No. 15-1345

IN THE

Supreme Court of the United States

YUSUF ABDI ALI,

Petitioner,

v.

FARHAN MOHAMOUD TANI WARFAA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

Contrary to the assertions of Respondent Farhan Mohamoud Tani Warfaa ("Warfaa"), this case presents an important and unique opportunity for this Court to clarify the scope of the common law immunity available in U.S. courts to foreign officials accused of committing, in their official capacities, *jus cogens* violations of international law. Such a clarification is vitally important in light of the differences between the conclusions of the Fourth Circuit in this case and the pronouncements of other Circuits and the Executive Branch.

ARGUMENT

THIS CASE IS AN IMPORTANT VEHICLE FOR CONFIRMING THE SCOPE OF FOREIGN OFFICIAL ACTS IMMUNITY.

Warfaa incorrectly asserts that this case is a poor vehicle for reviewing the Fourth Circuit's *per se* rule denying immunity in the face of *jus cogens* violations due to the absence of any statement of interest from the Executive Branch. Respondent's Brief in Opposition to Petition for a Writ of Certiorari ("Opposition") at 13. *Au contraire*, as this Court has noted, "the absence of recognition of...immunity by the Department of State" means that a court "ha[s] authority to decide for itself whether all the requisites for such immunity exist[]." *Ex parte Republic of Peru*, 318 U.S. 578, 587 (1943). Warfaa implicitly suggests that this Court should refrain from passing judgment on the validity of the *per se* rule in this case and leave this critical issue in the common law unsettled until another immunity case were to come

along at some unspecified point in the future at which the Executive Branch would deign, as it were, to weigh in on the question.

The Government's desire to stay silent about Petitioner's immunity is hardly anomalous. The State Department believes "that the U.S. Government need not and should not speak [about immunity] in every case." Harold Hongju Koh, "Foreign Official Immunity After Samantar: A United States Government Perspective," 44 Vand. J. Transnat'l L. 1141, 1160 (Nov. 2011). And it is also noteworthy that it is not uncommon for the Government to ask courts for lengthy extensions to provide its views about immunity, only to refuse to take a position in the end. *Compare Chen v. Shi,* Case No. 1:09-cv-08920-RJS, Dkt. 21 (S.D.N.Y. Aug. 8, 2011) ("reluctant[ly]" granting the Government's request for a "lengthy extension" to provide its views in a case involving claims against an official on whose behalf the Chinese government asserted immunity) with *Chen v. Shi*, 2013 WL 3963735, at *3 (S.D.N.Y. Aug. 1, 2013) (noting that, despite the State Department's "request for additional time," it "ultimately did not offer an opinion as to whether common law immunity shielded Defendant from liability").

Such delays undermine the very purposes of official immunity. Petitioner has asserted immunity from suit, which protects officials from the "burdens of litigation." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (foreign sovereign immunity). That is why official immunity is "effectively lost" when a defendant—as here—is subjected to unnecessary years of litigation without an appellate determination of immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified

immunity). Thus, the fact that Petitioner's immunity claim in this case has been pending for over a decade of litigation makes this case an ideal vehicle in which to resolve this important question.

The District Court and the Circuit Court below both noted their reliance for their immunity determinations on the rule first enunciated in the Fourth Circuit's case of *Yousuf v. Samantar*, 699 F.3d 763 (4th Cir. 2012), *cert. denied*, 134 S. Ct. 897 (2014), that foreign official immunity could not be claimed "for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." 699 F.3d at 777. The soundness of this categorical rule is the central issue posed by this petition.

If the Court concurs that the *per se* rule is unsound and that Petitioner Yusuf Abdi Ali ("Ali") is entitled to common law immunity for all of the claims made against him in this action, the Court *may* then consider whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note ("TVPA"), which Ali is accused of violating, eliminates all official acts immunity for actions under that statute.

Contrary to Warfaa's contentions, Opposition at 14-21, these issues are unsettled, with circuit courts and the Executive Branch expressing views that would allow official acts immunity for *jus cogens* violations in general and for violations of the TVPA specifically.

I. Two Circuit Courts and the Executive Branch Oppose the Fourth Circuit's *Per Se* Rule.

The Fourth Circuit decision, in holding that allegations of *jus cogens* violations abrogate foreign official acts

immunity under all circumstances, runs counter to the pronouncements of the Second and D.C. Circuits, as well as the views of the Executive Branch.

While the Second Circuit, in *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), deferred to a suggestion of the Executive Branch that the defendant official was entitled to foreign official acts immunity, it articulated the position of that Circuit that: "[a] claim premised on the violation of *jus cogens* does not withstand foreign sovereign immunity." *Id.* at 15. The Second Circuit upheld that conclusion in *Rosenberg v. Pasha*, 577 F. App'x 22, 24 (2d Cir. 2014); *see also In re Terrorist Attacks on Sept. 11, 2001,* 122 F. Supp. 3d 181, 189 (S.D.N.Y. 2015) ("The Second Circuit does not recognize such a [*jus cogens*] limitation to a foreign official's right to immunity from suit in U.S. courts where, as here, that official acted in his official capacity.").

In *Belhas v. Ya'alon*, 515 F.3d 1279, 1287 (D.C. Cir. 2008), the D.C. Circuit noted that: "[i]t is not necessary for this Court to reach the issue of whether the acts alleged by Plaintiffs constitute violations of *jus cogens* norms because the FSIA contains no unenumerated exception for violations of *jus cogens* norms." After *Matar* and *Belhas* were decided, this Court determined that the Foreign Sovereign Immunities Act ("FSIA") "does not govern whether an individual foreign official enjoys immunity from suit." *Samantar v. Yousuf*, 560 U.S. 305, 310 n.3 (2010). *Samantar* noted, however, that the rules developed for foreign official acts immunity under the FSIA "may be correct as a matter of common-law principles." *Id.* at 322 n. 17; *see also Giraldo v. Drummond Co.*, 808 F. Supp. 2d 247, 251 (D.D.C. 2011), *aff'd per curiam*, 493 F. App'x 106 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1637 (2013),

("Plaintiffs fail to cite any case that holds that allegations of violations of *jus cogens* norms will defeat foreign official immunity.").

Warfaa states emphatically in his Opposition that "Ali cites no case, nor can he, affirming immunity of foreign officials for torture and extrajudicial killing in the absence of a suggestion of immunity by the Executive Branch." Opposition at 21. However, *In re Terrorist Attacks on Sept. 11, 2001,* 122 F. Supp. 3d 181 (S.D.N.Y. 2015), is just such a case. In that case, victims of the September 11 terrorist attacks alleged that a former head of two Saudi government instrumentalities used his authority "to deliver material support and resources to al Qaeda." *Id*. at 183. The victims opposed the official's request for common law official acts immunity on the grounds that the official's conduct violated international and U.S. law, an assertion that the court characterized as "merely an artful way of implicating the *jus cogens* doctrine." *Id*. at 189. As here, the official's government confirmed that the official's actions were taken in his official capacity and requested that the district court recognize the official's immunity. Also, as here, the Executive Branch offered no views on the assertion of immunity.

The district court in *In re Terrorist Attacks on Sept. 11, 2001* viewed its role as having to "'decide for itself whether it is the established policy of the State Department to recognize claims of immunity of this type." 122 F. Supp. 3d at 189 (quoting *Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes*, 336 F.2d 354, 359 (2d Cir. 1964), *cert. denied*, 381 U.S. 936 (1965) (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36 (1945))). Relying partly on an Executive Branch

statement of interest in *Rosenberg v. Pasha*, the district court found that the "State Department has consistently recommended conduct-based immunity when (1) the foreign state requests it, and (2) the defendant acted in his official capacity on behalf of a recognized foreign government." 122 F. Supp. 3d at 188 (footnote omitted); *see* Statement of Interest and Suggestion of Immunity at 10-11, *Rosenberg v. Lashkar-E-Taiba*, 980 F. Supp. 2d 336 (E.D.N.Y. 2013), *aff'd sub nom. Rosenberg v. Pasha*, 577 F. App'x 22, 24 (2d Cir. 2014) (No. 10-CV-5381), http://opiniojuris.org/wp-content/uploads/Rosenberg-Suggestion-of-Immunity-12-17-12.pdf. (last accessed on July 18, 2016) The district court, accordingly, found that the Saudi official was entitled to official acts immunity notwithstanding allegations of *jus cogens* violations and the absence of a statement of interest from the Executive Branch..

Belhas represents yet a further instance of such a case affirming the immunity of a foreign official for alleged extrajudicial killings in the absence of a suggestion of immunity by the Executive Branch. 515 F.3d at 1283-84. Although the *Belhas* court considered the availability of immunity under the FSIA (then thought to govern all sovereign immunity determinations) rather than the common law, it nonetheless affirmed the immunity of an Israeli officer against allegations of involvement with extrajudicial killings under the TVPA despite the absence of any submissions by the Executive Branch. *Id.* at 1288-89.

The Executive Branch also has consistently taken the position that the common law of foreign official immunity does not recognize a *jus cogens* exception. As

the Executive Branch stated in recommending immunity for the foreign officials in *Matar*, "There Is No Exception to the Immunity of Individual Officials for Alleged *Jus Cogens* Violations." Statement of Interest of the United States of America at 27, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007), *aff'd*, 563 F.3d 9 (2d Cir. 2009) (No. 05-Civ.-10270), http://www.state.gov/documents/organization/98806.pdf (last accessed on July 18, 2016) (point heading I.B.2) ("U.S. SOI in *Matar*"). The Executive Branch explained to the *Matar* court that "the concept of *jus cogens* is of relatively recent origin and remains unsettled" (*id.* at 27 n.23); that "'acts such as...a denial of justice...can be performed only by the state acting as such'" (*id.* at 28) (quoting *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993)); that "any rule denying civil immunity to individual officials for alleged *jus cogens* violations would allow circumvention of the state's immunity for the same conduct" (U.S. SOI in *Matar* at 28); and that such a rule would "be out of step with customary international law (*id.* at 29)."

As the established policy of the Executive Branch, this refusal to recognize any blanket exclusion of immunity for *jus cogens* violations should carry special force in this Court's consideration of whether the Fourth Circuit's contrary determination warrants this Court's attention. As this Court noted in *Republic of Mexico v. Hoffman*, 324 U.S. At 36, absent a suggestion of immunity, "the court will inquire whether the ground of immunity is one which it is the established policy of the [State] department to recognize". In view of the willingness of the Executive Branch and the Second and D.C. Circuits to recognize official acts immunity despite allegations of *jus cogens* violations, the Fourth Circuit's *per se* rule precluding such recognition warrants this Court's review.

II. The Fourth Circuit's Decision Did Not Turn on an Interpretation of the TVPA and the TVPA Did Not Abrogate the Immunity of Foreign Officials for their Official Acts.

Warfaa wrongly suggests that, even if Ali were otherwise entitled to official acts immunity, such immunity would not avail him inasmuch as the TVPA eliminated any such immunity. Opposition at 11. Warfaa is incorrect.

As a threshold matter the Fourth Circuit's *ratio decidendi* for denying immunity to Petitioner was the application of its categorical, *per se*, abrogation of common law immunity where, as here, *jus cogens* violations are alleged. Thus, Warfaa's suggestion that the TVPA abrogated official acts immunity is premature, and a red herring, and is, manifestly, not the question presented to this Court, as the Fourth Circuit did not so hold, but, rather, speaks to a question which could be addressed on remand. What is before this Court is the Fourth Circuit's categorical non-immunity rule. On remand, upon a reversal of its categorical non-immunity rule, the Fourth Circuit could consider in the first instance whether, *vel non*, Petitioner is entitled to immunity without that proverbial thumb on the scale.

In any event, nothing in the language of the TVPA speaks to the availability of immunity for alleged violators of the statute. This silence means that the statute must be read in harmony with, rather than in derogation of, all relevant immunity rules. In the parallel context of 42 U.S.C.§ 1983, prohibiting the domestic deprivation of rights by persons acting under color of law, this Court has noted that, "[a]lthough the statute on its face admits of

no immunities, we have read it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.'" *Malley v. Briggs*, 475 U.S. 335, 339 (1986) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)).

The legislative history of the TVPA supports the survival of official acts immunity following enactment of the law. The Congressional authors of the law assumed such survival, expressing a view that a claim to immunity (believed at the time to be available for officials only under the FSIA) would ordinarily fail because foreign states would assert that the conduct that allegedly violated the TVPA had been taken outside the scope of the official's authority. *See* S. Rep. No. 102-249, at 8 (1991), 1991 WL 258662 ("Because all states are officially opposed to torture and extrajudicial killing, however, [the immunities available under] the FSIA would normally provide no defense to an action taken under the TVPA against a former official."). Courts have indeed declined to recognize immunities that foreign governments have not sought. *See, e.g., Hilao v. Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995) (the former Philippine president was not entitled to immunity because he acted outside the scope of his authority as "evidenced by the Philippine government's agreement that the suit against [him] proceed."); *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988).

The Executive Branch similarly interprets the TVPA as not abrogating official acts immunity for foreign officials accused of violating the statute. As the State and Justice Departments set out forthrightly in a Statement of Interest submitted in *Matar*, "The TVPA Does Not

Trump the Immunity of Foreign Officials for Their Official Acts." U.S. SOI in *Matar* at 33 (point heading I.C.). While the Judicial Branch must be the ultimate interpreter of the TVPA, this Court has noted that, in considering sovereign immunity issues, "the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico v. Hoffman*, 324 U.S. at 35 (treating the immunity from suit of a vessel in the possession and service of a friendly foreign government). At least as to the availability of immunity in individual cases, this Court has stated that "[i]t is...not for the courts to deny an immunity which our government has seen fit to allow." *Id.* Any interpretation of the TVPA which precluded an award of immunity to foreign officials for alleged TVPA violations would deprive the Executive Branch of an important tool useful in the conduct of this nation's foreign affairs, and should, therefore, be rejected.

While the Executive Branch eschewed offering a view in this case as to Ali's entitlement to common law immunity, it would indeed be a strained interpretation of the TVPA that found all immunities to be abrogated except as the Executive Branch might request otherwise in individual cases. The courts in *Belhas*, 513 F.3d at 1288, and *In re Terrorist Attacks on Sept. 11, 2001*, 122 F. Supp. 3d at 188-89, found no such cramped reading of the statute and held that foreign officials accused of violations of the TVPA were entitled to immunity despite the absence of Executive Branch recommendations in those cases.

Since the common law supports perforce the immunity of Ali for the actions that the Government of Somalia recognized as having being taken in Ali's official capacity and since the availability of that immunity was not

abrogated by the TVPA, the Fourth Circuit decision was in error. The correctness of Ali's position, coupled with the importance of a determination of the scope of official acts immunity in the face of views at variance with those of the Fourth Circuit from the D.C. and Second Circuits and the Executive Branch and the ability, indeed, the prerogative, of this Court to determine the scope of that immunity without the overlay of a recommendation from the Executive Branch, warrant this Court's review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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