No. 07-1893

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF; OFFICER JOHN DOE 1; JANE DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; AZIZ DERIA,
Respondents.

PETITION FOR REHEARING AND REHEARING *EN BANC*

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STATEMENT REQUIRED BY FEDERAL RULE OF APPELLATE PROCEDURE 35(b) AND FOURTH CIRCUIT LOCAL RULE 40(b)

This case presents exceptionally important issues concerning the scope of federal jurisdiction over officials of foreign states. In conflict with this Court's prior decision in *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004), and with the decisions of other courts, the panel reached two untenable conclusions. It held that immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611, applies only to foreign states themselves, not to individuals acting in an official capacity on behalf of foreign states; and it held, in the alternative, that FSIA immunity did not extend to officials who had left office at the time suit was filed against them. Rehearing or rehearing *en banc* is warranted for several reasons.

First, the panel's holding that the FSIA does not apply to an officer of a foreign state sued in his official capacity creates an intra-circuit conflict with *Velasco*, in which this Court held that individual defendants sued in their official capacities are immune from suit under the FSIA because official-capacity claims are "the practical equivalent of claims against the foreign state" itself. 370 F.3d at 399. The panel's holding also presents a question of exceptional importance because it directly contravenes the decisions of five other circuits addressing the same question. As those courts have explained, the text and history of the FSIA do not support the panel's distinction between suits against a foreign state and suits

against the officials through which the state acts.

Second, the panel's alternative holding—that *former* officials would not be entitled to FSIA immunity even if the FSIA applied to individuals—also is irreconcilable with *Velasco*, which held that FSIA immunity extends to defendants who are no longer officials of a foreign state at the time the plaintiff's suit was filed. Moreover, by withholding immunity from government officials as soon as they leave office, the panel's decision eviscerates the FSIA and contravenes the statute's goal of preserving international comity, in conflict with the views of other circuits that have considered the question.

BACKGROUND

Plaintiffs sued Defendant Mohamed Ali Samantar under the Torture Victim Protection Act of 1991, Pub. L. 102-256, 106 Stat. 73 (1992), and the Alien Tort Claims Act, 28 U.S.C. § 1350, for actions in his official capacity as the Minister of Defense and Prime Minister of Somalia between 1980 and 1990. (J.A. 28-65.)

The District Court dismissed the complaint for lack of subject-matter jurisdiction, concluding that the FSIA entitled Samantar to immunity for acts taken in his official capacity as an officer of a foreign state. Following this Court's holding in *Velasco v. Government of Indonesia*, 370 F.3d 392 (4th Cir. 2004), that immunity under the FSIA extends to an individual foreign official acting within the scope of his official duties, and in accordance with the position taken by a majority

of circuits, the District Court dismissed the complaint because "[t]he allegations . . . clearly describe Samantar, at all relevant times, as acting upon the directives of the then-Somali government in an official capacity, and not for personal reasons or motivation." (J.A. 223.)

A panel of this Court reversed. The panel noted that the majority of circuits hold "that the FSIA applies to individual officials of a foreign state," and that "a number of courts and commentators believe[d]" that this Court had already "adopted the majority position" in *Velasco*. (Slip op. at 13.) The panel nevertheless purported to distinguish *Velasco* and held that the FSIA does not apply to individual foreign officials sued in their official capacity. (*Id*. at 13-18.) In the alternative, the panel held that even if the FSIA applied to individuals, it would not apply to *former* government officials. (*Id*. at 18.) Concurring in part and concurring in the judgment, Judge Duncan explained that she would not reach the latter question because, in light of the diplomatic implications of the FSIA, "[p]rudential considerations [] militate against" resolving FSIA issues unnecessarily. (*Id*. at 23.)

ARGUMENT

I. THE PANEL'S ERRONEOUS HOLDING THAT INDIVIDUALS SUED IN THEIR OFFICIAL CAPACITY RECEIVE NO IMMUNITY UNDER THE FSIA WARRANTS REHEARING *EN BANC*

The panel's first holding—that the FSIA does not apply to an officer of a foreign state sued in his official capacity—conflicts with this Court's decision in

Velasco and is at odds with the holdings of five other courts of appeals that have addressed the same issue. To "secure or maintain uniformity of [this] [C]ourt's decisions," and to resolve this "question of exceptional importance," the Court should grant rehearing *en banc*. FED. R. APP. P. 35(a).

The panel's decision cannot be reconciled with this Court's earlier decision in *Velasco*, which held that FSIA immunity barred suits against, *inter alia*, two former Indonesian officials sued in their official capacity for payment on a promissory note issued by these officials. 370 F.3d at 395. As the Court observed, the overwhelming weight of authority establishes that FSIA immunity "extend[s] to an individual acting in his official capacity on behalf of a foreign state." *Id.* at 398-99 (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101-03 (9th Cir. 1990); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 496 (9th Cir. 1992); *El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 671 (D.C. Cir. 1996); *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Bryks v. Canadian Broad. Corp.*, 906 F. Supp. 204, 210 (S.D.N.Y. 1995)). Agreeing with these courts, and reasoning that official-capacity claims are "the practical equivalent of claims against the foreign state," *id.* at 399, this Court held that the individual defendants were immune from suit under the FSIA "[b]ecause [the plaintiff] did not sue the individual Defendants in their individual capacities, but rather sued [them] in their official capacities." *Id.* at 402.

In the present case, the panel defied *Velasco*'s holding in concluding that individual foreign officers are *not* immune from suit under the FSIA for actions taken in their official capacities. The panel purported to distinguish *Velasco* on the ground that *Velasco* addressed only "whether the Indonesian government was bound . . . by the unauthorized acts of individual government officials." (Slip op. at 15.) But that is an incorrect reading of *Velasco*. The *Velasco* Court analyzed whether the officials had actual authority to issue the promissory note at issue only to determine the applicability of the *exception* to FSIA immunity for the commercial activities of a foreign state, after *first* concluding that FSIA immunity ordinarily "extend[s] to an individual acting in his official capacity on behalf of a foreign state." 370 F.3d at 398, 400-02. Because the officials lacked actual authority to issue the promissory notes, the Court held that the commercial activities exception did not apply, and that the individual officers sued in their official capacity were therefore immune from suit—a result impossible to square with the panel's decision in this case. This conflict between *Velasco* and the panel's decision in this case warrants rehearing *en banc*. *See* FED. R. APP. P. 35(a)(1).

In addition, the panel's holding presents a "question[] of exceptional importance" on which the panel reached an erroneous conclusion at odds "with the authoritative decisions of other United States Courts of Appeals that have

addressed the issue." FED. R. APP. P. 35(a), (b)(1)(B). As the panel acknowledged (Slip Op. at 13), the Second, Fifth, Sixth, Ninth, and D.C. Circuits have all held that FSIA immunity extends to individuals acting in an official capacity on behalf of a foreign state. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 85 (2d Cir. 2008); *Byrd*, 182 F.3d at 388; *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian*, 912 F.2d at 1103; *Jungquist v. Sheikh Sultan bin Khalifa al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997).

The text and history of the FSIA mandate the conclusion reached by these other circuits. The FSIA immunizes "foreign states" from "the jurisdiction of the United States." 28 U.S.C. § 1603(a). Because foreign states can act only through their officers, the acts of a foreign official in his official capacity are, as this Court recognized in *Velasco*, "equivalent" to acts of the state itself. *Velasco*, 370 F.3d at 399; *see also Chuidian*, 912 F.2d at 1101 ("It 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."). Indeed, Congress intended the FSIA to codify the common-law doctrine of sovereign immunity that pre-dated the enactment of the statute. *See, e.g.*, *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008); *Chuidian*, 912 F.2d at 1100. The common law "expressly extended immunity to individual officials acting in their official capacit[ies]" because an

individual's official acts are, by definition, acts of the state. *Chuidian*, 912 F.2d at 1101.

The panel simply ignored these principles, resting its decision instead on a statutory analysis of whether an individual constitutes an "agency or instrumentality" of a foreign state. 28 U.S.C. § 1603(a). The panel's analysis of the statutory definition of an "agency or instrumentality" is both incorrect and irrelevant. First, as numerous circuits have held, 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. *In re Terrorist Attacks on Sept. 11, 2001*, 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.

Second, individuals acting in their official capacities on behalf of a foreign state are entitled to FSIA immunity *without reference* to the definition of an "agency or instrumentality." Because a suit against a foreign government officer in his or her official capacity is "equivalent" to a suit against the state itself, *see Velasco*, 370 F.3d at 399; *Chuidian*, 912 F.2d at 1101, the statutory immunity for the "foreign state" itself shields government officers from liability for actions in their official capacity. 28 U.S.C. § 1604. Indeed, the FSIA provides that the term "'foreign state' . . . *includes* . . . an agency or instrumentality" of that state. 28 U.S.C. § 1603(a) (emphasis added). The FSIA's use of "including" in the

definition of a "foreign state" means that the definition is illustrative rather than exhaustive. *See, e.g.*, *Fed. Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941) ("[T]he term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle."). Thus, consistent with the common-law doctrine that the FSIA was meant to codify, the statute encompasses suits against officers for actions taken in their official capacities.

Third, the panel completely ignored amendments to the so-called terrorism exception of the FSIA that, as the Second Circuit has held, show that "Congress consider[s] individuals and government officers to be within the scope of the FSIA." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d at 84. Congress amended the FSIA, *inter alia*, to lift immunity in connection with the "provision of material support or resources" for terrorist activities "by an official, employee, or agent of [a] foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(a)(1). These amendments "evince congressional recognition that claims against individual officials of a foreign government must be brought within the confines of the FSIA," because "[i]f these individuals were not otherwise immune from suit pursuant to the FSIA," the newly enacted "provisions would be entirely superfluous." *In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d at 84.

In sum, because the panel's holding conflicts irreconcilably with this Court's decision in *Velasco* and presents an important question that the panel resolved erroneously in conflict with the decisions of other circuits, rehearing by the panel or by the *en banc* Court should be granted.

II. THE PANEL'S ERRONEOUS HOLDING THAT THE FSIA DOES NOT APPLY TO FORMER OFFICIALS WARRANTS REHEARING *EN BANC*

The panel majority's alternative holding—that *former* officials would not be entitled to FSIA immunity even if the FSIA applied to individuals—further justifies rehearing *en banc*.

To begin with, the panel's holding concerning former foreign officials, like its holding on foreign officials generally, defies precedent of this Court. In *Velasco*, some of the defendants no longer occupied government positions at the time the plaintiff filed suit, yet this Court held that FSIA immunity shielded the individual defendants from suit in their official capacity. 370 F.3d at 399, 402. This holding—never acknowledged by the panel—squarely contradicts the panel majority's analysis in this case, thus justifying rehearing or rehearing *en banc*. FED. R. APP. P. 35(a)(1).

Furthermore, the panel's interpretation of the statute is contravened by the overwhelming authority in other circuits. As explained above, allowing litigation against a foreign official in his or her official capacity plainly violates the FSIA's

command that foreign states "shall be immune from the jurisdiction of the courts of the United States and of the States" except as provided in the statute. 28 U.S.C. § 1604. Yet such immunity would be of little value if it disappeared as soon an individual government official left office. Contrary to the FSIA's aim of preserving international comity by broadly immunizing foreign official acts from judicial scrutiny in U.S. courts, *see, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), the panel majority's construction of the FSIA would permit plaintiffs to challenge any foreign government action simply by waiting until the responsible official resigned, was removed, or was voted out of office. Thus, just as domestic official immunities must protect officials even after they leave office, *see, e.g.*, *Orem v. Rephann*, 523 F.3d 442, 446 (4th Cir. 2008), so, too, must FSIA immunity extend beyond foreign officers' departure from office to achieve the statute's purpose of shielding official government actions from judicial scrutiny in U.S. courts. *Cf. Allfreight Worldwide Cargo, Inc. v. Ethiopian Airlines Enters.*, No. 07-2079, 2009 WL 56972, at *3 (4th Cir. Jan. 9, 2009) (noting that "[i]n *Velasco* we acknowledged that recognition of a foreign entity's sovereign immunity is analogous to the sovereign immunity of the United States and the derivative immunity extended to its own contractors and common law agents").

In addition, the panel's holding that former officers are not immune marks a radical departure from the pre-FSIA common law that Congress aimed to codify.

As the D.C. Circuit observed in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), pre-FSIA law drew no distinction between present and former government officers; both were immune from suit based on official actions. *Id.* at 1285.

For all these reasons, numerous courts have held, as *Velasco* did, that former government officials are immune under the FSIA from suits brought against them in their official capacity. In *Belhas*, the D.C. Circuit observed that "it is likely we would reject the proposition [that FSIA immunity does not extend to former officials] were it before us on the merits." 515 F.3d at 1285. Indeed, the D.C. Circuit called this proposition—embraced by the panel here—"unreasonable" and stated that it "makes no practical sense." *Id.*; *see also id.* at 1291 (Williams, J., concurring) (calling it "implausible that an official automatically ceases to qualify as 'an organ of the foreign state' for the purposes of foreign sovereign immunity the minute he leaves his government post"). In *In re Terrorist Attacks on Sept. 11, 2001*, the court likewise rejected efforts to base an individual defendant's immunity on his status at the time when the complaint was filed. 349 F. Supp. 2d 765, 789 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008). And in *Byrd v. Corporacion Forestal y Indus. de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999), the Fifth Circuit held that "the FSIA extends to protect individuals acting within their official capacity," without indicating any exception to this rule for former officers.

To justify its contrary result, the panel relied on *Dole Food Co. v. Patrickson*, 538 U.S. 480 (2003). In *Dole Foods*, the Supreme Court construed the majority-ownership provision of the FSIA's "agency or instrumentality" definition, 28 U.S.C. § 1603, and concluded that a corporation's "instrumentality status" is "determined at the time the suit is filed," not at the time of the allegedly wrongful conduct. 538 U.S. at 478 (discussing 28 U.S.C. § 1603(b)(2), which defines an "agency or instrumentality of a foreign state" as any entity that, among other things, is majority-owned "by a foreign state or political subdivision thereof"). The panel majority here held that whether an *individual* government officer enjoys immunity likewise depends on the officer's status at the time when the suit is filed. But the panel's holding is erroneous for at least two reasons.

First, as explained above, a suit against a foreign government officer in his or her official capacity is "equivalent" to a suit against the state itself. *Velasco*, 370 F.3d at 399; *see also Chuidian*, 912 F.2d at 1101. Accordingly, there is no need to refer to the statute's definition of an "agency or instrumentality." 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.

Second, even if government officers must qualify as an "agency or instrumentality" to receive FSIA immunity, *Dole Foods* is inapposite. As the D.C. Circuit explained in *Belhas*, *Dole Foods* "never dealt with the acts of a government

official." 515 F.3d at 1286. While "a 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 the existence of the other," "the state does not act independently of its agents." *Id.* Hence, "[e]ven though the state's immunity survives [an individual officer's] departure, it is difficult to say how it could act within its immunity without being able to extend that immunity to the individual officials who acted on its behalf." *Id.* And in any event, "in light of [Congress's] 'well-recognized' purpose" of codifying pre-FSIA common law (including immunity for former foreign officers in their official capacity), "it is unreasonable to assume that in enacting the FSIA, Congress intended to make such sweeping and counterintuitive changes to foreign sovereign immunity . . . ." *Id.* at 1285.

The panel also suggested that the sovereign immunity of foreign officials should not survive their departure from office because foreign sovereign immunity, unlike immunities for domestic officials, "'is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.'" (Slip op. at 20-21 (quoting *Dole Foods*, 541 U.S. at 479) (emphasis omitted).) As noted, however, foreign sovereign immunity, like domestic official immunity, does not meaningfully protect officials if it applies only while they remain in office. In that

case foreign government actions could be litigated in U.S. courts as soon as the responsible official leaves office. *See Belhas*, 515 F.3d at 1286 ("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.").

In sum, the panel's holding regarding former foreign government officers not only creates an intra-circuit conflict but also reaches an insupportable result at odds with the decisions of other circuits. *En banc* review thus is warranted.

III. THE PANEL'S DECISION CARRIES "EXCEPTIONAL IMPORTANCE" BECAUSE IT WILL OPEN THE FLOODGATES TO LITIGATION AGAINST FOREIGN OFFICIALS IN THIS CIRCUIT.

The practical implications of the panel's decision further support granting review. By opening the door to suits against former officials challenging official government actions, the panel's decision potentially creates jurisdiction in this Circuit over every human rights case in the world—an outcome that, as the D.C. Circuit noted in *Belhas*, "would likely 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." 515 F.3d at 1287 (internal citation omitted). Indeed, if plaintiffs could obtain judicial review of virtually any official government action 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. And the flood of potential suits allowed by the panel decision may well include challenges to the actions of important allies of the United States. *See, e.g.*, *Belhas*, 515 F.3d at 1281.

To be sure, defendants in such suits may assert that, regardless of the FSIA, common-law immunity shields them from liability in U.S. courts. But whether and to what degree the FSIA displaces common-law immunities remain open questions in this Circuit. *Compare Chuidan*, 912 F.2d at 1102 (disagreeing that the FSIA "can reasonably be interpreted to leave intact the pre-1976 common law with respect to foreign officials"), *with Tachiona v. United States*, 386 F.3d 205, 220 (2d Cir. 2004) ("We have some doubt as to whether the FSIA was meant to supplant the 'common law' of head-of-state immunity . . . ."); *see also In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1110 (4th Cir. 1987) ("The exact contours of head-of-state immunity . . . are still unsettled."). And in any event common-law immunity, unlike FSIA immunity, "generally entail[s] deference to the executive branch's suggestions of immunity," *Tachiona*, 386 F.3d at 220; *see also Chuidan*, 921 F.2d at 1102. Thus, common-law immunity offers no assurance of closing the floodgates of potential litigation opened by the panel's improper holdings in this case.

CONCLUSION

The petition for rehearing and rehearing *en banc* should be granted.

Dated: January 22, 2009

Respectfully submitted,

s/ Julian H. Spirer_____

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2009, I electronically filed the foregoing PETITION FOR REHEARING AND REHEARING *EN BANC* with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on January 22, 2009, I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants, addressed as follows:

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