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 THE ZIONIST ORGANIZATION OF AMERICA, THE AMERICAN ASSOCIATION OF JEWISH LAWYERS AND JURISTS, AGUDATH ISRAEL OF AMERICA, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, *AMICI CURIAE* IN SUPPORT OF PETITIONER

Of Counsel

STEPHEN GREENWALD
AMERICAN ASSOCIATION OF JEWISH LAWYERS & JURISTS

SUSAN B. TUCHMAN
ZIONIST ORGANIZATION OF AMERICA

NATHAN DIAMENT
UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA

DAVID ZWIEBEL
AGUDATH ISRAEL OF AMERICA

NATHAN LEWIN
Counsel of Record
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
1828 L Street N.W.
Suite 901
Washington, D.C. 20036
(202) 828-1000

Attorneys for Amici Curiae

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INTEREST OF THE *AMICI*[1]

[1] No person, organization or corporation other than the amici and the organizations named herein have assisted in or contributed to the preparation of this brief. The parties have consented to the filing of this brief.

The legal issues presented by this case are of great importance to the First Amendment protected activities of the *amici* in the United States. The a*mici* are all Jewish organizations that support the State of Israel and that benefit from visits to the United States of current and former Israeli leaders. These organizations are also concerned for the freedom of government officials in Israel – America's most trusted ally in the Middle East – to take effective action to preserve the safety and security of that country's residents and effectively to counter the enemies of Israel and the United States.

The decision of the Fourth Circuit that permits civil lawsuits to be brought against current and former government officials notwithstanding the immunity that their governments have under the Foreign Sovereign Immunities Act will, if not reversed by this Court, encourage the institution of many unfounded lawsuits in United States courts against present and former government officials of the State of Israel as part of the campaign being waged against Israel known as "Lawfare." Such lawsuits have, to this date, been infrequent in this country because the decisions of five Circuits have clearly held that they should be dismissed at their inception because of the immunity provided by the Foreign Sovereign Immunities Act. But if that dam is breached by an affirmance of the decision below, courts in the United States will see a flood of baseless lawsuits that will be initiated, as they have been in various foreign countries, as a strategy utilized by the enemies of Israel.

In addition, affirmance of the Fourth Circuit's ruling will surely stifle speaking engagements, scholarly visits, and public appearances in the United States by current and former government officials of the State of Israel. Concern over having to defend against possible civil lawsuits in the United States may also inhibit objective decision-making in the public interest by Israeli government officials.

For these reasons – in addition to the arguments relating to statutory construction of the Foreign Sovereign Immunities Act presented in the Brief of Petitioner – the *amici* urge this Court to reverse the decision of the Fourth Circuit and to establish, as the law of the land, the rule of the Second, Fifth, Sixth, Ninth and D.C. Circuits that individuals who are sued for acts they performed in their official capacities on behalf of a foreign sovereign may have the lawsuits against them dismissed at their inception, both while and after they occupy their official governmental posts.

IDENTIFICATION OF THE *AMICI*

The American Association of Jewish Lawyers and Jurists ("AAJLJ") represents the American Jewish legal community in defending Jewish interests and human rights in the United States and abroad.

The Zionist Organization of America ("ZOA"), founded in 1897, is the oldest pro-Israel organization in the United States, whose leaders have included U.S. Supreme Court Justice Louis Brandeis, Rabbi Dr. Abba Hillel Silver and Rabbi Stephen Wise. The

ZOA works to strengthen United States-Israel relations and to combat anti-Israel and anti-Jewish bias in the media, in schools and in textbooks, and on college campuses. ZOA conducts events to which it invites present and former Israeli government officials.

Agudath Israel of America is a national Orthodox Jewish membership organization with offices, chapters, affiliated synagogues, and individual members across the United States. It is affiliated with a political party in the State of Israel whose representatives are members of the Israeli legislature ("Knesset") and are frequent speakers and participants at Agudath Israel of America functions in the United States.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") is the largest Orthodox Jewish umbrella organization in North America, representing nearly one thousand congregations. Through its Institute for Public Affairs, the U.O.J.C.A. represents the interests of its national constituency on public policy issues. Israeli leaders are frequently invited to address meetings and other events conducted by the U.O.J.C.A.

ARGUMENT

I.

INDIVIDUAL FOREIGN GOVERNMENT OFFICIALS NEED ABSOLUTE IMMUNITY FROM CIVIL LAWSUITS IN THE UNITED STATES TO PREVENT PERSONAL RETALIATION FOR NECESSARY BUT CONTROVERSIAL POLICIES

We draw the Court's attention to an area of foreign affairs with which these *amici* are most familiar and most concerned – the ongoing Israeli-Arab dispute in the Middle East. Emotions run high over much of the world with regard to this controversy, and the actions of the Israeli government in defense of its citizens are often criticized in the United States.

Israel's adversaries are ready to pursue all possible means to hinder measures that duly elected Israeli leaders feel are necessary for Israel's self-defense. Lawsuits against Israeli officials in foreign judicial forums is one tactic that has recently been used with success by supporters of the Palestinian cause in the Middle East. A report in *The National* dated October 12, 2009, began: "Almost 1,000 lawsuits alleging war crimes by Israeli ministers and military personnel have now been filed around the world, Israel has admitted." An October 30, 2009, Institute for Policy Studies story (http://geopolitics.net/wordpress/2009/10/30) reported that "[t]he Israeli defence ministry's prosecution

department has received about 1,500 notices of future civil lawsuits against the Israeli Defence Forces (IDF) over damage caused to Palestinians and their property, and loss of earning capacity during Operation Cast Lead, Israel's codename for its three-week attack on the coastal territory." This tactic of forcing Israeli officials to defend against criminal prosecutions and civil lawsuits has been pursued in Belgium, Switzerland, New Zealand, the United Kingdom, Denmark, the Netherlands, Canada and the United States. It is popularly called "Lawfare." Wall Street Journal, November 5, 2008 ("Lawfare Against Israel").

The Israeli daily *Yediot Aharonot* reported in its weekly supplement of November 20, 2009, that a "Wanted" list of individual Israeli past and present government officials targeted for arrest or suit in foreign jurisdictions includes the following: Ehud Barak (former Prime Minister and current Minister of Defense), Gabi Ashkenazi (Israel Defense Forces Chief of Staff), Eliezer Shakdi (Israel Defense Forces Air Force Commander), Matan Vilnai (Deputy Minister of Defense), Avi Dichter (former Minister of Internal Security), Carmi Gillon (Head of Shabak, Israeli General Security Service), Giora Eiland (former Chairman of National Security Council), Ehud Olmert (former Prime Minister), Amir Peretz (former Minister of Defense), Shaul Mofaz (former Minister of Defense and Israel Defense Forces Chief of Staff), Tzipi Livni (former Foreign Minister), Dan Halutz (former Israel Defense Forces Chief of Staff), Moshe Ya'alon (Deputy Prime Minister and former Israel Defense Forces Chief of Staff), Binyamin Ben-

Eliezer (former Deputy Prime Minister and Minister of Defense), and Doron Almog (Israel Defense Forces Major General and Commander, Gaza Strip Force). According to the *Yediot Aharonot* article, legal actions are being arranged by a network of attorneys in England, Ireland, Spain, Holland and New Zealand – countries where arrests of foreigners by private citizens are possible.

Criminal charges and civil lawsuits against these current or past Israeli leaders are brought in the hope of impeding the independent exercise of individual judgments by Israeli government officials. Given human nature, they are likely to have some effect. The policy reasons articulated by this Court for according absolute immunity to prevent unfounded retaliatory lawsuits against legislators (*Tenney v. Brandhove*, 341 U.S. 367 (1951)), judges (*Pierson v. Ray*, 386 U.S. 547, 554-555 (1967)), prosecutors (*Imbler v. Pachtman*, 424 U.S. 409, 424-426 (1976)), and judicial officers and government litigators (*Butz v. Economou*, 438 U.S. 478, 511-517 (1978)), apply fully to the situation of foreign government officials. *See also Nixon v. Fitzgerald*, 457 U.S. 731, 751-756 (1982).

The Court observed in the *Imbler* case that "harassment by unfounded litigation" would cause a prosecutor to "shade his decisions instead of exercising the independence of judgment required by his public trust." 424 U.S. at 423. In *Butz v. Economou*, the Court observed that "discretion which executive officials exercise . . . might be distorted if their immunity from damages arising

from that decision was less than complete" and that "there is a serious danger that the decision . . . will provoke a retaliatory response." 438 U.S. at 516.

The avalanche of "unfounded litigation" that is now being heaped on present and former Israeli government officials in European courts and is threatened in the United States (dependent, of course, on the outcome of this case) is plainly retaliatory and is also designed to force Israeli government officials to "shade" decisions made while in public positions out of concern that they may be sued in foreign courts.

The court below recognized that the Foreign Sovereign Immunities Act grants absolute immunity to a foreign government such as Israel for the actions of its officials. Such immunity destroys any incentive for filing an "unfounded lawsuit" against the foreign government itself because the effect of absolute immunity is to defeat a suit at the outset (*see Imbler*, 424 U.S. at 413, n. 13) without requiring the defendant to do anything more than move for dismissal.

The same cannot be said for qualified or common-law immunity which requires a defendant to make an affirmative showing to the court that he or she is entitled to immunity. *See, e.g.*, *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("foreign sovereign immunity is an immunity from suit rather than a mere defense to liability"); *Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n. 2 (7th Cir.

1989), *cert. denied*, 493 U.S. 937 (1989) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits").

But the Fourth Circuit refused to extend absolute immunity to individuals who occupy the decision-making posts from which government policy is formulated and implemented. This limitation has the practical real-world effect of eviscerating the statutory immunity. If concern over the need to defend against possible unfounded litigation justifies absolute immunity, it is *more* essential that the immunity be granted to individuals than to the governmental entities they administer. Few government officials can ignore totally the possibility that for the rest of their lives they will be hounded in foreign jurisdictions by civil lawsuits challenging actions they take while they exercise governmental authority. The immunity of their government is of less personal concern to them, and they can reasonably believe that the government will successfully defend, with its own resources, against future baseless lawsuits.

We believe that the reason why the "Lawfare" lawsuits have, to this date, been infrequent in the United States is that the lawyers who would initiate them know from the decisions of the Second, Fifth, Sixth, Ninth, and D.C. Circuits that complaints would promptly be dismissed on grounds of sovereign immunity. But if the floodgates are opened by an affirmance of the Fourth Circuit's decision a

torrent of unfounded lawsuits against Israeli government officials is likely to result.

II.

INDIVIDUAL FOREIGN GOVERNMENT OFFICIALS SHOULD NOT BE DETERRED FROM VISITING THE UNITED STATES

A consequence of the Fourth Circuit's decision is that former or current government officials such as the Israelis who have been targeted for civil suits will avoid visits to the United States in order not to be served with process in unfounded lawsuits. Newspaper reports have described incidents in which former Israeli officials and military personnel have chosen to abort visits to foreign countries when they have learned of efforts to arrest them or to initiate lawsuits against them. *E.g.*, Manchester Guardian, September 12, 2005 ("Israeli Evades Arrest at Heathrow Over Army War Crime Allegations").

The *amici* are American organizations that have invited current and past Israeli government officials to visit the United States to address seminars, dinners, and other meetings. There are also many educational institutions and research institutes that benefit from an exchange of information with present and former foreign government officials including Israeli leaders. For example, Moshe Ya'alon – one of those "targeted" for legal action – visited the United States "as a fellow at a

Washington, D.C., think tank" and thereby became "available for service of process." *Belhas v. Ya'alon*, 515 F.3d 1279, 1281 (D.C. Cir. 2008). A rule of law that would deny to individual government officials the immunity conferred on their government by the Foreign Sovereign Immunities Act would surely chill, if not foreclose, future visits by them to the United States.

The First Amendment protects not only the right to speak but also the right to hear and receive ideas. In *Board of Education, Island Trees Union Free School District No. 26* v. *Pico,* 457 U.S. 853, 867 (1982), this Court quoted approvingly Justice Brennan's endorsement of this right to receive ideas in his concurring opinion in *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965),:"[T]he right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *See also Martin v. Struthers*, 319 U.S. 141, 143 (1943) ("The right of freedom of speech and press . . . embraces the right to distribute literature, and necessarily protects the right to receive it.")

In considering the interests that Congress weighed when it enacted the Foreign Sovereign Immunities Act, the Court should be sensitive to the probable impact on the First Amendment right of American groups to *receive* information if current and former officials of foreign governments may be subjected to "unfounded litigation" when they come

to the United States for lectures or colloquia. We are not contending that the First Amendment right to hear and learn from an Israeli government official is, in and of itself, sufficient to override a law that would explicitly deny immunity. Nor are we arguing that these *amici* would have standing to initiate a lawsuit challenging the denial of immunity if it had been explicitly prescribed by statute. But we maintain that the probable impact of the Fourth Circuit's decision on the flow of information into the United States from present and former officials of foreign governments is a weighty constitutional consideration in the decision of this case.

CONCLUSION

The decision and judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

Of Counsel
STEPHEN GREENWALD
AAJLJ

SUSAN B. TUCHMAN
DAVID I. SCHOEN
Zionist Organization
of America

DAVID ZWIEBEL
MORDECHAI BISER
Agudath Israel
of America

NATHAN DIAMENT
Union of Orthodox
Jewish Congregations
of America

NATHAN LEWIN
(Counsel of Record)
ALYZA D. LEWIN
LEWIN & LEWIN, LLP
1828 L Street N.W.
Suite 901
Washington, D.C. 20036
(202) 828-1000

Attorneys for the Amici Curiae

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