No. 08-1555

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

I. THE COURTS OF APPEALS ARE DIVIDED ON IMPORTANT QUESTIONS UNDER THE FSIA THAT MERIT THIS COURT'S IMMEDIATE REVIEW

The Brief in Opposition concedes, as it must, that there is a "split in authority" that "the Fourth Circuit expressly recognized" about "whether the FSIA applies to individual officials." Opp. 16. The Second, Fifth, Sixth, Ninth, and D.C. Circuits hold that FSIA immunity extends to foreign officials, whereas the Fourth and Seventh Circuits hold that it does not. *Compare In re Terrorist Attacks on Sept. 11, 2001* ("*Fed. Ins. Co.*"), 538 F.3d 71, 85 (2d Cir. 2008), *cert. denied sub nom. Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009); *Byrd v. Corporacion Forestal y Industrial de Olancho*, 182 F.3d 380, 388 (5th Cir. 1999); *Keller v. Cent. Bank of Nig.*, 277 F.3d 811, 815 (6th Cir. 2002); *Chuidian v. Phil. Nat'l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990); and *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), *with* Pet. App. 17a-20a; *Enahoro v. Abubakar*, 408 F.3d 877, 881-82 (7th Cir. 2005).

This 5-2 conflict among the circuits is important and warrants this Court's immediate intervention. The decision below contravenes the text, history, and purposes of the FSIA. *See* Pet. 10-13. If allowed to stand as the law of the Fourth Circuit, it will undermine the comity between the United States and other sovereigns that the FSIA was meant to ensure, *see, e.g.*, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003), and will "amount to a blanket abrogation of foreign sovereign immunity by allowing litigants,"

simply by suing a foreign official instead of the state itself, "to accomplish indirectly what the [FSIA] bar[s] them from doing directly." *Chuidian*, 912 F.2d at 1102.

Faced with this deep circuit split, Respondents make the lackluster argument that review should be denied because the split over whether the FSIA applies to foreign officials "is of recent vintage" and because the Fourth Circuit's "careful consideration" of the issue "stands in stark contrast" to the decisions of other courts, including *Chuidian*. Opp. 16-17. In fact, however, the split is mature and recurring, the issue having been definitively resolved by seven circuits over the last nineteen years, beginning with the Ninth Circuit's seminal opinion addressing the issue at length in *Chuidian*. *See* 912 F.2d at 1099-1103. Respondents' preference for what they call the Fourth Circuit's "careful consideration," instead of *Chuidian*'s, Opp. 17, provides no basis for denying review. To the contrary, the well-developed views on both sides of the split make this case the ideal vehicle to resolve the conflict.

The second Question Presented—whether FSIA immunity applies to *former* government officials—provides an additional reason for granting review. Respondents cannot deny that, at a minimum, this issue has engendered strongly divergent views (whether technically denominated as conflicting holdings or not) between the Fourth and D.C. Circuits. *See* Pet. App. 21a; *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008) (explaining that the argument that a former official "loses [the] protection [afforded by the FSIA] on the day he resigns or reaches the expiration of his term" "makes no

practical sense [and] would be a dramatic departure from the common law of foreign sovereign immunity, as codified in the FSIA"); *id.* at 1291 (Williams, J., concurring) (arguing that *Dole Food* does not support the argument that a former official loses FSIA immunity upon leaving office). *See also* Brief for the United States as Amicus Curiae at 9-10, *Fed. Ins. Co. v. Kingdom of Saudi Arabia*, 129 S. Ct. 2859 (2009) (08-640), 2009 WL 1539068 (Solicitor General's Br.) (describing the disagreement between this case and the D.C. Circuit's "holding" on this issue and explaining that "the D.C. Circuit concluded that the temporal rule of *Dole Food* does not apply to foreign officials").

Respondents also concede, as they must, that the Fourth Circuit's resolution of the "former official[]" question is a "holding" that constitutes "binding circuit precedent." Opp. 15. It is a holding that is inextricably intertwined with the threshold question, on which the circuits are divided, of whether FSIA immunity extends to individual officials at all. Thus, this is not a situation where a lower court's alternative holding on an unrelated issue might prevent this Court from reaching a certworthy question in the first place. *Cf. Abdur'Rahman v. Bell*, 537 U.S. 88 (2002) (Stevens, J., dissenting) (dismissing certiorari in habeas case out of concerns over possible procedural default). And it is a holding of enormous importance in its own right because it would eviscerate the FSIA and "have a significant impact on . . . the United States' relations with [foreign] state[s]" if the FSIA allowed a foreign official to be sued in U.S. courts for official acts the moment he leaves office. *Belhas*, 515 F.3d at 1291 (Williams, J., concurring). For that reason, the

Solicitor General has described the "prospect that, under *Dole Food*, foreign officials could lose immunity upon leaving office" as "problematic" and "anomal[ous]." Solicitor General's Br. at 9. Indeed, "the Executive recognizes that foreign officials retain immunity for their official acts after leaving their positions and views any contrary rule as rife with potential to disturb foreign relations" and cause "very significant reciprocal implications in foreign courts for former officials of the United States." Brief for the United States as Amicus Curiae at 17-18, *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (No. 07-2579-cv).

Thus, this case presents one question on which seven courts of appeals are deeply divided and a second inextricably intertwined and profoundly important question on which the Fourth Circuit's holding differs from the views of the D.C. Circuit and the Executive Branch.[1] This Court should grant the

[1] Respondents question the importance of the Fourth Circuit's decision by quibbling over the number of additional lawsuits in which it will result. Opp. 35-37. But Respondents cannot deny that suits against foreign officials have increased significantly in recent years, and that the decision below will escalate this trend. What matters is not the precise number, but that the Fourth Circuit's decision will enable federal jurisdiction over suits against foreign officials that Congress intended to foreclose. Just as *Ex parte Young*, 209 U.S. 123 (1908), dramatically altered the viability of suits against state officials, the Fourth Circuit's decision will open the door to more suits against foreign officials than would be permitted under the overwhelming weight of authority followed by five other circuits. Moreover, in attempting to minimize the nationwide impact of the decision below, Respondents ignore cases in which Federal Rule of Civil Procedure 4(k)(2) has served as a nationwide long-arm statute eliminating the need for plaintiffs to comply with any one state's long-arm requirements. *See, e.g.*, *Mwani v. bin Laden*, 417 F.3d 1, 10-11 (D.C. Cir. 2005); *Touchcom, Inc. v.*