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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 KINGDOM OF SAUDI ARABIA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Kingdom of Saudi Arabia respectfully submits this brief in order to assist the Court in understanding the critical importance of sovereign immunity for foreign states and their officials. As relevant here, it is the position of Saudi Arabia that the presumptive immunity of foreign states extends to individual officials sued for official-capacity acts, whether that immunity is grounded in the Foreign Sovereign Immunities Act of 1976 ("FSIA"), the common law, or both. Because the official-capacity acts of state officials are the acts of the state itself, the sovereign immunity of individual officials sued in their official capacity must be understood to be at least coextensive with that of the state. Otherwise, plaintiffs could circumvent state sovereign immunity simply by suing current (and former) state officials, substantially reducing the importance of the doctrine and threatening international comity.

Saudi Arabia has unique experience with litigating the subject of sovereign immunity and a strong interest in the issues raised in this case. More than six years ago, numerous lawsuits were filed on behalf of individuals and businesses injured in the terrorist attacks of September 11, 2001, as well as the victims' families. These lawsuits accused more than 200 individuals, non-profits, financial institutions, foreign

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that no counsel for a party authored this brief in whole or in part and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for *amicus* also represents that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

officials, and sovereign states and entities of complicity in these attacks. Among those named as defendants were Saudi Arabia, agencies and instrumentalities of Saudi Arabia, and high-ranking officials of Saudi Arabia sued for official-capacity acts. The plaintiffs alleged that Saudi Arabia and its officials provided financial and other material support to al Qaeda, knowing and intending that al Qaeda would use this support to attack the United States and to murder innocent civilians.

Those allegations were as reprehensible as they were fabricated. Saudi Arabia has been and is a pivotal ally of the United States. Its own homeland has been targeted by the same al Qaeda extremists that organized and carried out the terrorist attacks of September 11. Indeed, the bipartisan National Commission on Terrorist Attacks Upon the United States concluded, after an exhaustive study of the causes of the September 11 attacks, that "Saudi Arabia has long been considered the primary source of al Qaeda funding, but we have found no evidence that the Saudi government as an institution or senior Saudi officials individually funded the organization." *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States* 171 (July 2004).

The Second Circuit has now affirmed a district court's dismissal of all claims against Saudi Arabia and several of its high-ranking officials under the FSIA. Consistent with the recommendation of the Solicitor General, this Court declined review of that decision, and it is now final. But, because claims against other Saudi officials and agencies and instrumentalities remain pending, and in light of the possibility that litigation in U.S. courts will be used

as a means to harass or embarrass Saudi Arabia and its officials in other matters (even as the political branches of the United States work toward even stronger diplomatic and economic ties with Saudi Arabia), Saudi Arabia retains a strong interest in the issues of sovereign immunity raised here.

SUMMARY OF ARGUMENT

It is a longstanding principle of domestic and international law that foreign nations are immune from suit in foreign judicial tribunals. The dual holdings of the Fourth Circuit below – that foreign sovereign immunity under the FSIA does not extend to official-capacity suits against foreign officials and, alternatively, that any such immunity would be time-bound and limited to the tenure of the official in office – conflict with the purposes and history of foreign sovereign immunity and the text, structure, history, and purposes of the FSIA itself. This brief makes three points in support of reversal of the Fourth Circuit's decision.

First, foreign sovereign immunity is a crucial component of U.S. law and international relations and, to fulfill the purposes of such immunity, foreign sovereign immunity must be extended to the official-capacity acts of individual officials. Sovereign immunity serves as a gesture of comity among nations, designed to protect the dignity of foreign states; it embodies the recognition that disputes over the official conduct of foreign states are best resolved through government-to-government contact rather than private litigation; and, by limiting the instances in which U.S. courts will sit in judgment of the legality of the official conduct of foreign states, sovereign immunity advances the amicable relations among nations.

In view of those purposes of foreign sovereign immunity, it would be surpassing strange to construe such immunity as applicable to a foreign state, but not to foreign officials sued for carrying out the acts of the foreign state. As this Court has long recognized in an analogous context, a state can act only through its officials and agents. For that reason, allowing private parties to sue foreign officials for official-capacity acts would conflict with the core purposes of immunity. Such a limited conception of foreign sovereign immunity would render meaningless the gesture of comity underlying such immunity; it would distract from efforts to have grievances regarding official conduct resolved through government-to-government channels; and it would subject the official conduct of foreign states to judgment in U.S. courts. It is therefore not surprising that robust immunity for foreign officials has long been recognized under the common law as well as the FSIA.

Second, regardless of whether the FSIA is the *exclusive* source of foreign sovereign immunity for official-capacity acts, the text, structure, history, and purposes of the statute establish that it does apply to official-capacity suits and that such immunity does not dissipate when an individual official leaves office. The Fourth Circuit's contrary conclusions are wrong.

Textually, a suit against an individual official for official-capacity acts is a suit against a "foreign state" within the meaning of the FSIA. The FSIA's definition of "foreign state" as "includ[ing]" agencies or instrumentalities in no way means that *only* agencies and instrumentalities constitute the foreign state. Such a reading of the FSIA would be flatly inconsistent with the text, because the word "includes" necessarily means that something other than the listed

entities can constitute the foreign state. And it would lead to a bizarre, bifurcated immunity regime in which the caption of a complaint (i.e., whether plaintiffs name the foreign state or officials of the foreign state) and not the conduct alleged in the complaint would determine whether the FSIA or the common law applies. Congress – in a statute designed to free immunity determinations from political and diplomatic pressure – cannot have intended such a result.

Nor is the Fourth Circuit correct in its counter-intuitive conclusion that any individual immunity under the FSIA is time-limited. The common law – which the FSIA codified – drew no distinction between former and current officials. And such a distinction would make no sense: allowing a plaintiff to sue for official-capacity conduct when an official leaves office would undermine comity and require U.S. courts to pass on the legality of the official acts of foreign states. This Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) – which turned on the present tense of part of the definition of "agency or instrumentality" – does not compel a different result because a suit against an individual official is against the "foreign state" itself.

Third, any conclusion by this Court that the FSIA does not apply to individuals sued for official-capacity acts or that it does not apply to former officials could have deleterious consequences, inviting years of litigation against foreign officials to test the contours of common-law immunity and leading to frequent calls for the State Department to weigh in on immunity questions involving sensitive foreign policy matters. Because that outcome would countermand the core purposes of foreign sovereign immu-

nity, if the Court concludes that the common law is the exclusive source of immunity, it should reaffirm three basic principles to guide lower court decisions: common-law immunity applies to officials sued for all official-capacity acts; common-law immunity is absolute, and not subject to any exception; and common-law immunity does not dissipate when an official leaves or retires from office.

ARGUMENT

I. SOVEREIGN IMMUNITY REMAINS CRITICALLY IMPORTANT TO THE AMICABLE RELATIONS AMONG NATIONS AND SUCH IMMUNITY MUST EXTEND TO THE OFFICIAL-CAPACITY ACTS OF INDIVIDUALS TO FULFILL ITS PURPOSES

A. This Court Has Long Recognized the Important Purposes Served by Foreign Sovereign Immunity

"The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." *Restatement (Third) of the Foreign Relations Law of the United States* 390 (1987). Since the early 1800s, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). That venerable practice – which dates to shortly after the birth of the Republic, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) – serves several important ends.

First, recognition of the immunity of foreign nations from suit in U.S. courts is "a gesture of comity between the United States and other sovereigns." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479

(2003); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall went on to explain . . . that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign."). This gesture of comity is not an end in itself, but serves to safeguard the dignity of foreign nations, *see National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign") (internal quotation marks omitted), and to promote "the maintenance of friendly relations," *Restatement (Third) of the Foreign Relations Law of the United States* at 391.

Second, granting immunity to foreign nations ensures that disputes over public, governmental acts will be resolved through government-to-government channels. As this Court has explained in a related context, "[r]edress of grievances by reason of . . . acts" of sovereign states "must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964) ("[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."). Put differently, the doctrine of sovereign immunity reflects that government-to-government relations and diplomacy, not private

litigation in foreign judicial tribunals, are the appropriate tools for seeking redress for the official conduct of foreign states. *Cf. The Schooner Exchange*, 11 U.S. at 146 (noting that suits against foreign nations typically raise "questions of policy [rather] than of law" and thus are "for diplomatic, rather than legal discussion").

Third, absent sovereign immunity, U.S. courts regularly would be called upon to sit in judgment of the acts of foreign nations – a practice this Court has recognized would "vex the peace of nations." *Sabbatino*, 376 U.S. at 417-18 ("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); *see id.* at 423 ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency"); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (a concern with avoiding U.S. courts "pass[ing] on the legality of . . . governmental acts" underlies the doctrine of sovereign immunity).

Those historical foundations for the doctrine of sovereign immunity remain apposite. The United

States prides itself on the broad access it provides to its state and federal courts. But what may be an appropriate point of civic pride in one context can be a vexing obstacle to diplomatic relations in another. Particularly in light of the ease with which litigants can access state and federal courts, a robust understanding of sovereign immunity remains critically necessary to respect the comity of other nations, to maintain the primacy of the Executive Branch in the conduct of diplomatic relations, and to prevent state and federal courts from "vex[ing] the peace" of nations by sitting in judgment of the official acts of foreign states.

B. Any Sensible Concept of Sovereign Immunity Must Encompass the Official-Capacity Acts of Individuals

As the federal courts have long held, the same considerations that support affording sovereign immunity to foreign states require such immunity to be extended to foreign officials acting in their official capacity. A foreign state can act only through its individual officials. *See In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71, 84 (2d Cir. 2008) (noting the "evident principle that the [foreign] state cannot act except through individuals"), *cert. denied*, 129 S. Ct. 2859 (2009); *cf. Tennessee v. Davis*, 100 U.S. 257, 263 (1880) (state "can act only through its officers and agents"). It would therefore countermand the purposes of sovereign immunity to refuse to extend the state's immunity to those officials. Such a blinkered concept of sovereign immunity would render meaningless the gesture of comity underlying such immunity; it would distract from efforts to have grievances regarding official state conduct resolved through government-to-government

channels; and it would subject the official conduct of foreign states to judgment in U.S. courts.

For these reasons, it is not surprising that, at the time of the enactment of the FSIA, it was settled that the sovereign immunity of a foreign state extended to individual officials sued for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66(f) (1965) ("[t]he immunity of a foreign state . . . extends to . . . any . . . official . . . 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"); *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) ("immunity of a foreign state extends to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted); *see also Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990) (common law prior to the FSIA "extended immunity to individual officials acting in their official capacity"). That principle has deep roots in American jurisprudence. As the Attorney General of the United States observed 15 years *before* Chief Justice Marshall's landmark decision in *The Schooner Exchange*, "it 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." 1 Op. Att'y Gen. 81, 1797 WL 427 (1797).[2]

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[2] *See also* U.S. Dep't of Justice Letter Br. at 3, *Kensington Int'l Ltd. v. Itoua*, Nos. 06-1763 & 06-2216 (2d Cir. filed May 23, 2007) ("*Kensington* Letter Br.") ("American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts"); Statement of Interest of the United States of America at 4-7,

As the United States has previously explained, moreover, under the common law, the immunity of foreign officials was absolute: "the immunity . . . recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts under the "restrictive theory" of immunity[3] in place at the time of the adoption of the FSIA, "the official himself could not be." *Kensington* Letter Br. at 8; *see also* Statement of Interest of the United States at 5, *Chuidian v. Philippine Nat'l Bank*, Case No. 86-2255-RSWL (C.D. Cal. filed Mar. 21, 1988) ("*Chuidian* Statement") ("While United States law, through the FSIA, recognizes only restrictive immunity for foreign sovereigns, the rationale for the FSIA's exceptions to absolute immunity . . . does not apply to an official carrying out official duties for the sovereign.").[4] Under the common law,

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Matar v. Dichter, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006) ("*Dichter* Statement").

[3] Under the restrictive theory, "immunity [wa]s confined to suits involving the foreign sovereign's public acts, and d[id] not extend to cases arising out of a foreign state's strictly commercial acts." *Verlinden*, 461 U.S. at 487.

[4] *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), illustrates this point. There, the plaintiffs brought a class action alleging violations of the U.S. securities laws against "the Province of Newfoundland and Labrador, and three of its highest officials." *Id.* at *1. The State Department submitted a suggestion of immunity recognizing the absolute immunity of the officials from the suit. *See id.* The Department, however, took the position that the Province itself did not enjoy immunity and was subject to suit for acts that fell "within the exceptions to immunity specified in the [Department's] Suggestion." *Id.* The court held that the "individual defendants" were "remove[d]" from the case while proceeding to exercise jurisdiction over the Province. *Id.* at *2.

therefore, it was well established that a foreign state's sovereign immunity extended to the official-capacity acts of individuals and that such immunity was unconditional – confirming that individual immunity for official-capacity acts has long been a crucial facet of a foreign state's sovereign immunity.

The FSIA – which Congress intended as a comprehensive codification of the common law – embodies these same principles. Indeed, an overwhelming number of courts have concluded that the immunity of a foreign state under the FSIA also governs official-capacity suits against individual officials.[5]

Finally, because a state cannot act except through its officials, and because the immunity of foreign officials for official-capacity acts is accordingly derived from the immunity of the state, it follows that such immunity continues even after a foreign official leaves office. Indeed, we are aware of no case (other than the decision below) in which a U.S. court has concluded that official-capacity immunity disappears or even dissipates when an official is no longer in the employ of his or her government. Such a "counter-intuitive" concept of individual immunity would represent "a dramatic departure from the common law of foreign sovereign immunity," which "made no distinction between the time of the commission of official acts and the time of suit." *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008); *see also Restatement (Second) of the Foreign Relations Law of the United States* § 66(f); *Matar v. Dichter*, 563 F.3d

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[5] *See, e.g.*, *In re Terrorist Attacks*, 538 F.3d at 80-85; *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Chuidian*, 912 F.2d at 1103.

9, 14 (2d Cir. 2009) ("Common law recognizes the immunity of former foreign officials. At the time the FSIA was enacted, the common law . . . recognized an individual official's entitlement to immunity for acts performed in his official capacity. An immunity based on acts – rather than status – does not depend on tenure in office.") (citations and internal quotation marks omitted).

II. THE FSIA APPLIES TO INDIVIDUAL OFFICIALS SUED FOR OFFICIAL-CAPACITY ACTS, AND SUCH IMMUNITY DOES NOT DIVEST UPON RETIREMENT FROM OR RELINQUISHMENT OF OFFICIAL DUTIES

As explained above, the purposes of foreign sovereign immunity require that such immunity – whatever its source – extend to individual officials sued for official-capacity acts. Whether or not such immunity lies *exclusively* in the FSIA, the text, structure, history, and purposes of the FSIA establish that, at the very least, the statute does apply to officials sued for official-capacity acts and that such immunity does not dissipate when an official leaves or retires from office or otherwise ceases to perform official functions. The Fourth Circuit's contrary – and outlying – holdings on these issues are wrong.

A. The Text, Structure, History, and Purposes of the FSIA Establish That It Applies to Individuals Sued for Official-Capacity Acts

1. The FSIA provides that "a foreign state shall be immune from the jurisdiction" of U.S. courts. 28 U.S.C. § 1604. The FSIA defines "foreign state" to "include[]," among other things, "a political subdivision of a foreign state or an agency or instrumentali-

ty of a foreign state." *Id.* § 1603(a). But that definition in no way exhausts the meaning of the phrase. "[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941); *see also Puerto Rico Maritime Shipping Auth. v. ICC*, 645 F.2d 1102, 1112 n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word 'including' indicates that the specified list . . . that follows is illustrative, not exclusive.").

The contrast between Congress's use of the term "means" in the definition of "agency or instrumentality" in § 1603(b) and "includes" in the definition of "foreign state" in § 1603(a) strengthens the conclusion that the definition of "foreign state" does not cover the waterfront: had Congress intended that result it would have said that a "foreign state" *means* "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." That difference in word choice must be presumed to be intentional. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute but omits it in another . . . , it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotation marks omitted; alterations in original).

Furthermore, as a textual matter, the FSIA applies to official-capacity suits against individual officials because official-capacity acts are acts of the "foreign state" and such suits are accordingly against the "foreign state." Again, a state "can act only through its officers and agents." *Davis*, 100 U.S. at 263. Accordingly, "the acts of the official representatives

of the state *are those of the state itself*, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895) (emphasis added), *aff'd*, 168 U.S. 250 (1897); *see also In re Terrorist Attacks*, 538 F.3d at 84 (citing *Underhill* for this proposition). Indeed, as explained, under the common-law regime in place at the time of Congress's enactment of the FSIA, a foreign official's immunity for official-capacity acts derived from the sovereign immunity of the state itself. *See*, *e.g.*, *Heaney*, 445 F.2d at 504 (the "immunity of a foreign state extends to any . . . official or agent of the state with respect to acts performed in his official capacity") (internal quotation marks omitted). For these reasons, the term "foreign state" in the FSIA is most naturally read to apply to suits challenging the official-capacity acts of officials.

Principles of domestic sovereign immunity bolster this textual analysis. The Eleventh Amendment withdraws jurisdiction over "any suit . . . against one of the United States" and makes no mention of state officials. U.S. Const. amend. XI. But, because "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent," such official-capacity claims have long been governed by the Eleventh Amendment. *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); *see also Kentucky v. Graham*, 473 U.S. 159, 166 (1985) ("an official-capacity suit" against an official of a domestic sovereign "is, in all respects other than name, to be treated as a suit against the [sovereign] entity"); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[i]t is . . . well established that even though a State is not named a party to the action, the suit may nonethe-

less be barred by the Eleventh Amendment . . . when . . . the state is the real, substantial party in interest") (internal quotation marks and alterations omitted). Just as "a suit against a state official in his or her official capacity" is "no different from a suit against the State itself," *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), official-capacity suits against foreign officials are best understood as suits against the "foreign state" and are therefore governed by the FSIA.

The purposes of the FSIA support this analysis. Congress enacted the FSIA as a "comprehensive statute" to "remedy" the "problem[]" that immunity decisions had rested with "two different branches" and were subject to a "variety of factors, . . . including diplomatic considerations." *Altmann*, 541 U.S. at 690-91 (internal quotation marks omitted); *see also Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (Congress "deci[ded] to deal comprehensively with the subject of foreign sovereign immunity in the FSIA"). A framework in which the sovereign immunity of foreign officials is outside the scope of the FSIA would substantially undermine Congress's objective of creating a comprehensive system of immunity that would be based on legal judgments rather than political and diplomatic calculations. *See In re Terrorist Attacks*, 538 F.3d at 83.[6]

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[6] Consistent with this view, upon enactment of the FSIA, State Department Legal Adviser Monroe Leigh recognized that the State Department would no longer be called upon to "make any sovereign immunity determinations after the effective date of [the FSIA]." *Text of Letter to the Attorney General from Department of State Legal Adviser* (Nov. 2, 1976), 75 Dep't State Bull. 649 (Nov. 1976). "[I]t would be inconsistent with the legislative intent of that Act," Mr. Leigh explained, "for the Executive Branch to file any suggestion of immunity on or after

2. The contrary reasoning of the Fourth Circuit – as well as that previously set forth by the United States – is unpersuasive.[7]

First, the Fourth Circuit's analysis of the text, structure, and legislative history of the FSIA began and ended with the premise that, if official-capacity suits against officials could not be considered suits against an "agency or instrumentality," then the FSIA does not apply to such suits. *See* Pet. App. 17a-20a. That premise is wrong. As explained above, a suit against a foreign official based on official-capacity acts is a suit against the "foreign state" itself. Furthermore, the FSIA's definition of "foreign state" – which includes the "agency or instrumentality" phrase that was the focus of the Fourth Circuit's

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January 19, 1977. After [the FSIA] takes effect, the Executive Branch will . . . play the same role in sovereign immunity cases that it does in other types of litigation – e.g., appearing as *amicus curiae* in cases of significant interest to the Government." *Id.*

[7] Although the United States previously has argued that the FSIA does not apply to foreign officials, *see*, *e.g.*, *Dichter* Statement at 10-23, the position of the United States has always been clear that common-law immunity for such officials is absolute, *see supra* pp. 11-12. Accordingly, the principal objection raised by the United States to applying the FSIA to foreign officials has always been that such immunity is *too narrow* compared to the common law, not that such immunity should not be recognized. *See*, *e.g.*, *Dichter* Statement at 17 (construing the FSIA as applicable to individuals "leads to problematic results," including the implication "that individual officials are subject to the same *exceptions* to immunity laid out in the FSIA for states and their agencies and instrumentalities"); *id.* at 2 ("[R]efusal by U.S. courts to grant immunity to foreign officials for their official acts could seriously harm U.S. interests, by straining diplomatic relations and possibly leading foreign nations to refuse to recognize the same immunity for American officials.").

decision – is not exhaustive of the category of persons and entities entitled to immunity under the statute. *See supra* pp. 13-16; *see*, *e.g.*, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) ("The nub of the dispute is whether the Bolivian Air Force counts as a 'foreign state' or rather as an 'agency or instrumentality' under section 1608."); *see id.* at 153 ("We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state."); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 546 U.S. 450, 452 (2006) (per curiam) (noting the Solicitor General's position that "a defense ministry (unlike, say, a government-owned commercial enterprise) generally is not an 'agency or instrumentality' of a foreign state but an inseparable part of the state itself," and citing *Transaero*; remanding for consideration of this question).[8]

Second, contrary to the suggestion of the United States, it makes no difference that the legislative history of the FSIA notes that diplomatic and consular immunity would survive enactment of the FSIA. *See Dichter* Statement at 11 ("[T]he legislative history's only reference to any type of individual official –

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[8] On remand, the Ninth Circuit adopted the *Transaero* framework and concluded that the Iranian Ministry of Defense "constitutes an inherent part of the state of Iran," not an "agency or instrumentality" of the "foreign state" under the FSIA. *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1035-36 (9th Cir. 2007), *rev'd on other grounds sub nom. Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732 (2009).

diplomatic or consular representatives – clarifies that the FSIA does not govern their immunity since the statute 'deals only with the immunity of foreign states.'") (quoting H.R. Rep. No. 94-1487, at 21 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6620). Consular and diplomatic immunity are specialized forms of immunity that serve different ends and offer distinct protections from the basic sovereign immunity afforded by the common law for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66 cmt. b; *see also*, *e.g.*, *Arcaya v. Paez*, 145 F. Supp. 464, 471-72 (S.D.N.Y. 1956) (diplomatic immunity applies to all judicial process but ends when diplomatic status ends), *aff'd*, 244 F.2d 958 (2d Cir. 1957); *Chuidian* Statement at 8 n.4 (noting that common-law sovereign immunity for individuals "should be distinguished from diplomatic or similar immunities which may be enjoyed by foreign government officials while they are in the United States"). That Congress did not expect the FSIA to affect diplomatic or consular immunity is in no way inconsistent with the theory that sovereign immunity for official-capacity acts would be governed by the FSIA.

Nor does it make any difference whether Congress actually focused on individual official-capacity suits in the legislative history. There is no "require[ment] that every permissible application of a statute be expressly referred to in its legislative history." *Moskal v. United States*, 498 U.S. 103, 111 (1990); *see Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) ("In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark."); *Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1009 (2008). As we

have explained, at the time Congress enacted the FSIA, it had long been established that individuals acting in their official capacity were entitled to claim the sovereign immunity of the foreign state. The appropriate inference is therefore that Congress understood that the immunity of the "foreign state" would extend to official-capacity acts of foreign officials. *See National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004) (courts should "assume Congress legislated against [a] background of law, scholarship, and history when it enact[s]" a statute).

B. The Immunity for the Official-Capacity Acts of Individuals Does Not Disappear or Dissipate When an Official Leaves Office

1. The sovereign immunity of a "foreign state" under the FSIA – which applies to suits against individual officials for official-capacity acts – does not disappear or dissipate when an official leaves or retires from office (or otherwise ceases to perform official duties).

Here again, this principle follows directly from the principle that a state can act only through its officials and that the immunity of a "foreign state" under the FSIA must accordingly extend to foreign officials acting in their official capacity. The FSIA broadly provides that, subject to certain exceptions, "a foreign state shall be immune from the jurisdiction of the courts of the United States." 28 U.S.C. § 1604. Congress made no exception to that principle for circumstances in which an individual official involved in carrying out the official acts of the "foreign state" has ceased to perform his or her official functions.

A contrary conclusion would undermine the purposes of foreign sovereign immunity. As the D.C.

Circuit has explained, "[e]very act committed by a sovereign government is carried out by its officials and agents." *Belhas*, 515 F.3d at 1286. "To suppose that the sovereign's immunity protecting the individual official in the performance of his sovereign's business vanishes the moment he resigns, retires, or loses an election is to establish that he had no immunity at all. Even though the state's immunity survives his departure, it is difficult to say how it could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf." *Id.* Furthermore, suits against former officials challenging the legality of official-capacity acts undertaken on behalf of a foreign state "would have a significant impact on the foreign state and the United States' relations with that state," *id.* at 1291 (Williams, J., concurring), and "would destroy, not enhance . . . comity," *id.* at 1286 (majority opinion).

Finally, as two courts of appeals have recognized, the common law at the time of the enactment of the FSIA extended immunity to individual officials and drew no distinction based on whether officials remained in office. *See Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285. Because the FSIA was passed against the backdrop of the common law, it must be "read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). For that reason as well, the FSIA is most naturally read as embodying a principle of official individual immunity that – consistent with the common law – depends on whether the conduct challenged is official-capacity conduct of the "foreign state," not upon

whether the individual named as a defendant is still in the employ of the government.

2. The Fourth Circuit incorrectly concluded that this Court's decision in *Dole Foods* required a contrary result. *See* Pet. App. 25a.

Dole Foods involved interpretation of the term "agency or instrumentality." Specifically, the defendant claimed instrumentality status, which required showing, among other things, that "a majority of [the entity's] shares . . . *is* owned by a foreign state or political subdivision." 28 U.S.C. § 1603(b) (emphasis added). This Court held that "the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478.

Official-capacity suits against individual officials, however, are best understood as suits against the "foreign state." *See supra* pp. 13-20. The grant of immunity to foreign states in § 1604, moreover, is not temporally bound. *See* 28 U.S.C. § 1604 ("a foreign state *shall be immune* from the jurisdiction of the courts of the United States") (emphasis added). The present tense language of the definition of "agency or instrumentality" in § 1603(b) simply does not bear on the question whether the official-capacity acts of individual officials remain the acts of a "foreign state" when an individual who undertook those acts leaves office. As explained above, the text and purposes of the FSIA foreclose the counterintuitive suggestion that an official's retirement from office would open the courthouse doors to suits challenging the official conduct of foreign states. *See supra* pp. 20-21.

III. IF THIS COURT CONCLUDES THAT THE FSIA DOES NOT APPLY TO INDIVIDUAL OFFICIALS SUED FOR OFFICIAL-CAPACITY ACTS, IT SHOULD CONFIRM THAT COMMON-LAW IMMUNITY IN SUCH CIRCUMSTANCES EXISTS AND IS ABSOLUTE

Although, at the time of enactment of the FSIA, common-law immunity applied to individual officials sued for official-capacity acts and was absolute, the Fourth Circuit's conclusion that the common law – and *only* the common law – provides a source of immunity for such officials would raise unnecessary risks for foreign states and their officials.

First, although immunity under the common law was unconditional, a return to the common law would tempt judges, in the tradition of the common law, to craft *ad hoc* exceptions to immunity. Absent a statutory standard to implement, these exceptions might be difficult to predict in advance. Indeed, it was "[d]ifficulties in implementing the principle [of sovereign immunity that] led Congress in 1976 to enact the [FSIA], resulting in more predictable and precise rules." *Kiowa Tribe of Oklahoma v. Manufacturing Techs., Inc.*, 523 U.S. 751, 759 (1998). A return to the common law would threaten that predictability. At the least, endorsement of the Fourth Circuit's approach would invite litigation regarding the contours of common-law immunity and foster uncertainty until those contours were settled. That outcome would run contrary to the principle that sovereign immunity is "immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation." *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841,

849 (5th Cir. 2000); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (qualified-immunity doctrines are intended to protect against burdens of litigation); *see infra* p. 25 n.10.

Second, a bifurcated approach to sovereign immunity – one in which the immunity of foreign states is governed by the FSIA and the immunity of foreign officials is governed by the common law – would allow plaintiffs, through the captioning of their complaint, to choose whether an immunity determination is made under the statutory framework of the FSIA or the common law. Plaintiffs who choose the common-law route, moreover, may then pressure the State Department to issue suggestions of immunity proposing withdrawal of common-law protections. *See*, *e.g.*, *Chuidian*, 912 F.2d at 1100 (suggesting the State Department could issue suggestions "deny[ing] immunity"). Whether or not such suggestions would be proper or legal,[9] this outcome would risk regularly drawing the State Department into politically and diplomatically sensitive disputes. The long-term interests of the United States and the State Department would appear to lie in avoiding such circumstances. *See Sabbatino*, 376 U.S. at 436 (noting, in the act-of-state context, that "[o]ften the State

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[9] This Court has suggested that the State Department at times requested immunity when the restrictive theory would have denied it. *See Verlinden*, 461 U.S. at 487 ("As a consequence, foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would *not* have been available under the restrictive theory.") (emphasis added). But whether the State Department could suggest the withdrawal of such immunity when the restrictive theory deemed that it applied would be an open question and a heavily litigated issue.

Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically").

Adhering to a well-established, defined statutory framework such as the FSIA obviates the possibility of ill-founded pronouncements that might interfere with the United States' interests. Indeed, avoiding these results was why Congress enacted the FSIA in the first place. *See Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009) (Congress "t[ook] upon itself in the FSIA to 'free the Government' from the diplomatic pressures engendered by the case-by-case approach" to immunity); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 19 (2009) (explaining that the common-law regime was "characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures" and that the FSIA was designed to remedy such concerns).

If – notwithstanding these considerations – this Court concludes that the FSIA does not apply to individual officials sued for official-capacity acts, the Court should attempt to cabin the deleterious consequences that could result by providing guidance on the nature of common-law immunity.[10] *First*, the

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[10] The Fourth Circuit shunted the question of common-law immunity off into a hodgepodge of issues left open on remand. *See* Pet. App. 25a-26a. But such a course is contrary to the whole purpose of sovereign immunity, which is to protect sovereigns not merely from damages liability but also from the burdens of defending a lawsuit. *See*, *e.g.*, *Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("like claims of absolute or qualified immunity of a public official, foreign

Court should make clear that common-law immunity presumptively applies to officials sued for official-capacity acts. *See Restatement (Second) of the Foreign Relations Law of the United States* § 66(f); *Heaney*, 445 F.2d at 504; *supra* pp. 9-10. *Second*, the Court should affirm that such immunity is absolute and not subject to any exception. *See Greenspan*, 1976 WL 841, at *1-*2; *Kensington* Letter Br. at 8; *supra* pp. 11-12. *Finally*, the Court should make clear that such common-law immunity does not dissipate when an official leaves or retires from office. Recognition of this principle would accord with the common law at the time of the enactment of the FSIA[11] and would appear to be consistent with the views of the United States regarding the scope of individual immunity.[12]

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sovereign immunity is an *immunity from suit* rather than a mere defense to liability") (emphasis by the Ninth Circuit; internal quotation marks omitted); *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 756 n.4 (2d Cir. 1998) ("Qualified immunity, like sovereign immunity, is an immunity from litigation and not just from liability."); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("[W]e adopt the prevalent view that sovereign immunity is an immunity from trial and the attendant burdens of litigation on the merits, and not just a defense to liability on the merits.") (internal quotation marks omitted). Issues of sovereign immunity should be resolved all at once, not piecemeal on multiple trips up and down through the appellate courts.

[11] *See Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285; *supra* pp. 12-13.

[12] *See* Brief for the United States as Amicus Curiae at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. filed May 29, 2009) (stating that "Congress is unlikely to have conferred a time-limited immunity" under the FSIA for individuals under which "a plaintiff could circumvent [individual sovereign] immunity by waiting until an official left office").

Because it has now been more than three decades since Congress enacted the FSIA and because an overwhelming number of courts have applied that framework to individual officials sued for official-capacity acts, a precipitous return to common-law immunity without authoritative guidance from this Court would be treacherous. Were this Court to remand for consideration of common-law immunity without offering any guidance to lower courts with respect to the nature and scope of such immunity, years of litigation in this case and others would be sure to follow. Because that outcome would threaten the core purposes of foreign sovereign immunity, this Court should take all necessary steps to avoid it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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