No. 13-1361

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

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. IF ALLOWED TO STAND, THE FOURTH CIRCUIT'S *JUS COGENS* EXCEPTION LIKELY WOULD BE APPLIED TO U.S. OFFICIALS IN FOREIGN COURTS 4

II. A *JUS COGENS* EXCEPTION WOULD RENDER FOREIGN OFFICIAL IMMUNITY UNCERTAIN. 7

A. The Limits Of *Jus Cogens* Norms Are Unclear. 7

B. *Jus Cogens* Norms Change And Are Determined Without The Consent Of The United States. 11

III. FOREIGN OFFICIAL IMMUNITY RULES ABROAD AFFECT THE CONTENT AND QUALITY OF DECISIONMAKING BY OUR GOVERNMENT OFFICIALS. 12

IV. THE EFFECTS ON U.S. OFFICIAL IMMUNITY COUNSEL GRANTING THE PETITION. 14

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Al-Adsani v. United Kingdom,
2001-XI Eur. Ct. H.R. 79 4

Al-Aulaqi v. Obama,
727 F. Supp. 2d 1 (D.D.C. 2010) 9

Almerfedi v. Obama,
654 F.3d 1 (D.C. Cir. 2011) 9

Boos v. Barry,
485 U.S. 312 (1988) 5

Bouzari v. Islamic Republic of Iran,
(2004) 71 O.R.3d 675 (Can. Ont. C.A.) 4

Bradley v. Fisher,
80 U.S. (13 Wall.) 335 (1872) 12

Comm. of U.S. Citizens Living in Nicar. v. Reagan,
859 F.2d 929 (D.C. Cir. 1988) 7

Fang v. Jiang,
(2007) NZAR 420 (2006 HC) (N.Z.) 4

Filarsky v. Delia,
132 S. Ct. 1657 (2012) 13

Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) 12

Heaney v. Gov't of Spain,
445 F.2d 501 (2d Cir. 1971) 5

Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening),
Judgment, 2012 I.C.J. 99 (Feb. 3, 2012) 4

Jones v. Ministry of the Interior of the Kingdom of Saudi Arabia,
(2007) 1 A.C. 270 .... 4, 5, 7

Kalogeropoulou v. Greece and Germany,
2002-X Eur. Ct. H.R. 415 4

Matar v. Dichter,
563 F.3d 9 (2d Cir. 2009) 8

Mwani v. bin Laden, 417 F.3d 1 (D.C. Cir. 2005) 6

Nat'l City Bank of N.Y. v. Republic of China,
348 U.S. 356 (1955) 5

Nixon v. Fitzgerald,
457 U.S. 731 (1982) 12

Princz v. Federal Republic of Germany,
26 F.3d 1166 (D.C. Cir. 1994) 2

Regina v. Bartle ex parte Pinochet,
38 I.L.M. 581 (H.L. 1999) 4

Sampson v. Federal Republic of Germany,
250 F.3d 1145 (7th Cir. 2001) 7, 11

Schooner Exch. v. McFaddon,
11 U.S. (7 Cranch) 116 (1812) 2, 5

Siderman de Blake v. Republic of Argentina,
965 F.2d 699 (9th Cir. 1992) 8

Sosa v. Alvarez-Machain,
542 U.S. 692 (2004) 13

Stichting Mothers of Srebrenica v. Netherlands,
(2013) 57 Eur. H.R. Rep. 114 (Eur. Ct. H.R.) 4

Tenney v. Brandhove,
341 U.S. 367 (1951) 13

The Paquete Habana,
175 U.S. 677 (1900) 11

Underhill v. Hernandez,
65 F. 577 (2d Cir. 1895) 5

United States v. Bellaizac-Hurtado,
700 F.3d 1245 (11th Cir. 2012) (Barkett, J., concurring) 7

United States v. Smith,
18 U.S. (5 Wheat.) 153 (1820) 11

Yousuf v. Samantar,
699 F.3d 763 (4th Cir. 2012) 4

STATUTES

10 U.S.C. §§ 948a–950w 11

28 U.S.C. § 1391(b)(3) 6

42 U.S.C. § 2000dd 11

Foreign States Immunities Act 87 of 1981 § 16 (S. Afr.) 6

Pub. L. No. 107-40, 115 Stat. 224 (2001) 9

State Immunity Act 1978, ch. 33, § 15 6

State Immunity Act, ch. 313, § 17 (1979) (Sing.) 6

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LEGISLATIVE MATERIALS

136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) 10

S. Comm. on Foreign Relations, 106th Cong., Treaties and Other International Agreements: the Role of the United States Senate 21 (Comm. Print 2001) 12

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Fed. R. Civ. P. 4(k)(2) 6

BOOKS AND ARTICLES

Amnesty International, *"Will I Be Next?" US Drone Strikes in Pakistan* (2013) 10

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U.N. Charter art. 51 8

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U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report ¶¶ 71-79, 102-03, 108-114, U.N. Doc. A/68/382 (September 13, 2013)..9

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STATEMENT OF INTEREST

The Fourth Circuit held that former foreign officials are not immune from civil suits alleging their official acts violated *jus cogens* norms of customary international law. *Jus cogens* norms are "peremptory" and "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: The Fourth Circuit's rule is legally erroneous and contrary to the interests of the United States.[1]

Each of the three *amici curiae* 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). As explained below, there is a significant risk that the Fourth Circuit's rule will be imposed reciprocally against U.S. officials sued in foreign courts. *Amici curiae* believe their experience will help the Court analyze the potential consequences for the immunity of U.S. officials in foreign courts and for the difficult decisions those officials must make.

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[1] The parties have consented in writing to the filing of this brief. 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.

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. The effects of the decision below, however, would not stop there.

The court below determined that former officials are not immune from civil suits alleging violations of *jus cogens* norms. *Jus cogens* norms are principles of customary international law "'accepted 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, May 23, 1969, art. 53, 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 clearly defined content, such as "unjustified use of force," "aggression," and "cruel, inhuman, and degrading treatment."

Two centuries ago, this Court 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). Nations provide immunity to foreign officials in the expectation that their own officials will be similarly protected in the courts of other nations. The rule of foreign official immunity established in U.S. courts very likely would be applied to U.S. officials facing suit in foreign courts.

A *jus cogens* exception applied against U.S. officials would render immunity uncertain for at least two reasons. First, *jus cogens* norms are often vague, and immunity would depend on the *post hoc* judgment of foreign courts determining the content of those norms. Second, *jus cogens* norms will change. What qualifies as a *jus cogens* norm depends on

assessing—at the time of litigation—the practice of nations, the decisions of foreign courts, and the views of international law scholars. There is no assessment of whether the United States consented to be bound by any such alleged rule. 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.

The time for the Court to reject the *jus cogens* exception to foreign official immunity is now. The Court declined to review the Fourth Circuit's earlier interlocutory decision, on appeal from the District Court's denial of Petitioner's motion to dismiss, after the Solicitor General observed that the Fourth Circuit's creation of a *jus cogens* exception to foreign official immunity "warrant[s] review by the Court at an appropriate time" but sought an "opportunity for further consideration" by the Executive Branch. The Fourth Circuit has now reasserted, without modification, its reasoning on appeal from a final judgment against the Petitioner. In addition, there is no longer any ambiguity as to whether the Government of Somalia is asserting Petitioner's immunity, which has been confirmed by the Prime Minister of the formally recognized government.

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, would affect the immunity U.S. officials receive abroad.

1. Foreign courts and international tribunals consistently have rejected 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-XI Eur. Ct. H.R. 79; *Kalogeropoulou v. Greece and Germany*, 2002-X Eur. Ct. H.R. 415; *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.); *Stichting Mothers of Srebrenica v. Netherlands*, (2013) 57 Eur. H.R. Rep. 114, 146 (Eur. Ct. H.R.). According to the International Court of Justice, 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 (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99, 142, paras. 92–97, Int'l Ct. of Justice (Feb. 3, 2012) (reversing *Ferrini v. Germany*, Oxford Rep. Int'l in Dom. Cts. 19 (Italian Ct. of Cassation 2004)).[2] Although

[2] The Fourth Circuit was thus 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*

[Footnote continued on next page]

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, our own Nation's separate statutory scheme for the immunity of foreign States notwithstanding. *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). The Fourth Circuit's rule stands out as a substantial incursion into traditional foreign official immunity.

2. There is a substantial risk that foreign countries will respond to this Nation's abrupt change of course. Foreign sovereign immunity rests on principles of comity and reciprocity. *See*, *e.g.*, *Nat'l 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. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812); *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 ensures that similar protections will be accorded those that we send abroad to represent the United States.").

Rules of foreign sovereign immunity in our Nation's courts likely will be applied to U.S. officials in foreign

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[Footnote continued from previous page]

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).

courts. In some cases, this effect is virtually automatic. The United Kingdom's sovereign immunity statute, for example, 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, ch. 33, § 15; *see also* State Immunity Act, R.S.C. (1985), ch. S-18, § 15 (Can.); State Immunity Act, ch. 313, § 17 (1979) (Sing.); Foreign States Immunities Act 87 of 1981 § 16 (S. Afr.).

The Fourth Circuit's decision risks prompting 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, plaintiffs suing former foreign officials may easily 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 may recognize the federal courts' practical availability for such claims and reciprocally deny immunity to U.S. officials.

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. Once final, the Fourth Circuit's decision is that of a national court from which a foreign court may determine its international legal obligations to provide

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[3] Cases against a foreign official claiming immunity from all U.S. courts may be brought in any 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).

immunity. *See*, *e.g.*, *Jones*, (2007) 1 A.C. at 286–87, 289 (Lord Bingham) (relying on U.S. judicial decisions to determine 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 would advance efforts to urge a *jus cogens* exception in foreign jurisdictions.

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 change, as they are based on evolving state practice, new decisions of national courts and international tribunals, and the latest works of international law scholars.

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

"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 & Arthur Watts eds., 9th ed. 1992)); *see also Comm. 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., concurring). *Jus cogens* norms also include concepts that are more difficult to define. Some 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 for 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. Two particularly unclear categories of norms typify the risk facing U.S. officials.

1. One alleged *jus cogens* norm prohibits the use of military force against another nation except when authorized by the United Nations or for national self-defense. *See* U.N. Charter art. 51. Armed action taken in self-defense is permitted only when it is necessary and proportional to the actual or threatened force. *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, 865 (2007). Another claimed *jus cogens* norm prohibits armed force directed at a particular individual—what commentators refer to as "targeted" or "extrajudicial killing[s]." *See Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009).

In the years since September 11, 2001, the United States has been engaged in an active armed conflict with al-Qaeda

and its allies. U.S. Executive Branch officials have ordered armed attacks in this conflict based on careful judgments that they were necessary to defend the Nation. 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, in the view of foreign judges with the luxury of hindsight and extended consideration. It would be difficult to assure any U.S. official that a foreign suit would be promptly dismissed under these standards.

With regard to the norm prohibiting extrajudicial killings, a *jus cogens* exception may permit foreign suits against U.S. officials challenging any alleged unmanned "drone" strikes on particular al-Qaeda leaders. Under a *jus cogens* exception to foreign official immunity, foreign courts could accept the claims of U.N. officials and other organizations that attacks targeting particular al-Qaeda leaders constitute grave violations of international law and permit civil suits against U.S. officials ordering such strikes. *See* U.N. Special Rapporteur on Counter-Terrorism and Human Rights, Report on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, U.N. Doc. A/HRC/25/59 (March 11, 2014); U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report ¶¶ 71-79, 102-03, 108-114, U.N. Doc. A/68/382 (September 13, 2013); Ben Emmerson, United Nations Special Rapporteur on Counter-Terrorism and Human Rights, Address at Har-

vard Law School (October 25, 2012); Amnesty International, *"Will I Be Next?" US Drone Strikes in Pakistan* 8, 14, 27-30, 45 (2013); Human Rights Watch, *Between a Drone and Al-Qaeda: The Civilian Cost of US Targeted Killings in Yemen* 81-93 (2013).

2. Second, a *jus cogens* norm prohibits "cruel, inhumane, or degrading treatment or punishment." *See* Restatement (Third) of Foreign Relations Law § 702(d) & cmt. n. The United States recognized the vagueness of this concept from the beginning. 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 not follow the clarifying reservation of the United States, which was designed to ensure that U.S. international law obligations would be defined by reference to familiar U.S. constitutional standards. Rather, they likely would turn to international law sources, which define the prohibition broadly and without clear limits. 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. *See*, *e.g.*, International Committee of the Red Cross, I *Commentaries on the Geneva Conventions* 52-54 (Jean Pictet ed., 1952).

The United States has detained thousands of 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, the 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 could 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); *Sampson*, 250 F.3d at 1150.

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.

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 turns democratic accountability on its head. It ignores whether any official exercising authority un-

der the United States Constitution agreed to bind our Nation to the *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.[4]

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 facilitate decisive government action, guided only by the interests of the American people and the laws of the United States. 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 address problems 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

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[4] The uncertainly surrounding the development of *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).

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.

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 the immunity protections of U.S. officials provide a compelling reason for granting the petition. While U.S. circuit courts' views on the common law of foreign official immunity may develop over time, the reciprocal effect of the Fourth Circuit's decision, if it becomes final, 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.

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