No. 13-3122

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jane Doe, 1, an alien, Jane Doe, 2, an alien, Jane Doe, 3, an alien, Jane Doe, 4, an alien, John Doe, 1, an alien, John Doe, 2, an alien, John Doe, 3, an alien, John Doe, 4, an alien, John Doe, 5, an alien, John Doe, 6, an alien,
Plaintiffs-Appellants,

v.

Ernesto Zedillo Ponce de León, an Alien resident of Connecticut,
Defendant-Appellee.

On Appeal from the United States District Court for the District of Connecticut

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PROOF BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLEE

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INTRODUCTION AND INTERESTS OF THE UNITED STATES

This is an appeal from a district court decision dismissing plaintiffs' lawsuit against the former President of Mexico, Ernesto Zedillo Ponce de León. The United States filed a Suggestion of Immunity to inform the district court that the State Department recognizes Zedillo's immunity from this lawsuit for acts alleged to have been taken in his official capacity as a government official. The district court correctly deferred to the Executive Branch's Suggestion of Immunity and dismissed the case.

It is well established that the Executive Branch may submit determinations concerning foreign sovereign immunity. *See, e.g.*, *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943); *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, "transfer[red] primary responsibility for immunity determinations" regarding foreign states "from the Executive to the Judicial Branch." *Republic of Austria* v. *Altmann*, 541 U.S. 677, 691 (2004). Congress did not, however, "eliminate[] the State Department's role in determinations regarding individual official immunity." *See Samantar* v. *Yousuf*, 130 S. Ct. 2278, 2291-2293 (2010). Accordingly, determination of the immunity of foreign officials, including sitting and former heads of state and other officials, remains vested with the Executive Branch. *See, e.g., Habyarimana* v. *Kagame*, 696 F.3d 1029, 1031-33 (10th Cir. 2012) (sitting head of state); *Matar* v. *Dichter*, 563 F.3d 9, 13-15 (2d Cir. 2009) (former official); *Ye* v. *Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) (head of state who left that position during course of litigation).

For the reasons set out in our Suggestion of Immunity and discussed below, we respectfully ask that this Court affirm the district court's decision dismissing the lawsuit against former President Zedillo.

STATEMENT OF THE ISSUE

The defendant, Ernesto Zedillo Ponce de León, is the former President of Mexico. The United States submitted a Suggestion of Immunity to the district court, and the court accordingly dismissed the case. This appeal raises the question whether,

after the Executive Branch issued a Suggestion of Immunity, the district court properly dismissed the case or was instead required to allow plaintiffs to amend their complaint.

STATEMENT OF FACTS

1. Plaintiffs brought this suit against Ernesto Zedillo Ponce de León, the former president of Mexico, under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victims Protection Act, 28 U.S.C. § 1350 note. A __. They allege that Zedillo is liable for acts of extrajudicial killing committed during the Acteal Massacre and other acts committed by the Mexican military and paramilitary groups. A __.

After a request by the government of Mexico, the United States filed a Suggestion of Immunity stating that Zedillo is immune from this civil lawsuit. A __. The Suggestion stated that the "alleged actions as set forth in the Complaint are predicated" on Zedillo's actions as President, "thus involving the exercise of his powers of office." A __. The Suggestion explained that the State Department accordingly presumed that the actions were taken in Zedillo's official capacity, and that the State Department "has not found a sufficient reason to question that preliminary assessment." A __. The Suggestion noted that plaintiffs' allegations of command responsibility and personal involvement in the alleged actions did not provide a basis for questioning whether Zedillo acted in his official capacity. A __.

2. Plaintiffs filed suit in Mexican court, seeking to establish that the Mexican government's request that the State Department assert Zedillo's immunity was not

legal under Mexican law. A __. The Mexican court issued a judgment to that effect. Plaintiffs notified the district court. A __. Plaintiffs also argued to the district court that they should be permitted to amend their complaint to include new allegations tying Zedillo more directly to the Acteal Massacre. A __.

The district court scheduled oral argument on whether the suit should be dismissed. The United States informed the court that it would not participate in oral argument and "rests on its Suggestion of Immunity." A __.

Before the district court heard argument, a Mexican appellate court reversed the lower court's judgment on procedural grounds. *See* Pl. Br. 13.

3. The district court dismissed the suit on the ground that the court must defer to the Executive Branch's Suggestion of Immunity. A __. The court acknowledged plaintiffs' contention that Mexico's request for immunity was illegal under Mexican law, but concluded that the Suggestion of Immunity rendered that issue irrelevant because the court was "not aware of any authority for the proposition that the impropriety of [a foreign government's request for immunity] would be sufficient justification for a court to disregard our own State Department's Suggestion of Immunity." A __. The court also observed that the State Department was presumably aware of the Mexican proceedings, but it had not withdrawn the Suggestion of Immunity. A __.

ARGUMENT

The District Court Properly Deferred to the Executive Branch's Suggestion of Immunity and was Not Required to Allow Plaintiffs to Amend Their Complaint

A. The Supreme Court and this Court have long recognized that Executive Branch determinations concerning foreign sovereign immunity are binding on the courts. *See, e.g., Republic of Mexico* v. *Hoffman*, 324 U.S. 30, 34-36 (1945) ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. 578, 587-89 (1943) ("'[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.'") (quoting *United States* v. *Lee*, 106 U.S. 196, 209 (1882)).

In *Samantar* v. *Yousuf*, 130 S. Ct. 2278 (2010), the Supreme Court held that although the Foreign Sovereign Immunities Act (FSIA) transferred determination of immunity for states from the Executive Branch to the Judicial Branch, the Act left in place the Executive Branch's historical authority to determine the immunity of foreign officials. *Id.* at 2290-92. Under that rule, if the State Department determines that an individual is immune and makes a Suggestion of Immunity, "the district court surrender[s] its jurisdiction." *Id.* at 2284-2285. If the State Department takes no position on immunity, "a district court ha[s] 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. *Ibid.* (citations and internal quotation

marks omitted). *Samantar* made clear that this same rule applies to "cases involving foreign officials." *Ibid.* (citing *Heaney* v. *Government of Spain*, 445 F.2d 501 (2d Cir. 1971), and *Waltier* v. *Thomson*, 189 F. Supp. 319 (S.D.N.Y. 1960), which involved consular officials, who were immune only for acts carried out in their official capacity).[1]

The pre-FSIA immunity decisions that the Supreme Court cited in *Samantar* confirm that the State Department's determination regarding immunity is, and historically has been, binding in judicial proceedings. In *Ex Parte Peru*, 318 U.S. 578, 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.'" *Id.* at 588 (quoting *Lee*, 106 U.S. at 209). In *Republic of Mexico* v. *Hoffman*, 324 U.S. 30, the Supreme Court made clear that "[e]very judicial action *exercising or relinquishing* jurisdiction over the vessel of a foreign government has its effect upon our relations with that government." *Id.* at 35 (emphasis added). 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

[1] 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* or *Waltier* cases. Both cases applied the immunity principles recognized and articulated by the Executive Branch.

recognize." *Ibid.*; *see also, e.g., Compania Espanola de Navegacion Maritima, S.A.* v. *The Navemar*, 303 U.S. 68, 74 (1938) ("If the claim [of immunity] is recognized and allowed by the Executive Branch of the government, it is then the duty of the courts to release the vessel upon appropriate suggestion by the Attorney General.").

There is a longstanding recognition that foreign officials are immune "from suits brought in [United States] tribunals for acts done within their own [S]tates, 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) ("[I]f the seizure of the vessel is admitted to have been an official act, done by the defendant . . . , [that] will of itself be a sufficient answer to the plaintiff's action."). In pre-FSIA suits against foreign officials, courts followed the same 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) ("The Suggestion of Immunity removes the individual defendants from this case. When the State Department formally recognizes and allows sovereign immunity of a defendant, a federal court will not exercise jurisdiction over that defendant.") (cited in *Samantar,* 130 S. Ct. at 2290); *Heaney*, 445 F.2d at 504-506 (applying principles articulated by the Executive Branch because the Executive did not express a position in the case); *see also Samantar,* 130 S. Ct. at 2284-2285.

Thus, both before and after *Samantar*, courts of appeals have recognized that the Executive Branch's suggestions of immunity are binding and conclusive, including in civil cases that involve present or former foreign officials. *See, e.g., Manoharan* v.

Rajapaksa, 711 F.3d 178, 179 (D.C. Cir. 2013) (per curiam) (explaining that the United States submitted a Suggestion of Immunity and "[a]ccordingly," the district court "was without jurisdiction"); *Habyarimana* v. *Kagame*, 696 F.3d 1029, 1031-33 (10th Cir. 2012) ("We must accept the United States' suggestion that a foreign head of state is immune from suit . . . 'as a conclusive determination by the political arm of the Government[.]'") (quoting *Ex Parte Peru*, 318 U.S. at 589); *Giraldo* v. *Drummond Co.*, 493 F. App'x 106 (D.C. Cir. 2012) (per curiam), *cert. denied*, 133 S. Ct. 1637 (2013); *Matar* v. *Dichter*, 563 F.3d 9, 13-15 (2d Cir. 2009) ("defer[ring] to the Executive's determination of the scope of immunity"); *Ye* v. *Zemin*, 383 F.3d 620, 625, 627 (7th Cir. 2004) ("[T]he Executive Branch's suggestion of immunity is conclusive and not subject to judicial inquiry. . . . We are no more free to ignore the Executive Branch's determination than we are free to ignore a legislative determination concerning a foreign state."); *see also Southeastern Leasing Corp.* v. *Stern Dragger Belogorsk*, 493 F.2d 1223, 1224 (1st Cir. 1974) (rejecting argument that district court "erred . . . in accepting the executive suggestion of immunity without conducting an independent judicial inquiry"); *Isbrandtsen Tankers, Inc.* v. *President of India*, 446 F.2d 1198, 1201 (2d Cir. 1971) ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere."); *Rich* v. *Naviera Vacuba S.A.*, 295 F.2d 24, 26 (4th Cir.

1961) ("[W]e conclude that the certificate and grant of immunity issued by the Department of State should be accepted by the court without further inquiry.").[2]

Indeed, this Court's decision in *Dichter*, 563 F.3d 9, controls the outcome of this case. In *Dichter*, the Court held that it must defer to the Executive Branch's Suggestion of Immunity even when (as here) the former foreign official has been accused of *jus cogens* violations in a civil suit. *Id.* at 13-15. The Court explained that when "[t]he United States—through the State Department and the Department of

[2] In *Yousuf* v. *Samantar*, 699 F.3d 763 (4th Cir. 2012), the Fourth Circuit held that the Executive Branch's determination with respect to conduct-based immunity was entitled to "substantial weight," but disagreed with the government's position that its determination was entitled to controlling weight and further held that it would not grant conduct-based immunity (which is at issue in this case) against alleged violations of *jus cogens* norms. *Id.* at 773, 778. A petition for certiorari from that decision is pending before the Supreme Court, *Samantar* v. *Yousuf*, No. 12-1078, which presents the questions whether the Executive Branch's determination of conduct-based immunity is binding on a court, and whether the Fourth Circuit should have created a categorical exception to foreign official immunity for suits alleging violations of jus cogens norms. Because Zedillo's immunity is conduct-based—as a former head of state, he enjoys residual immunity for acts taken in his official capacity—and because the plaintiffs allege *jus cogens* violations, the questions presented in *Samantar*, if resolved by the Supreme Court, could bear on the disposition of this suit. At the Supreme Court's invitation, the United States has filed a brief in *Samantar*. The United States argued that the Executive Branch's determinations of conduct-based immunity are binding on the courts, that the Fourth Circuit should not have created a categorical *jus cogens* exception when the Executive has not done so, and that the Supreme Court should grant the petition, vacate the judgment, and remand to permit the Executive to consider the Somali government's request for immunity for Samantar, which post-dated the Fourth Circuit's decision. Brief for the United States as Amicus Curiae, *Samantar* v. *Yousuf*, No. 12-1078 (Dec. 10, 2013). In addition, respondents have filed a recent letter from the legal adviser to the President of Somalia, purporting to waive any residual immunity Samantar might enjoy (Dec. 30, 2013). The Executive Branch is currently evaluating that letter.

Justice—file[s] a Statement of Interest in the district court specifically recognizing [a defendant's] entitlement to immunity and urging that [plaintiffs'] suit 'be dismissed on immunity grounds,'" the defendant is "immune from suit." *Ibid.*

B. Plaintiffs argue that the district court should have permitted them to amend their complaint. If permitted to do so, plaintiffs state that they would add allegations about Zedillo's direct involvement in *jus cogens* violations and about the legality, under Mexican law, of the Mexican government's request for immunity. They assert that these allegations would undermine the stated bases of the Executive Branch's Suggestion of Immunity.

1. Plaintiffs offer no authority for this position, that they be allowed to amend their complaint after the court has ruled, in an effort to have the State Department consider the question of immunity further. Once the Executive Branch has determined that a foreign official is immune from suit, that determination stands unless the Executive decides to reconsider it. *See, e.g., Dichter*, 563 F.3d at 13-15. The Executive Branch is not required to issue repeated affirmations of the Suggestion in response to additional factual allegations. *See Samantar*, 130 S. Ct. at 2284-85 (Once the Executive Branch makes a suggestion of immunity, "the district court surrender[s] its jurisdiction"); *Hoffman*, 324 U.S. at 34-36 ("It is . . . not for the courts to deny an immunity which our government has seen fit to allow."); *Ex Parte Peru*, 318 U.S. at 587-89 ("[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic

jurisdiction.") (internal quotation marks omitted); *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201 ("[O]nce the State Department has ruled in a matter of this nature, the judiciary will not interfere.").

A district court would not be free to set aside a Suggestion of Immunity simply because a plaintiff had filed an amendment to his complaint. Nor, by presenting facts to the court and positing that the State Department did not consider those facts, can a plaintiff "vitiate the degree of deference that should be afforded the suggestion" (Pl. Br. 39). *See Samantar*, 130 S. Ct. at 2284-85; *Hoffman*, 324 U.S. at 34-36; *Ex Parte Peru*, 318 U.S. at 587-89; *Dichter*, 563 F.3d at 13-15; *Isbrandtsen Tankers, Inc.*, 446 F.2d at 1201. Further, because the Executive's determination is entitled to absolute deference, it is not for courts to decide, in a case in which the Executive has filed a Suggestion of Immunity, that new allegations might affect the Executive's determination. If the Executive decides that developments subsequent to its immunity determination warrant further consideration, the government may so inform the court.[3]

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[3] The government's invitation brief in *Samantar* is an example of a case in which the Executive Branch has informed a court that events subsequent to its immunity determination warrant further consideration by the Executive Branch. In *Samantar*, the Executive had determined that the defendant was not immune from suit primarily because there was no recognized Somali government to suggest immunity. *See* Brief for the United States as Amicus Curiae at 5. Subsequently, the United States recognized the Somali government, and that government requested immunity on Samantar's behalf. *Id.* at 9-11. The United States accordingly informed the Supreme Court that the Executive should have the opportunity to consider that request in the

Continued on next page.

The need for that rule is underscored by the fact that the Executive's immunity determination reflects the application of customary international law principles recognized by the Executive Branch to the circumstances of the case. The Executive may consider, among other things, nonpublic information, such as information gleaned through intelligence sources or diplomatic communications. Thus, while a Suggestion of Immunity may explain the Executive Branch's principal reasoning in recognizing or not recognizing immunity, it does not necessarily disclose every piece of information on which the Executive relied.[4]

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context of broader diplomatic efforts to strengthen the Somali government and the Somali government's efforts to rebuild after decades of clan-based strife, and to submit any new determination concerning immunity to the lower courts. *Id.* at 12, 22-23.

[4] Plaintiffs make various assertions about the process for determining immunity, relying in part on statements addressing immunity in an article authored by the State Department's former Legal Adviser. Pl. Br. 31-32 (citing Harold Hongju Koh, *Foreign Official Immunity After* Samantar: *A United States Government Perspective*, 44 Vand. J. Transat'l L. 1141, 1153-54 (2011) (discussing "whether an act may be considered 'official' for conduct immunity purposes")). Like the views of other present or former government officials presented in an unofficial article or speech, the views expressed in that article do not necessarily represent the position of the United States. The positions of the United States with respect to the immunity of foreign officials are expressed through court filings by the Department of Justice in formal Suggestions of Immunity or Non-Immunity. *See* 28 U.S.C. §§ 516, 517; *Dichter*, 563 F.3d at 14. The Executive Branch's determination concerning former President Zedillo's immunity is set out in the Suggestion of Immunity filed in the district court, informing the court that the State Department recognizes Zedillo's immunity from this suit, and in this brief. In any event, this law review article does not help plaintiffs, because the primary proposition for which it is cited—that the immunity of a foreign official may be waived by the foreign state, Pl. Br. 32—does not apply here. The Government of Mexico invoked former President Zedillo's immunity, and did not waive it.

If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the State Department. But communications with the Executive Branch need not occur through amended complaints. And a plaintiff cannot demand that the Executive Branch make repeated affirmations of its immunity determination in response to serial complaints.

In short, a Suggestion of Immunity cannot be nullified by an amendment to a complaint. If a plaintiff believes that the Executive Branch lacks necessary information, he may communicate that information to the Executive Branch. And only if the Executive Branch withdraws or alters its Suggestion may the case proceed.

2. Even if plaintiffs here could properly demand that this Court analyze whether the additional allegations would bear on the Executive Branch's immunity determination (which they cannot), there would be no basis for concluding that the Executive Branch would withdraw its Suggestion and that the outcome of the case would be any different.

The circumstances that the plaintiffs argue undermine the immunity determination—arguments about the legality of Mexico's request and new allegations that Zedillo was directly involved in the massacre—were presented to the district court before the Executive Branch informed the court that it would not participate in oral argument and instead "rest[ed] on its Suggestion of Immunity," A —.

Moreover, before the Executive Branch filed the Suggestion of Immunity, plaintiffs also provided the State Department and Department of Justice with substantially the same information that they now wish to place in an amended complaint. That information includes the same declarations about the Acteal massacre on which plaintiffs say they would base the amendments to their complaint, *see* Pl. Br. 35-36, as well as other materials about that event. Likewise, plaintiffs' counsel communicated to the State Department their theory that the Mexican Ambassador's request for immunity violated Mexican law, including the "Opinion [of] Attorney Lopez Padilla" that they reference in their brief. *See* Pl. Br. 33-34. The Executive Branch was thus aware of the material that plaintiffs state they would include in an amended complaint when it made a Suggestion of Immunity and as the litigation proceeded to dismissal.

Although the Statement of Interest filed in district court referred primarily to the publicly-filed complaint, it does not follow that the Executive Branch "considered *solely*" (Pl. Br. 37) Mexico's request and the exact language of plaintiffs' complaint. And there is no basis for concluding that had that additional information been formally placed into the district court record, the Executive Branch would have rescinded its determination.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 2014

CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 3,608 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Adam Jed
Adam C. Jed

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2014, I electronically filed and served the foregoing brief by using the appellate CM/ECF system.

/s/ Adam Jed

Adam C. Jed