

No. 12-1078

In the Supreme Court of the United States

MOHAMED ALI SAMANTAR, PETITIONER

v.

BASHE ABDI YOUSUF, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), this Court held that the common law, rather than the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity of individual foreign officials who are sued for their official acts. The question presented is:

Whether the court of appeals erred in holding that the Executive Branch's determination concerning conduct-based immunity is not binding on the court, and in creating a new categorical judicial exception to foreign official immunity from civil suits alleging violations of *jus cogens* norms.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in light of the court of appeals' legal errors and changed circumstances.

STATEMENT

1. This case returns to this Court following the Court's holding that the immunity of individual foreign officials in United States courts is governed by the longstanding framework applied by the Executive Branch rather than by the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.*,

and its subsequent remand for further proceedings. See 130 S. Ct. 2278, 2289-2293 (2010).

a. Respondents are natives of the Somaliland region of Somalia, some of whom are now United States citizens. Respondents are members of the Isaaq clan, which was subjected to systematic persecution during the 1980s by the military regime governing Somalia at that time. Petitioner Mohamed Ali Samantar was the First Vice President and Minister of Defense of Somalia between 1980 and 1986, and the Prime Minister of Somalia between 1987 and 1990. Petitioner fled Somalia in 1991 following the collapse of the military regime and has lived in the United States since 1997. 130 S. Ct. at 2282-2283.

In 2004, respondents brought this action against petitioner in the District Court for the Eastern District of Virginia. Br. in Opp. 1. Respondents allege that they or their family members were victims of, among other things, torture and extrajudicial killing in Somalia. Respondents further allege that petitioner exercised command and control over Somali military forces who tortured, killed, or arbitrarily detained respondents or their family members; that he had actual or constructive knowledge of the wrongdoing committed by subordinate officials; and that he aided and abetted that wrongdoing. 130 S. Ct. at 2282.

The district court initially held that it lacked subject matter jurisdiction over petitioner under the FSIA. 130 S. Ct. at 2282-2283. The court of appeals reversed. *Ibid.*

b. This Court granted certiorari to address the question whether the FSIA governs the determination of an individual foreign official's immunity from suit. 130 S. Ct. at 2282. The Court held that the FSIA does

not govern foreign official immunity, and that such immunity is instead governed by the longstanding framework applied by the Executive Branch.

The Court explained that “[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976.” 130 S. Ct. at 2284. Courts followed a two-step procedure for resolving a foreign state’s claim of sovereign immunity. Under that procedure, if the State Department determined that the sovereign was entitled to immunity, “the district court surrendered its jurisdiction,” and if the State Department did not provide a determination, the court determined immunity by applying the principles articulated by the Executive Branch. *Ibid.* That two-step process, the Court explained, was also “typically followed when a foreign official asserted immunity.”¹ *Id.* at 2284-2285 (citing cases).

In 1976, Congress enacted the FSIA, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. 130 S. Ct. 2285; see *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). With respect to claims against a “foreign

¹ Generally speaking, the immunity enjoyed by an official of a foreign state is either status-based or conduct-based. Under customary international law principles accepted by the Executive Branch, a sitting head of state’s immunity is based on his *status* as the incumbent office holder and extends to all his actions. See 1 *Oppenheim’s International Law* 1038 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). By contrast, the immunity of former heads of state, as well as lower-level current and former officials, depends on the *conduct* at issue and generally applies only to acts taken in an official capacity. See *id.* at 1043-1044; Pet. App. 40a-41a. At issue in this case is whether petitioner, as a former official, enjoys conduct-based immunity. Pet. App. 40a-41a.

state or its political subdivisions, agencies, or instrumentalities,” the FSIA “transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch.” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (citation omitted).

After canvassing the pre-FSIA history of Executive Branch immunity determinations, this Court concluded that the FSIA did not similarly transfer primary responsibility to the Judicial Branch in determining the immunity of foreign officials. The Court explained that “nothing in the statute’s origins or aims * * * indicate[s] that Congress similarly wanted to codify the law of foreign official immunity.” 130 S. Ct. at 2292. Accordingly, in making determinations of foreign official immunity, courts are to apply the longstanding framework that has been in place since before the FSIA was enacted. *Id.* at 2291-2292.

The Court did not determine whether petitioner was entitled to immunity, instead remanding the case to the district court to consider “[w]hether petitioner may be entitled to immunity under the common law, and whether he may have other valid defenses to the grave charges against him.” 130 S. Ct. at 2292-2293.

2. a. On remand to the district court, the United States filed a Statement of Interest concluding that petitioner is not immune in this lawsuit. See Pet. App. 33a-48a. The Statement of Interest included a letter from the Legal Adviser of the State Department conveying the United States’ determination that petitioner should not be accorded immunity with respect to this matter. *Id.* at 46a-48a. The United States explained in the Statement of Interest that two considerations were “[p]articularly significant among the

circumstances of this case and critical to the present Statement of Interest.” *Id.* at 40a.

First, the United States found it significant that petitioner “is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity.” Pet. App. 40a. The United States explained that because the immunity of foreign officials for their official acts is the immunity of the sovereign, rather than the individual, the typical practice is for a foreign state to request a suggestion of immunity from the State Department on behalf of its officials. *Id.* at 40a-41a. This case, however, presented a “highly unusual situation because the Executive Branch” did not, at that time, recognize any government of Somalia. *Id.* at 41a. Two competing entities, neither recognized as the government of Somalia by the United States, sought to opine regarding the application of immunity to Samantar. *Ibid.* The Transitional Federal Government (TFG) sought to assert residual immunity on behalf of Samantar, while the government of the Republic of Somaliland sought to waive any residual immunity. *Id.* at 41a-42a. The State Department determined that in the absence of a recognized government, petitioner should not be immune. *Id.* at 42a.

Second, the United States concluded that it was appropriate “in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents.” Pet. App. 40a. Although petitioner’s residence in the United

States was “not, in itself, determinative of * * * immunity,” the Statement of Interest explained that the Executive had determined that in this case, in the absence of a recognized Somali government, the “interest in permitting U.S. courts to adjudicate claims by and against U.S. residents” supported the Executive’s determination of non-immunity. *Id.* at 42a-43a.

b. Based on the United States’ Statement of Interest, the district court held that petitioner was not immune from suit. Pet. App. 29a. In its initial ruling, the court determined that the Suggestion of Immunity filed by the United States in the Statement of Interest was dispositive. *Ibid.* In subsequently denying reconsideration, the court suggested that the Statement of Interest did not “control” but was “entitled to a great deal of deference.” *Id.* at 31a-32a. The district court denied a stay pending appeal, observing that “[o]nly the Executive Branch can determine whether a former foreign government official is entitled to common law immunity.” 1:04-cv-1360 Docket entry No. (Docket entry No.) 168, at 2 (E.D. Va. May 18, 2011). The court of appeals also denied a stay. 11-1479 Docket entry No. 23 (4th Cir. July 8, 2011).

3. The court of appeals affirmed the district court’s denial of immunity, albeit on grounds that were different from those relied upon by the district court and far broader than those set forth by the United States. Pet. App. 1a-28a.

The court of appeals first considered the level of deference to be given to the Executive Branch’s determination whether an individual foreign official is immune in a particular case. The court acknowledged the United States’ position that, “under long-established Supreme Court precedent,” the State

Department's view of whether a foreign official is entitled to sovereign immunity is binding on the courts. Pet. App. 10a. The court also acknowledged that by the 1930s, "judicial deference to executive foreign immunity determinations emerged as standard practice." *Id.* at 11a-12a. In the court of appeals' view, courts deferred to the Executive's immunity determination because they viewed that determination "as a function of the Executive's constitutional power" to recognize diplomats and other foreign representatives. *Id.* at 15a (citing U.S. Const. Art. II, § 3, which confers authority to "receive Ambassadors and other public Ministers"). The court of appeals accordingly concluded that "the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference." *Id.* at 16a.

The court of appeals drew a sharp distinction, however, between the status-based immunity accorded heads of state, and the conduct-based immunity accorded other foreign officials. The court believed that "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity," and that conduct-based immunity determinations "turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch." Pet. App. 16a-18a.

The court of appeals therefore engaged in its own immunity inquiry. Pet. App. 19a-21a. The court stated that some of the alleged acts in this case—"torture, summary execution and prolonged arbitrary imprisonment"—involve violations of a *jus cogens* norm of international law, *i.e.*, "a norm accepted and recog-

nized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” *Id.* at 22a (citation omitted). In the court’s view, “*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.” *Id.* at 23a. The court accordingly held that foreign officials “are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.” *Id.* at 26a. Because respondents allege violations of *jus cogens* norms, the court concluded that petitioner is not entitled to official-act immunity. *Ibid.*; see *id.* at 27a-28a.

The court observed that the United States’ Statement of Interest provided “additional reasons to support th[e] conclusion” that petitioner is not entitled to official-act immunity. Pet. App. 27a-28a. The court noted that the Statement of Interest’s reliance on the lack of any government of Somalia recognized by the United States indicated that “the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plaintiffs’ claims.” *Id.* at 27a. The court also emphasized that as “a permanent legal resident” of the United States, petitioner “has a binding tie to the United States and its court system.”² *Ibid.*

² The Fourth Circuit appears to have interpreted the Government’s reference to petitioner’s residence in the United States to mean that he is a lawful permanent resident. See, e.g., Pet. App. 27a (stating that “[petitioner’s] status as a permanent legal resident” was a “major basis” for the State Department’s immunity determination). That interpretation is incorrect. Petitioner is not

4. While petitioner's interlocutory appeal was pending, the case proceeded to trial in the district court. Instead of contesting liability and damages, petitioner defaulted. See Docket entry No. 355, at 6-11 (E.D. Va. Feb. 23, 2012) (transcript of hearing). The court awarded respondents \$21 million in compensatory and punitive damages. See 2012 WL 3730617 (E.D. Va. Aug. 28, 2012). An appeal of that award, which is based solely on the argument that the district court lacked jurisdiction to proceed during the pendency of petitioner's interlocutory appeal challenging the district court's rejection of his claim of immunity, is pending before the court of appeals. See No. 12-2178 (4th Cir. docketed Sept. 27, 2012).

5. On January 17, 2013, the United States formally recognized the Government of Somalia for the first time since 1991. See Pet. 9-10.

By way of historical background, after the collapse of the former Siad Barre regime in Somalia in 1991, Somalia experienced widespread and protracted violence, with no single group maintaining control over the entire country. See generally CIA, *The World Fact Book, Somalia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last updated Nov. 18, 2013). There were numerous instances of foreign military intervention in Somalia, extensive clan-based fighting, and large numbers of displaced persons. Islamist extremist organizations also moved into Somalia—including, most recently, Al Shabaab, an al-Qaida-affiliated terrorist organization. Al Shabaab has conducted a violent insurgency in southern

a lawful permanent resident and has never had that status. We have been informed by the Department of Homeland Security that petitioner is currently in removal proceedings.

and central Somalia against the Somali authorities and their allies. See National Counterterrorism Center, Counterterrorism 2013 Calendar, Groups, Al-Shabaab, http://www.nctc.gov/site/groups/al_shabaab.html (last visited Dec. 9, 2013). For the past year and a half, however, Somali forces—with support from allied forces—have pushed Al Shabaab out of Mogadishu and have begun to assert control over more of the country. The United States has provided extensive assistance to efforts to stabilize the affected regions and to assist Somali authorities' efforts to promote stability and reconciliation in Somalia. See U.S. Dep't of State, Hillary Rodham Clinton, Sec'y of State, Remarks with President of Somalia, Hassan Sheikh Mohamud After Their Meeting, <http://www.state.gov/secretary/rm/2013/01/202998.htm> (Jan. 17, 2013).

In February 2013, following the United States Government's formal recognition of the government of the Federal Republic of Somalia, Abdi Farah Shirdon, the Prime Minister of Somalia, sent a letter to the Secretary of State requesting that the United States support immunity for petitioner in this pending action. Pet. App. 70a-74a. In the letter, the Prime Minister stated that "the Federal Republic of Somalia hereby affirms and ratifies Mr. Samantar's plea of common law immunity from suit, finding that Mr. Samantar's acts in question were all undertaken in his official capacity with the Government of Somalia." *Id.* at 73a. The Prime Minister also opined that the pending litigation "is injurious to the historic, ongoing process of peace and reconciliation among clans and political factions within Somalia." *Id.* at 71a.

This Office has been informed by the Department of State that on December 2, 2013, the Parliament of Somalia voted in favor of a no-confidence motion against Mr. Shirdon, an action that is expected to result in Mr. Shirdon's removal from office when a new Prime Minister is appointed. See also Mohammed Ibrahim, *Parliament in Somalia Votes to Remove Prime Minister*, N.Y. Times, Dec. 3, 2013, at A4.

DISCUSSION

In the view of the United States, the petition for certiorari should be granted, the decision of the court of appeals vacated, and the case remanded to the court of appeals. The court of appeals' holding is predicated on two critical legal errors. First, the court announced an unsupported distinction between the United States' position on whether a foreign defendant should be recognized as holding status-based immunity, which it treated as binding, and the United States' position on whether a foreign defendant should be recognized as holding conduct-based immunity, which it accorded only non-binding "substantial weight." Pet. App. 18a. Second, the court of appeals, instead of resting its decision upon the narrow ground set forth by the United States in the district court for its determination that petitioner is not immune from suit, announced a new categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms. The Executive has not adopted any such categorical exception to immunity. The court of appeals' judicially created categorical rule would substantially impair the Executive's authority and responsibility to make immunity determinations.

At this stage, however, plenary review of the decision below would be premature, because developments since the court of appeals issued its decision may affect the immunity issues in the case—specifically, the United States’ recognition of the Government of Somalia and that Government’s formal request that petitioner be accorded immunity. Accordingly, the United States respectfully suggests that the erroneous judgment of the court of appeals should be vacated and the case remanded for consideration in the first instance of these intervening events and of any further determination by the United States that could be submitted to the district court. That disposition would also more readily allow the particular immunity determinations at issue here to be considered in the context of sensitive diplomatic processes and foreign-policy interests at a critical time for the nascent Somali regime.

I. THE COURT OF APPEALS’ DECISION IS ERRONEOUS IN TWO RESPECTS

The court of appeals’ decision in this case is predicated on two significant legal errors that, if left standing, could have negative consequences for the United States’ foreign-relations interests.

A. The Court Of Appeals Erred In Holding That The Executive Branch’s Determination As To Conduct-Based Immunity Is Not Controlling

Under this Court’s decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. This principle applies both to status-based and conduct-based immunities, and the court of appeals erred in holding otherwise.

1. a. In *Samantar*, this Court held that the FSIA left in place the Executive Branch’s historical authority to determine the immunity of foreign officials. 130 S. Ct. at 2291-2292. The Court described that historical practice in terms that made clear the deference that courts traditionally accorded to Executive Branch foreign sovereign immunity determinations before the FSIA’s enactment. See *id.* at 2284-2285. As the Court explained, under the pre-FSIA two-step procedure, a foreign state facing suit in a United States court could request a “suggestion of immunity” from the State Department and, if the State Department made such a suggestion, the district court “surrendered its jurisdiction.” *Ibid.* If the State Department took no position on immunity, “a district court had authority to decide for itself whether all the requisites for such immunity existed,” applying “the established policy” of the State Department to make that determination. *Ibid.* (citations and internal quotation marks omitted). The Court also recognized that the same two-step process would be applied in cases against individual foreign officials. *Ibid.*

b. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department’s determination regarding immunity is, and historically has been, binding in judicial proceedings. In *Ex Parte Peru*, 318 U.S. 578 (1943), for example, the Court held that in suits against foreign governments, “the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court made clear

that “[e]very judicial action *exercising or relinquishing* jurisdiction over the vessel of a foreign government has its effect upon our relations with that government.” *Id.* at 35 (emphasis added). The Court instructed that it is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.” *Ibid.*; see also, *e.g.*, *Compania Espagnola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938) (“If the claim [of immunity] is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General.”).

From early in the Nation’s history, individual foreign officials were recognized as having immunity “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, *e.g.*, *Suits Against Foreigners*, 1 Op. Att’y Gen. 45, 46 (1794) (“[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant * * * , [that] will of itself be a sufficient answer to the plaintiff’s action.”). In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, *e.g.*, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976) (“The Suggestion of Immunity removes the individual defendants from this case. When the State Department formally recognizes and allows sovereign immunity of a defendant, a federal court will not exercise jurisdiction over that defendant.”); *Heaney v. Government of Spain*, 445 F.2d 501,

504-506 (2d Cir. 1971) (applying principles articulated by the Executive Branch because the Executive did not express a position in the case); see also 130 S. Ct. at 2284-2885.

2. The court of appeals sought to draw a distinction between Executive Branch determinations of status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving foreign officials. 130 S. Ct. at 2284-2285. Indeed, the two cases cited by this Court involving foreign officials—*Heaney* and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity.³ And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department’s recognition of

³ The conduct-based immunity of consular officials is now governed by the Vienna Convention on Consular Relations and Optional Protocol on Disputes (VCCR), *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, but the VCCR did not apply to the *Heaney* case. 445 F.2d at 505. *Heaney* applied the immunity principles recognized and articulated by the Executive Branch.

conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 130 S. Ct. at 2290.

b. In concluding that conduct-based immunity determinations are not binding on the judiciary, the court of appeals relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis."⁴ Pet. App. 16a-17a. But this Court has long recognized that the Executive's authority to make, and the requirement of judicial deference to, foreign sovereign immunity determinations flow from the Executive's constitutional responsibility for conducting the Nation's foreign relations, not the more specific recognition power. See, e.g., *Ex Parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); *Hoffman*, 324 U.S. at 34 (stating that courts will "surrender[]" jurisdiction upon a suggestion of immunity "by the political branch of the

⁴ The court of appeals also cited three lower-court decisions involving head-of-state immunity. Pet. App. 15a-16a. While those decisions naturally discussed whether the Executive Branch in fact recognized the defendant as a head of state, they did not suggest that deference to the Executive was based solely on the recognition power. To the contrary, the decisions emphasized the Executive's responsibility for foreign affairs. See *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1211-1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Doe I v. Israel*, 400 F. Supp. 2d 86, 110-111 (D.D.C. 2005).

government charged with the conduct of foreign affairs”); *Lee*, 106 U.S. at 209 (“[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.”); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955) (stating that “[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit,” and that “the rule enunciated in *The Schooner Exchange*” rests on the need to avoid interfering in the Executive’s conduct of foreign relations).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 130 S. Ct. at 2290, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897); see also Pet. App. 40a-41a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations’ sovereignty as suits against foreign states. See *ibid.*; *Heaney*, 445 F.2d at 503 (same).

c. Accordingly, in the years before the FSIA, courts routinely deferred to Executive Branch determinations of conduct-based immunity of both foreign

states and foreign officials. Because the Executive Branch applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 130 S. Ct. at 2285, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive's decisions. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103 (2d Cir.) (affirming denial of immunity based on Executive Branch's conclusion that acts in question were "private acts"), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Korea*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969) (holding that Executive's conclusion that Bank of Korea was engaged in commercial activities was "binding on this Court"). In the relatively few cases involving foreign officials, moreover, courts also followed the "same two-step procedure" as in cases involving foreign states. 130 S. Ct. at 2284-2885 (citing *Heaney and Waltier*).

That deferential judicial posture as to both conduct-based and status-based immunity determinations is based in the separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized in this case, the Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive's authority to determine the immunity of foreign officials. 130 S. Ct. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regard-

ing individual official immunity.”); see *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (“[T]raditional ways of conducting government . . . give meaning to the Constitution.”) (citation and internal quotation marks omitted). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch’s role to determine the principles governing foreign official immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch’s determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific ground set forth in the Executive Branch’s Statement of Interest, which turned on the unique circumstances of this case, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically requested the court not to address respondents’ broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 68a n.3. The court of appeals’ decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish “substantive law governing the exercise of the

jurisdiction of the courts.” *Hoffman*, 324 U.S. at 35-36.

Indeed, both before and after this Court’s decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004) (suggestion of immunity on behalf of then-President Zemin of China in district court; after he left his position as head of state, the United States continued to recognize his immunity); see also Suggestion of Immunity Submitted by the U.S. at 6, *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. Sept. 7, 2012); Statement of Interest and Suggestion of Immunity of and by the U.S. at 5-6, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011) (third-party testimony was sought from former Colombian President Uribe in a suit in which he was alleged to have committed *jus cogens* violations); Statement of Interest and Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec. 17, 2012). The courts deferred to the United States’ Suggestions of Immunity in these cases. *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012), cert. denied, 133 S. Ct. 1637 (2013); Tr., *Doe v. Zedillo*, No. 3:11-cv-01433-MPS (D. Conn. July 18, 2013); *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP, 2013 WL 5502851, at *5-*7 (E.D.N.Y. Sept. 30, 2013).

Respondents erroneously assert (Br. in Opp. 17, 19-20) that the court of appeals’ creation of a categorical

exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' amicus brief filed in this case when it was previously before the Court. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations, and that courts (including the Fourth Circuit in this case) therefore are free to make immunity determinations on the basis of those factors. Br. in Opp. 19. That is incorrect.

The passages in the United States' brief in this Court identified considerations, not accounted for under the FSIA, that the Executive Branch could find it appropriate to take into account in making immunity determinations. The passages thereby served to underscore the range of discretion properly residing in the Executive Branch under the Constitution to make immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided how or if any particular consideration should play a role in immunity determinations, much less suggest that a court should weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own. In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. The Executive Branch made a determination of immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to

official immunity whenever allegations of *jus cogens* violations are made. See *Hoffman*, 324 U.S. at 35 (It is “not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”).

II. THIS COURT SHOULD REMAND FOR FURTHER CONSIDERATION IN LIGHT OF CHANGED CIRCUMSTANCES

The court of appeals erred in two significant respects, and its decision conflicts with the Second Circuit’s decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch’s suggestion of immunity and sustained a suggestion of immunity in a case involving alleged violations of *jus cogens* norms. An appellate decision holding that courts need not defer to the Executive’s immunity determination and announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time. In the view of the United States, however, it would be premature for this Court to grant plenary review at this time in light of significant developments that occurred after the lower courts’ consideration of the case. The lower courts should have an opportunity to consider any further determination by the United States on the immunity issue in light of those developments and diplomatic discussions between the United States and the recently recognized Government of Somalia.

The State Department’s suggestion of non-immunity in this case rested principally on the fact that there was no recognized government of Somalia to assert immunity on petitioner’s behalf, while noting

as well that petitioner was a long-time resident of the United States. The Government of Somalia has since made a request to the State Department to “obtain immunity” for petitioner in this lawsuit. Pet. App. 70a. Remanding this case will allow an opportunity for further consideration of that request by the Executive Branch in the context of broader diplomatic discussions and efforts by the United States to strengthen the capacity of the nascent Somali Government and the Somalia Government’s efforts to rebuild after decades of instability and strife, including clan-based conflicts that date back to the actions that form the basis for the plaintiffs’ allegations in this suit.⁵ Remand will also allow the United States to submit any new determination it might make concerning petitioner’s immunity, and for the lower courts to consider such matters in the first instance.

⁵ In addition, as noted above, on December 2, 2013, the Parliament of Somalia took action that is expected to result in the Prime Minister’s removal from office. See pp. 10-11, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision of the court of appeals vacated, and the case remanded for further consideration in light of the submissions in this brief.

Respectfully submitted.

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