No. 11-1479

In the United States Court of Appeals for the Fourth Circuit

BASHE ABDI YOUSUF, et al.,
Plaintiffs-Appellees,

v.

MOHAMED ALI SAMANTAR,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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INTRODUCTION AND INTERESTS OF THE UNITED STATES

We file this *amicus curiae* brief to reaffirm the formally stated position of the United States that, under the specific circumstances of this case, defendant-appellant Mohamed Samantar is not entitled to immunity from suit as a former Somali government official. The district court properly recognized that the State Department's immunity determination is binding and thus correctly denied Samantar's motion to dismiss based on his flawed claim of immunity. In an earlier phase of this case, the

Supreme Court held that the system established by Congress and the President in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (2006 & Supp. II 2008), governs immunity from civil suit of foreign states and their agencies or instrumentalities, but that system does *not* control the immunity of foreign government officials, such as that asserted by Samantar here. *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010). The Supreme Court ruled that, in enacting the FSIA, Congress left unchanged the existing common law regime under which — based on constitutional separation of powers principles — the courts give full effect to the Executive Branch's immunity determinations concerning foreign officials in suits in U.S. courts.

On remand of this case, the United States presented the district court with the State Department's determination, conveyed by the Legal Adviser, that Samantar is not entitled to immunity from suit as a former official of a foreign state. The U.S. filing cited as "[p]articularly significant among the circumstances of this case and critical to the present Statement of Interest" that: (1) there is no currently-recognized Somali government to request immunity on Samantar's behalf or to express a position on whether Samantar's relevant acts were taken in an official capacity; and (2) it is appropriate in the circumstances here to permit U.S. courts to exercise jurisdiction over U.S. residents such as Samantar, particularly when sued by other U.S. residents.

Consistent with the Supreme Court's mandate in this case, the district court gave full effect to this determination by the State Department and denied Samantar's motion to dismiss based on claimed foreign official immunity. For the reasons we describe below, the district court's order denying dismissal should be affirmed.[1]

STATEMENT

1. The facts, background, and course of this litigation are fully addressed in the parties' briefs. The principal allegations rest on the fact that Samantar is a former high-ranking official of the Barre regime in Somalia. *See Samantar*, 130 U.S. at 2282. Plaintiffs-appellees allege that, in the 1980s, they or their family members were subjected to systematic torture, extrajudicial killing, and other atrocities committed by

[1] Although we are aware of no precedent directly on point, in our view, a district court's denial of a defendant's motion to dismiss on the basis of foreign official immunity is immediately appealable under the collateral order doctrine. *See Mamani v. Berzain*, 654 F.3d 1148, No. 09–16246, 2011 WL 3795468, at *2 n.3 (11th Cir. Aug. 29, 2011) (holding, without explanation, that defendants appeal "as of right" from denial of motion to dismiss based on foreign official immunity); *see also Johnson v. Jones*, 515 U.S. 304, 311 (1995) (appealable collateral order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment" (quotation marks omitted)); *see also id.* at 311–12 (denial of qualified immunity turning on legal determinations subject to interlocutory appeal); *Mitchell v. Forsyth*, 472 U.S. 511, 527–30 (1985) (denial of U.S. official's claim of qualified immunity subject to interlocutory appeal); *Rux v. Republic of Sudan*, 461 F.3d 461, 467 n.1 (4th Cir.2006) (denial of foreign state immunity under the FSIA subject to interlocutory appeal).

military and intelligence agencies of the governing Supreme Revolutionary Council in Somalia. *Ibid.*; *see* JA 26–64. Plaintiffs further allege that Samantar exercised command and effective control over agents of the Somali government during his tenure as Minister of Defense from 1980 to 1986, and as Prime Minister from 1987 to 1990. *See, e.g.*, JA 51.

In January 1991, armed opposition factions drove the Barre regime from power, resulting in the complete collapse of Somalia's central government. Bureau of African Affairs, U.S. Dep't of State, *Background Note: Somalia* (September 26, 2011), *available at* http://www.state.gov/r/pa/ei/bgn/2863.htm. In the wake of that government's collapse, Samantar fled the country and has been a resident of the United States since 1997. *Samantar*, 130 S. Ct. at 2283.

2. As the parties have described, this case returned to the district court after the Supreme Court affirmed this Court's ruling that Samantar's claim of immunity is not governed by the Foreign Sovereign Immunities Act. Among other points, Samantar argued in the district court that he is entitled to immunity from this suit under the doctrines of foreign official and head of state immunity. Samantar argued that, under the common law, foreign officials cannot be civilly sued for acts taken in an official capacity. Samantar further argued that former foreign officials enjoy immunity for acts that were taken in an official capacity, because the immunity of foreign officials

assertedly arises from the official character of their acts and not from the official's status at the time of suit. Samantar claimed that the acts he is alleged to have taken in Somalia against the plaintiffs were done in an official capacity and that he therefore enjoys common law immunity from this suit. *See generally* Br. in Supp. of Mot. to Dismiss, *Yousuf v. Samantar*, No. 04-1360 (Nov. 29, 2010) (D. Ct. Docket No. 139).

The United States responded to Samantar's immunity claim by filing a Statement of Interest in the district court, stating clearly that the State Department had determined that Samantar is not immune from this suit. In that Statement, the United States explained that, in reaching this conclusion, the State Department had taken "into account the relevant principles of customary international law." JA 70. The Government further explained that two factors were "[p]articularly significant among the circumstances of this case and critical to" the Statement of Interest:

"(1) that Samantar is a former official of a state with no currently recognized government to request immunity on his behalf, including by expressing a position on whether the acts in question were taken in an official capacity"; and

"(2) the Executive's assessment that it is appropriate in the circumstances here to give effect to the proposition that U.S. residents like Samantar who enjoy the protections of U.S. law ordinarily should be subject to the jurisdiction of our courts, particularly when sued by U.S. residents." JA 71.

The Government's Statement of Interest made clear that it was essential to the first point that a foreign official's immunity belongs to the sovereign and not to the individual official. *Ibid.* (citing *Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14) (Merits)). Because the official's immunity belongs to the foreign state, and because former officials enjoy immunity only for acts taken in an official capacity, the Government explained that the State Department typically considers the foreign government's understanding of whether the alleged conduct was in an official capacity in determining whether to recognize the foreign official's immunity. JA 72.

Significantly, the Government pointed out that the United States has not recognized any entity as the government of Somalia since the fall of the Barre regime. Thus, while Samantar has relied in this litigation on a letter from the Somali Transitional Federal Government ("TFG") as confirming the official character of the alleged acts, and thus supporting his immunity, the Supreme Court has noted that "the United States does not recognize the TFG (or any other entity) as the government of Somalia." *Samantar*, 130 S. Ct. at 2283, n.3 (citing Brief for United States as Amicus Curiae 5, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555)). Accordingly, there is no recognized government to speak on behalf of the Somali state. And, in the absence of a recognized government to assert or waive immunity, the State Department

determined that Samantar's claim of immunity should not be recognized in this case. JA 73.

The United States further explained in its Statement of Interest that, because "[a] foreign official's immunity is for the protection of the foreign state * * * a former foreign official's decision to permanently reside in the United States is not, in itself, determinative of the former official's immunity from suit for acts taken while in office." JA 73. Nevertheless, "[b]asic principles of sovereignty * * * provide that a state generally has a right to exercise jurisdiction over its residents." *Ibid.* Thus, in the absence of a recognized government to assert immunity, the State Department determined that the United States' interest in permitting U.S. residents to litigate claims against another U.S. resident "further support[s]" its decision not to recognize Samantar's immunity. *Ibid.*

3. In light of the position expressed by the United States, the district court denied Samantar's motion to dismiss: "The government has determined that the defendant does not have foreign official immunity. Accordingly, defendant's common law sovereign immunity defense is no longer before the Court, which will now proceed to consider the remaining issues in defendant's motion to dismiss." JA 98.

Samantar filed this appeal and sought a stay of the district court proceedings pending appeal, which the district court and this Court denied. JA 21 (Docket No.

168), 24 (Docket No. 198). In denying a stay, the district court concluded that "[p]laintiffs correctly argue that Samantar's appeal is frivolous. Only the Executive Branch can determine whether a former foreign government official is entitled to common law immunity. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010). In this case, the State Department determined that Samantar is not entitled to common law immunity. Samantar has not cited any statute or binding precedent that would allow this Court to ignore the State Department's finding." Order Denying Stay, *Yousuf v. Samantar*, No. 04-1360 (May 18, 2011) (D. Ct. Docket No. 168).

The district court has set a hearing on December 22, 2011, concerning pre-trial motions; trial is scheduled to begin February 21, 2012. Minute Entry, *Yousuf v. Samantar*, No. 04-1360 (Oct. 20, 2011) (D. Ct. Docket No. 233).

ARGUMENT

BECAUSE THE STATE DEPARTMENT DETERMINED THAT SAMANTAR IS NOT IMMUNE FROM THIS CIVIL SUIT, THE DISTRICT COURT PROPERLY DENIED SAMANTAR'S MOTION TO DISMISS.

After the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, the district court properly denied Samantar's motion to dismiss.

1. In holding that the FSIA does not govern Samantar's claim of foreign official immunity, the Supreme Court described the courts' historic deference to Executive

Branch foreign sovereign immunity determinations before Congress enacted the FSIA. *Samantar*, 130 S. Ct. at 2284. The Supreme Court explained that "[t]he doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976." *Samantar*, 130 S. Ct. at 2284. The Court first recognized the doctrine in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812). *Samantar*, 130 S. Ct. at 2284. "Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Ibid.* A foreign state facing suit in our courts could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* But if the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed." *Ibid.* (quotation marks omitted). In such a circumstance, the district court was to apply "the established policy of the [State Department]" to determine whether the foreign state was entitled to immunity. *Ibid.* (quotation marks omitted).

Of considerable significance to this case, the Supreme Court further explained that, "[a]lthough cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted

immunity." *Id.* at 2284–85 (citing cases). Accepting the Government's argument as *amicus curiae*, the *Samantar* Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. Accordingly, the Court could discern "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity." *Ibid.* And, as the Supreme Court explained, the State Department's role was to determine whether a foreign state or official was immune from suit and courts would look to principles articulated by the State Department when determining foreign official immunity in suits in which the State Department did not participate. *Id.* at 2284.

At the time this suit was before the Supreme Court, the State Department had made no determination concerning Samantar's immunity. Accordingly, the Court left open the question whether Samantar "may be entitled to immunity under the common law," and it remanded the suit "for further proceedings consistent with this opinion." *Id.* at 2292–93. On remand, the Government informed the district court that the State Department had determined that Samantar is not immune from this suit, for the reasons described above. Under the Supreme Court's decision in this case, that determination was binding, and the district court properly gave it effect.

2.a. In attacking the district court's order, Samantar principally argues that the common law of foreign official immunity impels courts to defer only to Executive Branch determinations that a foreign official is immune from suit, but not to determinations that the official lacks immunity. Opening Br. 8–13. But Samantar's argument is contrary to the Supreme Court's explanation of the State Department's role in foreign official immunity determinations.

First, Samantar focuses on the Supreme Court's statement, describing pre-FSIA practice, that "'in the absence of recognition of the immunity by the Department of State, a district court had authority to decide for itself whether all the requisites for such immunity existed.'" *Ibid.* (quoting *Samantar*, 130 S. Ct. at 2284 (emphasis omitted)). Samantar's reliance on this sentence is misplaced. As plaintiffs argue in their appellee brief (Response Br. 25), in context, it is clear that the Supreme Court did not suggest that courts had authority before the FSIA was enacted to disregard the State Department's determination that a foreign sovereign was not immune from suit. Rather, the Supreme Court explained that, when the State Department made no immunity determination, the district court should make the determination, by considering "'*whether the ground of immunity is one which it is the established policy of the [State Department] to recognize*.'" *Samantar*, 130 S. Ct. at 2284 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945)) (emphasis added). Thus, the Supreme Court

recognized that the State Department's immunity principles govern the courts' determinations regarding foreign official immunity.

This rule is confirmed by the pre-FSIA immunity decisions cited by the Court in *Samantar*. In *Ex Parte Peru*, for example, the Supreme Court held that in suits against foreign governments, "'the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.'" 318 U.S. 578, 588 (1943) (quoting *United States v. Lee*, 106 U.S. 196, 209 (1882)). In that case, involving an *in rem* action against a foreign state-owned vessel, the Supreme Court unambiguously stated "that courts are required to accept and follow the executive determination that the vessel is immune." *Ibid.*

More importantly, the Supreme Court shortly thereafter noted that "[e]very judicial action *exercising or relinquishing* jurisdiction over the vessel of a foreign government has its effect upon our relations with that government." *Hoffman*, 324 U.S. at 35 (emphasis added). For that reason, the Court instructed that — in words that directly rebut Samantar's argument — it is "not for the courts to deny an immunity which our government has seen fit to allow, *or to allow an immunity on new grounds which the government has not seen fit to recognize*." *Ibid* (emphasis added). The Supreme Court added that "recognition by the courts of an immunity upon principles which the

political department of government has not sanctioned may be equally embarrassing to it in securing the protection of our national interests and their recognition by other nations." *Id.* at 36.

In sum, the law that developed in various Supreme Court opinions — and that the Court in *Samantar* held had not been displaced by Congress when it enacted the FSIA — stated unequivocally that the courts should not either deny or recognize immunity for a foreign official contrary to determinations of the State Department. Samantar's argument that a district court may disregard the State Department's determination that a specific former foreign official is not immune from suit is contrary to the Supreme Court's decision in this case. In a case like this one in which the Government has clearly stated the State Department's conclusion that Samantar is not entitled to foreign official immunity, and pointed to the particularly significant circumstances underlying the Government's Statement of Interest, a court would obviously not be following the "established policy of the State Department" (*Samantar*, 130 S. Ct. at 2284 (quotation and alternation marks omitted)), if it chose to overrule the State Department and grant immunity anyway.

In addition, Samantar's contention that courts are free to override the State Department's determination that a foreign official is not immune from suit misunderstands the respective roles of the Executive Branch and the courts. Before the

FSIA was enacted, the Supreme Court, this Court, and other courts of appeals recognized that judicial deference to Executive Branch determinations of foreign sovereign immunity was supported by the constitutional separation of powers. The Supreme Court grounded judicial deference to Executive Branch determinations of foreign sovereign immunity on the Executive's constitutional responsibility to conduct the Nation's foreign relations. *See Ex Parte Peru*, 318 U.S. at 588 ("That principle is that courts may not so exercise their jurisdiction [over foreign sovereigns] as to embarrass the executive arm of the government in conducting foreign relations"); *accord Hoffman*, 324 U.S. at 35–36.

By referring to the Executive Branch's constitutional authority over the conduct of foreign relations, this Court has similarly rejected the notion that courts may ignore the State Department's immunity determinations. *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("Despite these contentions, we conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry. We think that the doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion"). Other Circuits have done likewise. *See, e.g., Southeastern Leasing Corp. v. Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court

"erred * * * in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Spacil v. Crowe*, 489 F.2d 614, 618 (5th Cir. 1974) ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law."); *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("The State Department is to make this determination, in light of the potential consequences to our own international position. Hence once the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

The Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the State Department's authority to determine the immunity of foreign officials and for the courts' duty to follow its determinations. *See Samantar*, 130 S. Ct. at 2291 ("We have been given no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official immunity."); *Mistretta v. United States*, 488 U.S. 361, 401 (1989) ("[T]raditional ways of conducting government * * * give meaning to the Constitution." (quotation marks omitted)). In the absence of a governing statute, it is the State Department's role to determine the principles governing foreign official immunity from suit.

b. Samantar appears to make a distinct argument that courts may properly defer to the State Department's determination of a foreign official's immunity only where the State Department has identified some foreign policy harm that would follow if the court fails to abide by the determination. Opening Br. 10–11. That argument is mistaken; it confuses the rule of judicial deference to State Department immunity determinations with the Supreme Court's explanation for the reasons underlying the rule.

As explained above, before the FSIA was enacted, the Supreme Court held that courts must give effect to the State Department's determinations of foreign official immunity because, among other reasons, the failure to defer to the State Department's decision could undermine the Executive Branch's conduct of foreign relations. *See, e.g.*, *Hoffman*, 324 U.S. at 35–36. But the Supreme Court never required the State Department to specifically articulate any foreign policy harm, let alone suggest, as does Samantar (Opening Br. 11), that courts should review the State Department's foreign policy judgments. As plaintiffs persuasively argue, such a requirement would conflict with the separation-of-powers principles underlying the requirement of judicial deference to determinations of foreign official immunity by the State Department. Response Br. 25–27.

Moreover, Samantar's proposed requirement is foreclosed by Circuit precedent. *Rich*, 295 F.2d at 26 ("[T]he doctrine of the separation of powers under our Constitution requires us to assume that all pertinent considerations have been taken into account by the Secretary of State in reaching his conclusion."); *accord Hoffman*, 324 U.S. at 36; *Ex Parte Peru*, 318 U.S. at 588–89; *Southeastern Leasing Corp.*, 493 F.2d at 1224; *Isbrandtsen Tankers*, 446 F.2d at 1201; *see also Smith v. Reagan*, 844 F.2d 195, 198 (4th Cir. 1988) ("Plaintiffs seek in this suit to investigate and evaluate the executive branch's conduct of foreign policy, an area traditionally reserved to the political branches and removed from judicial review.").

3. The United States largely agrees with plaintiffs' arguments in support of the district court's order denying Samantar's motion to dismiss. However, plaintiffs' brief makes misstatements of fact and law, some of which we briefly address.

a. Plaintiffs argue that Samantar is not entitled to head of state immunity because "[t]he United States never recognized Samantar as the head of state of Somalia" (Response Br. 13), and because the Somali Constitution designates the President, not the Prime Minister, as the head of state (*id.* at 14). Although Samantar is not entitled to head of state immunity from this suit, it is not for these reasons.

The State Department has determined that Samantar is not immune from this suit under any immunity doctrine. As explained above, that determination controls.[2] *See also United States v. Noriega*, 117 F.3d 1206, 1211–12 (11th Cir. 1997) (declining to recognize defendant's claim to head of state immunity where Executive Branch made clear that the defendant did not enjoy such immunity).

b. Regarding Samantar's claim to foreign official immunity (as distinct from his claim to head of state immunity), plaintiffs correctly argue that foreign official immunity is not an individual right of the official, but instead is for the benefit of the foreign state. Response Br. 16. But plaintiffs further contend that the State of Somalia "does not exist in the eyes of the United States government." *Id.* at 17. And plaintiffs argue that, under the "governing legal standard" (*id.* at 13 n.2) — which plaintiffs

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[2] Under current customary international law, head of state immunity encompasses the immunity not only of heads of state but also of other "holders of high-ranking office in a State" such as "the Head of Government and Minister for Foreign Affairs." *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. ¶ 51. The Executive Branch has suggested head of state immunity for, among others, heads of state, such as kings (*see, e.g., Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Tex. 1994) (Saudi King)); heads of government, such as prime ministers (*see, e.g., Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (British Prime Minister)); and foreign ministers (*see, e.g., Rhanime v. Solomon*, No. 01-1479 (D.D.C. May 15, 2002) (Moroccan Foreign Minister)). Accordingly, under the principles accepted by the Executive Branch, a Prime Minister is not categorically ineligible for head of state immunity. Nevertheless, the State Department has determined that Samantar is not immune from this suit under any immunity doctrine.

identify as Section 66(f) of the Restatement (Second) of the Foreign Relations Law of the United States (*ibid.*) — "the common-law basis for asserting [foreign official] immunity largely evaporates" (*id.* at 17). This argument and its factual premise are mistaken.

The United States does not currently recognize any entity as the *government* of Somalia. But the United States continues to recognize Somalia as an independent state of the world. *See* Bureau of Intelligence and Research, U.S. Dep't of State, *Independent States of the World* (Oct. 11, 2011), http://www.state.gov/s/inr/ rls/4250.htm (listing Somalia among independent states recognized by the United States). The fact that the United States does not currently recognize a government of Somalia is relevant to Samantar's immunity, but not because of anything in the Second Restatement. Rather, the absence of a recognized Somali government is relevant to Samantar's immunity because the Executive Branch identified it as a factor "critical" to the State Department's immunity determination in this case. JA 71. It is that determination that controls.[3]

[3] Because the State Department has determined that Samantar is not entitled to immunity from this suit, the Court need not — and should not — address plaintiffs' contention that their allegations against Samantar cannot constitute "official acts" or acts taken in an "official capacity." *See* Response Br. 14–15.

CONCLUSION

For the foregoing reasons, the order of the district court denying Samantar's motion to dismiss should be affirmed.

Respectfully submitted,

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OCTOBER 2011

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(c) and (d), I certify that this brief uses proportionately spaced font and contains 4,352 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4, in 14 point Goudy Old Style.

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October 24, 2011

CERTIFICATE OF SERVICE

I certify that on October 24, 2011 the foregoing document, Brief for the United States as Amicus Curiae Supporting Appellees, was served on all parties or their counsel of record through the CM/ECF system.

S/Lewis S. Yelin
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