants' Brief at 44-47.)

The absolute immunity that the district court applied in this case is different from other kinds of immunities, like "judicial immunity, prosecutorial immunity, and legislative immunity," in which the government may have a strong interest. *Brzak v. United Nations*, 597 F.3d 107, 114 (2d Cir. 2010) (stating that if the court accepted the plaintiffs' constitutional arguments challenging the CPIUN on its face, these other forms of immunity "could not exist"). These other kinds of immunities identified in *Brzak*—judicial, prosecutorial, and legislative—are easily distinguishable from the absolute immunity that the district court applied here. For one, these immunities are based on the Constitution, or they were well-settled in the common law upon ratification of the Constitution and thus formed part of the background understanding of the Constitution. *See generally District of Columbia v. Heller*, 554 U.S. 570 (2008) (explaining how laws, practices, and understandings that pre-dated the Constitution inform the meaning of the Constitution). In short, as part of the Constitution itself or the fabric of the Constitution, these immunities themselves cannot violate the Constitution or the fundamental constitutional right to access to the courts.

For example, judicial immunity is deeply rooted in the common law. *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976) ("The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law.") Prosecutorial immunity has similarly deep roots. *Id*. at 422-23 ("The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties.") Legislative immunity has deep common law roots and is based on the Constitution itself. *Tenney v. Bradhove*, 341 U.S. 367, 372 (1951) ("Freedom of speech and action in the legislature was taken as a matter of course by those who served the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution.") Other official immunities have similarly deep common law roots, pre-existing the Constitution. *See, e.g., United States v. Enger*, 472 F. Supp. 490, 505 (D.N.J. 1978) (tracing the history of modern diplomatic immunity and stating, "[t]hus, it can be said that the fundamental principles of modern diplomatic immunity were in active use 2,000 years ago. Their use as been continuous since that time."); *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 357 (2d Cir. 1964) (stating that "[t]he doctrine [of sovereign immunity] originated in an era of personal sovereignty, when kings could theoretically do no wrong and when the

exercise of authority by one sovereign over another indicated hostility or superiority," and that the doctrine "was earlier entrenched in our law by Chief Justice Marshall's historic decision in *The Schooner Exchange v. McFaddon*, 7 Cranch 116, 3 L.Ed. 287 (U.S. 1812)."); *Scheuer v. Rhodes*, 416 U.S. 232, 239 (1974) (stating that "[t]he concept of the immunity of government officers from personal liability springs from the same root considerations that generated the doctrine of sovereign immunity."), *abrogated in part on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800, 814-15 (1982).

Thus, these other forms of immunity identified in *Brzak* are either based on the Constitution itself, or form the understanding of the Constitution at the time of ratification. These immunities therefore cannot themselves violate the Constitution or the fundamental constitutional right to access to the courts.

In contrast, the district court's application of absolute immunity in favor of the UN derives merely from the CPIUN. This immunity is not based directly on the Constitution or hard-wired into our constitutional tradition the way that the immunities referenced in *Brzak* are. And therefore, like any statute or treaty, that immunity must yield to a fundamental constitutional right, like the fundamental right to access to the courts. As a result, the plaintiffs' as-applied challenge to the UN's immunity under the CPIUN in this case does not mean that the immunities identified in *Brzak* "could not exist." *Brzak*, 597 F.3d at 114.

If the government could articulate a sufficiently important reason for its assertion of absolute immunity on behalf of the UN—which is has not, and cannot—this Court could consider that reason at this second step in the access-to-the-courts analysis and determine whether it over-rides the "character and intensity" of the plaintiffs' interests and the infringement on the fundamental right to access the courts. But because the government has not, and cannot, assert a strong interest against the plaintiffs' as-applied challenge to the UN's immunity under the CPIUN, the plaintiffs' fundamental right to access to the courts must over-ride the district court's blanket application of absolute immunity for the UN.

CONCLUSION

The district court in this case "bolt[s] the door to equal justice," *Griffin v. Illinois*, 351 U.S. 12, 16 (1956), by granting absolute immunity to the UN. The court's grant of absolute immunity means that the plaintiffs in the case have no way to access the courts, and no other means to protect their interests. The plaintiffs' interests in life, family, health, basic subsistence, and others are significant, while the government has failed to offer any justification for absolute immunity for the UN as applied in this case. Therefore, on balance, the court's grant of absolute immunity to the UN in this case violates the plaintiffs' fundamental right to access the courts.

Respectfully submitted,

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June 3, 2015

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 4,073 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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CERTIFICATE OF SERVICE

I hereby certify that on the 3d day of June, 2015, a true and correct copy of the foregoing document was served via mail, on the following:

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