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 *AMICI CURIAE* DOLLY FILÁRTIGA, SISTER DIANNA ORTIZ, AND OTHER TORTURE SURVIVORS AND THEIR FAMILY MEMBERS, HUMAN RIGHTS ORGANIZATIONS, RELIGIOUS ORGANIZATIONS, AND TORTURE SURVIVORS SUPPORT ORGANIZATIONS IN SUPPORT OF THE RESPONDENTS

TYLER R. GIANNINI
Counsel of Record
SUSAN H. FARBSTEIN
NATHAN P. ELA
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9263

Attorneys for Amici Curiae

January 27, 2010

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTERNATIONAL CASES

TABLE OF AUTHORITIES – Continued

U.S. STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF THE *AMICI CURIAE*

Amici curiae respectfully submit this brief pursuant to Supreme Court Rule 37 in support of the Respondents.[1]

The *amici curiae* (listed individually in Appendix A to this brief) are:

(a) former plaintiffs who have secured some measure of justice for their own torture and that of their family members through suits against former foreign government officials under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note);

(b) non-profit organizations dedicated to providing health and social services to survivors of torture and other severe human rights abuses;

(c) human rights organizations committed to abolishing torture through legal means and policy advocacy, including but not

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief and such consents have been lodged with the Court.

limited to litigation under the ATS and the TVPA; and

(d) religious organizations opposed to torture on moral grounds and committed to ensuring that the ATS and the TVPA continue to protect their members serving communities overseas.

The *amici curiae* oppose the use of torture under any circumstances and support the efforts of torture survivors to hold their perpetrators accountable. Thus, the *amici curiae* work to prevent the United States from serving as a safe haven for torturers.

SUMMARY OF ARGUMENT

Congress passed the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (reproduced at 28 U.S.C. § 1350 note), to ensure that U.S. courts could hear suits by torture survivors against former officials of foreign governments. Indeed, Congress understood and intended that the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq.*, would not bar such actions. In a substantial line of cases beginning thirty years ago with the seminal *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which was cited with approval by this Court in *Sosa v. Alvarez-Machaín,* 542 U.S. 692 (2004), torture survivors have obtained relief in U.S. courts. Survivors have relied upon two acts – the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the

TVPA – to initiate suits against their abusers, including former government officials.

In asserting that the FSIA "should be construed to include individuals acting in an official capacity on the state's behalf," Pet. Br. 17, Petitioner proposes that this Court adopt a rule that would result in presumptive FSIA immunity for former officials who have committed torture and other severe human rights violations. Petitioner's contention would have staggering implications for torture survivors. Automatic immunity for former officials would strip individuals, including American citizens like *amicus* Sister Dianna Ortiz, of the access to justice that Congress carefully crafted in enacting the TVPA. An American nun working as a missionary with impoverished communities in Guatemala, Sister Ortiz was abducted, raped, and otherwise tortured in 1989 by soldiers under the direction of the Minister of Defense, Hector Gramajo. *Xuncax v. Gramajo*, 886 F. Supp. 162, 173-74 (D. Mass. 1995). Petitioner would deny survivors like Sister Ortiz the opportunity to seek redress in U.S. courts and would fundamentally undermine the legislative and judicial endorsement of the principle that "torturers and death squads will no longer have a safe haven in the United States." S. Rep. No. 102-249, at 3 (1991).

This outcome would effectively eviscerate the TVPA, unraveling the relief that Congress understood the ATS to provide and deliberately extended to American citizens, as well as aliens, in enacting the TVPA. Instead, this Court should read the FSIA,

which on its face does not confer immunity upon former officials, to be consistent with the plain language of the TVPA and the ATS, as well as with the underlying purposes for which Congress enacted these statutes. Thus, this Court should conclude that former officials are not immune from suit under the FSIA.

Should this Court determine that the FSIA may apply to former officials, however, that holding would not result in a finding that Petitioner is immune. Rather, remand would be required to determine whether Petitioner acted within the scope of his lawful authority. The Fourth Circuit did not reach this issue, *Yousuf v. Samantar*, 552 F.3d 371, 377 n.3 (4th Cir. 2009), and it is not before this Court. Scope-of-authority analysis is an essential component of any immunity inquiry. Every Circuit that has found that the FSIA extends to individuals has further held that officials are eligible for immunity *only* when acting within the scope of their lawful authority. Such an inquiry requires an examination of whether violations of *jus cogens* norms are ever lawful and whether the acts alleged were legal and authorized under local law. In undertaking such an analysis, a court must not give undue weight to submissions of a foreign state purporting to authorize, on a post hoc basis, an official's illegitimate acts.

To ensure that torture survivors continue to be afforded the access to U.S. courts that Congress enshrined in the TVPA and that the courts have recognized for thirty years under the ATS, this Court

should reject Petitioner's claim that former officials are automatically entitled to FSIA immunity. Such a result would permit abusive regimes to immunize the most heinous acts of former officials and deny justice to the very individuals Congress passed the TVPA to protect, including American students brutalized while overseas, relief workers targeted while on vital aid missions, and U.S. government personnel – civilian or military – tortured while on foreign assignments.

ARGUMENT

I. IN PROVIDING TORTURE SURVIVORS WITH A TVPA CAUSE OF ACTION AGAINST INDIVIDUALS, CONGRESS UNDERSTOOD – AND COURTS HAVE CONFIRMED – THAT FORMER OFFICIALS ARE NOT IMMUNE FROM SUIT

Petitioner's brief ignores the TVPA and the ATS entirely and thus overlooks the statutory remedies provided by Congress for torture survivors, such as *amicus* Sister Ortiz. In asserting that automatic immunity applies to all former officials,[2] Petitioner

[2] *Amici* agree with Respondents that the FSIA does not apply to individual officials, much less to former officials. *See generally* Resp't Br.; *see also* Part II.A *infra*. However, should this Court determine that the FSIA may apply to former officials, it should remand for further analysis of whether the alleged acts were taken within the scope of Petitioner's lawful authority. *See* Part II.B *infra.*

would rewrite the TVPA to render it effectively void upon passage, subvert congressional intent that the FSIA and the TVPA be read consistently, and have this Court overturn decades of jurisprudence.

A. Endorsing landmark ATS cases – *Filártiga v. Peña-Irala* and *Forti v. Suárez-Mason* – Congress codified relief for torture survivors, including American citizens

In passing the TVPA, Congress codified the principle established in *Filártiga* that torture survivors can seek justice in U.S. courts against individual perpetrators. *See* S. Rep. No. 102-249, at 3-4, 7-8; H.R. Rep. No. 102-367, at 4 (1991). The TVPA creates a statutory cause of action against "an individual" who commits torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." 28 U.S.C. § 1350 note. Congress envisioned that the TVPA would offer a remedy to a broad range of potential victims who could not bring an action under the ATS by virtue of their U.S. citizenship, including American students, relief workers, missionaries, federal agents, and military personnel. *See* Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary, 101st Cong. 66 (1990) (statement of Sen. Arlen Specter) (describing the statute as one way to "protect our drug agents, wherever they are. . . . [T]hese are heinous and horrendous acts and

wherever we can move against them, we should."). Thus, Petitioner's approach would undermine a crucial legislative purpose explicitly enshrined in the TVPA: to protect American officials and citizens overseas.

In enacting the TVPA, Congress specifically referenced *Filártiga* to illustrate the heinous nature of the violations at issue. S. Rep. No. 102-249, at 3-4; H.R. Rep. No. 102-367, at 3-4. The *Filártiga* court labeled torturers the "enemy of all mankind." *Filártiga*, 630 F.2d at 890. In that case, *amicus* Dolly Filártiga, along with her father Joel, successfully sued a former Paraguayan Inspector General of Police for kidnapping and torturing to death her younger brother. *Id.* at 878. The Senate Report cited *Filártiga* as evidence of a "universal consensus" that "[o]fficial torture . . . violate[s] standards accepted by virtually every nation." S. Rep. No. 102-249, at 3. The Report also noted that the TVPA would "establish an unambiguous basis" for the cause of action in *Filártiga* and "extend a civil remedy also to U.S. citizens who may have been tortured abroad." *Id*. at 4-5. *See also* H.R. Rep. No. 102-367, at 3 (noting that U.S. treaty obligations require it "to adopt measures to ensure that torturers are held legally accountable for their acts," including through the provision of "means of civil redress to victims of torture"); *Kadić v. Karadžić*, 74 F.3d 377, 378 (2d Cir. 1996) ("Congress has made clear that its enactment of the [TVPA] was intended to codify the cause of action recognized by this Circuit

in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens.").

This Court has likewise understood the TVPA to indicate Congressional support for the result in *Filártiga*. *See Sosa*, 542 U.S. at 731 (describing the TVPA as "supplementing the judicial determination" made in *Filártiga* and as expressing Congressional approval of the result). This Court also endorsed the analysis employed in *Filártiga* and treated it as a paradigmatic ATS case in which relief for human rights violations should be available. *See id.* at 732 (citing *Filártiga* as "generally consistent with the reasoning of many of the courts and judges" in ATS and TVPA cases).

The Senate Report on the TVPA also endorsed *Forti v. Suárez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), an ATS case in which survivors and their next of kin sued a former Argentine general responsible for torture and summary execution committed by military and police forces under his control. S. Rep. No. 102-249, at 4. In adopting the TVPA, therefore, Congress confirmed that liability attaches to former high-ranking officials with command responsibility over human rights violations. *Id.* at 8-9 ("[R]esponsibility . . . extends beyond the person or persons who actually committed those acts [to] anyone with higher

authority who authorized, tolerated or knowingly ignored those acts.").[3]

Congress stated that the FSIA would not normally bar suits alleging torture by former officials. *See id.* at 7-8 ("Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official."); H.R. Rep. No. 102-367, at 5. That Congress explicitly endorsed existing ATS cases in which torture survivors held former foreign officials to account demonstrates its understanding that former officials, including high-ranking individuals, would be subject to suit under the TVPA, notwithstanding the FSIA.

B. The FSIA should be construed consistently with the TVPA so as not to render the TVPA effectively void upon passage

Accepting Petitioner's argument that the FSIA automatically affords immunity to former officials for acts of torture and summary execution would render the TVPA effectively void. This Court should not endorse such a result. Prior to enacting the TVPA,

---

[3] The principle of command responsibility is well established in TVPA cases. *See, e.g.*, *Hilao v. Estate of Marcos* ("*Marcos III*"), 103 F.3d 767, 776-78 (9th Cir. 1996) (citing *In re Yamashita*, 327 U.S. 1, 14-16 (1946)); *Ford v. Garcia*, 289 F.3d 1283, 1288-90 (11th Cir. 2002); *Gramajo*, 886 F. Supp. at 171-74; *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1328-34 (N.D. Cal. 2004).

Congress made clear that it viewed that statute as consistent with the FSIA. *See* S. Rep. No. 102-249, at 6 ("[O]nly individuals may be sued. Consequently, the TVPA is not meant to override the [FSIA].").

Principles of statutory construction have long advised that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see also United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As this Court has instructed,

> At the time a statute is enacted, it may have a range of plausible meanings. Over time, however, subsequent acts can shape or focus those meanings. The classic judicial task of reconciling many laws enacted over time, and getting them to make sense in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute. . . . [A] specific policy embodied in a later federal statute should control [a court's] construction of the [earlier] statute, even though it ha[s] not been expressly amended.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 143 (2000) (citations and internal quotation marks omitted). Thus, even if the FSIA might conceivably be interpreted, as Petitioner contends, to encompass former foreign officials, the imperative of

reconciling the TVPA with the FSIA counsels against such a reading.

The express terms of the TVPA, as well as its legislative history, make clear that Congress sought to provide torture victims with a remedy. *See* Part I.A *supra*. While courts have posited that interpreting the FSIA to cover individual former government officials does not eviscerate the TVPA,[4] these courts have overstated the applicability of the FSIA's enumerated exceptions. Further, these courts offer no example or explanation of how claims for torture or extrajudicial killing would fit within one of the FSIA exceptions. Relief under the TVPA would be largely illusory if plaintiffs' claims must conform to one of the exceptions to avoid dismissal.[5] While the waiver and

---

[4] *Belhas v. Ya'alon*, 515 F.3d 1279, 1288-89 (D.C. Cir. 2008); *Matar v. Dichter*, 500 F. Supp. 2d 284, 293 (S.D.N.Y. 2007), *aff'd without reaching the issue*, 563 F.3d 9 (2d Cir. 2009).

[5] Indeed, under such a regime, TVPA claims that numerous circuit and district courts have upheld as viable would, in fact, fail. *See, e.g., Chávez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming jury verdict under TVPA against former officer in the armed forces of El Salvador), *cert. denied*, *Carranza v. Chávez*, 130 S. Ct. 110 (U.S. Oct. 5, 2009); *Arce v. García*, 434 F.3d 1254 (11th Cir. 2006) (affirming judgment in favor of Salvadoran refugees against former members of Salvadoran military); *Marcos III*, 103 F.3d 767 (permitting suit against former Philippine president to proceed); *Lizarbe v. Rondon*, 642 F. Supp. 2d 473 (D. Md. 2009) (holding that former lieutenant in Peruvian army is not protected by FSIA immunity); *Liu Qi*, 349 F. Supp. 2d at 1279-88 (deciding that individual local government officials in China can be held accountable under TVPA for torture and other acts contrary to Chinese law); *Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996) (denying motion to dismiss by

(Continued on following page)

terrorism exceptions may provide plaintiffs with an avenue for relief in an extremely limited number of circumstances,[6] the other exceptions are irrelevant in the paradigmatic TVPA case. Claims predicated on the commercial activities, takings, or rights in property exceptions are facially inapplicable. 28 U.S.C. §§ 1605(a)(2)-(4). The noncommercial tort exception is limited to torts occurring in the United States, while the TVPA is meant to address torture committed abroad. *Id.* § 1605(a)(5). Thus, under an interpretation requiring plaintiffs to meet one of the FSIA's exceptions, neither the claim of Dolly Filártiga nor that of Sister Ortiz would have survived.

---

former Ghanaian official and noting that he could be held liable under TVPA for acts of torture that occurred outside of his scope of authority).

[6] The waiver exception would provide relief in very few cases since waiver requires an affirmative act on the part of the state. 28 U.S.C. § 1605(a)(1). For example, at the time of Sister Ortiz's lawsuit, defendant Gramajo, like other military officers involved in human rights violations in Guatemala, still had the support of the country's ruling parties. *See* Jennifer Schirmer, *The Guatemalan Military Project: A Violence Called Democracy* 265-66 (1998). Thus, waiver would have been an impossibility.

The terrorism exception is limited to acts by a designated state sponsor of terrorism, of which there are currently four – Cuba, Iran, Sudan, and Syria – countries whose citizens are unlikely to travel to the United States. Moreover, this exception is available only to a limited set of claimants, namely U.S. nationals, members of the U.S. armed forces, and U.S. government employees. 28 U.S.C. §§ 1605A(a)(2)(A)(i)(I), 1605A(a)(2)(A)(ii).

C. A long line of cases permits torture survivors to seek justice and hold former officials accountable in U.S. courts

In their landmark case, *amicus* Dolly Filártiga and her father brought an ATS suit against a former Paraguayan Inspector General of Police for kidnapping and torturing to death Ms. Filártiga's younger brother, Joelito, in retaliation for their father's political activism. *Filártiga*, 630 F.2d at 878-79. After Joelito's killing was publicized in the news media, Ms. Filártiga and her mother were arrested on false charges. *See* Dolly Filártiga, *American Courts, Global Justice*, N.Y. Times, Mar. 30, 2004, at A21. When the Filártigas tried to bring a case against Joelito's murderer in Paraguay, their lawyer was arrested, threatened, and shackled to a wall; he subsequently had his law license revoked. *Id.*

Before the Paraguayan dictator Alfredo Stroessner fell from power, the Filártigas filed their ATS case upon learning that Peña-Irala had been residing in the United States.[7] For the Filártigas, the ATS case was risky, but, as *amicus* Filártiga has observed, it also gave them protection: "the Paraguayan government threatened us but wouldn't risk retaliating once we had the American legal system on our

[7] The Filártigas filed suit in 1978. *Filártiga*, 630 F.2d at 879. Stroessner seized power in a 1954 *coup d'état* and ruled for thirty-five years until being deposed in 1989.

side." *Id.* In 2004, Ms. Filártiga wrote about the importance of the case and the ATS:

> [S]urvivors or victims' relatives have used this law to obtain a measure of justice. . . . [Without the law,] torturers like Américo Peña-Irala would be able to travel freely in the United States. Deposed dictators like Ferdinand Marcos and brutal generals like Carlos Vides Casanova, who presided over human rights abuses in El Salvador in the 1980's, could come here and enjoy safe haven. *Id.*

Ms. Filártiga also reported that in Paraguay, the case had become "a symbol of the injustice of the Stroessner dictatorship." *Id.* Yet if the rule championed by Petitioner here had been followed in *Filártiga*, Peña-Irala would have received immunity. Not only would *amicus* Filártiga and her father have been denied justice for the kidnapping, torture, and murder of their family member, but also the line of subsequent cases endorsed by this Court could never have come to pass. *Sosa*, 542 U.S. at 731-32.

Amicus Sister Ortiz exemplifies the paradigmatic case that Congress contemplated when passing the TVPA. Nearly a year after traveling from a Kentucky convent to a poor rural province in Guatemala to conduct missionary work, Sister Ortiz received threats that prompted her to leave the country temporarily.[8]

[8] Ortiz felt she was targeted "not because she was any kind of radical but simply because she was a garden-variety

(Continued on following page)

Gramajo, 886 F. Supp. at 173. Shortly after resuming her work two months later, Sister Ortiz was kidnapped from the garden of a religious center and taken, in a National Police patrol car driven by a uniformed policeman, to an unlit room where she was interrogated. *Id.* at 173-74. Sister Ortiz's captors punched her in the face, seared her skin more than one hundred times with cigarettes, and raped her repeatedly, causing her to black out intermittently. *Id.* at 174 & n.7. Upon her escape and return to the United States, Sister Ortiz filed claims against Gramajo under the TVPA. *Id.* at 173, 178.

The court held that Ortiz had "properly" used the TVPA against the former official because the "statute unambiguously provides victims of torture with a private cause of action against the perpetrators of such abuse" and immunity is "unavailable in suits against an official arising from acts that were beyond the scope of the official's authority." *Id*. at 175-76. Thus, the court aptly recognized that Congress passed the TVPA on the understanding that FSIA immunity would not apply to former officials charged with actionable violations under the TVPA. Under Petitioner's proposed immunity rule, however, Sister

---

Catholic missionary working with the poor at a time when the military wanted to seriously scare the church." Donna Minkowitz, "*The Blindfold's Eyes" by Dianna Ortiz*, Salon.com, Nov. 19, 2002, http://dir.salon.com/story/books/review/2002/11/19/ortiz/ (book review).

Ortiz's suit against the former Guatemalan Minster of Defense would have been dismissed.

Other torture survivors have also used the TVPA and the ATS to hold abusive former officials to account. In *Arce v. García*, 434 F.3d 1254 (11th Cir. 2006), Salvadoran refugees abducted and tortured by members of the El Salvador National Guard – who subjected them to electric shocks, sodomy, and asphyxiation – obtained redress against the former Minister of Defense and former Director General of the National Guard, both of whom had since gained permanent residency in the United States. In *Chávez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005), a naturalized American citizen received relief against a former Salvadoran official, then living in Memphis, who was responsible for her torture and rape while she was a student at the National University of El Salvador. In *Cabello v. Fernández-Larios*, 402 F.3d 1148 (11th Cir. 2005), survivors of a Chilean economist who had been tortured and extrajudicially killed were able to obtain a measure of relief in a suit against a former Chilean military official residing in Miami. In *Mehinovic v. Vuckovic*, 198 F. Supp. 2d 1322 (N.D. Ga. 2002), torture survivors won a judgment against a former Bosnian Serb soldier then residing in Georgia. In *Jean v. Dorélien*, 431 F.3d 776 (11th Cir. 2005), a federal jury found a former Haitian colonel who had moved to Florida liable for extrajudicial killing and torture. In *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996), a former high-ranking Ethiopian official, discovered living in Atlanta, was

held liable under the ATS for the torture of three women during Ethiopia's military dictatorship of the 1970s.

Petitioner's approach to former-official immunity would have rendered all of these defendants – former foreign government officials involved in brutal abuses – untouchable. Each of these cases followed from the *Filártiga* precedent and gave survivors, or family members of those killed, access to justice in U.S. courts. Yet under Petitioner's proposed rule, all of these plaintiffs would have been denied the relief Congress sought to provide by codifying *Filártiga* in the TVPA.

II. THE FSIA DOES NOT IMMUNIZE OFFICIALS ACTING OUTSIDE THE SCOPE OF THEIR LAWFUL AUTHORITY, AND REMAND IS APPROPRIATE BECAUSE THIS QUESTION IS NOT BEFORE THIS COURT

Even if immunity extends to former officials, Petitioner is not entitled to immunity for any acts, such as torture and extrajudicial killing, that contravene *jus cogens* norms and are thus necessarily outside the scope of his lawful authority. Every Circuit that has held that an official – current or former – has immunity under the FSIA has made clear that this immunity extends *only* to acts committed within the scope of his lawful authority; acts beyond legal authority are not immunized. *See, e.g.*, *Chuidian v.*

Philippine Nat'l Bank, 912 F.2d 1095, 1106 (9th Cir. 1990).[9]

In short, a court must consider whether Petitioner was lawfully authorized to commit torture and other abuses. It cannot find his actions were taken in an official capacity by focusing solely on his status as an official at the time of the conduct alleged. *See Barr v. Matteo,* 360 U.S. 564, 573-74 (1959). Petitioner's failure to acknowledge the distinction between official capacity and scope of authority is glaring in its omission. Pet. Br. 43-45. In thoroughly assessing whether immunity exists, a court must determine, first, what authority a state has *actually* granted to an official and, second, what authority domestic and international law permit a state to grant *lawfully* to an official. These issues were never considered by the Fourth Circuit and are not before this Court. Should

---

[9] *See also In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Cent. Bank of Nig.,* 277 F.3d 811, 815 (6th Cir. 2002); *Byrd v. Corporación Forestal y Industrial de Olancho S.A.,* 182 F.3d 380, 388-89 (5th Cir. 1999); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

Where an officer's acts exceed the scope of his legal authority, he is not immune, because the acts are "not th[ose] of an agency or instrumentality of a foreign state within the meaning of FSIA." *Hilao v. Estate of Marcos* ("*Marcos II*"), 25 F.3d 1467, 1470 (9th Cir. 1994). In claiming, based on pre-FSIA common law, that officials are immune even if they exceed their lawful authority, Pet. Br. 30, Petitioner utterly ignores both the holding and the rationale of the *Chuidian* line – the only case law suggesting that individuals are entitled to immunity under the FSIA.

this Court determine that the FSIA applies to former officials, remand is therefore appropriate for analysis of whether Petitioner was acting within the scope of his lawful authority.

A. The FSIA does not immunize former officials

Those Circuits that have interpreted the FSIA to apply to individuals have reasoned that an officer can be considered an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(b), when acting in an official capacity and within the scope of his lawful authority. *See, e.g.*, *Chuidian*, 912 F.2d at 1099-102; *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 81 (2d Cir. 2008).[10] Even if this Court were to accept this reasoning for current officials, however, the FSIA does not immunize former officials. *See generally* Resp't Br.[11]

---

[10] Petitioner argues that an individual official should be equated with the state itself. *See generally* Pet. Br. *Amici* have found no case to support this proposition.

[11] The FSIA itself does not state that immunity would extend to individual officials of foreign governments. 28 U.S.C. § 1603(b) (referring only to foreign states and their "agenc[ies] and instrumentalit[ies]"). A plain reading of the FSIA would not have the statute apply to individuals. *See Samantar*, 552 F.3d at 379-81; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005) ("If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."), *vacated for settlement by Abiola v. Abubakar*, 2008 U.S. Dist. LEXIS 2937 (N.D. Ill. Jan.

(Continued on following page)

In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court endorsed "the longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 478 (citations and internal quotation marks omitted). This Court held that, in a suit against a defendant that is potentially an agency or instrumentality, such status – and thus the applicability of FSIA immunity – is determined "at the time suit is filed," not "at the time of the conduct giving rise to the suit." *Id.* at 478-79.

In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court confirmed that, under *Dole*, "whether an entity qualifies as an 'instrumentality' of a 'foreign state' for purposes of the FSIA's grant of immunity depends on the relationship between the entity and the state at the time suit is brought rather than when the conduct occurred." *Id.* at 698; *see id.* at 708 (Breyer, J., concurring) ("[T]he legal concept of

---

15, 2008); *Tachiona v. United States,* 386 F.3d 205, 221 (2d Cir. 2004) (noting with respect to 28 U.S.C. § 1603(b) that "'agencies [and] instrumentalities' . . . are defined in terms not usually used to describe natural persons"), *cert. denied*, 547 U.S. 1143 (2006).

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), this Court also noted a distinction between suits against individual foreign officials and those against foreign states. *Id.* at 436 n.4. The Court cited *Filártiga*, a suit "against a Paraguayan police official for torture" in which "the Paraguayan Government was not joined as a defendant," to demonstrate that jurisdiction could be exercised against an individual official under the ATS without implicating the FSIA. *Id.*

sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit.") (emphasis in original). Thus, even if individual officials acting within the scope of their authority may be considered agencies or instrumentalities, *Dole* instructs that FSIA immunity would not extend to former officials.

B. Remand is appropriate if this Court determines that former officials are protected by the FSIA

While it is necessary for Petitioner to show that the FSIA extends immunity to *former* officials, it is not sufficient. As noted above, courts have made clear that an immunity analysis necessarily requires assessing whether an alleged act was undertaken within the scope of lawful authority. *See, e.g.*, *Chuidian*, 912 F.2d at 1106-07. Indeed, if automatic conferral of immunity to former officials were the rule, *Filártiga* and its progeny would never have been possible.

As Petitioner concedes, because the Fourth Circuit determined that former officials were not immune under the FSIA, it did not reach the question of whether Petitioner acted within the scope of his lawful authority. Pet. Br. 15-16. The Fourth Circuit specifically did not address whether the acts alleged here were violations of universally accepted international norms that could ever be within the scope of an official's lawful authority. *Samantar*, 552 F.3d at

377 n.3. Thus, even if this Court were to find for Petitioner on both of the Questions Presented, the proper course would be to remand to determine whether, as a legal and factual matter, the acts he is alleged to have committed fell within the scope of his lawful authority.

Ignoring this procedural posture, Petitioner asserts that a finding by this Court that the FSIA applies to suits against former officials for their official-capacity acts would establish that *he* is actually entitled to FSIA immunity. Pet. Br. 43-44. Thus, Petitioner suggests that this Court may presume his acts were within the scope of his official authority – and therefore lawful – simply because he took those acts in his role as an official and because the Somali Transitional Federal Government ("TFG") has stated that the actions alleged in the complaint "would have been taken by Mr. Samantar in his official capacit[y]." *Id.* at 10, 12 (citation and internal quotation marks omitted). Although this Court should not reach this question, Petitioner is mistaken. Assuming *arguendo* that former officials have some immunity under the FSIA, they are not immune for violations of *jus cogens* norms. *See* Part II.C *infra*. Additionally, a court must consider whether the given act was legal in the jurisdiction where it took place. *See* Part II.D.1 *infra*.

The inquiry in *Chuidian* and its progeny focuses on whether a defendant's acts were within the lawful realm of his duties. *Chuidian* made clear that a government official would not be entitled to sovereign

immunity "for acts not committed in his official capacity" or "acts beyond the scope of his authority." 912 F.2d at 1106. Thus, the FSIA does not immunize acts that "the sovereign has not empowered the official to do." *In re Estate of Ferdinand Marcos Human Rights Litig.* ("*Marcos I*"), 978 F.2d 493, 497 (9th Cir. 1992). Immunity also would not apply to "the illegal conduct of government officials," *Hilao v. Estate of Marcos (In re Estate of Ferdinand Marcos Human Rights Litig.)* ("*Marcos II*"), 25 F.3d 1467, 1472 n.7 (9th Cir. 1994), or to acts that could not have been legally authorized. *See Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (finding that, although defendant might have been authorized to make payments, he could not have been authorized to make "corrupt bargains"); *Keller v. Cent. Bank of Nig.,* 277 F.3d 811, 815 (6th Cir. 2002) (observing that *Chuidian* considered whether defendant was authorized to perform the types of acts alleged). The mere fact that an official acted under color of law is not sufficient. *Marcos II*, 25 F.3d at 1470-71 (finding former president acting under color of authority, but not within lawful mandate, not entitled to FSIA immunity); *see also Velasco v. Gov't of Indon.,* 370 F.3d 392, 398-400 (4th Cir. 2004) (noting that unauthorized acts, even if taken under color of law, cannot be imputed to foreign state). In short, remand is necessary for a court to consider whether Petitioner acted within the scope of his lawful authority.

C. Violations of *jus cogens* norms can never be within the scope of lawful authority

Assuming that the FSIA does apply to former government officials, immunity would not attach to violations of *jus cogens* norms, because such acts can never be within the lawful scope of an official's authority. A *jus cogens* or "peremptory norm" is one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 332. *Jus cogens* norms "enjoy the highest status within international law." *Comm. of U.S. Citizens Living in Nicar. (CUSCLIN) v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

The acts alleged by Respondents, including torture, extrajudicial killing, crimes against humanity, and war crimes, violate *jus cogens* norms and were prohibited under international law at the time the FSIA was enacted.[12] *Amici* agree with *amicus curiae*

---

[12] *See Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 714 (9th Cir. 1992) (noting that torture is violation of *jus cogens* norm); *Nguyen Thang Loi v. Dow Chem. Co. (In re Agent Orange Prod. Liab. Litig.)*, 373 F. Supp. 2d 7, 133-37 (E.D.N.Y. 2005) (quoting Cherif Bassiouni, *Crimes Against Humanity*, *in Crimes of War: What the Public Should Know* 107, 107-08 (Roy Gutman & David Rieff, eds., 1999) (observing that norm prohibiting crimes against humanity is *jus cogens* and has existed in customary international law for over half a century)); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶ 153 (Dec. 10,

(Continued on following page)

the Anti-Defamation League ("ADL") that "[i]t is self-evident that, because no state can ever derogate from such a peremptory norm of international law, officials who violate such norms are acting outside their lawful capacity." ADL Br. 6.[13] Thus, in *Marcos II*, the Ninth Circuit found that the estate of former President Marcos was not immune because his "acts of torture, execution, and disappearance were clearly acts outside of his authority as President" and "were not taken within any official mandate." 25 F.3d at 1472. Even as president, Marcos could not lawfully "authorize" violations of *jus cogens* norms.[14] International law

---

1998) (same); Restatement (Third) of the Foreign Relations Law of the United States, § 702 cmt. n (1987) (stating that prohibition of torture is a *jus cogens* norm).

[13] The ADL is also correct that there is no need to expand the FSIA to constrain the ATS and the TVPA because a variety of existing doctrines already limit liability to the narrow categories Congress intended. ADL Br. 9. The ADL errs, however, in suggesting that the Court can or should opine on any of these doctrines in this case. *Id.* at 10. Only the scope of the FSIA is at issue here, not the scope of the ATS or the TVPA.

[14] *Accord Enahoro*, 408 F.3d at 893 (Cudahy, J., dissenting) ("[O]fficials receive no immunity for acts that violate international *jus cogens* human rights norms (which by definition are not legally authorized acts.)"); *Cabiri*, 921 F. Supp. at 1198 (noting that defendant could not argue that torture fell within the scope of his lawful authority or was permitted under his nation's laws because no government claims legitimate authority to torture).

The Senate Report on the TVPA confirmed that a state cannot legally authorize torture when it noted that the U.S. Government "does not regard authorized sanctions that unquestionably violate international law as 'lawful sanctions' exempt

(Continued on following page)

confirms that acts in violation of *jus cogens* norms cannot fall within the scope of an official's authority because they cannot be considered sovereign acts.[15] Accordingly, even if Petitioner were correct, which he is not, that "an individual's entitlement to sovereign immunity for official acts flows from the sovereign nature of those acts," Pet. Br. 43, such a result would not assist him here.

Concluding that violations of *jus cogens* norms are inherently outside the scope of an official's lawful authority and thus not covered by sovereign

---

from the prohibition on torture." S. Rep. No. 102-249, at 6-7 (quoting Letter from Janet G. Mullins, Assistant Sec'y of State for Legis. Affairs, to Sen. Claiborne Pell, Chairman of the S. Comm. on Foreign Rel'ns (Dec. 11, 1989)).

[15] *See, e.g., Siderman*, 965 F.2d at 718 ("International law does not recognize an act that violates *jus cogens* as a sovereign act."); *Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶ 32 (Nov. 8, 2001) ("'He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.'" (quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10)); *Furundžija*, Case No. IT-95-17/1-T, at ¶ 155 ("The fact that torture is prohibited by a peremptory norm of international law . . . delegitimize[s] any legislative, administrative or judicial act authorising torture."); *R. v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147, 278 (1999) (Opinion of Lord Millett) ("International law cannot be supposed to have established a crime having the character of a jus cogens and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose.").

immunity does not require a finding that the FSIA includes a *jus cogens* exception.[16] Since the acts of an individual outside his lawful authority are not those of the state, the FSIA simply is not triggered. "No exception to [the] FSIA thus need be demonstrated." *Marcos II*, 25 F.3d at 1472. By contrast, a suit against a *state* for a violation of *jus cogens* norms would require an exception because a state falls within the "foreign state" scope of the FSIA regardless of the nature of the acts. *Id.* at 1471-72 (distinguishing *Siderman*, 965 F.2d at 718, which found Argentina immune from suit for torture).[17] Accordingly, FSIA

[16] *Amici*, however, agree with the ADL that "Congress likely intended to incorporate a *jus cogens* exception into 28 U.S.C. § 1605(a)(1)." ADL Br. 8.

[17] Thus, the D.C. Circuit erred in holding that because "the FSIA contains no unenumerated exception for violations of *jus cogens* norms" a former official was immune from claims alleging such violations. *Belhas*, 515 F.3d at 1287. Likewise, Petitioner's reliance on *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), is misplaced. Pet. Br. 6. *Nelson* addressed plaintiffs' assertion that a *state* could be held liable for torture under 28 U.S.C. § 1605(a)(2) because the suit was "'based upon a commercial activity carried on in the United States.'" 507 U.S. at 356 (quoting 28 U.S.C. § 1605(a)(2)). This Court held that the state was immune from suit for torture because "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce." *Id.* at 362. Thus, this Court's statement that "a foreign state's exercise of the power of its police has long been understood *for purposes of the restrictive theory* as peculiarly sovereign in nature," *id.* at 361 (emphasis added), simply has no bearing on whether a state can authorize an officer to commit such acts within the scope of his lawful authority. Indeed, in suits against individuals, courts have

(Continued on following page)

jurisprudence does not require a scope-of-authority analysis when the state *itself* is the defendant.

Petitioner is simply wrong in claiming that international law supports immunity for former officials who committed violations of *jus cogens* norms. Pet. Br. 6.[18] Indeed, international law requires that the United States hold a person residing within its territory accountable for acts of torture, rape, and murder, and contains no exception for government officials. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 5, 14, Feb. 4, 1985, S. Treaty Doc. 100-20 (1988), 1465 U.N.T.S. 85. Moreover, international law's provision of universal jurisdiction over torture, crimes against humanity, and war crimes "allow[s] every nation's courts to adjudicate foreign conduct involving foreign parties in such cases." *Sosa*, 542 U.S. at 772 (Breyer, J., concurring); *see also United States v. Yousef*, 327 F.3d 56, 106 (2d Cir. 2003) (noting that war crimes and crimes against humanity give rise to universal

---

often held that abuses are not official "acts of state." *See, e.g.*, *Marcos II*, 25 F.3d at 1471; *Filártiga*, 630 F.2d at 889-90.

[18] *See, e.g.*, Charter of the International Military Tribunal art. 7, August 8, 1945, 59 Stat. 1546 *et seq.*, 82 U.N.T.S. 280 ("The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment."); Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(2), May 25, 1993, 32 I.L.M. 1159 (same).

jurisdiction).[19] Any notion that former officials are immune is utterly inconsistent with this principle.

D. Even if a violation of *jus cogens* norms could be within the scope of authority, a court must consider whether the alleged acts actually were within the scope of lawful authority and specifically authorized

The *jus cogens* inquiry does not end a court's scope-of-authority analysis. *See, e.g.*, *Marcos II*, 25 F.3d at 1470-72 (conducting scope-of-authority analysis); *Gramajo*, 886 F. Supp. at 175-76 (same); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (same). While acts in violation of *jus cogens* can never be lawful, this result does not mean that any act not in violation of *jus cogens* is automatically legal. A scope-of-authority analysis is still required in assessing whether immunity applies.

---

[19] *Furundžija*, Case No. IT-95-17/1-T, at ¶ 156 (noting that universal jurisdiction lies over torture by virtue of its *jus cogens* status).

1. A court must consider whether Petitioner acted outside the scope of his lawful authority under Somali law

Even if the acts at issue were not violations of *jus cogens* norms, a court must still consider the scope of the authority that Somalia actually granted to Petitioner. The initial step of this analysis requires consideration of whether the acts were legal under Somali law. Other considerations include the nature of the alleged acts (i.e., public or private) and whether they were specifically endorsed and authorized by the official's state. Since the lower court never undertook such analysis, *Samantar*, 552 F.3d at 377 n.3, remand is appropriate on these issues.

Chuidian recognized that "'[w]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do.'" 912 F.2d at 1106 (quoting *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 689 (1949)). Other courts have reached similar conclusions, including in the context of egregious human rights abuses.[20] This

[20] For example, the *Liu Qi* court looked to the foreign state's law to determine whether officials accused of torture acted within the scope of their authority. 349 F. Supp. 2d at 1285. The court stated that a defendant is not immune if he did not act in his official capacity *or* acted outside the scope of his authority *or* if the acts were not validly authorized (i.e., legal). *Id.* at 1282. It further concluded that the defendants were not immune under

(Continued on following page)

is not an "exception" to the FSIA because, where an individual defendant has not acted within the scope of his lawful authority, the suit is not against an instrumentality of the state. *See Marcos II*, 25 F.3d at 1472.

Accordingly, no court can determine that Petitioner is, in fact, immune without a particularized

---

the FSIA from TVPA and ATS claims because the alleged conduct was "not validly authorized under Chinese law." *Id.* at 1266, 1287 ("Where, as here, [China] appears to have covertly authorized but publicly disclaimed the alleged human rights violations caused or permitted by Defendants Liu and Xia and asserts that such violations are in fact prohibited by Chinese law, Defendants cannot claim to have acted under to [sic] a valid grant of authority for purposes of the FSIA."). *See also Cabiri,* 921 F. Supp. at 1198 (determining that defendant could not claim acts of torture fell within scope of authority or were permitted under Ghanaian law).

In *Belhas*, the D.C. Circuit erred in declining to consider plaintiffs' claims that the defendant acted outside the scope of his lawful authority because he allegedly violated domestic law, based on its conclusion that the FSIA "does not create an exception for alleged violations of a foreign state's laws." 515 F.3d at 1288. Further, in failing to conduct an analysis of the foreign state's domestic law when it evaluated whether the defendant was acting in his official capacity, the court overlooked a critical component of the scope-of-authority analysis. The court erred in concluding that the acts in question were immunized based solely on a letter submitted by a foreign government that declared those acts were taken in the defendant's official capacity. *See id.* at 1283-84 (determining that defendant acted within scope of authority on basis of letter from Israel). This reasoning conflicts with other courts' scope-of-authority analysis, which assesses both whether the individual was acting within his official capacity and whether the authority was *lawful*. In short, the *Belhas* court simply ignored the latter inquiry by failing to assess Israeli domestic law.

analysis of his actual authority in light of Somali law at the time of the alleged abuses. If Somali law did not authorize Petitioner to commit the acts alleged, he cannot be immune. Thus, even if Petitioner were to prevail in his assertion that the FSIA extends to former officials, this Court should remand the case for a determination of whether Somali law actually authorized the alleged human rights violations.

2. A court must not give undue weight to a vague foreign government submission

Petitioner relies on letters from the Somali TFG as a basis for asserting immunity. Pet. Br. 43-45. This Court should not consider the import, if any, of such letters because the issue of whether Petitioner was acting within the scope of his lawful authority was neither addressed by the Fourth Circuit nor included in the Questions Presented. Regardless, Petitioner's reliance on the letters is misplaced.

The purpose of the FSIA was to ensure that courts would make immunity decisions "'on purely legal grounds and under procedures that insure due process,'" without regard to case-by-case diplomatic pressures. *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488 (1983) (quoting H.R. Rep. No. 94-1487, at 7 (1976)). Petitioner's proposal would have the Court disregard this purpose. Instead, he suggests that letters from the Somali TFG would suffice as a basis for immunity, predicated solely on the letters'

assertion that he acted under the color of law in his official capacity when he presided over torture and other abuses that gave rise to this suit. Pet. Br. 43-45. A proper analysis, however, would also include an examination of whether Petitioner's acts fell within the scope of his lawful authority.

Deferring to the litigation position of a foreign government is directly contrary to the FSIA's purpose. Indeed, such deference would be even more problematic than the untenable diplomatic situation that the FSIA was created to resolve. Rather than understanding the FSIA to remove courts' reliance on discretionary decisions by the Executive to yield to or resist diplomatic pressure, Petitioner would confer a veto power upon foreign states which they could invoke directly in U.S. courts against suits authorized by U.S. law. Permitting governments to secure immunity for torturers in the United States by merely sending a letter would also contradict the congressional policies enshrined in the TVPA and the ATS. *See* Part I.A *supra*. Courts may not afford such deference to a foreign government at the expense of a duly enacted statute.[21]

---

[21] U.S. courts regularly adjudicate cases despite objections from foreign nations: "Federal judges cannot dismiss a case because a foreign government finds it irksome, nor can they . . . tailor their rulings to accommodate the expressed interests of a foreign nation that is not even a party." *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001) (considering whether federal question jurisdiction existed), *aff'd on other grounds*, 538 U.S. 468 (2003).

Amici do not assert that a letter from a foreign government may *never* be relevant to a court's determination of whether the acts of a particular official were within the scope of lawful authority. However, in considering whether official authority existed, a court must assess *for itself* the content of foreign law. *See* Fed. R. Civ. P. 44.1 (noting that determination of foreign law "must be treated as a ruling on a question of law"). A government's statement may provide useful evidence of foreign law by describing applicable statutes, regulations, court decisions, and the like. *Id.* ("In determining foreign law, [a district] court may consider any relevant material or source, . . . whether or not submitted by a party or admissible under the Federal Rules of Evidence."). Such a letter would essentially have the status of an *amicus curiae* brief regarding the operative law. However, a government's statement is not itself law and thus cannot retroactively grant authority.[22]

---

[22] This Court considered a similar issue in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), in applying the act of state doctrine. There, this Court held that the "litigating position" of the Cuban Government was insufficient to establish an act of state and that Cuba would have needed instead to show that a "statute, decree, order, or resolution" demonstrated that Cuba had taken an official sovereign act. *Id.* at 691-92 n.8, 694-95. An inquiry into the scope of authority, like that into whether an act is an act of state, requires assessment of controlling law. Accordingly, a court cannot conclude, based solely on a foreign government's *ipse dixit*, that the acts in question were committed within an officer's scope of lawful authority, any more than it can conclude that a case involves an act of

(Continued on following page)

The letters provided by the Somali TFG fall well short of establishing that Petitioner engaged in legal and authorized activities. They merely state in vague terms 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 capacities.'" *Yousuf v. Samantar*, No. 04-1360, 2007 U.S. Dist. LEXIS 56227, at *35 (E.D. Va. Aug. 1, 2007) (emphasis added).[23]

Thus, even if this Court were to consider the letters, which it should not, statements that merely assert legal conclusions without providing legal authority hold no value.[24]

---

state based on such a statement. To the extent that *Belhas* deviated from these principles in affording deference to a foreign government's letter, it is not persuasive. 515 F.3d at 1283-84.

[23] Indeed, the letters contradict Somalia's contemporaneous denials that it engaged in or approved human rights abuses. *See, e.g.*, Abdikarim Ali Omar, *Letter to the Editor*, Wash. Post, Mar. 21, 1990, at A20 (Somali Ambassador to the United States stating that "Somalia upholds the human rights of its citizens.").

[24] Nor can these letters be treated as factual evidence that any act was actually taken within Petitioner's scope of lawful authority. There is no indication, for example, that the authors of these letters have any personal knowledge of Petitioner's acts. Moreover, the letters are hearsay. If such "statements were proof of anything, [plaintiffs] would [be] entitled to cross-examine [the author] under oath." *Dunhill*, 425 U.S. at 692 n.8.

CONCLUSION

To ensure that survivors of torture continue to have access to justice in U.S. courts, this Court should reject Petitioner's argument and hold that FSIA immunity does not extend to former government officials.

Respectfully submitted,

TYLER R. GIANNINI (VSB #39316)
Counsel of Record
SUSAN H. FARBSTEIN (NYB #4346359)
NATHAN P. ELA (Mass. BBO #669774)
INTERNATIONAL HUMAN RIGHTS CLINIC
HARVARD LAW SCHOOL
Pound Hall 401
1563 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-9362

Attorneys for Amici Curiae

January 27, 2010

APPENDIX A

LIST OF *AMICI CURIAE*

I. FORMER PLAINTIFFS IN ALIEN TORT STATUTE ("ATS") AND TORTURE VICTIM PROTECTION ACT ("TVPA") CASES

Dolly Filártiga and her younger brother Joelito lived in Asunción, Paraguay, in 1976, with their mother and father, a long-time opponent of Paraguay's dictator, General Alfredo Stroessner. That year, her brother was abducted and later tortured to death by Américo Norberto Peña-Irala, the Inspector General of Police of Asunción. Dolly Filártiga was forced out of her house in the middle of the night to view her brother's mutilated body. After her arrival in the United States, she sued Peña-Irala under the ATS in New York, becoming the first plaintiff to successfully use the statute to seek justice for human rights violations. In 1984, she and her father were awarded over $10 million in damages.

Amaryllis Hilao-Enríquez was a medical student when Ferdinand Marcos declared martial law in the Philippines. Like many activists of the period, she was arrested in 1972 but escaped. The authorities then targeted her sister, Liliosa, who was tortured to death two days after her arrest and became the first woman to die at the hands of the military after the declaration of martial law. Her brutal death raised concern in the international community about the Marcos dictatorship. Hilao-Enríquez helped found

the Society of Ex-Detainees against Detention and for Amnesty ("SELDA"), an organization that seeks justice for individuals arrested and tortured by the Marcos regime. She is currently SELDA's Secretary General as well as the National Chairperson of the Karapatan Alliance for the Advancement of Peoples' Rights, which documents human rights violations committed by the state and assists survivors in seeking justice. Hilao-Enríquez's parents were lead plaintiffs in the successful case to compensate thousands of Filipinos for the human rights violations that they suffered under Marcos.

Hilda B. Narciso was working as a church activist in the Philippines when, on March 24, 1983, she was detained, raped, and tortured by soldiers during the period of martial law declared by then-President Marcos. When Marcos left the Philippines and came to Hawaii in 1986, Narciso served as a class representative in a human rights suit against him. From 1994 to 2002, she served as the Executive Director of Claimants 1081 Inc., a human rights organization based in Manila that advocates on behalf of survivors of torture and the families of those who were executed or disappeared between 1972 and 1986, during martial law in the Philippines.

Sister Dianna Ortiz, a native of New Mexico, is a U.S. Roman Catholic nun of the Ursuline order. In 1982, while serving as a missionary teaching literacy and religion to indigenous peoples in Guatemala, she was kidnapped, raped, and tortured by government forces under the command of Guatemalan Minister of

Defense, Hector Gramajo. In 1995, Ortiz won a judgment under the TVPA against Gramajo, who was by then a retired officer. She subsequently founded *amicus* Torture Abolition and Survivors Support Coalition International ("TASSC"). Ortiz thus has both a personal and a professional interest in ensuring that survivors of torture continue to have access to justice under the TVPA in suits against former foreign officials.

II. HUMAN RIGHTS ORGANIZATIONS

The **Allard K. Lowenstein International Human Rights Clinic** ("Lowenstein Clinic") is a Yale Law School course that gives students first-hand experience in human rights advocacy under the supervision of international human rights lawyers. The Lowenstein Clinic undertakes many litigation and research projects on behalf of human rights organizations and individual victims of human rights abuses. Its work is based on the human rights standards contained in international law. The Lowenstein Clinic has conducted research and provided briefs for international tribunals and many courts in the United States, has done work on cases involving the definition of torture under the TVPA, and has acted as counsel for plaintiffs in many lawsuits under the ATS.

Amnesty International is a worldwide movement of people who campaign for internationally recognized human rights to be respected and protected

for everyone. The organization believes human rights abuses anywhere are the concern of people everywhere. Outraged by human rights abuses but inspired by hope for a better world, Amnesty International works to improve people's lives through campaigning and international solidarity. Its mission is to conduct research and generate action to prevent and end grave abuses of human rights and to demand justice for those whose rights have been violated. Members and supporters exert influence on governments, political bodies, companies, and intergovernmental groups. Activists take up human rights issues by mobilizing public pressure through mass demonstrations, vigils, and direct lobbying as well as online and offline campaigning. Amnesty International started campaigning in 1961 and today has more than 2.2 million members, supporters, and subscribers in over 150 countries and territories, in every region of the world.

EarthRights International is a human rights organization based in Washington, D.C., that litigates and advocates on behalf of victims of human rights abuses worldwide. EarthRights International is or has been counsel in several lawsuits under the ATS and the TVPA in which the acts of foreign government agents are at issue, and therefore has an interest in ensuring the correct application of immunity in cases involving international offenses.

Human Rights First is a non-profit, nonpartisan organization that has worked since 1978 to create

a secure and humane world by advancing justice, human dignity, and respect for the rule of law. Human Rights First supports human rights activists around the world, protects refugees in flight from persecution and repression, and helps build an international system of justice and accountability for human rights crimes. Human Rights First acts to halt catastrophic violations of human rights currently in progress and to support international efforts to ensure that states fulfill their responsibility to protect their people from gross violations of human rights.

Human Rights Watch is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights around the world with the goal of securing the respect of these rights for all persons. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, Human Rights Watch seeks to bring international public opinion to bear upon offending governments and others and, thereby, to bring pressure on them to end abusive practices. Human Rights Watch has filed amicus briefs before various bodies, such as U.S. Courts of Appeals and the Inter-American Commission.

The **International Human Rights Clinic** at Harvard Law School ("the Clinic") provides law students an opportunity to gain first-hand experience with the practice of human rights through clinical work,

course work, applied research, and scholarship. The Clinic has represented victims and survivors of human rights violations in U.S. and international courts. The Clinic currently is co-counsel in *Mamani, et al. v. Sánchez de Lozada and Sánchez Berzaín*, an ATS case against the former president and minister of defense of Bolivia for their involvement in civilian killings in 2003. The Clinic has also served as counsel for *amici curiae* in other ATS and TVPA cases that have included claims for torture and extrajudicial killing.

International Rights Advocates protects and empowers individuals victimized by multinational corporations and other powerful entities that traditionally enjoy impunity or immunity. Designed to foster global operations that, at a minimum, conform to human rights principles, International Rights Advocates has litigated numerous suits involving claims brought under the ATS and the TVPA and has an interest in ensuring the correct application of immunity.

The World Organization for Human Rights USA ("Human Rights USA") is a non-profit, public interest human rights organization dedicated to ending torture, slavery, and gender-based violence, using litigation in the United States as the primary tool for accomplishing these goals. Human Rights USA's staff has extensive experience litigating issues regarding U.S. adherence to international human rights standards, as well as human rights norms incorporated into U.S. domestic law, particularly the Convention

Against Torture and its implementing legislation. This litigation has included civil actions under the ATS and the TVPA dealing with immunity questions and act of state issues. Human Rights USA is an affiliate of the World Organization Against Torture (Organisation Mondiale Contre La Torture ("OMCT")) network, composed of over 200 similarly situated human rights organizations around the world, each focusing on its own nation's human rights compliance issues and needs.

III. TORTURE SURVIVOR SUPPORT AND RECOVERY ORGANIZATIONS

The **Boston Center for Refugee Health and Human Rights** ("the Center"), located at the Boston Medical Center, provides comprehensive health care for refugees and survivors of torture and related trauma, coordinated with legal aid and social services. The Center also educates and trains agencies and professionals who serve this patient population to advocate for the promotion of health and human rights and to conduct clinical, epidemiological, and legal research for the better understanding and promotion of health and quality of life for survivors of torture and related trauma. The Center has an interest generally in promoting justice and holding perpetrators of torture to account and specifically in ensuring the proper interpretation of the TVPA in cases such as this one.

Global Lawyers and Physicians is a non-profit, non-governmental organization formed in 1996 to reinvigorate collaboration between the legal and medical/public health professions, in order to better protect the human rights and dignity of all persons. Global Lawyers and Physicians provides support and assistance in developing, implementing, and advocating public policies and legal remedies that protect and enhance human rights. As such, the organization has an interest in seeing that remedies created by Congress in the TVPA remain available to survivors of torture.

Survivors of Torture, International believes in the abolition of torture and the healing of torture survivors. A successful outcome in this case would be significant because holding torturers accountable is an essential part of the healing process for torture survivors. Additionally, cases like this one may help prevent future abuse by confirming that torture is a human rights violation that incurs consequences.

Torture Abolition and Survivors Support Coalition, International ("TASSC") is the only organization founded by and for torture survivors. The mission of TASSC is to end the practice of torture wherever it occurs and to empower survivors, their families, and communities. TASSC demands an end to impunity for the architects of torture – those who order, justify, and practice it – and thus has an interest in ensuring that U.S. courts properly construe immunity and the TVPA in cases involving former officials.

IV. RELIGIOUS ORGANIZATIONS

Consistent Life joins this brief of *amici curiae* because of its commitment to the protection of all human life. In addition to the threat to life from summary or extrajudicial executions related to torture, Consistent Life is especially concerned about the need for protection of vulnerable activists who, for example, advocate for the poor, for the rights of women or racial minorities or people with disabilities or unborn children, or who are active in preventing executions, abortions, or war.

The Maryknoll Global Concerns Office represents Maryknoll, the U.S.-based Catholic missionary movement, in advocating before governments and international bodies for human rights protections in national and international law and practice and for an end to impunity for human rights abusers. Maryknoll includes: the Maryknoll Fathers and Brothers, the Maryknoll Sisters, the Maryknoll Lay Missioners, and the Maryknoll Affiliates. Maryknoll missioners work in about 40 countries around the world and have on many occasions accompanied victims of human rights abuse and survivors of torture, including a number of our own members.

The Muslim Public Affairs Council ("MPAC") is a public service agency working for the civil rights of American Muslims, for the integration of Islam into American pluralism, and for a positive, constructive relationship between American Muslims and their elected representatives. MPAC was created in 1988 to

promote a vibrant American Muslim community and enrich American society through exemplifying the Islamic values of Mercy, Justice, Peace, Human Dignity, Freedom, and Equality for all. MPAC has an interest in ensuring that, in cases such as this one, which offers the opportunity to realize justice and to safeguard human dignity, U.S. courts protect and promote these most basic values.

Pax Christi USA is a national Catholic social justice organization reaching more than half a million Catholics annually. Pax Christi USA strives to create a world that reflects the Peace of Christ by exploring, articulating, and witnessing the call of Christian nonviolence. Pax Christi USA commits itself to peace education and, with the help of its bishop members, promotes the gospel imperative of peacemaking as a priority in the Catholic Church in the United States.

The Shalom Center was founded in 1983 to bring a prophetic voice to Jewish, multireligious, and American life. From the earliest memories of Pharaoh's cruelty, the Jewish experience is that high officials of oppressive regimes have been responsible for ordering the use of torture; Judaism itself has long sought to construct a legal system in which torture would be impossible and in which high officials would be accountable to the public. Based on this collective experience, the Shalom Center has an interest in ensuring that in cases such as this one, the law is applied in such a way as to make domestic and international norms against torture enforceable.