No. 12-1078

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,

v.

BASHE ABDI YOUSUF, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE KINGDOM OF SAUDI ARABIA AND DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are foreign governments and international allies of the United States. They submit this brief to assist the Court in understanding the critical importance of sovereign immunity for foreign states and their officials. The court of appeals' decision, if allowed to stand, would subject officials of *amici* and other foreign sovereigns to litigation and potential liability in United States courts for governmental actions performed in their home countries. The availability of immunity for those officials would be uncertain and unpredictable because it would depend on the uncertain and unpredictable inquiry whether, in a particular case, the alleged conduct of a particular defendant violated a *jus cogens* norm of international law. *Amici* believe, consistent with the weight of authority under United States and international law, that the immunity of foreign officials from civil suits arising out of acts performed in their official capacities should instead be absolute. The contrary ruling of the court of appeals permits plaintiffs to circumvent state sovereign immunity simply by suing current (and former) state officials, substantially reducing the importance of immunity and threatening international comity.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* represent that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before its due date and that all parties have consented to the filing of this brief. Letters reflecting the consent of the parties to the filing of this brief have been filed with the Clerk.

STATEMENT

In 2004, a number of current and former residents of Somalia (respondents here) sued petitioner Mohamed Ali Samantar, a former official of the government of Somalia, in the United States District Court for the Eastern District of Virginia. Respondents alleged that, during the 1980s, Somali agents under petitioner's command committed acts of torture, arbitrary detention, and extra-judicial killing. Respondents asserted claims for damages against petitioner under the Torture Victim Protection Act of 1991 ("TVPA"), Pub. L. No. 102-256, 106 Stat. 73 (1992) (reproduced at 28 U.S.C. § 1350 note), and the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350.

On appeal from the district court's order granting petitioner's motion to dismiss based on sovereign immunity, this Court held that petitioner could not assert immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA").[2] The Court explained that the FSIA does not govern petitioner's immunity claim because respondents' damages action against petitioner for alleged acts performed in his official capacity "is not a claim against a foreign state as the [FSIA] defines that term." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2292 (2010). The Court accordingly concluded that petitioner's immunity claim "is properly governed by the common law." *Id.* Although acknowledging that the common law confers immunity on foreign officials for suits arising from their official-capacity acts, *see id.* at 2290-91 ("[W]e do not doubt that in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity."), the Court remanded the case

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[2] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611).

to the Fourth Circuit for adjudication of petitioner's common-law immunity claim in the first instance, *see id.* at 2292-93.

On remand, the court of appeals rejected petitioner's official-immunity claim under the common law. *See* Pet. App. 1a-28a. Based on a perceived "trend in international law to abrogate foreign official immunity" for violations of *jus cogens* norms, the court created an exception to official immunity for cases involving such alleged violations. *Id.* at 24a. According to the Fourth Circuit, *jus cogens* norms include, among other things, prohibitions against torture, summary execution, and prolonged arbitrary imprisonment. *Id.* at 22a. The court of appeals understood both "international and domestic law" to provide that "*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign." *Id.* at 23a. It accordingly held that "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* at 25a-26a.

REASONS FOR GRANTING THE PETITION

As petitioner demonstrates, the courts of appeals are divided over whether allegations of *jus cogens* violations negate foreign official immunity. *See* Pet. 11-18.[3] Petitioner also shows that the Fourth Circuit's *jus cogens* exception to immunity lacks any basis in

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[3] *Compare*, *e.g.*, *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (holding, in a case against a former foreign official, that "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity"), *with* Pet. App. 25a-26a ("officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity").

international or domestic law. *See* Pet. 25-34. *Amici*, which are foreign governments and international allies of the United States, write separately to emphasize the importance of the question presented to foreign sovereigns and to the United States' foreign relations.

I.A. Foreign sovereign immunity is a crucial component of United States law and international relations and, to fulfill the purposes of that immunity, it must be extended to the official-capacity acts of individual officials. Sovereign immunity serves as a gesture of comity among nations, designed to protect the dignity of foreign states; it embodies the recognition that disputes over the official conduct of foreign states are best resolved through government-to-government contact rather than private litigation; and, by limiting the instances in which United States courts will sit in judgment of the legality of the official conduct of foreign states, sovereign immunity advances the amicable relations among nations. Because an official-capacity act of a governmental official is an act of the state itself, those policies apply equally in suits against foreign officials for acts performed in their official capacities.

B. The exception to immunity created by the court of appeals in this case undermines those important objectives of foreign sovereign immunity. The category of *jus cogens* norms is unsettled and malleable, and suits against foreign officials frequently involve allegations of conduct that could be said to violate *jus cogens* norms. As a result, the Fourth Circuit's rule creates a broad and uncertain exception to the doctrine of official immunity. The court of appeals' decision will entangle foreign officials, their governments, and the federal courts in litigation over the scope of this new exception.

The Fourth Circuit's expansive exception to official immunity also undermines the sovereign immunity of foreign states themselves. Because states can act only through their officials, virtually any suit against a foreign state can be re-captioned as a suit against a responsible current or former government official. Thus, although no court has recognized a *jus cogens* exception to the FSIA, the Fourth Circuit's approach would "in effect make the statute optional" in many cases, *Samantar*, 130 S. Ct. at 2292 (internal quotation marks omitted), by enabling plaintiffs to proceed directly against foreign officials. That result threatens not only international comity but also the security of United States officials, who may be subject to reciprocal treatment in foreign courts.

II. Under the traditional common-law approach, it was well established that a foreign state's sovereign immunity extended to the official-capacity acts of individuals and that such immunity was unconditional. Allowing the Fourth Circuit's ruling to stand would subject foreign officials to litigation and liability in United States courts, and it would invite additional litigation regarding the contours of common-law immunity and foster uncertainty until those contours were settled. The court of appeals' rule would also deprive officials of a key benefit of immunity – immunity *from suit* – by making it impossible for courts to determine whether immunity applies without resolving the merits of the controversy. This Court should grant certiorari, reverse the court of appeals' decision, and hold that the immunity of foreign officials sued for official-capacity acts is absolute and not subject to any exception.

I. THE PETITION RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO FOREIGN GOVERNMENTS AND TO THE UNITED STATES' FOREIGN RELATIONS

A. This Court Has Long Recognized the Important Purposes Served by Foreign Sovereign Immunity

1. Foreign sovereign immunity is a crucial component of United States law and international relations. "The immunity of a state from the jurisdiction of the courts of another state is an undisputed principle of customary international law." *Restatement (Third) of the Foreign Relations Law of the United States*, Part IV, Ch. 5.A, intro. note (1987). Beginning in the early 1800s, "the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). Even after the State Department announced in 1952 that it would no longer request immunity in cases "arising out of a foreign state's strictly commercial acts," *id.* at 487, and after Congress codified that "restrictive theory" of sovereign immunity in the FSIA, *id.* at 488, it remains the rule, subject to certain limited exceptions, that "[a] foreign state is normally immune from the jurisdiction of federal and state courts," *id.* That venerable practice – which dates nearly to the birth of the Republic, *see The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (Marshall, C.J.) – serves several important ends.

First, recognition of the immunity of foreign nations from suit in United States courts is "a gesture of comity between the United States and other sovereigns." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003); *see also Republic of Austria v.*

Altmann, 541 U.S. 677, 688 (2004) ("Chief Justice Marshall went on to explain . . . that as a matter of comity, members of the international community had implicitly agreed to waive the exercise of jurisdiction over other sovereigns in certain classes of cases, such as those involving foreign ministers or the person of the sovereign."). This gesture of comity is not an end in itself, but serves to safeguard the dignity of foreign nations, *see National City Bank of New York v. Republic of China*, 348 U.S. 356, 362 (1955) (sovereign immunity "deriv[es] from standards of public morality, fair dealing, reciprocal self-interest, and respect for the power and dignity of the foreign sovereign") (internal quotation marks omitted), and to promote "the maintenance of friendly relations," *Restatement (Third) of the Foreign Relations Law of the United States*, Part IV, Ch. 5.A, intro. note.

Second, granting immunity to foreign nations ensures that disputes over public, governmental acts will be resolved through government-to-government channels. As this Court has explained in a related context, "[r]edress of grievances by reason of . . . acts" of sovereign states "must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422-23 (1964) ("[T]he usual method for an individual to seek relief is to exhaust local remedies and then repair to the executive authorities of his own state to persuade them to champion his claim in diplomacy or before an international tribunal."). Put differently, the doctrine of sovereign immunity reflects that government-to-government relations and diplomacy, not private litigation in foreign judicial tribunals, are the appropri-

ate tools for seeking redress for the official conduct of foreign states. *Cf. The Schooner Exchange*, 11 U.S. (7 Cranch) at 146 (noting that suits against foreign nations typically raise "questions of policy [rather] than of law" and thus are "for diplomatic, rather than legal discussion").

Third, absent sovereign immunity, United States courts would regularly be called upon to sit in judgment of the acts of foreign nations – a practice this Court has recognized would "vex the peace of nations." *Sabbatino*, 376 U.S. at 417-18 (internal quotation marks omitted); *see id.* ("To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations.") (internal quotation marks omitted); *id.* at 423 ("The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere."); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1918) ("The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency."); *see also Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 703-04 (1976) (a concern with avoiding United States courts "pass[ing] on the legality of . . . governmental acts" underlies the doctrine of sovereign immunity).

Those historical foundations for the doctrine of sovereign immunity continue to retain significance. The United States prides itself on the broad access it provides to its state and federal courts. But what may be an appropriate point of national pride in one context can be a troublesome impediment to diplomatic relations in another. Particularly in light of the ease with which litigants can access state and federal courts, a robust understanding of sovereign immunity remains critically necessary to respect the comity of other nations, to maintain the primacy of the Executive Branch in the conduct of diplomatic relations, and to prevent state and federal courts from "vex[ing] the peace" of nations by sitting in judgment of the official acts of foreign states.

2. The same considerations that support affording sovereign immunity to foreign states require extending that immunity to foreign officials acting in their official capacities.[4] A foreign state can act only through its individual officials. If those officials could be sued freely for acts on behalf of the states they serve, foreign sovereign immunity would become a mere technicality. Such a purely formal conception of sovereign immunity would render meaningless the gesture of comity underlying such immunity; would distract from efforts to have grievances regarding official state conduct resolved through government-to-government channels; and would subject the official conduct of foreign states to judgment in United States courts.

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[4] *See* Br. for the United States as Amicus Curiae Supporting Appellee at 21, *Giraldo v. Drummond Co.*, No. 11-7118 (D.C. Cir. filed Aug. 3, 2012) ("*Giraldo* U.S. Br."), 2012 WL 3152126 ("Suits against foreign officials below the head of state can have serious implications for the Executive Branch's conduct of foreign affairs.").

Accordingly, it has long been settled that the sovereign immunity of a foreign state extends to individual officials sued for official-capacity acts. *See*, *e.g.*, *Heaney v. Government of Spain*, 445 F.2d 501, 504 (2d Cir. 1971) (Friendly, C.J.) (citing *Restatement (Second) of the Foreign Relations Law of the United States* § 66(f) (1965)); Pet. App. 20a-21a. That principle has deep roots in American jurisprudence. As the Attorney General of the United States observed 15 years before Chief Justice Marshall's landmark decision in *The Schooner Exchange*, "it is . . . well settled . . . that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does in pursuance of his commission, to any judiciary tribunal in the United States." 1 Op. Att'y Gen. 81, 1797 WL 427 (1797).[5]

B. The Fourth Circuit's Ruling Undermines the Important Purposes of Foreign Sovereign Immunity

By subjecting officials of foreign states to suit in United States courts for official-capacity acts, the court of appeals' decision undermines those important purposes. According to the court of appeals, "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations,

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[5] *See also Giraldo* U.S. Br. at 13 ("As a general matter, under principles accepted by the Executive Branch, a former foreign official is entitled to immunity from suit based upon . . . acts taken in an official capacity."); U.S. Dep't of Justice Letter Br. at 3, *Kensington Int'l Ltd. v. Itoua*, Nos. 06-1763 & 06-2216 (2d Cir. filed May 23, 2007) ("*Kensington* Letter Br.") ("American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts"); Statement of Interest of the United States of America at 4-7, *Matar v. Dichter*, No. 05 Civ. 10270 (S.D.N.Y. filed Nov. 17, 2006) ("*Matar* U.S. SOI").

even if the acts were performed in the defendant's official capacity." Pet. App. 25a-26a. The Fourth Circuit's newly created exception to official immunity – an exception with a broad and ill-defined scope – threatens to undermine substantially foreign sovereign immunity in United States courts.

As an initial matter, the court of appeals' exception for alleged violations of *jus cogens* norms threatens to swallow the rule of immunity in cases brought under the ATS and TVPA. As petitioner shows, actions under those statutes frequently involve the type of alleged conduct that could be said to violate *jus cogens* norms. *See* Pet. 19-20.

The impact will not be limited to ATS and TVPA cases, however. The category of *jus cogens* norms is unsettled and malleable. The Fourth Circuit defined a *jus cogens* norm as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Pet. App. 22a (internal quotation marks omitted). The Fourth Circuit neither acknowledged nor disputed, however, that "[t]he concept of *jus cogens* is of relatively recent origin and remains unsettled." *Matar* U.S. SOI at 27 n.23. As the United States has explained, "controversy surrounds the question of which norms – if any – qualify as *jus cogens*." *Id.*; *see* Pet. 20-21.

Indeed, *jus cogens* has been said to encompass not only "torture, summary execution and prolonged arbitrary imprisonment," Pet. App. 22a, but also such "norms" as a "right to self-determination of peoples," Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Yale J. Int'l L.

331, 373 (2009); *see* A. Mark Weisburd, *The Emptiness of the Concept of* Jus Cogens*, as Illustrated by the War in Bosnia-Herzegovina*, 17 Mich. J. Int'l L. 1, 23-24 (1995). And some "scholars have asserted that due process should be recognized as a peremptory [i.e., *jus cogens*] norm." Criddle & Fox-Decent, 34 Yale J. Int'l L. at 371. The decision below thus raises the prospect of eliminating sovereign immunity whenever a plaintiff can characterize his treatment by officials of a foreign sovereign as a denial of "due process."

What is more, the court of appeals' exception to official immunity also threatens to undermine the immunity of foreign states themselves, by enabling plaintiffs to avoid that immunity simply by suing current and former state officials for acts performed in their official capacities. As the United States has explained, rules such as the Fourth Circuit's, which make the availability of immunity turn on the lawfulness of the official's conduct, "create an easy end-run around the immunity of the state": although "[a] foreign state's immunity is not subject to any general exception for *jus cogens* violations under the FSIA," under the Fourth Circuit's approach, "litigants could easily bypass [the FSIA's] tight restraints by suing individual officials for alleged *jus cogens* violations without limitation." *Matar* U.S. SOI at 25, 28-29. Thus, "any rule denying civil immunity to individual officials for alleged *jus cogens* violations would allow circumvention of the state's immunity for the same conduct." *Id.* at 28; *see id.* at 25 ("Any gap in the officials' immunity would simply allow[] litigants to accomplish indirectly what the Act barred them from doing directly.") (internal quotation marks omitted; alteration in original). Even if damages in such a

case would come from the individual official's pockets, rather than the state's coffers, the suit would necessarily require a United States court to sit in judgment on the official actions of a foreign sovereign – a result that "would very certainly imperil the amicable relations between governments and vex the peace of nations." *Sabbatino*, 376 U.S. at 417-18 (internal quotation marks omitted).

The exception to immunity created by the lower court also puts United States officials at risk of reciprocal denials of immunity in foreign courts. *See National City Bank of New York*, 348 U.S. at 362 (recognizing "reciprocal self-interest" as one of the considerations from which foreign sovereign immunity derives). The Executive Branch has expressed that concern in a brief in the Second Circuit, explaining that recognizing an "exception to a foreign official's immunity for civil suits alleging *jus cogens* violations . . . could prompt reciprocal limitations by foreign jurisdictions, exposing U.S. officials to suit abroad on that basis." Br. for the United States of America as *Amicus Curiae* in Support of Affirmance at 4, *Matar v. Dichter*, *supra* (2d Cir. filed Dec. 19, 2007) (No. 07-2579-cv), 2007 WL 6931924; *see id.* at 22 ("any refusal by the United States to afford foreign officials immunity could prompt foreign jurisdictions to respond in kind when U.S. officials are sued in their courts"). The Fourth Circuit's approach, if applied in foreign courts, would risk exposing United States officials to litigation abroad regarding a variety of alleged actions taken to protect the homeland – for example, allegedly authorizing "illegal" drone attacks.[6]

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[6] *See generally* John F. Burns, *U.N. Panel To Assess Drone Use*, N.Y. Times, Jan. 25, 2013, at A4.

In sum, the decision below creates an expansive and unpredictable exception to the doctrine of official immunity that threatens to undermine international comity and the security of United States officials. A change of this importance in the law of the United States, with such significance for its foreign relations, should occur only after plenary review by this Court.

II. THE COURT SHOULD HOLD THAT FOREIGN OFFICIALS ARE IMMUNE FROM SUITS BASED ON THEIR OFFICIAL ACTS

The Court should grant review and confirm that foreign official immunity is absolute. As the United States has previously explained, under the common law, the immunity of foreign officials was unconditional: "American jurisprudence has long recognized individual officials of foreign sovereigns to be immune from civil suit with respect to their official acts," and that immunity "remained in place even as the law of sovereign immunity evolved over time." *Kensington* Letter Br. at 3; *see Matar* U.S. SOI at 2 ("[F]oreign officials . . . do enjoy immunity from suit for their official acts. This immunity . . . is rooted in longstanding common law that the FSIA did not displace."); *Giraldo* U.S. Br. at 13-14 ("Where litigation involves a foreign official's exercise of the powers of his or her office, such as here, mere allegations of illegality are not sufficient to overcome the State Department's presumption that the alleged conduct was undertaken in an official capacity, giving rise to immunity under principles accepted by the Executive Branch.").[7] Under the common law, therefore, it was

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[7] *See also Kensington* Letter Br. at 8 (under the common law, "the immunity then recognized for foreign officials acting in their official capacity did not merely match, but rather exceeded, that of the state: even if the state could be sued for an official's acts

well established that a foreign state's sovereign immunity extended to the official-capacity acts of individuals and that such immunity was absolute – confirming that individual immunity for official-capacity acts has long been a crucial facet of a foreign state's sovereign immunity.

Allowing the exception to immunity created by the court of appeals to stand would invite further litigation regarding the contours of common-law immunity and foster uncertainty until those contours were settled. That outcome would entail all of the adverse consequences described in Part I above. It would, moreover, run contrary to the principle that sovereign immunity is immunity not only from liability, but also from the costs, in time and expense, and other burdens attendant to litigation. *See Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 849 (5th Cir. 2000) (sovereign immunity is "immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation"); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (qualified-immunity doctrines are intended to protect against burdens of litigation).[8]

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under the restrictive theory, the official himself could not be"); Statement of Interest of the United States at 5, *Chuidian v. Philippine Nat'l Bank*, Case No. 86-2255-RSWL (C.D. Cal. filed Mar. 21, 1988) ("While United States law, through the FSIA, recognizes only restrictive immunity for foreign sovereigns, the rationale for the FSIA's exceptions to absolute immunity . . . does not apply to an official carrying out official duties for the sovereign.").

[8] *See also Gupta v. Thai Airways Int'l, Ltd.*, 487 F.3d 759, 763 n.6 (9th Cir. 2007) ("like claims of absolute or qualified immunity of a public official, foreign sovereign immunity is an *immunity from suit* rather than a mere defense to liability") (emphasis added by Ninth Circuit; internal quotation marks omitted);

In addition to inviting further litigation over the contours of official immunity, the court of appeals' *jus cogens* exception undermines foreign officials' immunity from suit even in cases where the official's immunity claim is ultimately sustained. That is because the Fourth Circuit's "approach merges the merits of the underlying claim with the issue of immunity: if [the defendant]'s actions *were* torture and extrajudicial killing, then they were necessarily unauthorized and he has no claim to immunity; if they *were not* torture and extrajudicial killing, he would enjoy immunity." *Belhas v. Ya'alon*, 515 F.3d 1279, 1292 (D.C. Cir. 2008) (Williams, J., concurring). "Thus," as Judge Williams has explained, "immunity could be determined only at the moment of resolution on the merits, at which point it would commonly be irrelevant." *Id.* As a result, the court of appeals' rule does not simply enable plaintiffs to recover against foreign officials who actually have committed a broad and poorly defined range of offenses against international law; it permits them to proceed to discovery

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Robinson v. Government of Malaysia, 269 F.3d 133, 141 (2d Cir. 2001) (foreign sovereign immunity "is immunity from suit, not just from liability," and it "is effectively lost if a case is permitted to go to trial") (internal quotation marks omitted); *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1281 (3d Cir. 1993) ("[W]e adopt the prevalent view that sovereign immunity is an immunity from trial and the attendant burdens of litigation on the merits, and not just a defense to liability on the merits.") (internal quotation marks omitted); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits") (internal quotation marks omitted); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir. 1989) ("sovereign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits").

and perhaps ultimately trial based on a mere preliminary showing that such offenses have occurred.

In short, the Fourth Circuit's decision creates a wide, unpredictable, and ill-conceived exception in the doctrine of official immunity. It will predictably subject foreign officials to litigation and liability in United States courts, undermine international comity, foster additional litigation over the scope of the exception, and expose United States officials to suits abroad. The better approach, and the one consistent with this Court's historical recognition of the importance of absolute immunity for foreign sovereigns in suits arising from their public acts, is to reject judicially created, *ad hoc* exceptions to common-law immunity in suits challenging official-capacity acts of foreign officials.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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