No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF OF *AMICI CURIAE* FORMER ATTORNEYS GENERAL OF THE UNITED STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a foreign State's immunity from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, extends to an individual acting in an official capacity on behalf of a foreign State.

2. Whether an individual who is no longer an official of a foreign State at the time suit is filed retains immunity under the FSIA for acts taken in the individual's former official capacity.

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STATEMENT OF INTEREST

Amici curiae submit this brief in support of Petitioner's argument that current and former foreign officials are immune from civil liability in United States courts under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*.[1]

Each of the three *amici curiae* has served as Attorney General of the United States. The Honorable Edwin Meese III served as the seventy-fifth Attorney General of the United States (February 1985 – August 1988, appointed by President Ronald Reagan). The Honorable Richard Lewis Thornburgh served as the seventy-sixth Attorney General of the United States (August 1988 – August 1991, appointed by President Ronald Reagan). The Honorable William Pelham Barr served as the seventy-seventh Attorney General of the United States (November 1991 – January 1993, appointed by President George H.W. Bush).

As former Attorneys General of the United States, *amici curiae* have a unique perspective on important governmental decisionmaking in the Executive Branch, and how the reliable availability of foreign sovereign immunity may affect such decisionmaking. Immunity from suits outside the United States allows Executive Branch officials to make difficult but necessary decisions without fear of

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[1] The parties have consented in writing to the filing of this brief. Counsel for *amici* authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than counsel for *amici* made a monetary contribution to the preparation or submission of this brief.

later civil liability under foreign legal standards. *Amici curiae* believe their unique experience as former Attorneys General will aid this Court in analyzing the potential effects of this case on United States officials.

SUMMARY OF ARGUMENT

This case is about the immunity of foreign officials from civil suit in the United States. From its first mention of the concept, this Court has recognized that foreign sovereign immunity is a matter of reciprocity, the "interchange of good offices," between Nations. *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812). The rule established in this case, we can expect, will be applied to the United States and its officials by foreign countries. As important, the decision of the highest court of the world's leading constitutional democracy undoubtedly will influence the course of foreign sovereign immunity in customary international law. This is also a case, therefore, about the immunity from civil suit that United States government officials will be afforded in foreign countries.

Equivalent immunity from civil suit for both foreign States and officials of foreign States acting in their official capacity is the long-standing tradition of international law. The resolution of this case will leave foreign officials either (1) immune from civil suit subject to exceptions defined in the FSIA; (2) subject to civil liability, absent an affirmative suggestion of immunity by the Department of State or a judicial determination of immunity, unaided by statutory directives or Executive Branch guidance; or (3) without sovereign immunity, in the event this Court determines that the FSIA both does not reach

officials and is the sole basis for foreign sovereign immunity in our courts.

As an initial matter, *amici curiae* believe that the first result, holding that the FSIA reaches foreign officials, is correct as a matter of statutory interpretation. Moreover, either of the latter two results would make the United States among the first nations to distinguish so starkly between foreign States and their officials with regard to the administration of foreign sovereign immunity. If reciprocally applied to United States officials by foreign countries, such rules would have serious consequences.

First, immunity from civil suit abroad would become unreliable. Before the enactment of the FSIA, the common law system placed emphasis on affirmative intervention by the State Department in determining a foreign official's immunity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-487 (1983). If strongly tied to the active intervention of foreign political leaders, immunity from civil suit abroad could hardly be taken for granted by United States officials in exercising their governmental responsibilities. Our officials must make decisions, in the interests of the United States, that are deeply unpopular in certain foreign countries. Often such decisions will necessarily advantage the citizens of some nations and injure the citizens of others. Intervention by foreign leaders to secure immunity for United States officials, all political considerations to the contrary, would be uncertain.

Second, considerations of civil litigation abroad—the costs of defending it, the restrictions on future travel, and the risk of a sizeable adverse judgment—may become another factor for United States officials

in making decisions on behalf of the American people. This Court has long recognized that immunity doctrines affect official action; if insufficiently protective, the threat of civil litigation will chill officials from taking decisive action and will influence the content and quality of governance. United States officials should seek guidance in clear domestic legal rules, made applicable to their actions by the Framers of our Constitution or the political branches, as interpreted by our courts. Because of the anticipated reaction of foreign countries, affirming the decision below may cause United States officials, reasonably, to look to other sources. How will a policy—perhaps with significant effects in a foreign country—fare in that country's legal system, judged under that country's laws? Predictable systems of foreign sovereign immunity provide confidence to United States officials that their actions will be judged primarily by the courts of this country, according to familiar procedures and substantive legal standards.

ARGUMENT

I. THE TERM "FOREIGN STATE" IN THE FSIA INCLUDES ITS OFFICIALS.

As a matter of statutory interpretation, *amici curiae* believe that the term "foreign state" includes its officials acting in their official capacity. The FSIA codified, with only explicit departures, the United States common law of sovereign immunity extant in 1976. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). The common law reflected an international consensus—which has not changed—that a foreign State and officials acting on behalf of the State are indistinguishable for purposes of sovereign immunity. *See*, *e.g.*, *Heaney v. Gov't of Spain*, 445 F.2d 501, 504

(2d Cir. 1971); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895); *Jones v. Ministry of Interior of the Kingdom of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, 275-76 (appeal taken from Eng.) (U.K.); *Grunfeld v. United States*, (1968) 3 N.S.W.R. 36 (Australia); *Rahimtoola v. Nizam of Hyderabad*, [1958] A.C. 379, 402 (H.L. 1957) (appeal taken from Eng.) (U.K.); *Syquia v. Almeda Lopez*, 84 Phil. Rep. 312 (1949) (Philippines); Restatement (Second) of Foreign Relations Law of the United States § 66(f) (1965). Against this backdrop, the term "foreign state" in the FSIA naturally includes the State's officials.

Immunizing a foreign State's officers draws on the long-standing justification for foreign sovereign immunity: comity between nations. *Republic of Austria v. Altmann*, 541 U.S. 677, 689 (2004). The essence of comity is a mutual respect for the adequacy of the foreign State's legal system—that a foreign sovereign's acts should not be tested in United States courts, according to United States legal principles. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 763 (1972) (citing *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). As this Court has explained in the context of the related act of state doctrine, "[t]o permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417 (1964) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 304 (1918)). Because a State acts only through its officers, limiting immunity to the State as such does little to protect sovereign acts from scrutiny in our courts. *Monell v. Dep't of Soc. Servs. of New York*,

436 U.S. 658, 690 n.55 (1978) ("[O]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."). Every sovereign act could be reached through suits against officials.

Upending the long-standing equivalence of a State and its officers in sovereign immunity law also would undermine the principal objective of the FSIA. Under the common law, lawsuits directly attacking the actions of a foreign sovereign—through suits against the State or its officers—placed diplomatic and political pressures on the Executive Branch to suggest immunity. *See*, *e.g.*, *Altmann*, 541 U.S. at 690; *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983). The FSIA established a "comprehensive set of legal standards" to remove that pressure from the Executive Branch. *Verlinden*, 461 U.S. at 488. If those political pressures could be imposed again by a change in caption, naming the foreign government official responsible for a policy or action, the FSIA would have accomplished little. A statute should not be construed so dramatically to thwart its apparent purpose, and to modify rules of international law, without an explicit direction in the text. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117-18 (1804)).

Congress's express inclusion of an "agency or instrumentality of a foreign state" as part of a "foreign state" (28 U.S.C. § 1603(a)-(b)), without any reference to individual officials, complicates the question before this Court as a matter of statutory text. This feature of the FSIA was the principal basis of the decision below, which we believe was in error. Pet.

App. at 17a-20a. When measured against the international and common law rules of sovereign immunity in 1976, however, it becomes apparent that the detailed definition of a foreign State's "agency or instrumentality" served the needed purpose of clarifying a severe division of authority among both United States and foreign courts. Congress providing that the term "foreign state . . . *includes*" this clarifying definition of "agency or instrumentality" (28 U.S.C. § 1603(a)-(b) (emphasis added)) thus should not be understood to exclude a State's officers from the FSIA. *Cf. Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) (the term "'including' is not one of all-embracing definition, but connotes simply an illustrative example of the general principle").

That foreign States and their officers were entitled to symmetrical sovereign immunity was axiomatic among commentators and courts. What was controversial was the extent to which sovereign immunity reached corporations and organizations associated with the State, many of which had extensive commercial and financial activities. *See* Hazel Fox, *The Law of State Immunity* 436 (2d ed. 2008) (explaining the "unresolved conflict in state practice on what factors should be determinant of a link between an agency and the State to bring the former within the latter's immunity").[2] This judicial disagreement

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[2] The immunity of foreign-owned corporations was subject to multiple different tests and disparate outcomes in United States courts. *Compare S.T. Tringali Co. v. Tug Pemex XV*, 274 F. Supp. 227, 230 (S.D. Tex. 1967) (Pemex, a government-owned corporation, not immune by virtue of Mexican State ownership) *with F.W. Stone Eng'g Co. v. Petroleos Mexicanos of Mexico, D.F.*, 42 A.2d 57, 60 (Pa. 1945) (Pemex held immune based on

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was aggravated in the decades leading to 1976, as the United States and other countries adjusted to the restrictive theory of sovereign immunity, excepting a foreign State's commercial activities from immunity. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 Dep't of State Bulletin 984-85 (1952) (announcing United States adherence to the restrictive theory for the first time). In making explicit in the FSIA what degree of association would be required for an organization or corporation to be "include[d]" within the term "foreign state" (28 U.S.C. § 1603(a)-(b)), Congress resolved parts of that controversy. But Congress's determination of an outer perimeter question in sovereign immunity law did not silently negate the well-settled equivalence of a foreign State and its officials. *See Permanent Mission*, 551 U.S. at 198-99 (discussing congressional

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State Department suggestion of immunity). Likewise, courts in the United Kingdom struggled with the immunity of government-associated corporations. *See Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 2 W.L.R. 356, 370, 1 QB 529, 559-60 ("But how are we to discover whether a body is an 'alter ego or organ' of the government? The cases on this subject are difficult to follow, even in this country: let alone those in other countries."). By 1976, continental Europe had reached no greater clarity on the question. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 547-51, 554-65 (1991) (describing the "disharmony" and "chaos" in lower court rulings regarding the immunity of state-associated corporations prior to 1976, as well as the wide variations on such immunity in Western European countries).

intent to incorporate the international law of immunity).

Importantly, the FSIA's definition of agency or instrumentality was more protective of corporations associated with foreign States than most other countries' immunity regimes. *See* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 547-51 (1991) (explaining the "separate entity" rule from other jurisdictions, which the FSIA rejected). It makes sense that Congress would use express statutory terms to depart from a significant portion of international practice, and would accept the settled propositions tacitly. *See Permanent Mission*, 551 U.S. at 198-99.

II. ESTABLISHING RELIABLE SOVEREIGN IMMUNITY FOR FOREIGN OFFICIALS SERVES THE BEST INTERESTS OF THE UNITED STATES.

A. Affirming the Fourth Circuit's Decision Would Weaken Immunity For United States Officials Abroad.

Placing foreign officials outside the FSIA, and thus treating them differently from States in terms of sovereign immunity, would mark a significant departure from the well-established international law that the FSIA was intended to codify. A ruling from this Court establishing such a departure will affect the immunity United States officials receive abroad.

1. Should this Court embrace the minority view of circuit courts that sovereign immunity under the FSIA does not extend to foreign officials, the treatment of foreign States and their officials would radi-

cally diverge. Prior to the FSIA, United States courts afforded considerable deference to the State Department's suggestion of immunity in a particular case (*see Ex parte Republic of Peru*, 318 U.S. 578, 588-89 (1943)), and likewise would afford weight to the Department's refusal to file such a suggestion (*see Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 360 (1955); *Compania Espanola de Navegacion Maritima, S.A. v. Navemar*, 303 U.S. 68, 74-75 (1938)).

This system proved "troublesome" because the State Department's practice of filing suggestions of immunity appeared unpredictable and based on diplomatic pressures and political considerations. *Verlinden*, 461 U.S. at 487-88. In other cases, when a foreign sovereign failed to request a suggestion of immunity from the State Department, courts were left to make their own decisions on immunity questions, drawing on the common law and the Department's previous recommendations. In still other cases, the State Department's silence in the face of a foreign government's request for intervention was damaging to a claim of immunity. *Nat'l City Bank of New York*, 348 U.S. at 360-61. Ultimately, sovereign immunity standards were "neither clear nor uniformly applied" (*Verlinden*, 461 U.S. at 488) and created "considerable uncertainty." H.R. Rep. No. 94-1487, at 9 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6607.

The FSIA reflected a clear recognition by both Congress and the Executive Brach that a problem

existed.[3] Through the statute, Congress freed the Executive Branch of the diplomatic pressures attending its immunity recommendations by transferring responsibility to the courts. Judicial administration of statutory standards would be more impartial, prompt, and predictable.

2. Interpreting the FSIA to exclude individual officials would represent a clear step backwards in the foreign sovereign immunity practice of the United States. Before and after the FSIA's enactment, international law and the practice of foreign countries have been well-settled that officials acting in their official capacity and the State are the same for immunity purposes. "The foreign state's right to immunity cannot be circumvented by suing its servants or agents." *Jones*, [2007] 1 A.C. at 281 (U.K.); *see also Grunfeld*, 3 N.S.W.R. 36 (Australia). A decision from the highest court of the world's leading constitutional democracy departing from this settled principle—and placing a State and its officers into a separate system—would be noted by foreign governments. Foreign governments are unlikely to miss the observations of this Court, Congress, and the Executive Branch that foreign sovereign immunity is uncertain and politically driven outside the FSIA. *See*, *e.g.*, *Altmann*, 541 U.S. at 677-78; *Verlinden*, 461 U.S. at 488.[4]

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[3] President Gerald R. Ford strongly recommended passage of the FSIA. *See* 12 WEEKLY COMP. PRES. DOC. 1554 (Oct. 22, 1976).

[4] The approach urged by Respondents—that the FSIA forecloses any sovereign immunity for officials of foreign States—would widen dramatically the gulf between the United States

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3. Foreign countries will respond to changes in United States foreign sovereign immunity law. The doctrine of sovereign immunity rests on shared principles of comity and reciprocity. *See*, *e.g.*, *Nat'l City Bank of New York*, 348 U.S. at 362 (doctrine of sovereign immunity derives "from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign"); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). *Cf. Boos v. Barry*, 485 U.S. 312, 323 (1988) ("[I]n light of the concept of reciprocity that governs much of international law in this area, we have a more parochial reason to protect foreign diplomats in this country. Doing so ensures that similar protections will be accorded those that we send abroad to represent the United States.") (internal citation omitted). Other nations also have long recognized that sovereign immunity is an exchange of legal protections between nations. *See Spanish Gov't v. Lambege et Pujol*, Cour de Cassation [Supreme Court of France] D. 1849 1, 5, 9 (translated and excerpted in Barry E. Carter & Philip R. Trimble, *International Law* 588 (2d ed. 1995)) ("[T]he reciprocal independence of States is one of the most universally respected principles of international law, and it follows as a result therefore that a government cannot be subjected to the jurisdiction of another against its will."). Following this tradition, when

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and the rest of the world. *See* Opp. to Cert. at 18-26; *but see Enahoro v. Abubakar*, 408 F.3d 877, 879 (7th Cir. 2005) (holding that the common law may continue to protect, to some degree, foreign officials). As explained below, the peril to United States officials and our system of government would be substantially aggravated by this potential alternative holding.

Congress adopted the FSIA, it sought to ensure that "U.S. immunity practice would conform to the practice in virtually every other country." H.R. Rep. No. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

Accordingly, retreats from foreign sovereign immunity principles here weaken protections for United States officials abroad. In some cases, this effect is virtually automatic. The United Kingdom's sovereign immunity statute, for example, expressly provides that "the immunities and privileges conferred" by the Act may be restricted "in relation to any State" when they "exceed those accorded by the law of that State in relation to the United Kingdom." State Immunity Act, 1978, c. 33, § 15; *see also* State Immunity Act, R.S.C., ch. S-18, § 15 (1985) (Canada); State Immunity Act § 17 (1979) (Singapore); State Immunity Ordinance § 16 (1981) (Pakistan); Foreign States Immunities Act § 16 (1981) (South Africa). Likewise, nations with civil law systems, including France and Italy, "treat[] the conferment of immunity as subject to reciprocity." Fox, *The Law of State Immunity* 15. Resurrection of the pre-FSIA immunity regime in the United States, it should be expected, would ripple through the immunity laws of our international partners, with United States officials ultimately receiving less immunity protection in foreign jurisdictions.

B. Sovereign Immunity Rules Abroad Affect the Content and Quality of Decisionmaking By Our Government Officials.

The protections of foreign sovereign immunity are more than a matter of convenience for United States officials. The sovereign immunity protections

that we extend to foreign officials, and thereby reciprocally seek for United States officials abroad, will affect how we govern ourselves here at home.

1. Official immunity doctrines are designed to facilitate decisive government action, guided only by the interests of the American people and clearly defined legal rules established through constitutional processes. The abiding premise of these doctrines is that the prospect of future civil liability affects governmental decisionmaking. *Nixon v. Fitzgerald*, 457 U.S. 731, 752 n.32 (1982) ("Among the most persuasive reasons supporting official immunity is the prospect that damages liability may render an official unduly cautious in the discharge of his official duties."). Properly structured, immunity principles free government officials to make decisions about issues that "excit[e] the deepest feelings" in those they affect. *Bradley v. Fisher*, 80 U.S. 335, 348 (1871); *see also Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) ("[T]o submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute.").

To achieve these objectives, immunity protection must be predictable. Whatever the context, this Court has ensured that legal rules demarcating immunity are wholly discernable in advance. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Predictability in immunity avoids the paralyzing uncertainty of whether yet unknown standards will be applied. *Id.*; *see also Crawford-El v. Britton*, 523 U.S. 574, 590-91 (1998).

2. Foreign sovereign immunity for officials discharging their governmental duties historically has been absolute. Given the reciprocal nature of sover-

eign immunity, affirming the Fourth Circuit's decision likely would lead to United States officials no longer enjoying presumptive civil immunity abroad; they instead would have to rely on the active intervention of foreign political leaders to ensure immunity. Confidence in the United States Executive Branch to reach appropriate decisions on foreign official immunity may be well taken.[5] But United States officials may not be as sanguine about the willingness of foreign political leaders actively to intervene and secure immunity, especially in defense of unpopular United States policies. In the end, should a system similar to the Fourth Circuit's approach be applied to United States officials abroad, those officials will be less confident in protections from foreign civil suit challenging their decisions on behalf of the American people.

Reliable and predictable immunity from civil suit abroad is as or more important than domestic immunity. United States officials inevitably will make decisions with profound effects abroad. Citizens of foreign States will disagree with and be harmed by United States policy, especially as the Nation fights wars in two foreign theaters. And

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[5] No matter whether Executive Branch decisions ultimately are driven by discernable principles, the already expressed characterization of the pre-FSIA, common-law system as random, unreliable, and politicized (*see Altmann*, 541 U.S. at 689-91; *Verlinden*, 461 U.S. at 486-88), may substantially drive a perception of *ad hoc* decisions among our international partners. Surely, foreign officials—and their governments—disappointed by a particular Executive Branch decision to withhold a suggestion of immunity will have every incentive to press this caricature. *See Hirota v. MacArthur*, 335 U.S. 876, 878 (1948) (noting the importance of "appearance" in foreign affairs).

many foreign policy dilemmas faced by the United States are zero-sum, where any resolution will inevitably harm citizens of some countries and benefit others. It would be difficult to argue that subjecting foreign official immunity to uncertainty, and inviting reciprocal treatment of United States officials, would be in the interests of the United States.

As important, immunity from foreign civil suit *vel non* effectively changes the content of our law. If United Sates officials cannot rely on immunity from civil suit abroad, foreign legal rules, and the views of foreign courts on international law, understandably will affect their judgment. A chilling effect will follow, if only from the inherent difficulty in discerning the content of foreign law in advance.[6]

At a more fundamental level, foreign standards simply should not loom in the background of the decisions of United States officials. The law of foreign countries has not been made applicable to our government by any institution the Constitution authorizes to do so. *See generally Sosa v. Alvarez-Machain,* 542 U.S. 692 (2004). Reliable immunity from foreign suits "support[s] the rights of the people, by enabling their representatives to execute the functions of their office without fear" (*Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951)), and according only to the interests of the American people and the rules of law they establish through our constitutional democracy.

3. The effect on governmental decisionmaking in the United States is not outside this Court's ambit.

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[6] The analysis with respect to sovereign immunity in suits against former officials is no different. Decisive official decisionmaking is equally deterred if government officials lose immunity for their prior official actions upon leaving office.

To be sure, this Court has recognized that foreign sovereign immunity in United States courts "is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003); *see also Altmann*, 541 U.S. at 696. But it is equally apparent that the development of foreign sovereign immunity doctrine has been driven, in part, by the "reciprocal self-interest" in protecting United States officials from the chilling effect of potential foreign liability. *Nat'l City Bank of New York*, 348 U.S. at 362. This Court, therefore, should take account of how its decision will affect the structure of immunity regimes in foreign countries, which in turn affects United States official decisionmaking. *See Altmann*, 541 U.S. at 729-30 (Kennedy, J., dissenting) (immunity principles should account for how foreign States "shape their conduct" through diplomatic exchanges).

C. Application of the FSIA to Foreign Officials Does Not Foreclose Other Accountability Mechanisms.

It is important to bear in mind what is *not* at stake in this case—namely, the United States and other nations' ability to condemn or to sanction the actions of government officials through mechanisms other than private civil litigation. The FSIA governs civil suits by private litigants in United States courts. It does not circumscribe sovereigns' ability to utilize other mechanisms for holding officials accountable for their unlawful actions.

One such mechanism is criminal prosecution. The FSIA is not addressed to criminal proceedings. *See* 28 U.S.C. § 1330. Criminal prosecutions, in contrast to civil litigation, must be initiated by govern-

ment officials, who in most countries are accountable to leaders responsible for the nation's foreign affairs.

A foreign nation also may waive its officials' immunity in United States courts. For instance, in *In re Grand Jury Proceedings,* 817 F.2d 1108, 1110-11 (4th Cir. 1987), the Fourth Circuit concluded that former Philippine President Ferdinand Marcos and his wife Imelda Marcos were subject to civil proceedings in United States courts because the Republic of the Philippines had waived those individuals' immunity. *Id*. Similarly, a nation may enter into treaties that criminalize acts and simultaneously abrogate sovereign immunity for those acts. *See* Curtis A. Bradley & Jack L. Goldsmith*, Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 Green Bag 2d 9, 22 (2009) (noting that countries can eliminate sovereign immunity through such treaties and conventions).

Nations also may negotiate compensation agreements to redress the injuries of their nationals at the hands of foreign officials. The United States has been party to a number of such agreements, including, for instance, the Iran-United States Claims Tribunal. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-83 (1981) (affirming President Carter's settlement of claims arising from the Iran hostage crisis). More recently, the Libyan Claims Program negotiated between the Libyan and United States governments provided substantial compensation to the United States victims of terrorist attacks linked to the Libyan government. *See generally Libyan Claims Resolution Act*, Pub. L. No. 110-301, 122 Stat. 2999 (2009); *see also*, *e.g.*, 22 U.S.C. §§ 1621-1645 (describing the various settlement activities of the Foreign Claims Settlement Commission); Agreement Relating to the Agreement of Oct. 24, 2000 Concern-

ing the Austrian Fund "Reconciliation, Peace, and Cooperation," U.S.-Aus., Jan. 23, 2001, State Dep't No. 01-73, 2001 WL 935261 (settling claims with Austria).

At bottom, the objective of diplomacy is to shape the actions of foreign sovereigns to the interests of the United States and to right principles. Historically, this delicate task has been left to our political branches. At the heart of effective foreign relations are the selection of priorities and the identification of opportunities for progress. To that end, reliable foreign sovereign immunity against civil suit makes available to the American people the most effective, calibrated approach to channeling the conduct of foreign nations. Sovereign immunity principles vest the *State*—not private litigants—with the power to decide issues of liability for government acts, after the State has had opportunity carefully to consider the foreign policy implications of its decision and before litigation costs are incurred. *See* Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 Chi. J. Int'l L. 457, 460-64 (2001).[7] The burden of inertia always remains with sovereigns, who are accountable for the foreign policy consequences of their decisions, empowering them to keep diplomatic avenues open.

Subjecting foreign officials to the pre-FSIA common law system of sovereign immunity would be contrary to this principle. Congress and this Court have

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[7] The FSIA itself recognizes this principle by permitting the Executive Branch to lift civil immunity of the State and its officials for terrorism-related actions of a sovereign that the Executive Branchy has designated as a State sponsor of terrorism. *See* 28 U.S.C. § 1605A.

recognized that the mere filing of a lawsuit will place foreign policy pressure on the State Department to intervene, or not. In this way, the common law system vests foreign policy decisionmaking authority in private litigants, who lack the expertise and authority to decide such questions. *See Sosa*, 542 U.S. at 733 n.21; *Munaf v. Geren*, 128 S. Ct. 2207, 2226 (2008); *see also* Bradley, *supra*, at 460 ("The most significant cost of international human rights litigation is that it shifts responsibility for official condemnation and sanction of foreign governments away from elected political officials to private plaintiffs and their representatives."). Principles of immunity for foreign officials, statutorily defined in advance and administered by courts, reduce those diplomatic pressures and more firmly vest the initiation of State-to-State controversy with the officials our Framers intended to address foreign affairs.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted.

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