No. 12-1078

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL OF THE UNITED STATES IN SUPPORT OF PETITIONER

MICHAEL J. EDNEY
Counsel of Record
JACLYN N. WARR
GUSTAV W. EYLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
medney@gibsondunn.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

LEGISLATIVE HISTORY

FOREIGN CASES & STATUTES

SCHOLARLY MATERIALS

OTHER MATERIALS

STATEMENT OF INTEREST

The Fourth Circuit below held that former foreign officials are not immune from civil suits alleging their official acts violated peremptory norms, also known as *jus cogens* norms. *Jus cogens* norms are so-called "unbreakable" rules of customary international law, as determined by the practice of nations, the decisions of national and international courts, and the works of scholars on international law. *Amici curiae* submit this brief in support of Petitioner's argument that the Fourth Circuit's rule is legally erroneous and would have negative consequences for the United States.[1]

Each of the three *amici curiae* has served as Attorney General of the United States. The Honorable Edwin Meese III served as the seventy-fifth Attorney General of the United States (February 1985 – August 1988, appointed by President Ronald Reagan). The Honorable Richard Lewis Thornburgh served as the seventy-sixth Attorney General of the United States (August 1988 – August 1991, appointed by President Ronald Reagan). The Honorable William Pelham Barr served as the seventy-seventh Attorney General of the United States (November 1991 – January 1993, appointed by President George H.W. Bush).

---

[1] Counsel of record for the parties received timely notice of *amici*'s intent to file this brief and have consented in writing to the filing. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici* made a monetary contribution to the preparation or submission of this brief.

As explained below, the Fourth Circuit's rule likely would be imposed reciprocally on U.S. officials sued for their official acts in foreign courts. *Amici curiae* believe their experience will aid this Court in analyzing the potential effects of the Fourth Circuit's rule on the immunity of U.S. officials and on the difficult decisions those officials must make.

SUMMARY OF ARGUMENT

The decision below limits the immunity of former foreign officials against civil suits in the courts of the United States. If allowed to stand, the Fourth Circuit's rule would reduce the protection foreign officials receive in our Nation's courts. But the effects of the decision below would not stop there.

The court below determined that former officials are not immune from civil suits alleging violations of peremptory norms under international law, also known as *jus cogens* norms. *Jus cogens* norms are principles of customary international law "'accepted [and recognized] by the international community of States as a whole as a norm from which no derogation is permitted.'" *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679). *Jus cogens* norms range from prohibitions on well-defined and plainly abhorrent acts such as slavery and piracy to concepts without sharp limits and requiring the exercise of judgment to demarcate, such as "unjustified use of force," "aggression," and "cruel, inhuman, and degrading treatment."

For two centuries, this Court has explained that foreign sovereign immunity is a matter of reciprocity, the "interchange of good offices," between Nations. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116,

137 (1812). In doing so, the Court recognized an international practice that remains in place today: Nations provide immunity to foreign officials in the expectation that their own officials will be similarly protected in the courts of other nations. The rules of foreign official immunity established in U.S. courts very likely would be applied to U.S. officials facing suit in foreign courts.

If reciprocally applied to U.S. officials in foreign courts, a *jus cogens* exception would render immunity uncertain for at least two reasons. First, the limits of *jus cogens* norms are often vague. Whether immunity applies would depend on the *post hoc* judgment of foreign courts about the content and application of *jus cogens* norms.

Second, *jus cogens* norms will change. Their content is determined by an assessment—at the time of foreign litigation—of the practice of nations, the decisions of foreign courts, and the views of scholars. Not only would our leaders be unable to predict their future immunity, that immunity would depend on the views of international law scholars not appointed or elected by any government, much less our own.

U.S. officials' uncertain immunity from foreign civil liability would affect the decisionmaking of those officials. Considerations of civil litigation abroad—the costs of defending it, the restrictions on future travel, and the risk of a sizeable adverse judgment—may become another factor for U.S. officials in making decisions on behalf of the American people. Predictable systems of foreign sovereign immunity provide confidence to U.S. officials that their actions will be judged primarily by the courts of this country, according to familiar procedures and substantive legal standards.

ARGUMENT

I. IF ALLOWED TO STAND, THE FOURTH CIRCUIT'S *JUS COGENS* EXCEPTION LIKELY WOULD BE APPLIED TO U.S. OFFICIALS IN FOREIGN COURTS.

A *jus cogens* exception to foreign immunity is a significant departure from prevailing foreign immunity law worldwide. The Fourth Circuit's ruling, if allowed to stand, likely would affect the immunity U.S. officials receive abroad.

1. As an initial matter, other countries and international tribunals consistently have refused to recognize a *jus cogens* exception to foreign sovereign immunity from civil suits. *See*, *e.g.*, *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675 (Can. Ont. C.A.); *Al-Adsani v. United Kingdom*, [2001] 34 Eur. H.R. Rep. 273 (Eur. Ct. H.R.); *Kalogeropoulou v. Greece and Germany*, *reprinted in* (2002) 129 I.L.R. 537 (Eur. Ct. H.R.); *Fang v. Jiang*, [2007] NZAR 420, (2006 HC) (N.Z.); Constitutional Court of Slovenia, Case No. Up-13/99-24 (Mar. 8, 2001); *Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia* [2007] 1 A.C. 270 (H.L.) (U.K.). The International Court of Justice recently reversed a decision denying foreign sovereign immunity for alleged *jus cogens* violations, concluding that no aspect of international law or practice supports a *jus cogens* exception to "the customary international law on State immunity." *Jurisdictional Immunities of the State*, Judgment, 2012 I.C.J. 37–39, paras. 92–97 (Feb. 3, 2012) (reversing *Ferrini v. Germany*, Oxford Rep. Int'l in Dom. Cts. 19 (Italian Ct. of Cassation 2004)). Although some of these decisions concern the immunity of a foreign State, long-standing customary international law does not distinguish between suits against

foreign States and suits against the official acts of foreign leaders. *See*, *e.g.*, *Jones*, [2007] 1 A.C. at 280–81 (Lord Bingham); *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971); *Underhill v. Hernandez*, 65 F. 577, 579–81 (2d Cir. 1895). Against this backdrop, the Fourth Circuit's rule stands out as a substantial incursion into traditional foreign official immunity.[2]

2. If not reversed, foreign countries would respond to this change in U.S. foreign sovereign immunity law. Foreign sovereign immunity rests on shared principles of comity and reciprocity. *See*, *e.g.*, *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 362 (1955) (doctrine of sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"); *Schooner Exch.*, 11 U.S. (7 Cranch) at 136–37; *cf. Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so en-

---

[2] The Fourth Circuit was wrong to identify "an increasing trend in international law to abrogate foreign official immunity" for officials who commit acts "that violate *jus cogens* norms," particularly in relying on the United Kingdom's *Pinochet* decision. *See Yousuf v. Samantar*, 699 F.3d 763, 776 (4th Cir. 2012) (citing *Regina v. Bartle ex parte Pinochet*, 38 I.L.M. 581, 593–95 (H.L. 1999)). As the British House of Lords said of its own prior decision, *Pinochet* "was categorically different" from *civil* suits seeking damages for *jus cogens* violations, "since it concerned *criminal* proceedings falling squarely within the universal criminal jurisdiction mandated by the Torture Convention" and did not "fall within" the realm of cases in which foreign immunity is required. *Jones* [2007] 1 A.C. at 286 (Lord Bingham) (emphasis added).

sures that similar protections will be accorded those that we send abroad to represent the United States.") (internal citation omitted). Foreign nations also long have recognized that sovereign immunity is a reciprocal exchange of legal protections between nations. *See Spanish Gov't v. Lambege et Pujol*, Cour de Cassation [Supreme Court of France] D. 1849 1, 5, 9 (translated and excerpted in Barry E. Carter & Phillip R. Trimble, *International Law* 588 (2d ed. 1995)) ("[T]he reciprocal independence of States is one of the most universally respected principles of international law, and it follows as a result therefore that a government cannot be subjected to the jurisdiction of another against its will.").

Carrying out this principle, changes in foreign sovereign immunity rules announced here likely would change protections afforded to U.S. officials abroad. In some cases, this effect is virtually automatic. The United Kingdom's sovereign immunity statute, for example, expressly provides that "the immunities and privileges conferred" by the Act may be restricted "in relation to any State" when they "exceed those accorded by the law of that State in relation to the United Kingdom." State Immunity Act, 1978, c. 33, § 15; *see also* State Immunity Act, R.S.C. (1985), S-18, § 15 (Can.); State Immunity Act § 17 (1979) (Sing.); Foreign States Immunities Act 87 of 1981 § 16 (S. Afr.).

Given these authorities, the Fourth Circuit's decision substantially risks creating a *jus cogens* exception to the immunity of U.S. officials in foreign courts. Although the *jus cogens* exception is the decision of only one of the twelve federal circuits in which suits against foreign officials may be heard, it would not be difficult for plaintiffs suing former foreign officials to choose district courts in the Fourth

Circuit.[3] As such, the Fourth Circuit's decision effectively would open the U.S. courts to claims against those foreign officials over whom any U.S. court may obtain personal jurisdiction and who allegedly have violated a *jus cogens* norm. Foreign courts can be expected to recognize the federal courts' practical availability for such claims and reciprocally to deny immunity to U.S. officials in civil suits alleging violations of *jus cogens* norms.

Even if the Fourth Circuit's decision were not applied to U.S. officials as a matter of reciprocity, it would influence the development of the customary international law of foreign official immunity. The Fourth Circuit's decision is that of a national court from which a foreign court may determine its international legal obligations to provide immunity. *See*, *e.g.*, *Jones*, [2007] 1 A.C. at 286–87, 289 (Lord Bingham) (relying on U.S. judicial decisions to determine the U.K.'s foreign sovereign immunity obligations). As the world's leading constitutional democracy, the United States and the decisions of its courts are particularly prominent and influential in the development of international law. Unless reversed, the Fourth Circuit's decision likely would become the centerpiece of efforts to urge a *jus cogens* exception in foreign jurisdictions.

---

[3] Personal jurisdiction limitations do not require a case against a foreign official claiming immunity from all U.S. courts to be brought in any particular district court. *See* Fed. R. Civ. P. 4(k)(2); *Mwani v. bin Laden*, 417 F.3d 1, 11 (D.C. Cir. 2005). In addition, venue likely would be proper in any district court for a suit against a foreign defendant challenging actions taken abroad. *See* 28 U.S.C. § 1391(b)(3).

II. A *JUS COGENS* EXCEPTION WOULD RENDER FOREIGN OFFICIAL IMMUNITY UNCERTAIN.

A *jus cogens* exception would render foreign official immunity uncertain and unpredictable for two reasons. First, some *jus cogens* norms are poorly defined, and determining their content would require difficult judgments by foreign courts. Second, *jus cogens* norms themselves are subject to change, as they are based on evolving state practice, the decisions of national courts and international tribunals, and the works of international law scholars.

A. The Limits Of *Jus Cogens* Norms Are Unclear.

The Fourth Circuit has excepted alleged violations of *jus cogens* norms from foreign official immunity. But "there is no general agreement as to which rules have th[e] character" of a *jus cogens* norm. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1155 (7th Cir. 2001) (citing Lassa Oppenheim, OPPENHEIM'S INTERNATIONAL LAW 7 (Robert Jennings and Arthur Watts eds., 9th ed. 1992)); *see also Committee of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (*jus cogens* is "uncertain" in scope). *Jus cogens* norms prohibit many gravely wrong and instantly identifiable acts, such as slavery, piracy, and genocide. *See*, *e.g.*, *United States v. Bellaizac-Hurtado*, 700 F.3d 1245, 1261 (11th Cir. 2012) (Barkett, J., specially concurring). *Jus cogens* norms also include concepts that are more difficult to define. Some of these concepts strike at the heart of discretionary decisions to defend the United States, such as the prohibitions on the use of force; armed aggression; targeted or extrajudicial killings; cruel, inhumane, and degrading treatment; and prolonged arbitrary detention. *See*

Restatement (Third) of Foreign Relations Law § 702 cmts. f, n (1987); Carin Kahgan, Jus Cogens *and the Inherent Right to Self-Defense*, 3 ILSA J. Int'l & Comp. L. 767, 778 (1997); Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,"* 22 Brook. J. Int'l L. 111, 114 (1996); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992).

Importantly, while U.S. courts would have an opportunity to superintend which *jus cogens* norms foreclose the immunity of foreign officials in U.S. courts, it would be for foreign courts to make such judgments with respect to U.S. officials. Accordingly, the Fourth Circuit's rule would risk U.S. official liability for the full scope of *jus cogens* norms and all their ambiguities. We address below two particularly unclear categories of norms.

1. First, several commentators contend that *jus cogens* prohibits the use of military force against another nation except when authorized by the United Nations or for national self-defense. *See* James A. Green & Francis Grimal, *The Threat of Force as an Action in Self-Defense Under International Law*, 44 Vand. J. Transnat'l L. 285, 329 (2011); Ulf Linderfalk, *The Effect of* Jus Cogens *Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 Eur. J. Int'l L. 853, 860 (2007). Under the contended norm, armed action taken in self-defense is permitted only when it is necessary and proportional to the actual or threatened force. *See* U.N. Charter Article 51. In addition, *jus cogens* has been claimed to prohibit armed force targeted at a particular individual—what commentators refer to as "targeted" or "extrajudicial killings." *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009).

Since September 11, 2001, the United States has used armed force against al-Qaeda and its allies nearly every day. U.S. Executive Branch officials took those actions based on a careful judgment that they were necessary to defend the Nation. The other two Branches of government understood the necessity and gravity of these decisions. Congress authorized the use of force against those groups responsible for the attacks on our Nation and their affiliates. *See Authorization for Use of Military Force*, Pub. L. No. 107-40, 115 Stat. 224 (2001). U.S. courts have declined to interfere with the decisions of the President and his subordinates to use force. *See*, *e.g.*, *Almerfedi v. Obama*, 654 F.3d 1, 8 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 2739 (2012); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46–52 (D.D.C. 2010).

In sharp contrast, a *jus cogens* exception to official immunity would open U.S. wartime decisions to inspection in foreign courts. The threshold inquiry for immunity would be whether any particular use of force was necessary and proportionate to the threat, all evaluated by foreign judges with the luxury of hindsight and extended consideration. Such an inquiry would be fact-intensive, expensive, and invasive of the sovereign decisions of the United States. Under these standards, a U.S. official could have no confidence that a foreign suit would end before a trial on the merits.

The norm prohibiting "extrajudicial killings" creates additional uncertainty. Because of this norm, a *jus cogens* exception may permit foreign suits against U.S. officials challenging alleged unmanned "drone" strikes targeting particular al-Qaeda leaders. U.N. officials appointed to report on "extrajudicial killings" have raised questions regarding whether such alleged uses of force violate this norm. *See* Ben Em-

merson, United Nations Special Rapporteur on Counter-Terrorism and Human Rights, Address at Harvard Law School (October 25, 2012). A *jus cogens* exception to foreign official immunity would threaten to leave current and former U.S. officials without immunity from suits making these allegations in foreign courts.[4]

2. Second, a *jus cogens* norm prohibits "cruel, inhumane, or degrading treatment or punishment." *See* Restatement (Third) of Foreign Relations Law § 702 cmt. n. The United States has long recognized the vagueness of this concept. In ratifying the Convention Against Torture, the United States Senate entered a reservation to that treaty's prohibition on cruel, inhuman, or degrading treatment or punishment, noting its uncertain content and defining the phrase to mean the treatment "prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." *See* 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990).

If a *jus cogens* exception were established, however, foreign courts would be unlikely to follow the clarifying reservation of the United States. Rather, they likely would turn to international law sources, which define the prohibition broadly. The International Committee of the Red Cross *Commentaries on the Geneva Convention*, for example, advises liberal construction of the term to include any act which tends to deprive a protected person of his humanity.

---

[4] These lawsuits are not uncommon. In 2010, for example, a Pakistani man sued former Secretary of Defense Robert Gates and former Director of the Central Intelligence Agency Leon Panetta for ordering an alleged armed attack by unmanned drones in Pakistan. *See* Reza Sayah, *Pakistani Man Sues U.S. over Drone Strikes*, CNN.com (Dec. 1, 2010).

See I Commentaries on the Geneva Conventions 52 (Jean Pictet ed., 1952).

The United States has detained many foreign nationals since September 11, 2001, in its efforts to combat al-Qaeda and its affiliates. To set detailed standards regarding their treatment and trial, Congress enacted the Detainee Treatment Act of 2005 and the Military Commissions Acts of 2006 and 2009. *See* 42 U.S.C. § 2000dd; 10 U.S.C. § 948a–950w. If U.S. officials were not immune from foreign suits alleging *jus cogens* violations, foreign courts would reevaluate every one of those congressional and executive judgments against their own view of cruel, inhuman, and degrading treatment.

B. *Jus Cogens* Norms Change And Are Determined Without The Consent Of The United States.

Defining current *jus cogens* norms is not the only source of uncertainty. *Jus cogens* norms are themselves part of customary international law, which changes over time. To determine customary international law, courts examine the practices of nations taken out of a sense of legal obligation, the judgments of national courts and international tribunals, and the writings of international law scholars. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820). "Courts seeking to determine whether a norm of customary international law has attained the status of *jus cogens* look to the[se] same sources." *Sampson*, 250 F.3d at 1150 (emphasis added).

If a *jus cogens* exception were reciprocally embedded in foreign law following the Fourth Circuit's decision, U.S. officials would lose immunity not only for any current *jus cogens* norms, but also for those

that develop in the future. This would create yet another layer of uncertainty.

How *jus cogens* norms change merits additional concern. The existence and content of *jus cogens* norms are derived, in part, from the writings of international law scholars. This Court instructed the U.S. courts to consult such writings "not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Foreign courts may not carefully follow this Court's instructions. At the same time, the United States arguably need not consent to the creation of a *jus cogens* norm to be bound by it under international law. *See Sampson*, 250 F.3d at 1150.

This structure would turn democratic accountability on its head. It ignores whether any official exercising authority under the U.S. Constitution agreed to bind our Nation to a *jus cogens* norm, while allowing international law scholars, who are not elected by any citizenry or appointed by any government, substantially to influence a norm's existence and content.[5]

---

[5] The loose and unaccountable process for developing *jus cogens* norms appears to be a reason the Senate did not ratify the Vienna Convention on the Law of Treaties, which codifies a definition of *jus cogens* norms. *See* S. COMM. ON FOREIGN RELATIONS, 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 21 (Comm. Print 2001).

III. FOREIGN OFFICIAL IMMUNITY RULES ABROAD AFFECT THE CONTENT AND QUALITY OF DECISIONMAKING BY OUR GOVERNMENT OFFICIALS.

The foreign official immunity that U.S. courts establish, and that foreign courts reciprocally apply to U.S. officials abroad, affects how our leaders govern this Nation.

Official immunity doctrines are designed to facilitate decisive government action, guided only by the interests of the American people and clearly defined legal rules established through constitutional processes. This Court long has understood that the prospect of future civil liability affects governmental decisionmaking. *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982) ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties."). Properly structured, immunity principles free government officials to make decisions about issues that "excit[e] the deepest feelings" in those they affect. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 348 (1872); *see also Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) ("[T]o submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute."). Official immunity "help[s] to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012).

Reliable and predictable immunity from civil suit abroad is as important as domestic immunity, if not more so. U.S. officials inevitably will make decisions with profound effects abroad and with which citizens of foreign States disagree. Lawsuits against U.S. officials will follow. The *jus cogens* exception makes immunity depend on malleable concepts that can bend to the policy preferences of any foreign nation where a lawsuit is sited. And a *jus cogens* exception would increase the chance that litigation would reach the merits in foreign courts and the corresponding chance that U.S. officials would face liability under foreign legal standards.

If U.S. officials cannot rely on immunity from civil suit abroad, their judgments on important matters of national security and foreign affairs may be adversely affected by the policy preferences of foreign states, the views of foreign courts on international law, and foreign substantive legal standards. This is intolerable if only because the law of foreign countries has not been made applicable to our government by any institution the Constitution authorizes to do so. *See generally Sosa v. Alvarez-Machain*, 542 U.S. 692, 725–28 (2004). Reliable immunity from foreign suits "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear," *Tenney v. Brandhove*, 341 U.S. 367, 373–74 (1951), and according only to the interests of the American people and the rules of law they establish through our constitutional democracy.

The Presidents and Cabinet Secretaries we advised had to make difficult decisions, with speed and imperfect information, to protect the American people. We helped them ensure those decisions were consistent with U.S. law. A *jus cogens* exception to

foreign official immunity would expose them to foreign legal liability and evaluation under foreign legal standards and values. The chilling effect that would follow is not in the interests of the United States.

IV. THE EFFECTS ON U.S. OFFICIAL IMMUNITY COUNSEL GRANTING THE PETITION.

The potential effects on U.S. officials' immunity from foreign litigation provide a compelling reason for granting the petition. This reason is independent of the traditional analysis into whether the circuit courts have fully disagreed on a legal issue. Many circuit courts had applied the Foreign Sovereign Immunities Act ("FSIA") to foreign officials, a majority position that was repudiated in this Court's 2010 decision in this matter. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 n.4, 2292 (2010). The Court's ruling leaves the lower courts to resurrect the common law of foreign official immunity that had prevailed before the 1976 FSIA enactment. While U.S. circuit courts' views on this common law may develop over time, the reciprocal effect of the Fourth Circuit's decision on U.S. official immunity in foreign courts may be prompt and irreversible. Unlike a circuit court's erroneous legal ruling, this Court cannot directly correct a foreign court's reciprocal adoption of the *jus cogens* exception or denial of immunity to a U.S. official. The safest course to avoid the foreign reciprocal effects on U.S. official immunity is to grant the petition in this case and to reverse the erroneous and dangerous decision below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

MICHAEL J. EDNEY
Counsel of Record
JACLYN N. WARR
GUSTAV W. EYLER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
medney@gibsondunn.com

Counsel for Amici Curiae

April 4, 2013