No. 02-2171

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DON BEHARRY, a.k.a. DONALD BEHARRY,

Petitioner-Appellee,

v.

JOHN ASHCROFT, Attorney General of the United States; JAMES ZIGLAR, Commissioner of the Immigration and Naturalization Service; EDWARD MCELROY, District Director of the Immigration and Naturalization, New York District; and IMMIGRATION AND NATURALIZATION SERVICE,

Respondents-Appellants.

On Appeal from the United States District Court
for the Eastern District of New York
Honorable Jack Weinstein, Senior District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Amici Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, and Atlantic Legal Foundation, a nonprofit corporation organized under the laws of New York, hereby state that they have no parent companies, subsidiaries, or affiliates that have issued shares to the public.

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS-APPELLANTS

INTEREST OF AMICI CURIAE

Pacific Legal Foundation and Atlantic Legal Foundation submit this brief amicus curiae in conjunction with the annexed motion to file pursuant to Federal Rule of Appellate Procedure 29.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Litigating nationwide since 1973, Pacific Legal Foundation provides a voice in the courts for thousands of Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Pacific Legal Foundation is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; and Bellevue, Washington.

Pacific Legal Foundation has participated in numerous cases across the country defending the principles of federalism and more generally, advocating for constitutionally-limited government. In its amicus capacity, Pacific Legal Foundation has consistently argued that courts must apply the plain language of a legislative act whenever possible to avoid separation of powers problems. *See*, *e.g.*, *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000).

Pacific Legal Foundation believes that its public policy perspective and litigation experience will provide an additional viewpoint on the issues presented in this case.

Atlantic Legal Foundation is a nonprofit public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system and individual rights. One of Atlantic Legal Foundation's abiding concerns has been the preservation of our constitutional system of separation of powers and federalism. Most recently, on the subject of the proper allocation of the power to conduct foreign relations, Atlantic Legal Foundation represented former President Gerald R. Ford, Vice President Dick Cheney, and 26 other former senior federal officials concerned with making and implementing foreign policy as *amici curiae* in *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). Martin S. Kaufman, Senior Vice President and General Counsel of Atlantic Legal Foundation, and one of the authors of this brief, was counsel of record for those amici in *Crosby*. Mr. Kaufman earned a Diploma in Public International Law from the Hague Academy of International Law, and assisted in the writing of Friedmann, W., Lissitzyn, O., & Pugh, R., *International Law, Cases and Materials* (1969), an edition to Henkin, Louis, *et al.*, *International Law*: *Cases and Materials* (3d ed. 1993).

INTRODUCTION

This case comes before this Court due to a lower court's refusal to apply the plain language of the Immigration and Naturalization Act. In 1997, the Immigration and Naturalization Service (INS) attempted to deport, without a hardship hearing, an alien convicted of an aggravated felony, in accordance with a plain reading of the Act. The Federal District Court for the Eastern District of New York held that such a reading violated certain non-self-executing international treaty provisions and must be rejected in favor of a more expansive interpretation consistent with these provisions. *See Beharry v. Reno*, 183 F. Supp. 2d 584, 603-05 (E.D. N.Y. 2002). The court was wrong. Because a federal statute is superior to unratified and non-self-executing international treaties and related principles of customary international law, the Act must be applied as written. This case presents this Court with the opportunity to uphold the supremacy of United States law and the democratic process through which that law is enacted.

STATEMENT OF THE CASE

In 1982, Don Beharry (Beharry) came to the United States from Trinidad as a lawful, permanent resident. In the years that followed, he was convicted of numerous crimes, including several related to theft. In November of 1996, Beharry was convicted and jailed for committing second-degree robbery. *See Beharry*, 183 F.

Supp. 2d at 586-87. At the time of the conviction, Beharry's crime was classified as an aggravated felony under the terms of 1996 amendments to the Act, though it would not have been so classified at the time he committed the underlying robbery. *Id*. at 588.

In 1997, the INS commenced deportation proceedings. *Id*. at 587. After an immigration judge found Beharry ineligible for relief from deportation, he filed for a petition for *habeas corpus*. *Id*. at 587, 603. As the father of a United States citizen, Beharry grounded his petition on section 212(h), a provision that allows for a waiver of deportation when it would result in substantial hardship to a child who is a United States citizen. *Id*. at 586, 603. Section 212(h) does not apply, however, to lawful resident aliens convicted of an aggravated felony. *Id*. at 592, 603. Beharry conceded that he was ineligible for relief under the terms of section 212(h), but challenged the provision on constitutional grounds. *Id.* at 603.

The district court found that international law, rather than the asserted constitutional provisions, provided a basis for relief from straightforward application of the Act. *Id*. at 603-04. The district court concluded that such an application was incompatible with provisions in three international instruments: the Convention on the Rights of the Child (CRC), the Universal Declaration of Human Rights (UDHR), and the International Covenant on Civil and Political Rights (ICCPR). *Id*. at 595-97.

It determined that, as part of customary international law, these treaty provisions have the same status in domestic law as a federal statute and therefore supercede a prior inconsistent federal statute such as the Act. *Id*. at 597, 604. The court further held that federal statutes should be interpreted in a manner that is consistent with the treaty provisions, regardless of whether they have been ratified by the United States. *Id*. at 598, 603-05.

Ultimately, the court brought the Act into "compliance" with the treaty provisions by holding that section 212(h) requires a hardship waiver hearing for all aliens, including those convicted of an aggravated felony, if the underlying crime was not classified as an aggravated felony at the time it was committed. *Id*. at 604-05. It did so despite the fact that this Court recently held that it is the date of conviction, not of the time of the criminal act, that determines whether the terms of the 1996 Act apply to persons subject to deportation. *Domond v. United States Immigration and Naturalization Service*, 244 F.3d 81 (2nd Cir. 2001). The United States has appealed to this Court to confirm that the plain reading of the Act, and the decision in *Domond*, are superior in domestic law to non-self-executing international human rights treaties and international rules not adopted by the United States.

ARGUMENT

The district court's reinterpretation of section 212(h) of the Act rests on a series of utterly indefensible conclusions and assumptions about the status of international law in the domestic legal system. Specifically, the court incorrectly concludes that (1) it has jurisdiction to hear Beharry's international law defense; (2) international customary law is co-equal with a federal statute and therefore supercedes an inconsistent statute; and (3) courts may rely on international treaty provisions rejected by the United States to interpret a federal statute. Together, the district court's unprecedented conclusions result in a drastic and dangerous reallocation of domestic law-making power from internal democratic institutions to courts and foreign states.

I

THE COURT LACKS JURISDICTION OVER BEHARRY'S NON-SELF-EXECUTING TREATY AND CUSTOMARY INTERNATIONAL LAW CLAIMS

A. Non-self-executing Treaties Do Not Provide a Basis for Judicial Review

It is a fundamental principle of international and national law that a treaty cannot bind the United States without its consent. *See Vienna Convention on the Law of Treaties*, May 23, 1969, art. 34, 11 U.N.T.S. at 341 ("A treaty does not create either obligations or rights for a third State without its consent."); Art II, Section 2 of the

United States Constitution (granting the President "Power, by and with the Advice and *Consent* of the Senate to make Treaties, provided two thirds of the Senators present concur") (emphasis added). An obvious corollary is that unratified international agreements are unenforceable in domestic courts. *Securities and Exchange Comm. v. Int'l Swiss Investments Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990) ("An unratified treaty has no force until ratified by a two-thirds vote of the Senate"). Similarly, a treaty consented to only upon an express understanding that some of its provisions are inoperative or non-self-executing must be treated that way or be considered null with respect to the conditionally consenting party. *See* Bradley, Curtis A., & Goldsmith, Jack L.,*Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. Rev. 399, 438 (2000)

> [i]f the U.S. RUDs really do violate the object and purpose of the human rights treaties, . . . there are only two possible remedies under international law: either the United States is not a party to the treaty provisions with respect to which it has reserved (which yields the same result as if the RUD's were enforced) or the United States is not a party to the treaty at all.

In sum, international human rights treaties have absolutely no force of law in United States courts unless they have been ratified as self-executing treaties by the United States Senate or implemented by domestic legislation. *See Calderon v. Reno*, 39 F. Supp. 2d 943, 956 (N. D. Ill. 1998).

The CRC has not been ratified by the United States Senate; and therefore "does not have the force of domestic law under the treaty clause of the Constitution." *Beharry*, 183 F. Supp. 2d at 596. The UDHR is not even a treaty subject to constitutional ratification and provides no basis for a cause of action in United States courts. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992) (UDHR not an agreement that creates binding obligations). Finally, the ICCPR is a valid treaty in the United States only because the United States attached a series of reservations, understandings, and declarations ("RUDs") that limit its domestic effect. One motivation for these RUDs, which the government included in the face of substantial domestic and foreign opposition, "was a desire *not* to effectuate changes to domestic law." Stewart, David P., *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DePaul L. Rev. 1183, 1206 (1993) (emphasis added).

The non-self-executing declaration appended to the United States' ratification of the International Covenant on Civil and Political Rights "clarif[ies] that the Covenant will not create a private cause of action in U.S. courts," *International Covenant on Civil and Political Rights, Senate Comm. on Foreign Relations Report*, S. Rep. No. 102-23, at 19 (1992); specific reservations that preserve differences

between U.S. law and the requirements of the Covenant ensure that "changes in U.S. law in these areas will occur *through the normal legislative process*." *Id*. at 4 (emphasis supplied). This and other reservations "are integral parts of [the U.S.'s] consent to be bound." *Observations by the United States on General Comment* 24, 3 Int'l Hum. Rts. rep. 265, 269 (1996). Thus, RUDs make it clear that the political branches are not receptive to treating the human rights treaties as an independent source of domestic law: "By its reservations, the United States apparently seeks to assure that its adherence to a convention will not change, or require change, in U.S. laws, policies, or practices, even where they fall below international standards". Henkin, Louis, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 Am. J. Int'l L. 341, 345 (1995).

The use of RUDs is a "controversial" practice only in the imagination of the most extreme internationalist commentators. Courts, on the other hand, consistently recognize that the executive and legislative decision to give consent to a treaty only upon certain reservations precludes giving effect to those instruments in a manner contrary to the reservations. *See*, *e.g.*, *Beazley v. Johnson*, 242 F.3d 248, 266-67 (5th Cir. 2001); *De La Rosa v. United States*, 32 F.3d 8, 10, n.1 (1st Cir. 1994); *Sandhu v. Burke*, 2000 U.S. Dist. LEXIS 3584, at 32 (S.D. N.Y. Feb. 10, 2000); *Ralk v. Lincoln County*, 81 F. Supp. 2d 1372, 1380 (S.D. Ga. 2000); *Calderon*, 39 F. Supp.

at 956-57. Thus, to minimize the United States' refusal to unconditionally ratify treaties, the district court advanced a narrow and closed loop of authority, citing its own decisions, a book by Louis Henkin, and the *Restatement of the law (Third) of Foreign Relations*, the chief reporter of which is Louis Henkin. *See Beharry*, 183 F. Supp. 2d 594-95. This is scant support for a decision that allows the district court to substitute its judgment regarding the domestic status of the CRC, UDHR, and ICCPR for the manifestly contrary judgment of the United States *President* and *Congress*.

B. Beharry Does Not Have a Cognizable Defense Under Customary International Law

Faced with the courts' overwhelming deference to the political decision to leave domestic law unchanged, the district court suggests that the relevant treaty provisions apply as manifestations of "customary international law" rather than as a part of a treaty per se. *See Beharry*, 183 F. Supp. 2d at 597-98. This determination depends on an insupportable and fatal assumption that customary international law provides a private cause of action in a *habeas corpus* proceeding. It does not. In the first place, it is questionable whether customary international law is part of the "laws of the United States" for purposes of the *habeas corpus* statute.[1] *See generally*,

[1] 28 U.S.C. § 2241 states in relevant part:

(c) The writ of *habeas corpus* shall not extend to a prisoner unless- -

(continued...)

Bradley, Curtis A., and Goldsmith, Jack, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997) (arguing that customary international law is not federal common law and therefore not part of the "laws of the United States" within the meaning of the Supremacy Clause). However, even if it is, the *habeas* petitioner must identify a *specific basis* for a customary international law right of action *apart* from the *habeas* statute itself. *See Buell v. Mitchell*, 274 F.3d 337, 374-75 (6th Cir. 2001) (refusing to find a private right of action for a customary law claim raised as part of a *habeas* petition); *White v. Paulsen*, 997 F. Supp. 1380, 1383 (1998) ("[p]laintiffs' argument loses its footing at the critical next step: demonstrating the law of nations gives rise to a private right of action that applies to the allegations in this case"); *Handel v. Artukovic*, 601 F. Supp. 1421, 1426 (C.D. Ca. 1985) (considering, and rejecting, contention that plaintiffs had a right of action to bring a customary law claim); *see generally Montana Dakota Utilities Co. v. Northwestern Publishing Service Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.")

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[1] (...continued)
(3) He is in custody in violation of the Constitution or law or treaties of the United States.

In this case, Beharry cannot point to, and the court fails to identify, a source for a right of defense based on the customary international law prohibition against deportation without a hardship hearing. Substantive domestic law obviously precludes such a defense. The *habeas corpus* statute does not permit the attempted customary international law defense, even if it provides initial jurisdiction in this case. *See Guzman v. Tippy*, 130 F.3d 64, 66 (2nd Cir. 1997); *Beazley*, 242 F.2d at 268; *Alexis Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995). Finally, customary international law itself cannot supply the right of action since "[i]nternational law 'does not require any particular reaction to violations of law . . . . Whether and how the United States wished to react to such violations are domestic questions."' *Hilao v. Estate of Ferdinand Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994) (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 779 (D.C. Cir. 1984)); *see also Hawkins v. Comparet-Cassani*, 33 F. Supp. 2d 1244, 1255 (C. D. Ca. 1999) ("[T]he law of nations does not in itself create a personal right of action."); *Handel*, 601 F. Supp at 1427 ([P]laintiffs "have not pointed to any source, and the Court has found none, for the proposition that one looks to the law of nations to determine the *actionability* of conduct condemned by that body of law.")

Nothing in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), calls for recognition of a customary international law right of action in this case. In *Filartiga*, the court

held that the Alien Tort Act provided jurisdiction over a tort claim premised on customary international law, but did not directly address the separate question of whether plaintiffs also had a right of action. *Id*. at 887. Moreover, to the extent that the decision can be read to assume that a right of action existed at all, it was implied from the *unique language of the Alien Tort Act*, not from relevant international legal principles, or from any other domestic jurisdictional grant. *See Kadic v. Karadzic*, 70 F.3d 232, 246 (2nd Cir. 1995) (noting that "since [the Alien Tort Act] appears to provide a remedy . . . [the plaintiffs] causes of action are statutorily authorized, and, as in *Filartiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied.").

Since *Filartiga*, federal courts have continued to reject a right of action for a customary international law violation in a non-Alien Tort Act context.[2] *See Restatement of the Law 3d of the Foreign Relations Law of the U.S.*, section 703, reporters note 7. This is not to say that courts cannot imply such a right of action.

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[2] The single case that might support direct relief under customary international law in the *habeas* context, *Fernandez v. Wilkinson*, 505 F. Supp 787 (D. Kan. 1980), was affirmed on alternate (statutory) grounds by the Tenth Circuit, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981). Subsequent federal courts, including this one, have uniformly rejected the limitation on government detention of aliens imposed by *Rodriguez-Fernandez*, as well as the suggestion that such a result could be premised on international law. *See Guzman v. Tippy*, 130 F.3d at 65-66 (listing cases rejecting result in *Rodriguez-Fernandez* and noting that "indefinite detention does not violate international law").

See Buell v. Mitchell, 274 F.3d at 374 (recognizing that a right of defense under customary international law could be implied); *White*, 997 F. Supp. at 1383 ("[F]ederal courts have the authority to imply the existence of a private right of action for violations of jus cogens norms of international law"). However, courts have consistently answered the critical question of "whether a federal court *should* imply the existence of such a remedy" in the negative. *White*, 997 F. Supp at 1384; *Handel*, 601 F. Supp at 1428 ("[T]he 'special factors"' weighing against implying a right of action is "the absence of affirmative action by Congress"). In *Buell*, the Sixth Circuit summed up:

> [W]here customary international law is being used as a defense against an otherwise [valid] action, the reaction to any violation of customary international law is a domestic question that *must be answered by the executive and legislative branches*. We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is *reserved to the executive and legislative branches of the United States government, as it is their constitutional role to determine the extent of this country's international obligations and how best to carry them out.*

Buell, 274 F.3d at 375-76 (emphasis added).

Although *Buell* was a death penalty case, it arose, like this case, in the context of a *habeas corpus* petition. Therefore, its reasoning with regard to whether a right of defense should be implied under customary international law is directly relevant

to the present case and should be followed. Specifically, since this is a case arising under a *habeas* petition, not the Alien Tort Act, there is no legitimate basis for suddenly implying a right of defense under customary international law.

II

AS AN OTHERWISE VALID FEDERAL STATUTE, THE ACT IS SUPERIOR TO CUSTOMARY INTERNATIONAL LAW

Even if this Court agrees to hear Beharry's claims under customary international law, it cannot conclude that they provide a successful defense to the conflicting immigration law. On the contrary, federal precedent clearly indicates that customary international law is inferior and thus, not controlling, where there is a valid federal statute. It does not matter whether the federal law preceded the recognition of customary principles by other nations or whether it came after such an event: in either case, the federal act is preeminent.[3]

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[3] The district court held that "in order to overrule customary international law, Congress must enact domestic legislation which both *postdates* the development of a customary international law norm, and which clearly has the intent of repealing that norm." *Beharry*, 183 F. Supp. 2d at 599.

A. International Customary Law Is Irrelevant When There Is a Valid Federal Statute and Controlling Judicial Precedent

The district court failed to cite any persuasive authority for its conclusion that customary international law supercedes prior inconsistent federal legislation because none exists. Indeed, the opposite proposition is correct: "International law controls only 'where there is no treaty,' and no controlling executive act or judicial decision." (emphasis added). *Barrera-Echavarria*, 44 F.3d at 1450-51 (quoting *The Paquette Habana*, 175 U.S. 677, 700 (1900)); *see also*, *Gisbert v. United States Attorney General*, 988 F.2d 1437, 1448 (5th Cir. 1993). *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-54 (11th Cir. 1986). This is particularly true in the *habeas corpus* context. For instance, in *Guzman*, this Court held that international law was displaced in the area of immigration since "[t]he decision of the Attorney General to detain [illegal immigrants], the legislative enactment of the Immigration and Nationality Act, and the Supreme Court's ruling in *Shaughnessy v. United States ex rel. Mezei* [citation omitted]. . . are all controlling acts which prevail over international law." 130 F.3d at 66.

There is no indication that *Guzman* and similar decisions are predicated on the timing of the controlling legislative act; all that mattered is that the United States government directly and fully addressed the immigration issues at hand. *See, e.g.,*

Alvarez-Mendez v. Stock, 941 F.2d 956, 963 (1991) ("Although 'international law is part of the law of the United States' [citation], we are bound by a properly enacted statute, provided it be constitutional, even if that statute violates international law.") Indeed, many of these decisions uphold the supremacy of the Act even though the pertinent legislative, executive and judicial acts took place *prior* to the creation of several international instruments, such as the ICCPR, that might have given rise to pertinent customary international legal principles.

Here, it is undisputed that the Act is a valid and applicable statute, the plain effect of which is to: (1) preclude a hardship waiver hearing under section 212(h) from lawful aliens convicted of an aggravated felony and (2) require courts to look to the time of conviction when considering whether an alien is guilty of an aggravated felony. *Domond*, 244 F. 3d at 81. Nor is there any real dispute that these domestic legal principles apply to Beharry in a manner that permits his immediate deportation. The only argument is whether the "international implications" of this result can require a reinterpretation in accordance with customary international law. As *Guzman* shows, the district court should have answered "no" as soon as it determined that the relevant provisions of domestic law plainly apply and are constitutionally sound. *See Guerra v. Ashcroft*, 2002 U.S. Dist. LEXIS 2471 n.4 (N.D. Tex. Feb. 15, 2002) (in identical circumstances, the district court "respectfully disagrees with the

[*Beharry*] court's reasoning and application of international law" and declines to recognize a defense to deportation under such law).

B. As with All Federal Common Law, Customary International Law Is Subservient to a Valid Federal Statute

This Court's conclusion that CIL is "part of the federal common law." *Filartiga*, 630 F.2d at 885, leads directly to the conclusion that a valid federal statute always prevails over customary international law. The resort to federal common law is an "unusual exercise of lawmaking" which should be engaged only "in a 'few and restricted' instances.'" *Milwaukee v. Illinois*, 451 U.S. 304, 313-14 (1981) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). Significantly, the United States Supreme Court has "always recognized that federal common law is 'subject to the paramount authority of Congress.'" *Milwaukee*, 451 U.S. at 313 (quoting *New Jersey v. New York*, 238 U.S. 336, 348 (1931).

Because of Congress' preeminent authority over domestic law, federal common law controls only in "absence of an applicable Act of Congress," *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943), or when the federal statute does not answer the question before the court. *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J. concurring). Conversely, federal common law will *not* apply when "the field has been made the subject of comprehensive legislation . . . ."

Illinois v. Milwaukee, 406 U.S. 91, 108 n.9 (1972) (quoting *Texas v. Pankey*, 441 F.2d 236, 241-42 (10th Cir. 1971), *or when a federal statute speaks "directly" to a question otherwise answered by common law*. *Milwaukee*, 451 U.S. at 315; *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978); *Cleveland v. Beltman North American Co., Inc.*, 30 F.3d 373, 380 (2nd Cir. 1994). Federal circuit courts have consistently held that they may not apply federal common law once it is clear that a federal statute applies. 30 F.3d at 381; *Resolution Trust Corporation v. Miramon*, 22 F.3d 1357, 1364 (5th Cir. 1994); *Flacche v. Sun Life Assurance Co. of Canada*, 958 F.2d 730, 735 (6th Cir. 1992).

In this case, the Act speaks directly to the deportation issue in this case. The district court agreed that the INS' interpretation of the Act, requiring the immediate deportation of Beharry without a hardship hearing, was "arguably compatible with the complex statutory scheme." *Beharry*, 183 F. Supp. 2d at 588. But this understates the situation: given this Court's decision in *Domond*, which held that a person may be classified as an aggravated felon under the 1996 Act as long as he is *convicted* of the underlying crime after passage of the Act, the statutory scheme positively compels the INS' interpretation. After all, there is no question that (1) the INA's plain language withholds a 212(h) hardship from aggravated felons and (2) that Appellant was convicted of an aggravated felony after passage of the 1996 Act. *See*

Beharry, 183 F. Supp. 2d at 603 ("Petitioner admits that section 212(h) is inapplicable in terms of its own language. . . ."). Thus, when viewed through the prism of *Domond*, the Act simply and clearly answers the questions in this case. Therefore, as long as the current understanding of customary international law as federal common law prevails, the customary law principles here must give way to the valid and applicable federal immigration statute. *See* Bradley & Goldsmith, *supra*, at 817 (noting that most courts view customary international law as federal common law, but that such a "position is founded on a variety of questionable assumptions and . . . is in tension with fundamental constitutional principles").

III

SECTION 212(H) OF THE IMMIGRATION AND NATURALIZATION ACT IS UNAMBIGUOUS AND "CUSTOMARY INTERNATIONAL LAW" CANNOT BE USED TO "INTERPRET" THE ACT

The district court cannot rely on customary international law under the guise of "interpreting"[4] the Act to conform to a posited, but mythical or chimerical "seamless web of our national and international law,"[5] anymore than it can directly

[4] The District Court invoked "non-ratified treaties as an aid in statutory construction." *See Beharry v. Reno*, 183 F. Supp. 2d 584 at 593.

[5] In fact, in law, and in theory, international law and domestic law are "two separate, mutually independent legal orders that regulate quite different matters and have quite different sources." Hans (continued...)

apply customary international law. *Beharry v. Reno*, 183 F.Supp. 2d at 591. In fact, the lower court's tortured attempt to "harmonize" section 212(h) with customary international law conflicts with one of the fundamental principles of statutory interpretation: that the courts' constitutional role is most properly fulfilled by giving effect to the plain meaning of the language as Congress enacted it. *See, e.g., Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999) (Thomas, J., for a unanimous court: "As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there

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[5] (...continued)
Kelsen, *Principles of International Law* 553 (2d ed. 1966). While it is true that portions or aspects of international law can become part of our national law, the notion of nation-states and national sovereignty, upon which international law is founded, inherently means that they are in fact separate systems which interact. International law recognizes only nation states and international organizations as "actors." In international law, federal states (such as the United States) constitute a single "person." *See*, e.g., Art. 2 of the Convention on Rights and Duties of States, 49 Stat. 3097, 165 L.N.T.S. 19 (1933); *and see International Law, Cases and Materials* 308 n.1 (Friedmann, W., Lissitzyn, O., & Pugh, R., eds.,1969). It seems that the court below subscribes to the most extreme form of the "monist" view of international law, which would require that domestic courts "give effect to international law, notwithstanding inconsistent domestic law, even domestic law of constitutional character." *See* Henkin, Louis, *International Law: Politics and Values* 64 (1995). But even Professor Henkin, probably the most prominent current advocate of "monism," concedes that the two systems are separate: "International law requires a state to carry out its international obligations but, in general, how a state accomplishes this result is not of concern to international law." Henkin, Louis, *et al.*, *International Law: Cases and Materials* 153 (3d ed. 1993); *see also* Buergenthal, Thomas, and Maier, Harold G., *Public International Law in a Nutshell* 208 (2d ed. 1990) ("[I]t is the authority of the United States decision maker, not the authority of the community of nations, that gives legal effect to the rules of international law within the United States."); Borchard, Edwin, *The Relation Between International Law and Municipal Law*, 27 Va L. Rev. 137, 143 (1940) ("The domestic instruments that the State employs to perform its international obligations are a matter of indifference to international law. It may employ statute or administrative official or judicial control.... [I]t may directly incorporate only treaties and not customary [international] law.").

as well.") (citations and internal quotation marks omitted); *Dunn & Delta Consultants, Inc. v. Commodity Futures Trading Comm.*, 519 U.S. 465, 470 (1997) (Stevens, J., for the majority: [A]bsent any 'indication that doing so would frustrate Congress' clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.") (citations and quotation marks omitted); *Connecticut National Bank v. Germain,* 503 U.S. 249, 254 (1993) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.") (citations and quotation marks omitted); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433, n.12 (1987) (Stevens, J., writing for the majority: "As we have explained, the plain language of this statute [the Act] appears to settle the question before us.").

Rather than rely on the plain language of the Act, the district court turned to *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (commonly known as *The Charming Betsy*), and its progeny, for a canon of construction that allegedly harmonizes federal law with international law.[6] The Restatement (Third) states this canon as follows: "*Where fairly possible*, a United States statute is to be

[6] In *The Charming Betsy*, Justice Marshall declared that statutes "ought never to be construed to violate the law of nations if any other possible construction remains." *The Charming Betsy*, 6 U.S. at 118.

construed so as not to conflict with international law or with an international agreement of the United States." *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (emphasis supplied). As the emphasized language implies, the *Charming Betsy* canon comes into play *only* if the text of a statute is unclear and permits of several interpretations. *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) ([T]here is "a firm and obviously sound canon of construction against finding implicit repeal of a treaty in *ambiguous* congressional action.") (emphasis added).

In the case of an ambiguous statute, the *Charming Betsy* canon increases the likelihood of a court correctly construing it in accordance with the assumption that the Congress does not intend to violate international law. *See Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801) (stating that federal laws "ought not, *if it be avoidable* . . . be construed as to infract the common principles and usages of nations" which "the legislature of the United States will always hold sacred") (emphasis added); *see generally*, Bradley, Curtis, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L. J. 479, 495 (1999) ("[W]hen the text of a statute is unclear, the canon purportedly increases the likelihood of a correct construction, and thereby assists courts in acting as faithful agents of congressional will."). In light of this purpose and the correspondingly

limited application of the canon, it makes sense that the canon simply does not apply where the statute's language, and thus Congressional intent, is clear. *See Argentine Republic v. Amerada Hess Shipping Corp.* 488 U.S. 428, 438, 439-43 (1989) (reversing, on the basis of statutory language, this Court's decision that the *Charming Betsy* canon required provisions of the Foreign Sovereign Immunities Act (FISA) to be conformed to contrary international law principles).

In this case, the language of the relevant immigration statute is unambiguous. As the district court conceded, "Petitioner admits that section 212(h) is inapplicable in terms of its own language. . . ." and "is ineligible for relief under a narrow and wooden [read "plain meaning"] construction of [section 212(h)] of the Act." *Beharry*, 183 F. Supp. 2d at 603. Therefore it cannot be *fairly* construed to conform to the district court's construct of international law. Consequently, the district court's use of the *Charming Betsy* canon is simply a device to engraft treaty provisions that are otherwise completely unenforceable onto United States law. In taking this path, the court has gone past any reasonable application of the canon and once again violated basic and important separation of powers principles. *See* Turley, Jonathan, *Dualistic Values in the Age of International Legisprudence*, 44 Hastings L.J. 185, 265, 267 (1993) (an interpretation of the *Charming Betsy* cannon "shifting the emphasis away from determining congressional intent toward upholding international principles and

obligations whenever possible" is "clearly antagonistic to [the canon's] traditional intentionalistic and proceduralistic purposes" and would create a "supremacy rule for international legislation created by the courts and the President").

This endeavor cannot be upheld. Indeed, the Supreme Court has disapproved such unilateral lawmaking ever since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), precisely because it is made by federal judges and, given the absence of a proper delegation of such power to the federal courts, amounts to "an unconstitutional assumption of powers by courts of the United States."[7] *Id*. at 79. This is particularly true in the area of foreign affairs, the exclusive power over which resides in the political branches of the federal government.[8] *See United States v.*

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[7] The constitutional problem in *Erie* concerned not only federalism, as is commonly understood, but also separation of powers. *See* Lessig, Lawrence, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 Harv. L. Rev. 1785, 1793 (1997). Although the federalism problem was the one that was most obvious, separation of powers was also important. The *Erie* Court indicated that even if the federal government had the power to make general common law binding on the states, this did not mean that the federal courts had this power. *Erie*, 304 U.S. at 78; *see* Clark, Bradford R., *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1261-62 (1996) ("An essential premise of the Court's decision in Erie . . . appears to be that unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers.").

[8] With respect to the power over foreign relations, the Framers of the Constitution clearly recognized that "the exclusive delegation or rather this alienation, of State sovereignty" exists not only where the Constitution has expressly "granted an exclusive authority to the Union," but also where it granted "an authority to the Union to which a similar authority in the States would be absolutely and totally *contradictory and repugnant." The Federalist No. 32* (A. Hamilton). The language of the Constitution itself addresses the "concern for uniformity in this country's dealings with foreign nations and indicat[es] a desire to give matters of international significance to the jurisdiction of federal institutions." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1963).

Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). The assumption of foreign affairs powers "principally entrusted by the Constitution to the Congress or the Executive" is especially dangerous in this case because it converts the court into an "agent[s] of the international order." Richard A. Falk, *The Role of Domestic Courts in the International Legal Order* 72 (1964). As such, it jeopardizes the very heart of our democratic system by turning the judicial branch into a vehicle for other nations, not the American people, to determine what rules we are to live by. *See* Christenson, Gordon A., *Federal Courts and World Civil Society*, 6 J. Transnat'l L. & Pol'y 405, 443 (1997) [I]f international legal principles are enforceable without congressional authority, "would they not be outside constitutional legislative processes and powers?"). In this way, the district court's reasoning would undermine a principle of constitutional government even more important than separation of powers: self-government.

CONCLUSION

For the foregoing reasons, the district court's decision must be reversed.

DATED: June ____, 2000.

Respectfully submitted,

MARTIN S. KAUFMAN
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By ____________________________
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FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER {Number}

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____________________ ____

Date Signature of Attorney or Unrepresented Litigant

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief amicus curiae was filed with the Clerk this 24th day of June, 2002, via Federal Express. I further certify that two copies of the foregoing brief amicus curiae were served this day via first-class mail, postage prepaid upon the following:

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