No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

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

REPLY BRIEF OF PETITIONER

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Respondents and the Solicitor General envision virtually unthinkable immunity regimes.

1. In Respondents' view, the FSIA would not govern any suit against a foreign official challenging acts undertaken on behalf of a foreign state. Respondents' argument extends even to core aspects of policymaking by present and former cabinet-level officials of close U.S. allies. *See, e.g.*, *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008) (suit against former Israeli general for alleged torture by military in Lebanon); *In re Terrorist Attacks on Sept. 11, 2001* (*Fed. Ins. Co.*), 538 F.3d 71 (2d Cir. 2008) (suit against Saudi officials). No former officials and few current officials who visit the United States for however short a time would be immune from a suit in which a jury would measure the lawfulness of a foreign state's internal policy according to U.S. law and U.S. conceptions of international law.

In Respondents' view, the only immunity backstop against such suits would be "specialized immunities," Resp. Br. 39-41, such as diplomatic, consular, and head-of-state immunity. Those "status" immunities, however, "appl[y] solely to limited categories of high ranking officials of the State," and only "while [they] serv[e] in office." Hazel Fox, *The Law of State Immunity* 666 (2d ed. 2008). But the FSIA codified the *act*-based foreign sovereign immunity that U.S. and international law recognized before the FSIA, that international law requires today, and that extends a state's immunity to suits against a broader array of current and former officials for their official acts. *See id.* at 666-67; Restatement (Second) of Foreign Relations Law of the United States § 66 (1965). Deference to the "Political Branches," which

Respondents urge, requires giving effect to that codification—not reading the FSIA as having silently overridden centuries of immunity law absent any indication in the Act's text, structure, or legislative history.

The United States would stand alone in the world if this Court adopted Respondents' evisceration of foreign sovereign immunity. As the House of Lords explained in holding Saudi officials immune from personal liability in a suit alleging torture, "international law" requires that "state immunity afford[] individual employees or officers of a foreign state 'protection under the same cloak as protects the state itself.'" *Jones v. Ministry of Interior of Saudi Arabia*, [2007] 1 A.C. 270, 298-99 (H.L. 2006) (appeal taken from C.A.) (U.K.) (Lord Hoffmann).

2. The Solicitor General's position—that even after the FSIA, "foreign officials' immunity continues to be governed by the generally applicable principles of immunity articulated by the Executive Branch," SG Br. 7—is equally untenable. Congress passed the FSIA—at the *request* of the Executive Branch—to codify comprehensively the law of foreign sovereign immunity, "to free the Government from the case-by-case diplomatic pressures" of making immunity suggestions to courts, "to clarify the governing standards," and "to 'assur[e] litigants that… [immunity] decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 487-88 (1983); *see also* Restatement (Third) of Foreign Relations Law of the United States, Introductory Note to Chapter 5, Subchapter A, at 393-94 (1987) (FSIA resulted from requests by "the

Department of State…to relieve the Department of the task of ruling on claims of sovereign immunity"); Letter from Richard G. Kleindienst, Att'y Gen., U.S. Dep't of Justice, and William P. Rogers, Sec'y, U.S. Dep't of State, to Speaker, House of Representatives (Jan. 16, 1973), *reprinted in Immunities of Foreign States: Hearing Before the H. Subcomm. on Claims and Governmental Relations of the Comm. on the Judiciary*, 93d Cong. 34 (1973) ("Plaintiffs, the Department of State, and foreign states would…benefit from the removal of the issue of immunity from the realm of discretion and making it a justiciable question."). Thus, the FSIA ensures *uniform* immunity determinations made "exclusively [by] the courts," "[i]n accordance with the practice in most other countries." Letter from Monroe Leigh, Legal Adviser, U.S. Dep't of State, to Edward H. Levi, Att'y Gen., U.S. Dep't of Justice (Nov. 2, 1976), *reprinted in* 75 Dep't St. Bull. 649 (1976); *see also Jones*, 1 A.C. at 291, 306 (immunity "is governed by the law, not by executive or judicial discretion," and must be applied "without any discrimination between one state and another") (Lords Bingham and Hoffmann). The Government's description of the multitude of factors it might take into account in an individual immunity determination, SG Br. 7, 25-26, exemplifies the inconsistent results Congress sought to eradicate.

3. The FSIA must "be read with a presumption favoring the retention of long-established and familiar [common-law] principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and Congress "'speak[s] directly' to the question addressed by the common law." *United States v.*

Texas, 507 U.S. 529, 534 (1993). The FSIA contains no indication that Congress intended to abrogate the sovereign immunity of foreign officials, as urged by Respondents. Nor could Congress have intended to create a senseless, bifurcated regime plagued by the same problems that the FSIA was intended to end, as urged by the Government.[1]

Rather, a suit against a foreign official for official-capacity acts is in reality a suit against the state itself. It therefore falls within the purview of the FSIA, which immunizes "foreign state[s]" from suit in U.S. courts, subject to certain exceptions not applicable here. 28 U.S.C. §§ 1603-1607.

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[1] Contrary to the Government's assertion, the pre-FSIA common law did not recognize a settled, longstanding tradition of judicial deference to the Executive's immunity suggestions. *See, e.g.*, *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574-76 (1926) (dismissing case on sovereign immunity grounds despite State Department's contrary suggestion, *see In re The Pesaro*, 277 F. 473, 479 n.3 (S.D.N.Y. 1921)); H.R. Rep. No. 94-1487, at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606 (noting that, only "[i]n the early part of this century, the Supreme Court began to place less emphasis on whether immunity was supported by the law and practice of nations, and relied instead on the practices and policies of the State Department"); Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2161-63 (1999).

ARGUMENT

I. THE FSIA SUPPORTS TREATING A SUIT AGAINST AN OFFICIAL FOR OFFICIAL-CAPACITY ACTS AS A SUIT AGAINST A FOREIGN STATE

Each of Respondents' arguments for finding the FSIA inapplicable to suits against foreign officials for their official acts is without merit.

1. The FSIA provides that a "'foreign state'…*includes* an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a) (emphasis added), strongly suggesting that a "foreign state" refers to more than just the identified examples and extends to other means through which the state acts, *i.e.*, its officials.

Respondents are wrong that the term "includes" introduces an exhaustive list of entities constituting a "foreign state." Resp. Br. 19-20. That Congress did not intend for "includes" to serve as a term of limitation is underscored by the contrast between providing what a foreign state "*includes*," 28 U.S.C. § 1603(a) (emphasis added), and defining in the very next subsection what an agency or instrumentality "*means*," *id.* § 1603(b) (emphasis added). Had Congress intended to define a "foreign state" comprehensively, it could have said a foreign state *means* the state itself and its political subdivisions, agencies, or instrumentalities. *See Boyle v. United States*, 129 S. Ct. 2237, 2243 n.2 (2009) (contrasting the terms "mean" and "include" under RICO) (emphasis omitted).

The Government does not suggest the entities listed are exhaustive (*see also* U.S. Br. as Amicus Curiae, *Ministry of Def. & Support for the Armed*

Forces of the Islamic Rep. of Iran (MOD) v. Elahi, No. 04-1095, 2005 WL 3477863, at *9 (Dec. 19, 2005) ("*Elahi* Br.")), but nevertheless argues that § 1603(b) excludes individual officials because the listed entities are non-natural and "'a word is given more precise content by the neighboring words with which it is associated.'" SG Br. 17-18. But the better application of that canon is that individual officials resemble the agencies and instrumentalities described in § 1603(b) because they are the means through which a state acts.

The reason Congress *expressly* mentioned governmental and corporate entities is that they "had previously—and problematically—been omitted from the term 'state.'" Resp. Br. 20; *see also* Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations* 65 (2d ed. 2003). Had Congress *not* defined a foreign state to include such corporate entities as agencies and instrumentalities, the FSIA may have been read to exclude them.

By contrast, there was no dispute that foreign officials were entitled to the sovereign immunity of a foreign state for their official-capacity acts. Congress therefore had no need to say expressly that the state's immunity would continue to extend to its officials. Indeed, the fact that the FSIA's legislative history is silent about the foreign sovereign immunity of officials, but mentions that diplomatic and consular immunity are outside the statute's scope, SG Br. 18-19, suggests Congress did *not* depart from the common law and separate the sovereign immunity of the state from that of its officials. *Cf. Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991)

(absence of reference to "'sweeping'" legal change in legislative history is "'watchdog [that] did not bark'").

2. Respondents also argue a state must "[m]ean[] a [p]olitical [b]ody" and "individual officials" therefore do not "constitute 'states' under the FSIA." Resp. Br. 13-15 (bolding removed); *see also* SG Br. 14-15.

The dictionary definition of a state is irrelevant because Petitioner does not argue that he *is* a foreign state, but rather that "a suit against a present or former official for official-capacity acts is in reality a suit against the 'foreign state' itself and therefore falls within the purview of the FSIA." Petr. Br. 17, 21-41; *see also Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990); *Fed. Ins. Co.*, 538 F.3d at 84.

Moreover, the FSIA defines a "'foreign state'" to "include[]" *more* than just a "'body politic,'" Resp. Br. 13, to encompass the "agenc[ies] or instrumentalit[ies]" through which the state acts—entities that would fall outside the definition proposed by Respondents. 28 U.S.C. § 1603(a).

That definition would also lead to absurd results because it would exclude from the FSIA's scope a host of individuals and entities through which the "body politic" functions—such as defense ministries, armies, treasuries, and foreign affairs ministries. *See, e.g.*, *MOD v. Cubic Def. Sys., Inc.*, 495 F.3d 1024, 1035 (9th Cir. 2007), *rev'd on other grounds sub nom. MOD v. Elahi*, 129 S. Ct. 1732 (2009); *Garb v. Republic of Poland*, 440 F.3d 579, 589-90 (2d Cir. 2006); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 234-35 (D.C. Cir. 2003); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 153 (D.C. Cir. 1994). Indeed, the Government previously argued

the term "foreign state" extends to a "defense ministry, which…is presumptively inseparable from the foreign state itself." *Elahi* Br. at *9. An individual in his official-capacity acts is no less inseparable from the state.

3. Respondents argue it would render the separate references to foreign states and their officials in the FSIA's tort and terrorism exceptions "superfluous" if the term "foreign state" were construed to encompass suits against state officials. Resp. Br. 15-19 (discussing 28 U.S.C. §§ 1605(a)(5), 1605A(a)(1), 1605A(c)).[2]

But the fact that the FSIA mentions a foreign "state" separately from "officials" hardly suggests that a state's immunity does not extend to its officials. For example, although a foreign state's immunity extends to agencies or instrumentalities because the FSIA "includes" agencies or instrumentalities in the definition of a foreign state, 28 U.S.C. § 1603(a), the FSIA repeatedly refers *separately* to a "foreign state" and its "agenc[ies] or instrumentalit[ies]" when describing exceptions to

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[2] Respondents cite other statutes unrelated to immunity addressing the status of individual officials. But each statute mentioned individual officials to treat them differently from the state, or to treat one subset of officials differently from another. *See, e.g.*, 50 U.S.C. § 1801(a)-(b) (defining "'[f]oreign power'" and "'[a]gent of a foreign power'" separately because of different treatment accorded to each, *e.g.*, *id.* § 1805(d)(1)). Congress's silence about individual officials in the FSIA's definition of a "foreign state" suggests it did not similarly intend to differentiate between suits against a foreign state and suits against officials for their official acts.

the immunity of a foreign state's property from attachment. *See, e.g.*, *id.* § 1610(f)(2)(A) ("property of [a] foreign state or any agency or instrumentality of such state"); *see also id.* § 1610(f)(1)(A); (g)(1); (g)(2).

Moreover, the FSIA's tort and terrorism exceptions are not describing what constitutes a foreign state or when a state's immunity extends to its officials; they are defining and delimiting *exceptions* to immunity. *See* Dellapenna, *supra*, at 324, 415-16. In doing so, the exceptions make clear when states can be sued under a respondeat superior theory of liability. There is nothing "'superfluous,'" Resp. Br. 15, about specifying the circumstances in which a foreign state is liable for officials' actions pursuant to a new exception abrogating hundreds of years of sovereign immunity. Such statutory exceptions *must* "speak directly" to the new rule being created. *Texas*, 507 U.S. at 534.

Congress legislates against the background principle that "[w]aivers of [sovereign] immunity must be 'construed strictly in favor of the sovereign' and not 'enlarge[d]…beyond what the language requires.'" *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (citation omitted); *see also* Gregory C. Sisk, *Litigation with the Federal Government* 94-95 (4th ed. 2006) (Congress uses "'specifically targeted statutory language'" to waive sovereign immunity). Thus, in waiving the immunity of the United States, federal statutes routinely use language like that in the FSIA to describe the scope of the waiver. *See, e.g.*, 28 U.S.C. § 1346(b)(1) (waiving sovereign immunity when United States is sued for harm caused by "any employee of the Government while

acting within the scope of his office or employment"); *see also id.* § 2679(b)(1); 5 U.S.C. § 702; 7 U.S.C. § 2570, *abrogated by Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

This clarification answered numerous ambiguities that would have arisen had the FSIA simply revoked the immunity of a "state" for torts and terrorism, without mentioning "officials." For example, the language in the FSIA about the "scope of… employment," *see* 28 U.S.C. §§ 1605(a)(5); 1605A(a)(1), clarifies that a state may be liable even if an official is entitled to diplomatic or other status-based immunity. The same language may also waive the immunity of a foreign state for foreseeable actions by the state's officials even if those actions are inconsistent with the state's orders or do not reflect the state's official policies, and even if the state subsequently disclaims the actions. *See Joseph v. Office of Consulate Gen. of Nig.*, 830 F.2d 1018, 1025 (9th Cir. 1987).

In short, the FSIA exceptions' separate references to "state" and "officials" do not suggest, much less make "evident," *Isbrandtsen*, 343 U.S. at 783, that the FSIA ended the common law's protection of "officials" of the "state." The parallel treatment given to "officials" and their "state[s]" by the FSIA when immunity is taken away, if anything, further reinforces their unity of interest when the state's immunity continues.

4. Respondents are wrong that the FSIA precludes service of process on individuals. Resp. Br. 25-26; SG Br. 24. Officials may be served in accordance with the FSIA's procedures for service on

a foreign state, 28 U.S.C. § 1608(a). *See Baumel v. Syrian Arab Republic*, 550 F. Supp. 2d 110, 113-14 (D.D.C. 2008); *Gates v. Syrian Arab Republic*, 580 F. Supp. 2d 53, 64 (D.D.C. 2008); *Nikbin v. Islamic Republic of Iran*, 471 F. Supp. 2d 53, 67-69 (D.D.C. 2007).

The FSIA permits service based upon "any special arrangement" between the plaintiff and the foreign state or agency or instrumentality, 28 U.S.C. § 1608(a)(1), (b)(1); by directing the summons and complaint "to the head of the ministry of foreign affairs of the foreign state," *id.* § 1608(a)(3); and pursuant to "an applicable international convention on service of judicial documents," *id.* § 1608(a)(2), (b)(2). In turn, the Hague Service Convention, which the United States has ratified, *see* Dellapenna, *supra*, at 278, permits service pursuant to the laws of the forum state, including the Federal Rules of Civil Procedure, if the defendant is found in the United States. *See* 1 James Wm. Moore et al., *Moore's Federal Practice* § 4.52[2][a] (3d ed. 2009).

5. Respondents profess concern that applying the FSIA to individuals would expose them to personal liability for the state's terrorist acts or commercial activities. Resp. Br. 26-27. As to the former, because 28 U.S.C. § 1605A authorizes a cause of action against certain officials for terrorist acts, their personal property should be available to satisfy such judgments. As to the latter, only the state, not its agents, would ordinarily be responsible for any judgment under agency principles. *See* Working Group of the ABA, *Reforming the Sovereign*

Immunities Act, 40 Colum. J. Transnat'l L. 489, 539 & n.170 (2002).[3]

II. RESPONDENTS' RELIANCE ON NON-FSIA SOURCES OF LAW DOES NOT NEGATE THE SOVEREIGN IMMUNITY OF FOREIGN OFFICIALS

Unaided by the FSIA's text or structure, Respondents turn to other sources of law, none of which establish that the FSIA excluded officials from the scope of a foreign state's immunity.

A. RESPONDENTS' RELIANCE ON DOMESTIC IMMUNITY CASES CONTRAVENES THE FOREIGN SOVEREIGN IMMUNITY PRINCIPLE THAT ONE STATE CANNOT JUDGE ANOTHER STATE'S ACTS

Respondents mistakenly rely on domestic immunity cases to argue that foreign sovereign immunity turns on whether the court's judgment would operate directly against the state, so that actions for the official's personal money purportedly raise no concerns. Resp. Br. 38. Such a rule has no basis in the law of foreign sovereign immunity.

Under domestic immunity cases, as Respondents cogently explain, "a suit for personal money damages from an official does not constitute a suit against the

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[3] Respondents' Due Process concerns about extending the FSIA to individuals, Resp. Br. 27-28, are misplaced because Congress ensured minimum contacts would be satisfied in any suit allowed to proceed under the FSIA "by enacting substantive [exceptions to immunity] requiring some form of substantial contact with the United States." *Verlinden*, 461 U.S. at 490.

state" only where the official's "actions exceeded limits on his authority imposed by *controlling law*," in which case "'[t]he officer is *not* doing the business which the *sovereign has empowered him* to do or he is doing it in a way which the sovereign has forbidden.'" Resp. Br. 38 (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)) (emphasis added). Thus, an essential prerequisite to such a suit is finding that an official is *not* acting for the sovereign because his actions violate the sovereign's "controlling law."

But such a determination is precisely what foreign sovereign immunity *prohibits*. While federal courts may determine when an official's acts exceed *our* "controlling law," they have no basis for saying that a foreign official's actions violate *foreign* law, and that he therefore must not be acting for his state. U.S. courts are not ultimate arbiters of "controlling law" for other nations or of international law. Indeed, the fundamental premise of foreign sovereign immunity is that one nation may not judge the acts of another. *See Heaney v. Government of Spain*, 445 F.2d 501, 503 (2d Cir. 1971); *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895). Thus, unlike domestic immunity, federal courts cannot say an official's acts violate "controlling law" of a foreign state without gravely interfering with the international comity underlying foreign sovereign immunity.

Moreover, it is one thing for U.S. courts to "balanc[e]…'fundamentally antagonistic social policies,'" *United States v. Stanley*, 483 U.S. 669, 695 n.13 (1987) (Brennan, J., concurring in part and dissenting in part), by permitting damages actions that subject *domestic* officials "to 'the supreme

authority of the United States.'" *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105 (1984). But U.S. courts have no role "in identifying and resolving these social tradeoffs for other countries…[because] [f]oreign nations have different legal and political cultures, different attitudes toward spreading risk through civil damages, and different degrees of wealth (and thus different capacities to pay civil damages)," whether those damages come from states or individuals. Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 Green Bag 2d 137, 148 (2010).

In short, none of the reasons for distinguishing between damages suits against domestic officials and suits against the state apply in the foreign context, and such a distinction undermines all the policies shielding foreign states from suit. As the Government correctly notes, "personal damage actions against foreign officials can unduly chill their performance of duties, trigger reciprocity concerns about the treatment of United States officials sued in foreign courts, and interfere with the Executive Branch's conduct of foreign affairs" just as much as actions brought directly against a foreign state. SG Br. 22.

For these and other reasons, the common law has long distinguished between cases against domestic officials, who may be held personally liable in certain circumstances, and cases against foreign officials,

who are absolutely immune from suit for their official acts. *See* Bradley & Goldsmith, *supra*, at 137-44.[4]

B. FOREIGN SOVEREIGN IMMUNITY DOES NOT TURN ON WHETHER THE JUDGMENT WOULD BE PAID BY THE STATE

For the reasons just stated, the common law of foreign sovereign immunity, contrary to Respondents' assertion, draws no distinction between suits seeking a judgment against the state and those seeking money from the official, but immunizes *all* official acts on the state's behalf. Actions taken in an official capacity simply "cannot form the basis for a suit against [a foreign official] personally." Statement of Interest of the United States, *Matar v. Dichter*, No. 05 Civ. 10270 (WHP), at 26 (S.D.N.Y. Nov. 17, 2006).

As the Government notes, pre-FSIA common law "recognized the immunity of individual foreign officials 'from suits brought in [United States]

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[4] *Velasco v. Government of Indonesia*, 370 F.3d 392, 399 (4th Cir. 2004), and *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929), on which Respondents rely, are not to the contrary. Resp. Br. 47 & n.17. *See Velasco*, 370 F.3d at 398-99 (officer's entitlement to immunity turns on the official nature of his acts); *Lyders*, 32 F.2d at 310 (denial of immunity turned on the absence of evidence regarding the official nature of the act in question). Nor does the Restatement (Third) of Foreign Relations § 907 comment c instruct U.S. courts to apply domestic immunity principles in suits against foreign officials. Resp. Br. 47-48. To the contrary: "Suits [alleging violations of international law] against a foreign state are subject to the defense of [foreign] sovereign immunity [while] [s]uits *against the United States* are subject to the domestic counterpart of that doctrine . . . ." *Id.* (emphasis added and citation omitted).

tribunals for acts done within their own States, in the exercise of governmental authority.'" SG Br. 10. This immunity "was traditionally not limited to current employees of the foreign government." SG Br. 11. Extending sovereign immunity to current and former officials is "consistent with customary international law," *id.*, and "serves the important purposes of protecting the reciprocal interests of sovereigns, ensuring that officials are not unduly chilled in the performance of their duties, and preventing litigants from circumventing the FSIA's stringent limitations on suit against the state through suits against its former officials," *id.* at 29.

The "immunity of foreign officials" does not turn on whether the state would respond directly to a judgment, but "arises from the official character of their acts," which "'are those of the state itself.'" *Id.* at 11-12 (quoting *Underhill*, 65 F. at 579). As the Government explains, "personal damage suits against foreign officials based on actions taken in their official capacity may require the court to sit in judgment of a foreign state's actions, much as in a suit against the state itself." *Id.* at 12-13; *see also Jones*, 1 A.C. at 281 (Lord Bingham); *Jaffe v. Miller*, [1993] 13 O.R.3d 745, 758-59 (C.A.), *leave to appeal refused*, [1994] 1 S.C.R. viii (note) (Canada). [5]

[5] The Government asserts that foreign officials may sometimes be entitled to either more or less immunity than foreign states themselves. But the Government cannot cite a single instance where an official has been accorded less immunity, and the only case purportedly giving officials broader immunity, *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841 (S.D.N.Y. Nov. 23, 1976), involved allegations against officials only for official acts, while the allegations against the

Moreover, as a practical matter, the prospect of bankrupting a foreign official for official acts has at least as much effect on the individual's conduct as relief against the state. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324 (2008) ("damages" are "a potent method of governing conduct") (internal quotation marks omitted).

Respondents nevertheless insist the touchstone of foreign sovereign immunity is whether a judgment runs against a foreign state. Their own interpretation of the FSIA contravenes even *this* erroneous understanding of foreign sovereign immunity law because, in their view, the statute would *never* immunize individuals from suit, even in an injunctive action running against the state. Regardless, Respondents cannot cite a single authority deviating from the settled rule that foreign officials' entitlement to sovereign immunity turns on the official character of their acts.

1. *Restatement (Second) of Foreign Relations*

Respondents argue that under the Restatement (Second) of Foreign Relations, foreign sovereign immunity turns on the "compulsive effect of the *judgment* on the state," Resp. Br. 42 (emphasis added), because the Restatement immunizes officials only "if the effect of exercising jurisdiction would be to enforce a *rule of law* against the state." Restatement (Second) of Foreign Relations § 66(f)

(continued…)

state involved both official and commercial acts. *See* State Territory, Jurisdiction, and Jurisdictional Immunities, 1976 Digest § 7, at 329-30.

(emphasis added). But obviously a court can enforce a *rule of law* against a foreign state without enforcing a *judgment* against it. *Cf. Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 232-33 (1998) (differentiating between enforcing laws and enforcing judgments under Full Faith and Credit Clause). The "'effect of exercising jurisdiction would be to enforce a rule of law against the state'" where the lawsuit would require the court to sit in judgment "of the propriety of [the state's] political conduct" because the challenged acts of the official are "those of the sovereign itself." *Heaney*, 445 F.2d at 504 (quoting Restatement (Second) of Foreign Relations § 66(f)).

The Restatement's illustrations confirm this understanding. A foreign official would not be immunized for injuries caused by an automobile accident in the forum state, Restatement (Second) § 66, ill. 3, because "use of public roads" by a foreign official "belong[s] to the sphere of…*private* activities" unrelated to state policy, even if "such operation and use have occurred in the performance of official functions." *Collision with Foreign Gov't-Owned Motor Car Case*, 40 I.L.R. 73, 78 (Austria Sup. Ct. 1961). By contrast, truly official acts *are* immunized, regardless of the relief sought. *Compare* Restatement (Second) § 66, ill. 2 (defense ministry official would be entitled to immunity in breach-of-contract case involving supplies purchased for armed forces), *with Grunfeld v. United States* (N.S.W. Sup. Ct. 1968) (Australia) (officer who bought supplies for the military was entitled to sovereign immunity in breach-of-contract action because he acted "for the purposes of the foreign state itself"), *excerpted in* 20 *U.N. Legislative Series, Materials on Jurisdictional Immunities of States and Their Property*, at 181-83

U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (William S. Hein & Co., photo. reprint 2003) (1982) [hereinafter *Materials*].

Finally, the Restatement (Third), which was issued after enactment of the FSIA, deleted "'in its entirety the discussion of the United States common law of sovereign immunity, and substitute[d] a section analyzing issues exclusively under the [FSIA].'" *Fed. Ins. Co.*, 538 F.3d at 83. It therefore confirms the FSIA governs the sovereign immunity of foreign officials. *Id.*

2. *Foreign Sovereign Immunity Cases*

Respondents' reliance on foreign sovereign immunity cases fares no better.

a. Contrary to Respondents' assertions, none of the cases cited in Petitioner's brief turned on the alleged coercive effect of the judgment on the state. In some cases, the fact that a judgment ran against the state *reinforced* the conclusion that the lawsuit challenged official state action. But the touchstone in each case was the official nature of the act. *See Church of Scientology Case*, 65 I.L.R. 193, 197 (Fed. Sup. Ct. 1978) (Germany) ("The nature of the particular State act to be judged is the decisive factor."); *Grunfeld*, *excerpted in Materials*, at 183 (Officer "did not act in a personal capacity, and it is clear that what was done…was done for the purposes of the foreign state itself."); *Syquia v. Almeda Lopez*, *excerpted in Materials*, at 360, 363 (Phil. Sup. Ct. 1949) (Officers could not be held "personally liable" for damages because [they] were acting "pursuant to orders received from that Government."); *Heaney*, 445 F.2d at 503 (Officer was entitled to sovereign immunity because the "act here in question…[is]

'strictly political or public.'"); *Oliner v. Can. Pac. Ry. Co.*, 311 N.Y.S.2d 429, 434 (App. Div. 1970) ("[T]he action [in question] was an act of state" and therefore the officer is "entitled to sovereign immunity."); *Bradford v. Dir. Gen. R.R.s of Mex.*, 278 S.W. 251, 252 (Tex. Civ. App. 1925) (dismissing suit because the action required the court to question "'an act done by a sovereign in his sovereign character'").

b. Respondents' attempt to distinguish other cases as not involving sovereign immunity are belied by the courts' opinions. *See Holland v. Lampen-Wolfe*, [2000] 1 W.L.R. 1573, 1578 (H.L.) (U.K.) (Lord Cooke) (agreeing that defendant is entitled to "sovereign immunity"); *id.* at 1588 (Lord Millett) (explaining the "immunity in question in the present case belongs to the United States"); *Jaffe*, 13 O.R.3d at 766 (explaining officers were "entitled to sovereign immunity"). And, while *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596, 600 (1876), also applied the act of state doctrine, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 430-31 (1964), reiterated that "sovereign immunity provided an independent ground" (in addition to the act of state doctrine) for this Court's affirmance in *Underhill*, 168 U.S. 250, and at the time these cases were decided, the act of state doctrine was "linked with principles of sovereign immunity" in any event. *Allied Bank Int'l v. Banco Credito Agricola de Cartago*, 757 F.2d 516, 520 (2d Cir. 1985).

c. As Respondents apparently concede, Resp. Br. 44, *Jones v. Ministry of Interior of Saudi Arabia* holds that sovereign immunity extends to suits against officers acting in their official capacity,

regardless of whether the plaintiff seeks damages from the state or the officer. 1 A.C. 270. Contrary to the misrepresentations by amici, *Jones* clearly holds that "*international law*" imposes a duty to recognize the immunity of officers accused of committing torture while acting in an official capacity, and that a state may not, "as a matter of discretion, relax or abandon" this immunity. 1 A.C. at 305-06 (emphasis added); *see also id.* at 278, 281-83, 288, 290-91, 293, 296-302 (Lords Bingham and Hoffmann).

d. The authorities cited by amici Public International Law Professors confirm that entitlement to immunity turns on the official nature of the act in question. In *Cole v. Heidtman* (S.D.N.Y. 1968), the State Department recommended the denial of sovereign immunity to both the foreign agency and its official because the acts were "'of a *private* nature under the standards set forth in the Tate Letter.'" 1977 Digest app. at 1063 (emphasis added). In *Schmidt v. Home Secretary of the Government of the United Kingdom*, 103 I.L.R. 322, 325 (H. Ct. 1994), *aff'd,* [1997] 2 I.R. 121 (S.C.), the Irish High Court held that foreign officials are immune from tort claims challenging their official actions, and that *Saorstat & Continental Steamship Co. v. De Las Morenas*, 12 I.L.R. 97, 98 (S.C. 1944) (Ireland), on which amici rely, was not to the contrary. And in *Pilger v. United States Steel Corp.*, the British government "voluntarily strip[ped the officer] of…sovereign immunity" through legislation. 3 I.L.R. 181 (N.J. Ch. 1925).

C. THE TVPA DOES NOT CREATE AN EXCEPTION TO FOREIGN SOVEREIGN IMMUNITY

Respondents and their amici suggest the Torture Victim Protection Act (TVPA) creates an exception to immunity. Because the Fourth Circuit did not reach this question, *see* Pet. App. 11a n.3, it is not properly before this Court. In any event, the TVPA reinforces the conclusion that the FSIA ordinarily bars suits against individual officials for their official-capacity acts.

Respondents' argument that the TVPA should be read *in pari materia* with the FSIA, Resp. Br. 28, ignores that merely creating a cause of action does not waive preexisting immunity. *See, e.g.*, *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989) (enactment of new law where state officials are the only potential defendants does not waive the officials' Eleventh Amendment immunity). As the Government has explained, because the TVPA is "silent as to…the immunities of foreign officials," "it must be read in harmony with relevant immunity rules," U.S. Br. as Amicus Curiae, *Matar v. Dichter*, No. 07-2579-cv, at 26 (2d Cir. Dec. 19, 2007), "'rather than in derogation of them,'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986). This is particularly true because Congress appended the TVPA to the Alien Tort Statute, which this Court held in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989), is subject to all provisions in the FSIA, including the FSIA's *exclusive* exceptions to immunity. *See Belhas*, 515 F.3d at 1289. By contrast, when Congress wanted to waive FSIA immunity for certain acts by state

sponsors of terrorism, it amended the *FSIA* to create an exception to immunity. *Id.*

The TVPA's legislative history confirms that TVPA claims are "subject to restrictions in the" FSIA. H.R. Rep. No. 102-367(I), at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 88; *see also* S. Rep. No. 102-249, at 7 (1991) ("[T]he TVPA is not meant to override the [FSIA]."). As the Government explains, when Congress passed the TVPA, both the House and Senate Committees "assume[d], consistent with the Ninth Circuit's then-recent decision in *Chuidian*… that the FSIA would govern the determination of immunity for…foreign officials while in office and for all former foreign officials." SG Br. 20 (citing TVPA House & Senate Reports). Indeed, the Senate Report explained Congress's understanding that an official could "avoid liability by invoking the FSIA" if he could "prove an agency relationship to a state, which would require that the state 'admit some knowledge or authorization of relevant acts.'" S. Rep. No. 102-249, at 8; *see also* 138 Cong. Rec. S2668 (daily ed. Mar. 3, 1992) (statement of Sen. Specter) ("If an agency relationship with the foreign state can be proved…then the FSIA would operate to bar the suit [against the official].").

Seven months later, Congress again demonstrated its understanding that the FSIA applied to claims against individuals for their official acts. The Antiterrorism Act creates a remedy for terrorist acts, but bars claims against "a foreign state…*or an officer or employee of a foreign state…acting within his or her official capacity or under color of legal authority*." 18 U.S.C. § 2337(2) (emphasis added). The legislative history explains this restriction

"maintains the status quo, in accordance with the Foreign Sovereign Immunities Act, with respect to sovereign states *and their officials*." S. Rep. No. 102-342, at 47 (1992); H.R. Rep. No. 102-1040, at 7 (1992) (emphasis added).

Respondents erroneously conflate liability and immunity in arguing Congress used the terms "'actual or apparent authority'" and "'under color of law'" in the TVPA to invoke domestic-immunity cases permitting personal-capacity suits against government officials. Resp. Br. 28. Under 42 U.S.C. § 1983, this language concerns the circumstances in which an individual's actions are sufficiently tied to the state to create *liability*. *See Hafer v. Melo*, 502 U.S. 21, 28 (1991); *see also West v. Atkins*, 487 U.S. 42, 52 n.10 (1988) (even private parties may act under color of law if acting under state direction). An official's entitlement to *immunity*, by contrast, is "'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" *Hafer*, 502 U.S. at 28-29.

Nor would subjecting TVPA claims to the FSIA nullify the TVPA. Resp. Br. 30. TVPA claims could still be brought, for instance, if the foreign state disclaims the official's actions, *see, e.g.*, *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1285-87 (N.D. Cal. 2004); if the terrorism exception applies to the claim, 28 U.S.C. § 1605A(a)(1), *see, e.g.*, *Price v. Socialist People's Libyan Arab Jamahiriya*, 389 F.3d 192, 200 (D.C. Cir. 2004); or if the claim falls within another FSIA exception, such as those for commercial activities or non-commercial torts, *see, e.g.*, *Kalasho*

v. Republic of Iraq, No. 06-11030, 2007 WL 2683553, at *6-7 (E.D. Mich. 2007) (magistrate's report rejected in part on other grounds), or implicit or explicit waiver of immunity by the state, 28 U.S.C. § 1605(a)(1), *see, e.g.*, *Paul v. Avril*, 812 F. Supp. 207, 210-11 (S.D. Fla. 1993).

Finally, that Congress understood that head-of-state and diplomatic immunity would not shield former officials from liability under the TVPA, Resp. Br. 29-30, is hardly surprising, because such *status-based* immunities generally lapse when an official leaves office. The act-based *sovereign* immunity that the FSIA codified does not. *See supra* p.1.

III. RESPONDENTS AND THEIR AMICI ADVANCE A SERIES OF ARGUMENTS NOT PROPERLY BEFORE THIS COURT

Respondents and their amici argue the actions allegedly taken by Petitioner could not have been official-capacity acts and that torture is a *jus cogens* violation for which no state or official may claim immunity. The Fourth Circuit did not reach these arguments, and they are not properly before this Court. Pet. App. 11a n.3; Resp. Br. 51 n.19; SG Br. 8, 31. They are also meritless.

1. Respondents' claims involve actions allegedly undertaken by Petitioner in his capacity as a former Defense Minister, First Vice President, and Prime Minister. JA 55-98 ¶¶ 2, 5-7, 95, 104, 114, 124, 134, 143, 152. The "[e]xercise of the powers of police and penal officers…. 'cannot be performed by an individual acting in his own name,'" but rather "'can be performed only by the state acting as such.'" *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993). Thus, under the FSIA, the alleged "abuse of the

power of [the] police" or military of a foreign state, "however monstrous such abuse undoubtedly may be," has "long been understood…as peculiarly sovereign in nature." *Id.* at 361; *see also Herbage v. Meese*, 747 F. Supp. 60, 67 (D.D.C. 1990) (FSIA bars claims for personal liability, "no matter how heinous the alleged illegalities," where "allegations would require an adjudication of the propriety and legality of the acts of British authorities in the performance of their official duties"), *cited by Nelson*, 507 U.S. at 361. This is particularly true when the foreign state characterizes the actions as official. *See, e.g.*, *Belhas*, 515 F.3d at 1284.

Here, Respondents themselves claim Petitioner was implementing the policies of the regime he represented, and the Somali TFG[6] has reaffirmed Petitioner would have taken the alleged acts in his official capacity on behalf of Somalia—a foreign state that is a member of the United Nations, that the United States recognizes, and with which the United States has never severed diplomatic ties. Petr. Br. 8-9; Somali Professors Br. 30.

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[6] Respondents' arguments that the TFG does not reflect the views of the State of Somalia are belied by the extensive ties between the United States and the TFG, *see* Petr. Br. 8-9, and by the United States' recognition that the TFG speaks for Somalia for other purposes. For example, the United States drafted and co-sponsored U.N. Resolution 1851, which recognized that only the TFG could consent to allow other countries to interdict and prosecute pirates in Somalia's territorial waters. *See* S.C. Res. 1851, ¶¶ 3, 10, UN Doc. S/RES/1851 (Dec. 16, 2008). In any event, ratification by a current government provides only one indication that an individual's conduct was undertaken on behalf of a state. *See Chuidian*, 912 F.2d at 1106-07.

Contrary to Respondents' argument, Resp. Br. 51-53, sovereign immunity also applies to actions that allegedly violate domestic or international law. *See Belhas*, 515 F.3d at 1286-88; *Herbage*, 747 F. Supp. at 66-67. "[T]o condition a foreign sovereign's immunity on the outcome of a preliminary judicial evaluation of the propriety of its political conduct…would frustrate the very purpose of [foreign sovereign immunity]." *Heaney*, 445 F.2d at 504.

2. This Court cannot recognize a *jus cogens* exception to sovereign immunity for claims of torture because the exceptions to immunity in the FSIA are *exclusive*. *See Amerada Hess*, 488 U.S. at 435-36. And the FSIA exception for torture suits is limited to designated state sponsors of terrorism, 28 U.S.C. § 1605A, which Somalia is not.[7]

Nor does international law permit such an exception to immunity. *See, e.g.*, *Jones*, 1 A.C. at 298 (Lord Hoffmann); *Bouzari v. Islamic Republic of Iran*, [2004] 71 O.R.3d 675, 695 (C.A.) (Canada). The Convention Against Torture (CAT), on which Respondents rely, "requires a State party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State," not for alleged torture abroad. *Status of the CAT*, at 21, UN Doc. CAT/C/2/Rev.5 (Jan. 22,

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[7] Nor does a state "waive[] its [FSIA] immunity either explicitly or by implication," 28 U.S.C. § 1605(a)(1), when it engages in torture. A state waives its immunity under § 1605(a)(1) only if it takes affirmative steps to submit to U.S. jurisdiction, which neither Petitioner nor Somalia has done here. *See, e.g.*, *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173-74 (D.C. Cir. 1994).

1998); 136 Cong. Rec. S17486-01 (daily ed. Oct. 27, 1990); *see also Jones*, 1 A.C. at 296 (Lord Hoffmann). And, while parties to the CAT have agreed to *criminal* jurisdiction over extraterritorial torture in certain circumstances, under international law sovereign immunity still applies in *civil* cases. *See Jones*, 1 A.C. at 286-87, 289-91, 293, 296-306; *Bouzari*, 71 O.R.3d at 691-96. Such private litigation over torture claims, to which states have not consented, lacks the prosecutorial safeguards and state-to-state direct accountability of a criminal proceeding initiated by the government. Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 Mich. L. Rev. 2129, 2181 (1999).

IV. IN THE ALTERNATIVE, A FORMER OFFICIAL IS AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE

Officials and former officials also satisfy each prong of the definition of an "'agency or instrumentality,'" 28 U.S.C. § 1603(b). *See Fed Ins. Co.*, 538 F.3d at 83; *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); *Chuidian*, 912 F.2d at 1101.

First, an official can be an "entity," 28 U.S.C. § 1603(b). *See City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999) ("entity" "may include a natural person"); *In re McCook Metals, L.L.C.*, 319 B.R. 570, 587 n.10 (Bankr. N.D. Ill. 2005) (same).

Second, an official is a "separate legal person," 28 U.S.C. § 1603(b)(1). The "word[] 'person'…include[s]

corporations…as well as individuals." 1 U.S.C. § 1; *cf. Weil v. Comm'r*, 173 F.2d 805, 808 (2d Cir. 1949) ("[I]n probate administration, executors are regarded as separate legal persons."'). And a "separate legal person" is one, like an individual official, who can "sue or be sued," "contract" or "hold property in [his] own name." 1976 U.S.C.C.A.N. at 6614.[8]

Third, an individual official "is an organ of a foreign state." 28 U.S.C. § 1603(b)(2). *See, e.g.*, *Jaffe*, 13 O.R.3d at 757 ("'[A] State acts through its organs or agencies, which normally include…persons….'"); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170-71 (1803) ("head of a department" is an "organ of executive will"); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) (President is "the Nation's organ in foreign affairs").

Fourth, an individual is *not* a corporate entity of the sort excluded from the definition of an "agency or instrumentality" by 28 U.S.C. § 1603(b)(3).

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[8] Respondents contrast the term "separate legal person" with the reference to "a natural person" in 28 U.S.C. § 1610(f)(1)(B). The use of the term "natural person" in this provision simply clarifies that *only* natural persons are implicated. By contrast the term "separate legal person" used in § 1603(b)(1) encompasses both natural and non-natural persons.

CONCLUSION

The judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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