No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

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

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in an official capacity on behalf of a foreign state.

Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity under the FSIA for acts taken in the individual's former official capacity.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II), John Doe I, Jane Doe I, and John Doe II, who were also the parties in the Fourth Circuit proceeding.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 552 F.3d 371. An order denying rehearing and rehearing en banc (Pet. App. 76a-77a) is unreported.

The district court's memorandum opinion granting Petitioner's motion to dismiss the second amended complaint (Pet. App. 30a-63a) is unreported but available electronically at 2007 WL 2220579. The accompanying order (Pet. App. 64a) is unreported.

JURISDICTION

The court of appeals entered judgment on January 8, 2009, and denied rehearing and rehearing en banc on February 2, 2009. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until June 18, 2009. This Court granted the petition on September 30, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 78a-95a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. 96a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. 97a-99a).

STATEMENT OF THE CASE

This case presents exceptionally important questions concerning the scope of federal jurisdiction over officials of foreign states. The FSIA plays a vital role in ensuring comity between the United States

and other nations, and it provides courts with a comprehensive framework for evaluating the immunity claims of foreign sovereigns. By permitting plaintiffs to circumvent the FSIA through suits against representatives of a foreign state for their official acts, the Fourth Circuit's decision threatens international relations and eviscerates Congress's carefully constructed framework immunizing foreign states.

A. Statutory Framework

The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts, 28 U.S.C. § 1604, unless a specified exception in the statute applies, *see* 28 U.S.C. §§ 1330, 1605-1607; *see also Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993).

The FSIA defines a "foreign state" as follows:

> (a) A "foreign state" . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States as defined in

> section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added).

Congress passed the FSIA to codify comprehensively the law concerning the immunity of foreign sovereigns and vest *all* immunity determinations in the courts, subject to substantive rules derived from customary international law at the time of the FSIA's enactment. *See, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004) (explaining that the FSIA "established a comprehensive framework for resolving *any* claim of sovereign immunity") (emphasis added).

Before passage of the FSIA, for more than 150 years, the United States "generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983); *see also Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.). Then, in 1952, the State Department adopted the "restrictive theory" of sovereign immunity, under which "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984, 984-85 (1952).

Application of the restrictive theory proved "troublesome," *Verlinden*, 461 U.S. at 487, and created "considerable uncertainty." H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N.

6604, 6607. In some cases, the Department of State, responding to diplomatic pressure from foreign countries, filed "suggestions of immunity" made on the basis of "political considerations" that varied from one administration to the next. *See Verlinden*, 461 U.S. at 487-88; *see generally* Michael Sandler et al., *Sovereign Immunity Decisions of the Department of State: May 1952 to January 1977*, 1977 Digest app. at 1017, 1018-19. Courts would generally grant or deny immunity based on the State Department's suggestions. *See Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). In other cases, where the State Department did not express a view about immunity, courts were left to make their own determinations based on the common law and prior State Department recommendations. *Verlinden*, 461 U.S. at 487. Thus, "sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations," and pursuant to "governing standards [that] were neither clear nor uniformly applied." *Id.* at 488.

Against this backdrop, Congress sought to achieve several purposes in enacting the FSIA. In transferring responsibility for determining foreign sovereign immunity exclusively to the courts, the FSIA "free[d] the Government from . . . case-by-case diplomatic pressures, . . . clarif[ied] the governing standards, and . . . 'assur[ed] litigants that decisions [would be] made on purely legal grounds and under procedures that insure due process.'" *Id.* (quoting 1976 U.S.C.C.A.N. at 6606 (alteration omitted)); *see also, e.g.*, 15 James Wm. Moore et al., *Moore's Federal Practice* § 104.3, at 104-10 (3d ed. 2009) (explaining that the FSIA's "primary goal was to

abandon the unpredictable case-by-case approach to foreign sovereign immunity in favor of a system in which decisions were to be made on purely legal grounds and under procedures that ensured due process"). The FSIA also "codif[ied] . . . international law at the time of the FSIA's enactment" (specifically "the restrictive view of sovereign immunity" expressed in the Tate letter). *Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199 (2007). And, by providing for the uniform treatment of foreign states in U.S. courts pursuant to then-prevailing international law, the FSIA sought to avoid friction with foreign countries and ensure reciprocal treatment for U.S. interests abroad. *See* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 34 (2d ed. 2003) (citing, *inter alia*, 1976 U.S.C.C.A.N. at 6607-08, 6611, 6620, 6626, 6630, 6632); *see also* 1976 U.S.C.C.A.N. at 6605-06 (noting that, under the FSIA, "U.S. immunity practice would conform to the practice in virtually every other country").

This Court has interpreted the FSIA in accordance with these purposes. For example, the Court held unanimously that the FSIA provides "the *sole* basis for obtaining jurisdiction over a foreign state in [U.S.] courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989) (emphasis added); *see also Nelson*, 507 U.S. at 355 (same). The Court also held that "Congress intended courts to resolve *all* [sovereign immunity] claims in conformity with the principles set forth in the Act, regardless of when the underlying conduct occurred." *Altmann*, 541 U.S. at 697-98 (internal quotation marks omitted); *see also id.* at 699 (explaining that "applying the FSIA to all pending

cases regardless of when the underlying conduct occurred is most consistent with two of the Act's principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims").

Likewise, in further recognition of the comprehensiveness of the Act, the Court has repeatedly refused to recognize exceptions to FSIA immunity for violations of international law beyond the exceptions expressly provided by the statute. *See Amerada Hess*, 488 U.S. at 436 ("From Congress' decision to deny immunity to foreign states in the class of cases [identified in the statute], we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA's exceptions"). In fact, with respect to alleged violations of international law resulting from "wrongful arrest, imprisonment, and torture" by a foreign state's military and police, this Court has said that, "however monstrous such abuse" of "the power of [the] police by [a foreign] Government . . . undoubtedly may be, a foreign state's exercise of the power of its police has long been understood . . . as peculiarly sovereign in nature," and thus immunized by the FSIA. *Nelson*, 507 U.S. at 361.

B. Factual Background

1. The Petitioner, Mohamed Ali Samantar, served as Minister of Defense, First Vice President, and Prime Minister of the Democratic Republic of Somalia under Somali President Muhammad Siad Barre from 1971 through 1990. JA 38 ¶¶ 2-4. During this entire time, the United States recognized

the government of Somalia and maintained diplomatic relations with it. JA 39 ¶ 7. In fact, "[f]rom 1982 to 1988, the United States viewed Somalia as a partner in defense in the context of the Cold War. Somali officers of the National Armed Forces were trained in U.S. military schools in civilian as well as military subjects." Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (Oct. 2009) [hereinafter *State Dep't Background Note*], http://www.state.gov/r/pa/ei/bgn/2863.htm.

During the 1980s, various high-ranking U.S. officials received Samantar as part of his official state visits to the United States. JA 39 ¶¶ 7-8. For example in 1983, while serving as Minister of Defense and First Vice President, Samantar met with the U.S. Vice President, Secretary of Defense, Director of the Central Intelligence Agency, and Chairman of the Joint Chiefs of Staff. JA 39 ¶ 8. In 1989, while serving as Prime Minister, he was received by the U.S. Vice President and Secretary of State. JA 39 ¶ 8.

The Barre government was overthrown early in 1991. Samantar sought temporary asylum in Kenya and then emigrated to Italy, where he lived openly from February 1991 to June 1997. Since June 1997, Samantar has resided in the United States. JA 39-40 ¶¶ 9-10.

2. After the collapse of the Barre regime, Somalia entered a period of intense civil strife. Pet. App. 33a; *see also State Dep't Background Note*. Then, in October 2004, as a result of a two-year peace process led by Kenya, Somalia's current government, the Transitional Federal Institutions (TFI), was formed.

Pet. App. 34a; *see also State Dep't Background Note*. The TFI includes the Transitional Federal Parliament (TFP), as well as the Transitional Federal Government (TFG), consisting of the President, Prime Minister, and Council of Ministers. *State Dep't Background Note*.

The United States recognizes Somalia as a state and maintains diplomatic relations with its government. Bureau of Intelligence & Research, U.S. Dep't of State, *Independent States in the World* (July 29, 2009) [hereinafter *Independent States in the World*], http://www.state.gov/s/inr/rls/4250.htm. In fact, while Somalia remains strife-ridden, the United States has repeatedly expressed support for the TFG, which it views as an ally in the fight against al-Qaeda and against piracy off the Somali coast. *See* Pet. App. 35a-36a; *see also, e.g.*, Hillary Rodham Clinton, Sec'y, U.S. Dep't of State, *Remarks With Somali Transitional Federal Government President Sheikh Sharif Sheikh Ahmed* (Aug. 6, 2009) ("The United States pledges our continued support for President Sheikh Sharif's government."), http://www.state.gov/secretary/rm/2009a/08/126956.htm; Johnnie Carson, Ass't Sec'y, Bureau of African Affairs, U.S. Dep't of State, *Briefing on Secretary Clinton's Upcoming Trip to Africa* (July 30, 2009) (discussing the importance of the TFG in fighting piracy and al-Qaeda-affiliated extremists), http://www.state.gov/p/af/rls/rm/2009/126783.htm. Somalia is also a member of the United Nations. *Independent States in the World*; *see also* Permanent Mission of the Somali Republic to the United Nations, http://www.un.int/wcm/content/site/somalia/pid/3243 (listing Somalia's representatives to the United Nations).

3. Respondents are members of the Isaaq clan and lived in Somalia during the 1980s. Pet. App. 30a. They allege various human rights violations at the hands of Somali government agents. JA 64-75. While Respondents allege grave and serious mistreatment, including torture, they "do not allege that Samantar personally committed these [alleged] atrocities or that he was directly involved." Pet. App. 5a. Instead, Respondents claim that Samantar is liable because, as Minister of Defense and Prime Minister, "he knew or should have known about this conduct and, essentially, gave tacit approval for it." Pet. App. 6a.

C. The District Court's Opinion

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia, asserting claims under the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, and the Alien Tort Statute (ATS), *id.* § 1350. Pet. App. 43a.

The district court stayed proceedings so that the State Department could file a statement of interest regarding Samantar's entitlement to sovereign immunity as a former official of a foreign state. The court also ordered Samantar to provide monthly updates regarding the Department's position. Pet. App. 44a; JA 5-7, 14. For two years, Samantar's attorneys regularly inquired with the State Department about its position and filed monthly reports with the district court indicating that the Department had the matter "still under consideration." Pet. App. 44a; JA 7-17.

During this time, the TFG repeatedly urged the State Department to support Samantar's entitlement

to immunity, due to the potential harm that this lawsuit would have on the effort to rebuild Somalia and strengthen the TFG. In particular, TFG Minister of Foreign Affairs Abdullahi Sheikh Ismail wrote to Secretary of State Condoleezza Rice in February 2005, urging the State Department to file a statement of interest supporting Samantar's immunity because:

> The Somali reconciliation process will be made only more difficult if allegations of . . . [wrongdoing], as serious as they may be, are to be aired and debated in a forum far from the place in which those events allegedly occurred. . . . We also have concerns that the selective nature of the allegations in the lawsuit against Mr. Samantar will exacerbate the inner clan tensions that have been at the root of many of the difficulties that our country has faced and will face in the challenging process [ahead].

JA 51-52.

In February 2007, TFG Deputy Prime Minister and Acting Prime Minister Salim Alio Ibro wrote to Secretary Rice, reaffirming Samantar's entitlement to immunity and "indicat[ing] that the actions attributed to Mr. Samantar in the lawsuit in connection with the quelling of the insurgencies from 1981 to 1989 would have been taken by Mr. Samantar in his official capacit[y]" on behalf of Somalia. JA 104. He also "reemphasize[d] the potential danger to the reconciliation process in Somalia of a lawsuit that would hold a flame to past events and revive old hostilities." JA 104. TFG Prime Minister Ali Mohamed Gedi reiterated these

views in an April 2007 letter to Secretary Rice. *See* JA at 106-08.

After waiting two years with no response from the Department of State concerning its view about Samantar's entitlement to immunity, the district court reinstated the case to the active docket. Pet. App. 44a. Respondents then filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. Pet. App. 44a-45a.

The district court granted Samantar's motion to dismiss. In interpreting the scope of the FSIA, the district court explained that, "'[a]lthough the statute is silent on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state.'" Pet. App. 47a (quoting *Velasco v. Government of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)). Agreeing with a majority of courts of appeals, the district court held that, because "'[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state,'" FSIA immunity applies to foreign officials as well as states themselves. Pet. App. 47a (quoting *Velasco*, 370 F.3d at 399 (citing *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990))).

The district court further compared this case to two cases that had recently been decided by other district courts and that "involv[ed] facts that closely parallel the facts of the instant action." Pet. App. 48a (citing *Belhas v. Ya'alon*, 466 F. Supp. 2d 127 (D.D.C. 2006), *aff'd*, 515 F.3d 1279 (D.C. Cir. 2008); *Matar v.*

Dichter, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009)). Each involved allegations of human rights violations by Israeli officials—in *Belhas*, by a former general for actions taken by the Israeli military in Lebanon, 466 F. Supp. 2d at 129, and in *Matar* by a former director of the Israeli General Security Service for bombings by military personnel in Gaza, 500 F. Supp. 2d at 286-87. Each district court held that it lacked jurisdiction because the FSIA immunized the former Israeli officials from suit for their official acts, and that neither the TVPA nor the ATS negated the immunity provided by the FSIA. Pet. App. 48a-53a.

Like the Israeli officials sued in *Belhas* and *Matar*, the district court explained, "Samantar is a retired military leader," and he "is perhaps entitled to even more deference because he was Minister of Defense, a cabinet level position, and then Prime Minister, during the alleged events." Pet. App. 53a. Furthermore, the court concluded that "[t]he allegations in the complaint clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation." Pet. App. 61a. Indeed, like the Israeli government in *Belhas* and *Matar*, the Somali TFG sent letters to the State Department reaffirming Samantar's entitlement to immunity and stating that the alleged actions would have been taken in an official capacity on behalf of the state.[1]

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[1] While Respondents submitted two letters from representatives of the so-called Republic of Somaliland to the State Department expressing support for this lawsuit to go

Thus, because Respondents challenged alleged actions by Samantar that would (if proven) have been taken in an official capacity on behalf of a foreign state (and Respondents did not argue that any of the statutory exceptions to FSIA immunity applied, Pet. App. 47a n.12), the district court concluded that Samantar was entitled to immunity under the FSIA and dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 61a-63a.

D. The Fourth Circuit's Opinion

The Fourth Circuit reversed. Pet. App. 26a. It concluded that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had left office at the time that suit was filed against them. Pet. App. 20a, 25a. In so holding, the panel acknowledged that "the majority view clearly is that the FSIA applies to individual officials of a foreign state." Pet. App. 14a (citing *Chuidian*, 912 F.2d at 1099-1103; *In re Terrorist Attacks on Sept. 11, 2001* (*Fed. Ins. Co.*), 538 F.3d 71,

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(continued…)

forward, the district court declined to defer to these letters because Respondents did not "establish[] that Somaliland is an independent nation, nor that it is a foreign state recognized by the United States." Pet. App. 54a n.14. Indeed, according to the Central Intelligence Agency, the self-proclaimed Republic of Somaliland is "not recognized by *any* [foreign] government." CIA, *The World Factbook, Africa: Somalia* (Nov. 10, 2009) (emphasis added), https://www.cia.gov/library/publications/the-world-factbook/geos/so.html (background section).

The district court also "noted that the plaintiffs do not argue in the alternative that Somalia does not qualify as a 'state' for purposes of the FSIA." Pet. App. 47a n.12.

83 (2d Cir. 2008); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996)).

The panel reasoned that the statute makes "no explicit mention of individuals or natural persons, [so] it is not readily apparent that Congress intended the FSIA to apply to individuals." Pet. App. 14a. While noting that the FSIA immunizes both a "foreign state" and an "agency or instrumentality" of a state, the panel did not consider whether an individual acting in an official capacity on behalf of a foreign state constitutes a part of the foreign state itself. Rather, the panel focused exclusively on the terms "agency or instrumentality," a phrase that it found to be "laden with corporate connotations." Pet. App. 17a. "'If Congress meant to include individuals acting in [their] official capacity in the scope of the FSIA,'" the panel reasoned, "'it would have done so in clear and unmistakable terms.'" Pet. App. 18a (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)).

The panel majority further held that, even if the FSIA applies to individuals, it does not apply to *former* government officials like Samantar. Pet. App. 21a. The panel rested this conclusion on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). "In *Dole Food*, the Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel, which owned a majority share in parent companies of the [corporation] at the time of the events being litigated[,] but not at the time of suit." Pet. App. 21a.

Under 28 U.S.C. § 1603(b)(2), an "'agency or instrumentality of a foreign state' means any entity . . . which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest *is* owned by a foreign state or political subdivision." (emphasis added). Addressing the majority-ownership prong of § 1603(b)(2), this Court held that "the plain text of this provision, because it is expressed in the present tense, requires that [majority-ownership] status be determined at the time suit is filed." *Dole Food*, 538 U.S. at 478.

Relying on *Dole Food*, the panel concluded that an *individual's* status as an agency or instrumentality must similarly be determined at the time suit is filed. Pet. App. 22a-23a. Thus, because Samantar was no longer in office when this suit was brought, the panel reasoned that he could not be considered an "agency or instrumentality" of a foreign state.

Judge Duncan concurred in part, explaining that the panel's "conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us." Pet. App. 27a. Therefore, Judge Duncan did not join the panel "in reaching the question of whether and how [*Dole Food*] would apply to individual foreign officers." Pet. App. 27a.

In determining the applicability of the FSIA, the panel expressly declined to reach several of Respondents' arguments. It did not resolve Respondents' contention that, "even if the FSIA extends sovereign immunity to former foreign officials, the alleged acts attributed to Samantar, such as the torture and killing of civilians, are *per se* violations of universally accepted norms of

international law, which can never be within the scope of a foreign official's duties." Pet. App. 11a n.3 (internal quotation marks and citation omitted). It also did not reach Respondents' claim on appeal (which the district court noted Respondents failed to argue) that "Somalia currently does not even exist in a form that would qualify it as a 'foreign state' under the FSIA." Pet. App. 11a n.3.

In remanding the case to the district court for further proceedings, the Fourth Circuit left open the question whether Samantar "is shielded from suit by a common[-]law immunity." Pet. App. 25a-26a. It also emphasized that its decision "should not be read to intimate that [Respondents] have necessarily stated viable claims against Samantar under the ATS or TVPA; those are also open questions for remand." Pet. App. 26a.

Samantar filed a timely petition for rehearing and rehearing en banc, which the Fourth Circuit denied on February 2, 2009. Pet. App. 76a-77a. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until June 18, 2009. This Court granted the petition for certiorari on September 30, 2009.

SUMMARY OF THE ARGUMENT

Congress enacted the FSIA as a comprehensive codification of the law concerning foreign sovereign immunity. The FSIA immunizes "foreign state[s]" from suit in U.S. courts, subject to certain exceptions not applicable here. 28 U.S.C. §§ 1603-1607. The statutory text, pre-FSIA common law of foreign sovereign immunity, objectives of the FSIA to promote comity and ensure reciprocal treatment of

U.S. interests abroad, and post-FSIA legislation all confirm that the term "foreign state" should be construed to include individuals acting in an official capacity on the state's behalf.

I. Petitioner—the former Minister of Defense, First Vice President, and Prime Minister of Somalia—is entitled to immunity under the FSIA for actions allegedly taken in an official capacity on behalf of a foreign state.

A. The FSIA does not comprehensively define the term "foreign state," but rather provides only that a foreign state "*includes* a political subdivision . . . or an agency or instrumentality." 28 U.S.C. § 1603(a) (emphasis added). Defining the term "foreign state" by inclusion strongly suggests that the term refers to more than just the enumerated examples. Just as the statute expressly provides that a "foreign state" includes the "agenc[ies] or instrumentalit[ies]" through which the state acts, the term "foreign state" should also be construed to include other means through which nations necessarily act, *i.e.*, individual officials acting on the state's behalf. Indeed, a suit against a present or former official for official-capacity acts is in reality a suit against the "foreign state" itself and therefore falls within the purview of the FSIA.

B. The fact that pre-1976 common law immunized a state's officials for their official acts eliminates any potential ambiguity about the scope of a "foreign state" under the FSIA. Pre-FSIA common law extended the sovereign immunity of a foreign state to its officials because an individual's official-capacity acts have long been understood to *be* acts of the state itself. Moreover, the common law drew no

distinction between present and former officials sued for official-capacity acts because an immunity based on the sovereign nature of the acts at issue does not depend on the named defendant's status at the time of suit.

This pre-FSIA common law is particularly relevant because this Court has recognized that the FSIA was intended to codify international law at the time of the statute's enactment. Indeed, laws enacted against a common-law background, like the FSIA, should be read with a presumption favoring common-law principles. That is particularly true in the context of statutes involving sovereign immunity, because derogations of sovereign immunity are strictly construed.

Construing the FSIA to exclude individual officials would broadly abrogate preexisting sovereign immunity and contravene all of these principles of construction. It would eviscerate the FSIA if plaintiffs could avoid the immunity that the FSIA expressly affords to foreign states simply by suing representatives of a foreign state for acts undertaken on the state's behalf instead of suing the state itself.

C. Construing the FSIA to exclude individual officials would also undermine the comity and reciprocal treatment of U.S. interests abroad that the FSIA was meant to ensure. Interpreting the statute not to apply to representatives of a state sued for their official acts would open the floodgates to litigation against foreign officials in U.S. courts, engendering precisely the friction with other countries that the FSIA was designed to avoid when it conformed sovereign immunity determinations in U.S. courts to those of other nations. Moreover, it

risks serious implications for U.S. officials abroad, given the overwhelming *current* international authority that provides robust immunity to officials and former officials of foreign states.

D. Post-1976 legislation confirms that the FSIA applies to foreign officials sued for acts taken on behalf of a foreign state. In 1996, Congress amended the FSIA to waive the immunity of "foreign state[s]" designated as sponsors of terrorism, and clarified that the waiver of the state's immunity extends to actions by the state's officials. In 2008, Congress further amended the FSIA to clarify that foreign states and their officials should be treated the same for purposes of the terrorism exception. These amendments to the jurisdictional immunity of a "foreign state" demonstrate Congress's understanding that acts of state officials are acts of the state itself. Moreover, the limited exception to individual immunity created by these amendments would have been entirely superfluous if individual officials were not otherwise immune from suit under the FSIA.

II. The Fourth Circuit's analysis to the contrary is flawed at every turn. *First*, in holding that an individual official is not an "agency or instrumentality" under the FSIA, the Fourth Circuit fundamentally erred by failing to recognize that the term "foreign state" itself includes the individual officials through which the state acts. Moreover, the Fourth Circuit erred even on its own terms because the phrase "agency or instrumentality" is also readily understood to include individuals through which a foreign state acts, and should be read as including

such individuals in light of the common law of foreign sovereign immunity that the FSIA codified.

Second, the Fourth Circuit also erred in holding that the FSIA does not apply to *former* officials. This Court's decision in *Dole Food* is inapposite because it dealt only with the status of an "agency or instrumentality," whereas a former official's immunity flows directly from the immunity of the "foreign state" that the official represented. In any event, *Dole Food* dealt only with the agency-or-instrumentality status of a state-owned corporation, not an individual official. The distinction is critical because a lawsuit against a foreign official for official-capacity acts necessarily attacks the acts of the foreign state itself regardless of the official's status at the time suit is filed, whereas a foreign state that has severed financial ties to a corporation as of the time of suit no longer has the same interest in that corporation's actions.

Finally, it is no answer to the Fourth Circuit's evisceration of the statute to suggest that the common law may immunize officials and former officials even if the FSIA does not. Comprehensive legislation generally supersedes and replaces the common law dealing with the same subject. This is especially true of the FSIA, which was enacted to codify the substance of the pre-1976 common law of foreign sovereign immunity while eliminating the discretionary role of the State Department in immunity determinations. A reversion to pre-FSIA common law for individual immunity determinations would reintroduce precisely the sort of diplomatic pressures and lack of uniformity that Congress

sought to eliminate by channeling all foreign sovereign immunity determinations into the FSIA.

ARGUMENT

I. SAMANTAR IS ENTITLED TO IMMUNITY UNDER THE FSIA FOR ACTIONS ALLEGEDLY TAKEN IN AN OFFICIAL CAPACITY ON BEHALF OF A FOREIGN STATE

As the overwhelming majority of courts of appeals that have considered the question have held, the FSIA should be read to extend immunity to individual officials for actions taken on behalf of a foreign state. *See Fed. Ins. Co.*, 538 F.3d 71, 85 (2d Cir. 2008); *Byrd*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian*, 912 F.2d 1095, 1103 (9th Cir. 1990); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

The court below held that officials are not immunized under the Act because, in its view, the phrase "agency or instrumentality" does not typically connote individuals. But this analysis focuses on precisely the wrong question. The FSIA merely *includes* an "agency or instrumentality" within the meaning of a "foreign state"; it does not limit a "foreign state" to those entities. The question, therefore, is whether, under an Act intended to "codif[y]. . . international law at the time of [its] enactment," *Permanent Mission of India*, 551 U.S. at 199, the immunization of foreign states encompassed immunity for officials performing the state's governmental functions. The answer is plainly yes because international law in 1976 extended the state's immunity to its officials for the obvious reason

that, since the state can only act through its officials, those officials are indistinguishable from the state itself, so stripping their immunity would substantially undermine the state's immunity.

Consequently, particularly since there is a presumption *in favor* of preserving sovereign immunity, the FSIA should be construed consistently with pre-1976 common law, rather than as departing from it *sub silentio*. This is especially true because denying immunity to former and present government officials would also depart from the current treatment given such officials by foreign nations under international law, and thus would defeat the reciprocity that is both an important general value under foreign immunity law and one of the avowed purposes of the FSIA itself. Finally, post-1976 congressional enactments vividly confirm that the FSIA was intended to cover individual state officials.

A. The Term "Foreign State" Should Be Construed To Include Officials Acting On The State's Behalf

The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts. 28 U.S.C. § 1604. While the statute does not expressly mention individuals, neither does it define the term "foreign state." Rather, the Act provides only that a foreign state "*includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state." *Id.* § 1603(a) (emphasis added). The question, therefore, is whether the inclusive term "foreign state" encompasses the individuals through which the state acts.

In this context, the term "includes" is "not one of all-embracing definition, but connotes simply an

illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also, e.g.*, 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:7, at text accompanying n.18 (7th ed. 2007) (explaining that "the word 'includes' is usually a term of enlargement, and not of limitation," and, "therefore, conveys the conclusion that there are other items includable, though not specifically enumerated") (internal quotation marks omitted). Defining the term "foreign state" by inclusion and illustration therefore strongly suggests that the term refers to more than just the identified examples.

Consequently, even assuming that the phrase "agency or instrumentality" does not encompass natural persons, *but see infra* at 45-47, the statute's illustrative inclusion of an "agency" as a "foreign state" *supports* the conclusion that a "foreign state" similarly includes its "agents." Since "foreign state" does not mean the state *qua* state, but also "agencies or instrumentalities" through which the state acts, the term "foreign state" should also be construed to include other means through which nations necessarily act, *i.e.*, the individual officials and former officials who acted on behalf of the state. *Cf. Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994) (explaining that "[a]ny government of reasonable complexity must act through men organized into offices and departments" and "hold[ing] that armed forces are as a rule so closely bound up with the structure of the state that they" constitute part of "the 'foreign state' itself" within the meaning of the FSIA); *Ministry of Def. & Support for the Armed Forces of the Islamic Rep. of Iran (MOD) v. Cubic Def. Sys., Inc.*, 495 F.3d 1024,

1035 (9th Cir. 2007) (finding that a defense ministry constitutes a "foreign state" under the FSIA and noting that a "foreign state is nothing more than the sum of its parts [and] . . . exists only through its head of state" and other officials, "its ministries, and the myriad administrative offices that collectively embody a sovereign state"), *rev'd on other grounds sub nom. MOD v. Elahi*, 129 S. Ct. 1732 (2009).

Indeed, acts taken by state officials on behalf of a state have long been understood to *be* acts of the state. *See, e.g.*, *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303 (1918) (concluding that the action of a "duly commissioned military commander" of the Mexican government "[p]lainly . . . was the action, in Mexico, of the legitimate Mexican government"); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) ("[T]he acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers . . . ."), *aff'd*, 168 U.S. 250 (1897). Thus, the term "foreign state" is readily construed to include officials acting on the state's behalf. A suit against a present or former official for actions undertaken on behalf of the state is in reality a suit against the "foreign state" itself, and therefore falls within the purview of the FSIA.

B. The FSIA Should Be Construed Consistently With The Common Law Of Foreign Sovereign Immunity That It Codified

The fact that pre-1976 common law immunized the state's officials for their official acts, just as it did the state itself and its agencies, eliminates any potential ambiguity about the scope of a "foreign state" under the FSIA.

1. As this Court recognized in *Permanent Mission of India*, because the FSIA was intended to "codif[y] . . . international law at the time of the FSIA's enactment," pre-1976 "international practice" is particularly relevant to interpreting the scope of the Act. 551 U.S. at 199-200 (relying on the Restatement (Second) of Foreign Relations Law of the United States (1965) to determine the scope of foreign sovereign immunity under the FSIA); *see generally* 2B *Sutherland Statutory Construction* § 50:2, at text accompanying n.5 (7th ed. 2008) (explaining that the common law is "especially important . . . in determining legislative intent" when the statute purports to codify or restate the common law); S. Rep. No. 94-1310, at 9 (1976) ("[T]he [FSIA] would codify the so-called 'restrictive' principle of sovereign immunity, as presently recognized in international law."); 1976 U.S.C.C.A.N. at 6605 (same).

Permanent Mission of India reflects the settled precept that statutes enacted against a common-law backdrop, such as the FSIA, should "be read with a presumption favoring the retention of long-established and familiar [common-law] principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also United States v. Texas*, 507 U.S. 529, 534 (1993) (explaining that a statute should not be read "to abrogate a common-law principle" unless it "speak[s] directly to the question addressed by the common law") (internal quotation marks omitted).

This presumption favoring retention of the common law is particularly necessary in the context of legislation addressing sovereign immunity because

statutes derogating sovereign immunity are strictly construed. *See Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (explaining that this Court has "frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"); 3 *Sutherland Statutory Construction* § 62:1 (7th ed. 2008) ("Even where the government is expressly included in a statute, the statute is kept within the narrowest possible limits to preserve sovereignty."). And it is all the more important in the context of preserving *foreign* sovereign immunity, which "promotes the comity interests that" are vital to harmonious relations among nations. *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180, 2190 (2008); *see also Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 & n.7 (1955) (foreign sovereign immunity derives from "standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign") (quoting *Schooner Exch.*, 7 Cranch at 136-37, 143-44).

2. Here, the common law accorded immunity to state officials for acts undertaken on behalf of the state, so any statutory silence or ambiguity should not be read to abrogate that immunity.

a. Under pre-FSIA common law, acts taken by a state official on behalf of a state were long understood to *be* acts of the state, and a suit against a state officer for his official acts was therefore treated as the equivalent of a suit against the state. *See Underhill*, 65 F. at 579 ("[B]ecause the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers, courts and publicists have

recognized the immunity of public agents from suits brought in foreign tribunals for acts done within their own states in the exercise of the sovereignty thereof."). Thus, before enactment of the FSIA, courts routinely held that officials acting in their official capacities were entitled to immunity derived from that of the state itself. *See, e.g.*, *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (explaining that "the immunity of a foreign state" *itself* "extend[ed] to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted); *Bradford v. Dir. Gen. of R.R.s of Mex.*, 278 S.W. 251, 251-52 (Tex. Civ. App. 1925); *see also Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429 (N.Y. App. Div. 1970) (dismissing suit because a government official who is entitled to sovereign immunity was an indispensable party); 1 Op. Att'y Gen. 81 (1797), 1797 WL 427 ("[I]t is . . . well settled . . . that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States.").[2]

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[2] Recent cases also confirm this understanding that "pre-1976 common law expressly extended immunity to individual officials acting in their official capacity." *Chuidian*, 912 F.2d at 1101; *see also Matar*, 563 F.3d at 14 ("At the time the FSIA was enacted, the common law of foreign sovereign immunity recognized an individual official's entitlement to immunity for acts performed in his official capacity" (internal quotation marks omitted)); *Fed. Ins. Co.*, 538 F.3d at 83 ("Prior to the FSIA's passage, [common law] principles expressly extended immunity to individual officials acting in their official

The Restatement (Second) of Foreign Relations Law, on which this Court relied to interpret the FSIA in *Permanent Mission of India*, 551 U.S. at 200, similarly explained that under the common law, a foreign state's sovereign immunity extended to a "minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965).

Courts outside the United States interpreting pre-1976 international common law reached similar conclusions. These courts recognized that individuals acting in their official capacities were immune from suit for actions taken on behalf of the state. *See, e.g.*, *Grunfeld v. United States* (N.S.W. Sup. Ct. 1968) (Australia) (explaining "[i]t is well settled that an entitlement to sovereign immunity is not limited to the foreign sovereign himself" and holding that officers "acting as agents of the United States" were entitled to immunity), *reprinted in* 20 *U.N. Legislative Series*, *Materials on Jurisdictional Immunities of States and Their Property*, at 181-83, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (William S. Hein & Co., photo. reprint 2003) (1982) [hereinafter *Materials on Jurisdictional*

(continued…)

capacity.") (internal quotation marks omitted); *Belhas*, 515 F.3d at 1285 ("In 1976, it was well settled that sovereign immunity existed for any . . . official . . . with respect to acts performed in his official capacity" (internal quotation marks omitted)).

Immunities]; *Syquia v. Almeda Lopez* (Phil. Sup. Ct. 1949) (holding that "under the well settled rule of International law," U.S. military officers acting "pursuant to orders received from the Government" were entitled to immunity), *reprinted in Materials on Jurisdictional Immunities* at 360, 363; *see also Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, 402 (H.L. 1957) (appeal taken from C.A.) (U.K.) (Lord Reid) (explaining official is entitled to sovereign immunity because "the State is entitled to object to its agent being made a party: the agent would merely be defending the action on behalf of his principal"). *See generally* Sompong Sucharitkul, *Immunities of Foreign States Before National Authorities*, 149 Recueil Des Cours 87, 100 (1977) (collecting 1976 courses of the Hague Academy of International Law) ("By general definition, a State acts through its organs or agencies, which normally include the persons . . . which constitutionally form organic parts of the machinery of the central government of a sovereign State. Such agencies being part and parcel of the State are generally accorded the same immunity as the State they represent.") (footnote omitted).

From the adoption of the restrictive theory of sovereign immunity in 1952 to the effective date of the FSIA, the State Department issued suggestions of immunity for individual officials sued for acts taken on behalf of a foreign state. *See* Sandler et al., *supra* (appendix to 1977 Digest, describing all State Department immunity decisions from 1952 through 1977) [*hereinafter Appendix*]; *Greenspan v. Crosbie* (S.D.N.Y.; suggestion 1976), *Appendix* at 1076-77 (suggesting immunity for foreign officials); *Semonian v. Crosbie* (D. Mass.; suggestion 1976), *Appendix* at

1075-76 (same); *Waltier v. Thomson* (S.D.N.Y.; suggestion 1960), *Appendix* at 1037 (suggesting sovereign immunity for "acts done by Mr. Thomson in the course of, or in connection with, his official duties"); *cf. Cole v. Heidtman* (S.D.N.Y.; suggestion declined 1968), *Appendix* at 1062-63 (concluding British West Indies Central Labour Organization and its liaison officer were not entitled to immunity under the Tate Letter because the lawsuit involved private, commercial activities).

This immunity was also available where individuals were alleged to have acted "'in excess of their authority,'" so long as they acted "'in their official capacities and on behalf of the [State].'" *Appendix* at 1076 (quoting State Department letter suggesting immunity in *Greenspan*); *see also Greenspan*, 1976 WL 841, at *2 (adopting suggestion of immunity and dismissing lawsuit). As the Second Circuit explained in *Heaney v. Government of Spain*, 445 F.2d at 504, "to condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct, with the attendant risks of embarrassment at the highest diplomatic levels, would frustrate the very purpose of the doctrine itself." *See also id.* at 504-05 (holding, in the alternative, that the official was also entitled to consular immunity).

b. Under pre-1976 common law, it was also well settled that sovereign immunity extended to *former* officials for actions that they took on behalf of a state while in office. *See Underhill*, 65 F. at 583 (holding that a former military officer was entitled to sovereign immunity for actions taken while in office on behalf of Venezuela); *see also Matar*, 563 F.3d at

14 (analyzing pre-1976 common law); *Belhas*, 515 F.3d at 1285 (same).

Former officials were entitled to this immunity because "[a]n immunity based on acts—rather than status—does not depend on tenure in office." *Matar*, 563 F.3d at 14; *see also Belhas*, 515 F.3d at 1285 ("The common law of foreign sovereign immunity made no distinction between the time of the commission of official acts and the time of suit."). Under international common law, individual immunity for official acts exists because "[a]ctions against . . . [State] agents . . . are essentially proceedings against the State they represent." U.N. Int'l Law Comm'n, *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries* 18 (1991) [hereinafter *Draft Articles on Jurisdictional Immunities*]. Consistent with this rationale, these act-based immunities "are not in any way affected by the change or termination of the official functions of the representatives concerned. . . . because the immunity in question not only belongs to the State, *but is also based on the sovereign nature or official character of the activities*." *Id.* (emphasis added); *see also* Hazel Fox, *The Law of State Immunity* 666 (2d ed. 2008) (contrasting act-based immunities with status-based immunities); Sucharitkul, *supra*, at 98-99 (same).

For these reasons, courts outside the United States interpreting pre-1976 international law also recognized that an individual's entitlement to sovereign immunity and similar act-based immunities depended on the official nature of the act in question, not on the current status of the individual who allegedly committed the act. *See*

Johnson v. Turner (Phil. Sup. Ct. 1954) (holding U.S. military officers who had "long left the Philippines" were entitled to sovereign immunity for actions taken "in their official capacities"), *in Materials on Jurisdictional Immunities* at 368-70; *Rahimtoola*, [1958] A.C. at 393-94 (Viscount Simonds) (holding former High Commissioner of Pakistan was entitled to sovereign immunity for actions taken as "the agent of a Sovereign State"); *cf. Zoernsch v. Waldock*, [1964] 2 All E.R. 256 (C.A.) (U.K.) (holding former president of the European Commission of Human Rights was entitled to diplomatic immunity for actions taken in his official capacity). *See generally* Sucharitkul, *supra*, at 99 ("While the immunities *ratione materiae*, on account of the public or official character of the acts, will continue to subsist since they belong ultimately to the States, the immunities *ratione personae* will succumb with the termination of the public offices.").[3]

4. In sum, it is hardly surprising that international law in 1976 treated state officials as the state for immunity purposes. It simply reflects the obvious reality that state officials are functionally indistinguishable from the state for their official acts because the "state" can only act through its officers.

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[3] Similarly, courts held that the closely related act of state doctrine shielded both current and former officials from suit. *See Underhill*, 168 U.S. at 252-54 (affirming Second Circuit's decision on the basis of the act of state doctrine); *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876) ("The fact that the defendant has ceased to be president of St. Domingo does not destroy his immunity [under the act of state doctrine]. That [immunity] springs from the capacity in which the acts were done, and protects the individual who did them . . . .").

Consequently, stripping the officers' immunity is inconsistent with, and undermines, the purpose of immunizing the sovereign.

The term "foreign state" in the FSIA should be interpreted in light of this settled pre-FSIA understanding that the immunity of a state extends to officials acting on the state's behalf, because the official-capacity acts of state officials *are* the acts of the state itself. Construing the FSIA to preclude immunity for officials and ex-officials would broadly abrogate that preexisting sovereign immunity. Indeed, it would "defeat the purpose[]" of the FSIA as a "comprehensive codification of immunity and its exceptions" if plaintiffs "could avoid [the] immunity" that the FSIA accords to foreign states "simply by recasting the form of their pleadings" and suing state officials for their official acts instead of suing the foreign state itself. *Chuidian*, 912 F.2d at 1102; *cf. Chi. & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) ("[C]ompliance with the intent of Congress cannot be avoided by mere artful pleading."); *Block v. North Dakota*, 461 U.S. 273, 284-85 (1983) (explaining that North Dakota cannot "avoid the [Quiet Title Act's] statute of limitations and other restrictions [on suits against the United States] by the device of an officer's suit," and that "'[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by [such] artful pleading'").

Such a result would undermine the FSIA's objective of codifying pre-1976 international law, *see Permanent Mission of India*, 551 U.S. at 199, and would contravene venerable canons of construction—

namely, the "presumption favoring the retention of long-established and familiar [common-law] principles" absent statutory language or "purpose to the contrary," *Isbrandtsen*, 343 U.S. at 783; and the precept that "waiver[s] of sovereign immunity [are] to be strictly construed," *Blue Fox*, 525 U.S. at 261, particularly in the context of *foreign* sovereign immunity, which is designed to promote comity among nations, *see Schooner Exch.*, 7 Cranch at 136-37, 143-44.

C. Interpreting The FSIA To Exclude Individual Officials Would Undermine The Comity And Reciprocity That The FSIA Was Meant To Ensure

Construing the FSIA to exclude individual officials would also undermine the comity and reciprocal treatment of U.S. interests abroad that Congress meant to ensure when it codified the law governing foreign sovereign immunity in the FSIA. *See, e.g.*, *Altmann*, 541 U.S. at 696.

First, construing the FSIA to exclude claims against state officials for official-capacity acts would open the floodgates to litigation against foreign officials in U.S. courts. That would "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations," including strong U.S. allies whose officials have already been targeted in U.S. courts. *Belhas*, 515 F.3d at 1287 (internal quotation marks omitted); *see also, e.g.*, *Matar*, 563 F.3d at 10 (suit against former Israeli official); *Fed. Ins. Co.*, 538 F.3d at 75 (suit against Saudi officials); *Blaxland v. Commonwealth Dir. of Pub. Prosecutions*, 323 F.3d 1198 (9th Cir.

2003) (suit against Australian officials); *El-Fadl*, 75 F.3d 668 (suit against Jordanian officials); *Kato v. Ishihara*, 239 F. Supp. 2d 359 (S.D.N.Y. 2002) (suit against Japanese official); *Greenpeace, Inc. (U.S.A.) v. State of France*, 946 F. Supp. 773 (C.D. Cal. 1996) (suit against French officials); *Bryks v. Can. Broad. Corp.*, 906 F. Supp. 204 (S.D.N.Y. 1995) (suit against Canadian officials).

Foreign sovereign immunity rests on the premise that disputes among nations over official state action should be resolved through diplomacy, among other means, rather than through private civil litigation in foreign courts. *See, e.g.*, Fox, *supra*, at 64. The resulting "[s]trains in international relationships" engendered by permitting such suits against officials of foreign states in U.S. courts may "incrementally reduce US national security" and "undermine a variety of cooperative ventures, ranging from trade, to environmental protection, to the war on drugs, to arms control, to combating terrorism," to the fight against piracy. Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460 (2001). The FSIA was designed to avoid precisely such friction with other countries by conforming sovereign immunity determinations in U.S. courts to those of other nations. *See* 1976 U.S.C.C.A.N. at 6634; *see also supra* at 3-6.

Second, reading the FSIA to exclude foreign officials, and thereby undermining the protection that U.S. law affords foreign countries from suit in U.S. courts, risks serious reciprocal implications for U.S. officials abroad. International law, both at the time of the FSIA's enactment and now, provides robust protection to officials and former officials from

civil suits for their official actions. *See infra* at 36-38. By codifying those protections and "conform[ing]" "U.S. immunity practice . . . to the practice in virtually every other country," Congress sought to ensure reciprocal treatment for U.S. interests in the courts of other countries. *See* 1976 U.S.C.C.A.N. at 6605-06; *see also* Dellapenna, *supra*, at 34; *cf. Hilton v. Guyot*, 159 U.S. 113, 228 (1895) ("[I]nternational law is founded upon mutuality and reciprocity . . . ."); *Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States . . . .") (citation omitted).

That reciprocity would be jeopardized if U.S. courts did not grant foreign officials the immunity that modern international law requires. Now, as in 1976, courts around the world recognize that officials are entitled to sovereign immunity in civil suits challenging their official-capacity acts. *See Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 281 (H.L. 2006) (appeal taken from C.A.) (U.K.) (Lord Bingham) (citing domestic and international authorities establishing consensus that a "foreign state's right to immunity cannot be circumvented by suing its servants or agents"); *Holland v. Lampen-Wolfe*, [2000] 1 W.L.R. 1573, 1583 (H.L.) (appeal taken from C.A.) (U.K.) (Lord Millett) ("Where the immunity applies [under customary international law], it covers an official of the state in respect of acts performed by him in an official capacity."); *Jaffe v. Miller*, [1993] 13 O.R.3d 745, 758-59 (C.A.) (concluding under both common law and Canada's

State Immunity Act that the official was entitled to sovereign immunity because "confer[ring] immunity on a government department of a foreign state but . . . deny[ing] immunity to the functionaries, who in the course of their duties performed the acts, would render [sovereign immunity] ineffective"); *Church of Scientology Case*, 65 I.L.R. 193, 198 (Fed. Sup. Ct. 1978) (Germany) ("Any attempt to subject State conduct to German jurisdiction by targeting the foreign agent performing the act would undermine the absolute immunity of sovereign States in respect of sovereign activity."); *see also* Fox, *supra*, at 455-56 ("State immunity is extended to a person who performs an act on behalf of the State to prevent proceedings which indirectly implead the foreign State, where the State would have enjoyed immunity had the proceedings been brought against it.").

Recent non-judicial international authorities confirm that individuals acting in their official capacities are entitled to immunity for their official acts. For example, the Convention on Jurisdictional Immunities of States and Their Property, which the United Nations General Assembly adopted on December 2, 2004, recognizes that the "State," for immunity purposes, includes "representatives of the State acting in that capacity." Article 2(1)(b)(iv). As the International Law Commission's Commentaries further explain, "It is to be observed that, in actual practice, proceedings may be instituted, not only against the government departments or offices concerned, but also against their directors or permanent representatives in their official capacities. Actions against such representatives or agents of a foreign Government in respect of their official acts are essentially proceedings against the State they

represent. The foreign State, acting through its representatives, is immune *ratione materiae*." *Draft Articles on Jurisdictional Immunities*, Article 2 Commentary, ¶ 18 (footnote omitted); *cf.* U.N. Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, Article 4 (2001) ("The conduct of any State organ shall be considered an act of that State under international law . . . . An organ *includes any person or entity* which has that status in accordance with the internal law of the State.") (emphasis added).

These authorities similarly recognize that former officials are entitled to sovereign immunity for their official acts. *See, e.g.*, Fox, *supra*, at 461 (discussing former officials' entitlement to sovereign immunity under U.N. Convention); *Draft Articles on Jurisdictional Immunities*, Article 2 Commentary, ¶ 18 ("Such immunities characterized as *ratione materiae* are accorded for the benefit of the State and are not in any way affected by the change or termination of the official functions of the representatives concerned. Thus, no action will be successfully brought against a former representative of a foreign State in respect of an act performed by him in his official capacity."); *cf.* Restatement (Third) of Foreign Relations Law of the United States § 464, at 471 (1987) (Reporters' Notes) ("Former heads of state or government have sometimes sought immunity from suit in respect of claims arising out of their official acts while in office. Ordinarily, such acts are not within the jurisdiction to prescribe of other states.").

If U.S. courts decline to accord officials and former officials of foreign states the immunity that

international law requires, U.S. officials may be at heightened risk of reciprocal actions abroad. *See* Bradley, 2 Chi. J. Int'l L. at 461 (describing the risk of such retaliation and giving an example of an Iranian law that allows lawsuits against the United States in Iranian courts and that was enacted "as a 'measure of reciprocity' in response to . . . suits allowed in US Courts against Iran") (citing *Tehran to Set Up Special Court for Lawsuits Against the U.S.*, Agence France Presse, Nov. 15. 2000; *Iran MPs Cry 'Down with America,' Approve Lawsuits Against United States*, Agence France Presse, Nov. 1, 2000); Jennifer K. Elsea, *CRS Report for Congress: Suits Against Terrorist States by Victims of Terrorism* 66 (2008) (explaining that "Cuba reportedly allows . . . suits [against the United States] for violations of human rights," in response to suits permitted against Cuba in U.S. courts, and that "at least two judgments assessing billions of dollars in damages against the U.S. have apparently been handed down" by Cuban courts).

Such a risk would come at a time in which actions taken by the United States abroad have been controversial, even among U.S. allies, and in which current and former U.S. officials have already been targeted in foreign courts seeking to hold them liable for acts undertaken in their official capacities. Indeed, in the criminal context, numerous suits have already been filed against U.S. officials in France, Germany, Belgium, Spain, and Italy, alleging violations of international law in relation to the wars in Iraq and Afghanistan and other U.S. intelligence and military operations. *See, e.g.*, Manuela D'Alessandro & Daniel Flynn, *Italy Convicts Former CIA Agents in Rendition Trial*, Reuters, Nov. 4, 2009,

http://www.reuters.com/article/topNews/idUSTRE5A33QB20091104; *Legal Fight Against Rumsfeld Heads to Spain*, Spiegel Online Int'l, Apr. 30, 2007, http://www.spiegel.de/international/europe/0,1518,480215,00.html; *US Attacks Belgium War Crimes Law*, BBC News, June 12, 2003, http://news.bbc.co.uk/2/hi/europe/2985744.stm; French War Crimes Complaint Against Donald Rumsfeld, Ctr. for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/french-war-crimes-complaint-against-donald-rumsfeld; German War Crimes Complaint Against Donald Rumsfeld, Ctr. for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/german-war-crimes-complaint-against-donald-rumsfeld%2C-et-al. Undoubtedly, similar politically motivated civil suits will be filed against U.S. officials if the United States weakened the immunity accorded in our courts to foreign officials.

Moreover, to the extent there is ambiguity about whether the FSIA extends immunity to individual officials, that ambiguity should be resolved in light of the *Charming Betsy* canon, which requires courts to construe federal statutes, wherever possible, not to violate international law. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see generally* Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 Harv. L. Rev. 869, 921 (2007) (citing authorities and explaining that the *Charming Betsy* canon supports the use of international law as "a relevant consideration in discerning Congress's intent"). Indeed, "[i]n the absence of any relevant exception, the United States would violate [present] international law if it failed to confer immunity on

state officials for their official acts committed while in office." Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 16 (2009). Thus, the FSIA should be interpreted consistently with the statute's purposes and with the overwhelming authority holding that international law immunizes foreign officials for official-capacity acts.

D. Post-1976 Legislation Confirms That The FSIA Applies To Individuals Acting In An Official Capacity On Behalf Of A Foreign State

Post-1976 amendments to the FSIA confirm that Congress understood individual officials of the foreign state, when they undertake their official duties, to be part of the "foreign state" itself, and thus within the purview of the FSIA.

In 1996, Congress amended the FSIA to waive the immunity of certain "foreign state[s]" designated as state sponsors of terrorism, for claims of "torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act," 28 U.S.C. § 1605(a)(7) (repealed 2008; pertinent language recodified at *id.* § 1605A(a)(1)), and also created a private right of action for such conduct, *id.* § 1605 note (amended language codified in 2008 at *id.* § 1605A(c)).

Congress expressly provided that this waiver of the "jurisdictional immunity *of a foreign state*," *id.* § 1605 (pertinent language also codified in 2008 at *id.* § 1605A) (emphasis added), also encompasses acts by officials, employees, and agents undertaken on behalf of the state, thus demonstrating its understanding

that individual agents of a foreign state, when they perform their official duties, *are* the "foreign state" for purposes of the FSIA. *Id.* § 1605(a)(7) (repealed 2008; pertinent language recodified at *id.* § 1605A(a)(1)) (abrogating preexisting immunity in connection with, *inter alia*, the "provision of material support or resources . . . *by an official, employee, or agent* of [a] foreign state while acting within the scope of his or her office, employment, or agency") (emphasis added); *id.* § 1605 note (creating private right of action against any "*official, employee, or agent* of a foreign state designated as a state sponsor of terrorism . . . while acting within the scope of his or her office, employment, or agency") (emphasis added). In 2008, Congress further amended the FSIA to clarify that foreign states and their officials should be treated the same for purposes of the terrorism exception. *See id.* § 1605A(c).

Moreover, the reference by these amendments to officials, employees, and agents underscores that the FSIA applies to individuals because, "[i]f these individuals were not otherwise immune from suit pursuant to the FSIA, these provisions" creating an exception to individual immunity in limited circumstances "would be entirely superfluous." *Fed. Ins. Co.*, 538 F.3d at 84. As the Second Circuit explained, "[i]ndividuals and government officers . . . cannot be designated [directly as] 'state sponsor[s] of terrorism.'" *Id.* "So that such individuals would nevertheless fall within the scope of the Terrorism Exception to FSIA immunity, Congress enacted specific provisions that defined the exception to reach these individuals." *Id.* The creation of that exception suggests "that Congress considered individuals and government officers [otherwise] to be within the

scope of the FSIA." *Id.*; *cf. Alden v. Maine*, 527 U.S. 706, 724 (1999) ("The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary.").

E. These Principles Establish That Samantar Is Entitled To Immunity Under The FSIA For His Official-Capacity Acts

For the reasons described above, the FSIA applies to individual officials sued for acts undertaken in an official capacity on behalf of a "foreign state." 28 U.S.C. § 1604. That construction of the statute comports with the statutory text because the acts of an official representative of a state, when taken on behalf of the state, have long been understood to be the acts of the state itself. Thus, a suit against an individual for official-capacity acts is in reality a suit against the state. This understanding also best implements the key purposes of the FSIA, which would be circumvented if plaintiffs could plead around Congress's comprehensive codification of foreign sovereign immunity law by suing the individuals through which a state acts instead of the state itself. And it follows the customary international law of state immunity, which the FSIA codified and which advances comity among nations by recognizing broad immunity for individuals sued over official-capacity acts.

Moreover, because an individual's entitlement to sovereign immunity for official acts flows from the sovereign nature of those acts, and not from the

individual's status at the time of suit, a lawsuit against a former official for official-capacity acts is just as readily understood as a lawsuit against the "foreign state." 28 U.S.C. § 1604. Indeed, "[t]o allow the resignation of an official . . . to repeal his immunity" for official-capacity acts "would destroy . . . [international] comity" and effectively nullify the sovereign immunity of the state. *Belhas*, 515 F.3d at 1286. The FSIA therefore applies to suits against former officials of a foreign state for their official-capacity acts.

These principles establish that Samantar is entitled to immunity under the FSIA. As the district court correctly found, "[t]here is . . . no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister." Pet. App. 53a. The complaint expressly sued Samantar for actions allegedly taken in these official roles. JA 55-102 (*see* ¶¶ 2, 5-7, 95, 104, 114, 124, 134, 143, 152).

Indeed, "the Somali Transitional Federal Government, which is supported and recognized by the United States as the governing body in Somalia," Pet. App. 54a, has repeatedly reaffirmed in letters to the Department of State that the actions alleged in the complaint, "as serious as they may be," "would have been taken by Mr. Samantar in his official capacit[y]" on behalf of Somalia, and that allowing this lawsuit to proceed in U.S. courts would "exacerbate . . . tensions" in Somalia and threaten "the reconciliation process" in that country. JA 51-52, 104.

Thus, while the complaint is captioned as an action against Samantar, its allegations are directed at purported acts that would have been undertaken

in an official capacity on behalf of a foreign state. Under the FSIA, a U.S. court has no jurisdiction over such an action, just as it would have no jurisdiction over an action filed directly against Somalia. 28 U.S.C. § 1604.

II. THE FOURTH CIRCUIT'S ERRONEOUS HOLDINGS TO THE CONTRARY DO NOT WITHSTAND SCRUTINY

Each of the Fourth Circuit's contrary holdings—that the FSIA does not apply to individual officials at all, and that in any event it does not apply to former officials—is incorrect.

A. The Fourth Circuit Erred In Holding That The FSIA Does Not Apply To Individuals

The Fourth Circuit's conclusion that FSIA immunity does not apply to individuals is flawed at every turn.

First, as noted, the Fourth Circuit fundamentally erred by failing to recognize that an "agency or instrumentality" does not exhaust what constitutes a "foreign state" under the FSIA, and that a "foreign state" includes the individual officials through which the state acts.

Second, and in any event, the Fourth Circuit was wrong even on its own terms, because the phrase "agency or instrumentality" also encompasses foreign officials acting in their official capacities. As numerous circuits have held, an "agency or instrumentality" of a foreign state encompasses "any thing or person through which action is accomplished," including individual officers of the state. *Fed. Ins. Co.*, 538 F.3d at 83; *see also Keller*, 277 F.3d at 815-16; *Byrd*, 182 F.3d at 388-89; *El-*

Fadl, 75 F.3d at 671. To be sure, § 1603(b)'s definition of "agency or instrumentality" "may not explicitly include individuals." *Chuidian*, 912 F.2d at 1101. But "neither does it expressly exclude them." *Id.* "The terms 'agency,' 'instrumentality,' 'organ,' 'entity,' and 'legal person,' while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals." *Id.*; *cf. United States v. Ambert*, 561 F.3d 1202, 1211 (11th Cir. 2009) (explaining that "[*i*]*nstrumentalities* of interstate commerce . . . are the people and things themselves moving in commerce") (emphasis added and internal quotation marks omitted); 11 U.S.C. § 101(12A) (defining a "debt relief *agency*" as "any *person* who provides any bankruptcy assistance . . . in return for the payment of money") (emphasis added).

Moreover, although the language of § 1603(b)(3) refers only to corporate entities, this prong of the statutory definition of an "agency or instrumentality" merely prescribes what *is not* an agency or instrumentality for FSIA purposes. That a particular type of corporate entity is *excluded* from the definition of an agency or instrumentality, *see* 28 U.S.C. § 1603(b)(3), says nothing about whether an individual acting in an official capacity is likewise excluded. If anything, in light of the long tradition of extending foreign sovereign immunity to individual officials acting on behalf of foreign states, Congress's decision not to exclude individuals from the definition of an agency or instrumentality suggests that individuals come within the purview of the statute. *See Chuidian*, 912 F.2d at 1101 (concluding that the phrase "agency or instrumentality" includes individual officials because "[n]owhere in the text or

legislative history does Congress state that individuals are *not* encompassed within the section 1603(b) definition"); *see also Fed. Ins. Co.*, 538 F.3d at 83 (same).

Finally, contrary to the Fourth Circuit's analysis, interpreting the phrase "agency or instrumentality" as including foreign officials is consistent with the service of process requirements under 28 U.S.C. § 1608(b). In holding that section 1608(b)'s service of process requirements "do[] not contemplate service on an individual," Pet. App. 19a, the court below ignored authorized methods that are equally applicable to both individuals and entities. For example, section 1608(b)(2) authorizes service "in accordance with an applicable international convention on service of judicial documents," 28 U.S.C. § 1608(b)(2), a standard that plainly applies to individuals. *See also id.* § 1608(b)(1), (3) (describing additional methods of service that are equally applicable to individuals and entities). Thus, the Fourth Circuit erred in concluding that a foreign official like Samantar cannot be considered an "agency or instrumentality" for the purpose of the FSIA.

B. The Fourth Circuit Erred In Holding That The FSIA Does Not Apply To Former Officials

The Fourth Circuit also erred in holding that, even if the FSIA applies to individual officials, it does not apply to former officials for actions that they took on behalf of a foreign state.

First, because a former official's immunity flows from the immunity of the "foreign state" that the official represents, 28 U.S.C. § 1603(a), this Court's decision in *Dole Food*—which turned entirely on

when the status of an "agency or instrumentality" under 28 U.S.C. § 1603(b) is determined—does not come into play at all. Rather, the immunity of the foreign state encompasses *all* officialsi acts undertaken on behalf of the state, regardless of whether the responsible officials happen to be in office at the time of suit. Indeed, the relevant jurisdictional inquiry at the time of suit is not the official's employment status, but whether the challenged acts constitute acts of a "foreign state." *See Draft Articles on Jurisdictional Immunities* at 18 (explaining that act-based immunities "are not in any way affected by the change or termination of the official functions of the representatives concerned. . . . because the immunity in question not only belongs to the State, but is also based on the sovereign nature or official character of the activities"). Here, as the Somali government has confirmed, there is no question that Respondents are challenging alleged acts that would have been taken by Samantar in an official capacity on behalf of Somalia. JA 104, 107.

Second, and in any event, *Dole Food* is inapposite even if individual immunity under the FSIA is premised on an individual official's status as an "agency or instrumentality." *Dole Food* only analyzed the majority-ownership prong of 28 U.S.C. § 1603(b)(2) and "never dealt with the acts of a government official" under the separate "organ of a foreign state" prong. *See Belhas*, 515 F.3d at 1286; *see also id.* at 1291 (Williams, J., concurring).

That distinction is crucial because the two prongs of § 1603(b)(2) immunize agencies and instrumentalities based on fundamentally different premises. While immunity "[u]nder the majority-

ownership prong . . . depends solely on [a] foreign state's direct ownership of a majority of [a] corporation's shares," whether an individual official qualifies as an "organ of a foreign state" "rest[s] on the foreign state's exercise of some degree of control and direction of the person's . . . activities." *Belhas*, 515 F.3d at 1291 (Williams, J., concurring) (citing authorities for the proposition that, because the two prongs of § 1603(b)(2) are distinct, an entity may qualify as an "organ" of a foreign state, based on the foreign state's control over the entity, independent of whether it also satisfies the majority-ownership prong); *see also* Dellapenna, *supra*, at 72 (explaining than an organ of a foreign state "serves the interests of and is closely controlled by the foreign state in question"); *Kelly v. Syria Shell Petrol. Dev. B.V.*, 213 F.3d 841, 846 (5th Cir. 2000) (explaining that courts consider, *inter alia*, "whether the foreign state actively supervises the entity" when determining if an entity is an organ) (internal quotation marks omitted).

Moreover, "[t]he corporation and the state have at all times been entities wholly separate and distinguishable from each other and able to act without the presence or even existence of the other." *Belhas*, 515 F.3d at 1286. Indeed, in many instances, the ties between foreign states and their majority-owned corporations are largely "financial," and the latter enjoy a substantial "degree of flexibility and independence from close political control" by the state. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-25 (1983). In contrast, while a state need not form or own corporations in order to act, "[e]very act committed by a sovereign government [must be]

carried out by its officials and agents" under the state's authority and/or control. *Belhas*, 515 F.3d at 1286; *see also id.* ("[I]ndividual officials or agents must act as instrumentalities for anything actually to be done."); *Transaero*, 30 F.3d at 153; *MOD*, 495 F.3d at 1035.

Therefore, a lawsuit against the corporation does not necessarily impugn the state's official acts. In fact, once the state severs or lessens financial ties with the corporation, the "impact on a foreign state of [a U.S. court's] exercising jurisdiction over a corporation it merely owned in the past is at best attenuated" (*e.g.*, "the foreign state may receive a lower sales price for its majority stake if it cannot pass corporate immunity for past deeds along with ownership"). *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). But because the acts of officials *are* acts of the state, an action against an individual for official-capacity acts invariably challenges the acts of the state—whether or not the individual happens to remain in office at the time of suit. *See, e.g.*, *Belhas*, 515 F.3d at 1286.

Denying sovereign immunity to a former official for official-capacity acts would allow a U.S. court to sit in judgment of the official acts of a foreign sovereign, contrary to the most basic underpinnings of foreign sovereign immunity. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417-18 (1964) ("To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted); Fox, *supra*, at 64 (noting that foreign

sovereign immunity recognizes that disputes among nations over official state action should be resolved through diplomacy rather than private civil litigation in foreign courts). Thus, a former official's "lack of immunity for actions undertaken on the state's behalf would have a significant impact on the foreign state and the United States' relations with that state." *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). "To allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy" the international "comity" that the FSIA was designed to protect, in a way that permitting lawsuits against formerly state-owned corporations with which the state had largely financial ties does not. *Id.* at 1286 (majority opinion); *see also Dole Food*, 538 U.S. at 479 (explaining that the FSIA "give[s] foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns").

Finally, as described above, the pre-FSIA law of foreign sovereign immunity, the substance of which Congress codified, recognized that former officials retained immunity for official-capacity acts. *See supra* at 30-32. In contrast, there was no similar pre-FSIA practice of extending immunity to formerly state-owned corporations, because the recent "massive wave of privatization" of state-owned corporations was "unforeseen in 1976." *See* Dellapenna, *supra*, at 91. Whatever the temporal implications of the majority-ownership prong of § 1603(b)(2), it is "unreasonable" and "implausible" to believe that "Congress intended to make . . . sweeping and counterintuitive changes" to the pre-

FSIA law of sovereign immunity governing former officials "with the simple use of the word 'is'" in the organ-of-a-foreign-state prong of the statute. *Belhas*, 515 F.3d at 1285; *id.* at 1291 (Williams, J., concurring). The FSIA should not be construed to abrogate the very common-law principles that Congress intended to codify. The Fourth Circuit erred in concluding otherwise.

C. The Possibility Of Common-Law Immunity Does Not Cure The Fourth Circuit's Misinterpretation Of The FSIA

It is no answer to the Fourth Circuit's evisceration of the FSIA to suggest that the common law may immunize officials and former officials for state acts even if the statute does not. Such a bifurcated approach to foreign sovereign immunity would undermine Congress's comprehensive statutory scheme.

It is well settled that "general and comprehensive legislation . . . indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." 2B *Sutherland Statutory Construction* § 50:5, at text accompanying n.5. Indeed, courts generally presume that federal statutes displace federal common law. *See, e.g.*, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("[I]n cases such as the present 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.").

This Court has concluded, for example, that because the Federal Water Pollution Control Act Amendments "occupied the field through the establishment of a comprehensive regulatory

program," the Act displaced federal common-law claims for abatement of a nuisance caused by interstate water pollution. *See City of Milwaukee*, 451 U.S. at 307-08, 317. Similarly, the enactment of the Federal Tort Claims Act displaced the Government's entitlement to sovereign immunity in prison litigation cases, *see United States v. Muniz*, 374 U.S. 150, 158 (1963), and 42 U.S.C. § 1983 is the exclusive federal damages remedy for violations of federal constitutional rights by state actors, displacing any *Bivens*-type action implied directly from the Fourteenth Amendment, *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734-35 (1989).

These principles have particular force in the context of the FSIA, which Congress enacted to overturn the common-law procedures used to determine foreign sovereign immunity before 1976, while codifying the substance of pre-FSIA common law. In enacting the FSIA, Congress not only defined the scope of foreign sovereign immunity, but also eliminated the pre-1976 role of the State Department in immunity determinations. *See, e.g.*, *Verlinden*, 461 U.S. at 488; *see also, e.g.*, Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, to Edward H. Levi, Att'y Gen., U.S. Dep't of Justice (Nov. 2, 1976), *reprinted in* 75 Dep't St. Bull. 649 (1976) (recognizing that "it would be inconsistent with the legislative intent of [the] Act" for the State Department to "make *any* sovereign immunity determinations after the effective date of" the FSIA) (emphasis added).

In doing so, the FSIA, "[i]n accordance with the practice in most other countries, . . . place[d] the responsibility for deciding sovereign

immunity issues *exclusively* with the courts." 75 Dep't St. Bull. 649 (emphasis added); S. Rep. No. 94-1310, at 9 ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process."); 1976 U.S.C.C.A.N. at 6606 (same).

The State Department's pre-FSIA discretion had led to a regime characterized by delay and unprincipled decisions based on political considerations. *See, e.g.*, *Altmann*, 541 U.S. at 690. In transferring *all* immunity determinations to the courts, Congress sought to ensure a uniform, evenhanded approach to foreign sovereign immunity, unencumbered by the shifting pressures and "'uncertaint[ies]'" of domestic and international politics. *Chuidian*, 912 F.2d at 1100 (quoting 1976 U.S.C.C.A.N. at 6607).

A reversion to pre-FSIA common law for individual immunity determinations would contravene Congress's choice by making the statute "optional," allowing litigants to choose between suing foreign states, subject to the restrictions in the Act, and suing individual officials of a foreign state, hoping to secure State Department support for a waiver of common-law immunity. *Id.* at 1102. Indeed, "[l]itigants who doubted the influence and diplomatic ability of their sovereign adversary would choose to proceed against the official, hoping to secure State Department support, while litigants less favorably positioned would be inclined to proceed

against the foreign state directly, confronting the [FSIA] as interpreted by the courts without the influence of the State Department." *Id.* Such a two-pronged approach would reintroduce precisely the sort of unpredictability, lack of uniformity, and political pressures and whims that Congress sought to eliminate from immunity determinations.

If the Court disagrees, however, and concludes that the FSIA does not extend to individuals acting in an official capacity on behalf of a foreign state, it should, at a minimum, make clear that nothing in the FSIA derogates the longstanding common-law immunity that applied to officials and former officials of foreign states. *See supra* at 26-32.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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