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

REPLY FOR PETITIONER

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September 11, 2009

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REPLY FOR PETITIONER

I. THE COURTS OF APPEALS ARE DIVIDED ON IMPORTANT QUESTIONS UNDER THE FSIA THAT MERIT THIS COURT'S IMMEDIATE REVIEW

The Brief in Opposition concedes, as it must, that there is a "split in authority" that "the Fourth Circuit expressly recognized" about "whether the FSIA applies to individual officials." Opp. 16. The Second, Fifth, Sixth, Ninth, and D.C. Circuits hold that FSIA immunity extends to foreign officials, whereas the Fourth and Seventh Circuits hold that it does not. *Compare In re Terrorist Attacks on Sept. 11, 2001* ("*Fed. Ins. Co.*"), 538 F.3d 71, 85 (2d Cir. 2008), *cert. denied sub nom. Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); and *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), *with* Pet. App. 17a-20a; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

This 5-2 conflict among the circuits is important and warrants this Court's immediate intervention. The decision below contravenes the text, history, and purposes of the FSIA. *See* Pet. 10-13. If allowed to stand as the law of the Fourth Circuit, it will undermine the comity between the United States and other sovereigns that the FSIA was meant to ensure, *see, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), and will "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants,"

simply by suing a foreign official instead of the state itself, "to accomplish indirectly what the [FSIA] bar[s] them from doing directly." *Chuidian*, 912 F.2d at 1102.

Faced with this deep circuit split, Respondents make the lackluster argument that review should be denied because the split over whether the FSIA applies to foreign officials "is of recent vintage" and because the Fourth Circuit's "careful consideration" of the issue "stands in stark contrast" to the decisions of other courts, including *Chuidian*. Opp. 16-17. In fact, however, the split is mature and recurring, the issue having been definitively resolved by seven circuits over the last nineteen years, beginning with the Ninth Circuit's seminal opinion addressing the issue at length in *Chuidian*. *See* 912 F.2d at 1099-1103. Respondents' preference for what they call the Fourth Circuit's "careful consideration," instead of *Chuidian*'s, Opp. 17, provides no basis for denying review. To the contrary, the well-developed views on both sides of the split make this case the ideal vehicle to resolve the conflict.

The second Question Presented—whether FSIA immunity applies to *former* government officials—provides an additional reason for granting review. Respondents cannot deny that, at a minimum, this issue has engendered strongly divergent views (whether technically denominated as conflicting holdings or not) between the Fourth and D.C. Circuits. *See* Pet. App. 21a; *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008) (explaining that the argument that a former official "loses [the] protection [afforded by the FSIA] on the day he resigns or reaches the expiration of his term" "makes no

practical sense [and] would be a dramatic departure from the common law of foreign sovereign immunity, as codified in the FSIA"); *id.* at 1291 (Williams, J., concurring) (arguing that *Dole Food* does not support the argument that a former official loses FSIA immunity upon leaving office). *See also* Brief for the United States as Amicus Curiae at 9-10, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (08-640), 2009 WL 1539068 (Solicitor General's Br.) (describing the disagreement between this case and the D.C. Circuit's "holding" on this issue and explaining that "the D.C. Circuit concluded that the temporal rule of *Dole Food* does not apply to foreign officials").

Respondents also concede, as they must, that the Fourth Circuit's resolution of the "former official[]" question is a "holding" that constitutes "binding circuit precedent." Opp. 15. It is a holding that is inextricably intertwined with the threshold question, on which the circuits are divided, of whether FSIA immunity extends to individual officials at all. Thus, this is not a situation where a lower court's alternative holding on an unrelated issue might prevent this Court from reaching a certworthy question in the first place. *Cf. Abdur'Rahman v. Bell*, 537 U.S. 88 (2002) (Stevens, J., dissenting) (dismissing certiorari in habeas case out of concerns over possible procedural default). And it is a holding of enormous importance in its own right because it would eviscerate the FSIA and "have a significant impact on . . . the United States' relations with [foreign] state[s]" if the FSIA allowed a foreign official to be sued in U.S. courts for official acts the moment he leaves office. *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). For that reason, the

Solicitor General has described the "prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office" as "problematic" and "anomal[ous]." Solicitor General's Br. at 9. Indeed, "the Executive recognizes that foreign officials retain immunity for their official acts after leaving their positions and views any contrary rule as rife with potential to disturb foreign relations" and cause "very significant reciprocal implications in foreign courts for former officials of the United States." Brief for the United States as Amicus Curiae at 17-18, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579-cv).

Thus, this case presents one question on which seven courts of appeals are deeply divided and a second inextricably intertwined and profoundly important question on which the Fourth Circuit's holding differs from the views of the D.C. Circuit and the Executive Branch.[1] This Court should grant the

[1] Respondents question the importance of the Fourth Circuit's decision by quibbling over the number of additional lawsuits in which it will result. Opp. 35-37. But Respondents cannot deny that suits against foreign officials have increased significantly in recent years, and that the decision below will escalate this trend. What matters is not the precise number, but that the Fourth Circuit's decision will enable federal jurisdiction over suits against foreign officials that Congress intended to foreclose. Just as *Ex parte Young*, 209 U.S. 123 (1908), dramatically altered the viability of suits against state officials, the Fourth Circuit's decision will open the door to more suits against foreign officials than would be permitted under the overwhelming weight of authority followed by five other circuits. Moreover, in attempting to minimize the nationwide impact of the decision below, Respondents ignore cases in which Federal Rule of Civil Procedure 4(k)(2) has served as a nationwide long-arm statute eliminating the need for plaintiffs to comply with any one state's long-arm requirements. *See, e.g., Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005); *Touchcom, Inc. v.*

Petition to decide these related issues concerning the immunity that the FSIA affords to foreign officials.

II. RESPONDENTS MANUFACTURE ILLUSORY VEHICLE PROBLEMS THAT DO NOT WEIGH AGAINST THIS COURT'S REVIEW

Faced with these two certworthy questions, Respondents conjure up a series of alleged issues that they concede are "not presented for review" in this Court, but that they nonetheless contend "still color and shape the legal analysis" and weigh against granting the Petition. Opp. 12. These supposed vehicle problems are illusory and irrelevant.

First, Respondents argue that Somalia purportedly "lack[s] a functioning government" and is a "failed state." Opp. 11-12. Respondents offer no judicial authority or statutory argument about how internal political unrest in a foreign country can affect that state's FSIA immunity[2] or why such unrest makes

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Bereskin & Parr, 574 F.3d 1403, 1407-08, 1418 (Fed. Cir. 2009); *Progressive Games, Inc. v. Amusements Extra, Inc.*, 83 F. Supp. 2d 1185, 1193-96 (D. Colo. 1999). They likewise ignore that some statutes under which plaintiffs typically sue foreign officials expressly provide for nationwide service of process. *See* Pet. 18.

[2] Contrary to Respondents' argument, permitting federal jurisdiction over the claims against Petitioner in these circumstances would raise precisely the sorts of foreign-relations concerns that the FSIA was meant to obviate. As the Somali Transitional Federal Government ("TFG") wrote to the State Department, this lawsuit poses a "'danger to the reconciliation process in Somalia [by] hold[ing] a flame to past events and reviv[ing] old hostilities.'" Pet. App. 55a (quoting Feb. 17, 2007 letter from the TFG's Deputy Prime Minister and

this case "unique." Opp. 11-12. Moreover, the district court noted that Respondents waived the argument "that Somalia does not qualify as a 'state' for purposes of the FSIA," Pet. App. 47a n.12, and the Fourth Circuit expressly declined to reach this issue, Pet. App. 11a n.3. Therefore, as the case reaches this Court, there is no dispute over whether Somalia is a "foreign state" for purposes of the FSIA, 28 U.S.C. § 1603(a). In fact, Somalia bears all the indicia of a foreign state: the State Department recognizes Somalia as such, and Somalia maintains diplomatic relations with the United States and membership in the United Nations. *See* U.S. Dep't of State, Bureau of Intelligence & Research, *Fact Sheet: Independent States in the World* (July 29, 2009), http://www.state.gov/s/inr/rls/4250.htm; *see also* Permanent Mission of the Somali Republic to the United Nations, *Mission Personnel*, http://www.un.int/wcm/content/site/somalia/pid/3243 (listing Somalia's representatives to the United Nations); Pet. App. 54a (noting that "the Somali Transitional Federal Government . . . is supported and recognized by the United States").

Second, Respondents suggest that this case is unique because their purpose in bringing suit "does not involve an attempt to punish a foreign

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Acting Prime Minister, Salim Alio Ibro, to the State Department); *see also Belhas*, 515 F.3d at 1287 (explaining that where a former regime is no longer in power, "'our Government could have normal relations with the government of the day—unless disrupted by [a lawsuit against a former official in] our courts, that is'") (quoted source omitted).

government or to influence American foreign policy." Opp. 12-13 (citing *Federal Insurance Co.* and *Matar*). But the FSIA immunizes "foreign state[s]" from claims in U.S. courts regardless of the plaintiff's subjective motivation. *See* 28 U.S.C. § 1604. Moreover, Respondents offer no support for the purposes that they ascribe to *Federal Insurance Co.* and *Matar*, both of which involve claims, just like this case, for monetary damages from foreign officials. *See Fed. Ins. Co.*, 538 F.3d 71, *aff'g* 349 F. Supp. 2d 765, 794-95 (S.D.N.Y. 2005); *Matar*, 563 F.3d at 11-12. Indeed, cases in which plaintiffs, like Respondents, seek monetary damages from foreign officials are hardly unusual. *See, e.g.*, *Belhas*, 515 F.3d at 1281-82; *Enahoro*, 408 F.3d at 878-79; *Lizarbe v. Rondon*, No. PJM 07-1809, 2009 WL 2208159, at *1-2 (D. Md. Feb. 26, 2009); *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 35-36 (D.D.C. 2008).

Third, Respondents make the mystifying assertion that whereas this case "is brought under the ATS and the TVPA," thus purportedly requiring the Court to consider the interrelationship of these statutes with the FSIA, "other decisions regarding the FSIA's applicability to officials were premised on the FSIA alone." Opp. 13 (citing *Fed. Ins. Co.*, 538 F.3d 71). But cases against foreign officials that implicate the FSIA, including *Federal Insurance Co.*, are frequently brought under the TVPA and/or the ATS. *See Fed. Ins. Co.*, 538 F.3d 71, *aff'g* 349 F. Supp. 2d at 780; *see also, e.g.*, *Matar*, 563 F.3d at 10-11; *Belhas*, 515 F.3d at 1282; *Enahoro*, 408 F.3d at 878-79, 883; *Pugh v. Socialist People's Libyan Arab Jamahiriya*, No. Civ.A.02-02026 HHK, 2006 WL 2384915, at *1 (D.D.C. May 11, 2006); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 96-97 (D.D.C. 2005). In

all events, FSIA immunity does not vary depending on the type of suit being immunized. To the extent Respondents suggest, Opp. 27-28, that the FSIA does not apply at all to claims under the ATS or the TVPA, their argument is belied by the language of the FSIA, which confers immunity without regard for the source of the underlying cause of action; by decisions of this Court and others, *see Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 437-38 (1989); *Belhas*, 515 F.3d at 1289; and by legislative history, *see* S. Rep. No. 102-249, at 7 (1991) ("[T]he TVPA is not meant to override the [FSIA]."); H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88 (same).

Fourth, Respondents argue that, even if the FSIA applies to former officials, the district court would still have jurisdiction over this case because Petitioner's alleged acts were supposedly "outside of" his "official authority." Opp. 33. But the Fourth Circuit expressly declined to reach this argument, Pet. App. 11a n.3, and the district court rejected it, Pet. App. 53a-55a. As the district court explained, "[t]here is . . . no doubt that Samantar is being sued in his capacity as a former Minister of Defense and Prime Minister," and the complaint expressly sues Samantar in these official roles. Pet. App. 53a-54a. "Moreover, the Somali Transitional Federal Government, which is supported and recognized by the United States as the governing body in Somalia," has reaffirmed that the alleged actions "'would have been taken by Mr. Samantar in his official capacit[y].'" Pet. App. 54a-55a. Accordingly, this case is unlike those in which the FSIA may not extend to foreign officials for actions unrelated to their official duties, *see, e.g.*, *Jungquist*, 115 F.3d at

1028 (personal promise by foreign official to compensate plaintiff for injuries sustained in boating accident), or for official actions disclaimed by the foreign state, *see, e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9th Cir. 1994). Respondents' argument is thus both meritless and not properly before this Court.[3]

In sum, Respondents' arguments about the "color and shape [of] the legal analysis," Opp. 12, do not detract from the suitability of this case as an excellent vehicle to resolve the significant Questions Presented about the scope of individual immunity under the FSIA.

III. THE FOURTH CIRCUIT'S DECISION IS ERRONEOUS

Respondents devote the bulk of their Opposition to a series of inapposite arguments defending the Fourth Circuit's decision.

First, 28 U.S.C. § 1605(a)(5), on which Respondents rely, Opp. 20, actually undermines their argument. This provision creates an *exception* to sovereign immunity for certain torts "caused by . . . any official or employee of [a] foreign state." Of course, there would be no need for such an express exception to sovereign immunity if the FSIA did not

[3] To the extent Respondents argue even more broadly for a *per se* rule that official actions that allegedly violate international and/or domestic law are never immunized by the FSIA, they are wrong again. As the D.C. Circuit explained in rejecting this argument, reading such an exception into the FSIA would contravene Congress's intent and "'place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations.'" *Belhas*, 515 F.3d at 1287 (quoted source omitted).

apply to foreign officials in the first place. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 724 (1999) ("The handful of state statutory and constitutional provisions authorizing suits or petitions of right against States only confirms the prevalence of the traditional understanding that a State could not be sued in the absence of an express waiver, for if the understanding were otherwise, the provisions would have been unnecessary.").

Second, Respondents incorrectly assert that 28 U.S.C. § 1608, which they quote selectively, does not permit service on an individual. Opp. 21-22, 25-26. In fact, this provision authorizes service "in accordance with an applicable international convention on service of judicial documents," 28 U.S.C. § 1608(a)(2), (b)(2), a standard that plainly applies to individuals. *See also id.* § 1608(a)(3), (a)(4), (b)(3) (describing additional methods of service that are equally applicable to individuals and entities).

Third, Respondents find it anomalous that Petitioner's interpretation of the FSIA would purportedly subject foreign officials to personal liability for a state's commercial transactions, *id.* § 1605(a)(2); to punitive damages, *id.* § 1606; and to attachment of personal property to satisfy a terrorism-related judgment, *id.* § 1610(g)(1). Opp. 23-24. With respect to the former two provisions, there is no liability because nothing in these FSIA provisions expressly *authorizes* a cause of action against foreign officials. *See Republic of Austria v. Altmann*, 541 U.S. 677, 695 (2004). And, if such a cause of action did exist, foreign officials would be liable to an even *greater* extent under Respondents'

view that the FSIA does not apply to individual officials *at all*. With respect to § 1610(g)(1), the Antiterrorism Amendments to the FSIA authorize a cause of action against individual foreign officials for terrorism-related acts, 28 U.S.C. § 1605A(c), so it is hardly surprising or anomalous that the personal property of such officials would be available to satisfy a judgment.

Finally, Respondents' reliance on *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), Opp. 26-28, is misplaced because *Sosa* addressed the scope of the ATS *absent* any claim of foreign sovereign immunity. Likewise, this Court's decision in *Altmann*, which held that the FSIA applies to conduct that occurred prior to its enactment, 541 U.S. at 699-700, does not support Respondents' position. To the contrary, this Court's broad construction of the FSIA as a "comprehensive jurisdictional scheme" that "appl[ies] to *all* . . . claims of sovereign immunity" "regardless of when the underlying conduct occurred," *id.* at 697, 699 (emphasis added), suggests that immunity under the FSIA does not lapse when a foreign official leaves office.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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