Supreme Court, U.S.
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In the
Supreme Court of the United States

INTERNATIONAL BOUNDARY COMMISSION (U.S. SECTION), A UNITED STATES AGENCY; DENNIS SCHORNACK, IN HIS OFFICIAL CAPACITY AS UNITED STATES INTERNATIONAL BOUNDARY COMMISSIONER,

Petitioners,

v.

SHIRLEY-ANN AND HERBERT LEU,

Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The President of the United States purported to remove from office the Commissioner of an international organization who resisted litigation control by the Department of Justice. Contrary to more than seventy years of Supreme Court precedents, the Court of Appeals for the Ninth Circuit held that the Commissioner had no standing to challenge his removal because, it said, there was no possible redress in the absence of a high-ranking executive branch official as a party to the case. Must a high-ranking executive branch official be a party, for redressability, when another party challenges presidential powers of removal from office?

2. Contrary to decisions in other Circuits, the Court of Appeals for the Ninth Circuit ruled that the district court had no jurisdiction to choose among parties contesting to be the proper respondents to a lawsuit. Does a federal judge not have jurisdiction, when parties answering an ambiguous complaint disagree as to which of them is the party being sued and in order to manage the cases before her, to decide which party, pursuant to Rule 9(a) of the Federal Rules of Civil Procedure, is the correct party with the capacity to answer the complaint?

3. The Court of Appeals for the Ninth Circuit permitted the Department of Justice, even though it was not representing any federal party, to substitute a named defendant

according to Rule 25(d) of the Federal Rules of Civil Procedure, which is a federal rule applicable to federal parties. Can Rule 25(d) apply to substitute a defendant and enable Justice Department representation under 28 U.S.C. § 516 when the named defendant is not an officer of the United States and the organization sued is not an agency of the United States?

PARTIES TO THE PROCEEDING BELOW

Herbert and Shirley-Ann Leu sued "The International Boundary Commission (U.S. Section) a United States agency," and "Dennis Schornack, in his official capacity as United States International Boundary Commissioner." The International Boundary Commission ("IBC"), an international treaty organization comprising two commissioners, one appointed by the President of the United States, the other appointed by Canada, was created by treaties ratified by the United States Senate in 1908 and 1925. Convention Between the United States and Great Britain Relating to the Canadian International Boundary, U.S.-Gr. Brit., Apr. 11, 1908, 35 Stat. 2003, Pet. App. D; Treaty Between the United States and Great Britain in Respect of Boundary Between the United States and Canada, U.S.-Gr. Brit., Feb. 24, 1925, 44 Stat. 2102, Pet. App. E.

The IBC, to the exclusion of all other agencies, organizations and authorities, is responsible for marking, mapping, and maintaining the border between Canada and the United States, settling all disputes as to the location of the border, and keeping clear a "boundary vista," ten feet to each side. The clear boundary vista provides access for U.S. Customs and Border Patrol and the Royal Canadian Mounted Police to police and patrol the border.

The 1908 and 1925 Treaties provide for presidential appointment of a commissioner, but with no specified term of office. The treaties are self-executing as no statute or other U.S. law provides for the appointment or removal of an IBC commissioner.

The first American served three different presidents over an eleven year period. Vacancies for commissioners appointed by the President can be filled, according to the plain language of the treaties, only upon the "death, resignation, or other disability" of a commissioner. The treaties confer no authority for the removal of a commissioner, nor for appointment of a commissioner or "acting commissioner" absent these conditions, and before President Bush's action in 2007, no President in American history had ever purported to remove the head of any international organization, including this one.

The IBC is deliberately technocratic. Its founding treaties, deriving from the Jay Treaty of 1794, 8 Stat. 116, and numerous other boundary treaties thereafter, specify that the commissioners should be experts and that they must mark, map, and maintain the border without political interference.

The Commissioner of the IBC, though appointed by the President, is not an officer of the United States because he is not appointed pursuant to a statute nor is he confirmed by the Senate. Instead, he is appointed by treaty as an official of an international organization. Dennis Schornack was appointed by President Bush to fill a vacancy created by resignation, consistent with the requirements of the treaties. President Bush purported to remove him, but without any authority to do so, and to replace him with an "Acting Commissioner" (David Bernhardt) whom he subsequently named "Commissioner," thus claiming to create a position

that does not exist in the law and had never previously existed ("Acting Commissioner"), and then to create and fill a vacancy for Commissioner that was not created by "death, resignation, or other disability."

Bernhardt purported to resign on Inauguration Day 2009, and to name Kyle Hipsley as his own replacement. The appellate court recognized Hipsley as the Acting Commissioner, even though he was not appointed by the President. The Ninth Circuit allowed Hipsley, the Acting Commissioner named by Bernhardt, who had no authority to name a successor, to defend the underlying lawsuit in an official capacity and on behalf of the IBC. The court made the determination that Hipsley could substitute for the named defendant while referencing Rule 25(d), but denied that it was making any determination as to whether Bernhardt had been appointed lawfully and without reference to any authority for Bernhardt to name Hipsley.

The Department of Justice ("DOJ") entered an appearance on behalf of the "federal defendants," invoking 28 U.S.C. § 516, but later conceded, consistent with a long history of opinions from the Department of State's Legal Adviser, that the IBC is an international organization and not an agency of the United States. DOJ has persisted in treating the IBC, despite this admission against claimed interest, as an agency of the United States with respect to its presumption in representing the IBC, trying to settle the legal dispute contrary to the IBC's mandate and interests, defending presidential authority to remove and replace the Commissioner.

Herbert and Shirley-Ann Leu brought the underlying suit, the first of its kind by Americans since the IBC was created in 1908. They did not appear at the oral argument in the Ninth Circuit, but made clear in the media their preference for an outcome that would recognize DOJ as counsel and Bernhardt and Hipsley as Commissioners because the Bush Administration attempted to enter a settlement with the Leus that would give them what they want: protection of a wall they built too close to the border in violation of the 1908 and 1925 treaties.

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PETITION FOR A WRIT OF CERTIORARI

The International Boundary Commission and Commissioner Dennis Schornack respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the district court denying the motion of the International Boundary Commission and Commissioner Dennis Schornack for Relief is reported at *Leu v. International Boundary Commission*, 523 F. Supp. 2d 1199 (W.D. Wash. 2007) and is reproduced at Pet. App. B. The opinion of the Ninth Circuit is reported at *Leu v. International Boundary Commission*, 605 F.3d 693 (9th Cir. 2010) and is reproduced at Pet. App. A. The order of the Ninth Circuit denying the petitioners' motion for rehearing with a suggestion for rehearing *en banc* is reproduced at Pet. App. C.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 19, 2010. Pet. App. A. The petitioners filed a timely petition for rehearing with a suggestion for rehearing *en banc*. The Ninth Circuit denied that petition on August 19, 2010. Pet. App. C. This petition is timely filed pursuant to Supreme Court Rule 13(1) and this Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

1. Article II, Section 2, Clause 2 of the Constitution of the United States provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

2. 28 U.S.C. § 516, provides:

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

3. Federal Rule of Civil Procedure 9(a), provides:

Capacity or Authority to Sue; Legal Existence.

(1) In General.
Except when required to show that the court has jurisdiction, a pleading need not allege:

(A) a party's capacity to sue or be sued;
(B) a party's authority to sue or be sued in a representative capacity; or
(C) the legal existence of an organized association of persons that is made a party.

(2) Raising Those Issues.
To raise any of those issues, a party must do so by a specific denial, which must state any supporting facts that are peculiarly within the party's knowledge.

4. Federal Rule of Civil Procedure 25(d), provides:

Public Officers; Death or Separation from Office.

An action does not abate when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending. The officer's successor is automatically substituted as a party. Later proceedings should be in the substituted party's name, but any misnomer not affecting the parties' substantial rights must be disregarded. The court may order substitution at any time, but the absence of such an order does not affect the substitution.

The 1908 and 1925 Treaties are reprinted in the Appendix.

STATEMENT OF THE CASE

A. Factual Background.

The IBC Commissioners, from Canada and the United States, observed in 2007 that a couple in Blaine, Washington (the Leus), living adjacent to the U.S. border with Canada, had constructed a four-foot high, eighty-five foot long reinforced concrete wall within the boundary vista restricted by the international treaties. The two Commissioners, together and in person, advised the Leus that their wall intruded into the treaty-protected boundary vista and would have to be moved. The Leus refused and sued "The International Boundary Commission (U.S. Section) a United States agency," and "Dennis Schornack, in his official capacity as United States International Boundary Commissioner," asserting that the IBC's instructions to relocate the wall violated their rights under the Fourth and Fifth Amendments of the U.S. Constitution. Until the Leus filed their suit in early 2007, no American had sued the IBC since the treaty organization's creation. In all other instances of intrusion into the restricted boundary zone, whether deliberate or accidental, U.S. citizens had accepted the IBC's authority and complied with its requests.

The Leus captioned the case against "a United States agency" and the "United States International Boundary Commissioner" because they knew that their Fourth and Fifth Amendment claims would be dismissed if brought against an international organization and an international official. They

ignored the Commissioner appointed by Canada, notwithstanding that he, too, had informed them of their infraction and the necessary remedy.

The Department of Justice ("DOJ"), asserting plenary authority pursuant to 28 U.S.C. § 516, applicable only to U.S. agencies and U.S. government officials, entered an appearance in United States District Court for the Western District of Washington on behalf of "federal defendants." The IBC and the named commissioner, obliged by treaty to protect the IBC's integrity as an independent, binational organization, and acting on multiple advisories from the U.S. Department of State for more than fifty years that the IBC is not a federal agency, asked DOJ to correct its position and to move for dismissal on grounds that the Leus' "unlawful seizure" and "Takings Clause" claims were inapplicable to the IBC as an international organization, and to Commissioner Schornack, who could not be an officer of the United States according to the requirements of Article II, Section 2, Clause 2 of the Constitution of the United States. DOJ refused its clients' request to move for dismissal of the complaint, informed the IBC that it would have to subordinate its interests to other undefined interests of the United States to be determined by DOJ, and proceeded to consult with other U.S. agencies to the exclusion of the IBC.

The IBC and the Commissioner engaged their own counsel to file appearances because they were not "federal defendants;" no authority derived from 28 U.S.C. § 516 for DOJ to represent them; the Department of State had advised them to retain private counsel because the government could not

provide legal advice for the international treaties; DOJ had refused to represent the IBC's interests as articulated by the IBC; and DOJ had all but guaranteed it would miss the court deadline and default on the Complaint. DOJ threatened Commissioner Schornack that he would lose his job unless he dismissed IBC counsel and took instructions exclusively from DOJ. The Commissioners, defending the best interests and independence of the IBC, instructed their counsel to file a notice of appearance and a timely motion to dismiss the Leus' lawsuit, just before DOJ's thirty-day extension was to expire. DOJ had not planned to meet its second deadline to respond to the Complaint, preferring to seek a second extension as the first one was expiring.

Five days later, on July 10, 2007, President Bush purported to fire Commissioner Schornack and replace him with a compliant lawyer from the Department of the Interior. The firing presumed that the Commissioner was an officer of the United States, a U.S. government agency official in the presidential chain of command. The applicable treaties creating the IBC, however, provided for appointment only upon a commissioner's "death, resignation, or other disability" and established the IBC as an international treaty organization, not a federal entity.

The IBC asked the court, pursuant to Rule 9(a) of the Federal Rules of Civil Procedure, to decide who had the capacity to act as the defendants in the Leus' suit. The court concluded that it would recognize DOJ and "federal defendants," treating the

presidential action as a *fait accompli,* yet claimed not to be deciding whether the President lawfully could dismiss and replace the Commissioner; whether the IBC is a federal agency; and whether the Commissioner is an officer of the United States.

The Court of Appeals for the Ninth Circuit vacated the district court's ruling, asserting that the district court did not have jurisdiction to apply Rule 9(a) because Schornack had no standing to challenge his removal. He had no standing to challenge his removal, the court said, because he had been removed, and because there was no high ranking executive branch official party to the case for redressability: "Schornack has elected to contest the lawfulness of the President's attempt to remove him by filing motions in a suit in which no executive-branch official is a party. *Cf. Swan v. Clinton*, 100 F.3d 973, 979-81 (D.C. Cir. 1996) (concluding that an injunction against the President was unnecessary where enjoining 'subordinate officials . . . could substantially redress [the plaintiff's] injury.')" The court went on, "We lack jurisdiction to review Schornack's non-redressable claim, whether presented under the collateral-order doctrine or through a petition for a writ of mandamus, and all claims here asserted by Schornack against the executive branch are dismissed." The court presumed that DOJ and a substituted "Acting Commissioner" represented the IBC, yet, the court concluded, "We express no view on the merits of the validity of President Bush's termination of Schornack's tenure as Commissioner of the International Boundary Commission." The court

said nothing about the standing of the IBC, which had also challenged the Commissioner's removal.

The court of appeals, thus, denied the district court authority to adjudicate the issue arising under Rule 9(a) on the grounds that no redress was available for the challenge to presidential removal. This decision on Rule 9(a) denied the authority of a district court to decide on the proper parties and hence to manage its own cases, contrary to decisions in other circuits. The decision as to redressability, the court's grounds for denying standing, is contrary to a long line of Supreme Court decisions.

B. Proceedings Below.

The Leus styled the complaint against "an agency of the United States" and "the United States Boundary Commissioner" because the IBC as an international organization would have been immune to their Fourth and Fifth Amendment claims, as would Schornack have been as "Commissioner." DOJ asserted an exclusive right to represent "federal defendants" but declined to move for dismissal of the lawsuit. DOJ would have defaulted in district court had outside counsel engaged by the IBC and Schornack not filed a timely motion to dismiss. DOJ subsequently attempted to settle with the Leus for more than the Leus wanted, to the detriment of border security and DOJ's supposed clients.

After the IBC moved to dismiss the Leus' suit, DOJ renewed its instruction for Schornack to dismiss outside counsel and accept DOJ as exclusive counsel for the IBC. DOJ advised that it was responsible for

interests other than those of the IBC and would favor those other still undefined interests. DOJ threatened that, were Schornack not to accept this instruction, it would arrange for the President to fire him. He refused to compromise the IBC; DOJ carried out its threat, the President purporting to dismiss Schornack without cause. DOJ also arranged for the President to appoint immediately a replacement, whose first acts were to seize control of the lawsuit, entering an appearance through substitution pursuant to Rule 25(d), and to order outside counsel, unilaterally and without consulting the other Commissioner (the treaties require all decisions of the IBC to be by consensus of the two Commissioners), to cease participation in the case.

The district court, noting DOJ's default and declining to accept immediately DOJ's assertion of representation, ordered DOJ to prepare, on behalf of U.S. government interests, an *amicus* brief for the motion to dismiss that had been filed by outside counsel. However, the court later ruled that, because the IBC Commissioner was not appointed for a specific term, he must be serving at will and at the pleasure of the President. The district court judge thus recognized the President's purported replacement and DOJ, yet also recognized that the plain language, object and purpose of the treaties and the history of the IBC were contrary to this conclusion. She subsequently certified an interlocutory appeal of Schornack's dismissal, which was deciding the parties, counsel, and likely outcome of the underlying case.

The Ninth Circuit heard an interlocutory appeal of the matter under the collateral order doctrine and vacated the decision of the lower court, stating that the Ninth Circuit could not redress the Schornack dismissal because no high-ranking executive branch official was party to the case, and that the lower court lacked jurisdiction to make any judgment about the President's authority to dismiss Schornack. The Ninth Circuit explained:

> Schornack asks us to hold that he was not lawfully terminated from his position and that Bernhardt was not lawfully appointed to replace him. We conclude, however, that we do not have jurisdiction to so hold because Schornack does not have Article III standing to seek this relief. *See Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009) (holding that a party seeking relief "bears the burden of showing that he has standing for each type of relief sought").
>
> [1] To the extent that Schornack merely seeks to have President Bush's action in removing him declared unlawful, that is "not an acceptable Article III remedy." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106-07 (1998) (holding that "psychic satisfaction," seeing "that a wrongdoer gets his just deserts,"

> or ensuring that another is "punished for [his] infractions," are not cognizable Article III remedies); *Fieger v. Mich. Supreme Court*, 553 F.3d 955, 962 (6th Cir. 2009) ("In the context of a declaratory judgment action, allegations of past injury alone are not sufficient to confer standing.")

The Ninth Circuit denied petitions for rehearing and rehearing *en banc*.

Following receipt of a Mandate from the Ninth Circuit, the district court denied a motion filed by the IBC and Schornack to extend the court's stay pending this petition because, the court concluded, the IBC and Schornack had no standing to file the motion. Subsequently, the court granted a joint stipulation filed by the Leus and DOJ to dismiss the action in its entirety. The stipulation included acceptance of the settlement sought by these same parties on the eve of President Obama's inauguration, confirming construction of the intrusive wall and permitting the Leus to enlarge it. However, recognizing legal doubts, the agreement stated that "if a Court order dismissing the Litigation is later vacated and/or annulled, this Agreement shall be void."

The court order of November 2, 2010 dismissing the action described here is inherently defective. The identified representative of the IBC is "Acting United States Commissioner Kyle Hipsley," but there is no such position as "Acting United States

Commissioner" and Mr. Hipsley has no claim to such a position or any other that would empower him to enter a legal settlement on the IBC's behalf. Moreover, DOJ counsel, not Mr. Hipsley, signed the Agreement on behalf of the IBC, yet could represent according to 28 U.S.C. § 516 only interests of the United States, not the international organization.

The denials of standing by both the district and appellate courts have made it impossible for the lawfully appointed Commissioner and the IBC itself to challenge the order dismissing the action. Moreover, the court issued the order within twenty-four hours of the filing of the joint stipulation, permitting no possibility of challenge.

The district court's order of November 2, 2010 cannot render moot the issues raised in this petition because the petition arises under the collateral order doctrine, dealing with vital constitutional issues undecided by the orders of the district and appellate courts; because, were this Court to agree that the IBC's legally authorized representative is Commissioner Schornack, no authority exists for the execution of the stipulation and settlement forming the basis of the district court's dismissal; and, because procedurally the denial of standing prohibited all challenges but this one.

REASONS FOR GRANTING THE PETITION

A. More Than Seventy Years Of Supreme Court Precedent Establish That A High-Ranking Executive Branch Official Need Not Be A Party For Challenges To Presidential Authority

The Ninth Circuit denied Schornack standing to challenge his removal, ostensibly on the ground that the executive branch was not present in the case. That decision contravenes this Court's redressability cases and conflicts with the law of other circuits. Moreover, the logic of the opinion is inherently unsound and divorced from the facts.

For purposes of redressability, there are only two possibilities here: either the IBC is an agency of the United States and Hipsley is an executive branch employee who can provide relief (presumably appointed lawfully in accordance with the treaties) – meaning the appellate court could hear the matter, even on its own terms – or the IBC is not an agency of the United States, and Hipsley was assumed improperly by the Ninth Circuit to be a party defendant. Factually, therefore, the Ninth Circuit's opinion was divorced from this case, but if there were "federal defendants," the Ninth Circuit ruled contrary to other circuits and many earlier decisions of this Court.

The lower court's implicit conclusion that Schornack was lawfully removed required finding him in the President's chain of command as an officer of the United States. DOJ contradicted itself in

asking the appellate court to treat Hipsley as a lawful agency head (even asking the court, in a post-decision letter, to recognize Hipsley as the named appellee) while urging dismissal for want of a high-ranking official and conceding that the agency is not an agency of the United States.

The only reason even to think there is a need for representation of the executive branch in cases involving presidential authority is for some party to be able to carry out the court's order. In *Utah v. Evans*, 536 U.S. 452 (2002), this Court entered a declaratory judgment requiring an action of the President even though the President was not a party to that case. The Court held that standing to challenge government actions depends on "the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered," not whether the President is a party, *id.* at 464, and found such relief possible because "it would seem, as in [*Franklin v. Massachusetts*, 505 U.S. 788 (1992)] 'substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation'" of the statute and laws in question. *Id.* at 463-64. There is no need for the President himself to be a party.

The Ninth Circuit's opinion directly conflicts with this Court's redressability decisions in *Evans*, 536 U.S. 452, and *Franklin*, 505 U.S. 788. It conflicts with decisions of other Circuits respecting redressability, as in *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1310-11 (11th Cir. 2001), and *Swan*, 100 F.3d 973, a case the Ninth Circuit quoted but misread.

Contrary to the Ninth Circuit's decision, the President need not be a named party, not even when appointees serve "during the pleasure" of the President. All the seminal removal decisions of this Court, including especially *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), *Wiener v. United States*, 357 U.S. 349 (1958), *Morrison v. Olson*, 487 U.S. 654 (1988), and also *Buckley v. Valeo,* 424 U.S. 1 (1976) and *Bowsher v. Synar,* 478 U.S. 714 (1986), instruct that a court decision is binding on the authority of the President to remove an official, and the authority can be challenged without the President or a high-ranking executive branch official being a named party. In none of these cases did this Court say there was no redressability because the President or a high-ranking official was not a party.

While ignoring the underlying facts of the presidential removal cases – that neither the President nor a high-ranking executive branch official was a party in any of them – the Ninth Circuit relied on misreadings of three more cases to support its conclusion. It failed to recognize that this Court, in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), acknowledged that "standing is not precluded" in a matter requiring a non-party's action where the non-party's actions could be presumed. *Id.* at 562. According to *Evans* and *Franklin,* standing requires only a substantial likelihood that the President "would abide by an authoritative interpretation'" of the statute and laws in question, and presidential compliance may be presumed. *Evans*, 536 U.S. at 463-64; *Franklin*, 505 U.S. at 803.

The Ninth Circuit misconstrued the reason this Court found no standing in *Lujan*. Standing was denied not because plaintiffs' claims were not redressable, nor because the President was not a party, but because plaintiffs failed to show an injury in fact. *Lujan*, 504 U.S. at 567. This Court reasoned that it was highly speculative whether the plaintiffs would visit foreign countries where they would be deprived the enjoyment of wildlife. *Id.* at 564 n.2. *Lujan* does not support the appellate court's conclusion that redressability was impossible without the President or another "high-ranking executive branch official" as a party.

Unlike in *Lujan,* it is not speculative that Schornack would resume his duties as Commissioner and defend the IBC against the Leus' complaint if the courts would rule that he should do so. He was the only party present in the district court, and again at the Ninth Circuit hearing nearly three years later. Nor does it matter, for redressability, that he has served without pay: Schornack's appointment conferred upon him the authority and responsibility to defend the IBC. Redress follows the respect other government officials must give to a ruling of a federal court concerning the IBC.

The IBC and Schornack, contrary to the Ninth Circuit's assertion in its reference to *Summers,* 129 S.Ct. at 1149, satisfy the requirements and meet the burden of showing Article III standing. They were injured in fact by the President's unlawful removal. The consequence of declaratory relief would be more than the appellate court's belittling characterization of "psychic satisfaction" (relying on *Steel Co.,* 523

U.S. at 106-07, and *Fieger*, 553 F. 3d at 962). Relief would recognize the IBC's international status, provide the lower court proper defendants against pending claims, and protect an international organization against an over-reach of executive power, enabling the IBC to fulfill its treaty mandate and to preserve its integrity and independence, thus curing much more than the "psychic injury" to which the appellate court made reference.

The appellate court, relying on *Cohens v. Virginia,* 19 U.S. 264, 399-402 (1821), and *Flast v. Cohen*, 392 U.S. 83, 96-97 (1968), said, "It is not permissible under Article III for us to give an essay-like lecture to the executive branch in a decision that will not bind it because it is not a party to this litigation." This Court was neither lecturing nor writing essays in the removal cases.

The Ninth Circuit ignored *Franklin v. Massachusetts,* where this Court was confident of redressability despite the absence of the President as a party, "either because the President would voluntarily abide by it or because the President had no choice but to abide by it." *Adams v. Clinton*, 90 F. Supp. 2d 35, 42-43 (D.D.C. 2000) (citing *Franklin,* 505 U.S. at 803 (finding it "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation of the census statute and constitutional provision")).

Although the President was named in *Adams*, redressability was found in an order to the Secretary of Commerce, who himself was not a named defendant. 90 F. Supp. 2d. at 44 ("when necessary to

satisfy the redressability component of standing, a court may constructively amend a complaint to include prayers for relief against unnamed defendants in their official capacities who might otherwise be in a position to frustrate the implementation of a court order."). There are no such obstacles here. Hipsley is, according to DOJ and the appellate court, a named defendant from the executive branch and only he could frustrate implementation of a federal court's order.

The Eleventh Circuit concluded in *Made in the USA Foundation,* 242 F.3d at 1310-11, that "a judicial order instructing subordinate executive officials to cease their compliance with [NAFTA's] provisions would suffice for standing purposes." And according to the D.C. Circuit in *Swan v. Clinton,* standing is afforded as long as even "partial relief" is available from some subordinate to the President. 100 F.3d at 980-81. Hence, in addition to contradicting the relevant line of this Court's cases, the Ninth Circuit is at odds with decisions in at least two circuits.

As a factual matter, the Ninth Circuit was wrong. Having accepted Hipsley as the Acting Commissioner and an officer of the United States, the party the court said was missing was the named defendant. It is also oxymoronic to recognize DOJ, purporting to represent the interests of the United States and specifically the executive branch, as counsel, while concluding that the executive branch is absent from the case.

B. A Federal District Court Can And Must Have Authority To Manage Cases Before It By Determining Who Are The Proper Parties

The Ninth Circuit presumed Bernhardt (and then Hipsley) to be the proper defendants, and DOJ to be counsel, based on the circular argument that, because Schornack had been removed (without judging, the appellate court claimed, the legality of the removal), he had no standing. The Ninth Circuit, thus, chose between the IBC and Schornack, on the one hand, and the "U.S. Section" of the IBC and Bernhardt, on the other, while instructing the district court that it had no jurisdiction to make such a choice. This irrationality is contrary to the plain meaning of Rule 9(a), and to judgments about that rule in other circuits.

Pursuant to Rule 9(a), a federal judge has jurisdiction to determine who has the capacity to sue and be sued. The ruling in the Ninth Circuit appealed here is contrary to the law of the Eighth, Second, and Sixth Circuits. *See Blackmar v. Lichtenstein,* 578 F.2d 1273, 1276 (8th Cir. 1978) ("[t]o presume real party in interest . . . is not to engage in that 'prudential exercise' of jurisdiction which the United States Supreme Court has recently required of federal courts."); *Winbourne v. Eastern Air Lines,* 632 F.2d 219, 224 (2d Cir. 1980) (capacity to sue must be resolved first); *Berndt v. State of Tenn.*, 796 F.2d 879, (6th Cir. 1986) (court enabled plaintiff to add defendants after identifying them as proper parties).

The dispute before the Court over the identification of proper parties is ultimately over the

dismissal of the presidentially-appointed head of an international organization. DOJ based its right to represent parties and to issue directives in this case on its claim that it represents a U.S. agency and a federal official, notwithstanding its own admission in opposing the petition for *en banc* hearing that the IBC is not a U.S. agency. Were DOJ to have acknowledged from the beginning that the IBC is an international organization and the Commissioner is not an officer of the United States, it perhaps would not have contested the IBC's appearance with its own counsel, nor sought the presidential removal of the Commissioner who refused to obey DOJ's edicts. Instead, DOJ forced these issues onto the district court.

The appellate court denied the district court's obligation and authority to engage, in the words of the Eighth Circuit, in the "'prudential exercise' of [its] jurisdiction." Schornack's invocation of Rule 9(a) was not to determine whether any personal rights or benefits accruing to him had been infringed, but rather to determine who had authority to speak and act on behalf of the IBC in litigation naming the IBC as a defendant. If the President were without authority to remove and replace the Commissioner, which both the district and the appellate courts said they were not deciding, then Schornack was the only proper spokesman for the IBC in the litigation. Claiming not to decide the question while asserting with consummate circularity that Schornack was removed because he was removed and was replaced because he was replaced decides the very question the appellate court claimed it and the district court had no jurisdiction to answer. In this case, DOJ

appeared claiming to represent "federal defendants," only later to admit that the IBC is not a federal agency.[1] Yet, the appellate court ruled that the district court could not even examine the question as to who were the proper parties.

Determination of proper parties can and must necessarily be decided by a court administering cases brought before it. The court must be able, pursuant to the Federal Rules of Civil Procedure, to prevent unauthorized persons from appearing and defrauding the court. There is an obvious and material difference between determining the party with authority to act on behalf of a named defendant, and determining whether someone denied such authority might have personal claims. Here, the appellate court ordered the district court to accept DOJ as counsel and Hipsley as the named defendant pursuant to Rule 25(d), effectively requiring recognition of the IBC as a federal agency even after DOJ had conceded it is not a federal agency, thereby stripping the district court of its essential case management obligations and the IBC of its rights to defend its interests.

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[1] DOJ could represent the interests of the United States in the case, as the district court had ordered when requiring an *amicus* brief for the motion to dismiss filed by the IBC's counsel. It could not, however, claim to be exclusive counsel for an international organization and, moreover, advise the organization that it would subordinate its interests.

C. Rule 25(d) Of The Federal Rules Of Civil Procedure Applies Only To Federal Agencies And Officials And Cannot Resolve The Identity Of Parties In This Case

If the IBC were a federal agency and the Commissioner were an officer of the United States, the dispute over the Commissioner's removal would be redressable, whether Hipsley, as a party, were a high-ranking executive branch official, or whether, consistent with seventy years of Supreme Court jurisprudence, there was no high ranking executive branch official as a party to the proceedings and none was necessary. Alternatively, the IBC is an international organization as DOJ admits and as Hipsley himself acknowledged when he stated that the IBC is "a Treaty organization, not a federal agency." And the Commissioner cannot be an officer of the United States by reason of the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. Rule 25(d) then could not apply, substituting a federal defendant, when the organization at issue is not an agency of the United States. DOJ cannot assert exclusive representation on behalf of the treaty organization while it represents distinct interests of the federal government. The IBC Commissioner advised DOJ that the position it advocated was contrary to the IBC's interests.

The "removal" cases misconstrued by the court of appeals deal with officers of the United States. The IBC Commissioner is not, constitutionally, an officer of the United States. According to Article II, Section 2, Clause 2 of the Constitution, an officer of the United States must be appointed pursuant to a statute or be confirmed by the Senate. The IBC

Commissioner, appointed pursuant to the plain language of international treaties, is neither appointed pursuant to a statute, nor confirmed by the Senate. Consequently, he is not and cannot constitutionally be an officer of the United States.

Rule 25(d) cannot apply to the head of an international organization who is not an officer of the United States, and 28 U.S.C. § 516 confers no authority on DOJ when the defendants are not officers or agencies of the United States. The plain language of the rule, and of the statute, limits substitution to federal officers and agencies.

The Ninth Circuit accepted Hipsley as the named defendant in the underlying lawsuit and as an officer of the United States, yet Hipsley was not appointed, as required, by the President, nor appointed by statute, nor confirmed by the Senate. According to the Ninth Circuit, no one had standing to challenge the fraud on the court asserting DOJ's plenary authority to represent an institution it later admitted is not an agency of the United States, nor to challenge Hipsley's "appointment" by another official himself arguably not an official of the IBC nor holding any position with authority to appoint an international official. For the Ninth Circuit, mere invocation of Rule 25(d) was good enough and beyond challenge. The Ninth Circuit's acceptance of Rule 25(d), however, permanently impacts the status and character of the international treaty organization while unconstitutionally expanding presidential power and the scope of DOJ representation.

The courts cannot sanction DOJ's presumption that it can represent an international organization

and subordinate the organization's interests to other interests of the United States. DOJ cannot substitute one federal official for another as Commissioner of the IBC, pursuant to Rule 25(d), when the Commissioner is not a federal official. Judicial approval of this conduct is contrary to the plain language of the Federal Rules.

CONCLUSION

For the foregoing reasons, the IBC respectfully requests that the Court grant the petition for a writ of certiorari and review the decision of the Court of Appeals for the Ninth Circuit in this matter.

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Respectfully submitted,

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