

No. 15-1345

In the Supreme Court of the United States

YUSUF ABDI ALI, PETITIONER

v.

FARHAN MOHAMOUD TANI WARFAA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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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 of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity of current or former foreign officials who are sued for acts performed in an official capacity. The question presented is:

Whether the court of appeals erred in finding that petitioner is not immune from suit on the ground that a categorical judicial exception to foreign official immunity applies in civil suits alleging violations of *jus cogens* norms.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.¹

STATEMENT

1. This case involves some of the same issues concerning the role of the Executive Branch in determining the immunity from suit of foreign officials that this Court addressed in *Samantar v. Yousuf*, 560 U.S. 305 (2010), and that were raised in subsequent petitions

¹ Concurrent with this filing, the United States is filing a brief, in response to the Court's invitation, recommending denial of respondent's conditional cross-petition (No. 15-1464) seeking review of the affirmance of the dismissal of his claims under the Alien Tort Statute, 28 U.S.C. 1350.

for a writ of certiorari in that case (Nos. 12-1078 and 13-1361).

a. In 1976, Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1391(f), 1441(d), 1602 *et seq.*, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a United States court. See *Samantar*, 560 U.S. at 313; see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-435 (1989). With respect to claims against a “foreign state or its political subdivisions, agencies, or instrumentalities,” the FSIA “transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch.” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (citation omitted).

In *Samantar*, this Court held that the FSIA does not govern the immunity from suit of individual foreign officials in United States courts. See 560 U.S. at 313-326. Instead, the Court held, foreign official immunity is governed by the common-law framework that predated enactment of the FSIA. See *id.* at 311, 325. Under that framework, courts followed a two-step procedure for deciding immunity questions. See *id.* at 311-312. If the State Department determined that a foreign state or official was entitled to immunity, “the district court surrendered its jurisdiction.” *Id.* at 311. If the State Department did not make an immunity determination, the court determined immunity by applying principles articulated by the Executive Branch. See *id.* at 311-312. This Court explained that lower courts are to continue to apply that common-law framework in making determinations of foreign official immunity. See *id.* at 323 (“We have

been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity.”).

b. On remand in *Samantar*, the United States filed a statement of interest informing the district court that the State Department had determined that the defendant in that case was not immune from suit. The statement identified two factors as particularly important to the State Department's determination. First, the defendant was a former official of Somalia, “a state with no currently recognized government to request immunity on his behalf,’ or to take a position as to ‘whether the acts in question were taken in an official capacity.’” *Yousuf v. Samantar*, 699 F.3d 763, 767 (4th Cir. 2012) (*Samantar II*) (quoting statement of interest), cert. denied, 134 S. Ct. 897 (2014). Second, the defendant's status as a U.S. resident “who enjoy[s] the protections of U.S. law” made it appropriate to subject the defendant “to the jurisdiction of our courts, particularly when sued by U.S. residents.” *Ibid.* (quoting statement of interest). The district court denied the defendant's motion to dismiss the suit on immunity grounds, “apparently viewing the Department of State's position as controlling.” *Ibid.*

The court of appeals affirmed the district court's denial of immunity, but based that decision on a newly created, categorical exception to immunity not espoused by the Executive Branch. Under customary international law principles, certain state officials, such as sitting heads of state, enjoy absolute immunity from foreign adjudicatory jurisdiction based on their status as incumbent office holders. See 1 *Oppenheim's International Law* 1038 (Robert Jennings &

Arthur Watts eds., 9th ed. 1996). By contrast, the immunity of all former foreign officials, as well as current, lower-level officials, depends on the conduct at issue and generally applies only to acts taken in an official capacity. See *id.* at 1043-1044. The court of appeals concluded that courts are required to defer absolutely to the Executive Branch's determination of status-based immunities, because in its view such a determination is rooted in the President's constitutional power to recognize diplomats and other representatives of foreign sovereigns. See *Samantar II*, 699 F.3d at 772. But the court of appeals believed that "there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of" conduct-based immunity. *Id.* at 773. Instead, the court stated, the Executive's views in that context are entitled only to "substantial weight." *Ibid.*

The court of appeals therefore engaged in its own immunity inquiry. The court determined that the allegations in the complaint against Samantar—including claims of "torture, summary execution and prolonged arbitrary imprisonment"—involved violations of a *jus cogens* norm of international law, *i.e.*, "a norm 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." *Samantar II*, 699 F.3d at 775 (citation omitted). In the court's view, "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign." *Id.* at 776. The court accordingly held that foreign officials "are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's

official capacity.” *Id.* at 777. The court also observed that the Executive Branch’s statement of interest provided “additional reasons to support th[e] conclusion” that Samantar was not immune. *Ibid.*

c. Samantar filed a petition for certiorari, and this Court invited the Solicitor General to file a brief expressing the views of the United States. The government’s brief argued that the court of appeals had erred in holding that the Executive Branch’s determination as to a foreign official’s conduct-based immunity is not controlling, and in creating a categorical judicial exception for claims alleging violations of *jus cogens* norms. See 12-1078 U.S. Amicus Br. at 12-22. The United States nevertheless urged the Court not to undertake plenary review, but instead to vacate the judgment and remand the case for further proceedings. See *id.* at 22-23. That disposition was appropriate, the brief explained, in light of significant developments that had occurred after the lower courts’ consideration of the case: the United States had recently recognized the Government of Somalia for the first time since 1991, the Somali Prime Minister had requested the State Department to suggest immunity for Samantar, and remand would allow the State Department to consider the Prime Minister’s request in the context of ongoing diplomatic discussions and to submit to the courts any new immunity-related determination.² See *id.* at 9-11, 23. This Court denied certiorari. See 134 S. Ct. 897 (2014).

² After the United States filed its brief, the plaintiffs filed in this Court a letter to the Secretary of State purporting to be from the Somali Legal Adviser, which stated that Somalia waived Samantar’s immunity. Subsequently, the Somali President’s Chief of Staff sent an email to the U.S. Embassy in Nairobi, Kenya, repu-

d. The case against Samantar proceeded in the district court, which entered a default judgment against him. Samantar appealed, but the court of appeals dismissed the appeal as moot, citing its disposition in Samantar's prior appeal. See 13-1361 Pet. App. 2a; *Yousuf v. Samantar*, No. 04-cv-1360, 2012 WL 3730617 (Aug. 28, 2012). Samantar again petitioned for certiorari. He included in the appendix to his petition a letter to the Secretary of State from the Somali Prime Minister at the time requesting that the United States file a suggestion of immunity for Samantar. See 13-1361 Pet. App. 73a-74a.

This Court again invited the Solicitor General to express the views of the United States. The government's brief informed the Court that the State Department had received a letter from the Office of the President of Somalia identifying Somalia's State Attorney General, not the Prime Minister, as the official authorized to discuss immunity issues on behalf of the Government of Somalia. See 13-1361 U.S. Amicus Br. at 10, App. 6a. In a meeting with a State Department representative, the Somali State Attorney General communicated that Somalia did *not* wish to request immunity for Samantar (or for petitioner). See *id.* at 10, App. 4a.³ The State Department memorialized that communication in a diplomatic note to Somalia, and,

diating the letter. The United States informed the Court of those developments and explained that uncertainty concerning the status of the letter underscored the need for further diplomatic discussions. See 12-1078 Letter from Donald B. Verrilli, Jr., Solicitor Gen., to Scott S. Harris, Clerk of Court (Jan. 8, 2014).

³ Some communications to or from officials in Somalia regarding Samantar also addressed the question of immunity for petitioner in this case. See p. 10, *infra*.

receiving no objection, concluded that Somalia did not wish to assert immunity for Samantar. See *id.* at 11-12, App. 3a-5a.

In light of that development, the United States recommended that the Court deny certiorari. See 13-1361 U.S. Amicus Br. at 12. The United States explained that, although the court of appeals had erred in concluding that the Executive Branch's determination was not controlling and in crafting a categorical judicial exception to immunity, review was not warranted because the judgment below was consistent with the Executive Branch's determination that Samantar was not immune from suit. See *ibid.* This Court again denied certiorari. See 135 S. Ct. 1528 (2015).

2. a. Respondent is a Somali national who alleges that petitioner tortured and attempted to murder him because of respondent's membership in a clan opposed to the regime of Mohamed Siad Barre. See Pet. App. 26a-27a. Respondent alleges that he was abducted in 1987 at the behest of petitioner, who was an officer in the Somali National Army, and was then severely beaten on multiple occasions over the course of several months. See *id.* at 27a. He further alleges that, in early 1988, petitioner interrogated him, shot him five times, and ordered soldiers to bury his body—circumstances from which he escaped only because he appeared to be dead and later convinced the soldiers to release him in exchange for a bribe. See *ibid.*

Anticipating the overthrow of the Barre regime, petitioner fled Somalia in 1990 and entered Canada from the United States. See Pet. App. 27a. Canada deported petitioner to the United States, however. See *id.* at 27a-28a. The United States similarly intended to deport petitioner, but he voluntarily re-

turned to Somalia in 1994. See *id.* at 28a. Petitioner entered the United States again in 1996 and has resided here ever since. See *ibid.*⁴

b. After the collapse of the Barre regime in 1991, Somalia experienced widespread and protracted violence, with no single group maintaining control over the entire country. See generally Central Intelligence Agency, *The World FactBook: Somalia*, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last updated Jan. 12, 2017). There were numerous instances of foreign military intervention in Somalia, extensive clan-based fighting, and large numbers of displaced persons. Violent extremist organizations also moved into Somalia—including, in 2006, Al Shabaab, an al-Qaida-affiliated terrorist organization. See National Counterterrorism Ctr., *Counter Terrorism Guide, Groups, Al-Shabaab*, http://www.dni.gov/nctc/groups/al_shabaab.html (last visited May 19, 2017). Al Shabaab conducted a violent insurgency in southern Somalia against the Somali authorities and their allies. See *ibid.* Over a number of years, however, Somali forces—with support from allied forces—largely degraded Al Shabaab’s control. See *ibid.* The United States provided extensive assistance to efforts to stabilize the affected regions and to assist Somali authorities’ efforts to promote stability and reconciliation. See Bureau of African Affairs, Dep’t of State, *Fact Sheet: U.S. Relations with Somalia*, <http://go.usa.gov/x9uGx> (last updated June 30, 2016) (*Fact Sheet*).

⁴ Throughout this brief, references to residency are not intended to connote immigration status, but merely to refer to any person who is physically present in the United States.

On January 17, 2013, as noted above, the United States recognized a Government of Somalia for the first time since 1991. *Fact Sheet*.

3. In 2004, respondent brought this action in the Eastern District of Virginia under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73, and the Alien Tort Statute (ATS), 28 U.S.C. 1350, alleging that petitioner “is liable for engaging in attempted extrajudicial killing, torture, degrading treatment, arbitrary detention, crimes against humanity, and war crimes.” See Pet. App. 28a. The district court stayed the suit for extended periods “to give the United States Department of State an opportunity to express its views” and “to give the Supreme Court an opportunity to decide related issues in a companion case, *Samantar v. Yousuf*.” Pet. App. 28a. The district court lifted its final stay in April 2014, after receiving a statement of interest from the United States explaining that the government was “not in a position to present views to the Court concerning this matter at this time.” *Ibid.* (quoting statement of interest); see D. Ct. Doc. 85 (Apr. 24, 2014) (statement of interest notifying the district court of ongoing diplomatic engagement with Somalia in the wake of the January 2013 recognition of the Somali government).

The district court denied petitioner’s motion to dismiss respondent’s TVPA claims, see Pet. App. 32a-49a, rejecting petitioner’s argument that he is immune from suit because respondent “seeks to hold him liable for acts committed pursuant to his official duties as a Colonel in the Somali National Army,” *id.* at 40a. That argument, the district court ruled, is “squarely foreclosed” by the categorical rule, announced by the

court of appeals in *Samantar II*, “that a foreign official exceeds the scope of his authority any time he engages in an act that violates *jus cogens* norms.” *Id.* at 41a (citing 699 F.3d at 777). The district court concluded that because respondent’s TVPA claims allege a violation of *jus cogens* norms, the common law “affords [petitioner] no immunity.” *Id.* at 42a.

4. Petitioner appealed the district court’s denial of his motion to dismiss the TVPA claims. In December 2014, while the parties were briefing the appeal, the State Department memorialized—in the same diplomatic note to Somalia that addressed *Samantar*, see pp. 6-7, *supra*—its understanding that Somalia did not seek immunity for petitioner. See 13-1361 U.S. Amicus Br. at App. 3a-5a. As noted above, the State Department received no objection from Somalia in response.

Without seeking the views of the United States, the court of appeals affirmed the district court’s denial of the motion to dismiss the TVPA claims. See Pet. App. 53a-79a. The court of appeals agreed with the district court’s conclusion that circuit precedent precludes petitioner’s claim of foreign official immunity for alleged violations of *jus cogens* norms. The court of appeals noted that petitioner did “not contest that the misdeeds alleged in the complaint violate *jus cogens* norms,” and it declined to overrule the holding in *Samantar II* that foreign official immunity cannot be claimed “for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.” *Id.* at 78a (quoting *Samantar II*, 699 F.3d at 777); see *id.* at 79a.

5. After this Court invited the Acting Solicitor General to express the views of the United States in

this case, petitioner’s counsel furnished to the Acting Solicitor General a letter dated November 23, 2016, apparently from H.E. Omar Abdi Rashid Ali Sharmarke, then the Prime Minister of the Federal Republic of Somalia, addressed to Secretary of State Kerry. The letter purported to confirm that the conduct for which respondent sued petitioner was undertaken in petitioner’s official capacity, and to request that the United States file a suggestion of immunity in this litigation on petitioner’s behalf. See App., *infra*, 1a-5a.⁵ Because the State Department did not receive the November 23 letter through diplomatic channels, it engaged Somalia diplomatically to attempt to authenticate the letter and to verify that the letter represented Somalia’s position concerning petitioner’s immunity.

In response to the State Department’s efforts, Hassan Sheikh Mohamud, then the President of Somalia, sent the Secretary of State a letter dated January 8, 2017, through diplomatic channels. See App., *infra*, 6a-8a. The letter states that the Federal Republic of Somalia has a national policy of “non-interference in foreign State courts, be it civil, criminal and administrative matters regarding persons living in their countries.” *Id.* at 7a. The letter further states that petitioner “doesn’t have nor is entitled to Somali Government [i]mmunity,” and it requests that the United States file a statement of interest in this litigation “to execute this waiver of immunity.” *Id.* at 8a.

⁵ The United States is providing the parties with electronic copies of the original documents that are reproduced in the Appendix to this brief and formatted in accordance with Supreme Court Rule 33.1.

The State Department has informed this Office that it has concluded that the letter from President Mohamud, transmitted to the State Department through diplomatic channels, represents the position of the Government of Somalia with respect to petitioner's immunity. The State Department has further informed this Office that because the Somali Government did not communicate Prime Minister Shar-marke's letter diplomatically, the State Department does not recognize that letter as expressing the view of the Government of Somalia. In light of Somalia's waiver of any immunity petitioner claims, the Executive Branch has determined that petitioner is not immune from respondent's suit.⁶

DISCUSSION

In the view of the United States, the petition for certiorari should be denied. The court of appeals in this case applied its decision in *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012) (*Samantar II*), cert. denied, 134 S. Ct. 897 (2014), which created a categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms. As the United States explained in its briefs to this Court in the *Samantar* case, the court of appeals committed two critical legal errors in creating that exception. First, the court erred in holding that the Executive Branch's position on whether a foreign defendant

⁶ In February 2017, Somalia elected Mohamed Abdullahi Mohamed as President. See Statement, Acting Spokesperson, Dep't of State (Feb. 8, 2017) (congratulating Mohamed Abdullahi Mohamed on his election), <http://go.usa.gov/x9SGY>. The State Department has informed this Office that it has no reason to believe that Mr. Mohamed's election alters Somalia's stated position concerning its waiver of any claim to immunity on behalf of petitioner.

should be afforded conduct-based official immunity is entitled only to “substantial weight.” *Id.* at 773. Second, the court erred in fashioning a categorical exception to foreign official immunity that the Executive Branch has not recognized. The court’s judicially created rule substantially impairs the Executive Branch’s authority and responsibility to make immunity determinations.

This Court should nevertheless deny review. Although the Executive Branch was not in a position to provide its views on petitioner’s claim to immunity while this case was pending in the lower courts because it was still engaged in diplomatic discussions with Somalia, the government of Somalia subsequently informed the State Department that it did not wish to assert immunity for petitioner, and the State Department has more recently received a diplomatic note communicating the President of Somalia’s decision to waive any claim by petitioner to immunity from suit. Following receipt of that note, the State Department determined that petitioner is not immune from respondent’s suit. The court of appeals’ judgment, which affirmed the district court’s denial of petitioner’s immunity, is therefore consistent with the Executive Branch’s determination that petitioner is not entitled to immunity. Moreover, the unusual posture of this case makes it a poor vehicle for this Court’s consideration of the question presented.

A. The Decision Of The Court Of Appeals Rests On Erroneous Circuit Precedent

1. Under this Court’s decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. That principle applies both to status-based and conduct-based

immunity, and the court of appeals erred in holding otherwise in *Samantar II*, which the court followed in this case.

a. In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA left in place the Executive Branch's historical authority to determine the immunity of foreign officials in the same manner as it determined the immunity of foreign states. See *id.* at 321-325. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and long has been, binding in judicial proceedings. See *id.* at 311-312. In *Ex parte Peru*, 318 U.S. 578 (1943), for example, the Court held that in suits against foreign governments, "the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction." *Id.* at 588 (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court instructed that it is "not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.* at 35; see, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-506 (2d Cir. 1971) (applying principles articulated by Executive Branch because

the Executive did not express a position); see also *Samantar*, 560 U.S. at 311-312.

b. In *Samantar II*, the Fourth Circuit drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations concerning conduct-based immunities, which the court erroneously considered itself free to second-guess. See 699 F.3d at 769-773.

This Court in *Samantar* did not distinguish between conduct-based and status-based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. See 560 U.S. at 311-312; see also *id.* at 308 (noting that *Samantar* was a former official, who would not have status-based immunity). Indeed, the two cases cited by this Court involving foreign officials—*Heaney*, 445 F.2d at 504-505, and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both concerned consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity.⁷ And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State De-

⁷ The conduct-based immunity of consular officials is now governed by the Vienna Convention on Consular Relations and Optional Protocol on Disputes (VCCR), *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. *Heaney* applied, in the alternative, the VCCR and immunity principles articulated by the Executive Branch. See 445 F.2d at 503-506.

partment's recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see *Samantar*, 560 U.S. at 321-322.

In concluding that conduct-based immunity determinations are not binding on the Judiciary, *Samantar II* relied on two law review articles for the proposition that the Executive's determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive's conduct-based determinations are not grounded on a similar "constitutional basis." *Samantar II*, 699 F.3d at 773. But this Court has long recognized that the Executive's authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, flow from the Executive's constitutional responsibility for conducting the Nation's foreign relations, without tying that authority to the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity "must be accepted by the courts as a conclusive determination by the political arm of the Government" that "continued retention of the vessel interferes with the proper conduct of our foreign relations"); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-361 (1955); see generally *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs").

The Executive's authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. See *Samantar*, 560 U.S. at 323. Although foreign state and foreign official immunity are not invariably coextensive in

scope, see *id.* at 321, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff’d*, 168 U.S. 250 (1897); see *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (foreign officials have immunity “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority”). As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate much the same considerations of comity and respect for other Nations’ sovereignty as suits against foreign states. See 65 F. at 579; see also *Heaney*, 445 F.2d at 503.

The deference owed to the Executive concerning conduct-based immunity determinations is, therefore, based on the constitutional principle of separation of powers. See *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (“[T]raditional ways of conducting government . . . give meaning to the Constitution.”) (citation and internal quotation marks omitted). In the absence of a governing statute such as the FSIA, it continues to be the Executive Branch’s role to determine whether current or former foreign officials are entitled to immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), *cert. denied*, 544 U.S. 975 (2005).⁸

⁸ The petition (Pet. 16-21) makes assertions about other nations’ treatment of certain questions relating to immunity for foreign officials. Compare *ibid.*, with Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Sup. Ct. Rev. 213, 240-241. The Execu-

2. The conclusion in *Samantar II* that the Executive’s immunity determinations are not binding in cases involving foreign-official conduct (rather than status) is closely related to another serious error in that decision: creation of a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms. 699 F.3d at 775-777. In this case, the court of appeals’ rejection of immunity for petitioner relied entirely on *Samantar II*’s erroneous holding that “foreign official immunity could not be claimed ‘for *jus cogens* violations, even if the acts were performed in the defendant’s official capacity.’” Pet. App. 78a (quoting *Samantar II*, 699 F.3d at 777); see *id.* at 79a.

a. The *per se* rule of non-immunity created by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically asked the court in *Samantar II* not to address the argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. U.S. Amicus Br. at 19 n.3, *Yousuf v. Samantar*, No. 11-1479 (4th Cir. Oct. 24, 2011). The court’s decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish “substantive law governing the exercise of the jurisdiction of the courts.” *Hoffman*, 324 U.S. at 36.

Indeed, both before and after this Court’s decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir.

tive may take such precedents into account, as appropriate, in identifying the principles that guide immunity determinations.

Mar. 5, 2004); U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv (2d Cir. Dec. 19, 2007); see also Suggestion of Immunity at 6, *Doe v. De León*, No. 11-cv-01433 (D. Conn. Sept. 7, 2012); Statement of Interest at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 10-cv-5381 (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 9, *Doğan v. Barak*, No. 15-cv-08130 (C.D. Cal. June 10, 2016). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Ye*, 383 F.3d at 626-627; *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23-24 (2d Cir. 2014); *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016), appeal pending, No. 16-56704 (9th Cir. docketed Nov. 14, 2016).

b. Respondent argues (Br. in Opp. 23-25) that a foreign official can never be immune from a suit involving allegations of *jus cogens* violations because such acts are “by definition, *ultra vires*” and so “cannot be officially ‘authorized’ by a state” (*id.* at 24). That argument is mistaken.

In *Samantar*, this Court unanimously held that courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before enactment of the FSIA. See 560 U.S. at 321-325; see also *id.* at 311-312 (concluding that if the Executive does not make an immunity determination in a particular case, the court is to look to principles articulated by the Executive Branch rather than independently creating its own standard). In making conduct-based immunity determinations, the Executive Branch considers whether to credit a foreign state's representation that the

defendant's conduct was undertaken in his or her official capacity. See *Doğan*, WL 6024416 at *3, *9 (discussing diplomatic note endorsing defendant's conduct as acts taken in official capacity); *id.* at *7 (noting that State Department's suggestion of immunity was based on determination that suit challenged "exercise of [defendant's] official powers"). A categorical bar on conduct-based immunity whenever a plaintiff alleges a violation of a *jus cogens* norm, regardless of the foreign government's representations and the views of the Executive Branch, would unduly constrain the Executive's authority to determine the principles governing the immunity of foreign officials.

B. This Court Should Deny Certiorari

Although the court of appeals' controlling precedent is erroneous for the reasons stated above, its judgment affirming denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. As in *Samantar*, this Court's review therefore is not warranted, although review may be warranted in the future in an appropriate case raising similar issues.

1. Earlier in this litigation, the United States informed the district court that the government was "not in a position to present views to the Court concerning this matter at this time." Pet. App. 28a (quoting statement of interest). At that time, the government was still engaged in diplomatic discussions with the Somali Government, with which the United States had established diplomatic relations only the year before. The United States' diplomatic engagement with Somalia led to discussions in 2014 in which the representative of Somalia stated that Somalia did not seek immunity for petitioner—a statement that was

subsequently memorialized in a diplomatic note from the United States. See 13-1361 U.S. Amicus Br. at App. 3a-5a. More recently, discussions with Somalia resulted in a January 2017 letter from the then-President of the country, Hassan Sheikh Mohamud, which was sent to the State Department through diplomatic channels. See App., *infra*, 6a-8a. That letter waived any immunity petitioner might have claimed from this suit. The Executive Branch recognizes President Mohamud's letter as the official position of the Somali Government, and it accepts Somalia's waiver of any immunity from this suit, including any immunity its former official might have claimed.

Because the Executive Branch has now determined that petitioner is not immune from this suit, it is clear that the judgment of the court of appeals is consistent with the Executive Branch's determination, even if the rationale for the court's judgment is erroneous. In light of the unusual circumstances presented here— involving the need for extended diplomatic engagement with a newly recognized foreign government— review of the court of appeals' decision is not warranted.

2. As petitioner explains (Pet. 8-11), the Fourth Circuit's reasoning in *Samantar II*, on which the court of appeals relied in this case, is inconsistent with *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), and *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). In those decisions, which pre-dated this Court's decision in *Samantar*, the Second and Seventh Circuits held that no categorical exception to immunity exists in a case involving alleged violations of *jus cogens* norms, because courts must defer to an immunity determination by the Executive Branch in

such a case (as in other cases). See *Rosenberg*, 577 Fed. Appx. at 23-24 (following *Matar* and acknowledging conflict with Fourth Circuit); *Matar*, 563 F.3d at 13-15; *Ye*, 383 F.3d at 625-627 (involving a head of state); see also *Estate of Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, ¶ 106 (Can.) (recognizing conflict and declining to recognize a *jus cogens* exception to official immunity).⁹

An appellate decision holding that courts need not defer to the Executive’s immunity determination and applying a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would therefore warrant review by this Court at an appropriate time. The issue of the respective roles of the Executive Branch and the courts in identifying the controlling principles of foreign official immunity, in light of this Court’s determination that such immunity is “governed by the common law,” *Samantar*, 560 U.S. at 325, is working its way through the lower courts. See, e.g., *Doğan v. Barak*, No. 15-cv-08130, 2016 WL 6024416, at *10 (C.D. Cal. Oct. 13, 2016) (“Because the common law immunity inquiry centers on what conduct the *Executive* has seen fit to immunize, courts are not free to carve out such an exception.”) (citation omitted), appeal pending, No. 16-56704 (9th Cir. dock-

⁹ Contrary to petitioner’s contention (Pet. 10-11), *Belhas v. Ya’alon*, 515 F.3d 1279 (D.C. Cir. 2008), does not conflict with Fourth Circuit precedent. In *Belhas*, the court of appeals rejected a *jus cogens* exception to foreign official immunity under the FSIA, as a matter of statutory interpretation. See *id.* at 1287 (“[T]he FSIA contains no unenumerated exception for violations of *jus cogens* norms.”). The Fourth Circuit, by contrast, has concluded that courts have the authority to recognize a common-law exception to foreign official immunity. See Pet. App. 78a-79a; *Samantar II*, 699 F.3d at 776-777.

eted Nov. 14, 2016). This Court therefore may well have an opportunity to consider the issue in the future.

* * * * *

In sum, the court of appeals' judgment in respondent's favor is consistent with the Executive Branch's determination, arrived at in light of the views of the Somali government, that petitioner is not immune, and is consistent with the Somali government's waiver of immunity for petitioner. This therefore is a situation in which the United States, the foreign government concerned, and the court below have all reached the same conclusion as to immunity. Accordingly, correction of the errors in that court's reasoning would not alter its judgment. This Court should not grant review simply to correct the erroneous reasoning of the court of appeals' opinion. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (“[T]his Court reviews judgments, not opinions.”).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 2017

APPENDIX A

Jamhuuriyadda Federaalka Soomaaliya
Xukuumadda Soomaaliya
Xafiiska Ra'iisul Wasaaraha



(The Government of Federal Republic of Somalia)
Office of the Prime Minister

Ref.OPM/0000-942-/23/2016

Date: 23/11/2016

The Honorable John Forbes Kerry
United States Secretary of State
United States Department of State
2201 "C" Street, Northwest
Washington, District of Columbia 20520
United States of America

Dear Secretary of State Kerry:

The Federal Republic of Somalia presents its compliments to the US Department of State. On behalf of the Government of the Federal Republic of Somalia, I, Omar Abdi Rashid Ali Sharmarke, Prime Minister of Somalia, have the distinct honor and high privilege, by this letter, of requesting, urgently, pursuant to the powers vested in me by the Federal Republic of Somalia Provisional Constitution, adopted 1 August 2012, that you use your good offices to obtain immunity for Mr. Yusuf Abdi Ali, a former colonel in the Somali National Army, in the 1980s, in respect of certain civil litigation which is currently pending against him in the United States District Court for the Eastern District of Virginia (Alexandria Division), styled as: *Farhan Mohamoud*

(1a)

Tani Warfaa versus Yusuf Abdi Ali, Civil Action No. 05-701, which litigation is currently the subject of a Petition for a Writ of Certiorari to the Supreme Court of the United States, bearing Record No. 15-1464, and a Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court, bearing Record No. 15-1345 (“the Litigation”).

The Litigation was originally filed on 10 November 2004, as Civil Action No. 04-1361, by two individuals, then proceeding anonymously, said to reside in Somalia, who both claimed that they were specifically targeted by Mr. Ali and soldiers acting under his command of the Somali National Army’s Fifth Brigade, in the northern region of Somalia, because of their suspected support of rebel forces, and both allege that they were arrested, detained and tortured. Those claimants took a voluntary dismissal of their subject claims in April of 2005, and recommenced their suit against Mr. Ali, again proceeding anonymously, One of the claimants, identified in the Litigation as “Jane Doe”, dismissed her claims in 2014, and, in that year, the remaining claimant was obliged by the District Court to reveal his identity, namely Farhan Mohamoud Tani Warfaa, who contends in the Litigation, among other things, that he was shot multiple times by Mr. Ali at close range. Mr. Ali vigorously denies such allegations. As previously stated to you by my predecessor, His Excellency, Prime Minister Abdi Farah Shirdon, in an earlier diplomatic letter, dated 30 November 2013, the Government of the Federal Republic of Somalia is of the considered view that the Litigation is injurious to the historic, ongoing process of peace and reconciliation among clans and political factions within Somalia, which is being fostered by the Government of Somalia, the United Nations, and

other governments, including, not least, the United States, the unfortunate earlier failure of the United States to honor the Government of Somalia's request for immunity for the now deceased former Prime Minister of Somalia, Mohamed Ali Samantar, who was subjected to similar civil litigation in the same District Court, notwithstanding.

I am advised that the Litigation has had a long history in the courts, as adverted to above, dating back to 2004. For most of its duration, the subject proceedings were stayed in order to allow the United States Department of State an opportunity to state its views as to: (1) whether it objects to the action going forward on the ground that Ali should have immunity, and (2) whether fact discovery in Ethiopia would interfere with U.S. foreign policy. Over the decade that followed, upon successive requests from the District Court, the State Department responded, on two occasions, first, on 19 September 2013, and, again, on 24 April 2014, and, in each instance, declined to take an affirmative position on the matter. Thereafter, Mr. Ali moved to dismiss the Amended Complaint, asserting, among other things, that he was entitled to common law "official acts" immunity. The District Court thereafter, per its Order of 25 July 2013, denied Mr. Ali's claims of common law immunity, but also dismissed Mr. Warfaa's claims against Mr. Ali

premised upon the Alien Tort Statute, 28 U.S.C., § 1350, allowing the case to proceed under claims brought under the Torture Victims Protection Act of 1991, 28 U.S.C., § 1350 note. Both parties timely appealed from that ruling, and, on 3 February 2016, the United States

Court of Appeals for the Fourth Circuit affirmed the rulings of the District Court in all respects.

Mr. Ali then filed a Petition for a Writ of Certiorari with the Supreme Court of the United States on 2 May 2016, seeking review of his claim of common law immunity from suit, and, on 3 June 2016, Mr. Warfaa filed a Conditional Cross-Petition for a Writ of Certiorari, seeking review of the dismissal of his claims against Mr. Ali brought under the Alien Tort Statute. Thereafter, on 3 October 2016, the Supreme Court entered orders inviting the Solicitor General of the United States to file a brief expressing the views of the United States.

As adverted to above, by this letter, the Federal Republic of Somalia hereby affirms and ratifies Mr. Ali's plea of common law immunity from suit, finding that Mr. Ali's acts in question, as Commander of the Fifth Brigade of the Somali National Army, were all undertaken in his official capacity with the Government of Somalia, and would hasten to add that the Federal Republic of Somalia rejects the notion that Mr. Ali's action were contrary to the law of Somalia or the law of nations, much less that he may be fairly said to be liable under any of the theories propounded in the Amended Complaint filed in the District Court. To that end, the Federal Republic of Somalia specifically understands that this designation of immunity for Mr. Ali should come in the form of a Statement of Interest of the United States, to be submitted to the United States Supreme Court, the United States Court of Appeals for the Fourth Circuit, and the District Court, by the Attorney General, or his designee, pursuant to 28 U.S.C., § 517, and that the Department of State should move with dispatch to take all steps necessary to validate the

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immunity from suit to which Mr. Ali is entitled, as a former government official of Somalia, and obtain a dismissal of the subject civil proceedings against him.

On behalf of the Federal Republic of Somalia, I wish to stress the critical importance of the instant request, and our deep appreciation of the prompt attention of the Department of State.

Respectfully yours,

/s/ OMAR SHARMARKE
H.E. OMAR ABDI RASHID ALI SHARMARKE
Prime Minister
Federal Republic of Somalia

cc: Joseph Peter Drennan, Esquire, Counsel for Mr.
Yusuf Abdi Ali

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6a

APPENDIX B



Embassy of the Federal Republic of Somalia
Washington DC

Note No: 01-2017

The Embassy of the Federal Republic of Somalia presents its compliments to the Department of State of the United States of America and has the honor of transmitting the attached Diplomatic Note by President Hassan Sheikh Mohamud to Secretary John F. Kerry.

The Embassy of the Federal Republic of Somalia avails itself of this opportunity to renew to the Department of State the assurances of its highest considerations.

Washington, DC – Jan. 11, 2017



Embassy of The Federal
Republic of Somalia in
Washington DC

1705 DeSales Street NW, Suite 300, Washington DC
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www.somaliembassydc.net

APPENDIX C

Jamhuuriyadda Federaalka Soomaaliya
Xafiiska Madaxweynaha



Federal Republic of Somalia
Office of the President

Ref: JFS/XM/ 02/01/17

Date: Jan. 08, 2017

The Honorable John Forbes Kerry
United States Secretary of State
2201 *C* Street, Northwest
Washington, District of Columbia 20520
United States of America

Dear Secretary of State

The Federal Republic of Somalia presents its compliments to the State Department of the United States.

On behalf of the Federal Republic of Somalia as the President of the Federal Republic, I hereby notifying the Government of United States, pursuant to powers vested in me by the Provisional Constitution and other Laws of the Federal Republic of Somalia, and in reference to the Letter N.JS/XM/179/12/13 dated 28th December 2013 officially rescinds any previous letters providing immunity to any Somali national whose case is going through a US court.

I would like to confirm the National Policy of the Federal Republic of Somalia, as internationally recognized, is based on non-interference in foreign State courts, be

it civil, criminal and administrative matters regarding persons living in their countries.

In regard to the Immunity requested by Yusuf Abdi Ali, who was a former Army Colonel during General Mohamed Siyad Barre's Regime, I can confirm he doesn't have nor is entitled to Somali Government Immunity, therefore the Federal Republic of Somalia upholds its previous statement.

As previously stated in the letter of 28th December 2013 by the Somali Government which clearly indicates that the courts of the United States are appropriate for the litigation of such claims, so long as the defendant is subject to the personal jurisdiction of the courts in question and accordingly, the Federal Republic of Somalia hereby waives any claim of immunity asserted by the defendant in the said Civil Action.

To that end, the Federal Republic of Somalia respectfully requests the State Department to move forward with a dispatch to execute this waiver of immunity, by submitting a Statement of Interest of the United States of America.

On behalf of the Federal Republic of Somalia, I wish to stress the critical importance of the instant request and our deep appreciation of the prompt attention of your office.

/s/ OMAR SHARMARKE
**THE PRESIDENT OF THE FEDERAL
REPUBLIC OF SOMALIA
HASSAN SHEIKH MOHAMUD**

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