No.

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Samantar v. Yousuf*, 560 U.S. 305 (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. In an interlocutory opinion on remand, the Fourth Circuit created a categorical exception to common-law immunity whenever plaintiffs sue foreign officials over alleged *jus cogens* norms of international law. As the United States recognized in its CVSG brief in this case last year, the Fourth Circuit's per se rule of non-immunity creates a circuit split and jeopardizes important interests of the United States. The question presented, which now arises on certiorari from the Fourth Circuit's final judgment, 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 final judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The interlocutory opinion of the court of appeals on immunity (Pet. App. 41a-68a) is reported at 699 F.3d 763. The final order of the court of appeals, which disposes of Petitioner's appeal of the district court's entry of final judgment, is unreported. *See* Pet. App. 1a-2a.

The district court's order denying Petitioner's motion to dismiss the second amended complaint (Pet. App. 69a) is unreported but is available electronically at 2011 WL 7445583. An order denying Petitioner's motion to reconsider that dismissal (Pet. App. 70a-72a) is unreported. The final judgment of the district court is unreported. *See* Pet. App. 3a-4a.

JURISDICTION

Petitioner seeks review of a final decision of the Fourth Circuit entered on February 3, 2014. 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. 119a, 122a-133a), the Alien Tort Statute (ATS), 28 U.S.C. § 1350 (Pet. App. 119a), and the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note (Pet. App. 120a-121a).

STATEMENT OF THE CASE

In *Samantar v. Yousuf*, 560 U.S. 305 (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. Plaintiffs would still be prevented from circumventing the FSIA, the Court explained, because the immunity of foreign officials who are sued for their official acts is "properly governed by the common law . . . ." *Id.* at 325.

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 *whenever* plaintiffs in a civil suit allege that those acts violate *jus cogens* norms of international law, such as norms prohibiting torture.

Petitioner first sought this Court's review of the Fourth Circuit's interlocutory common-law immunity determination in 2013. This Court called for the views of the Solicitor General. The Government advised that the Fourth Circuit's "per se," "categorical judicial exception" to immunity for *jus cogens* violations "conflicts with the Second Circuit's decision" on the same issue; "is predicated on . . . critical legal errors"; and should not be "left standing" because it threatens "negative consequences for the United States' foreign-relations interests," including reciprocal treatment of U.S. officials abroad. *See* Brief of the United States 11-12, 22, *Samantar v. Yousuf*, 134 S. Ct. 897 (2014) (No. 12-1078) ("U.S. Br."). Nonetheless, the Government recommended that the Court GVR to provide the United States additional time to consider its recommendation as to

Petitioner's immunity. Meanwhile, Respondents urged the Court to deny certiorari, largely because the case was interlocutory and because of an eleventh-hour, *ultra vires* letter from a self-professed Somali legal adviser purporting to rescind Somalia's request for immunity for Petitioner. This Court denied certiorari on January 13, 2014.

Petitioner now seeks review of the Fourth Circuit's final judgment, which expressly rests on the Fourth Circuit's earlier interlocutory finding of a categorical *jus cogens* exception to immunity. Moreover, there can no longer be any question about Somalia's position: On March 16, 2014, the current Somali Prime Minister formally reaffirmed Somalia's unwavering request that Petitioner be immunized from suit over his official acts. This Court's plenary review of the Fourth Circuit's erroneous rule of law is warranted.

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, the court reinstated the case to the active docket. *Id.* at *6. Respondents filed a second amended complaint. The district court granted Samantar's motion to dismiss, holding that he was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. *Id.* at *15.

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*, 560 U.S. at 324-26. 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.* "[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 325-26.

B. *Samantar* II

1. District Court Proceedings on Immunity

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. 44a. He also argued that he was entitled to head-of-state immunity. *Id.*

The Government opposed immunity for Samantar for two reasons.[1] Pet. App. 76a. *First*, "Samantar [was] a former official of a state with no currently recognized government." Pet. App. 83a. 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. 85a. *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 foreign 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. 86a.

The Government did not recommend that the court deny immunity on the basis of an exception for alleged violations of *jus cogens* norms. Nor did it

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[1] The Government did not distinguish between head-of-state and foreign official immunity when discussing these two factors. *See* Pet. App. 78-82a.

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. 69a. 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. 72a.

2. Interlocutory Fourth Circuit Proceedings

The Fourth Circuit affirmed for different reasons. Pet. App. 67a-68a. It concluded that foreign officials are never 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 foreign official is entitled to sovereign immunity" for official acts.[2] Pet. App. 50a. 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. 111a n.3 (citing Appellees' Br. at 14-15, 2011 WL 4577137).

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[2] 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. 52a-56a.

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. 60a (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) (second emphasis added)).

Nevertheless, the Fourth Circuit held that alleged acts that violate *jus cogens* norms can *never* be sovereign acts attributable to the foreign state. *See* Pet. App. 62a-66a. In particular, 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. 62a (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." *Id.*

To support its conclusion about 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. 64a (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 acknowledged that "the *jus cogens* exception appears to be less settled in the civil context." Pet. App. 65a (citing *Jones v. Saudi Arabia*, [2006] 1 A.C. 270, 290 ¶24, 129 I.L.R. 713 ¶24 (H.L.) (rejecting *jus cogens* exception to foreign official immunity in civil context)).

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. 66a.

Thus, because this case involves alleged *jus cogens* violations, the panel held that Petitioner "is not entitled to conduct-based official immunity under the common law . . . ." Pet. App. 67a.

The panel devoted less than a page of discussion at the very end of its opinion to the Government's views. *After* "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 the court did not even mention in its earlier discussion of a *jus cogens* exception—supplied nothing more than "*additional* reasons to support" the denial of immunity. Pet. App. 65a-66a, 68a (emphasis added). 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. 65a-68a.

3. Petition for Certiorari

Petitioner sought this Court's review of the Fourth Circuit's immunity decision in *Samantar II*. As Petitioner explained, the Fourth Circuit's decision created a circuit split, risked reciprocal treatment of U.S. officials abroad, and contravened settled principles of domestic and international law. Petitioner also noted that, since the Fourth Circuit's decision, the United States recognized the government of Somalia in January 2013; thereafter, in February 2013, the Somali Prime Minister requested immunity for Petitioner, reaffirming that Samantar's alleged acts were taken in his official capacity on behalf of Somalia. *See* Pet. App. 113a.

On June 24, 2013, this Court called for the views of the Solicitor General. On December 10, 2013, the Solicitor General filed a brief recommending that the Court grant, vacate, and remand.

The Government recognized that the rule adopted by the Fourth Circuit "conflicts with the Second Circuit's decision in *Matar* . . . ." U.S. Br. 22 (citing *Matar*, 563 F.3d 9). The Government also argued that the Fourth Circuit "fundamentally erred" by "fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms." U.S. Br. 19, 21. And the Government explained that the Fourth Circuit's erroneous rule should not be "left standing" because it "could have negative consequences for the United States' foreign-relations interests." *Id.* at 12.

Despite its avowed belief that the Fourth Circuit's rule "would warrant review by the Court at an appropriate time," U.S. Br. 22, the Government urged the Court to GVR to "allow an opportunity for further

consideration . . . by the Executive Branch" of developments since the Fourth Circuit's decision. U.S. Br. 23. In particular, the Government pointed to the United States' recognition of the Somali government in January 2013 (nearly a year before the filing of the CVSG brief), and to the "expected . . . removal from office" of the then-Prime Minister of Somalia. *Id.* at 11, 23 n.5.

In a supplemental brief, Petitioner argued that the Court should grant plenary review instead of GVR'ing. *See* Petitioner's 12-23-2013 Supplemental Brief 1-4, *Samantar*, 134 S. Ct. 897 (No. 12-1078) ("Pet. Supp. I"). Petitioner explained that a GVR in light of a hypothetical future immunity determination by the Government was both pointless (because the Fourth Circuit's per se rule of non-immunity did not turn on the Government's views) and improper (because the Government did not even offer this Court any assurance that it would *ever* reach a new immunity recommendation). *See id.* at 4-12.

Respondents, for their part, argued in a supplemental filing—for the first time—that this Court's jurisdiction to review the Fourth Circuit's interlocutory decision was in doubt. *See* Respondent's 12-24-2013 Supplemental Brief 4-5, *Samantar*, 134 S. Ct. 897 (No. 12-1078) ("Resp. Supp."). Notwithstanding Petitioner's pending immunity appeal in the Fourth Circuit, the district court had proceeded to enter final judgment against him. Petitioner's Fourth Circuit appeal of the district court's final judgment was pending during this Court's consideration of his petition for certiorari seeking review of the Fourth Circuit's interlocutory

immunity determination. Respondents therefore argued that interlocutory review by this Court was impermissible because, "once a final judgment issues, challenges to interlocutory rulings, including specifically denials of immunity, must proceed through review of the final judgment into which all interlocutory rulings have merged." *Id.* at 4 (citing *Ortiz v. Jordan*, 131 S. Ct. 884 (2011)).

With the matter fully briefed, this Court scheduled the petition for consideration at the Conference of January 10, 2014.

Numerous last-minute filings ensued in the days before that Conference. On December 30, 2013, Respondents submitted a letter from Abukar Hassan Ahmed. Ahmed is a plaintiff in a related action against another former Somali official, in which he has been represented by Respondents' counsel. *See* Petitioner's 01-07-2014 Supplemental Brief 1, *Samantar*, 134 S. Ct. 897 (No. 12-1078) ("Pet. Supp. III"). Ahmed held himself out as a Legal Adviser to the Somali President. *See* Resp. Letter of December 20, 2013. Just after a new Prime Minister was elected, Ahmed purported to rescind the former Somali Prime Minister's request for immunity for Petitioner. *Id.*

Petitioner responded on January 7, 2014, with documentation showing that Ahmed's letter was *ultra vires*. Within days, the Somali President had "instructed" his Chief of Staff "to communicate officially" with the United States that Ahmed's "letter to the US Secretary of State is null and void." Pet. Supp. App. 2a (e-mail from Kamal Hassan, Chief of Staff to the Somali President, to Gamal M. Hassan, U.S. Embassy, Nairobi, Kenya, Jan. 2, 2014). The

Somali government also transmitted to the United States a formal diplomatic letter that sought to further dispel "any confusion caused by Professor Ahmed's erroneous and unauthorized letter." Pet. Supp. III App. 5a (Letter from Kamal D. Hassan, Chief of Staff to the Somali President, to James P. McAnulty, Special Representative for Somalia, U.S. Embassy, Nairobi, Kenya, Jan. 7, 2014). This formal letter explained that Ahmed—"no longer a Legal Adviser to the President"—"was in no way authorized to represent the views of Somalia about immunity for" Petitioner. *Id.* at 4a. Thus, the letter made clear that "the position of the Federal Government of Somalia has not changed," and that Petitioner should be immune from suit because "his acts in question were all undertaken in his official capacity with the Government of Somalia." *Id.* at 4a-5a.

Respondents and the Government then filed even more letters. Respondents stated that they had previously been unaware of the circumstances surrounding Ahmed's unauthorized letter. And the Government stated that it had been unaware of the Somali government's communications to the United States repudiating Ahmed's letter.

Following this flurry of activity, this Court denied certiorari on January 13, 2014.

4. Final Judgment and Appeal

As noted above, the district court declined to stay its proceedings after denying Petitioner's request for common law official immunity. *See supra* p. 10. As a result, proceedings in the district court continued even after Petitioner had taken an interlocutory appeal of the district court's immunity determination.

While Petitioner's interlocutory appeal was pending in the Fourth Circuit, the district court issued its final judgment in favor of Respondents on August 28, 2012. Pet. App. 3a-4a.

Petitioner timely appealed the district court's final judgment. That appeal was pending when this Court CVSG'd, as well as when this Court denied certiorari as to the Fourth Circuit's interlocutory decision on immunity.

On February 3, 2014, the Fourth Circuit issued a brief order disposing of Petitioner's appeal of the district court's final judgment. *See* Pet. App. 1a-2a. In doing so, the Fourth Circuit expressly relied on and reaffirmed its earlier immunity ruling: "In light of our disposition in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), we dismiss this appeal as moot." Pet. App. 2a. Petitioner seeks certiorari from that final judgment.

C. Somalia Reaffirms Its Request For Immunity For Petitioner

Finally, in a formal diplomatic letter to Secretary of State Kerry dated March 16, 2014, the current Somali Prime Minister, Abdiweli Sheikh Ahmed Mohamed, reaffirmed that "[t]he position of the Federal Government of Somalia has not changed from the letter sent to [Secretary Kerry] on February 26, 2013" by the previous Somali Prime Minister. Letter of Prime Minister Abdiweli Sheikh Ahmed Mohamed, Pet. App. 73a. The Prime Minister further explained that "the Federal Republic of Somalia affirms and ratifies Mr. Samantar's plea of common law immunity from suit, finding that his acts in question were all undertaken in his official

capacity with the Government of Somalia." *Id.* at 74a.

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

As the Solicitor General previously recognized in the Government's CVSG brief, *see supra* p. 9; U.S. Br. 11, 19-22, the Fourth Circuit fashioned a "per se" rule—a "categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms." 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, *abrogated on other grounds by Samantar*, 560 U.S. at 308; *Ye v. Zemin*, 383 F.3d 620, 625 (7th Cir. 2004).

1. As the Solicitor General told this Court, the Fourth Circuit's decision "conflicts with the Second Circuit's decision in *Matar*." U.S. Br. 22 (citing *Matar*, 563 F.3d 9). Whereas the Fourth Circuit created "a categorical exception to official immunity whenever *jus cogens* violations are alleged," *Matar* granted official immunity to a defendant "in a case involving alleged violations of *jus cogens* norms." *Id.* at 21-22.

In *Matar*, 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. 563 F.3d at 10-11. 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 in *Matar* 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*").

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.* at 14 (quoting Restatement (Second) of Foreign Relations Law § 66(f) and citing *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971)).

To be sure, the Government previously recommended that Petitioner not be granted immunity, *see* Pet. App. 94a, 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. 111a n.3.[3]

Making this conflict even more apparent, lower courts have recognized this division of authority concerning *jus cogens* violations and have expressly looked to this Court for guidance on this "complicated" question. *See, e.g.*, *Rosenberg v. Lashkar-e-Taiba*, No. 10-CV-5381, 2013 WL 5502851, at *6-*7 (E.D.N.Y. Sept. 30, 2013).

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 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

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[3] Indeed, the Government has consistently taken the position that the common law of foreign official immunity does not recognize a *jus cogens* exception. *See, e.g.*, 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.

and so can never cloak foreign officials in immunity." *Id.* at 1287.

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, because the rules developed for foreign official immunity under the FSIA also "may be correct as a matter of common-law principles," *Samantar*, 560 U.S. at 322 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).

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, *see* U.S. Amicus in *Ye* at 27-34, and 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); *see also* 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. As the Solicitor General put it, the Fourth Circuit's ruling should not be "left standing" because it "could have negative consequences for the United States' foreign-relations interests," including by risking reciprocal treatment of U.S. officials. U.S. Br. 12.

The decision below undermines 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 v. McFaddon*, 11 U.S. 116, 136 (1812)). It also opens 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, if the decision below is allowed to stand, the Fourth Circuit will become a magnet for suits against foreign officials, who may be served whenever they pass through Maryland or 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 claim with the issue of immunity." *Belhas*, 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.

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 v. Abubakar*, 408 F.3d 877, 878-79 (7th Cir. 2005) (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

search of cases published between March 1, 2010 and May 1, 2014 involving ATS and TVPA claims against foreign states and/or foreign officials, 92% (33 out of 36 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.

The *jus cogens* exception recognized by the court below also effectively "make[s] the [FSIA] optional,'" *Samantar*, 560 U.S. at 324 (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 v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1994)

(continued…)

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).

(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 v. Federal Republic of Germany*, 26 F.3d 1166, 1174 & n.1 (D.C. Cir. 1994) (finding no *jus cogens* exception to FSIA immunity). Under the Fourth Circuit's rule, however, "litigants through 'artful pleading,'" *Samantar*, 560 U.S. at 324, will easily circumvent FSIA immunity by suing the responsible officer instead of the foreign state itself, *id.*

Finally, the decision below risks 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. As the Government has made clear, "[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." U.S. Amicus in *Matar* at 25. The Solicitor General has reiterated that point when advising this Court that the decision below should not be "left standing." U.S. Br. 12.

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 An Ideal Vehicle To Consider The Question Presented

This case presents an excellent vehicle to consider the Question Presented. The Fourth Circuit's decision, while wrong, is thoroughly reasoned. And the Government's previous CVSG filing makes clear

that the Fourth Circuit's ruling creates a circuit split and threatens important national interests.

When Petitioner previously sought certiorari, Respondents and the Government argued for denial and GVR, respectively, in light of supposed vehicle concerns. Those alleged vehicle issues no longer exist.

First, Respondents previously suggested that this Court might lack jurisdiction to review the Fourth Circuit's *interlocutory* ruling on immunity because the district court had already issued its final judgment. *See* Resp. Supp. 4-5. But Petitioner now seeks certiorari from the Fourth Circuit's *final* judgment. The Fourth Circuit's interlocutory immunity determination merged into—and, indeed, was expressly the basis for, Pet. App. 2a—that final judgment. As Respondents themselves previously contended: "once a final judgment issues, challenges to interlocutory rulings, including specifically denials of immunity, must proceed through review of the final judgment into which all interlocutory rulings have merged." Resp. Supp. 4 (citing *Ortiz v. Jordan*, 131 S. Ct. 884 (2011)). It is therefore undisputed that this Court's review of the Fourth Circuit's immunity determination is now jurisdictionally proper.

Second, the Government previously sought a GVR to "allow an opportunity for further consideration . . . by the Executive Branch" of developments since the Fourth Circuit's decision, including the then-Somali Prime Minister's "expected . . . removal from office." U.S. Br. 11, 23 & n.5. Relatedly, immediately after the election of a new Prime Minister and days before the certiorari petition was set for Conference, Respondents attempted to cast doubt on Somalia's

position by submitting what turned out to be an unauthorized letter from a so-called Legal Adviser to the Somali President, purporting to waive Petitioner's immunity from suit. *See supra* pp. 11-12.

But there can no longer be any question about the position of the recognized Somali government. The Somali Prime Minister is "the Head of the Federal Government." Provisional Constitution, Fed. Rep. of Somalia, Art. 100, *available at* http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=. The current Prime Minister, Abdiweli Sheikh Ahmed Mohamed, has reaffirmed in a letter to Secretary of State Kerry that "[t]he position of the Federal Government of Somalia has not changed from the letter [of] February 26, 2013." Letter of Prime Minister Abdiweli Sheikh Ahmed Mohamed, Pet. App. 73a. "[T]he Federal Republic of Somalia affirms and ratifies Mr. Samantar's plea of common law immunity from suit, finding that his acts in question were all undertaken in his official capacity with the Government of Somalia." *Id.* at 38a.

In any event, the alleged prior doubts about Samalia's position provided no basis for denying review. This Court can address the legal question presented—whether *jus cogens* allegations categorically preclude common-law immunity—and then remand for application of the appropriate legal rule, taking into account the position of the Somali government.

In sum, the asserted reasons for denying certiorari when Petitioner sought this Court's review of an interlocutory order no longer exist. Petitioner now seeks review of the Fourth Circuit's *final* judgment,

and the Somali government has reaffirmed its unwavering request for immunity for Petitioner.

II. THE FOURTH CIRCUIT'S DECISION IS WRONG

The Fourth Circuit's per se rule of non-immunity whenever *jus cogens* violations are alleged is wrong as a matter of law.

A. The Fourth Circuit's Decision Is Contrary To International Law

The Solicitor General has explained that the Fourth Circuit "fundamentally erred" by "fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms." U.S. Br. 19, 21. This "per se," "categorical exception" contradicts bedrock principles of international law and should not be "left standing." *Id.* at 12, 19, 21.

"[I]nternational law has shaped the development of the common law of foreign sovereign immunity." Pet. App. 58a. Thus, 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).

Courts in other countries have consistently refused to recognize a *jus cogens* exception to immunity 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." Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 246 (citation and internal quotation marks omitted).

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). However, 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 (explaining that "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, there is no *jus cogens* exception to foreign official immunity in civil cases. Indeed, 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 Fourth Circuit's Decision Is Contrary To Domestic Law, Including Decisions Of This Court

The Fourth Circuit also erroneously decided that domestic law recognizes a *jus cogens* exception to foreign official immunity on the basis that "violation[s] of *jus cogens* norms cannot constitute official sovereign acts." Pet. App. 65a (quoting *Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1209 (9th Cir. 2007).

In *Saudi Arabia v. Nelson*, this Court squarely rejected the premise of the Fourth Circuit's decision. 507 U.S. 349 (1993). There, the plaintiff sued the Saudi government, alleging that Saudi officials

tortured him in retaliation for complaining about unsafe conditions at a Saudi hospital. *Id.* at 351-54. 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 of India to the United Nations v. City of New York*, 551 U.S. 193, 200-01 (2007), it is similarly appropriate to rely on the FSIA to interpret the scope of common-law immunity; *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 v. Banco Para El Comercio Exterior de Cuba* 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. 611, 627-28 (1983); *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).

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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