

No. 16-56704

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AHMET DOĞAN, *et al.*,
Plaintiffs-Appellants,

v.

EHUD BARAK,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

**BRIEF FOR THE UNITED STATES OF AMERICA
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

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INTEREST OF THE UNITED STATES

This case involves claims brought against a foreign government official for acts taken in his official capacity. The district court recognized that, under the Supreme Court's decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010), courts are required to defer to the Executive Branch's suggestion of immunity on behalf of a foreign official named as a defendant in a civil suit in the United States. ER 13. The State Department determined that defendant Ehud Barak is immune from this suit

(ER 92-93), and the Department of Justice communicated that determination to the district court in a suggestion of immunity (ER 77-90). Accordingly, the district court deferred to the State Department's immunity determination and dismissed the suit. ER 15, 27.

The United States has a substantial interest in ensuring that courts properly recognize the controlling nature of the State Department's foreign-official immunity determinations. Moreover, the question of the amenability of foreign officials to suit in the United States for acts taken in an official capacity has significant implications for the reciprocal treatment of United States officials in foreign courts and for our Nation's foreign relations. Cf. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S.Ct. 1312, 1322 (2017) (recognizing the United States' interests in reciprocal treatment in suit implicating foreign-state immunity); *Boos v. Barry*, 485 U.S. 312, 323 (1988) (noting "the concept of reciprocity that governs much of international law" addressing the immunity of diplomats).

BACKGROUND

1. For much of our Nation's history, the Executive Branch had the responsibility to identify principles, which were binding on the courts, governing the immunity of foreign states and their officials in civil suits in the United States. See

Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (stating 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”); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (accepting the State Department’s suggestion of immunity “as a conclusive determination” that suit against foreign-state owned vessel “interferes with the proper conduct of our foreign relations”).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, which now provides the sole basis for obtaining jurisdiction over a foreign state in a civil suit brought in the United States. See *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010); see also *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). With respect to claims against a “foreign state or its political subdivisions, agencies, or instrumentalities,” the FSIA “transfer[red] primary responsibility for immunity determinations from the Executive to the Judicial Branch.” *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004).

In the wake of the FSIA’s enactment, many courts, including this one, interpreted the FSIA as also codifying principles governing the immunity from suit of individual foreign officials. See *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990) (holding that a suit against a foreign government official “for

acts committed in his official capacity * * * must be analyzed under the framework of the [FSIA]”). In *Samantar*, the Supreme Court rejected that construction. See 560 U.S. at 313-26. Instead, it held that foreign-official immunity is governed by the common-law framework that predated the enactment of the FSIA. See *id.* at 311, 325.

Under that framework, courts followed “a two-step procedure” for deciding foreign-state and foreign-official immunity questions. *Samantar*, 560 U.S. at 311. If the State Department determined that a foreign state was entitled to immunity, “the district court surrendered its jurisdiction.” *Id.* If the State Department did not make an immunity determination, the court determined immunity by applying principles articulated by the Executive Branch. *Id.* at 311-12. “Although 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 312 (citing, as examples, *Heaney v. Government of Spain*, 455 F.2d 501, 504-05 (2d Cir. 1971); *Waltier v. Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960)).

While Congress transferred to the judiciary the responsibility for determining the immunity of foreign states, *Samantar* held, Congress did not similarly transfer to the courts the responsibility for making foreign-official immunity determinations. 560 U.S. at 320 (“Even reading the Act in light of Congress’ purpose of codifying

state sovereign immunity, * * * we do not think that the Act codified the common law with respect to the immunity of individual officials.”). The Supreme Court therefore explained that lower courts are to continue to apply the pre-FSIA, common-law framework in making determinations of foreign-official immunity, giving conclusive weight to the State Department’s suggestions of immunity. *Id.* at 323 (“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.”).

2. In this case, the parents of a man killed in an Israeli military operation sued Ehud Barak, who at the time of the killing was Israel’s Defense Minister, seeking to hold Barak liable for their son’s death. ER 120-50 (complaint).

a. In 2009, the Government of Israel imposed “a naval blockade of the Gaza Strip to stem the flow of weapons into Gaza and put pressure on Hamas,” the entity in control of that territory. ER 4. The next year, a flotilla of six vessels, including the *Mavi Marmara*, sailed from Turkey towards Gaza with the stated intent to deliver humanitarian assistance and to bring international attention to Israel’s blockade. *Id.* Israel intercepted the flotilla approximately sixty miles from the blockade zone. ER 5. After the flotilla failed to respond to Israeli radio warnings, the Israeli navy decided to board the vessels. *Id.* The Israeli soldiers who boarded the *Mavi Marmara*

were violently attacked with makeshift weapons. *Id.* During the altercation, Israeli soldiers killed nine people, including Furkan Doğan. ER 5-6. The complaint alleges that Doğan, a U.S. citizen, was shot four times from behind and also shot in the face at point-blank range. ER 123, 130 (¶¶ 12, 39). Israeli forces eventually took control of the ship. ER 5-6.

Plaintiffs filed this suit against Barak, who was the Israeli Defense Minister at the time of the interdiction, asserting claims under the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992); the Alien Tort Statute, 28 U.S.C. § 1350; and the Anti-Terrorism Act, 18 U.S.C. § 2331 *et seq.* Plaintiffs allege that Barak planned the operation to intercept the flotilla, personally authorized Israeli forces to board the vessels, and had command responsibility over those forces. ER 127-30 (¶¶ 28-34). Plaintiffs contend that Barak bears ultimate responsibility for Doğan's death. The complaint alleged that “[t]he acts inflicted against Furkan Doğan were inflicted by and/or at the instigation, under the control or authority, or with the consent or acquiescence of Defendant Barak in his official capacity as Minister of Defense.” ER 141 (¶ 83).

b. In December 2015, the Israeli Government sent a diplomatic note to the State Department concerning the suit. ER 118-19. The note informed the State Department that “all of the actions of Mr. Barak at issue in the lawsuit were

performed exclusively in his official capacity as Israel's Minister of Defense." ER 118. The diplomatic note explained Israel's view that, "[a]lthough brought against Mr. Barak personally, the lawsuit challenges the legality under international and United States law of actions taken by the Government of the State of Israel by its agents, and is in essence a suit filed against the State of Israel itself." *Id.* The note asked that "the United States Government promptly submit a suggestion of immunity" in this suit. ER 119.

The State Department determined that former Defense Minister Barak is immune from this suit. ER 92-93. In a letter to the Department of Justice, the State Department explained that "[p]laintiffs expressly challenge Barak's exercise of his official powers as an official of the Government of Israel. The Complaint does not refer to any private conduct by Barak, but only to his official actions." ER 93. The letter further explained that, "[a]s a general matter, acts of defendant foreign officials who are sued for exercising the powers of their office are treated as acts taken in an official capacity for which a determination of immunity is appropriate," especially where the foreign government itself recognizes that the acts at issue were taken in an official capacity. *Id.* Accordingly, the State Department determined that, "taking into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by

customary international law, and considering the overall impact of this matter on the foreign policy of the United States, * * * Ehud Barak enjoys immunity from suit with respect to this action.” *Id.* At the State Department’s request, the Department of Justice filed a suggestion of immunity on behalf of Barak. ER 77-90.

3. The district court accepted the State Department’s immunity determination and dismissed the suit. ER 27 (“The resolution of this dispute belongs with the Executive Branch, not the Judicial Branch.”). In so doing, the district court rejected plaintiffs’ various arguments urging the court not to treat the State Department’s determination as controlling.

The district court first rejected plaintiffs’ argument that because the Executive Branch does not have exclusive constitutional authority over the Nation’s foreign affairs, absolute deference to the State Department’s foreign-official immunity determinations “violates the separation of power between the Executive Branch and the Judicial Branch.” ER 15. In the district court’s view, the Supreme Court historically required courts to accept the Executive Branch’s foreign sovereign immunity determinations not because deference is constitutionally required, but because the courts’ failure to defer “would seriously hamper” the Executive’s conduct of foreign relations. ER 16; see also ER 20-21. And because it believed that the courts’ deference to the Executive Branch’s immunity determinations is not

constitutionally grounded, the district court also rejected plaintiffs' contention that courts are required to defer only to the Executive Branch's status-based immunity determinations, which plaintiffs claim are based on the President's constitutional authority to recognize foreign states.¹ ER 17 (citing U.S. Const. art. II, § 3; and *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015)). The district court also explained that, even undertaking an independent analysis, it would conclude that Barak is immune from this suit under principles accepted by the Executive Branch. ER 18-19.

The district court next rejected the plaintiffs' invitation to follow the Fourth Circuit in adopting a judicially created categorical exception to foreign-official immunity for alleged violations of a *jus cogens* norm, that is, "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted." ER 21 & n.18 (quoting *Yousuf v. Samantar*, 699 F.3d 763, 775 (4th Cir. 2012)) (quotation marks omitted). "[C]ourts are not free to carve out such an exception on their own," the district court explained, "[b]ecause the common law immunity inquiry centers on what conduct the *Executive* has seen

¹ Under customary international-law principles, certain state officials, such as sitting heads of state, enjoy absolute immunity from foreign adjudicatory jurisdiction based on their status as incumbent office holders. See 1 *Oppenheim's International Law* 1038 (Robert Jennings & Arthur Watts eds., 9th ed. 1996). By contrast, all former foreign officials as well as current, lower-level officials may be immune only for acts taken in an official capacity. See *id.* at 1043-44.

fit to immunize,” and the government’s suggestion of immunity “made clear that [the Executive Branch] does not recognize a *jus cogens* exception to immunity.”

ER 22. In any event, such an exception would undermine a foreign official’s immunity any time a plaintiff alleged a *jus cogens* violation because “whether there was actually a *jus cogens* violation is inextricably intertwined with the merits of the underlying claim.” *Id.*; see *id.* (noting that “foreign official immunity is not just a defense to liability, but an immunity from suit—i.e., an immunity from trial and the attendant burdens of litigation”).

Finally, the district court rejected plaintiffs’ argument that Congress implicitly abrogated foreign-official immunity for claims asserted under the TVPA. Relying on a Supreme Court decision addressing the availability of immunity in the context of a suit under 42 U.S.C. § 1983, the district court observed that “[c]ourts should generally ‘proceed on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.’” ER 23 (quoting *Filarsky v. Delia*, 566 U.S. 377, 389 (2012)) (omission in original; internal quotation marks omitted).²

² As the district court observed, the Senate Report accompanying the TVPA stated that “[c]ourts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing’ the TVPA.” ER 24 (quoting S. Rep. No. 102-249, at 8 (1991)) (alteration in original).

The district court found no clear legislative intent to abrogate foreign-official immunity. The TVPA is “textually silent as to common law immunities.” ER 24. And the legislative history of the TVPA showed that the congressional committees did not intend to abrogate status-based immunities. *Id.* As for conduct-based immunities, the legislative history shows at most that the committees believed that foreign states usually would not choose to assert their officials’ immunity in cases brought under the statute. ER 24-25. Accordingly, the district court held that “Congress did not intend to abrogate immunity for foreign officials, at least where the foreign state officially acknowledges and embraces the official’s acts.” ER 26.

For these reasons, the district court held that Barak is immune and dismissed plaintiffs’ suit. ER 27. Plaintiffs now appeal.

ARGUMENT

THE DISTRICT COURT PROPERLY DEFERRED TO THE STATE DEPARTMENT’S DETERMINATION THAT EHUD BARAK IS IMMUNE FROM THIS SUIT

Governing precedent of the Supreme Court and this Court requires a court to dismiss a civil suit against a foreign official when the State Department determines that the official is immune from suit. The district court correctly complied with that precedent in dismissing plaintiffs’ suit in light of the Executive Branch’s suggestion of immunity on behalf of Ehud Barak. In urging this Court to reverse, plaintiffs ignore that precedent. They also ignore the fact that no court has

ever required a foreign official to be subject to suit after the State Department has determined that the official is immune. The Court should decline plaintiffs' invitation to be the first court to do so.

I. *Samantar* and *Chuidian* Make Clear That the State Department's Determinations Are Controlling Under the Common Law of Foreign-Official Immunity

In *Samantar v. Yousuf*, a case, like this one, involving the conduct-based immunity of a former foreign official, the Supreme Court held that the FSIA left in place the State Department's common-law authority to determine the immunity of foreign officials, as it had previously determined the immunity of foreign states. See 560 U.S. 305, 321-25 (2010).

The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and long has been, binding in judicial proceedings. See *Samantar*, 560 U.S. at 311-12. 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 *Republic of Mexico v. Hoffman*, 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.” 324 U.S. 30, 35 (1945); see also *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74 (1938).

The Supreme Court recognized that the same procedure “was typically followed when a foreign official asserted immunity.” *Samantar*, 560 U.S. at 312; see, e.g., *Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *2 (S.D.N.Y. Nov. 23, 1976); *Heaney v. Government of Spain*, 445 F.2d 501, 503-06 (2d Cir. 1971) (applying principles articulated by the State Department because the Executive Branch did not express a position in the case). The Supreme Court explained that when Congress enacted the FSIA, thereby codifying the principles of foreign-state immunity, it left in place “the State Department’s role in determinations regarding individual official immunity.” *Samantar*, 560 U.S. at 323.

This Court has also recognized that, if the FSIA does not govern the immunity of foreign officials from suit, the State Department’s determinations are controlling. In *Chuidian v. Philippine National Bank*—another suit against a foreign official not entitled to status-based immunity—this Court explained that

[t]he principal distinction between pre-1976 common law practice and post-1976 statutory practice is the role of the State Department. If individual immunity is to be determined in accordance with the Second Restatement [which describes the common-law regime], presumably we would once again be required to give conclusive weight to the State Department’s determination

of whether an individual's activities fall within the traditional exceptions to sovereign immunity.

912 F.2d 1095, 1102 (9th Cir. 1990) (citing *Ex parte Peru*, 318 U.S. at 589, and Restatement (Second) of the Foreign Relations Law of the United States § 69 n.1 (1965)). *Chuidian* held that Congress intended the FSIA to codify the principles governing foreign-official immunity, in part because this Court concluded that Congress did not intend to create “a bifurcated approach to sovereign immunity.” *Id.* The Supreme Court disagreed with that assessment and held that Congress did, indeed, intend such an approach. See *Samantar*, 560 U.S. at 322-323. But the Supreme Court did agree with *Chuidian*'s assessment of the controlling nature of the State Department's immunity determinations under the common-law procedure that predated the FSIA. See *id.* at 311 (explaining that if the Executive Branch suggested immunity, “the district court surrendered its jurisdiction”).

Samantar and *Chuidian* resolve this appeal. The State Department determined that Ehud Barak is immune from plaintiffs' suit, and the district court accepted that determination as controlling and dismissed the suit. ER 27. This Court should affirm.

II. Plaintiffs' Contrary Arguments Lack Merit

Plaintiffs make a number of arguments urging the Court to ignore the State Department's immunity determination. All of those arguments fail to engage the precedent discussed above; none has merit.

A. Plaintiffs' principal argument (Br. 12-32) is that, in their view, the TVPA abrogated foreign-official immunity, and that judicial deference to the State Department's determination of foreign-official immunity offends the separation of powers by permitting the Executive Branch to override the will of Congress. The premise is mistaken. The TVPA does not address, let alone abrogate, the common-law immunity of foreign officials.

In the TVPA, Congress created a right of action against, and imposed a corresponding monetary liability on, “[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation,” subjects an individual to torture or extrajudicial killing. TVPA § 2(a), 106 Stat. 73. Plaintiffs do not contend that the TVPA expressly abrogates foreign-official immunity. Instead, they argue that the TVPA's text eliminates a foreign official's immunity because the right of action “makes no exception” for officials (Br. 13), in contrast to the Anti-Terrorism Act, which excludes foreign officials acting within their official capacities from its right of

action (Br. 14). But that argument confuses the scope of a right of action with the separate question of immunity from suit.

When Congress creates a right of action, it defines the class of persons who may potentially be held liable for wrongful conduct. The TVPA includes within its scope any individual acting under actual or apparent authority or color of law, which includes a foreign official acting in his or her official capacity; the Anti-Terrorism Act excludes such foreign officials. But whether a defendant may be immune from suit under a specific statute is an issue that is distinct from the scope of a cause of action.

For example, 42 U.S.C. § 1983 creates a right of action against “[e]very person who, under color of [law],” deprives another of his or her legal rights. The Supreme Court has described Section 1983 as a statute that “creates a species of tort liability that on its face admits of no immunities.” *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Nevertheless, because the distinction between the creation of a right of action and immunity from suit is “an entrenched feature” of American law, *Rehberg v. Paulk*, 566 U.S. 356, 361 (2012), the Supreme Court has interpreted Section 1983’s right of action “in harmony with general principles of tort immunities and defenses rather than in derogation of them,” *Imbler*, 424 U.S. at 418. The text of the TVPA defines the scope of a right of action and identifies a class of persons who

may be liable. But it, like Section 1983, simply does not address the immunities that may be available to a defendant.³

Plaintiffs next argue that the TVPA's legislative history demonstrates that Congress intended to abrogate foreign-official immunity. Br. 16-21. That, too, is mistaken. As an initial matter, the House and Senate reports expressly observed that the TVPA would not affect status-based immunities such as diplomatic or head-of-state immunity, as plaintiffs acknowledge. S. Rep. No. 102-249, at 7-8 (1991); H.R. Rep. No. 102-367, at 5 (1991); see Br. 17.

Plaintiffs argue, however, that the Senate Judiciary Committee clearly intended to abrogate the immunity of former officials in suits under the TVPA. Br. 17. Even assuming that statement in a committee report would suffice, what the committee said was both significantly less definitive and premised on an erroneous view of the law. The report expressed the view that to support an official's claim of immunity, the official's state would have to "admit some knowledge or authorization of relevant acts." S. Rep. No. 102-249, at 8. But the committee believed that,

³ Plaintiffs' textual argument also proves too much. Plaintiffs recognize that the State Department's determinations of status-based foreign-official immunity "are entitled to absolute deference." Br. 36. Plaintiffs do not explain how the text of the TVPA permits the State Department to require the dismissal of a TVPA suit based on an official's status-based immunity, but does not permit the State Department to make a similar determination based on an official's conduct-based immunity.

“[b]ecause all states are officially opposed to torture and extrajudicial killing,” states would be unlikely to make such an admission. *Id.* Accordingly, as the district court concluded, the TVPA’s legislative history does not clearly demonstrate an intent by Congress to abrogate a foreign official’s immunity in suits under the TVPA, “at least where the sovereign state officially acknowledges and embraces the official’s acts.”

ER 26. Moreover, consistent with this Court’s then-recent decision in *Chuidian*, the Senate Judiciary Committee erroneously assumed that a foreign official’s immunity would be governed by the FSIA. See S. Rep. No. 102-249, at 8. As explained above, however, see *supra* pp. 12-13, the FSIA did not disturb the preexisting authority of the Executive Branch to determine the immunity of foreign officials from suit.

Plaintiffs contend that the district court’s conclusion creates a “blanket exception” (Br. 13) to the TVPA and establishes a categorical immunity any time a foreign state endorses its official’s conduct (Br. 18, 21, 47), which, plaintiffs say, conflicts with the TVPA’s purpose of holding accountable foreign government officials who engage in torture or extrajudicial killing (Br. 15-16). Plaintiffs misdescribe the district court’s holding. See also, *e.g.*, Br. 24 (incorrectly suggesting that district court recognized “absolute immunity for acts of torture”); *id.* at 25, 30, 48 (similar). The district court did not hold that foreign officials would be entitled to immunity in suits under the TVPA any time the official’s state endorses the

official's alleged conduct. It held that a foreign official is entitled to immunity in any civil suit in which the State Department has determined that the official is immune. ER 15, 27.

The State Department does not invariably determine that foreign officials sued under the TVPA are immune. See, e.g., *Yousuf v. Samantar*, 699 F.3d 763, 777-78 (4th Cir. 2012) (discussing State Department's determination that former Somali official was not immune in TVPA suit in the circumstances of that case). Although the State Department takes into account whether a foreign state "asserts that the actions of its official were authorized acts taken in an official capacity" in making an immunity determination (ER 93), that factor is not controlling (see *id.*). Thus, for example, even if a foreign state purports to endorse the acts of a former foreign official, the State Department would not determine that the former foreign official is immune from suit if it concludes that the acts alleged were not taken in an official capacity.

For these same reasons, the district court's interpretation of the TVPA as leaving in place the State Department's authority to determine a foreign official's immunity from suit does not "render the TVPA a nullity" (Br. 27), any more than the availability of qualified immunity renders 42 U.S.C. § 1983 a nullity. Moreover, a plaintiff could pursue a claim under the TVPA when a defendant is sued for acts

taken not in an official capacity but under “color of law” (TVPA § 2(a), 106 Stat. 73; see, e.g., *Kadic v. Karadžić*, 70 F.3d 232, 245 (2d Cir. 1995)), or when the State Department accepts a foreign state’s waiver of its official’s immunity (see, e.g., *Mamani v. Berzain*, Nos. 07-22459, 08-21063, 2009 WL 10664387, at *13 (S.D. Fla. Nov. 25, 2009), *rev’d in part on other grounds* by 654 F.3d 1148 (11th Cir. 2011)).

Plaintiffs further invite the Court to consider domestic immunity law, especially as it relates to suits under 42 U.S.C. § 1983. Br. 21-27. To the extent Section 1983 is relevant to the question here, it supports the government’s position. As noted above, see *supra* p. 16, the Supreme Court has interpreted Section 1983 in harmony with principles of tort immunity. The Court has done so because in construing that statutory right of action, it “proceed[s] on the assumption that common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so.” *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (quoting *Pulliam v. Allen*, 466 U.S. 522, 529 (1984)) (omission in original). Finding no such clear intent in Section 1983, the Supreme Court “time and again” has recognized common-law immunity principles as precluding suit under that statute. *Rehberg*, 566 U.S. at 361 (discussing cases). As we have explained above, see *supra* pp. 15-18, the TVPA evinces no “clear legislative intent” to abrogate the State Department’s authority to make controlling

immunity determinations in suits against foreign officials. See also *Manoharan v. Rajapaksa*, 711 F.3d 178, 179-80 (D.C. Cir. 2013) (per curiam) (holding that TVPA does not clearly abrogate head-of-state immunity).

Because the TVPA does not abrogate foreign-official immunity, judicial deference to the State Department's immunity determinations does not "override the will of Congress." Br. 30 (some capitalization and emphasis omitted).

B. Plaintiffs next argue that this Court should follow the Fourth Circuit's decision on remand in *Samantar* in holding that there is no constitutional basis for the Executive Branch's determinations of conduct-based foreign-official immunity, and that courts may craft their own principles governing the immunity of former officials, including a categorical exception to immunity for alleged *jus cogens* violations. Br. 32-41; 50-53; see *supra* p. 9, n.1 (explaining the difference between conduct- and status-based immunity), p. 9 (explaining the concept of *jus cogens*). But the distinction plaintiffs seek to make between the State Department's authority to make status- and conduct-based immunity determinations conflicts with the governing Supreme Court precedent.

As an initial matter, the Supreme Court in *Samantar* did not distinguish between conduct- and status-based immunities. Rather, in explaining that courts historically deferred to the State Department's foreign-official immunity

determinations, the Court cited two cases involving consular officers who were entitled only to conduct-based immunity for acts carried out in their official capacities. See *Samantar*, 560 U.S. at 312 (discussing *Heaney*, 445 F.2d 501, and *Waltier*, 189 F. Supp. 319).⁴ And in reasoning that Congress did not intend to modify the established 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. See *id.* at 321-22 (citing *Greenspan*, 1976 WL 841). Most significantly, *Samantar* itself involved claims against a former foreign official who would be entitled only to conduct-based immunity, if any. *Id.* at 308. The Supreme Court nevertheless gave no qualification to its holding that, in enacting the FSIA, Congress did not wish to alter "the State Department's role in determinations regarding individual official immunity." *Id.* at 323; see *id.* at 325-26 (remanding the case for consideration of whether the former official "may be entitled to immunity under the common law").

⁴ The conduct-based immunity of consular officials is now governed by the Vienna Convention on Consular Relations and Optional Protocol on Disputes, *done* Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. It was unclear whether that convention applied in *Heaney*, which involved conduct that occurred prior to the United States' ratification of the convention. The Second Circuit viewed the convention as an articulation of the State Department's immunity principles. *Heaney*, 445 F.2d at 505-06.

More fundamentally, the Fourth Circuit’s holding on remand in *Samantar* and plaintiffs’ argument endorsing that decision both rest on the premise that the Supreme Court’s pre-FSIA foreign sovereign immunity decisions are based solely on the President’s constitutional authority to recognize foreign states. See, e.g., Br. 36 (discussing *Yousuf*, 699 F.3d at 722); see generally U.S. Const. art. II, § 3; *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015). That constitutional power supports the State Department’s status-based determinations, plaintiffs argue, but not its conduct-based determinations. See Br. 36-37. Again, the premise is mistaken.

The Supreme Court’s pre-FSIA decisions recognize that the State Department’s authority to make foreign sovereign immunity determinations, and the courts’ obligation to defer to those determinations, flow from the Executive Branch’s constitutional responsibility for conducting the Nation’s foreign relations, not only from its 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 continuation of the suit “interferes with the proper conduct of our foreign relations”); *Hoffman*, 324 U.S. at 34 (stating that courts will “surrender[]” jurisdiction upon a suggestion of immunity “by the political branch of the government charged with the conduct of foreign affairs”); see also *National City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360-61

(1955) (stating that “[a]s the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit,” and that judicial deference rests on the need to avoid interfering with the United States’ “diplomatic relations”).⁵

As plaintiffs point out (e.g., Br. 37), the President’s general foreign-affairs powers are not exclusive and are shared in many contexts with Congress. Congress thus could codify some aspects of foreign-official immunity if it chose to do so. But

⁵ Plaintiffs’ contention notwithstanding (see Br. 44), the government does not “disclaim[]” the President’s authority to recognize foreign states as a basis for the Executive Branch’s authority to make certain foreign-official immunity determinations. It is simply that the recognition authority is not the sole basis. See, e.g., ER 83 (suggestion of immunity) (making this point). Similarly, there is no “inconsistenc[y]” (Br. 45) between the government’s position in this litigation and in its criminal prosecution of Roy M. Belfast, Jr., a U.S. citizen indicted for committing acts of torture in Liberia. In a motion to dismiss the indictment, Belfast claimed that the indictment alleged that he acted in an official capacity. He argued that his acts must therefore be considered those of the sovereign and protected under the FSIA. In response to that argument, the United States noted the inapplicability of the FSIA to criminal prosecutions. See United States’ Resp. in Opp’n to Def.’s Mot. to Dismiss the Indictment, at 21, No. 06-20758 (S.D. Fla. Apr. 18, 2007), reproduced as Ex. B to Docket Entry No. 15, filed by plaintiffs in this appeal. The United States further explained that the indictment alleged that Belfast acted “under color of law,” which “is not the same as sovereignty,” and that it did not, “and need not,” allege that Belfast’s acts “were officially authorized by Liberia.” *Id.* at 22-23. In this case, the State Department accepted the Government of Israel’s representation that Barak’s alleged acts “were performed exclusively in his official capacity as Israel’s Minister of Defense” (ER 118), and appropriately took into account the Government of Israel’s request for immunity (ER 84-85).

in the absence of an applicable statute (such as the FSIA), it continues to be the role of the Executive Branch, not the courts, to determine the principles governing foreign-official immunity from suit. That role is supported by the President's constitutional foreign relations authority.

By contrast, courts have no authority to create federal common-law principles of foreign-official immunity, absent Executive Branch guidance. The Supreme Court in *Samantar* made clear that a court is required to “surrender[] its jurisdiction” when the Executive Branch files a suggestion of immunity. 560 U.S. at 311. And when the Executive Branch does not participate in the litigation, courts must “inquire[] whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.” *Id.* at 312 (second alteration in original; quotation marks omitted); see *id.* at 323 (“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.”).

Plaintiffs’ proposal that the Court create a *jus cogens* exception to foreign-official immunity would bring to the fore the question of the courts’ authority to create federal common-law immunity principles in a manner not presented by the Fourth Circuit’s remand decision in *Samantar*. In *Samantar*, the State Department determined that the former foreign official was not immune from suit. See 699 F.3d

at 777-78. Thus, the Fourth Circuit's judgment was at least consistent with the Executive Branch's immunity determination. In this case, by contrast, the State Department has determined that Ehud Barak is immune. Were the Court to accept plaintiffs' invitation and declare that Barak is not immune simply because plaintiffs allege a *jus cogens* violation, it would be the first court to require a foreign official to be subject to suit notwithstanding the State Department's determination that the official is immune from suit.⁶

⁶ Under the common law of foreign sovereign immunity, it is virtually unheard of for a court to deviate from the State Department's determination, either in favor of or against immunity. Plaintiffs identify only two cases. Br. 33 n.8. In the first case, *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926), the Supreme Court held that a ship operated by the Italian government was entitled to immunity, despite the State Department's determination earlier in the litigation that the ship was not immune. But the Court later expressly disclaimed any intent to disregard the Executive Branch's determination. Thus, in *Hoffman*, immediately after stating 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," the Court added a footnote explaining that "[t]his salutary principle was not followed in *Berizzi [Brothers]*." 324 U.S. at 35 & n.1. The Court went on to explain that "[t]he propriety of thus extending the immunity where the political branch of the government had refused to act was not considered." *Id.* at 35 n.1. In the second case, a district court did not accept one ground for a foreign official's immunity advanced by the Executive Branch, but it accepted another. *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 799 (N.D. Cal. 1987) ("Out of respect for the foreign policy decisions of the Executive Branch, this Court finds that Ordonez is entitled to diplomatic immunity."). In any event, plaintiffs have identified no case in which a court has disregarded the State Department's immunity determination and required a foreign state or official to defend a suit.

C. Finally, plaintiffs urge the Court to reject the State Department's immunity determination because it "is entirely silent on the foreign policy implications of this case" and so is not "reasonable." Br. 42 (*italics omitted*). That argument misperceives both the nature of the State Department's immunity determinations and the judicial role.

In making immunity determinations, the State Department takes "into account principles of immunity articulated by the Executive Branch in the exercise of its constitutional authority over foreign affairs and informed by customary international law." ER 93. In doing so, the State Department may consider "the overall impact of [the suit] on the foreign policy of the United States." *Ibid.* But there is no requirement that the Executive Branch articulate the extent and basis of that conclusion. Under the common law of foreign-state and foreign-official immunity, the Executive Branch's foreign-policy considerations are not subject to judicial review. See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("[T]he degree to which granting or denying a claim of immunity may be important to foreign policy is a question on which the judiciary is particularly ill-equipped to second-guess the executive."); *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."); *Rich v.*

Naviera Vacuba, S.A., 295 F.2d 24, 26 (4th Cir. 1961) (per curiam) (“We think that the doctrine of 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 [immunity] conclusion.”).

CONCLUSION

For the foregoing reasons, the Court should affirm the district court’s judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,401 words, excluding the parts of the brief exempted under Rule 32(f) and Circuit Rule 32-1(c) according to the count of Microsoft Word 2013.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in 14-point Goudy Old Style, a proportionally spaced font, using Microsoft Word 2013.

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July 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing Brief for the United States of America as Amicus Curiae Supporting Affirmance with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system, which, pursuant to Circuit Rule 25-5(f), constitutes service on all parties registered for electronic filing.

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