No. ____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign state's immunity from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1604, extends to an individual acting in his official capacity on behalf of a foreign state.

2. Whether an individual who is no longer an official of a foreign state at the time suit is filed retains immunity for acts taken in the individual's former capacity as an official acting on behalf of a foreign state.

PARTIES TO THE PROCEEDING

The Petitioner is Mohamed Ali Samantar. Respondents are Bashe Abdi Yousuf, Aziz Mohamed Deria (in his capacity as Personal Representative of the Estates of Mohamed Deria Ali, Mustafa Mohamed Deria, James Doe I and James Doe II), John Doe I, Jane Doe I, and John Doe II.

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PETITION FOR WRIT OF CERTIORARI

Mohamed Ali Samantar respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 552 F.3d 371. An order denying rehearing and rehearing en banc (Pet. App. 76a-77a) is unreported.

The district court's memorandum opinion granting Petitioner's motion to dismiss the second amended complaint (Pet. App. 30a-63a) is unreported but available electronically at 2007 WL 2220579. The accompanying order (Pet. App. 64a) is unreported.

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. On April 23, 2009, the Chief Justice granted Petitioner's application for an extension of time to file a petition for writ of certiorari to, and including, June 18, 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 (FSIA), 28 U.S.C. §§ 1330, 1602-1606, 1608 (Pet. App. 78a-95a), 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

This case presents exceptionally important questions concerning the scope of federal jurisdiction over officials of foreign states. Specifically, this case presents two related questions that have divided the lower courts: first, whether FSIA immunity applies only to foreign states themselves, or also to individuals acting in an official capacity on behalf of foreign states; and second, whether such immunity for acts taken on behalf of foreign states while in office extends to individuals after they leave office.

These issues are vitally important because of the FSIA's role in ensuring comity between the United States and other nations. Indeed, if left to stand, the holding of the court below—that FSIA immunity does not extend to current or former foreign officials—threatens to eviscerate the FSIA altogether by allowing plaintiffs to obtain federal jurisdiction over virtually any action by a foreign state, simply by suing the responsible officer instead of the state itself. That result conflicts with the holdings of other circuits; contravenes the text, history, and purposes of the FSIA; and threatens to open the floodgates to claims concerning extraterritorial conduct by foreign nations.

A. District Court Proceedings

Petitioner Mohamed Ali Samantar was the First Vice President, Minister of Defense, and Prime Minister of the Democratic Republic of Somalia during the 1980s and 1990s. Pet. App. 30a. Respondents sued Samantar under the Torture Victim Protection Act of 1991 (TVPA) and the Alien Tort Statute, 28 U.S.C. § 1350, for actions taken in his official capacity on behalf of Somalia. Pet. App.

30a.

Respondents filed their complaint in November 2004 in the United States District Court for the Eastern District of Virginia. Pet. App. 43a. They alleged that the court had jurisdiction pursuant to 28 U.S.C. § 1350. The district court stayed proceedings so that the State Department could file a Statement of Interest regarding Samantar's entitlement to sovereign immunity. The court also ordered Samantar to provide monthly updates regarding the Department's position. Pet. App. 44a.

Samantar filed monthly reports to the district court indicating that the Department had the matter "still under consideration." Pet. App. 44a. After waiting two years for the Department to file a Statement of Interest, the court reinstated the case to the active docket. Pet. App. 44a. Respondents filed a second amended complaint, which Samantar moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Samantar was entitled to immunity under the FSIA, 28 U.S.C. §§ 1602-1611. Pet. App. 44a-45a.

The FSIA provides the sole basis for obtaining jurisdiction over a foreign state in a civil case brought in a U.S. court. *Arg. Rep. v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434-35 (1989). The FSIA immunizes "foreign state[s]" from "the jurisdiction . . . of the United States," unless the claim falls within one of the statute's specified exceptions. 28 U.S.C. §§ 1603(a), 1604. No party argued that any of the exceptions applied here. Pet. App. 46a-47a.

In interpreting the scope of the FSIA, the district court explained that, "'[a]lthough the statute is silent

on the subject, courts have construed foreign sovereign immunity to extend to an individual acting in his official capacity on behalf of a foreign state.'" Pet. App. 47a (quoting *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004)). Agreeing with a majority of courts of appeals, the district court held that because "'[c]laims against the individual in his official capacity are the practical equivalent of claims against the foreign state,'" FSIA immunity applies to foreign officials as well as states themselves. Pet. App. 47a (quoting *Velasco*, 370 F.3d at 399 (citing *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990))). Because Samantar was acting in his official capacity when he committed the acts alleged by Respondents, the district court concluded he was entitled to sovereign immunity and dismissed the complaint for lack of subject matter jurisdiction. Pet. App. 61a-63a.

B. Fourth Circuit Proceedings

The Fourth Circuit reversed. Pet. App. 26a. It concluded that FSIA immunity does not apply to foreign officials at all, and in any event does not apply to officials who had left office at the time that suit was filed against them. Pet. App. 20a, 25a.

In reaching this conclusion, the panel first surveyed the history of the FSIA. "When Congress enacted the FSIA in 1976," the Fourth Circuit explained, "it did so against a backdrop of foreign sovereign immunity jurisprudence spanning more than 150 years." Pet. App. 11a (citing *Amerada Hess*, 488 U.S. at 434 n.1). Before the FSIA was enacted, courts routinely "'deferred to the decisions of the political branches . . . on whether to take jurisdiction over actions against foreign sovereigns and their

instrumentalities.'" Pet. App. 12a (quoting *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486 (1983)). While the State Department previously recommended immunity for almost every sovereign, in 1952, the Department changed this policy and instead "adopted a restrictive theory of sovereign immunity." Pet. App. 12a (citing *Amerada Hess*, 488 U.S. at 434 n.1). "One consequence of [this] restrictive theory . . . was that 'foreign nations often placed diplomatic pressure on the State Department,' which still bore the primary 'responsibility for deciding questions of sovereign immunity.'" Pet. App. 12a (quoting *Verlinden*, 461 U.S. at 487). Congress enacted the FSIA in 1976 to "shift[] responsibility for deciding questions of foreign sovereign immunity from the Executive Branch to the Judicial Branch 'in order to free the Government from the case-by-case diplomatic pressures, [and] to clarify the governing standards.'" Pet. App. 12a (quoting *Verlinden*, 461 U.S. at 488).

But the panel noted that the statute includes "no explicit mention of individuals or natural persons, [so] it is not readily apparent that Congress intended the FSIA to apply to individuals." Pet. App. 14a. The panel acknowledged "the majority view clearly is that the FSIA applies to individual officials of a foreign state." Pet. App. 14a (citing *Chuidian*, 912 F.2d at 1099-1103; *In re Terrorist Attacks on Sept. 11, 2001 (Fed. Ins. Co.)*, 538 F.3d 71, 83 (2d Cir. 2008); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815-16 (6th Cir. 2002); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388-89 (5th Cir. 1999); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996)). It nonetheless followed the Seventh Circuit's contrary view, *Enahoro v. Abubakar*, 408

F.3d 877, 881-82 (7th Cir. 2005), and held that FSIA immunity does not extend to individuals. Pet. App. 17a-20a.

Noting that the FSIA immunizes both a "foreign state" and an "agency or instrumentality" of a state, the panel explained that an "'agency or instrumentality . . . ' is defined as an 'entity' that 'is a separate legal person, corporate or otherwise,'" Pet. App. 17a (quoting 28 U.S.C. § 1603(b)(1)), and this phrase is "laden with corporate connotations." Pet. App. 17a. "'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.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881-82). Because, in the panel's view, FSIA immunity does not apply to individuals, the panel held that "the district court erred by concluding that Samantar is shielded from suit by the FSIA." Pet. App. 20a.

The panel majority further held that, even if the FSIA applies to individuals, it does not apply to *former* government officials like Samantar. Pet. App. 21a. The panel rested this conclusion on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). "In *Dole Food*, the Dead Sea Companies corporation claimed immunity under the FSIA as an instrumentality of the State of Israel, which owned a majority share in parent companies of the [corporation] at the time of the events being litigated[,] but not at the time of suit." Pet. App. 21a. Under 28 U.S.C. § 1603(b)(2), an "'agency or instrumentality of a foreign state' means any entity . . . 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" (emphasis added). This Court held that "the plain text of this provision, because it is expressed in the present tense, requires that [the majority-ownership] status be determined at the time suit is filed." *Dole Food*, 538 U.S. at 478.

Relying on *Dole Food*, the panel concluded that an *individual's* status as an agency or instrumentality must similarly be determined at the time suit is filed. Pet. App. 22a-23a. The Fourth Circuit reasoned that, "like the 'ownership interest' clause at issue in *Dole Food*, the clause immediately preceding it is also expressed in the present tense. Under section 1603(b)(2), an entity can be an 'agency or instrumentality of a foreign state' only if that entity '*is* an organ of a foreign state or political subdivision thereof.'" Pet. App. 22a.

Additionally, the panel decided that declining to apply the FSIA to former government officials does not undermine the Act's purpose, "which has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit, but instead aims to give foreign states . . . some *present* protection from the inconvenience of suit as a gesture of comity." Pet. App. 24a (quoting *Rep. of Austria v. Altmann*, 541 U.S. 677, 696 (2004)) (internal quotation marks omitted).

The panel remanded the case to the district court for further proceedings, including on the question whether Samantar was entitled to common-law immunity. Pet. App. 25a-26a.

Judge Duncan concurred in part, explaining that

the panel's "conclusion that the FSIA does not apply to individuals is sufficient to resolve the case before us." Therefore, Judge Duncan did not join the panel "in reaching the question of whether and how [*Dole Food*] would apply to individual foreign officers." Pet. App. 27a.

Samantar filed a timely petition for rehearing and rehearing en banc, which the Fourth Circuit denied on February 2, 2009. Pet. App. 77a.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER FSIA IMMUNITY APPLIES TO INDIVIDUALS ACTING IN AN OFFICIAL CAPACITY ON BEHALF OF A FOREIGN STATE

The courts of appeals are divided on whether immunity under the Foreign Sovereign Immunities Act extends to foreign officials acting in an official capacity. The Second, Fifth, Sixth, Ninth, and D.C. Circuits have held that FSIA immunity extends to foreign officials. *See In re Terrorist Attacks on Sept. 11, 2001* (*Fed. Ins. Co.*), 538 F.3d 71, 85 (2d Cir. 2008); *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); *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997). In contrast, the Fourth Circuit and the Seventh Circuit have held that foreign officials are not entitled to FSIA immunity. *See* Pet. App. 17a-20a; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

The FSIA precludes claims against a "foreign

state" unless those claims fall within a specific FSIA exception. *See* 28 U.S.C. § 1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). The FSIA defines "foreign state" as follows:

> (a) "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
> (b) An "agency or instrumentality of a foreign state" means 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.

In the present case, the Fourth Circuit joined the Seventh Circuit in holding that the FSIA does not apply to individuals sued in their official capacity. The panel explained that § 1603(b)'s definition of "agency or instrumentality" is "laden with corporate connotations." Pet. App. 17a. "'Given that the phrase 'corporate or otherwise' follows on the heels of 'separate legal person,' we are convinced that the

latter phrase refers to a legal fiction—a business entity which is a legal person.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881). The court further reasoned that "'[i]f 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.'" Pet. App. 18a (quoting *Enahoro*, 408 F.3d at 881-82).

In contrast, the Second, Fifth, Sixth, Ninth, and D.C. Circuits have explained convincingly why the Fourth Circuit's analysis is inconsistent with the text, history, and purposes of the FSIA. First, an "agency or instrumentality" of a foreign state is readily construed to include "any thing or person through which action is accomplished," including individual officers of the state. *Fed. Ins. Co.*, 538 F.3d at 83; *see also Keller*, 277 F.3d at 815-16; *Byrd*, 182 F.3d at 388-89; *El-Fadl*, 75 F.3d at 671. Although § 1603(b)'s definition of "agency or instrumentality" "may not explicitly include individuals . . . neither does it expressly exclude them. . . . Nowhere in the text or legislative history does Congress state that individuals are *not* encompassed within the section 1603(b) definition . . . ." *Chuidian*, 912 F.2d at 1101; *see also Fed. Ins. Co.*, 538 F.3d at 83 (same).

Second, whether or not the phrase "agency or instrumentality" encompasses natural persons, FSIA immunity extends to foreign officials because "[i]t is generally recognized that a suit against an individual acting in his official capacity is the practical equivalent of a suit against the sovereign directly." *Chuidian*, 912 F.2d at 1101-02 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978)).

Because an individual's official acts are, by definition, acts of the "state," it is perfectly natural to read the FSIA's grant of immunity to "foreign state[s]" as encompassing those official acts by individuals. 28 U.S.C. § 1604. Furthermore, in defining the term "foreign state," the FSIA merely indicates that this term "*includes* an agency or instrumentality of a foreign state." *Id.* § 1603(a) (emphasis added). In this context, "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941).

Third, under the common-law principles that the FSIA codified, *see Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008), individuals who were sued in their official capacity were eligible for sovereign immunity. *See Fed. Ins. Co.*, 538 F.3d at 83 (citing *Chuidian*, 912 F.2d at 1101); *see also Chuidian*, 912 F.2d at 1099-1100 (common-law immunity extended to "'any . . . public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state[.]'" (quoting Restatement (Second) of Foreign Relations Law § 66 (1965))). "If in fact the Act does not include such officials, the Act contains a substantial unannounced departure from prior common law." *Chuidian*, 912 F.2d at 1101; *see also Matar v. Dichter*, 563 F.3d 9, 13 (2d Cir. 2009) (explaining that "[t]he FSIA is a statute that invade[d] the common law and accordingly must be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident") (citation and internal

quotation marks omitted); *Fed. Ins. Co.*, 538 F.3d at 83 (same).

Fourth, such a result would be contrary to the settled precept that statutes derogating sovereign immunity are strictly construed. *See Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (explaining that this Court has "frequently held . . . that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign"); 3 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 62:1 (7th ed. 2008) ("Even where the government is expressly included in a statute, the statute is kept within the narrowest possible limits to preserve sovereignty.").

Finally, the Fourth Circuit ignored amendments to the so-called terrorism exception of the FSIA that show that "Congress consider[s] individuals and government officers to be within the scope of the FSIA." *Fed. Ins. Co.*, 538 F.3d at 84. When Congress added the terrorism exception to the FSIA, it expressly referred to officials, employees, and agents. 28 U.S.C. § 1605(a)(7) (repealed 2008; pertinent language recodified at 28 U.S.C. § 1605A(a)(1)) (abrogating preexisting immunity in connection with, *inter alia*, the "provision of material support or resources . . . *by an official, employee, or agent* of [a] foreign state while acting within the scope of his or her office, employment, or agency" (emphasis added)); *id.* § 1605A(c) (creating private right of action against 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" (emphasis

added)). The reference by these amendments to officials, employees, and agents reinforces the conclusion that the FSIA applies to individuals. "If these individuals were not otherwise immune from suit pursuant to the FSIA, these provisions" creating an exception to individual immunity in limited circumstances "would be entirely superfluous." *Fed. Ins. Co.*, 538 F.3d at 84.

II. THE FOURTH CIRCUIT'S DECISION CREATES A CONFLICT OVER WHETHER FSIA IMMUNITY APPLIES TO FORMER GOVERNMENT OFFICIALS

The Fourth Circuit's holding that FSIA immunity does not apply to *former* officials (whether or not it extends to present foreign officials) conflicts with the D.C. Circuit's decision in *Belhas v. Ya'alon*, 515 F.3d 1279, 1285-86 (D.C. Cir. 2008). *See also* Brief for the United States as Amicus Curiae at 9-10, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, No. 08-640 (U.S. June 1, 2009), 2009 WL 1539068 (Solicitor General's Br.) (describing circuit split on this issue); *Fed. Ins. Co.*, 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008).

As described above, in concluding that FSIA immunity does not extend to former officials, the Fourth Circuit relied on this Court's decision in *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), which held that a *corporation*'s status as an "agency or instrumentality" of a foreign state must "be determined at the time suit is filed." *Id.* at 478. Analogizing an individual to a corporation, the Fourth Circuit concluded that an individual's status as a foreign official must likewise be determined at the time of suit.

The D.C. Circuit, in contrast, rejected this argument and concluded that FSIA immunity encompasses both current and former government officials. *See Belhas*, 515 F.3d at 1284-86. This conclusion is consistent with the FSIA's text, history, and purpose for several reasons. First, a former official is entitled to immunity under the FSIA without regard to the statute's definition of an "agency or instrumentality." As explained above, a suit against a foreign government officer in his official capacity is equivalent to a suit against the state itself. *Chuidian*, 912 F.2d at 1101; *see also Belhas*, 515 F.3d at 1286 ("Every act committed by a sovereign government is carried out by its officials and agents."). Thus, the statutory immunity for the "foreign state" itself shields government officers from liability for actions in their official capacity, *see* 28 U.S.C. § 1604, and *Dole Food* is inapplicable.

Second, *Dole Food* is inapposite because it only analyzed the majority-ownership prong of 28 U.S.C. § 1603(b)(2) and "never dealt with the acts of a government official" under the "organ of a foreign state" prong. *See Belhas*, 515 F.3d at 1286; *see also id.* at 1291 (Williams, J., concurring) (describing the differences between the majority-ownership and organ of a foreign state prongs of § 1603(b)(2)). "The status of a corporation at one time owned by a foreign state and an individual who was at one time an official of such a state are hardly the same." *Id.* at 1286 (majority opinion). In particular, "[t]he corporation and the state have at all times been entities wholly separate and distinguishable from each other and able to act without the presence or even existence of the other." *Id.* The FSIA extends immunity to such corporations that are currently

majority-owned because lawsuits against them have a direct and immediate impact on the foreign state's treasury. But the "impact on a foreign state of our exercising jurisdiction over a corporation it merely owned in the past is at best attenuated." *Id.* at 1291 (Williams, J., concurring). In fact, as soon as the corporation's ownership status changes, "even by the foreign state's ownership dropping to fractionally less than a majority of shares," it is immediately transformed into an ordinary private actor, entitled to no sovereign immunity. *Id.* (citing *Dole Food*, 538 U.S. at 478-80).

No similar transformation occurs when an official leaves office. "Every act committed by a sovereign government is carried out by its officials and agents. . . . [I]ndividual officials or agents must act as instrumentalities for anything actually to be done." *Id.* at 1286 (majority opinion). Unlike an act of a formerly-owned corporation, an act by an officer is readily attributable to the state itself. Lawsuits regarding such official acts directly impact the state, regardless of whether the individual continues to employed by the state. Thus, "an individual's . . . lack of immunity for actions undertaken on the state's behalf would have a significant impact on the foreign state and the United States' relations with that state." *Id.* at 1291 (Williams, J., concurring). "To allow the resignation of an official involved in the adoption of policies underlying a decision or in the implementation of such decision to repeal his immunity would destroy, not enhance . . . comity." *Id.* at 1286 (majority opinion).

Finally, holding that the FSIA only applies to

current officials "would be a dramatic departure from the common law of foreign sovereign immunity," which the FSIA codified. *Id.* at 1285. At the time the FSIA was enacted, the common law "made no distinction between the time of the commission of official acts and the time of suit." *Id.* "[I]t is unreasonable to assume that in enacting the FSIA, Congress intended to make such sweeping and counterintuitive changes to foreign sovereign immunity with the simple use of the word 'is.'" *Id.*

The Fourth Circuit's erroneous decision thus conflicts with the decision of the D.C. Circuit on the same issue, and warrants this Court's review.

III. THIS CASE PRESENTS A COMPELLING VEHICLE TO RESOLVE IMPORTANT QUESTIONS CONCERNING THE SCOPE OF FSIA IMMUNITY

This case presents a compelling vehicle to decide these two important and interrelated questions about the FSIA that have divided the lower courts.

A. The Important Issues Raised By This Case Merit This Court's Review

The issues raised by this case merit the Court's review because the Fourth Circuit's decision, if allowed to stand, will undermine the comity between the United States and other sovereigns that the FSIA was meant to ensure. *See Dole Food*, 538 U.S. at 479. "Recognizing the potential sensitivity of actions against foreign states, the FSIA aimed to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." *Fed. Ins. Co.*, 538 F.3d at 82 (citation and internal quotation marks omitted).

Even prior to the Fourth Circuit's decision, the number of suits brought in United States courts against foreign officials had already increased substantially in recent years. From 1976 to 1989, federal district courts decided nineteen cases that were filed against foreign government officials in U.S. courts. Between 1990 and 1999, this number increased to forty-six. Between 2000 and the present, ninety-nine such suits have been decided.[1]

The Fourth Circuit's decision will open the floodgates to even more litigation against foreign officials. As the Ninth Circuit has explained, if plaintiffs could obtain judicial review of virtually any act by any foreign government simply "by [the] artful pleading" of suing the responsible officer instead of the foreign state itself, the statute would become "optional." *Chuidian*, 912 F.2d at 1102. "Such a result would amount to a blanket abrogation of foreign sovereign immunity by allowing litigants to accomplish indirectly what the Act barred them from doing directly." *Id.* Just as allowing official-capacity suits against state officials for prospective relief under *Ex parte Young*, 209 U.S. 123, 159-60 (1908), has led to a myriad of injunctive suits against state actors, notwithstanding the state's Eleventh Amendment immunity, so too will the Fourth Circuit's authorization of suits against officials swallow the "rule" prohibiting actions against foreign states. These suits will "place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with

[1] These numbers are based on a Westlaw search run on June 17, 2009.

any number of foreign nations." *Belhas*, 515 F.3d at 1287 (citation and internal quotation marks omitted).

In fact, the Fourth Circuit's decision effectively nullifies the holdings of other circuits that have properly construed the FSIA to immunize foreign officials from suit, because courts in the Fourth Circuit potentially have jurisdiction over virtually all actions brought in the United States against foreign officials. The statutes under which foreign defendants are typically sued in U.S. courts do not require plaintiffs to comply with any one state's long-arm statute. *See, e.g.*, *Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005) (concluding that Federal Rule of Civil Procedure 4(k)(2) effectively served as a nationwide long-arm statute that "eliminate[d] the need to employ the forum state's long-arm statute" in an action brought under the Alien Tort Statute); 18 U.S.C. § 2334(a) (providing for nationwide service of process under the Antiterrorism Act); 18 U.S.C. § 1965 (providing for nationwide service of process under RICO). Moreover, in this context, whether the exercise of personal jurisdiction comports with due process depends "on whether [the] defendant has sufficient contacts with the United States as a whole," not merely with the forum state. *Mwani*, 417 F.3d at 11; *see also, e.g.*, *Heinemann v. Kennedy*, No. 2:07CV91, 2008 WL 649061, at *5 (N.D. W. Va. Mar. 10, 2008) (explaining that "in RICO cases the Fourth Circuit has held that the proper inquiry is whether a defendant has sufficient minimum contacts with the United States, not with any particular state") (citing *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 626-27 (4th Cir. 1997)). Thus, since virtually all suits against foreign officials can be brought in the Fourth Circuit, the decision below effectively overrules the

five circuit court decisions precluding such suits.

The Fourth Circuit's erroneous decision thus deepens circuit splits on important and recurring issues, and warrants this Court's immediate review.

B. The Solicitor General's Arguments In *Federal Insurance* Do Not Support Denying Review Here

The Solicitor General's Supreme Court amicus brief in *Federal Insurance Co. v. Kingdom of Saudi Arabia*, No. 08-640 (petition filed Nov. 12, 2008), nonetheless makes the remarkable contention that a judicial misinterpretation of the FSIA is inconsequential because the statute and the common law are largely coextensive on the question whether FSIA immunity applies to individuals. *See* Solicitor General's Br. 8-9 (citing *Matar*, 563 F.3d at 13). That argument is flawed even where the scope of statutory and common-law protections are identical, and certainly has no application where, as here, there is a conceded potential divergence between the statute and the common law.

As an initial matter, even the Solicitor General acknowledges that the common law and the FSIA may diverge concerning whether a foreign official loses immunity for official acts upon leaving office. *See* Solicitor General's Br. 9-10 (recognizing the circuit split between the Fourth and D.C. Circuits and explaining that "application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office"). The purported overlap between the FSIA and the common law thus provides no basis for denying review of the question raised by this case (and absent from *Federal Insurance*) concerning the

immunity of former officials.

More fundamentally, the Solicitor General's counterintuitive suggestion that the FSIA may be misinterpreted without consequences because individual defendants may be entitled to common-law immunity would nullify the FSIA and its purposes altogether. In enacting the FSIA, Congress not only defined the scope of foreign sovereign immunity, but also obviated the need for Executive Branch discretion in making immunity determinations. In doing so, Congress sought to ensure a uniform, evenhanded approach to immunity determinations unencumbered by the shifting pressures of international politics, and to free the Executive from making sensitive, case-by-case immunity decisions.

Specifically, before the FSIA, a foreign defendant typically requested a finding of immunity from the State Department, and the Department conveyed its conclusions to the court by filing a "suggestion." In practice, "courts treated such 'suggestions' as binding determinations, and would invoke or deny immunity based upon the decision of the State Department." *Chuidian*, 912 F.2d at 1100; *accord Rep. of Iraq v. Beaty*, Nos. 07-1090, 08-539, 2009 WL 1576569, at *6 (U.S. June 8, 2009) ("[T]he granting or denial of [sovereign] immunity was historically the case-by-case prerogative of the Executive Branch."). "During the 1970s, Congress became concerned that the law of sovereign immunity under [this approach] was leaving immunity decisions subject to diplomatic pressures rather than to the rule of law." *Chuidian*, 912 F.2d at 1100. "'From the standpoint of the private litigant, considerable uncertainty result[ed]. A private party who deals with a foreign government

entity cannot be certain that his legal dispute with a foreign sovereign will not be decided on the basis of nonlegal considerations through the foreign government's intercession with the Department of State.'" *Id.* (quoting H.R. Rep. No. 94-1487, at 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6607).

As a result of this ad hoc decision-making process dominated by political considerations and favoritism, Congress enacted the FSIA precisely to "remove the role of the State Department in determining immunity." *Id.*; *accord Beaty*, 2009 WL 1576569, at *6 (Congress "[had] taken upon itself in the FSIA to 'free the Government' from the diplomatic pressures engendered by the case-by-case approach") (citation omitted). The Solicitor General's argument that the source of immunity is irrelevant contravenes the neutral framework enacted by Congress and would reintroduce precisely the sort of political pressures and whims that Congress sought to eliminate from immunity determinations.

The Solicitor General's argument is particularly flawed where, as here, the FSIA allegedly provides different protection than the common law. The Solicitor General's notion that the judiciary can simply provide common-law immunity in the face of finding that a statute provides no immunity (or vice versa) is at odds with the settled precept that "general and comprehensive legislation . . . indicates a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter." 2B *Sutherland Statutory Construction* § 50:5. Indeed, courts generally presume that federal statutes displace federal common law. *See, e.g.*, *City of Milwaukee v. Illinois*,

451 U.S. 304, 317 (1981) ("[I]n cases such as the present 'we start with the assumption' that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.") (citation omitted).[2]

At a minimum, if the FSIA does not provide immunity in a particular context, this is at least strong evidence that immunity should not be granted, and that a suggestion of immunity by the Executive Branch would not be entitled to deference. *See generally Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring) (explaining that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb," and that "[c]ourts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject"). The Solicitor General's contrary argument would render the statute a nullity.

Indeed, the Solicitor General's suggestion that the common law survives unaffected by the statute—and

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[2] This Court has concluded, for example, that because the Federal Water Pollution Control Act Amendments "occupied the field through the establishment of a comprehensive regulatory program," the Act displaced federal common-law claims for abatement of a nuisance caused by interstate water pollution. *See City of Milwaukee*, 451 U.S. at 307-08, 317. Similarly, the enactment of the Federal Tort Claims Act displaced the Government's entitlement to sovereign immunity in prison litigation cases, *see United States v. Muniz*, 374 U.S. 150, 158 (1963), and § 1983 is the exclusive federal damages remedy for violations of federal constitutional rights, displacing any *Bivens*-type action implied directly from the Fourteenth Amendment, *see Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 734-35 (1989).

that a misinterpretation of the FSIA can therefore be "cured" by finding common-law immunity—has itself divided the lower courts. *Compare Chuidian*, 912 F.2d at 1102 (concluding that the FSIA cannot "reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials"), *with Matar*, 563 F.3d at 14 ("[E]ven if . . . a former foreign official . . . is not categorically eligible for immunity under the FSIA . . . he is nevertheless immune from suit under common-law principles that pre-date, and survive, the enactment of that statute.").

In sum, the Solicitor General's notion that divided and erroneous interpretations of the FSIA are unworthy of review, because often the same immunity can result from the very Executive Branch discretionary actions that the Act was intended to obviate, nullifies the FSIA's effort at uniformity and is necessarily based on a controversial view of the interrelationship of the common law and statutory immunity. The Solicitor General's arguments in *Federal Insurance* provide no basis for denying certiorari here.

C. This Case Is A Better Vehicle Than *Federal Insurance* To Address The Scope Of Individual Immunity Under The FSIA

This case presents a better vehicle than *Federal Insurance* to address the scope of immunity afforded to foreign officials under the FSIA.

While both this case and *Federal Insurance* squarely present the threshold issue of whether the FSIA applies to individuals who are foreign officials at the time that suit is brought, this case presents the additional issue of whether FSIA immunity

applies to *former* officials. As noted above, even the Solicitor General acknowledges that the courts of appeals are divided—and the common law and the FSIA may diverge—on the critical question of whether a foreign official loses immunity for official acts upon leaving office. *See* Solicitor General's Br. 9-10 (recognizing the circuit split between the Fourth and D.C. Circuits and explaining that "application of the FSIA framework raises the problematic prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office").[3]

The present case is also a better vehicle for resolving the question of whether FSIA immunity applies to present foreign officials because, however this Court resolves that issue in *Federal Insurance*, it will likely not affect the outcome in that case. The Second Circuit held that the district court lacked personal jurisdiction over the individual defendants sued in their personal capacities in *Federal Insurance*. Specifically, the Second Circuit reasoned that the defendants' alleged acts of donating money to a foreign charity purportedly knowing that the money would be diverted to al Qaeda do not constitute conduct expressly aimed at the United States or U.S. residents sufficient to support the exercise of personal jurisdiction. *Fed. Ins. Co.*, 538 F.3d at 94-95. As the Solicitor General explains, the

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[3] The Solicitor General nonetheless suggests that this "potential anomaly so far has not led to untoward results." Solicitor General's Br. 9. But the fact that some courts have avoided the issue in the past does not justify denying review in the present case, where even the Solicitor General concedes there is a conflict between the Fourth Circuit and the D.C. Circuit on this issue.

Second Circuit correctly decided that issue, and in any event, "the court's case-specific holding[] on this score do[es] not warrant review by this Court." Solicitor General's Br. 20. Because the same alleged acts form the basis for both the personal-capacity and the official-capacity claims against the defendants in *Federal Insurance*, the Second Circuit would likely hold that personal jurisdiction is lacking over the defendants in their official capacities if squarely presented with the issue. Thus, the complaint in *Federal Insurance* would likely be dismissed *regardless* of this Court's holding concerning individual immunity under the FSIA. Here, in contrast, the only questions presented are certworthy issues under the FSIA, and those issues may well be outcome-determinative of jurisdiction.[4]

[4] The Petitioners in *Federal Insurance* also raise another issue regarding the scope of the domestic tort exception. As the Solicitor General argues, that question does not merit this Court's review either. The Second Circuit's "conclusion that [the *Federal Insurance*] petitioners had not overcome Saudi Arabia's immunity was correct" and no circuit split exists on this question. Solicitor General's Br. 17-18.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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