No. 12-1078

In The
Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,
v.

BASHE ABDI YOUSUF, *ET AL.*

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly affirmed the district court's denial of common-law, official-acts immunity, in accord with the State Department's Statement of Interest advising that common-law immunity should be denied on the facts of this case.

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JURISDICTION

The Court of Appeals exercised jurisdiction over this interlocutory appeal under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). *See* Pet. App. 6a. This Court's jurisdiction, however, is not settled. *See* Part I, *infra*.

STATEMENT

1. In 2004, Bashe Yousuf and Aziz Deria, two United States citizens, and James Doe I, James Doe II, John Doe I, and John Doe II, who are now lawful permanent residents of the United States, filed suit against petitioner under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note, and the

Alien Tort Statute, 28 U.S.C. § 1350.[1] Almost a quarter-century ago, petitioner served as an official in the Siad Barre regime in Somalia. *Yousuf*, *et al.*, C.A. Br. 3. He has been a permanent legal resident of the United States for the last 16 years, residing in Fairfax, Virginia. *Id.*

The district court initially dismissed the case on the ground that Samantar should be immune from suit under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq*. The Fourth Circuit reversed, 552 F.3d 371, 373 (4th Cir. 2009). This Court granted certiorari. 130 S. Ct. 49 (2009). The United States filed an *amicus curiae* brief in the case advising that FSIA immunity should not apply to individuals like petitioner who have been sued in their personal capacity for damages. *See* Br. for the United States as Amicus Curiae Supporting Affirmance, *Samantar v. Yousuf*, No. 08-1555, 2010 WL 342031 ("U.S. S. Ct. Amicus Br."), at *6-28 (Jan. 27, 2010). The United States further advised that "foreign officials' immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch," and enumerated some of the considerations most relevant to this case, including "the nature of the acts alleged, respondents' invocation of the statutory right of action in the TVPA against torture and extrajudicial killing, and the lack of any recognized government of

[1] Three additional Doe plaintiffs withdrew from the case. *See Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Feb. 2, 2007), ECF No. 75; *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Aug. 02, 2011), ECF No. 203.

Somalia that could opine on whether petitioner's alleged actions were taken in an official capacity or that could decide whether to waive any immunity that petitioner otherwise might enjoy." *Id.* at *7.

This Court affirmed, holding that the FSIA does not apply to former government officials sued in their personal capacities. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). In so ruling, this Court recognized that "'the majority view' among the Circuits [was] that 'the FSIA applies to individual officials of a foreign state.'" *Id.* at 2283 (citation omitted). But this Court held that the "FSIA does not govern petitioner's claim of immunity" because the text, history, and purpose of the statute rendered it inapplicable to a former individual official's claim to immunity from a personal-capacity suit. *Id.* at 2285-2293.

This Court then remanded the case for consideration of petitioner's claims to common-law immunity, specifically head-of-state and foreign-official-acts (also known as "foreign official") immunity. *Samantar*, 130 S. Ct. at 2292-2293.

2. On remand, the Department of State "reviewed this matter carefully and *** concluded that Defendant Mohamed Ali Samantar is not immune from the Court's jurisdiction in the circumstances of this case." Pet. App. 46a. The Department of Justice then filed a Statement of Interest with the district court "setting forth this immunity determination." *Id.* at 48a; *see* Pet. App. 33a-48a (Statement of Interest). The Statement stressed the "highly unusual situation" (Pet. App. 41a) presented because (1) "the Executive Branch

does not currently recognize any government of Somalia"; (2) "[i]n the absence of a recognized government authorized either to assert or waive [petitioner's] immunity or to opine on whether [petitioner's] alleged actions were taken in an official capacity, the Department of State has determined that such immunity should not be recognized here[]"; and (3) "[t]he Executive's conclusion that [petitioner] is not immune is further supported by the fact that [petitioner] has been a resident of the United States since June 1997." *Id*. at 41a-43a.

The district court subsequently denied petitioner's motion to dismiss, ruling that he was not entitled to common law immunity. Pet. App. 5a-6a. Petitioner moved for reconsideration and, when that was denied, appealed both orders. *Id*. at 6a. The district court and the court of appeals both declined to stay the trial court proceedings pending the interlocutory appeal. *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. May 18, 2011), ECF No. 168; *Yousuf v. Samantar*, No. 11-1479 (4th Cir. July 8, 2011), ECF No. 23.

Following discovery, the district court denied petitioner's motion for summary judgment. ***Y****ousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Dec. 22, 2011), ECF No. 290. On the morning of trial in February 2012, petitioner elected to take a default judgment on liability and damages. Testifying under oath, petitioner accepted liability "for all the actions that are described in the plaintiffs' complaint *** [including] for causing the deaths that are at issue in this case, for being responsible for the extrajudicial

killings, the attempted extrajudicial killings, *** the torture, and the other very serious allegations." Hearing Tr. at 7, *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA (E.D. Va. Feb. 24, 2012), ECF No. 355. Petitioner testified, and his counsel confirmed, that "[h]e underst[ood] fully that his electing to take a default will give rise to liability *** on all the well-pleaded causes of action in respect to this case. He also underst[ood] further that this decision will invariably give rise to the Court assessing damages against him[.]" *Id.* at 9.

After conducting a bench trial, the district court issued a thirty-eight page decision finding petitioner liable and awarding damages. Mem. Op., *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA, 2012 WL 3730617 (E.D. Va. Aug. 28, 2012). Petitioner's appeal of that default judgment is pending. *Yousuf v. Samantar*, No. 1:04-cv-1360-LMB-JFA, *appeal docketed*, No. 12-2178 (4th Cir. Sept. 24, 2012).

3. After petitioner filed his notice of appeal from the final default judgment, the court of appeals issued the decision at hand and unanimously affirmed the district court's denial of both head-of-state and official-acts immunity. Pet. App. 1a-28a. The court first addressed its jurisdiction and concluded that it had interlocutory jurisdiction under the collateral-order doctrine to review a denial of common-law official-acts immunity. Pet. App. 6a n.1.

The court then affirmed the district court's judgment that petitioner was not entitled to either official-acts or head-of-state immunity for his alleged actions, in accord with the State Department's non-

immunity position. Pet. App. 7a-28a. With respect to head-of-state immunity, the court ruled that, "consistent with the Executive's constitutionally delegated powers and the historical practice of the courts, *** the State Department's pronouncement as to head-of-state immunity is entitled to absolute deference." *Id.* at 16a. Accordingly, the court held that "[t]he district court properly deferred to the State Department's position that Samantar be denied head-of-state immunity." *Id.*

As to official-acts immunity, the court of appeals agreed with petitioner (*see* Pet. C.A. Opening Br. at 8-13) that the State Department's determination that he was not entitled to immunity was "not controlling," but then concluded that the State Department's view nevertheless "carries substantial weight[.]" Pet. App. 18a. The court credited in particular the two "major bas[e]s" for the State Department's view that Samantar should be denied immunity: first, that petitioner is a former official of a state without a government recognized by the United States; and second, that petitioner is a long-term U.S. resident who, because he "'enjoy[s] the protections of U.S. law ordinarily should be subject to the jurisdiction of the courts, particularly when sued by U.S. residents'" and citizens. *Id.* at 26a-27a (citation omitted).

Applying the judicial review for which petitioner had advocated, the Fourth Circuit further reasoned that deference to the State Department's non-immunity position was warranted because the common law does not afford immunity to former

foreign officials for acts that violate *jus cogens* norms of international law, *i.e.*, certain "universally agreed-upon norms" that are "recognized by the international community of States as a whole" to constitute crimes against humanity. Pet. App. 22a (internal quotations and citation omitted). Accordingly, citing both the State Department's "suggestion of non-immunity," *id.* at 26a-28a, and the fact that this case involves "acts that violated *jus cogens* norms, including torture, extrajudicial killings and prolonged arbitrary imprisonment of politically and ethnically disfavored groups," *id.* at 27a, the court of appeals affirmed the denial of common-law immunity, *id.* at 28a.

Petitioner did not seek rehearing en banc.

REASONS FOR DENYING THE PETITION

This interlocutory request for a writ of certiorari is riddled with barriers to review of a question that the factual and procedural history of the case, at best, only half presents. To begin with, this Court's jurisdiction to even consider the case is debatable and unsettled. The case arises, moreover, out of the "highly unusual situation" (Pet. App. 41a) in which the State Department has recommended a *denial* of official-acts immunity because of a lack of a recognized foreign government to invoke it, the personal-capacity nature of the suit, and the defendant's long-term residence in the United States. The court of appeals' judgment is in accord with the Executive Branch's position on immunity, and petitioner identifies no substantial basis on which this Court could conceivably veto the Executive

Branch's judgment and afford him the grant of immunity he seeks. Petitioner's disagreement with the court of appeals' opinion does not merit review when the judgment cannot conceivably change.

Worse still, petitioner is in no position to object to this Court about the court of appeals' exercise of some independent judgment and articulation of a judicial rationale for a common-law ruling, rather than just rubber-stamping the Executive Branch's Statement of Interest, because petitioner argued below that the court should not defer *at all* to the State Department's view. Petitioner, in other words, got the judicial review for which he asked. He just does not like the answer the court of appeals gave on the facts of his case.

I. THERE ARE JURISDICTIONAL AND PROCEDURAL BARRIERS TO CERTIORARI REVIEW

Certiorari review is not warranted because there is jurisdictional doubt about whether this Court could even answer the question presented. This Court has never addressed whether common-law, official-acts immunity qualifies under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) for interlocutory review. *See* Pet. App. 53a n.1 (United States notes that it is "aware of no precedent directly on point"). This Court, however, has "stressed that [*Cohen*'s collateral-order doctrine] must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Digital*

Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994)).

To be sure, certain immunities have been found to be immediately appealable under *Cohen* if they are equivalent to a "right not to be tried" and thus are "'effectively unreviewable on appeal from a final judgment.'" *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989) (citation omitted); *see Mohawk*, 558 U.S. at 107 (The "decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'") (citation omitted). But the "right not to be tried in the sense relevant to the *Cohen* exception" must "rest[] upon an *explicit statutory or constitutional* guarantee that trial will not occur." *Midland*, 489 U.S. at 801 (emphasis added); *see, e.g.*, *Van Cauwenberghe v. Biard*, 486 U.S. 517, 526 (1988) (denial of foreigner's motion to dismiss on ground of immunity from civil process during extradition not immediately appealable even though "the district court lacks personal jurisdiction because of immunity from service of process").

The Fourth Circuit therefore may well have erred in finding "no reason to draw a distinction" between allowing appeals of denials of immunity under the common law and denials of immunity *under the FSIA*, Pet. App. 6a n.1, since the FSIA provides just such an "explicit statutory" immunity guarantee, *Midland*, 489 U.S. at 801. *See* 28 U.S.C. § 1602 (Act governs "determination[s] by United States courts of

the claims of foreign states to immunity from the jurisdiction of such courts").

Furthermore, because official-acts immunity turns on the case- and record-specific determination of whether an individual's challenged behavior was within the scope of his or her official duties, Pet. App. 20a-21a, the inquiry is more analogous to the type of factual, individual immunity questions for which interlocutory review is less appropriate. *See Johnson v. Jones*, 515 U.S. 304, 319-320 (1995) (questions of evidentiary sufficiency in qualified immunity cases not immediately appealable under collateral order doctrine). That jurisdictional issue thus looms as a potential barrier to this Court answering the question presented.

This case, moreover, is an exceptionally poor vehicle for this Court to wade into the jurisdictional question because the jurisdictional uncertainty is compounded by additional procedural obstacles. To begin with, even if there is jurisdiction, this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari); *see also Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (referring to the Court's "normal practice of denying interlocutory review"); *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("[T]his Court above all others must limit its review of interlocutory orders."); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause

the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); *American Constr. Co. v. Jacksonville, T & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893) ("Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.").

One reason that interlocutory certiorari review is disfavored is that reaching the merits of the legal question might not "serve the goal of judicial efficiency." *Nike, Inc. v. Kasky*, 539 U.S. 654, 660 (2003) (Stevens, J., concurring in dismissal of writ as improvidently granted). And that concern is particularly weighty when, as here, the trial court "continue[s] forward with proceedings while the court of appeals considered the interlocutory order." STERN & GRESSMAN, SUPREME COURT PRACTICE, Ch. 4.19, 283 (9th ed. 2007) (citing cases).

Here, this Court's "piecemeal, prejudgment" review, *Mohawk*, 558 U.S. at 106, would have no practical or resource-conserving point because final judgment has already been rendered in the very proceeding from which immunity is sought and the appeal has been fully briefed. *Cf. id.* at 107 (noting, in the context of the collateral order doctrine, that justification for interlocutory review must "be sufficiently strong to overcome the usual benefits of deferring appeal until litigation concludes"). "Substantial progress toward a final decision creates

the possibility that the issues before the Supreme Court will become moot and lessens the likelihood that a Supreme Court ruling will save the parties and the courts from wasted effort." STERN & GRESSMAN, *supra*, Ch. 4.19, 283. And that pending appeal would likely be resolved before this Court could render decision in this case.

II. THERE IS NO RELEVANT CIRCUIT CONFLICT

A. No Circuit's Law Supports Petitioner's Position

Petitioner's claim of a conflict in circuit law is wrong. *See* Part II.B, *infra*. But there is a more fundamental problem with his petition: The only argument he made below and the only argument that could afford him any relief is that the court of appeals was *correct* to undertake its own common-law review of his immunity claim and not automatically acquiesce in the State Department's statement of non-immunity. *See, e.g.*, Pet. C.A. Opening Br. at 12-13 ("Once the State Department declined to find that foreign policy considerations dictated that [petitioner] receive immunity, the responsibility devolved upon the District Court *** 'to decide for itself whether all the requisites for such immunity existed.'") (quoting *Samantar*, 130 S. Ct. at 2284)).

More specifically, petitioner cannot prevail unless this Court were to hold, as he has argued, that the State Department's views are "meritless" (Pet. 23) and should be afforded no weight at all, and that instead the common law empowers courts to review the scope-of-authority immunity question in complete

disregard of the Executive Branch's position. *See* Pet. C.A. Opening Br. at 8 ("The District Court erred in deferring unreflexively to the State Department's putative determination *** that [Petitioner] was not entitled to immunity.").

There is, however, no conflict in the circuits on that question. In fact, there is no authority for that position at all. No court has ever held that the Executive Branch's views are irrelevant to official-acts immunity. And no court has ever overridden the Executive Branch's (rarely made) judgment that immunity should be denied and forced an immunity that the State Department has eschewed as inconsistent with its foreign policy interests.

For that reason, petitioner's attempt to wrap himself in those court of appeals' decisions that (in petitioner's view) afforded the State Department's views dispositive weight on the factors to be considered in an immunity judgment makes no sense at all. Those courts of appeals would all reject petitioner's claim of immunity too. That those courts of appeals might, in petitioner's view, have rejected his claim with less discussion hardly gives him grounds for complaint, and certainly does not frame an issue for this Court's review.

Furthermore, because the United States has weighed in *against* any grant of immunity to petitioner and because the court of appeals' judgment is consistent with the Executive Branch's position, this case simply does not present the question of how much deference is owed or how courts should respond when the State Department asserts the

appropriateness of immunity in a case. Instead, all the Fourth Circuit did here was explain, in the course of analyzing a *common law* claim in a case that the United States has recognized "is *not* a claim against a foreign state," *Samantar*, 130 S. Ct. at 2293 (emphasis added), why in its judicial judgment the common law of immunity comports with the Executive Branch's position. That is what courts do when applying the common law.

To be sure, petitioner objects to how the court of appeals analyzed his immunity claim and the factors it considered. But having successfully argued that the court of appeals should not automatically accept the Executive Branch's non-immunity suggestion in his case at all, petitioner is ill-positioned to seek this Court's review on the ground that the court of appeals nonetheless should have automatically accepted the one part of the Executive Branch's position *in other statements of interest*—the *jus cogens* factor—that he likes. Pet. 23.

Beyond that, "this Court reviews judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). And the judgment in this case is fully consistent with the State Department's statement of non-immunity. The court of appeals accorded the State Department's views "substantial weight," Pet. App. 18a, 27a, and specifically cited the Department's views that immunity was inappropriate because of (i) petitioner's longstanding residency in the United States, and (ii) the absence of any recognized foreign government asserting that his actions were within

the scope of his authority, both of which were "additional reasons" to deny immunity. *Id.* at 28a.

Accordingly, even if petitioner were correct that the court of appeals should not have exercised the very independent judicial judgment for which he had so forcefully advocated, the judgment in this case would not change. This Court would simply have to affirm the judgment below on an alternative ground "which the law and record permit." *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982); *see Turner v. Rogers,* 131 S. Ct. 2507, 2525 (2011) ("In some cases, the Court properly affirms a lower court's judgment on an alternative ground *** that the parties have raised.").

B. The Fourth Circuit's Decision Is Correct And Consistent With Other Circuits

1. There is no conflict.

The conflict in circuit law that petitioner propounds (Pet. 11-18) does not exist. Neither the Fourth Circuit here nor any other circuit has recognized *jus cogens* as a basis for overriding the Executive Branch's articulated position on immunity. Fourth Circuit law, in fact, enforces such respect for the Executive Branch's judgment. *See Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) (A "grant of immunity issued by the Department of State should be accepted by the court without further inquiry.").

The D.C. Circuit's opinion in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (*see* Pet. 15-17) is off

point. In that case, the D.C. Circuit held that the FSIA provides individual immunity to former officials. That decision thus has been abrogated by this Court's ruling in *Samantar*. Beyond that, all the court of appeals held in *Belhas* was that "the *FSIA* contains no unenumerated exception for violations of *jus cogens* norms." *Belhas*, 515 F.3d at 1287 (first emphasis added). Thus, even if the decision had not been overtaken by *Samantar*, *Belhas* said nothing at all about the role of *jus cogens* principles in applying common law official-acts immunity.

The D.C. Circuit, in fact, recently acknowledged that the role of *jus cogens* violations in other official-acts immunity circumstances is an open one in that circuit. *See Giraldo v. Drummond Co.*, 493 F. App'x 106, 107 (D.C. Cir. 2012) (unpublished) (in denying motion to compel third-party testimony of former President of Colombia, court notes that "[w]e need not decide whether a factual record supporting claims of illegal acts or *jus cogens* violations could ever lead to a different result[]"), *cert. denied*, 133 S. Ct. 1637 (2013). The D.C. Circuit itself thus seems unconvinced of petitioner's claim that "the rationale and result of *Belhas* continue to apply after this Court's holding in *Samantar*" (Pet. 16) to the specific official-acts immunity question that the Fourth Circuit decided.

Petitioner's invocation of the Seventh Circuit's decision in *Ye v. Zemin,* 383 F.3d 620 (7th Cir. 2004), fares no better. That case involved only the question of head-of-state immunity. And just as the Seventh Circuit held that the Executive Branch's view on

head-of-state immunity is "conclusive," *Ye*, 383 F.3d at 627, 630, so too did the Fourth Circuit here. Pet. App. 16a ("[T]he State Department's pronouncement as to head-of-state immunity is entitled to absolute deference.").

Petitioner emphasizes (Pet. 17) the Seventh Circuit's parenthetical description of the appellants' argument—"'(or any person for that matter)'" (citation omitted)—and on that basis suggests that the court of appeals might extend its *jus cogens* holding beyond head-of-state immunity. Maybe. But then again, maybe not. Six-word parenthetical surmise is not a holding; it does not bind future Seventh Circuit panels; and it does not an inter-circuit conflict make.

Finally, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), like *Belhas*, is an FSIA decision that has been overtaken by this Court's decision in *Samantar*. The Second Circuit has not yet analyzed official-acts immunity in the wake of this Court's decision in *Samantar*. Nor has the Second Circuit had a chance to consider the factors and principles announced by the Executive Branch in its *Samantar* brief and post-*Samantar* statements of interest. *See, e.g.,* U.S. S. Ct. Amicus Br. *24-26 (listing factors relevant to immunity determinations, including the nature of the behavior at issue).

Furthermore, the court of appeals' statement that "there can be no immunity—statutory or otherwise—for violations of *jus cogens* (international law norms)" came in the context of an Executive Branch suggestion that immunity be granted, and

thus held only that *jus cogens* cannot override the State Department's view. *See Matar*, 563 F.3d at 14.

Nothing the Fourth Circuit said is to the contrary. In fact, the Fourth Circuit explicitly recognized that "the context for [those] cases was different," as "almost all involved the erroneous (pre-*Samantar*) application of the FSIA to individual foreign officials claiming immunity[.]" Pet App 20a-21a (citing, *inter alia*, *Matar*, 563 F.3d at 14; *Belhas*, 515 F.3d at 1285). That is presumably why the Fourth Circuit repeatedly cited *Matar*, *Belhas*, and *Ye* favorably, and perceived no conflict.

2. The Fourth Circuit's decision was proper.

Petitioner's protests (Pet. 18-22) about judicial interference with the Executive Branch's foreign policy judgments ring hollow given that he advocates for courts to veto a State Department position on immunity. But that is not the only flaw pervading his merits argument. Nothing in the proper separation of powers reduces Article III courts to automaton-like rubberstamps. Quite the opposite, while the separation of powers affords substantial deference to the Political Branches in matters implicating foreign affairs, deference is not abdication. And that is particularly true when the only question before the court involves the application of common-law principles to a traditionally judicial issue like scope of authority. *See National Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("Our deference in matters of

policy cannot[] *** become abdication in matters of law.").

Beyond that, petitioner's (and his *amici*'s) prognostications that foreign relations cannot survive an exercise of judicial judgment applied to a long-time United States resident forget that it is not uncommon for the State Department to remain silent on questions of immunity pertaining to former foreign officials. It did just that for over six years in this very case. *Samantar*, 130 S. Ct. at 2283. In such circumstances, there is no dispute that courts must make the very common-law judgments that the court did here, aligning to the extent reasonable with any existing Executive Branch guidance. *Id.* at 2284-2285.

Importantly, that Executive Branch guidance pointed right where the court of appeals went in this case. After all, the principle that *jus cogens* violations are pertinent to official-acts immunity did not originate with the Fourth Circuit. It started with the Executive Branch, which told this Court that it would be "appropriate to take into account *** the nature of the acts alleged" in making immunity determinations. U.S. Amicus Br. at 7, 25, *Samantar, supra*. Because the Executive Branch also told this Court that courts making immunity judgments should hew to the Executive Branch's identified considerations, *id.* at 6-7, the court of appeals entered an immunity judgment that (i) gave "substantial weight" to the Executive Branch, Pet. App. 27a, (ii) reached the same conclusion as the Executive Branch, and (iii) relied on factors that the Executive

Branch had publicly announced were relevant *to this very case*. Foreign policy can surely survive inter-branch comity like that far better than petitioner's view that courts should throw out the State Department's immunity position altogether.

3. Certiorari briefing is not the place to introduce new evidence.

Lastly, petitioner's attempt to introduce new facts in this Court compounds the inappropriateness of interlocutory certiorari review. The petition attempts to introduce into the record a letter procured from the Prime Minister of a Somali government the United States recently recognized. *See* Pet. 9-10, 23-24. In that letter, the Prime Minister requests that the State Department assert Samantar's immunity from suit. *See* Pet. App. 70a-75a.

That letter presents multiple additional obstacles to this Court's review. To begin with, "this is a court of final review and not first view[.]" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (internal quotations and citation omitted). If petitioner has new-found facts that he believes "may affect the legal issues presented," *Kiyemba v. Obama*, 559 U.S. 131, 131 (2010) (per curiam), he should take that information to district court. But he has not done that. Nor has the United States.

Petitioner has raised the letter in his reply brief in the appeal from final judgment now pending in the Fourth Circuit. But that makes his certiorari *cum* evidentiary petition even more out of place. *See* Pet.

C.A. Reply Br., No. 12-2178, at 6-7. When "[n]o court has yet ruled *** in light of the new facts," this Court "decline[s] to be the first to do so." *Kiyemba,* 559 U.S. at 131; *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below.") (internal quotations and citation omitted).[2]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] It bears noting that petitioner's arguments presume that the Prime Minister—rather than the Somali President, Hassan Sheikh Mohamud (who did not sign the letter)—has the constitutional authority to conduct foreign relations under Somalia's provisional constitution, which itself has not yet been ratified. *See* Provisional Constitution of the Federal Republic of Somalia Aug. 1, 2012, Art. 136(2), available at http://unpos.unmissions.org/LinkClick.aspx?fileticket=CqsW6PVY-C4%3D&tabid=9708&language=en-US; *Somalia: Parliament to 'Review' Federal Constitution*, ALLAFRICA.COM, Mar. 9, 2013, http://allafrica.com/stories/201303100128.html.