No. ___

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

PETITION FOR WRIT OF CERTIORARI

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March 4, 2013

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 (FSIA), governs the immunity of individual foreign officials who are sued for their official acts. The Fourth Circuit's decision on remand nullifies common-law immunity, and allows plaintiffs to circumvent the FSIA's immunity for foreign states, whenever plaintiffs sue foreign officials and allege that their official acts violate *jus cogens* norms of international law. The question presented is:

Whether a foreign official's common-law immunity for acts performed on behalf of a foreign state is abrogated by plaintiffs' allegations that those official acts violate *jus cogens* norms of international law.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I, and James Doe II), John Doe I, Jane Doe I, John Doe II, John Doe III, and John Doe IV.

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PETITION FOR WRIT OF CERTIORARI

Mohamed Ali Samantar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 699 F.3d 763.

The district court's order denying Petitioner's motion to dismiss the second amended complaint (Pet. App. 29a) is unreported but is available electronically at 2011 WL 7445583. An order denying Petitioner's motion to reconsider that dismissal (Pet. App. 30a-32a) is unreported.

JURISDICTION

Petitioner seeks review of a final decision of the Fourth Circuit entered on November 2, 2012. On January 16, 2013, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari until March 4, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 76a, 79a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. 76a, 79a-90a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. 77a-78a).

STATEMENT OF THE CASE

In *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), this Court held that the FSIA does not govern the immunity of individual officials who are sued for acts taken on behalf of a foreign state. The Court emphasized that this interpretation would not allow plaintiffs to circumvent the FSIA because the immunity of foreign officials who are sued for their official acts is "properly governed by the common law . . . ." *Id.* at 2292.

But on remand, the Fourth Circuit created an exception to common-law immunity that swallows the rule. The court held that a foreign official is not entitled to common-law immunity for acts performed in an official capacity if plaintiffs in a civil suit allege that those acts violate *jus cogens* norms of international law, such as norms prohibiting torture. Because almost all ATS and TVPA suits allege violations of *jus cogens* norms, this rule will allow plaintiffs to pursue such claims simply by suing the responsible officer instead of the state itself. This result conflicts with the holdings of other circuits, opens the floodgates to claims concerning extraterritorial conduct by foreign nations, disrupts international comity, and risks reciprocal treatment of U.S. officials by other countries.

A. *Samantar I*

1. District Court Proceedings

Petitioner Mohamed Ali Samantar was the First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia during the 1980s and 1990s. *Yousuf v. Samantar*, No. 1:04CV1360, 2007 WL 2220579, at *1 (E.D. Va. Aug. 1, 2007). Respondents sued Samantar under

the TVPA and the ATS for actions taken in his official capacity on behalf of Somalia. *Id.*

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia. The district court stayed proceedings so that the State Department could file a statement of interest regarding Samantar's entitlement to sovereign immunity. After waiting two years without receiving a statement of interest from the State Department, the court reinstated the case to the active docket. *Id.* at *6. Respondents filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. *Id.* at *6-7. No party argued that any of the exceptions to FSIA immunity applied. *Id.* at *7.

The district court held that Samantar was entitled to FSIA immunity and dismissed the complaint. *Id.* at *15. The court explained that Samantar was entitled to immunity because "'claims against the individual in his official capacity are the practical equivalent of claims against the foreign state.'" *Id.* at *8 (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)). Moreover, even though Respondents did not raise the issue, the court noted that "violations of *jus cogens* norms [do not] constitute[] an implied waiver of [FSIA] immunity." *Id.* at *14 (citations omitted).

2. Fourth Circuit Proceedings

The Fourth Circuit reversed, concluding that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had

left office by the time of suit. *Yousuf v. Samantar*, 552 F.3d 371, 381 (4th Cir. 2009). The court did not reach the question whether Samantar was entitled to common-law immunity. *Id.* at 383-84.

3. Supreme Court Proceedings

This Court affirmed, holding that the FSIA does not govern the immunity of individual officials who are sued for acts taken on behalf of a foreign state. *Samantar*, 130 S. Ct. at 2292-93. The Court explained that this "reading of the FSIA will not 'in effect make the statute optional,' as some Courts of Appeals have feared, by allowing litigants through 'artful pleading to take advantage of the Act's provisions or, alternatively, choose to proceed under the old common law.'" *Id.* (quoting *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1102 (9th Cir. 1990)). That is because "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law." *Id.* Thus, this Court was "not persuaded that [its] construction of the statute's text should be affected by the risk that plaintiffs may use artful pleading" to circumvent immunity doctrine. *Id.*

"[E]mphasiz[ing] . . . the narrowness of [its] holding," this Court remanded for the lower courts to consider in the first instance "[w]hether [Samantar] may be entitled to immunity under the common law . . . ." *Id.* at 2292-93.

B. *Samantar II*

1. District Court Proceedings

On remand from this Court, Samantar moved to dismiss the second amended complaint, arguing that he was entitled to common-law immunity because

"any actions for which the plaintiffs sought to hold him responsible were taken in the course and scope of his official duties." Pet. App. 4a. He also argued that he was entitled to head-of-state immunity because at least some of the alleged wrongdoing occurred while he was Prime Minister. *Id.*

The Government opposed immunity for Samantar. Pet. App. 33a. While the Government acknowledged that "[t]he immunity of a foreign state was . . . generally understood to extend not only to the state, heads of state, and diplomatic officials, but also to other officials acting in an official capacity," Pet. App. 36a, it claimed that Samantar was not entitled to common-law immunity for two reasons.[1] *First*, "Samantar [was] a former official of a state with no currently recognized government." Pet. App. 40a. The Government argued that, "[i]n the absence of a recognized government authorized either to assert or waive Defendant's immunity or to opine on whether Defendant's alleged actions were taken in an official capacity . . . immunity should not be recognized." Pet. App. 42a. *Second*, the Government argued that Samantar was not entitled to immunity because he is now a U.S. resident. *Id.* However, the Government stressed that "a former official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit." Pet. App. 43a.

The Government did not recommend that the court deny Samantar immunity on the basis of an exception for alleged violations of *jus cogens* norms.

[1] The Government did not distinguish between head-of-state and foreign official immunity when discussing these two factors. *See* Pet. App. 35a-39a.

Nor did it discuss whether such an exception to immunity would ever be appropriate.

The district court denied Samantar's motion to dismiss, explaining that "[t]he government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common-law sovereign immunity defense is no longer before the Court." Pet. App. 29a. The court denied Samantar's motion for reconsideration, finding that "the status of the government of Somalia" and "the residency of the defendant" were "sound" rationales for denying immunity. Pet. App. 32a.

2. Fourth Circuit Proceedings

The Fourth Circuit affirmed for different reasons. Pet. App. 27a-28a.[2] It concluded that foreign officials are not entitled to common-law immunity for acts committed in an official capacity if plaintiffs in a civil suit allege violations of *jus cogens* norms of international law. *Id.*

The court rejected the Government's view that it should receive "absolute deference [as to] whether a

[2] The Fourth Circuit noted that the denial of immunity was immediately appealable under the collateral-order exception to the final judgment rule. *See* Pet. App. 26a n.1 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir. 2006)). After the district court and the Fourth Circuit denied Samantar's motions to stay proceedings in the district court while the appeal on common-law immunity was pending, Samantar defaulted in the district court. The district court entered a default judgment, *Yousuf v. Samantar*, No. 1:04cv1360, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012), which Samantar appealed to the Fourth Circuit on jurisdictional grounds. That appeal has not yet been fully briefed in the Fourth Circuit. No. 12-2178 (appeal docketed Sept. 24, 2012).

foreign official is entitled to sovereign immunity" for official acts.[3] Pet. App. 10a. The court also ignored the Government's argument that "the Court need not—and should not—address" plaintiffs' contention that immunity is unavailable for alleged *jus cogens* violations. Pet. App. 68a n.3 (citing Appellees' Br. at 14-15, 2011 WL 4577137); *see also* Appellees' Br. at 14-15 (arguing "that extrajudicial killing and torture cannot be considered authorized or 'official acts' because they are contrary to longstanding and universally recognized principles of international law").

The panel instead announced its own rule of law governing the scope of common-law foreign sovereign immunity for official acts. The panel acknowledged that this Court and lower courts have "embraced the international law principle that sovereign immunity, which belongs to a foreign *state*, extends to an individual *official* acting on behalf of that foreign state." Pet. App. 20a (citing *Underhill v. Hernandez*, 168 U.S. 250, 252, (1897); Restatement (Second) of Foreign Relations Law § 66(f) (1965); *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008); *Chuidian,* 912 F.2d at 1106; *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009)). Nevertheless, it held that alleged acts that violate *jus cogens* norms can never be sovereign acts attributable to the foreign state. *See* Pet. App. 22a-26a. In particular,

[3] The panel concluded that Samantar was not entitled to head-of-state immunity because the Government's determination as to head-of-state immunity, in contrast with its views about common-law immunity for official acts, "is entitled to absolute deference." Pet. App. 12a-16a.

the panel characterized a "*jus cogens* norm" as one "'accepted and recognized 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.'" Pet. App. 22a (quoting Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331). Examples of such norms include "[p]rohibitions against . . . torture, summary execution and prolonged arbitrary imprisonment." Pet. App. 22a. In the panel's view, foreign officials sued for alleged *jus cogens* violations are not entitled to immunity.

To support its finding of a *jus cogens* exception to immunity in *civil* litigation, the panel noted that "[a] number of decisions from foreign national courts have reflected a willingness to deny official-act immunity in the *criminal* context for alleged *jus cogens* violations." Pet. App. 24a (citing *Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593–95 (H.L. 1999); *Ferrini v. Germany*, Oxford Rep. Int'l in Dom. Cts. 19 (Italian Ct. of Cassation 2004)) (emphasis added). But the panel acknowledgwed that "the *jus cogens* exception appears to be less settled in the civil context." Pet. App. 25a (citing *Jones v. Saudi Arabia*, 129 I.L.R. 713, at ¶ 24 (H.L. 2006) (rejecting *jus cogens* exception to foreign official immunity in civil context)).

The panel cited three U.S. court decisions that, in its view, showed that "American courts have generally followed the foregoing trend, concluding that *jus cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity." Pet. App. 25a (citing *Sarei v. Rio Tinto,*

PLC, 487 F.3d 1193, 1209 (9th Cir. 2007); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992); *Enahoro v. Abubakar*, 408 F.3d 877, 893 (7th Cir. 2005) (Cudahy, J., dissenting)). The panel also found "Congress's enactment of the TVPA, and the policies it reflects, to be both instructive and consistent with our view of the common law regarding these aspects of *jus cogens*." Pet. App. 26a.

Thus, because this case involves alleged *jus cogens* violations, the panel held that "Samantar is not entitled to conduct-based official immunity under the common law . . . ." *Id.*

The panel devoted less than a page of discussion at the very end of its opinion to the Government's views. After already "conclud[ing] that . . . officials from other countries are not entitled to foreign official immunity for *jus cogens* violations," the panel noted that the two factors identified by the Government—which played no role in the court's earlier discussion of a *jus cogens* exception—"suppl[y] us with additional reasons to support" the denial of immunity. Pet. App. 28a. But the panel never indicated that foreign official immunity could be denied solely on the basis of the non-recognition of a government and the residency of the defendant. Pet. App. 25a-28a.

C. The United States' Recognition Of The Somali Government

Since the Fourth Circuit issued its opinion below, the United States has formally recognized the government of Somalia. *See* Hillary Rodham Clinton, Secretary of State, Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting, Jan. 17, 2013, http://www.state.gov/

secretary/rm/2013/01/202998.htm ("I am delighted to announce that for the first time since 1991, the United States is recognizing the Government of Somalia. . . . I believe that our job now is to listen to the Government and people of Somalia, who are now in a position to tell us, as well as other partners around the world, what their plans are, how they hope to achieve them."); U.S. Department of State, Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC, Jan. 17, 2013, http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm ("President Hassan Sheikh's visit and the U.S. decision to recognize his government are evidence of the great strides toward stability Somalia has made over the past year. These steps also demonstrate the strong relationship between the Government of Somalia, its people, and the United States of America.").

Moreover, contrary to one of the two grounds for denying immunity previously asserted by the United States—that Somalia had no recognized government to assert or waive immunity—the newly recognized Prime Minister of Somalia has formally requested that the State Department recognize Samantar's immunity from suit in this case. In a letter to Secretary of State Kerry dated February 26, 2013, the Prime Minister of Somalia requested that Secretary Kerry "use [his] good offices to obtain immunity for" Samantar, whose alleged "acts in question were all undertaken in his official capacity with the Government of Somalia . . . ." Pet. App. 70a The Prime Minister further "reject[ed] the notion that [Samantar's alleged] action[s] were contrary to the law of Somalia or the law of nations . . . ." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DECISION CREATES A CIRCUIT SPLIT OVER THE IMPORTANT QUESTION OF WHETHER ALLEGED *JUS COGENS* VIOLATIONS DEFEAT FOREIGN OFFICIAL IMMUNITY

A. The Fourth Circuit's Decision Conflicts With The Decisions Of Other Circuits

The Fourth Circuit's decision creates a circuit split about whether the common law recognizes a *jus cogens* exception to foreign official immunity in civil suits. The Fourth Circuit held that foreign officials accused of violating *jus cogens* norms of international law are not entitled to such immunity, *see* Pet. App. 1a, Pet. App. 21a-25a., while the Second, Seventh, and D.C. Circuits have reached the opposite conclusion, *see Matar*, 563 F.3d at 15 (rejecting the argument that a foreign official "should be deemed to have forfeited [his] sovereign immunity whenever [he] engages in conduct that violates fundamental humanitarian standards" (emphasis and citation omitted)); *Belhas*, 515 F.3d at 1287 (rejecting the argument "that *jus cogens* violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity"), *abrogated on other grounds by Samantar*, 130 S. Ct. at 2282; *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004) (rejecting the argument that "a head of state (*or any person for that matter*) [is not entitled to immunity] for acts that violate *jus cogens* norms of international law" (emphasis added)); *see also* Brief of the United States as Amicus Curiae Supporting Appellee at 7-8, *Giraldo v. Drummond Co.*, No. 11-7118 (D.C. Cir. Oct. 23, 2012), 2012 WL 3152126 (U.S. Amicus Br. in *Giraldo*)

(explaining that *Belhas*, *Matar*, and *Ye* "expressly" rejected a *jus cogens* exception to foreign official immunity).

As explained above, officials acting on behalf of a foreign state are generally entitled to common-law foreign official immunity. *See, e.g.*, *Samantar*, 130 S. Ct. at 2290, (citing Restatement (Second) of Foreign Relations Law § 66(f)); *Matar,* 563 F.3d at 14 (same). That is because official acts taken by agents of a foreign state have long been understood to be "those of the sovereign itself," *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971), and permitting plaintiffs to challenge the propriety of such acts in U.S. courts would undermine the "power and [the] dignity" of a foreign state. *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 144 (1812).

The Fourth Circuit created an exception to common-law immunity whenever a plaintiff alleges acts that, if proven, would violate *jus cogens* norms of international law, such as "[p]rohibitions against . . . torture, summary execution and prolonged arbitrary imprisonment." Pet. App. 21a-27a (citations omitted). And because "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign," the panel reasoned that foreign officials who allegedly commit such acts cannot be acting on behalf of a foreign state, and therefore cannot be entitled to the state's immunity. Pet. App. 23a.

By contrast, the Second, Seventh, and D.C. Circuits have refused to recognize such an exception to foreign official immunity.

1. The Fourth Circuit's holding directly conflicts with the Second Circuit's decision in *Matar*, 563 F.3d

at 15. There, plaintiffs sued the former head of the Israeli Security Agency under the ATS and TVPA, alleging that he authorized various war crimes in an Israeli military operation in Gaza City. *Id.* at 10-11. Moreover, plaintiffs claimed that he was not entitled to foreign official immunity because these acts allegedly violated *jus cogens* norms of international law.

The Government filed a statement of interest explaining that the common law does not recognize any exception to foreign sovereign immunity for alleged *jus cogens* violations. *See* Statement of Interest of the United States of America, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), http://www.state.gov/documents/organization/98806.pdf (U.S. SOI in *Matar*); Brief for the United States of America as Amicus Curiae in Support of Affirmance at 27-33, *Matar*, 563 F.3d 9 (2d Cir. 2007) (No. 07-2579), 2007 WL 6931924 (U.S. Amicus in *Matar*). As the Government explained, a foreign official is entitled to immunity for his "official acts." U.S. SOI in *Matar* at 2. And official acts are acts "performed on the state's behalf, such that they are attributable to the state itself—as opposed to constituting private conduct." *Id.* at 24. Because "the complaint itself makes plain that the challenged conduct was performed on Israel's behalf," the Government argued that the defendant was entitled to foreign official immunity. *Id.* at 26.

Moreover, the Government specifically rejected the plaintiffs' argument that acts that allegedly violate *jus cogens* norms are not "official acts" or acts taken in an "official capacity." *See id.* at 23-33. As the Government explained, even assuming that the

defendant's conduct violated *jus cogens* norms, he was still entitled to foreign official immunity because "the violation would remain attributable to the state itself." *Id.* at 27. Furthermore, recognizing such an exception "would allow circumvention of the state's immunity for the same conduct," given that "[a] foreign state's immunity is not subject to any general exception for *jus cogens* violations under the FSIA." *Id.* at 28. Finally, a *jus cogens* exception to foreign official immunity "would also be out of step with customary international law," *id.* at 29, and "could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis," U.S. Amicus in *Matar* at 4.

The Second Circuit agreed with the Government's well-founded views and expressly rejected the plaintiffs' argument that "there can be no immunity . . . for violations of *jus cogens* . . . norms." 563 F.3d at 14. "A claim premised on the violation of *jus cogens*," the court held, "does not withstand foreign sovereign immunity." *Id.* at 15. Thus, the defendant was entitled to common-law "immunity for 'acts performed in his official capacity.'" *Id.* (quoting Restatement (Second) of Foreign Relations Law § 66(f) & citing *Heaney*, 445 F.2d at 504).

To be sure, in the present case, the Government recommended that Samantar not be granted immunity, *see* Pet. App. 51a, while in *Matar*, the Government suggested that the defendant be immunized from suit, *see* U.S. Amicus in *Matar* at 2. But in both cases, the Government argued against a *jus cogens* exception to immunity. *See* Pet. App. 68a n.3 (arguing that "the Court need not—and should not—address plaintiffs' contention that their

allegations against Samantar cannot constitute 'official acts' or acts taken in an 'official capacity.'"). Indeed, the Government has consistently explained to courts that the common law of foreign official immunity does not recognize a *jus cogens* exception. *See also* Brief for the United States as Amicus Curiae Supporting Affirmance at 27-34, *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004) (No. 03-3989), http://www.state.gov/documents/organization/78379.pdf (U.S. Amicus in *Ye*); Further Statement of Interest of the United States in Support of the United States' Suggestion of Immunity at 14-15, *Weixum v. Xilai*, 566 F. Supp. 2d 35 (D.D.C. 2008) (No. 04-0649), http://www.state.gov/documents/organization/98772.pdf.

In *Matar*, the Second Circuit followed the Government's well-established position on this issue, *see* 563 F.3d at 14-15, while in the present case, the Fourth Circuit adopted an exception to foreign official immunity that conflicts with the law of other circuits and threatens to "intrude on core aspects of the foreign state's sovereignty and give rise to serious diplomatic tensions," U.S. Amicus in *Matar* at 25.

2. The Fourth Circuit's decision also conflicts with the D.C. Circuit's decision in *Belhas*, 515 F.3d at 1286-88.

There, plaintiffs sued the former general of the Israeli Defense Forces under the ATS and TVPA, alleging that he authorized certain war crimes and extrajudicial killings that occurred during Israeli military operations in Lebanon. *Id.* at 1281-82. In concluding that the defendant was entitled to foreign sovereign immunity, the D.C. Circuit rejected the plaintiffs' argument that alleged "*jus cogens*

violations can never be authorized by a foreign state and so can never cloak foreign officials in immunity." *Id.* at 1287. As the court stressed, recognizing such an exception to foreign official immunity "would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." *Id.* (quoting *Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1174 n.1 (D.C. Cir. 1994)). And, as Judge Williams further explained in his concurrence, a *jus cogens* exception would make foreign official immunity "irrelevant" because such an exception "merges the merits of the underlying claim with the issue of immunity." *See id.* at 1291-93 (Williams, J., concurring).

Belhas, which was decided before this Court's first decision in *Samantar*, considered whether a *jus cogens* exception applied to an individual official's immunity under the FSIA. *See id.* at 1286-88. But, as *Belhas* explained, the "'well-recognized' purpose of the FSIA was the 'codification of international law at the time of the FSIA's enactment,'" *id.* at 1285 (quoting *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007)). Moreover, given that rules developed for foreign official immunity under the FSIA also "may be correct as a matter of common-law principles," *Samantar*, 130 S. Ct. at 2291 n.17, the rationale and result of *Belhas* continue to apply after this Court's holding in *Samantar* that individual immunity is governed by the common law directly, rather than by the common law as codified by the FSIA. *See Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 251 (D.D.C. 2011) (applying *Belhas* and concluding that "plaintiffs' allegations of *jus cogens* violations do not

defeat" a foreign official's entitlement to common-law immunity), *aff'd*, No. 11–7118, 2012 WL 5882566 (D.C. Cir. Oct. 23, 2012) (unpublished); *see also* Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 263-64 (arguing that the FSIA is relevant to the development of common-law foreign official immunity).

3. Finally, the decision below is also at odds with the Seventh Circuit's decision in *Ye*, 383 F.3d at 625. There, the plaintiffs sued the former President of China under the ATS, alleging that he authorized torture, genocide, and the arbitrary arrest and imprisonment of Falun Gong practitioners. *Id.* at 622. The plaintiffs argued that because these alleged acts violated *jus cogens* norms, the defendant was not entitled to immunity. *Id.* at 624.

The Government urged the Seventh Circuit not to recognize a *jus cogens* exception—either to head-of-state immunity or to conduct-based foreign official immunity. *See* U.S. Amicus in *Ye* at 27-34. The Seventh Circuit agreed, rejecting the plaintiffs' argument that "the Executive Branch has no power to immunize a head of state (*or any person for that matter*) for acts that violate *jus cogens* norms of international law." *Ye*, 383 F.3d at 625 (emphasis added). The Government has since characterized *Ye* as rejecting a *jus cogens* exception in both the head-of-state and foreign official immunity contexts. *See* U.S. Amicus in *Giraldo* at 8 (explaining that the Seventh Circuit in *Ye* "expressly h[eld] that allegations of *jus cogens* violations cannot overcome

the Executive Branch's determination of foreign official immunity" (emphasis added)).

B. This Important Question Warrants This Court's Immediate Review

The circuit split that the Fourth Circuit created involves an exceptionally important question that warrants this Court's immediate intervention. If the decision of the court below is allowed to stand, it will undermine the comity between the United States and other sovereigns that the doctrine of foreign sovereign immunity was meant to protect, *see, e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004) (citing *Schooner Exchange*, 11 U.S. at 136), and open the floodgates to "countless" cases in U.S. courts challenging extraterritorial conduct in foreign nations, including close allies of the United States, *see, e.g.*, *Belhas*, 515 F.3d at 1287 (suit alleging *jus cogens* violations by former Israeli general in connection with military operations in Lebanon). Indeed, the Fourth Circuit will become a magnet for suits against foreign officials, who may be served whenever they pass through Northern Virginia to reach Washington, D.C. *Cf. Ye*, 383 F.3d at 623 (process served while President Jiang was staying at a hotel in Chicago); Mem. of P. & A. in Supp. of Avraham Dichter's Mot. To Dismiss the Compl. at 1, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05 Civ.10270), 2005 WL 3881690 (process served while former Director of Israel's Security Agency was appearing in New York for a speech); *see also Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide long-arm statute that "eliminate[d] the need to employ the

forum state's long arm statute" in an action brought under the Alien Tort Statute).

The Fourth Circuit's decision nullifies foreign sovereign immunity in the vast majority of ATS and TVPA cases. The *jus cogens* exception "merges the merits of the underlying the claim with the issue of immunity." 515 F.3d at 1292-93 (Williams, J., concurring). Thus, every time a plaintiff even alleges a *jus cogens* violation by a foreign official, "there will effectively be no immunity." *Giraldo*, 808 F. Supp. 2d at 250; *see also Heaney*, 445 F.2d at 504 ("[T]o condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct, with the attendant risks of embarrassment at the highest diplomatic levels, would frustrate the very purpose of the doctrine itself.").

Many ATS and TVPA suits against foreign states and their officials, including some close allies of the United States, already involve allegations of *jus cogens* violations.[4] Indeed, based on a Westlaw

[4] *See, e.g.*, *Matar*, 563 F.3d at 10 (alleging former director of Israeli Security Agency authorized extrajudicial killing and other war crimes in military operations in Gaza City); *Belhas*, 515 F.3d at 1281-82 (alleging former Israeli Head of Army Intelligence authorized extrajudicial killing and other war crimes in military operations in Lebanon); *Enahoro*, 408 F.3d at 878-79 (alleging Nigerian general authorized torture and extrajudicial killing); *Ye*, 383 F.3d at 622 (alleging President of China authorized torture and genocide); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 96-97 (D.D.C. 2005) (alleging Israeli officials authorized torture and genocide); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1266-70 (N.D. Cal. 2004) (alleging Chinese officials tortured and arbitrarily detained plaintiffs); *Paul v. Avril*, 812 F. Supp. 207, 209 (S.D. Fla. 1993) (alleging former head of Haitian military authorized torture and arbitrary detention).

search of cases published between March 1, 2010 and March 1, 2013 involving ATS and TVPA claims against foreign states and/or foreign officials, 91% (31 out of 34 cases) involved alleged conduct that would violate *jus cogens* norms, as the Fourth Circuit defined that term. The Fourth Circuit's opinion invites even more such suits. By opening the floodgates to "countless" suits challenging foreign conduct, the Fourth Circuit's decision will "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." *Belhas*, 515 F.3d at 1287 (citation and internal quotation marks omitted).

Further exacerbating the problem created by the court below, there is not even a limit to what constitutes a *jus cogens* violation. As courts, commentators, and the Government have recognized, "controversy surrounds the question of which norms—if any—qualify as *jus cogens*." *See* U.S. SOI in *Matar* at 27 n.23 (emphasis added); *see also, e.g.*, Sean D. Murphy, Principles of International Law 96 (2d ed. 2012) ("[T]here is often disagreement on which norms are *jus cogens*."); Bradley & Helfer, *supra*, at 237 n.115 ("The *jus cogens* category of international law is not free from controversy."); A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens, *As Illustrated by the War in Bosnia-Herzegovina*, 17 Mich. J. Int'l L. 1, 21 (1995) ("[M]ore authority exists for the category of *jus cogens* than exists for its particular content." (citation omitted)); I Oppenheim's International Law 7 (Robert Jennings & Arthur Watts, eds.) (9th ed. 1992) ("Such a category of rules of *jus cogens* is a comparatively recent development and there is no general

agreement as to which rules have this character."); *Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 289 (H.L. 2006) ("[T]his area of international law is 'in a state of flux.'"). Without any clear guidance on what norms satisfy this standard, courts are free to assert—as the Fourth Circuit did here—that "[p]rohibitions against the acts involved in th[e] case . . . are among these universally agreed-upon norms." Pet. App. 22a.

The *jus cogens* exception recognized by the court below also effectively "make[s] the [FSIA] optional,'" *Samantar*, 130 S. Ct. at 2292 (quoting *Chuidian*, 912 F.2d at 1102), contrary to this Court's decision in *Samantar*, *see id.* Every court to consider the question has held that there is no *jus cogens* exception to a foreign state's immunity under the FSIA. *See Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1156 (7th Cir. 2001) (noting that a *jus cogens* exception "would allow for a major, open-ended expansion of our jurisdiction into an area with substantial impact on the United States' foreign relations"); *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1996) (rejecting argument that "a foreign state should be deemed to have forfeited its sovereign immunity [under the FSIA] whenever it engages in conduct that violates fundamental humanitarian standards" (emphasis omitted)); *Siderman de Blake*, 965 F.2d at 719 (holding that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction" over a foreign state under the FSIA); *Princz*, 26 F.3d at 1174 & n.1 (finding no *jus cogens* exception to FSIA immunity). Under the Fourth Circuit's rule, however, "litigants through 'artful pleading,'" *Samantar*, 130 S. Ct. at 2292, will easily circumvent

FSIA immunity by suing the responsible officer instead of the foreign state itself, *id.*

Finally, because international law does not recognize a *jus cogens* exception to foreign sovereign immunity, *see infra* 25-29, the decision below risks triggering reciprocal treatment for U.S. officials sued in foreign courts—whether those officials are former Bush Administration officials sued for allegedly authorizing "torture," or Obama Administration officials sued for allegedly authorizing "illegal" drone attacks. For this reason, the common law "does not recognize any exception to a foreign official's immunity for civil suits alleging *jus cogens* violations." U.S. Amicus in *Matar* at 4 (explaining that such an exception "would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis"). Indeed, "[g]iven the global leadership role of the United States," U.S. officials "are at special risk of being subjected to politically driven lawsuits abroad in connection with controversial U.S. military operations." *Id.* at 25.

The Fourth Circuit's erroneous decision thus creates a circuit split on a significant and recurring issue, and warrants this Court's immediate review.

C. This Case Presents A Compelling Vehicle

This case presents a compelling vehicle to resolve this important question. The lower court's decision provides a detailed—albeit incorrect—analysis of this issue. Moreover, the panel's holding directly conflicts with the well-reasoned decisions of other circuit courts, and courts outside the United States, that have uniformly rejected a *jus cogens* exception to

foreign official immunity. *See supra* 11-18 and *infra* 25-29.

Additionally, the decision below directly conflicts with the United States' interpretation of customary international law. The United States thoroughly analyzed this issue in previous litigation and concluded that "the recognition of [a *jus cogens*] exception by the United States would be out of step with international law and could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis." U.S. Amicus in *Matar* at 4; U.S. SOI in *Matar* at 27-33; U.S. Amicus in *Ye* at 27-34; (rejecting argument that "former heads of state are not immune in cases alleging torture or *jus cogen*s violations"). Likewise, in the present case, the United States urged the court not to reach Respondents' argument that *jus cogens* allegations categorically defeat immunity. Pet. App. 68a n.3. Yet the Fourth Circuit denied Samantar immunity on just that basis. Pet. App. 21a-28a.

To be sure, the panel briefly acknowledged that the Government "has supplied us with additional reasons to support" the denial of immunity. Pet. App. 28a. But the panel never indicated that the two factors identified by the Government provided a sufficient basis for denying immunity, nor could it have. Both grounds are meritless, and neither precludes this Court's review of the rule of law adopted by the Fourth Circuit regarding a *jus cogens* exception to foreign sovereign immunity.

First, the Government argued that immunity should be denied because "Samantar is a former official of a state with no currently recognized government." Pet. App. 40a. But the United States

has since recognized the government of Somalia. *See* Hillary Rodham Clinton, Secretary of State, Remarks With President of Somalia Hassan Sheikh Mohamud After Their Meeting, Jan. 17, 2013, http://www.state.gov/secretary/rm/2013/01/202998.htm; U.S. Department of State, Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC, Jan. 17, 2013, http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm. The duly recognized Prime Minister of Somalia has now reaffirmed that Samantar's alleged actions were taken "in his official capacity with the Government of Somalia," and that denying him immunity in this case would be "injurious to the historic, ongoing process of peace and reconciliation . . . within Somalia." Pet. App. 71a.

Second, the Government urged that immunity be denied because Samantar now resides in the United States. Pet. App. 55a. But, as even the Government conceded, "a former official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit." Pet. App. 56a. Moreover, to Petitioner's knowledge, no case has ever held that a current or former foreign official may lose immunity for official acts on the basis of his residency, further confirming that this factor is not a sufficient basis for denying immunity, and therefore that the Government is not entitled to deference on this ground. *See First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623, 628-29, 633-34 & n.27 (1983), (declining to defer to the Executive's interpretation of what factors dictate when "the normally separate juridical status of a government instrumentality is to be disregarded" for purposes of

the FSIA—an issue that was governed by "both international law and federal common law"—because the Executive's interpretation was contrary to these "controlling principles").

II. THE FOURTH CIRCUIT'S DECISION IS WRONG

The Fourth Circuit erroneously held that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." Pet. App. 26a.

A. The Panel's Decision Is Contrary To International Law

As the Fourth Circuit properly recognized, "international law has shaped the development of the common law of foreign sovereign immunity." Pet. App. 18a. Indeed, it is critical that courts interpreting the common law not "disturb th[e] international consensus" concerning foreign official immunity since "[s]uch a deviation from the international norm would create an acute risk of reciprocation by foreign jurisdictions." U.S. Amicus in *Matar* at 24-25. As this Court explained in a related context, "in 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, and thus serves our national interest in protecting our own citizens." *Boos v. Barry*, 485 U.S. 312, 323-24 (1988) (citation omitted).

By inventing a *jus cogens* exception to foreign official immunity, the Fourth Circuit contravened customary international law. Courts in other jurisdictions have consistently refused to recognize a similar exception in civil cases—whether a foreign state or its officials are sued. *See, e.g.*, *Zhang v. Zemin*, [2010] NSWCA 255, at ¶¶ 121, 153 (C.A.) (Australia); *Fang v. Jiang*, [2006] NZAR 420, 433-35 (H.C.) (New Zealand); *Jones*, 1 A.C. at 291-306 (Lord Hoffman) (U.K.); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675, 695 (C.A.) (Canada); *Al-Adsani v. United Kingdom*, App. No. 35763/97, ¶ 61, 34 Eur. H.R. Rep. H. (2001) (European Court of Human Rights).

Indeed, the International Court of Justice recently rejected a *jus cogens* exception to immunity in civil suits brought in an Italian court against Germany and German officials for war crimes that occurred in Italy during World War II. *See* Jurisdictional Immunities of the State (Ger. v. Italy), Judgment, ¶¶ 85-97 (Feb. 3, 2012), *available at* http://www.icj-cij.org/docket/files/143/16883.pdf. The ICJ found that "there is almost no State practice which might be considered to support the proposition that a State is deprived of its entitlement to immunity in such a case," *id.* ¶ 83, and emphasized that the national courts of the United Kingdom, Canada, Poland, New Zealand, and Greece, as well as the European Court of Human Rights have rejected such an exception "in each case after careful consideration," *id.* ¶ 96 (citing cases). Moreover, the ICJ warned that if "the mere allegation that the State had committed such wrongful acts were to be sufficient to deprive the State of its entitlement to immunity, immunity could, in effect be negated simply by skilful construction of

the claim." *Id.* ¶ 82. Therefore, "under customary international law as it presently stands, a State is not deprived of immunity by reason of the fact that it is accused of serious violations of international human rights law or the international law of armed conflict." *Id.* ¶ 91.

The UN Convention on Jurisdictional Immunities of States and Their Properties similarly confirms that a *jus cogens* exception to immunity in civil cases contravenes customary international law. This proposed multilateral treaty, which the UN General Assembly endorsed in 2004, does not recognize such an exception. *See Fang*, NZAR at 434; *Jones*, 1 A.C. at 289 (Lord Bingham) "In fact, the Convention's drafters twice rejected proposals to adopt such an exception, both because there was no settled state practice to support it and because any attempt to include such a provision would almost certainly have jeopardized the conclusion of the Convention." Bradley & Helfer, *supra*, at 246 (citation and internal quotation marks omitted).

To be sure, the Fourth Circuit cited authorities recognizing a *jus cogens* exception to immunity in *criminal* cases where the Convention Against Torture (CAT) applies. *See, e.g.*, *Regina v. Bartle, ex parte Pinochet*, 38 I.L.M. 581, 593–95 (H.L. 1999). While parties to the CAT have agreed to *criminal* jurisdiction over extraterritorial torture in certain circumstances, the CAT does not abrogate immunity in civil cases. *See* Jurisdictional Immunities of the State (Ger. v. Italy) ¶ 87 ("The Court does not consider that the United Kingdom judgment in *Pinochet* . . . is relevant" because *inter alia* "the rationale for the judgment in *Pinochet* was based

upon the specific language of the 1984 United Nations Convention against Torture."); *see also Fang*, NZAR at 433-34; *Jones*, 1 A.C. at 286-87, 289-91, 293, 296-306; *Bouzari*, 71 O.R.3d at 691-96; *Status of the CAT*, at 21, UN Doc. CAT/C/2/Rev.5 (Jan. 22, 1998); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990) (the CAT "requires a State party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State," not for alleged torture abroad).

For at least two reasons, "international law clearly distinguishes between the civil and criminal immunity of officials." U.S. SOI in *Matar* at 30; *see also, e.g.*, Jurisdictional Immunities of the State (Ger. v. Italy) ¶ 87 ("the distinction between criminal and civil proceedings [w]as 'fundamental to the decision'" in *Pinochet* (quoting *Jones*, 1 A.C. at 290 (Lord Bingham)). *First*, "officials are accorded immunity [from civil suits] in part because states themselves are responsible for their officials' acts [while] [o]n the criminal side, . . . international law holds individuals personally responsible for their international crimes, and does not recognize the concept of state criminal responsibility." U.S. SOI in *Matar* at 30. Thus, because states cannot be held criminally liable for their acts, "the [criminal] sanction can be imposed on the individual without subjecting one state to the jurisdiction of another." *Bouzari*, 71 O.R.3d at 695; *Jones*, 1 A.C. at 290 ("A state is not criminally responsible in international or English law, and therefore cannot be directly impleaded in criminal proceedings.") (Lord Bingham).

Second, private civil litigation over *jus cogens* claims, to which states have not consented, lacks the

prosecutorial safeguards and state-to-state direct accountability of a criminal proceeding initiated by the government. *See* U.S. SOI in *Matar* at 30 ("critically, there is the check of prosecutorial discretion in the criminal context"); *Fang*, NZAR at 433 ("Criminal proceedings may only be brought . . . by the state [while] civil proceedings . . . may be brought by private persons."); *Zhang*, NSWCA 255, at ¶ 159 ("Litigation of a criminal character can ultimately be controlled by the powers and capacities of the Attorney-General and the prosecuting authorities."); Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2181 (1999).

As these authorities demonstrate, no international consensus supports a *jus cogens* exception to foreign official immunity in civil cases. Instead, the Fourth Circuit's decision dramatically departs from customary international law and creates a significant risk of reciprocal treatment of U.S. officials by foreign nations.

B. The Panel's Decision Is Contrary To Domestic Law

The Fourth Circuit also erroneously decided that domestic law recognizes a *jus cogens* exception to foreign official immunity because "violation[s] of *jus cogens* norms cannot constitute official sovereign acts." Pet. App. 25a (quoting *Sarei*, 487 F.3d at 1209).

Not only have other circuits rejected that conclusion in the context of foreign official immunity, but this Court squarely rejected the Fourth Circuit's premise in *Saudi Arabia v. Nelson*. There, the plaintiff sued the Saudi government, alleging that

Saudi officials tortured him in retaliation for complaining about unsafe conditions at a Saudi hospital. 507 U.S. 349, 351-54 (1993). In deciding that the commercial-activities exception to the FSIA did not apply, the Court concluded that these alleged acts (which undoubtedly would violate *jus cogens* norms, as defined by the Fourth Circuit) were nevertheless sovereign acts of a foreign state. *Id.* at 361. As this Court explained, "a foreign state's exercise of the power of its police[,] . . . however monstrous such abuse undoubtedly may be . . . [is] peculiarly sovereign in nature." *Id.*

In reaching this conclusion, this Court relied in part on cases applying the common-law sovereign immunity principles that the FSIA codified. *See, e.g.*, *id.* (citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964)). And just as it is appropriate for this Court to rely on the common law to determine the scope of FSIA immunity, *see Permanent Mission*, 551 U.S. at 200-01, it is similarly appropriate to rely on the FSIA to interpret the scope of common-law immunity, *see* Bradley & Helfer, *supra*, at 263-64; *Matar*, 563 F.3d at 14-15 (relying in part on case applying the FSIA to determine whether there is a *jus cogens* exception to common-law foreign official immunity). Indeed, this Court in *First National City Bank* relied in part on the policies underlying the FSIA to fashion a common-law rule governing when it is appropriate to pierce the veil of a corporation owned by a foreign state. 462 U.S. at 627-28; *see also Boyle v. United Techs. Corp.*, 487 U.S. 500, 511-12 (1988) (relying in part on the policies underlying the Federal Tort Claims Act to determine the scope of common-law contractor immunity).

The cases on which the Fourth Circuit relied do not support its position. In *Siderman de Blake*, the Ninth Circuit *held* that the FSIA does not allow any *jus cogens* exception to the immunity of a foreign state. 965 F.2d at 719. The House of Lords relied in part on this holding in support of its own conclusion that customary international law does not recognize a *jus cogens* exception to foreign official immunity. *See Jones*, 1 A.C. at 297 (Lord Hoffman) ("While *Siderman* turned upon the terms of national legislation, the legislation itself is evidence against a state practice of having an exception to state immunity in torture cases."). And while the Ninth Circuit noted that "the prohibition against official torture has attained the status of a *jus cogens* norm," it provided no explanation or support for its statement in *dicta* that a *jus cogens* norm necessarily "trump[s]" sovereign immunity. *Siderman de Blake*, 965 F.2d at 716-18.

The Ninth Circuit's opinion in *Sarei* does not support the Fourth Circuit's decision because it recognized a *jus cogens* exception to the *act-of-state doctrine*, *see* 487 F.3d at 1209-10, which this Court has explained is "distinct from immunity," *Samantar*, 130 S. Ct. at 2290. Moreover, the only authority that the Ninth Circuit cited in support of that conclusion was its own unfounded *dicta* in *Siderman de Blake*. *See Sarei*, 487 F.3d at 1209-10.

The Fourth Circuit's reliance on the *Enahoro dissent* is also misplaced. *See Enahoro*, 408 F.3d at 893 (Cudahy, J., dissenting). Not only does this *dissent* not represent Seventh Circuit law, but it relies on inapposite cases, such as those recognizing a *jus cogens* exception in *criminal* cases, *see Regina v.*

Bow Street Metropolitan Stipendiary Magistrate and Others, Ex Parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (1999), or finding that former foreign officials may be prosecuted for "private acts," *see* Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), I.C.J., February 14, 2002, at ¶ 55).

Of course, if these cases did support a *jus cogens* exception to foreign official immunity, they would only deepen the circuit split and underscore the need for this Court to resolve the important question presented by this petition.

Finally, contrary to the Fourth Circuit's passing suggestion, the TVPA also does not establish a *jus cogens* exception to foreign official immunity. Pet. App. 25a. Because the text of the TVPA is silent as to whether it abrogates the immunities of foreign officials, *see* U.S. Amicus in *Matar* at 26, "it must be read in harmony with relevant immunity rules," *id.* "'rather than in derogation of them,'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986). As this Court explained in *Schooner Exchange*, courts may not infer an abrogation of foreign sovereign immunity unless expressed by the political branches "in a manner not to be misunderstood." 11 U.S. at 146. A statute, like the TVPA, that creates a cause of action without mentioning immunity does not waive either domestic immunity, *see Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (citing *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246 (1985)), or foreign sovereign immunity, *see Matar*, 563 F.3d at 15; *Belhas*, 515 F.3d at 1288-89.

To the extent the Fourth Circuit suggested that the terms "'actual or apparent authority'" and "'color of

law'" in the TVPA invoke domestic-immunity cases permitting personal-capacity suits against government officials, *see* Pet. App. 26a, the court erroneously conflated liability and immunity. Under 42 U.S.C. § 1983, this language concerns the circumstances in which an individual's actions are sufficiently tied to the state to create liability. *See Hafer v. Melo*, 502 U.S. 21, 28 (1991); *see also West v. Atkins*, 487 U.S. 42, 52 n.10 (1988) (even private parties may act under color of law if acting under state direction). An official's entitlement to immunity, by contrast, is "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Hafer*, 502 U.S. at 28-29.

The legislative history of the TVPA *confirms* that Congress did not abrogate foreign official immunity or presume a *jus cogens* exception. Indeed, the legislative history reflects Congress's understanding that TVPA suits would be subject to foreign official immunity doctrines. *See* H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; S. Rep. No. 102-249, at 7 (1991).

Nor does this reading of the TVPA nullify the statute. TVPA claims may be brought, consistent with immunity principles, when a foreign state disclaims a foreign official's actions. *See, e.g.*, *Hilao*, 25 F.3d at 1472; *Doe I v. Qi*, 349 F. Supp. 2d 1258, 1285-87 (N.D. Cal. 2004); *cf.* S. Rep. No. 102-249, at 8 (an official could "avoid liability by invoking the FSIA" if he could "prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts'"). Here,

by contrast, the recognized Somali government has asserted immunity on Samantar's behalf.

In sum, by creating a *jus cogens* exception to foreign official immunity in civil cases, the Fourth Circuit substantially departed from well-established domestic and international law.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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