No. 08-1555

In The
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,

Respondents.

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

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In an action filed under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note, against a natural person who resides in the United States and who is a former official of a failed state, which action seeks damages from that individual for acts of torture, rape, and extrajudicial killings overseen by him under color of law of a foreign state, whether:

1. The Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-1611, extends a foreign state's immunity to an individual official of that state; and

2. Assuming the FSIA applies to individual officials, the law extends immunity to an individual who is no longer an official of a foreign state at the time the complaint is filed.

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JURISDICTION

Petitioner seeks review of a final decision of the court of appeals entered on January 8, 2009. Rehearing and rehearing en banc were denied on February 2, 2009. Petitioner filed this Petition on June 18, 2009. This Court issued an order on July 7, 2009 extending Respondents' time to file a response to the petition to, and including, September 3, 2009. 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, 28 U.S.C. §§ 1330, 1602-1611 (Pet. App. 78a-95a; Resp't App. 1-9), the Alien Tort Statute, 28 U.S.C. § 1350 (Pet. App. 96a), and the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (Pet. App. 97a-99a).

STATEMENT OF THE CASE

According to the Petition, this case raises two questions concerning the application of the FSIA: (1) whether FSIA immunity applies at all to natural persons who, like Petitioner, serve as officials of a foreign state; and (2) even if the FSIA does extend to individuals, whether it applies to this suit, where Petitioner is no longer an official of a foreign state. However, the issues presented are not that clean or

simple, for this case involves claims brought under the ATS and the TVPA against Petitioner/Defendant Mohamed Ali Samantar, who is a former official of the Somali regime of Major General Mohamed Siad Barre. Respondents/Plaintiffs seek to hold Petitioner liable for acts of torture, rape, and extrajudicial killing committed under Petitioner's oversight. This suit is brought solely against Samantar as an individual and not against Somalia, which notably has lacked a functioning central government since 1991 when Petitioner fled the country after the collapse of the Barre regime.

Given the above factual and legal circumstances, the resolution of the issues in this case will necessarily entail this Court's review not only of the FSIA but also the ATS and the TVPA as well as how those three statutes interact in circumstances where a former official of a now failed state has been sued for torture, rape, and extrajudicial killings.

A. Petitioner's Actions Giving Rise To Respondents' Claims

Respondents in this case were citizens of Somalia who suffered under the military dictatorship of General Barre, either as direct victims or as family members of others tortured and killed by government agents. Respondents allege that Petitioner, who served as a General in the Somali Army and as Minister of Defense during much of the time period relevant to this litigation and who controlled

members of the military, knew or should have known of the abuse and persecution Respondents and their family members suffered under the regime.

Respondent Bashe Abdi Yousuf, for example, was a young businessman who helped form a public service organization dedicated to improving education and health care in the Somali city of Hargeisa. In November 1981, he was abducted by government agents and taken to a detention center where he was tortured repeatedly over a period of several months. Among other things, Yousuf was subjected to electro-shock treatment and a torture called "the MIG,"[1] in which Yousuf's hands and feet were tightly bound together behind his back so that his body was pulled into a U-shape with his limbs high in the air. The torturers then placed a heavy rock onto his back, producing excruciating pain and causing the ropes to cut deeply into Yousuf's arms and legs. Yousuf was interrogated about the members and activities of his organization and told that the torture would end if he falsely confessed to anti-government crimes. He spent the next six years of his life in solitary confinement in near total darkness. Fleeing Somalia after his release, Yousuf arrived in the United States in 1991, and later became a naturalized United States citizen.

Respondent Jane Doe was taken from her home in July 1985 and detained for three months in a small

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[1] This method of torture is so named because the prisoner's body resembles the Somali Air Force's MIG aircraft.

cell, her left leg chained to the floor and her arms tied behind her back with wire. In addition to being regularly interrogated and tortured, Jane Doe was raped at least fifteen times by a man in a camouflage uniform after he cut open her vagina with fingernail clippers.[2] Jane Doe was later sentenced to life in prison. She spent three and a half years in solitary confinement before she was released and fled Somalia.

Throughout this time, Petitioner was a high-ranking government official in Somalia, having taken part in the 1969 coup led by Barre that seized power from the nation's democratically elected government. From about January 1980 to December 1986, Petitioner served as First Vice President and Minister of Defense of the Democratic Republic of Somalia. Around January 1987, he was appointed Prime Minister of Somalia, a position he held until approximately September 1990. Petitioner served as a General in the Somali Armed Forces throughout this time.

The Barre regime engaged in a decades-long oppression of disfavored social groups and political opponents – oppression that included widespread and systematic torture, arbitrary detentions, and extra-judicial killings against innocent civilians. These

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[2] As a child, Jane Doe was subjected to infibulation, a procedure commonly performed on Somali girls. Her vagina was sewn closed except for a tiny hole.

horrific acts, Respondents allege, were the natural and foreseeable consequences of a common, shared design and joint criminal enterprise on the part of the leaders of the Barre regime and the Somali Armed Forces. Samantar was a part of that criminal enterprise and shared its common goal to rid Somalia of certain groups, particularly non-ruling clans perceived as disloyal. As a General, Minister of Defense, and Prime Minister, Samantar shared command and control over the Somali military. Respondents further allege that at all relevant times Samantar failed or refused to take necessary measures to investigate and prevent these abuses, or to punish personnel under his command for committing such abuses.

In 1991, the Barre regime collapsed. Since then, there have been approximately 14 attempts to form a Somali government, but each has failed. Somalia currently has no functioning government, and the United States maintains no official presence there.

When the Barre regime fell, Samantar fled Somalia. He went first to Italy, and then came to the United States. He has enjoyed a comfortable retirement in Fairfax, Virginia since June 1997. Respondents subsequently found Samantar and in 2004 brought suit against him in federal court.

B. District Court Proceedings

On November 10, 2004, Respondents filed this suit in the United States District Court for the Eastern District of Virginia, alleging jurisdiction

pursuant to the ATS and the TVPA. Pet. App. 43a. The district court stayed proceedings while Petitioner urged the State Department to issue a Statement of Interest regarding his immunity. After two full years of silence and inaction by the Department despite Petitioner's efforts to secure federal government intervention (as often occurs in cases involving claims of foreign sovereign immunity), the court reinstated the case to the active docket. Pet. App. 44a. After Respondents filed a second amended complaint, Petitioner moved to dismiss for lack of subject matter jurisdiction, arguing that the FSIA granted him immunity. Pet. App. 44a-45a; *see* 28 U.S.C. §§ 1602-1611.

The district court granted Petitioner's motion to dismiss, holding that the FSIA applied to individuals as well as foreign states themselves. Pet. App. 47a. Respondents appealed.

C. Fourth Circuit Proceedings

The Fourth Circuit reversed the district court's judgment. Pet. App. 26a. First, the panel unanimously held that the FSIA does not grant immunity to individuals. Pet. App. 20a. The Fourth Circuit looked to the statute's plain text, which makes no mention of immunity as to individual officers or agents and only grants immunity to a "foreign state," defined as "includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C.

§ 1603(a). An "agency or instrumentality" is defined in section 1603(b) as "any entity":

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The absence of any explicit reference to individuals is telling, the Fourth Circuit determined, particularly when Congress conferred immunity on a "foreign state" by using terms and vocabulary that clearly refer to corporate and legal entities, not natural persons. For example, the term "separate legal person" is a term of art "laden with corporate connotations." Pet. App. 17a (citing *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983) ("The idea of a [s]eparate legal personality has been described as an almost indispensible aspect of the public corporation.") (internal quotation marks omitted)). Likewise, section 1603(b)(3) refers to "citizen[s]" under the federal diversity statute, 28 U.S.C. § 1332, "which govern[s] the citizenship of corporations and legal representatives of estates," and is "inapplicable to individuals" as "it is nonsensical to speak of an

individual, rather than a corporate entity, being 'created' under the laws of a country." Pet. App. 19a.

The Fourth Circuit concluded that the text shows Congressional intent that the FSIA should not apply to individuals. "If Congress meant to include individuals acting in [their] official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms." *Id.* at 18a (quoting *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005)). The legislative history further supports this conclusion: "'[S]eparate legal person' was 'intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name'." *Id.* at 20a (quoting H.R. Rep. No. 94-1487, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614) (internal quotations omitted). Thus, the court below held that "the district court erred by concluding that Samantar is shielded from suit by the FSIA." *Id.*

A majority of the court also held that even if individuals do fall under the FSIA, the statute does not shield former officials from the jurisdiction of United States courts. *Id.* at 25a.[3] Section 1603(b) of the FSIA is written in the present tense, defining an

[3] Judge Duncan joined in the panel's first holding and concurred in the judgment. Judge Duncan declined to join in the panel's second holding. Pet. App. 26a-27a.

"agency or instrumentality of a foreign state" as an entity "which *is* a separate legal person," "which *is* an organ of a foreign state [or] *is* [majority] owned by a foreign state," and "which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b) (emphasis added). In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court interpreted section 1603(b) to mean that a corporation maintained FSIA immunity only so long as the state continued to own a majority of its shares. *Id.* at 478. If, at the time of filing suit, the corporation was no longer majority state-owned, it did not qualify for immunity under the FSIA. *Id.* The panel majority held that if an individual could be an "agency or instrumentality" of a "foreign state" under the FSIA, then *Dole Food*'s reasoning would apply equally to that individual, as the plain text of the statute treated corporations no differently than other agencies or instrumentalities. Pet. App. 22a-23a. This fits with the purpose of sovereign immunity, which is not to prevent chilling effects on foreign governments, but to provide foreign states "some protection from the inconvenience of suit as a gesture of comity." *Id.* at 24a (quoting *Republic of Austria v. Altmann*, 541 U.S. 677, 709 (2004)) (internal quotation marks omitted).

The Fourth Circuit remanded the case to the district court for further proceedings. *Id.* at 26a.

REASONS FOR DENYING THE PETITION

This Petition presents a poor case for this Court's review because of the unique facts and particular legal claims involved. Petitioner is, for instance, a former official of a government that no longer exists in a country that has had no functioning government or central authority for the past 18 years. A ruling here may thus be limited to a very unusual, and easily distinguishable, set of facts. Furthermore, the Petition oversimplifies the complex legal issues in this case. Jurisdiction here is premised on the ATS and the TVPA, *not* on the FSIA, as were *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), and other like cases. To resolve the issues presented would thus require the Court to delve into the interactions among these three statutes – not to mention those cases like *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), interpreting those statutes.

The Petition cannot overcome this case's uniqueness and complexity as it presents no compelling arguments to justify granting review of the Fourth Circuit's well-reasoned opinion. Petitioner claims, for instance, that the circuits have disagreed on the question of whether the FSIA applies to former officials, but he bases that split in authority entirely on *dicta* in a single case. Petitioner also predicts that the Fourth Circuit's other holding – that the FSIA does not apply to individuals at all – will cause a tidal wave of litigation. The Seventh Circuit reached the same conclusion more than four years ago, however,

and Petitioner fails to proffer any evidence that a deluge of filings has occurred as a result. Petitioner further argues that this case presents an urgent matter implicating international comity and our federal Government's ability to pursue its foreign policy objectives, but omits mention of how – despite Petitioner's active two-year lobbying campaign – the Government has chosen not to intervene in this case (unlike other litigation where individual officials were sued).

Because this case presents unique factual and legal circumstances, and because it was in any case rightly decided, this Court should deny the petition.

I. THE UNIQUE CIRCUMSTANCES OF THIS CASE MAKE IT A POOR VEHICLE TO REVIEW THE QUESTIONS PRESENTED

The atypical facts of this case make it a poor vehicle for determining the rules of sovereign immunity that will apply to nations worldwide – nations in very different situations than Somalia. Indeed, the unique circumstances presented here will unduly complicate and limit the Court's holding.

Somalia has lacked a functioning government since 1991, when the Barre regime collapsed and Samantar fled the country. There is still no functioning central authority with territorial control over Somalia, despite approximately 14 attempts to establish one in the past 18 years. The Court will have to answer what has become of this former country's

sovereignty under the FSIA and how that status impacts the analysis here, particularly where Petitioner is a former official of a now failed state. And, unlike other cases in which it has intervened on an official's behalf, the State Department remained studiously silent in the face of two years' worth of concerted efforts from Samantar and two putative Somali governments for a statement of immunity for Petitioner. Indeed, these facts demonstrate that this suit does not strongly implicate the usual concerns that animate the doctrines of governmental and sovereign immunities – international comity and the United States' ability to conduct foreign policy. Thus, rather than clarifying the legal issues this Petition purports to ask, the facts of this case only raise more questions – questions that though not presented for review, still color and shape the legal analysis. The questions of when a state as a legal matter no longer exists, and what happens to that state's sovereign immunity, may be intellectually interesting, but they hardly make an ideal backdrop for determining the scope of the sovereign immunity granted to the rest of the world's nations.

Moreover, this case does not involve an attempt to punish a foreign government or to influence American foreign policy, two issues which often arise in the sovereign immunity context. Unlike *Terrorist Attacks*, 538 F.3d 71, for example, this case is not about reaching into any government's coffers. This is a suit against Petitioner individually; Respondents do not seek recovery from Somalia's treasury. And,

unlike *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), this litigation is not about changing or influencing U.S. foreign policy. Somalia is not a defendant, and this is not an attempt at an end-run around the FSIA.

Perhaps most importantly, this case is complicated by the fact that it is brought under the ATS and the TVPA, whereas other decisions regarding the FSIA's applicability to officials were premised on the FSIA alone, *see, e.g.*, *Terrorist Attacks*, 538 F.3d 71. Petitioner ignores these other two statutes in his Petition, thus presenting the Court with an oversimplified view of the case. To hold the FSIA applicable to Petitioner, this Court would also have to address the interactions among the three statutes – not to mention its recent holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which endorsed Respondents' understanding of the ATS and TVPA – and decide whether Congress intended the TVPA and ATS to permit federal claims against individual officials of a foreign state for acts of torture and extrajudicial killings. These issues further demonstrate what a poor vehicle this case offers for this Court's review.

II. THERE IS NO CIRCUIT SPLIT ON WHETHER FSIA IMMUNITY APPLIES TO FORMER OFFICIALS

The Fourth Circuit is the first and, to date, the *only* court to have decided the question whether, assuming FSIA immunity applies to government officials, those officials retain immunity even after

they have left office for acts taken while in office. Samantar claims that there is a circuit split on this question, but he cites only a single case to support this conclusion, the D.C. Circuit's recent decision in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), which expressly declined to decide the issue, *see id.* at 1284-85, 90. Samantar thus tries to manufacture a circuit split armed only with *dicta*. The argument is meritless, and review by this Court is unwarranted.

In *Belhas*, the plaintiffs argued that the FSIA does not apply to former officials. All three judges on the panel refused to decide the question, however, as plaintiffs had failed to raise it in the district court. *Id.* at 1284-85 ("We need not ultimately decide the merits of this argument, as it is not properly before us. . . . [T]his is not a proper case for us to decide this question of statutory interpretation."); *id.* at 1290 (Williams, J., concurring) ("Plaintiffs' failure to raise the argument before the district court provides ample ground for rejection, and I join the court on that point."). The panel's discussion of this issue was therefore nonbinding *dicta*. *See Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 352 n.12 (2005) ("Dictum settles nothing, even in the court that utters it."); *cf. Stickel v. United States*, 76 S. Ct. 1067, 1068 (1956) (Harlan, J.) (denying application for stay and continuance of bail and noting lower-court *dictum* "present[s] nothing reviewable by this Court"). Other than the present case, Petitioner cites no court of appeals to have addressed this issue, let alone decided it.

Review here would accordingly be premature. The Fourth Circuit's decision came down early this year, and the other circuits have not yet had time to confront the issue and determine whether to follow the Fourth Circuit's reasoning. Further consideration in the lower courts could help clarify and focus the issue for subsequent review by this Court, if a circuit conflict ever actually arises. Additionally, some of the issues tied up with this question in this case – the traditional scope of sovereign immunity and the potential application of the TVPA and ATS – add additional layers of complication and uncertainty that make this case unsuitable for this Court's review.

Finally, the Petition's inclusion of the question whether former officials fall within the FSIA's ambit hardly makes this a "better vehicle" for interpreting the law, as Samantar claims. In fact, it does precisely the opposite. The Fourth Circuit expressly decided this case on both grounds. If the first question alone is reversed, the second, narrower holding remains binding circuit precedent. *See United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485-86 (1924) ("[W]here there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is obiter [*dicta*], but each is the judgment of the court, and of equal validity with the other." (internal quotation marks omitted)). Reversal of only one of the holdings would have no effect and would impermissibly render the opinion an advisory one. *See* U.S. CONST. art. III, § 1; *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("We are not

permitted to render an advisory opinion, and if the same judgment would be rendered by the [lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.").

III. THE RECENT CIRCUIT SPLIT ON WHETHER THE FSIA APPLIES TO INDIVIDUALS DOES NOT REQUIRE IMMEDIATE RESOLUTION BY THIS COURT

While the Fourth Circuit expressly recognized a disagreement among the circuits on the question of whether the FSIA applies to individual officials, Pet. App. 14a-15a, the mere recognition of a split in authority does not mandate immediate review by this Court. Indeed, there are clear reasons that the Petition should be denied and the issue left to further discussion and consideration by the lower courts, after which review by this Court may be warranted.

First, the split in authority is of recent vintage. Only two circuit courts have examined the question since the Seventh Circuit created the circuit split less than five years ago – the Second Circuit in *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), a decision which this Court recently declined to review, *see Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___, 129 S. Ct. 2859 (2009) (No. 08-640) (June 29, 2009), and the Fourth Circuit's decision in this case. That so few courts that have had the opportunity to consider the differing approaches

alone is sufficient to deny the Petition here; the issue should be allowed to percolate through the lower courts.

Moreover, the Fourth Circuit's decision presents the most comprehensive and thorough statutory analysis of any of the courts that have examined whether the FSIA applies to individuals. The panel carefully considered the Act's plain language, structure, purpose, and legislative history: Its careful consideration stands in stark contrast to the reasoning of other courts, which have often simply cited to the Ninth Circuit's decision in *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), without further discussion. *See, e.g.*, *Belhas*, 515 F.3d at 1283; *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999). *Chuidian* itself devoted only two short paragraphs to statutory analysis. *See* 912 F.2d at 1100-01. Thus, the split rests on weak analytical underpinnings that courts will have to revisit in light of the Fourth Circuit's in-depth and thoughtful statutory interpretation. At the very least, this Court should defer review until other courts have considered the issue more fully.

IV. THE FOURTH CIRCUIT'S DECISION FOLLOWS THE CLEAR INTENT OF CONGRESSIONAL ENACTMENTS AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT

In refusing to apply the FSIA to individuals, the Fourth Circuit not only followed the clear intent of Congress as expressed in the plain meaning of the statute but also recognized, as *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), counsels, that the proper inquiry on remand is to focus on the two statutes that conferred jurisdiction and provided Petitioner's causes of action, namely the ATS and TVPA. Because the Fourth Circuit's decision comports with this Court's precedent, the Petition should be denied.

A. The FSIA Does Not By Its Plain Language Apply To Individual Officials

Using well-established tools of statutory construction articulated by this Court, the Fourth Circuit correctly analyzed the statutory text and purpose in concluding that the FSIA does not apply to individuals – a view that the United States has explicitly endorsed on inquiry from this Court. *See* U.S. Amicus Br. at 6, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___, 129 S. Ct. 2859 (2009) (No. 08-640) ("The text, structure, and history of the FSIA demonstrate that it was not intended to address the immunity of foreign officials."). Petitioner's

arguments do nothing to undermine the circuit's cogent analysis.

First, the Court should infer nothing from Congress's silence on the subject of individuals: this approach – "by saying Congress did not exclude individuals . . . therefore they are included" – "seem[s] upside down as a matter of logic." *Enahoro*, 408 F.3d at 882. But Petitioner attempts just these logical acrobatics. He concedes that the law does not explicitly confer immunity on individuals, but argues nevertheless that the definition of a "foreign state" in 28 U.S.C. § 1603 impliedly includes individuals because officials or employees of a foreign state are readily seen as an "agency or instrumentality" of a government. Pet. at 10. This runs counter to the corporate connotations inherent in the statute's language and definitions, as identified by the Fourth Circuit. Pet. App. 17a-18a. Further, the statute clearly mandates specific criteria that any entity claiming immunity as an "agency or instrumentality" of a foreign state must meet. 28 U.S.C. § 1603; *see also* H.R. Rep. No. 94-1487, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614 (each "criterion" in the definition of "agency or instrumentality" must be met in order to fall under the FSIA). A natural person undoubtedly could not qualify under the Act's very terms: an individual is not an "entity" which is a "separate legal person," which, in turn, is an organ of a foreign state or majority-owned by such state. 28 U.S.C. § 1603(b). Indeed, a person is not commonly thought of as an "agency or instrumentality" at all,

and had Congress intended to include individuals in the definition of "foreign state," it would have chosen an appropriate word or term – like "agent" or "official" – to make that intention plain. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means . . . what it says there."). As the Seventh Circuit observed:

> [I]f it was a natural person Congress intended to refer to, it is hard to see why the phrase "separate legal person" would be used, having as it does the ring of the familiar legal concept that corporations are persons, which are subject to suit. . . . If Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.

Enahoro, 408 F.3d at 881-82. Section 1603 simply does not contemplate the application of the FSIA to individual officials.

Petitioner's proposed construction of the law is also at odds with other provisions of the FSIA. Section 1605, for instance, carves out limited exceptions to sovereign immunity, including torts involving "injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment." 28 U.S.C. § 1605(a)(5). If, as Samantar posits, a "foreign

state" already includes individuals, the mention of officials and employees is superfluous and without purpose. *See, e.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Another FSIA provision, section 1608, establishes the exclusive methods of service of process under the FSIA. It permits various types of service on an agency and instrumentality of a foreign state, but these methods manifestly do not contemplate service on an individual. As the Fourth Circuit noted,

> service must be perfected "by delivery of a copy of the summons and complaint either to an *officer*, a *managing or general agent*, or to any other agent *authorized by appointment or by law* to receive service of process in the United States." . . . This language is strikingly similar to the general procedural rule for service on a corporation or other business entity. *See* FED. R. CIV. P. 4(h)(1)(B). The requirements for serving an individual, by contrast, can be found back in Rule 4(e) ("Serving an Individual Within a Judicial District of the United States"), or even Rule 4(f) ("Serving an Individual in a Foreign Country"). The fact that section 1608 uses language virtually identical to that found in Rule 4(h) for service upon corporate entities and fails to prescribe or refer to service provisions for individual defendants strongly supports our interpretation that "an agency

> or instrumentality of a foreign state" cannot be an individual.

Pet. App. 19a-20a (emphasis in original).

Undaunted by this pellucid textual evidence, Samantar points to the so-called "Terrorism Exception," 28 U.S.C. § 1605A, which creates a cause of action against foreign states and their officials, agents, and employees, as proof that the FSIA includes individuals in its grant of immunity. Pet. at 12-13. But Samantar rests his argument here on flawed reasoning. He cites, for instance, *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008), to support the claim that section 1605A makes specific reference to the "legal status" of individual officials acting on behalf of a state, which "evince[s] congressional recognition that claims against individual officials . . . must be brought within the confines of the FSIA." *Id.* at 84. Essentially, the term "foreign state," according to Petitioner, includes individuals acting on that state's behalf for immunity purposes, but because those same individuals cannot be designated "state sponsors of terrorism," when Congress enacted section 1605A, it wanted to make clear that the new cause of action would hold liable both foreign states, who were state sponsors of terrorism, and the individuals acting on that state's behalf for certain terrorist acts.

While this argument has some superficial appeal, this reading of the FSIA would render the statute internally inconsistent and lead to absurd results.

For instance, Petitioner's reading would create inconsistency as the term "foreign state" would mean two different things under section 1605A. "Foreign state" would first include individuals when stripping a "foreign state" of immunity, 28 U.S.C. § 1605A(a)(1) ("A foreign state shall not be immune. . . ."), but would then exclude individuals in the creation of a cause of action where the two concepts are specifically distinguished, 28 U.S.C. § 1605A(c) ("A foreign state that is or was a state sponsor of terrorism . . . and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable. . . ."). Samantar cannot explain why Congress would purposefully draft a law in this manner.

Petitioner's reading of the FSIA would result in other statutory inconsistencies that make the Fourth Circuit's logic and interpretation even more compelling. For instance, were individuals included in FSIA's definition of "agency," a foreign officer would be subject to suit *personally* for his or her state's commercial transactions, 28 U.S.C. § 1605(a)(2), and would be subject to punitive damages from which the foreign state is expressly exempted, *id.* § 1606. His personal property could additionally be used to satisfy terrorism-related judgments against the state itself. *Id.* § 1610(g)(1). As the federal government has noted, "It is difficult to believe that Congress intended . . . that the personal property of every official or employee of a state sponsor of terrorism would be available for execution to satisfy a terrorism-related

judgment against the state." U.S. Amicus Br. at 7, *Federal Ins. Co. v. Kingdom of Saudi Arabia*, 557 U.S. ___ (2009) (No. 08-640). Under Petitioner's reading of the statute, litigants would "have an obvious incentive to name as many individual foreign officials as possible as defendants, in order to maximize potential recovery and circumvent the FSIA's limitations on attachment and damages against the state." U.S. Amicus Br. at 17, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579). Samantar thus would place individuals in a decidedly unenviable position that is not warranted by the statute's text and purpose.

Petitioner is not saved by his contention that because a suit against an official is the "equivalent" of suit against that official's foreign state, a state must share its immunity with its officer. Pet. at 10-11. This argument proves too much. Courts, for instance, have long viewed a suit against an "agency or instrumentality" as the potential "equivalent" of a suit against the state. *See, e.g.*, *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 463 (1945); *Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400-01 (1979) ("[A]gencies exercising state power have been permitted to invoke the [Eleventh] Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself."). Yet, despite this case law, Congress deemed it necessary to detail specific requirements to resolve whether an "agency" falls within the FSIA. If

suits against a foreign government's agent or agency can both be tantamount to a suit against that government, it is unclear why Congress would choose to construct a careful and specific regime for determining an agency's immunity but not broach discussion about the FSIA's application to individuals. Petitioner offers no cogent explanation for why the statute would employ different language to effectuate the same result as to state agencies and agents.

Finally, Petitioner erroneously points to Congressional use of the verb "include" to define "foreign state" under the FSIA, *see* 28 U.S.C. § 1603, as demonstrating that the definition is merely illustrative and not exhaustive. But the use of "include" in section 1603 pertains to the exception it specifically identifies. The term "foreign state" under section 1603 "includes" such state's agencies and instrumentalities in all of the FSIA's provisions *except* 28 U.S.C. § 1608, which deals with service of process. In section 1608, the law provides for different means of effectuating service as to "foreign states" and an "agency or instrumentality" thereof, and accordingly the statute must make clear that "foreign state" does not "include" that state's "agency or instrumentality." *See* H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6613 ("In section 1608, the term 'foreign state' refers only to the sovereign state itself."). Without this exception, the service provisions regarding agencies and instrumentalities would be mere surplusage. The purpose of "include" in section 1603, therefore, is directly attributable to Congress's careful delineation

between states and their agencies for service of process and not an attempt to indicate that the definition of "foreign state" in section 1603 is incomplete.

In short, the immunity granted to "foreign states" under the FSIA does not apply to individuals.

B. The Decision Below Is Consistent With This Court's Holding In *Sosa v. Alvarez-Machain*, The ATS, And The TVPA

Having correctly determined that the FSIA does not apply to a former individual military official, the Fourth Circuit's decision to reverse the dismissal and remand the case properly comports with the holding in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004), and is consonant with congressional intent behind the ATS and TVPA.

In *Sosa*, this Court found that Congress provided "a clear mandate . . . that establish[es] an unambiguous and modern basis for federal claims of torture and extrajudicial killing" through the enactment of the ATS and, more recently, the TVPA. *Id.* at 728 (internal quotation marks omitted). Carefully reviewing the history of both statutes, *id.* at 712-38, this Court confirmed that enactment of the TVPA affirmed and broadened the ATS's jurisdictional reach to include individuals engaging in torture and extrajudicial killing. Indeed, Congress made it clear that former government officials are not entitled to FSIA immunity from suit for their involvement in torture and extrajudicial killing under the TVPA. *See* S. Rep.

No. 102-249, at 8-10 (1991), 1991 WL 258662, at *7-8; *see also* H.R. Rep. No. 102-367(I), at 4-5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87-88 ("Only 'individuals,' not foreign states, can be sued under the bill."). The TVPA, after all, uses the term "individual," making crystal clear that foreign states and their agencies or instrumentalities cannot be sued under this bill under any circumstances, but only individual persons. Thus, the TVPA, enacted over a decade after the FSIA, is not meant to be thwarted by the FSIA:

> [T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation. . . . [T]he FSIA should normally provide no defense to an action taken under the TVPA against a former official.

S. Rep. No. 102-249, at 8 (1991), 1991 WL 258662, at *6; *see Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) ("Specific statutory language should control more general language when there is a conflict between the two.").

At the same time, the *Sosa* Court explicitly endorsed the Second Circuit's pathbreaking ATS case, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), in which the ATS was found to provide jurisdiction to hear claims against a former Paraguayan army officer who had committed numerous atrocities while in office. *See Sosa*, 542 U.S. at 730-31. Indeed, any doubt as to the jurisdiction conferred by the ATS in

certain cases involving torture and extrajudicial killing was, as the *Sosa* Court observed, removed by congressional enactment of the TVPA, in which the Legislature affirmed and codified the holding in *Filartiga*. *Sosa*, 542 U.S. at 731. The case at bar presents very similar claims of inhumane treatment leveled against a former official for actions taken during his tenure in office that exceeded the scope of his legal authority. *See Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) ("Congress intended to adopt the doctrine of command responsibility from international law as part of the [TVPA]." (citing S. Rep. No. 102-249, at 9 (1991), 1991 WL 258662, at *7; *In re Yamashita*, 327 U.S. 1 (1946))). In permitting the suit to go forward, the Fourth Circuit was following the clear dictates of this Court and Congress through the TVPA and ATS.

C. The Fourth Circuit's Reasoning That Immunity Must Be Evaluated Based On The Facts At The Time Of Suit Comports With Supreme Court Precedent

The Fourth Circuit correctly held that even if individuals do fall under the FSIA, the statute does not shield former officials from the jurisdiction of United States courts. Pet. App. 25a. This holding follows from the text and intent of the FSIA, as well as this Court's decision in *Dole Food Co. v. Patrickson*, in which a unanimous Court held that a corporate defendant is covered under FSIA only if it

qualifies as an "agency or instrumentality" of a foreign state at the time the suit was filed. 538 U.S. 468, 478 (2003).

Both the Fourth Circuit and *Dole Food* started with the text of the statute. Section 1603(b) defines "agency or instrumentality" entirely in the present tense. An agency or instrumentality of a foreign state is an entity "which *is* a separate legal person," "which *is* an organ of a foreign state [or] *is* [majority] owned by a foreign state," and "which *is* neither a citizen of a State of the United States as defined in section 1332(c) and (e)." 28 U.S.C. § 1603(b)(1)-(3) (emphasis added). The Court in *Dole Food* read this language to mean what it said: "[T]he plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed." 538 U.S. at 478.

This use of the present tense fits with the jurisdictional nature of sovereign immunity. *See id.* It is a "longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought' "; the FSIA's text similarly provides that FSIA immunity status is to be determined by the facts at the time of suit. *Id.* (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) (internal quotation marks omitted). This principle also applies equally to this case, as jurisdiction for both corporations and individuals (assuming an individual comes under the FSIA as an "agency or instrumentality" at all) depends on the facts at the

time suit is filed, not at the time of the acts giving rise to the action.

Samantar tries to distinguish *Dole Food* by pointing out that it construed only subpart (2), which deals with an entity "which is an organ of a foreign state . . . or a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2); *see* Pet. at 14-16. But as the Fourth Circuit noted, "this argument knocks the legs out from under his own contention that the FSIA applies to individuals." Pet. App. 22a. To be an "agency or instrumentality of a foreign state," Samantar must satisfy all three subparts of section 1603(b), including subpart (2), interpreted by *Dole Food*. Either subpart (2) applies to Samantar, in which case *Dole Food* applies, or subpart (2) does not apply, in which case Samantar cannot be an agency or instrumentality. Further, *Dole Food*'s rationale applies equally to the definition's other clauses, each of which is subject to the same textual analysis. Pet. App. 23a. Nothing in the statutory text suggests a distinction between corporations and any other "agency or instrumentality" on either point.

Recognizing this, Samantar does not press the statutory text and ironically ends up leaning on the differences between corporations and individuals instead. Pet. at 13-15. Even assuming that Petitioner is correct that individuals fall within the ambit of the FSIA, Petitioner fails to show why being an individual would require a different result here. A state can act only through others, whether corporations or

individuals. Both corporations and individuals can act independently from the state, and both can act on behalf of the state. The "transformation" from public to private actor can occur just as readily for individuals as for corporate entities. The mere fact of a corporation being 50.1% or 49.9% owned by the state makes no substantial difference on the "direct and immediate impact on the foreign state's treasury." Pet. at 15. By stating that "no similar transformation occurs when an official leaves office," *id.*, Samantar simply assumes the point he is trying to prove. A foreign state has a significant and direct interest in preventing damage awards against the corporations in which it owns an interest, just as that state has an interest in preventing judgments against its officials while they are in office when sued in their official capacity. But this does not explain why, under this reading, Congress's identical language means different things in different parts of the same statute.

This Court's decision in *Republic of Austria v. Altmann*, 541 U.S. 677, 709 (2004), buttresses the conclusion that FSIA immunity is to be decided based on the facts at the time of suit. In *Republic of Austria*, the Court held that the statutory exception to foreign sovereign immunity for "property taken in violation of international law," 28 U.S.C. § 1605(a)(3), applies to claims based on conduct that occurred before the enactment of this statute, despite the defendant's contention that at the time of the conduct, he would have been immune from suit. *See* 541 U.S. at 696.

The Court clarified that foreign sovereign immunity is determined at the time the suit is filed:

> [T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some *present* "protection from the inconvenience of suit as a gesture of comity."

Id. at 696 (quoting *Dole Food*, 538 U.S. at 479) (emphasis in original). Justice Breyer's concurrence puts the point more starkly: "[T]he legal concept of sovereign immunity, as traditionally applied, is about a defendant's *status* at the time of suit, not about a defendant's *conduct* before the suit." *Id.* at 708 (Breyer, J., concurring) (emphasis in original).

Accordingly, the Fourth Circuit correctly applied Supreme Court precedent.

V. EVEN IF THE FSIA APPLIES TO FORMER OFFICIALS, IT DOES NOT REACH THE CONDUCT ALLEGED HERE

Even were this Court to decide both questions in Petitioner's favor, the result would not change. Determining that the FSIA applies to former officials does not settle the question of jurisdiction here. Under

settled principles of law, the district court will still have jurisdiction over this suit because Samantar's acts were outside of his lawful authority.

It is well established that FSIA immunity does not cover acts that exceed the scope of one's lawful, official authority. Even *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095 (9th Cir. 1990), recognizes this principle. *See id.* at 1106 ("'[W]here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.'" (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949))); *see also Jungquist v. Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (The inquiry as to whether an act falls within an official's lawful authority has two parts, "focus[ing] on the nature of the individual's alleged actions [and] whether the [official] was authorized in his official capacity."); *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388-89 (5th Cir. 1999) ("The FSIA's protections cease, however, when the individual officer acts beyond his official capacity."); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 308 (9th Cir. 1997) ("If the foreign state has not empowered its agent to act, the agent's unauthorized act cannot be attributed to the foreign state; there is no 'activity of the foreign state'" for FSIA purposes.); *Hilao v. Estate of Marcos*, 103 F.3d 767, 777 (9th Cir. 1996) ("[A] higher official need not have personally performed or ordered the abuses in order to be held liable" under the TVPA. "[R]esponsibility for torture, summary execution, or

disappearances extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." (quoting S. Rep. No. 102-249 at 9 (1991), 1991 WL 258662, at *7) (quotation marks omitted) (alteration in original)); *Doe v. Liu Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (no immunity where China "appears to have covertly authorized but publicly disclaimed the alleged human rights violations").

An official's lawful authority is bounded both by the laws of his country and by customary international law. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004). Petitioner's actions clearly violated both limitations. The Somali Constitution during Barre's regime itself purported to outlaw rape, torture, and extrajudicial killings by the government. *See* CONSTITUTION OF THE SOMALI DEMOCRATIC REPUBLIC art. 27.1 (prohibiting the use of torture); *id.* at art. 25.2 (prohibiting extrajudicial killings); *id.* at art. 26.2-26.3 (prohibiting arbitrary detention); *id.* at art. 19 (requiring Somalia to follow customary international law). Such acts are never within the scope of lawful, official authority for any office Petitioner held. *See Cabiri v. Assasie-Gyimah*, 921 F. Supp. 1189, 1198 (S.D.N.Y. 1996) (FSIA inapplicable because acts of torture fall "outside the scope" of defendant's official authority); *Xuncax v. Gramajo*, 886 F. Supp. 162, 175-76 (D. Mass. 1995) (FSIA inapplicable because acts of torture, summary execution, arbitrary detention, disappearance and cruel, inhuman or degrading

treatment "exceed anything that might be considered to have been lawfully within the scope of Gramajo's official authority"). The courts have also recognized these acts as violations of customary international law. *See Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (cited with approval in *Sosa*, 542 U.S. at 732); *Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995) ("[O]fficial torture is prohibited by universally accepted norms of international law, and the Torture Victim Act confirms this holding and extends it to cover summary execution." (emphasis and internal citation omitted)). Petitioner is thus not entitled to protection under the FSIA regardless of how the questions presented here are decided, and review accordingly would not change the outcome of the case.

VI. THE FOURTH CIRCUIT'S DECISION WILL NOT "OPEN THE FLOODGATES" OF LITIGATION

Petitioner also urges this Court to grant review to prevent "artful pleading" against officers of a foreign state that will "swallow the 'rule' prohibiting actions against foreign states." Pet. at 17. The Fourth Circuit's decision will not only open the floodgates to increased litigation, Petitioner argues, but also will harm international comity and the ability of the federal government to execute its foreign policy goals. But the evidence for this Pandora's Box is sorely lacking. Petitioner cites only "a Westlaw search" he performed – without providing any details that would allow independent corroboration. *Id.* at 17 n.1. Even

assuming that there has been an increase in suits against foreign officials, Samantar fails to show that this increase is statistically significant and not simply concomitant with the general increase in litigation over the last three decades. *See* U.S. Courts, Judicial Facts and Figures 2007, tbls. 4.1 and 4.4, *available at* http://www.uscourts.gov/judicialfactsfigures/2007/all2007judicialfactsfigures.pdf (charting number of civil suits filed from 1990 to 2007); Thomas H. Cohen, Office of Justice Programs, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin No. NCJ 208713, Federal Tort Trials and Verdicts, 2002-03 (Aug. 2005), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv03.pdf (charting tort cases terminated in federal district courts from 1970 to 2003).

Further, Petitioner fails to account for the Seventh Circuit's 2005 decision finding that the FSIA does not apply to individuals and allowing suits against officials, like the former President of Nigeria, to go forward. *See generally Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005). The Fourth Circuit cannot "open the floodgates" – they are already open – and Petitioner does not even try to show that *Enahoro* resulted in anything like the flood of litigation predicted here. On these grounds alone, Petitioner's "floodgate" arguments are unfounded and do not militate in favor of this Court's review of the case.

In reality, plaintiffs' ability to bring civil actions against human rights abusers still will be constrained by the Article III requirement that a court have

personal jurisdiction over any defendant. The federal long-arm provision that Petitioner claims will enable this flood is in fact a narrow one; it applies only in federal cases where a defendant is a non-resident of the United States, and has minimum contacts with the United States as a whole, but also has insufficient contacts with any state to support jurisdiction. *See* FED. R. CIV. P. 4(k)(2). This "narrowly tailored" provision was enacted in 1993 in response to the Supreme Court's suggestion in *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 111 (1987). *See* FED. R. CIV. P. 4(k), advisory committee's notes to 1993 amendments ("This paragraph corrects a gap in the enforcement of federal law [and] responds to the suggestion of the Supreme Court made in *Omni Capital*."). Far from applying in "virtually all suits," as Petitioner suggests, this provision will only apply in limited circumstances. In most cases, the defendant will either lack sufficient contacts with the United States as a whole, or – as in this case – will have sufficient contacts with at least one state to support personal jurisdiction in that state. Finally, and most importantly, Rule 4(k)(2) represents the policy decision of this Court, which proposed this very rule, and of Congress, who approved it. Samantar's quibble over the policy embodied in this rulemaking is with these bodies, not with the Fourth Circuit's decision implementing Congress's clear intent.

CONCLUSION

For the reasons cited above, the Petition should be denied.

Respectfully submitted,

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