No. 13-1361

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 IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's denial of common-law, official-acts immunity, in accord with the State Department's Statement of Interest advising that common-law immunity should be denied on the facts of this case.

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JURISDICTION

The judgment of the court of appeals was entered on February 3, 2014. The petition for a writ of certiorari was filed on May 5, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In 2004, Bashe Yousuf and Aziz Deria, who are United States citizens, and Ahmed Gulaid and Buralle Mahamoud, who are now lawful permanent residents of the United States, filed suit against petitioner Mohamed Ali Samantar under the Torture

Victim Protection Act of 1991, 28 U.S.C. § 1350 note, and the Alien Tort Statute, 28 U.S.C. § 1350.[1]

Petitioner previously served as an official in the Siad Barre regime in Somalia. Appellees' Response Brief 3, *Yousuf v. Samantar*, No. 12-2178 (4th Cir. Feb. 12, 2013), ECF No. 28 ("Yousuf C.A. Br."). During that time, he was responsible for, among other atrocities, torture, war crimes, and extrajudicial killings. Petitioner personally ordered these and other "human rights abuses" by the military and intelligence forces under his command. Pet. App. 32a-33a. He has been a permanent legal resident of the United States for the last 17 years, residing in Fairfax, Virginia. Yousuf C.A. Br. 6.

The district court initially dismissed the case on the ground that petitioner should be immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*. The Fourth Circuit reversed. 552 F.3d 371, 373 (4th Cir. 2009). This Court granted certiorari and affirmed. 130 S. Ct. 2278 (2010).

During proceedings in this Court, the United States filed an *amicus curiae* brief advising that FSIA immunity should not apply to individuals like petitioner who have been sued in their personal capacities for damages. The United States further advised that "foreign officials' immunity continues to

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[1] Three Doe plaintiffs withdrew from the case. *See Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Feb. 2, 2007), ECF No. 75; *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Aug. 02, 2011), ECF No. 203.

be governed by the generally applicable principles of immunity articulated by the Executive Branch" and enumerated some of the considerations most relevant to this case, including "the nature of the acts alleged, respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy." Brief of the United States 7, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555) ("U.S. Br. (No. 08-1555)").

This Court held that the FSIA does not apply to former government officials sued in their personal capacities. 130 S. Ct. at 2292. In so ruling, this Court recognized that "'the majority view' among the Circuits [was] that 'the FSIA applies to individual officials of a foreign state.'" *Id*. at 2283 (citation omitted). But the Court concluded that the "FSIA does not govern petitioner's claim of immunity" because the text, history, and purpose of the statute rendered it inapplicable to a former individual official's claim to immunity from a personal-capacity suit. *Id*. at 2285-2293.

This Court then remanded the case for consideration of petitioner's assertions of common-law immunity, specifically head-of-state and official-acts (also known as "foreign official") immunity. *Samantar*, 130 S. Ct. at 2292-2293.

2. a. On remand, the Department of State "reviewed this matter carefully and *** concluded that Defendant Mohamed Ali Samantar is not

immune from the Court's jurisdiction in the circumstances of this case." Pet. App. 89a. The Department of Justice then filed a Statement of Interest with the district court "setting forth this immunity determination." *Id.* at 91a; *see* Pet. App. 76a-87a (Statement of Interest). The Statement stressed the "highly unusual situation" (Pet. App. 84a) presented because (1) "the Executive Branch does not currently recognize any government of Somalia"; (2) "[i]n the absence of a recognized government authorized either to assert or waive [petitioner's] immunity or to opine on whether [petitioner's] alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here[]"; and (3) "[t]he Executive's conclusion that [petitioner] is not immune is further supported by the fact that [petitioner] has been a resident of the United States since June 1997." *Id*. at 84a-86a.

The district court subsequently denied petitioner's motion to dismiss, ruling that he was not entitled to common-law immunity. Pet. App. 69a. Petitioner moved for reconsideration and, when that motion was denied, appealed both orders. *Id*. at 8a & n.5. The district court and the court of appeals both declined to stay district court proceedings pending the interlocutory appeal. Order, *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. May 18, 2011), ECF No. 168; Order, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. July 8, 2011), ECF No. 23.

b. The Fourth Circuit unanimously affirmed the district court's denial of both head-of-state and official-acts immunity, Pet. App. 41a-68a, in accord

with the State Department's non-immunity position, *id.* 76a-91a.

The court of appeals first ruled that, "consistent with the Executive's constitutionally delegated powers and the historical practice of the courts, *** the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference." *Id.* at 56a. Accordingly, the court held that "[t]he district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity." *Id.*

Although the court of appeals agreed with petitioner (*see* Brief of Appellant 8-13, No. 11-1479 (4th Cir. Aug. 8, 2011), ECF No. 25 ("Pet. C.A. Br. (No. 11-1479)") that the State Department's determination that he was not entitled to official-acts immunity was "not controlling," it concluded that the State Department's view "carries substantial weight." Pet. App. 58a. The court credited in particular the two "major bas[e]s" for the State Department's view that Samantar should be denied official-acts immunity: (1) that petitioner is a former official of a state without a government recognized by the United States; and (2) that petitioner is a long-term U.S. resident who, because he "enjoy[s] the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts, particularly when sued by U.S. residents" and citizens. *Id.* at 67a (citation omitted).

The court of appeals also stated that the common law does not afford immunity to former foreign officials for acts that violate *jus cogens* norms of international law, *i.e.*, certain "universally agreed-

upon norms" that are "recognized by the international community of States as a whole." Pet. App. 62a (internal quotations and citation omitted); *see id.* at 65a-66a. That is because, the court explained, "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign." *Id.* at 63a.

Accordingly, citing both the State Department's "suggestion of non-immunity," Pet. App. at 66a-68a, and the fact that this case involves "acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups," *id.* at 67a, the court of appeals affirmed the denial of official-acts immunity, *id.* at 68a.

c. Petitioner did not seek rehearing en banc, but sought review of the Fourth Circuit's interlocutory judgment in this Court. He raised the same question presented as in the instant petition, based on essentially the same arguments he repeats here.

The Solicitor General filed a brief at the Court's invitation that criticized the Fourth Circuit's reasoning, but did not take issue with the Fourth Circuit's ultimate judgment of non-immunity. *See* Brief of the United States 6, *Samantar v. Yousuf*, 134 S. Ct. 897 (2014) (No. 12-1078) ("U.S. Br. (No. 12-1078)"). The Solicitor General also recognized that "plenary review of the decision below would be premature" in light of "developments since the court of appeals issued its decision [that] may affect the immunity issues in the case[.]" *Id.* at 12, 22. It thus recommended that this Court grant, vacate, and remand the case "in light of the court of appeals' legal

errors and changed circumstances." *Id.* at 1. That course would, in the Solicitor General's view, allow an opportunity for further consideration by the courts below of a "further [immunity] determination by the United States" that "could be submitted," *id.* at 12, or "might" be made, *id.* at 22-23.

In the ensuing weeks, the parties and the Solicitor General filed a series of letters with the Court regarding the Somali government's official stance on petitioner's immunity claim:

- Respondents filed a December 28 letter from Abukar Hassan Ahmed (then a legal adviser to the Somali President) to Secretary of State John Kerry stating that "the Federal Republic of Somalia hereby waives any claim of immunity asserted by" the petitioner. Letter of December 30, 2013 at 1 (No. 12-1078).
- In response, petitioner filed a January 7 letter from the Somali President's Chief of Staff, Kamal D. Hassan, purporting to declare "null and void" the December 28 letter, and to reaffirm the Somali government's February 2013 request for petitioner's immunity. Petitioner's Suppl. Br. at App. 4a (No. 12-1078).
- The Solicitor General submitted two letters, dated January 6 and 8, in which it declined to opine on the legitimacy or legal status of the December 28 letter or the Somali government's official immunity position. Responding to petitioner's contention that

> the Solicitor General had "with[e]ld from the Court" certain important information, the letter explained that the State Department had yet to take a "definitive public position discrediting what purported to be an official communication from that Government in the December 28 letter." S.G. Letter at 2 (No. 12-1078). Instead, the Solicitor General stated that the questions petitioner raised "further underscore the need[] *** for further diplomatic discussions between the United States and Somalia to clarify the position of the Government of Somalia on the immunity issue." *Id.* To date, the Solicitor General has not updated any court on the status of those discussions.

This Court denied certiorari on January 13, 2014.

3. a. Meanwhile, with no stay in place during petitioner's interlocutory appeal, the trial proceeded in district court on a parallel track. Following discovery, the district court denied petitioner's motion for summary judgment. Order, *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Dec. 22, 2011), ECF No. 290.

On the morning of trial in February 2012, petitioner elected to take a default judgment on liability and damages. Testifying under oath, petitioner accepted liability "for all the actions that are described in the plaintiffs' complaint *** [including] for causing the deaths that are at issue in this case, for being responsible for the extrajudicial killings, the attempted extrajudicial killings, *** the torture, and the other very serious allegations."

Hearing Tr. at 7, *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Feb. 24, 2012), ECF No. 355. Petitioner testified, and his counsel confirmed, that "[h]e underst[ood] fully that his electing to take a default will give rise to liability *** on all the well-pleaded causes of action in respect to this case. He also underst[ood] further that this decision will invariably give rise to the Court assessing damages against him[.]" *Id.* at 9.

After conducting a bench trial, the district court issued a 38-page decision finding petitioner liable and awarding damages. Pet. App. 5a-38a. Among other things, the district court found that petitioner's "subordinates in the Somali Armed Forces and affiliated intelligence and security agencies were committing human rights abuses," and that petitioner "not only knew about this conduct and failed to take necessary and reasonable measures to prevent it, but he in fact ordered and affirmatively permitted such violations." *Id.* at 29a, 32a-33a. These abuses exemplified the "brutality" of the Barre regime and included "the systematic assaults on unarmed civilians by the Somali Armed Forces," leaving thousands dead and one million internally displaced. *Id.* at 11a-12a. The district court ultimately held petitioner liable for "extrajudicial killing," "attempted extrajudicial killing," "torture," "cruel, inhuman, and degrading treatment," "arbitrary detention," "crimes against humanity," and "war crimes." *Id.* at 7a, 33a.

b. On appeal from final judgment, petitioner did not challenge these factual findings or re-assert his immunity from suit. Instead, the lone issue he raised

was whether "the District Court was divested of jurisdiction" over the case during the time in which he pursued his interlocutory appeal. Opening Brief of Petitioner-Appellant 2, *Yousuf v. Samantar,* No. 12-2178 (4th Cir. Jan. 4, 2013), ECF No. 22 ("Pet. C.A. Br. (No. 12-2178)"). The Fourth Circuit dismissed his final judgment appeal as "moot" "[i]n light of [its] disposition in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012)[.]" Pet. App. 2a.

Petitioner again did not seek rehearing en banc. He now "seeks certiorari from th[e] final judgment" dismissing his appeal as moot. Pet. 13.

4. Petitioner has filed with his latest certiorari petition a March 16, 2014 letter from the current Somali Prime Minister, Abdiweli Sheikh Ahmed Mohamed, to Secretary of State Kerry. *See* Pet. App. 73a. That letter, which postdates both the Fourth Circuit's interlocutory and final judgments (and thus was never considered below), states that the "position of the Federal Government of Somalia has not changed from the letter sent to you on February 26, 2013." *Id.* It "adopts and ratifies" petitioner's request for immunity because "his acts in question were all undertaken in his official capacity with the Government of Somalia and were not contrary to the law of Somalia or the law of nations." *Id.* at 74a.

REASONS FOR DENYING THE PETITION

This case does not warrant further review for several reasons.

At the outset, petitioner has traded one procedural problem for another. Petitioner, who seeks review of the Fourth Circuit's final judgment

dismissing his appeal as moot, neglected to brief or otherwise re-raise his assertion of immunity during his appeal from the district court's default judgment after a bench trial. Petitioner has also sought to inject new facts of putative legal significance in this proceeding without having given the lower courts an opportunity to consider them. Review under these circumstances would force this Court to pass on legal and factual issues in a procedurally suspect posture.

The case arises, moreover, out of "unique circumstances" (U.S. Br. 19 (No. 12-1078)) and a "highly unusual situation" (Pet. App. 48a) in which the State Department has recommended a *denial* of official-acts immunity. Petitioner has not and cannot point to a single court of appeals decision conflicting with the decision below where, like here, the Executive Branch has suggested no immunity. The Fourth Circuit's judgment below is in accord with the Executive Branch's position on immunity—informed by the personal-capacity nature of the suit and petitioner's long-term residence in the United States—and petitioner identifies no substantial basis on which a court could veto the Executive Branch's judgment and afford him the grant of immunity he seeks. Petitioner's disagreement with the court of appeals' opinion does not merit review when the judgment cannot conceivably change. That is doubly true given that the Fourth Circuit already accepted petitioner's argument that it should not treat the Executive Branch's immunity determination as controlling.

In the event that the Fourth Circuit's interlocutory decision on *jus cogens* is applied

someday in materially different circumstances—*i.e.*, to trump an Executive Branch recommendation of immunity—such that any foreign policy concerns actually materialize, the Court can review the issue in that hypothetical case. But it is time now for speculation and further review in this case—spanning nearly a decade, multiple certiorari petitions, and a final default judgment affirmed on appeal—to come to an end.

I. PROCEDURAL CONCERNS COUNSEL AGAINST CERTIORARI REVIEW

A. Petitioner Failed To Seek Review Of Immunity In His Final Judgment Appeal

Certiorari review is not warranted to review an interlocutory immunity judgment petitioner did not challenge—and the court of appeals did not address—during petitioner's appeal of the final judgment on a developed record.

In his final judgment appeal, petitioner raised no arguments based on the district court's immunity judgment. Rather, he raised only the distinct issue of whether "the District Court was divested of jurisdiction" during the pendency of his earlier interlocutory appeal. *See* Pet. C.A. Br. 2 (No. 12-2178); *see also* U.S. Br. 9 (No. 12-1078) (noting that petitioner's final-judgment appeal was "based *solely* on the" jurisdictional argument) (emphasis added).

Contrary to petitioner's contention (Pet. 22), nor did the Fourth Circuit pass on the question presented when it summarily dismissed as "moot" petitioner's final judgment appeal "[i]n light of [its] disposition in" the earlier interlocutory appeal. Pet App. 2a. In

doing so, the court of appeals was simply agreeing with respondents' argument that petitioner's "purely interlocutory jurisdictional objection was rendered moot" by the interlocutory affirmance and entry of final judgment, Yousuf C.A. Br. 19-20, and that the court of appeals should not disturb a final judgment that petitioner had not challenged on any other ground.

It is of course true that the court of appeals' *interlocutory* opinion addressed petitioner's immunity arguments. But that is of little moment. The interlocutory appeal arose from a pleading-stage denial of a motion to dismiss; post-trial, however, "the full record developed in court supersedes the record existing at the time of the" interlocutory immunity determination. *Ortiz v. Jordan*, 131 S. Ct. 884, 889 (2011). The district court's uncontroverted factual findings are now the baseline for evaluating petitioner's immunity request. *See id.* (petitioner's immunity "defense must be evaluated in light of the character and quality of the evidence received in court").

For that reason, Petitioner's recycled question presented—whether a foreign official's common-law immunity may be "abrogated by plaintiffs' *allegations*" that his acts violated *jus cogens* norms of international law, Pet. i (emphasis added)—is inapt. Due to petitioner's default, all of his admissions plus all of the "uncontroverted and credible testimony produced during the bench trial" are established facts for purposes of evaluating his immunity. Pet. App. 10a. These include the district court's specific factual finding that, with respect to the horrific incidents of

torture and execution of helpless civilians proven by respondents, petitioner "not only knew about this conduct and failed to take necessary and reasonable measures to prevent it, but he in fact ordered and affirmatively permitted such violations." *Id.* at 33a.

Those factual findings matter because petitioner's request for "conduct-based immunity," which "generally applies only to acts taken in an official capacity," U.S. Br. 3 n.1 (No. 12-1078), necessarily rises or falls based on the specifics of the "conduct" in question. Moreover, the proven facts underlying the petitioner's liability for war crimes, torture, and extrajudicial killing (among other crimes), Pet. App. 7a, 32a, cannot be reconciled with the Somali government's putative position that petitioner's acts "were not contrary to the law of Somalia or the law of nations." Pet. App. 74a. And they make petitioner's concerns about mere "artful pleading" to avoid official-acts immunity (Pet. 19-21) ring hollow.

Yet the Fourth Circuit was never asked to analyze how petitioner's claim of immunity should be treated now that respondents' *allegations* have been supplanted by proven *facts*. "[W]ithout the benefit of thorough lower court opinions to guide [its] analysis of the merits" of the post-trial immunity issue, the Court should observe its preferred practice of declining review. *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012); *see Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551 n.3 (1990) (analyzing "the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion");

cf. Youakim v. Miller, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

B. Petitioner Relies On New Evidence

Petitioner's attempt to introduce new, post-judgment evidence in this Court compounds the inappropriateness of certiorari review. Both petitioner's interlocutory and current certiorari petitions sought to rely on letters, not part of the record below, from former and current Prime Ministers of the recently recognized Somali government. In the most recent letter—dated March 16, 2014, six weeks after the Fourth Circuit dismissed petitioner's final judgment appeal as moot—the current Prime Minister purports to reassert petitioner's immunity from suit. Pet. App. 73a.

To begin with, this is "a court of review, not of first view[.]" *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120, 2123 (2014) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). When "[n]o court has yet ruled *** in light of the new facts," this Court rightly "decline[s] to be the first to do so." *Kiyemba v. Obama*, 559 U.S. 131, 131 (2010) (per curiam). If petitioner has newfound facts that he believes "may affect the legal issues presented," *id.*, he should take that information to the district court. But he has not done so.

Although petitioner raised the existence of one of the letters in his final judgment reply brief, his failure to re-raise his common-law immunity arguments in that appeal (or in a petition for

rehearing en banc) means that the Fourth Circuit was never asked to evaluate the significance of the letter—nevermind to reconsider or distinguish its earlier interlocutory judgment.

Those letters pose especially difficult interpretative challenges for this Court. The Solicitor General told this Court in January that "further diplomatic discussions between the United States and Somalia" were needed "to clarify the position of the Government of Somalia on the immunity issue," S.G. Letter at 2 (Jan. 8, 2014) (No. 12-1078), and that the "Department of State intends to initiate diplomatic discussions as soon as practicable in order to" do so, S.G. Letter at 1 (Jan. 6, 2014) (No. 12-1078). If those discussions have occurred, the United States has yet to inform this Court (or any other).[2]

Petitioner suggests that the Court could simply decide the *jus cogens* question and then remand for its proper application, with the lower court "taking into account the position of the Somali government" at that time. Pet. 23. But that exercise would be entirely futile unless the lower courts were to disregard both the views of the Solicitor General and those of every court of appeals (including the Fourth Circuit) that the Executive Branch's immunity

[2] As recently as April 24, 2014, the United States, upon invitation in a related case, told the district court via a Statement of Interest that "[t]he Government of Somalia has been occupied with questions of security," including a "serious assassination attempt on the President of Somalia," "which has proven an obstacle to discussions regarding immunity." Statement of Interest at 2, *Doe v. Ali*, No. 1:05-cv-00701-LMB-JFA (E.D. Va. Apr. 24, 2014), ECF No. 85.

recommendation is entitled to at least substantial deference. More broadly, the fact that the status of the Somali government's request for immunity remains in diplomatic limbo—while the State Department's position remains unchanged—simply underscores the fraught nature of this Court's review.

II. THE JUDGMENT BELOW IS CORRECT AND DOES NOT CONFLICT WITH THAT OF ANY OTHER CIRCUIT

In any event, the arguments petitioner previously raised and that the Fourth Circuit addressed in the interlocutory appeal are undeserving of certiorari review. That judgment was correct and in accord with the United States' ultimate position on immunity, and does not conflict with any decision of another court of appeals.

A. No Circuit's Law Supports Petitioner's Position

Petitioner's claim of a conflict in circuit law is wrong. *See* Part II.B, *infra*. But there is a more fundamental problem with his petition: The only argument he made on interlocutory appeal and the only argument that could afford him any relief is that the court of appeals was *correct* to undertake its own common-law review of his immunity claim and not automatically acquiesce in the State Department's statement of non-immunity. *See, e.g.*, Pet. C.A. Br. 12-13 (No. 11-1479) ("Once the State Department declined to find that foreign policy considerations dictated that [petitioner] receive immunity, the responsibility devolved upon the District Court *** 'to decide for itself whether all the requisites for such

immunity existed.'") (quoting *Samantar*, 130 S. Ct. at 2284)).

More specifically, petitioner cannot prevail unless this Court were to hold, as he has argued, that the State Department's views are "meritless" (Pet. 24) and should be afforded no weight at all, and instead that the common law empowers courts to review the scope-of-authority immunity question in complete disregard of the Executive Branch's position. *Compare* Pet. C.A. Br. 18-19 (No. 11-1479) (arguing that "the Executive Branch's pronouncement is not *** entitled to deference"), *with* U.S. Br. 15 (No. 12-1078) (courts are not "free to second-guess" "Executive Branch determinations of conduct-based immunities").

There is, however, no conflict in the circuits on that question. In fact, there is no authority for petitioner's position at all. No court has ever held that the Executive Branch's views are essentially irrelevant to official-acts immunity. And to our knowledge, no court has *ever* overridden the Executive Branch's (rarely made) judgment that official-acts immunity should be denied and forced an immunity that the State Department has eschewed as inconsistent with its foreign policy interests.

For that reason, petitioner's attempt to wrap himself in those court of appeals' decisions granting immunity makes no sense: the very same decisions afforded the State Department's views dispositive weight. Those courts of appeals would all reject petitioner's claim of immunity too. That those courts of appeals might have rejected his claim with less discussion or less reliance on the nature of the

conduct at issue hardly gives him grounds for complaint, and certainly does not frame an issue for this Court's review.

Furthermore, because the United States has weighed in *against* any grant of immunity to petitioner and because the court of appeals' judgment is consistent with the Executive Branch's position, this case does not present the question of how much deference is owed or how courts should respond when the State Department asserts the appropriateness of immunity in a case. Instead, all the Fourth Circuit did here was explain, in the course of analyzing a common law claim in a case that the United States has recognized "is *not* a claim against a foreign state," *Samantar*, 130 S. Ct. at 2292 (emphasis added), why the common law of immunity comports with the Executive Branch's position. That is what courts do when applying the common law.

To be sure, petitioner objects to how the court of appeals analyzed his immunity claim and the factors it considered. But having successfully argued that the court of appeals should not automatically accept the Executive Branch's non-immunity suggestion in his case, petitioner is ill-positioned to seek this Court's review on the ground that the court of appeals nonetheless should have automatically accepted the one part of the Executive Branch's position—the *jus cogens* factor—that he likes. Pet. 24.

Beyond that, "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). And the judgment in this case is fully consistent with the

State Department's statement of non-immunity. The court of appeals accorded the State Department's views "substantial weight," Pet. App. 58a, 67a, and specifically cited the Department's views that immunity was inappropriate because of (i) petitioner's longstanding residency in the United States, and (ii) the absence of any recognized foreign government asserting that his actions were within the scope of his authority, both of which were "additional reasons" to deny immunity. *Id.* at 68a.

Accordingly, even if petitioner were correct that the court of appeals should not have exercised the independent discretion for which he had so forcefully advocated, the judgment in this case would not change. This Court would simply have to affirm the judgment on an alternative ground "which the law and record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *see Turner v. Rogers,* 131 S. Ct. 2507, 2525 (2011) ("In some cases, the Court properly affirms a lower court's judgment on an alternative ground *** that the parties have raised.").

B. The Fourth Circuit's Decision Is Correct And Consistent With Those Of Other Circuits

1. No relevant conflict exists

The conflict in circuit law that petitioner propounds (Pet. 14-18) does not exist. Neither the Fourth Circuit here nor any other circuit has recognized *jus cogens* as a basis for overriding the Executive Branch's articulated position on immunity. Fourth Circuit law, in fact, enforces such respect for

the Executive Branch's judgment. *See Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961).

The D.C. Circuit's decision in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (*see* Pet. 16-17), is off point. In that case, the D.C. Circuit held that the FSIA provides individual immunity to former officials. That decision thus has been abrogated by this Court's 2010 ruling in *Samantar*. Beyond that, all the D.C. Circuit held in *Belhas* was that "the *FSIA* contains no unenumerated exception for violations of *jus cogens* norms." *Belhas*, 515 F.3d at 1287 (emphasis added). Thus, even if the decision had not been overtaken by *Samantar*, *Belhas* said nothing about the role of *jus cogens* principles in applying common law official-acts immunity.

The D.C. Circuit, in fact, recently acknowledged that the role of *jus cogens* violations in other official-acts immunity circumstances is an open one in that circuit. *See Giraldo v. Drummond Co.*, 493 F. App'x 106, 107 (D.C. Cir. 2012) (unpublished) (in denying motion to compel third-party testimony of former President of Colombia, court notes that "[w]e need not decide whether a factual record supporting claims of illegal acts or *jus cogens* violations could ever lead to a different result[]"), *cert. denied*, 133 S. Ct. 1637 (2013). The D.C. Circuit itself thus seems unconvinced of petitioner's claim that "the rationale and result of *Belhas* continue to apply after this Court's holding in *Samantar*" (Pet. 17) to the specific official-acts immunity question that the Fourth Circuit decided.

Petitioner's invocation of the Seventh Circuit's decision in *Ye v. Zemin,* 383 F.3d 620 (7th Cir. 2004),

fares no better. That case involved only the question of head-of-state immunity. And just as the Seventh Circuit held that the Executive Branch's view on head-of-state immunity is "conclusive," *Ye*, 383 F.3d at 627, 630, so too did the Fourth Circuit here. Pet. App. 56a ("The State Department's pronouncement as to head-of-state immunity is entitled to absolute deference.").

Petitioner emphasizes (Pet. 17-18) the Seventh Circuit's parenthetical description of the appellants' argument—"(or any person for that matter)"—and on that basis suggests that the court of appeals might extend its *jus cogens* holding beyond head-of-state immunity. Maybe. But then again, maybe not. Six-word parenthetical surmise is not a holding; it does not bind future Seventh Circuit panels, and it does not create a circuit conflict. In any event, the Executive Branch recommended immunity in *Ye*; here it did not.

Although the Solicitor General likewise did not perceive a conflict with the law of the D.C. or Seventh Circuits, it did with respect to Second Circuit law. U.S. Br. 22 (No. 12-1078). But *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), pre-dates this Court's *Samantar* decision, and thus the Second Circuit has never had the chance to consider the factors and principles announced by the Executive Branch in its *Samantar* brief and post-*Samantar* statements of interest. *See, e.g.,* U.S. Br. 24-26 (No. 08-1555) (listing factors relevant to immunity determinations, including the nature of the behavior at issue).

Critically, the Second Circuit's statement rejecting immunity "for violations of *jus cogens*" came

in the context of an Executive Branch suggestion that immunity be granted. *Matar*, 563 F.3d at 14. The Second Circuit thus held only that *jus cogens* cannot override the State Department's view. Indeed, the only court of appeals decision to have cited the Fourth Circuit's interlocutory immunity opinion observed this very distinction when it concluded that a State Department suggestion of immunity "does not require us to decide what deference we should give to the State Department when the Department indicates that a defendant[] *** should *not* receive immunity." *Manoharan v. Rajapaksa*, 711 F.3d 178, 180 n.* (D.C. Cir. 2013) (comparing *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012)).

Because the Executive Branch urged no immunity for petitioner, the Fourth Circuit did not and could not render any holding as to the effect of *jus cogens* violations when the Executive Branch recommends immunity. And the Fourth Circuit explicitly recognized that "the context for [those other] cases was different," as "almost all involved the erroneous (pre-*Samantar*) application of the FSIA to individual foreign officials claiming immunity." Pet App 20a-21a (citing, *inter alia*, *Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285). That is presumably why the Fourth Circuit repeatedly cited *Matar*, *Belhas*, and *Ye* favorably, and perceived no conflict.

2. The Fourth Circuit's decision was proper

The Fourth Circuit's non-immunity judgment is correct and does not depart from established practice. Petitioner's (and his *amici*'s) prognostications that foreign relations cannot survive an exercise of

judicial judgment applied to a long-time United States resident ignores the undisputed fact that the State Department commonly remains silent on questions of immunity pertaining to former foreign officials. *See* Petitioner Suppl. Br. 10, *Samantar v. Yousuf*, 134 S. Ct. 897 (Dec. 23, 2013) (No. 12-1078) ("[I]t is not uncommon for the Government to ask courts for lengthy extensions to provide its views about immunity, only to refuse to take a position in the end."). The State Department did just that for over six years in this very case. *Samantar*, 130 S. Ct. at 2283. In such circumstances, there is no dispute that courts must make the type of common-law judgments that the court did here, aligning to the extent reasonable with any existing Executive Branch guidance. *Id*. at 2284-2285.

Importantly, that Executive Branch guidance pointed right where the court of appeals went in this case. After all, the principle that *jus cogens* violations are pertinent to official-acts immunity did not originate with the Fourth Circuit. It started with the Executive Branch, which told this Court that it would be "appropriate to take into account *** the nature of the acts alleged" in making immunity determinations. U.S. Br. 7, 25 (No. 08-1555). Because the Executive Branch also told this Court that courts making immunity judgments should hew to the Executive Branch's identified considerations, *id*. at 6-7, the court of appeals entered an immunity judgment that (i) gave "substantial weight" to the Executive Branch, Pet. App. 67a; (ii) reached the same conclusion as the Executive Branch; and (iii) relied on factors that the Executive Branch had publicly announced were relevant *to this very case.*

Foreign policy can surely survive inter-branch comity like that far better than petitioner's view that courts should throw out the State Department's immunity position altogether.

Petitioner also predicts a "flood[]" of suits against foreign officials in the Fourth Circuit in light of its interlocutory opinion. Pet. 18. In that unlikely event, this Court presumably will have its choice of vehicle, including cases in which the Executive Branch has recommended immunity, should the Fourth Circuit extend its decision to that very different circumstance. But petitioner's speculation does not warrant this Court's intervention in this case, where the Fourth Circuit's judgment conforms to the Executive Branch's immunity position.

3. Calling for the views of the Solicitor General again is unnecessary

This Court already solicited the United States' views in response to petitioner's prior interlocutory certiorari petition presenting the identical question and received them just seven months ago. Without ever impugning the judgment of non-immunity, and despite determining that plenary review would be "premature," U.S. Br. 12 (No. 12-1078), the Solicitor General suggested that the Court vacate and remand the interlocutory opinion in this case anyway, based on its disagreement with some reasoning in the Fourth Circuit's opinion. But the invocation of this Court's extraordinary certiorari power to vacate an immunity judgment that the Solicitor General vigorously sought below would be as unprecedented as it is improper.

A GVR order is appropriate only "when intervening developments *** reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and "where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quotations omitted) (alteration in original). Here, however, (i) the interlocutory judgment wholly accords with the United States' statement of interest seeking a judgment denying immunity; and (ii) there is no "reasonable probability" of a changed result because no intervening change in the State Department's position that immunity should be denied has occurred.

That is especially true because the United States recognized the government of Somalia in January 2013 and received the Prime Minister's letter requesting immunity for petitioner one month later—well before it filed its more recent brief in this Court. Indeed, the United States has had 18 months to reconsider its immunity position, to file a statement of any new position in this Court or in the lower court proceedings, or even to ask the district court to reopen its judgment. It has done none of those things, instead maintaining its official position of non-immunity. The Executive Branch already kept the courts and the parties waiting for six years before providing its position on immunity. After two courts have relied on its suggestion of non-immunity to conduct a trial, enter final judgment, and undertake appellate review, this Court should not offer the United States even more time to consider changing

its mind. And without a 180-degree change in position, there is no basis for a different judgment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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