

No. 13-1361

In the Supreme Court of the United States

MOHAMED ALI SAMANTAR, PETITIONER

v.

BASHE ABDI YOUSUF, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In *Samantar v. Yousuf*, 560 U.S. 305 (2010), this Court held that the common law, rather than the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, governs the immunity of individual foreign officials who are sued for their official acts. The question presented is:

Whether the court of appeals erred in holding that the Executive Branch's determination concerning conduct-based immunity is not binding on the court, and in creating a new categorical judicial exception to foreign official immunity from civil suits alleging violations of *jus cogens* norms.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. This is the third time this case has come before the Court. In 2010, the Court held in this case that the immunity of individual foreign officials in United States courts is governed by the longstanding framework applied by the Executive Branch rather than by the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq.* See 560 U.S. at 319-326. On remand, the district court held that petitioner was not entitled to immunity, and the court of appeals affirmed. Pet. App. 41a-68a. This Court de-

nied review. 134 S. Ct. 897. After the district court entered a final judgment, the court of appeals dismissed the appeal as moot in light of its earlier decision. Pet. App. 1a-2a. Petitioner once again seeks this Court's review of the Fourth Circuit's holding that he is not entitled to immunity.

a. Respondents are natives of the Somaliland region of Somalia, some of whom are now United States citizens. Respondents are members of the Isaaq clan, which was subjected to systematic persecution during the 1980s by the military regime governing Somalia at that time. Petitioner Mohamed Ali Samantar was the First Vice President and Minister of Defense of Somalia between 1980 and 1986, and the Prime Minister of Somalia between 1987 and 1990. Petitioner fled Somalia in 1991 following the collapse of the military regime. He has lived in the United States since 1997. 560 U.S. at 308-309; Pet. App. 12a, 43a.

In 2004, respondents brought this action against petitioner in the District Court for the Eastern District of Virginia. Br. in Opp. 1-2 & n.1. Respondents alleged that petitioner exercised command and control over Somali military forces who tortured, killed, or arbitrarily detained respondents or their family members; that he knew about the wrongdoing committed by subordinate officials; and that he aided and abetted that wrongdoing. 560 U.S. at 308.

The district court held that it lacked subject matter jurisdiction over petitioner under the FSIA. 560 U.S. at 309-310. The court of appeals reversed. *Id.* at 310.

b. This Court granted certiorari to address the question whether the FSIA governs the determination of an individual foreign official's immunity from suit. 560 U.S. at 308, 311. The Court held that the FSIA

does not govern foreign official immunity, and that such immunity is instead controlled by the longstanding framework applied by the Executive Branch. *Id.* at 308.

The 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.” 560 U.S. at 311. With respect to both foreign states and officials, courts generally followed a two-step process: if the State Department provided a determination of immunity, courts would treat it as binding, and if the Department did not provide a determination, courts would apply immunity principles articulated by the Executive Branch.¹ *Id.* at 311-312 (citing cases).

The Court held that the FSIA, which was enacted in 1976 in order to transfer “primary responsibility for immunity determinations from the Executive to the Judicial Branch,” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004), does not similarly transfer pri-

¹ The immunity of foreign officials “ultimately belongs to the sovereign rather than the official.” Pet. App. 83a (United States’ Statement of Interest, citing *Arrest Warrant of 11 Apr. 2000 (Democratic Rep. Congo v. Belgium)*, Judgment, 2002 I.C.J. 3 ¶ 61 (Feb. 14)). Generally speaking, the immunity enjoyed by an official of a foreign state is either status-based or conduct-based. Under customary international law principles accepted by the Executive Branch, a sitting head of state’s immunity is based on his *status* as the incumbent office holder and extends to all his actions. See 1 *Oppenheim’s International Law* 1038 (Robert Jennings & Arthur Watts, eds., 9th ed. 1996). By contrast, the immunity of former heads of state, as well as lower-level current and former officials, depends on the *conduct* at issue and generally applies only to acts taken in an official capacity. See *id.* at 1043-1044; Pet. App. 82a-84a. At issue in this case is whether petitioner, as a former official, enjoys conduct-based immunity. Pet. App. 83a-84a.

mary responsibility to the Judicial Branch in determining the immunity of foreign officials. The Court explained that “nothing in the statute’s origins or aims * * * indicate[s] that Congress similarly wanted to codify the law of foreign official immunity.” 560 U.S. at 325. Accordingly, in making determinations of foreign official immunity, courts are to apply the longstanding framework that has been in place since before the FSIA was enacted. *Ibid.*

The Court remanded the case to the district court to consider “[w]hether petitioner may be entitled to immunity under the common law.” 560 U.S. at 325-326.

2. a. On remand, the United States filed a Statement of Interest concluding that petitioner is not immune in this lawsuit. Pet. App. 76a-91a. The United States explained that two considerations were “[p]articularly significant among the circumstances of this case and critical to the present Statement of Interest.” *Id.* at 83a.

First, the United States found it significant that petitioner “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.” Pet. App. 83a. The United States explained that because the immunity of foreign officials for their official acts belongs to the sovereign, rather than the individual, the typical practice is for a foreign state to request a suggestion of immunity from the State Department on behalf of its officials. *Id.* at 83a-84a. This case, however, presented a “highly unusual situation because the Executive Branch” did not, at that time, recognize any government of Somalia. *Id.*

at 84a. The State Department determined that in the absence of a recognized government, petitioner should not be immune. *Id.* at 85a.

Second, the United States explained that, although it was not in itself determinative, the Executive's conclusion that petitioner was not immune from suit was "further supported" by the fact that petitioner had been a resident of the United States since 1997. Pet. App. 85a-86a. In the absence of a recognized government that could request immunity, *id.* at 86a, the United States continued, it was appropriate to give effect to the proposition that those "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," *id.* at 83a.

b. Based on the United States' Statement of Interest, the district court held that petitioner was not immune from suit. Pet. App. 69a. The district court and the court of appeals declined to stay proceedings pending petitioner's appeal of the denial of immunity. *Id.* at 8a-9a.

3. The court of appeals affirmed the district court's denial of immunity. Pet. App. 41a-68a.

The court of appeals first considered the level of deference to be given to the Executive Branch's determination whether an individual foreign official is immune in a particular case. In the court of appeals' view, courts had historically deferred to the Executive's immunity determinations because they viewed those determinations "as a function of the Executive's constitutional power" to recognize diplomats and other foreign representatives. Pet. App. 55a. The court of appeals accordingly concluded that "the State Department's pronouncement as to head-of-state

immunity is entitled to absolute deference.” *Id.* at 56a.

The court of appeals drew a sharp distinction, however, between the status-based immunity accorded sitting heads of state, and the conduct-based immunity accorded other foreign officials. Pet. App. 55a-58a. The court believed that “there is no equivalent constitutional basis suggesting that the views of the Executive Branch control questions of foreign official immunity.” *Id.* at 57a.

The court of appeals therefore engaged in its own immunity inquiry. Pet. App. 59a-62a. The court stated that some of the alleged acts in this case—“torture, summary execution and prolonged arbitrary imprisonment”—involve violations of a *jus cogens* norm of international law, *i.e.*, “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.” *Id.* at 62a. In the court’s view, “*jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign.” *Id.* at 63a. The court accordingly held that foreign officials “are not entitled to foreign official immunity for *jus cogens* violations,” *id.* at 66a, and that petitioner is not entitled to official-act immunity, see *id.* at 66a-68a.

The court of appeals observed that the United States’ Statement of Interest provided “additional reasons to support th[e] conclusion” that petitioner is not entitled to official-act immunity. Pet. App. 67a-68a. The court noted that the Statement of Interest’s reliance on the lack of any government of Somalia recognized by the United States indicated that “the court does not face the usual risk of offending a foreign nation by exercising jurisdiction over the plain-

tiffs' claims." *Id.* at 67a. The court also emphasized that as "a permanent legal resident" of the United States, petitioner "has a binding tie to the United States."² *Ibid.*

4. Petitioner filed a petition for certiorari, challenging the court of appeals' *jus cogens* holding. 12-1078 Pet. i.

a. This Court requested the views of the United States. The United States recommended that the Court grant the petition, vacate the decision below, and remand for further proceedings (GVR). See 12-1078 U.S. Amicus Br. 1. With respect to the merits, the United States argued that the court of appeals erred in holding that the Executive Branch's determination as to conduct-based immunity is not controlling, and in announcing a categorical judicial exception to immunity for claims alleging violations of *jus cogens* norms. *Id.* at 12-22.

The United States explained, however, that "significant developments that occurred after the lower courts' consideration of th[is] case" rendered plenary review inappropriate. 12-1078 U.S. Amicus Br. 22. In January 2013, the United States formally recognized the Government of Somalia. *Id.* at 9; see *id.* at 9-11, 22-23. In February 2013, the Somali Prime Minister at the time, Abdi Farah Shirdon, requested that the United States support immunity for petitioner. Pet.

² The Fourth Circuit appears to have interpreted the government's reference to petitioner's residence in the United States to mean that he is a lawful permanent resident. See, *e.g.*, Pet. App. 67a. That interpretation is incorrect. Petitioner is not a lawful permanent resident and has never had that status. We have been informed by the Department of Homeland Security that petitioner is currently in removal proceedings.

App. 113a-118a. In December 2013, however, Prime Minister Shirdon was subject to a no-confidence motion, 12-1078 U.S. Amicus Br. 11, 23 n.5, which was expected to result in his removal from office. The United States therefore explained that “[t]he lower courts should have an opportunity to consider any further determination by the United States on the immunity issue in light of those developments and diplomatic discussions between the United States and the recently recognized Government of Somalia.” *Id.* at 22.

b. After the United States filed its brief, respondents filed a December 28, 2013, letter to the Secretary of State purportedly from the Somali Legal Adviser, which stated that the Government of Somalia “waive[d]” petitioner’s immunity from suit. Br. in Opp. 7. In response, petitioner submitted a January 2, 2014 email from the Somali President’s Chief of Staff to the U.S. Embassy in Nairobi, Kenya, stating that it rescinded the December 28 letter. *Ibid.*; see 12-1078 Pet. Supp. Br. App. 2a-3a. The email also stated that the Somali President has “instructed me to communicate officially with you [the U.S. Government] on those lines,” and added, “[l]et us talk.” *Id.* at 2a. In response, the United States informed the Court that the “uncertainty surrounding the legal status and legitimacy of the December 28 letter, and the subsequent communications raising questions about the letter,” underscored the need for “further diplomatic discussions between the United States and Somalia to clarify the position of the Government of Somalia on the immunity issue.” Letter from Donald B. Verrilli, Jr., Solicitor General, to Scott S. Harris, Clerk of Court (Jan. 8, 2014).

c. This Court denied certiorari. 134 S. Ct. 897.

5. While petitioner's interlocutory appeal was pending, the case had proceeded in the district court. Instead of contesting liability and damages, petitioner defaulted. Pet. App. 3a-4a. He also sought bankruptcy protection. See 12-bk-11085 Docket entry No. 1, (E.D. Va. Feb. 19, 2012). In August 2012, after holding a bench trial, the court found petitioner liable, *id.* at 5a-38a, and awarded respondents \$21 million in compensatory and punitive damages, *id.* at 3a-4a, 38a.

Petitioner appealed, arguing that the district court had lacked jurisdiction to proceed during the pendency of petitioner's interlocutory appeal. 12-2178 Pet. C.A. Br. 15, 17-18. Citing its disposition of petitioner's prior appeal, the court of appeals dismissed the appeal as moot in February 2014. Pet. App. 1a-2a.

In May 2014, petitioner filed the instant certiorari petition, again challenging the court of appeals' holding that petitioner is "not entitled to foreign official immunity for *jus cogens* violations." Pet. App. 66a; see Pet. i. Petitioner included in the appendix to his petition a letter dated March 16, 2014, from the Somali Prime Minister at the time, Abdiweli Sheikh Ahmed Mohamed, to the Secretary of State.³ That letter requested that the State Department "obtain immunity for [petitioner] and obtain a dismissal of the subject civil proceedings against him." Pet. App. 75a.

³ The State Department has informed this Office that in December 2014, the Prime Minister was subjected to a no-confidence vote. The new Prime Minister is Omar Abirashid Ali Sharmarke. See Central Intelligence Agency, *Chiefs of State and Cabinet Members of Foreign Governments, Somalia*, <https://www.cia.gov/library/publications/world-leaders-1/SO.html> (last visited Jan. 23, 2015).

6. In the intervening months since the Court denied review in January 2014, the United States has engaged Somalia in diplomatic discussions to determine Somalia's position with respect to petitioner's immunity.

On April 22, 2014, the State Department received a letter from the Office of the President of Somalia, stating that Somalia's State Attorney General, Osman Elmi Guled, has "full authority" to "act[] on behalf of the Federal government of Somalia on all types of immunities." App., *infra*, 6a.⁴

On July 25, 2014, a representative of the State Department Legal Adviser met with State Attorney General Guled. App., *infra*, 4a. As the State Department subsequently recounted in a formal communication to Somalia, State Attorney General Guled informed the State Department representative at that meeting that Somalia does not wish to seek immunity for petitioner in this case and that Somalia has no objection to a civil suit proceeding against petitioner in a U.S. court. *Ibid.*

Because the State Department did not receive diplomatic correspondence from Somalia confirming that position, on December 23, 2014, the State Department sent a formal diplomatic communication to Somalia relating the United States' understanding that, notwithstanding any prior communications on the subject, it is the final position of the Government of Somalia that it does not wish to seek immunity for petitioner in this suit. App., *infra*, 3a-5a. The message

⁴ The United States has provided the parties with electronic copies of the original documents that are reproduced in the Appendix to this brief and formatted in accordance with Supreme Court Rule 33.1.

requested that, if this understanding was in error, Somalia should respond to that effect no later than January 23, 2015. *Id.* at 4a-5a. That date has now passed, and the Government of Somalia has not responded to the December 23, 2014 diplomatic note. *Id.* at 1a-2a.

As a result of its diplomatic engagement with Somalia, the State Department has informed this Office that it has concluded that the Government of Somalia does not request that the United States recognize petitioner's immunity in this case. App., *infra*, 1a-2a. The State Department has further informed this Office that in light of the Somali President's designation of the State Attorney General as having full authority with respect to the issue of petitioner's immunity, the subsequent diplomatic engagement with the Somali President's designee, and the lack of a timely response to the State Department's December 23, 2014 diplomatic communication, the State Department does not recognize the letters of the two former Somali Prime Ministers, see Pet. App. 73a-74a, 113a-118a, as expressing the current view of the Government of Somalia.

The Executive Branch has concluded that there is no reason to alter its determination, expressed in its Statement of Interest in the district court in 2011, that petitioner is not immune from suit.

DISCUSSION

In the view of the United States, the petition for certiorari should be denied.

As discussed in the United States' previous amicus brief filed in response to the Court's invitation in this case, the court of appeals' reasoning suffers from two critical legal errors. First, the court erred in holding

that the United States' position on whether a foreign defendant should be recognized as enjoying conduct-based official immunity should be accorded only non-binding "substantial weight." Pet. App. 58a. Second, the court erred in announcing a new categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms, when the Executive has not adopted any such categorical exception to immunity. The court's judicially created categorical rule would substantially impair the Executive's authority and responsibility to make immunity determinations.

This Court should nonetheless deny review. Since this case was last before the Court, the State Department has engaged in diplomatic discussions with the Government of Somalia, and it has ascertained that Somalia does not seek immunity for petitioner. Under the circumstances, the Executive Branch has decided not to alter its determination that petitioner is not immune from this suit. The judgment of the court of appeals, which affirmed the district court's denial of petitioner's immunity, is therefore consistent with the Executive Branch's immunity determination, and it properly disposes of the immunity issue in this case.

I. THE COURT OF APPEALS' DECISION IS ERRONEOUS IN TWO RESPECTS

A. The Court Of Appeals Erred In Holding That The Executive Branch's Determination As To Conduct-Based Immunity Is Not Controlling

Under this Court's decisions, an Executive Branch determination whether a foreign official is immune from suit is binding on the courts. This principle applies both to status-based and conduct-based im-

munities, and the court of appeals erred in holding otherwise.

1. a. In *Samantar*, this Court held that the FSIA left in place the Executive Branch’s historical authority to determine the immunity of foreign officials. 560 U.S. at 321-325. The Court described that historical practice in terms that made clear the deference that courts traditionally accorded to Executive Branch foreign sovereign immunity determinations before the FSIA’s enactment. See *id.* at 311-312. As the Court explained, under the pre-FSIA two-step procedure, a foreign state facing suit could request a “suggestion of immunity” from the State Department and, if the State Department made such a suggestion, the district court “surrendered its jurisdiction.” *Id.* at 311. If the State Department took no position on immunity, “a district court had authority to decide for itself whether all the requisites for such immunity existed,” applying “the established policy” of the State Department to make that determination. *Id.* at 311-312 (citation and internal quotation marks omitted). The Court also recognized that the same two-step process would be applied in cases against individual foreign officials. *Id.* at 312.

b. The pre-FSIA immunity decisions that this Court cited in *Samantar* confirm that the State Department’s determination regarding immunity is, and historically has been, binding in judicial proceedings. 560 U.S. at 311-312. In *Ex parte Peru*, 318 U.S. 578 (1943), for example, the 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.” *Id.* at 588 (quoting

United States v. Lee, 106 U.S. 196, 209 (1882)). In *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court instructed that 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.” *Id.* at 35; see, e.g., *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

From early in the Nation’s history, individual foreign officials were recognized as having immunity “from suits brought in [United States] tribunals for acts done within their own States, in the exercise of governmental authority.” *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897); see, e.g., *Suits Against Foreigners*, 1 Op. Att’y Gen. 45, 46 (1794). In pre-FSIA suits against foreign officials, courts followed the same two-step procedure as in suits against foreign states. See, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734 (GLG), 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-506 (2d Cir. 1971) (applying principles articulated by the Executive Branch because the Executive did not express a position in the case); see also 560 U.S. at 311-312.

2. The court of appeals drew a distinction between Executive Branch determinations concerning status-based immunities, which the court acknowledged would be binding, and Executive Branch determinations of conduct-based immunities, which the court considered itself free to second-guess. That distinction has no basis.

a. As an initial matter, this Court in *Samantar* did not distinguish between conduct-based and status-

based immunities in discussing the deference traditionally accorded to the Executive Branch. Rather, in endorsing the two-step approach to immunity questions, the *Samantar* Court recognized that the same procedures applied in cases involving the conduct-based immunity of foreign officials. 560 U.S. at 311-312. Indeed, the two cases cited by this Court involving foreign officials—*Heaney*, 445 F.2d at 504-505, and *Waltier v. Thomson*, 189 F. Supp. 319, 320-321 (S.D.N.Y. 1960)—both involved consular officials who were entitled only to conduct-based immunity for acts carried out in their official capacity.⁵ And in reasoning that Congress did not intend to modify the historical practice regarding individual foreign officials, the Court cited *Greenspan*, in which the district court deferred to the State Department’s recognition of conduct-based immunity of individual foreign officials. 1976 WL 841, at *2; see 560 U.S. at 321-322.

b. In concluding that conduct-based immunity determinations are not binding on the Judiciary, the court of appeals relied on two law review articles for the proposition that the Executive’s determinations of status-based immunity are based on its power to recognize foreign sovereigns, see U.S. Const. Art. II, § 3, while the Executive’s conduct-based determinations are not grounded on a similar “constitutional basis.”⁶

⁵ The conduct-based immunity of consular officials is now governed by the Vienna Convention on Consular Relations and Optional Protocol on Disputes (VCCR), *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, but the VCCR did not apply to the *Heaney* case. 445 F.2d at 505-506. *Heaney* applied the immunity principles articulated by the Executive Branch.

⁶ The lower-court decisions cited by the court of appeals did not suggest that deference to the Executive was based solely on the

Pet. App. 56a-57a. But this Court has long recognized that the Executive’s authority to make foreign sovereign immunity determinations, and the requirement of judicial deference to such determinations, flow from the Executive’s constitutional responsibility for conducting the Nation’s foreign relations, not the more specific recognition power. See, e.g., *Ex parte Peru*, 318 U.S. at 589 (suggestion of immunity “must be accepted by the courts as a conclusive determination by the political arm of the Government” that “continued retention of the vessel interferes with the proper conduct of our foreign relations”); see also *Hoffman*, 324 U.S. at 34; *Lee*, 106 U.S. at 209; *National City Bank v. Republic of China*, 348 U.S. 356, 360-361 (1955).

The Executive’s authority to make foreign official immunity determinations similarly is grounded in its power to conduct foreign relations. While the scope of foreign state and foreign official immunity is not invariably coextensive, see 560 U.S. at 321, the basis for recognizing the immunity of current and former foreign officials is that “the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers.” *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), aff’d, 168 U.S. 250 (1897); see Pet. App. 78a-84a. As a result, suits against foreign officials—whether they are heads of state or lower-level officials—implicate

recognition power. Pet. App. 55a-56a. To the contrary, they emphasized the Executive’s responsibility for foreign affairs. See *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005); *United States v. Noriega*, 117 F.3d 1206, 1211-1212 (11th Cir. 1997), cert. denied, 523 U.S. 1060 (1998); *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 110-111 (D.D.C. 2005).

much the same considerations of comity and respect for other Nations' sovereignty as suits against foreign states. See *ibid.*; see also *Heaney*, 445 F.2d at 503.

c. Accordingly, in the years before the FSIA, courts routinely accepted as binding Executive Branch determinations of conduct-based immunity of both foreign states and foreign officials. Because the Executive Branch, beginning in 1952, applied the restrictive theory of sovereign immunity, under which foreign states enjoy immunity only as to sovereign, not commercial, activity, 560 U.S. at 312, determinations of foreign state immunity were conduct-based, and courts deferred to the Executive's decisions. See, e.g., *Isbrandtsen Tankers, Inc. v. President of India*, 446 F.2d 1198, 1200 (2d Cir.), cert. denied, 404 U.S. 985 (1971); *Petrol Shipping Corp. v. Kingdom of Greece*, 360 F.2d 103, 110 (2d Cir.), cert. denied, 385 U.S. 931 (1966); *Amkor Corp. v. Bank of Kor.*, 298 F. Supp. 143, 144 (S.D.N.Y. 1969). In the relatively few cases involving foreign officials, moreover, courts also followed the "same two-step procedure" as in cases involving foreign states. 560 U.S. at 312 (citing *Heaney* and *Waltier*).

That deferential judicial posture as to conduct-based immunity determinations is based on the constitutional principle of separation of powers. Under the Constitution, the Executive is "the guiding organ in the conduct of our foreign affairs." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). As this Court recognized previously in this case, the Executive Branch's constitutional authority over the conduct of foreign affairs continues as a foundation for the Executive's authority to determine the immunity of foreign officials. 560 U.S. at 323; see *Mistretta v. United*

States, 488 U.S. 361, 401 (1989). In the absence of a governing statute (such as the FSIA), it continues to be the Executive Branch’s role to determine foreign official immunity from suit. See, e.g., *Ye v. Zemin*, 383 F.3d 620, 626-627 (7th Cir. 2004), cert. denied, 544 U.S. 975 (2005). The court of appeals therefore erred in holding that the Executive Branch’s determinations of conduct-based immunity are not entitled to controlling weight.

B. The Court Of Appeals Erred In Creating A New Categorical Judicial Exception To Immunity

The court of appeals also committed legal error in declining to rest its determination of non-immunity on the specific grounds set forth in the Executive Branch’s Statement of Interest, and instead fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms.

1. The per se rule of non-immunity adopted by the Fourth Circuit is not drawn from a determination made or principles articulated by the Executive Branch. To the contrary, the United States specifically requested the court not to address respondents’ broader argument that a foreign official cannot be immune from a private civil action alleging *jus cogens* violations. Pet. App. 111a n.3. The court’s decision is thus inconsistent with the basic principle that Executive Branch immunity determinations establish “substantive law governing the exercise of the jurisdiction of the courts.” *Hoffman*, 324 U.S. at 36.

Indeed, both before and after this Court’s decision in *Samantar*, the United States has suggested immunity for former foreign officials who were alleged to have committed *jus cogens* violations. See U.S. Amicus Br. at 19-25, *Matar v. Dichter*, No. 07-2579-cv

(2d Cir. Dec. 19, 2007); U.S. Amicus Br. at 23-34, *Ye v. Zemin*, No. 03-3989 (7th Cir. Mar. 5, 2004); see also Statement of Interest & Suggestion of Immunity at 7-11, *Rosenberg v. Lashkar-e-Taiba*, No. 1:10-cv-5381-DLI-CLP (E.D.N.Y. Dec. 17, 2012); Suggestion of Immunity at 6, *Doe v. De León*, No. 3:11-cv-01433-AWT (D. Conn. Sept. 7, 2012); Statement of Interest & Suggestion of Immunity at 5-8, *Giraldo v. Drummond Co.*, No. 1:10-mc-00764-JDB (D.D.C. Mar. 31, 2011). The courts deferred to the United States' Suggestions of Immunity in those cases. See *Matar v. Dichter*, 563 F.3d 9, 14-15 (2d Cir. 2009); *Ye*, 383 F.3d at 626-627; *Rosenberg v. Pasha*, 577 Fed. Appx. 22, 23-24 (2d Cir. 2014); *Doe v. De León*, 555 Fed. Appx. 84, 85 (2d Cir.), cert. denied, 135 S. Ct. 78 (2014); *Giraldo v. Drummond Co.*, 493 Fed. Appx. 106 (D.C. Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 1637 (2013).

2. Respondents erroneously suggest (Br. in Opp. 2-3, 24-25) that the court of appeals' creation of a categorical exception to immunity whenever *jus cogens* violations are alleged is supported by the United States' 2010 merits-stage amicus brief in this case. See 08-1555 U.S. Amicus Br. 7, 24-26. Specifically, they contend (Br. in Opp. 24) that the United States stated that various factors, including the nature of the acts alleged, are "appropriate to take into account" in immunity determinations. As the United States explained in its December 2013 invitation brief, that is incorrect. 12-1078 U.S. Amicus Br. 20-21.

The passages in the United States' merits-stage amicus brief identified considerations, not accounted for under the FSIA, which the Executive Branch could find appropriate to take into account in making immunity determinations. The passages thereby

served to underscore the range of discretion properly residing in the Executive Branch under the Constitution in making immunity determinations. The United States' brief in this Court did not state that the Executive Branch had in fact decided if or how any particular consideration should play a role in specific immunity determinations, much less suggest that a court should independently weigh those considerations (or invoke any one of them) to make a determination of immunity or non-immunity on its own.

In any event, this Court unanimously ruled in this case that the courts should continue to adhere to official immunity determinations formally submitted by the Executive Branch, just as they did before the enactment of the FSIA. See 560 U.S. at 321-325. The Executive Branch made a determination of non-immunity in this case. The court of appeals fundamentally erred in failing to rest on the United States' submission and instead itself announcing a categorical exception to official immunity whenever allegations of *jus cogens* violations are made. See *Hoffman*, 324 U.S. at 35.

* * * * *

The court of appeals thus erred in two significant respects, and its decision conflicts with the Second Circuit's decision in *Matar v. Dichter*, *supra*, which held that courts must defer to the immunity determination in the Executive Branch's suggestion of immunity in a case involving alleged violations of *jus cogens* norms. See *Rosenberg*, 577 Fed. Appx. at 23-24 (following *Dichter*, but acknowledging conflict with Fourth Circuit); see also *Kazemi Estate v. Islamic Rep. of Iran*, 2014 SCC 62, ¶ 106 (Can.) (recognizing conflict, and declining to recognize a *jus cogens* excep-

tion to official immunity). An appellate decision holding that courts need not defer to the Executive's immunity determination and announcing a categorical judicial exception for cases involving alleged violations of *jus cogens* norms would warrant review by the Court at an appropriate time.

II. THIS COURT SHOULD DENY CERTIORARI

This Court should deny certiorari because, although the Fourth Circuit's opinion was erroneous for the reasons stated above, its judgment affirming the denial of petitioner's immunity is in accord with the Executive Branch's determination that petitioner is not immune. The Fourth Circuit's judgment therefore properly disposes of the immunity issue in this case.

A. The United States' previous recommendation that the Court GVR in this case rested primarily on the State Department's need to engage in diplomatic discussions with the newly recognized Somali Government in order to consider the position on the immunity issue that had been expressed by that Government. 12-1078 U.S. Amicus Br. 22-23. The correspondence filed by the parties concerning the Somali Government's position on immunity that occurred shortly after the United States filed its brief, see p. 8, *supra*, underscored the need for diplomatic engagement.

Those discussions have now occurred. The State Department has concluded that Somalia does not request immunity for petitioner in this suit. The Executive has decided that, under the circumstances, there is no reason to alter its determination that petitioner is not immune from this suit. See pp. 10-11, *supra*. Unlike the last time this case was before the

Court, the United States is able to convey to the Court its determination with respect to immunity.

B. Because the Executive Branch has decided not to alter its determination that petitioner is not immune, it is now clear that the judgment of the court of appeals (albeit not its rationale) is consistent with the Executive Branch's determination. Accordingly, it is the view of the United States that the court of appeals' judgment properly disposes of the immunity issue in this case. In light of the unique circumstances of this case, review of the now-final judgment in this case is not warranted.

Petitioner argues (Pet. 23) that the Court should address "the legal question presented—whether *jus cogens* allegations categorically preclude common-law immunity—and then remand for application of the appropriate legal rule, taking into account the position of the Somali government." Petitioner contends (Reply Br. 7-9) that such a decision would afford him meaningful relief because, once the Court has established that there is no *jus cogens* exception, he might obtain on remand a judicial decision finding him immune from this suit. Petitioner bases that prediction on two premises: first, his incorrect assumption that the Somali Government *does* request immunity, such that the United States might alter its immunity determination; and second, his assertion that the United States' original Statement of Interest has been overtaken by subsequent events. *Id.* at 8. Both of those premises, however, have been vitiated by the Executive Branch's intervening ascertainment of the Somali Government's actual position, and the Executive's conclusion under the circumstances that it will not alter its immunity determination.

In the event of the remand petitioner seeks, the Fourth Circuit would presumably accord at least “substantial weight” to the Executive Branch’s conclusion that petitioner is not entitled to immunity. Pet. App. 58a. The Fourth Circuit has already opined that the factors on which the Statement of Interest initially relied were entitled to significant weight. See *id.* at 67a (stating that the low “risk of offending a foreign nation by exercising jurisdiction” in this case and petitioner’s “binding tie to the United States” added “substantial weight in favor of denying immunity”). Now that the Executive Branch has reaffirmed its determination of non-immunity, following its diplomatic engagement with the Government of Somalia, there is no reason to believe that the Fourth Circuit would decline to reinstate its judgment denying immunity.

In sum, because the court of appeals’ judgment in respondents’ favor is consistent with the Executive Branch’s determination that petitioner is not immune, and in light of all the circumstances, this Court should not grant review simply to correct the erroneous reasoning in the Fourth Circuit’s opinion. See *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842 (1984) (“[T]his Court reviews judgments, not opinions.”); Stephen M. Shapiro et al., *Supreme Court Practice* 249 (10th ed. 2013) (certiorari will be denied where the question presented is “irrelevant to the ultimate outcome of the case”).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
*Acting Assistant Attorney
General*
EDWIN S. KNEEDLER
Deputy Solicitor General
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*Assistant to the Solicitor
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MARK B. STERN
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Attorneys

MARY E. MCLEOD
*Acting Legal Adviser
Department of State*

JANUARY 2015

APPENDIX A

[SEAL OMITTED]

*United States Department of State
Washington, D.C. 20520*

January 28, 2015

The Honorable Donald Verrilli, Jr.
Solicitor General
United States Department of Justice
950 Pennsylvania Ave., NW
Room 5143
Washington, DC 20530

Re: *Samantar v. Yousuf*, No. 13-1361

Dear Mr. Verrilli:

I am writing to request that the Department of Justice convey to the United States Supreme Court that the Department of State stands by its prior determination that petitioner Mohamed Ali Samantar does not enjoy immunity from the jurisdiction of the U.S. courts with respect to the above-referenced case.

On December 23, 2014, the Department of State, following earlier diplomatic correspondence and direct discussions with the Government of Somalia, sent a diplomatic note to the Government of Somalia. The note stated that the understanding of the Department of State, based on the earlier diplomatic discussions, is that the final position of the Government of Somalia is that it does not seek immunity for Mr. Samantar, and that it has no objection to civil litigation proceeding

against him in United States courts. The note informed the Government of Somalia that the Department of State intends to act on that basis. The note requested that the Government of Somalia inform the Department of State if any of these understandings are in error by January 23, 2015. The Government of Somalia has not done so. The Department notes that any immunity Mr. Samantar might enjoy ultimately belongs to the Government of Somalia, rather than to Mr. Samantar himself.

Under the circumstances, taking into account the relevant principles of customary international law, and considering the overall impact of this matter on the foreign policy of the United States, the Department of State has not altered its prior determination that Mr. Samantar does not enjoy immunity in this litigation.

Sincerely,

/s/ MARY E. McLEOD
MARY E. MCLEOD
Acting Legal Adviser

APPENDIX B

[SEAL OMITTED]

Embassy of the United States of America

Somalia Unit, U.S. Embassy Nairobi
December 23, 2014

H.E. Mohamed Ali Nur
Ambassador
Federal Government of Somalia
Embassy of Somalia
Nairobi

Excellency,

I have the honor of forwarding the attached diplomatic note regarding immunity status for Mohamed Ali Samantar and Yusuf Abdi Ali. We ask that you convey this message to the office of the President as well as the State Attorney General, Osman Elmi Guled.

Excellency, please accept the assurances of my highest consideration.

Sincerely,

/s/ BRIAN H. PHIPPS
BRIAN H. PHIPPS
Deputy Special Representative
for Somalia

No. 16

The Somalia Unit of the Embassy of the United States of America presents its compliments to the Ministry of Foreign Affairs of the Federal Government of Somalia and has the honor to refer to the April 22, 2014 letter from the Office of the Presidency regarding issues of immunity. That letter conferred upon Osman Elmi Guled, the State Attorney General of the Federal Republic of Somalia, “the Power of Attorney and full authority to be in charge of all matters relating to these issues” and stated that he “represents and acts on behalf of the Federal Government of Somalia on all types of immunities.”

Representatives of the United States Government met with the State Attorney General on July 25, 2014. In this meeting, the State Attorney General made clear that Somalia does not seek immunity for Mohamed Ali Samantar and Yusuf Abdi Ali, regardless of previous communications between our governments.

Based on the July conversation, as well as the State Attorney General’s full authority under the April 22, 2014, letter to act on behalf of Somalia on issues relating to immunity, the Department of State understands that the Government of Somalia does not wish to seek immunity for Mohamed Ali Samantar and Yusuf Abdi Ali, and has no objection to civil suits against them proceeding in United States courts. The Department of State understands this to be the Government of Somalia’s final position on the matter, and will proceed on that basis. If any of the understandings set forth in this diplomatic note are in error, the Department of

State requests the Government of Somalia to communicate with the U.S. Somalia Unit in Nairobi as soon as possible, but no later than January 23, as the United States Supreme Court recently asked the United States for its views on the case involving Mr. Samantar.

The Department of State expresses its appreciation to the Government of Somalia for these discussions, and looks forward to continuing the partnership between our countries as we work together toward a more stable and prosperous Somalia. The Somalia Unit of the Embassy of the United States of America avails itself of this opportunity to renew to the Ministry of Foreign Affairs of the Federal Government of Somalia the assurances of its highest consideration.

Embassy of the United States of America,
Nairobi, December 23, 2014. [SEAL OMITTED]

APPENDIX C

Jamhuuriyadda Federaalka Soomaaliya
Madaxtooyada
Ku-Xigeenka Agaasimaha Guud ee
Madaxtooyada

[SEAL OMITTED]

Federal Republic of Somalia
The Presidency
Deputy Director General

Ref: JFS/XKAG/080/4/14

April 22, 2014

US EMBASSY
MUTHAIGA NORTH,
NAIROBI,
KENYA

SUB: POINT OF CONTACT FOR IMMUNITY
CASES

Dear Sirs,

This letter is written to give His Honor **Osman Elmi Guled**, the State Attorney General of the Federal Republic of Somalia, the Power of Attorney and full authority to be in charge of all matters relating to these issues.

As the State Attorney General is the main legal advisor to the government, His Honor Guled deals, represents and acts on behalf of the Federal government of Somalia on all types of immunities.

The State Attorney General can be contacted via email address: [EMAIL REDACTED] and Telephone numbers: [TELEPHONE NUMBERS REDACTED]

We appreciate any cooperation in this matter.

Sincerely,

/s/ THABIT ABDI MOHAMED
THABIT ABDI MOHAMED
Deputy Director General of the Presidency/
Operations Manager

[SEAL OMITTED]

Somalia Presidency, Villa Somalia, Mogadishu, [CONTACT INFORMATION REDACTED]