No. 20-16408

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NSO GROUP TECHNOLOGIES LIMITED;
Q CYBER TECHNOLOGIES LIMITED,

Defendants-Appellants,

v.

WHATSAPP INC., a Delaware corporation;
FACEBOOK INC., a Delaware corporation,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 4:19-cv-07123-PJH, Hon. Phyllis J. Hamilton

MOTION OF FOREIGN SOVEREIGN IMMUNITY SCHOLARS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Geoffrey M. Klineberg
Bethan R. Jones
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
gklineberg@kellogghansen.com
bjones@kellogghansen.com

Counsel for Amici Curiae

December 23, 2020

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Ninth Circuit Rule 29-3, *amici* Foreign Sovereign Immunity Scholars respectfully move for leave to file the attached brief as *amici curiae* in support of Plaintiffs-Appellees. *Amici* are experts in the law of foreign sovereign immunity, including foreign state and foreign official immunity, and they have an interest in the correct understanding and application of this body of law in U.S. courts. The following professors seek leave to participate as *amici* in this case:

- Sarah H. Cleveland is Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School. She served from 2009 to 2011 as Counselor on International Law to the Legal Adviser at the U.S. Department of State and from 2012 to 2018 as Co-Coordinating Reporter for the Restatement (Fourth) of the Foreign Relations Law.
- William S. Dodge is Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. He served from 2011 to 2012 as Counselor on International Law to the Legal Adviser at the U.S. Department of State and from 2012 to 2018 as a Reporter for the Restatement (Fourth).
- Chimène I. Keitner is Alfred & Hanna Fromm Chair in International and Comparative Law at the University of California, Hastings College of the Law. She served from 2016 to 2017 as Counselor on International Law

to the Legal Adviser at the U.S. Department of State and from 2013 to 2018 as an Adviser on Foreign Sovereign Immunity for the Restatement (Fourth).

Appellees have consented to the filing of this brief, but counsel for Appellants have indicated that they do not consent.

Through their academic work, *amici* are knowledgeable about the issues in this case and believe their perspective may assist the Court. They raise arguments different from those made by the parties and by other *amici*. Accordingly, *amici* respectfully seek this Court's leave to file the attached brief as *amici curiae*.

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*
Geoffrey M. Klineberg
Bethan R. Jones
KELLOGG, HANSEN, TODD, FIGEL & FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
gklineberg@kellogghansen.com
bjones@kellogghansen.com

Counsel for Amici Curiae

December 23, 2020

CERTIFICATE OF SERVICE

I certify that on, December 23, 2020, I electronically filed a copy of the foregoing **MOTION OF FOREIGN SOVEREIGN IMMUNITY SCHOLARS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES** with the Clerk of Court for the U.S. Court of Appeals for the Ninth Circuit via the appellate CM/ECF system, which will send electronic notification of to all registered CM/ECF users in this case.

/s/ Geoffrey M. Klineberg
Geoffrey M. Klineberg

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1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
gklineberg@kellogghansen.com
bjones@kellogghansen.com

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are experts in the law of foreign sovereign immunity, including foreign state and foreign official immunity, who have an interest in the correct understanding and application of this body of law in U.S. courts.

Sarah H. Cleveland is Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School. She served from 2009 to 2011 as Counselor on International Law to the Legal Adviser at the U.S. Department of State and from 2012 to 2018 as Co-Coordinating Reporter for the Restatement (Fourth) of the Foreign Relations Law of the United States (Am. Law Inst. 2018).

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Chimène I. Keitner is Alfred & Hanna Fromm Chair in International and Comparative Law at the University of California, Hastings College of the Law. She served from 2016 to 2017 as Counselor on International Law to the Legal

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici* represent that no counsel for any of the parties authored any portion of this brief and that no entity, other than *amici* or its counsel, monetarily contributed to the preparation or submission of this brief.

Adviser at the U.S. Department of State and from 2013 to 2018 as an Adviser on Foreign Sovereign Immunity for the Restatement (Fourth).

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") to codify the law of foreign state immunity from civil suit in U.S. courts. The Act provides immunity to foreign states and their agencies and instrumentalities, including corporations in certain circumstances. Corporations that do not fall within the scope of the FSIA are not entitled to immunity in U.S. state or federal courts. And, they cannot invoke alternative potential sources of jurisdictional immunity based on their alleged connection to, or conduct on behalf of, a foreign state because the FSIA is comprehensive on this topic.

Even if the FSIA did not comprehensively address the immunity of corporations and other entities, NSO would not be entitled to conduct-based immunity under federal common law because such immunity extends only to natural persons. Federal common law and customary international law distinguish between status-based immunity, like head-of-state immunity, and conduct-based immunity, which applies to acts taken in an official capacity. Both kinds of immunity apply only to natural persons, a fact confirmed by the sources on which NSO relies. *Amici* are aware of no U.S. cases, foreign cases, international cases, or other authorities supporting NSO's argument that corporations may claim

conduct-based foreign official immunity. Simply put, there is no basis for NSO to claim immunity from suit in this case.

ARGUMENT

I. NSO DOES NOT QUALIFY FOR IMMUNITY UNDER THE FSIA, WHICH PROVIDES THE SOLE BASIS OF IMMUNITY FROM CIVIL SUIT FOR FOREIGN CORPORATIONS

Congress enacted the FSIA in order to "clarify[] the rules that judges should apply in resolving sovereign immunity claims and eliminat[e] political participation in the resolution of such claims." *Republic of Austria v. Altmann*, 541 U.S. 677, 699 (2004). "[T]o accomplish these purposes, Congress established a comprehensive framework for resolving *any* claim of sovereign immunity." *Id.* (emphasis added). Because the FSIA is comprehensive, the Supreme Court has held that courts may not supplement its provisions by developing additional rules of immunity. *See Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 142 (2014) (rejecting foreign state's claim of immunity from post-judgment discovery because the FSIA provided for no such immunity). Rather, "any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall." *Id.* at 141-42.[2]

[2] With respect to the separate question of criminal jurisdiction, the FSIA's provisions do not provide for immunity; the FSIA is properly construed to provide immunity only from civil proceedings. *See* Chimène I. Keitner, *Prosecuting Foreign States*, 61 Va. J. Int'l L. (forthcoming 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3726827.

NSO concedes that it does not qualify as a "foreign state" under the FSIA. *See* NSO Br. 42-43 (disclaiming any entitlement to "derivative" sovereign immunity under the FSIA); ECF 62, at 9 (conceding it could "not claim immunity for itself under the [FSIA]"); *see also* 28 U.S.C. § 1603 (defining eligible entities). Its attempt to claim immunity outside the FSIA ignores the statute's text and the history that led to its enactment.

A. Foreign Sovereign Immunity Before the FSIA Was a Matter of Federal Common Law

Historical accounts of immunity for foreign states and entities often begin with Chief Justice John Marshall's opinion in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).[3] Early suits generally involved *in rem*

[3] In fact, the first notable dispute involving jurisdiction over a foreign public ship of war arose over the *Cassius* in 1795. *See* Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. Rev. 704, 729-37 (2012) (describing the litigation that prompted the Executive Branch to file its first, non-binding "suggestion" of immunity). NSO suggests (at 6-7) that the Attorney General recognized common-law conduct-based immunity for "foreign officials and other agents acting on the state's behalf" "as early as 1797" (quoting Attorney General opinions cited by the United States in a pre-*Samantar* statement of interest). First, these opinions—and the U.S. statement—involved only claims to immunity by natural persons and are therefore irrelevant here. Second, the opinions did not indicate that the defendants could claim conduct-based immunity from suit; rather, they affirmed that the defendants were "on the same footing" with any non-diplomatic official with respect to their "suability." *See generally* Keitner, 87 N.Y.U. L. Rev. at 712 (excavating court records and diplomatic correspondence from six cases involving claims to conduct-based foreign official immunity in the 1790s). The language NSO quotes advised the defendants to "answer" the plaintiffs' actions by asserting a defense that they had acted within the scope of

actions against ships and their cargos and were governed largely by admiralty law. But the rise of cross-border transactions and "the widespread and increasing practice on the part of governments of engaging in commercial activities" necessitated a framework for addressing claims to foreign sovereign immunity beyond the admiralty context to "enable persons doing business with them to have their rights determined in the courts." Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State to Philip B. Perlman, Acting U.S. Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 Dep't St. Bull. 984-85 (1952).

Over time, the State Department developed a practice of "suggesting" immunity in certain cases, while remaining silent in others. The State Department formalized its approach to the question of immunity in 1952 in the Tate Letter, which indicated that the United States would follow the "restrictive" theory of immunity for foreign states, which restricts immunity to suits based on governmental acts. *Id.* (indicating that, under the restrictive theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)"). Between 1952 and

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their lawful authority as agents of a foreign government. *See id.* at 723-24, 757; *see also Suits Against Foreigners*, 1 Op. Att'y Gen. 45 (1794) (suit against Victor Collot, a former governor of Guadeloupe); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81 (1797) (suit against Henry Sinclair, "a person acting under a commission from the sovereign of a foreign nation").

1976, the State Department made immunity determinations in 110 known cases. *See* Sovereign Immunity Decisions of the Department of State from May 1952 to January 1977 (Michael Sandler et al. eds.), *in* 1977 Dig. U.S. Prac. Int'l L. 1017, 1020. These decisions distinguished between corporations and officials. State-owned corporations were denied immunity when the claims were based on their commercial activities (*e.g.*, Nos. 1, 9, 22, 36, and 47). Foreign officials, however, were granted immunity—even when a foreign state or state-owned corporation would not have been immune—if the officials were heads of state (*e.g.*, Nos. 49 and 99) or if they acted in their "official capacities" (*e.g.*, Nos. 97 and 98).

In 1965, the American Law Institute addressed whether corporations and other entities benefit from a foreign state's immunity in the Restatement (Second) of Foreign Relations Law, which indicated in § 66(g) that the immunity of a foreign state—along with applicable exceptions—extends to "a corporation created under its laws and exercising functions comparable to those of an agency of the state." *See* Restatement (Second) of the Foreign Relations Law of the United States § 66(g) (Am. Law Inst. 1965) ("Restatement (Second)"). Consistent with international law and State Department practice, the Restatement (Second) treated corporations as distinct from natural persons in the context of foreign sovereign immunity, addressing corporations in § 66(g) while addressing heads of state,

heads of government, foreign ministers, and other officials in § 66(b), (d), (e), and (f), respectively.[4]

B. Congress Comprehensively Codified the Common Law in the FSIA

When the State Department's role in making case-by-case suggestions became untenable, Congress stepped in to codify the restrictive theory of sovereign immunity and put foreign states on the same footing as private parties with respect to their commercial activities. As part of its codification effort, Congress specifically addressed the immunities of corporations and other entities by describing various types of connections to the foreign state that would render the entity immune. *See* H.R. Rep. No. 94-1487, at 6 (1976) (noting the FSIA's purpose "to provide when and how parties can maintain a lawsuit against a foreign state *or its entities* in the courts of the United States") (emphasis added). The text of the FSIA reflects this legislative intent by defining an "agency or instrumentality of a foreign state" to include "separate legal person[s], corporate or otherwise." 28 U.S.C. § 1603(b)(1); *see also Samantar v. Yousuf*, 560 U.S. 305, 314 (2010) (noting that "the Act specifically delimits what counts as an agency or

[4] The FSIA's definition of "agency or instrumentality" supersedes § 66(g), as described in Part I.B. Part II discusses the current law governing status-based and conduct-based immunities of foreign officials and the effect of the FSIA on § 66(f).

instrumentality"). To come within the scope of the FSIA, the entity must be created under the foreign state's own laws. *See* 28 U.S.C. § 1603(b)(3) (providing that the entity must not be a citizen of the United States or "created under the laws of any third country"). In addition, a majority of the entity's "shares or other ownership interest [must be] owned by a foreign state or political subdivision thereof," or the entity must qualify as an "organ" of a foreign state or political subdivision. *Id.* § 1603(b)(2).[5]

Congress intended the FSIA to establish the only circumstances under which a corporation or other entity could claim foreign sovereign immunity. As the Senate Report accompanying the FSIA made clear, "[a]n entity which does not fall within the definitions of sections 1603 (a) [defining "foreign state" to include political subdivisions and agencies and instrumentalities of the foreign state] or (b) [defining agencies and instrumentalities of a foreign state] would not be

[5] Because the FSIA does not define the term "organ," courts have had to adopt different tests to determine whether an entity qualifies as an organ of a foreign state. *See*, *e.g.*, *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) (finding that Pemex-Refining was an "organ" of Mexico under § 1603(b)(2) because, as the district court explained, it is "an integral part" of the state that "was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property"). NSO does not (and could not) claim that it constitutes an "organ" of any state.

entitled to sovereign immunity in any case before a Federal or State court." S. Rep. No. 94-1310, at 15 (1976); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 473-78 (2003) (holding that foreign corporation that did not satisfy the requirements of § 1603 was not entitled to immunity despite other connections to a foreign state). Thus, corporations and other entities that do not come within the FSIA's definition of a "foreign state" cannot claim immunity. *See Altmann*, 541 U.S. at 699.[6]

The Supreme Court confirmed this in *Samantar.* There, the Court concluded that Congress did not "inten[d] to include *individual* officials within the meaning of 'agency or instrumentality.'" 560 U.S. at 316 (emphasis added). In doing so, the Court noted that the words "entity," "separate legal person," and "organ" were not typically used to refer to individuals and that § 1603(b)(3)'s requirements with respect to corporate citizenship and creation could not be applied to natural persons

[6] Other countries have taken different approaches to the immunity of separate entities. Under the United Kingdom's State Immunity Act 1978, for example, a separate entity is entitled to immunity only if "the proceedings relate to anything done by it in the exercise of sovereign authority" and a State would have been immune in the same circumstances. 1978, c. 33, § 14(2) (U.K.); *see also* James Crawford, *Brownlie's Principles of Public International Law* 476 (9th ed. 2019) (noting that the United States takes "[a]n entirely different approach"). Congress made its own deliberate choice about when and how to exempt entities from the ordinary jurisdictional reach of U.S. state and federal courts, and that choice governs here.

at all. *Id.* at 315-16. The Court also observed that the "types of defendants listed" in the FSIA "are all entities." *Id.* at 317. This analysis makes clear that, while the FSIA does not apply to natural persons, it does "cover[ ] [the] field" of immunity with respect to corporations and other entities. *Id.* at 320. To paraphrase *Samantar*, the immunity of entities *was* the "problem to which Congress was responding when it enacted the FSIA." *Id.* at 323.[7]

C. NSO Does Not Meet the Definition of a Foreign State and Is Therefore Not Eligible for Immunity from Suit Under the FSIA

NSO has abandoned any argument that it is entitled to "derivative" immunity under the FSIA. *See* NSO Br. 42-43 (arguing that " '[d]erivative sovereign immunity' is not . . . a distinct theory of immunity" but "merely another name for conduct-based immunity"). And for good reason. The "derivative" immunity concept comes from *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), in which the Fourth Circuit reasoned that a company "would be entitled to derivative immunity under the FSIA" in an employment discrimination

[7] NSO argues that failing to recognize immunity here would constitute an "end run" around the FSIA's protections for foreign states. *See* NSO Br. 40. But the *Samantar* Court rejected the argument that excluding officials from the FSIA's scope would somehow circumvent the foreign state's immunity. It noted that a case against a non-FSIA defendant might be dismissed because a foreign state is an indispensable party under Rule 19, or because the requested relief would run against a foreign state, thereby making the foreign state the proper defendant. 560 U.S. at 325. That is not the case here. *See infra* Part II.B (explaining when a foreign state should be considered the "real party in interest").

suit if it were following Saudi Arabia's orders not to promote the plaintiff. *Id.* at 466.[8] This contradicts Congress's clear intent to codify foreign state immunity comprehensively in the FSIA—a point not addressed in the *Butters* opinion. And even if *Butters* had been correct when it was decided, it has now been superseded by *NML Capital*'s holding that courts may not supplement the text of the FSIA with additional rules of state immunity. *NML Capital*, 573 U.S. 134.

Courts are not free to disregard the FSIA's text when Congress has spoken clearly on the issue, as it has on the immunity of corporations and other entities. *See id.* at 141-42. Since NSO does not purport to *be* an agency or instrumentality of a foreign state, its argument boils down to a claim that it should be treated *as if it were* such an agency or instrumentality for immunity purposes, based on the identities of its anonymous customers. If there were any doubt that this proposition

[8] Case law arguably adopting a similar approach is so scant as to be virtually non-existent. For example, an earlier district court decision that was summarily affirmed found that two natural persons were not liable for their alleged acts as guards because they had been paid directly by the Saudi consulate and had acted within the scope of their employment. *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 384 (S.D. Tex. 1994). The district court's grant of summary judgment as to these two defendants does not justify extending any form of jurisdictional immunity to NSO. In a later unpublished decision, the plaintiff had "concede[d]" that the defendant diplomatic and cultural mission "qualifie[d] as a 'foreign state' for purposes of the FSIA," so the only question was whether his employment discrimination claim came within an enumerated exception to the FSIA. *Salman v. Saudi Arabian Cultural Mission*, 2017 WL 176576 (E.D. Va. Jan. 17, 2017) (citing *Butters* but not discussing or applying derivative immunity).

was ill-founded before *NML Capital*—which there should not have been—*NML Capital* squarely forecloses this argument.

II. NON-NATURAL PERSONS SUCH AS NSO CANNOT CLAIM COMMON-LAW CONDUCT-BASED IMMUNITY

Even if Congress had not established a comprehensive regime for the immunity of corporations and other entities by enacting the FSIA (which it did), NSO would not be entitled to common-law conduct-based immunity because such immunity applies only to natural persons. As the Supreme Court explained in *Samantar*, the immunities of foreign officials are "properly governed by the common law." 560 U.S. at 325. The common law of foreign official immunity is federal common law. *See United States v. Sinovel Wind Grp. Co.*, 794 F.3d 787, 792 (7th Cir. 2015) (noting that *Samantar* "recognized some residual federal common law of foreign sovereign immunity").[9] The federal common law of

[9] Federal common law is for federal courts to make. This is so even though the United States has argued in a different case before this Court that "courts have no authority to create federal common-law principles of foreign-official immunity, absent Executive Branch guidance." Br. for United States as Amicus Curiae Supporting Affirmance at 25, *Doğan v. Barak*, 932 F.3d 888 (9th Cir. 2019) (No. 16-56704) ("U.S. *Doğan* Amicus Br."). This Court did not decide in *Doğan* how much deference to give a case-specific suggestion of immunity by the State Department or how to treat Executive Branch guidance on foreign official immunity. 932 F.3d at 893. The claim that the State Department can itself make federal common law that binds the courts raises serious separation-of-powers questions. *See* Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 Va. J. Int'l L. 915, 954-67 (2011). To support its claim of lawmaking authority, the United States has relied

foreign official immunity is informed by customary international law. *See Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (noting that "immunity decisions turn upon principles of customary international law"). And neither federal common law nor customary international law extends the immunity accorded foreign officials to non-natural persons.

With respect to foreign official immunity, both federal common law and customary international law distinguish between status-based immunity (immunity *ratione personae*) and conduct-based immunity (immunity *ratione materiae*). *See Lewis v. Mutond*, 918 F.3d 142, 145 (D.C. Cir. 2019) (citing Chimène I. Keitner, *The Common Law of Foreign Official Immunity*, 14 Green Bag 2d 61, 64 (2010)).[10]

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on cases from the 1940s. *See Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945); *Ex parte Republic of Peru*, 318 U.S. 578 (1943). But more recent decisions have confirmed that, absent a delegation from Congress, the Executive Branch lacks lawmaking powers even with respect to foreign relations law. *See Medellín v. Texas*, 552 U.S. 491, 532 (2008) (noting that the President has authority "to execute the laws, not make them"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). This Court can choose to rely on the views of the United States with respect to the content of customary international law and the policies that should shape federal common law to the extent that it finds them persuasive, but it need not accede to the Executive's claims of lawmaking authority.

[10] *See also* Crawford, *Brownlie's Principles of Public International Law* 471-72 (distinguishing between immunity *ratione personae* and immunity *ratione materiae*); Hazel Fox & Philippa Webb, *The Law of State Immunity* 543 (rev. 3d ed. 2015) (same).

The immunities of diplomatic and consular officials are governed by treaties and statutes rather than common law.[11] These different types of foreign official immunity vary in their details, some of which are discussed below, but they have one thing in common—they all apply only to natural persons.

A. Only Natural Persons Are Entitled to Status-Based and Conduct-Based Immunity

Under federal common law and customary international law, foreign heads of state, heads of government, and foreign ministers enjoy status-based immunity and are absolutely immune from suit while in office. *See Yousuf*, 699 F.3d at 769 ("A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts unless that immunity has been waived by statute or by the foreign government recognized by the United States.") (quoting *Lafontant v. Aristide*, 844 F. Supp. 128, 131-32 (E.D.N.Y. 1994)); *Arrest Warrant of 11 April 2000 (Dem. Rep. of Congo v. Belg.)*, 2002 I.C.J. 3, 20-21, ¶ 51 (Feb. 14) (noting that "in international law it is firmly established that . . . holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from

[11] *See* Vienna Convention on Diplomatic Relations (VCDR), Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95; Vienna Convention on Consular Relations (VCCR), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; *see also* 22 U.S.C. § 254d (implementing the VCDR).

jurisdiction in other States, both civil and criminal"). Status-based immunity ends "after a person ceases to hold the office." *Arrest Warrant*, 2002 I.C.J. at 25, ¶ 61; *see also Sikhs for Justice v. Singh*, 64 F. Supp. 3d 190, 194 (D.D.C. 2014) ("The day he left office, [the former Prime Minister of India] lost the absolute protection of status-based head-of-state immunity."). Only natural persons may hold the positions of head of state, head of government, and foreign minister, and accordingly, only natural persons are afforded status-based immunity.

Under federal common law and customary international law, lower ranking officials and all former officials are entitled to conduct-based immunity for acts taken in their official capacity. *See Yousuf*, 699 F.3d at 774 ("With respect to conduct-based immunity, foreign officials are immune from 'claims arising out of their official acts while in office.' ") (quoting Restatement (Third) of the Foreign Relations Law of the United States § 464 reporters' note 14 (Am. Law Inst. 1987)); *Sikhs for Justice*, 64 F. Supp. 3d at 194 (indicating that former heads of state, heads of government, and foreign ministers remain entitled to conduct-based immunity "for official acts"); *Arrest Warrant*, 2002 I.C.J. at 25, ¶ 61 (noting that "a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed . . . in a private capacity"); *see also* U.S. *Doğan* Amicus Br. 9 n.1 (noting that "all former foreign officials as well as current, lower-level officials may be immune only for acts taken in an official capacity"); Fox & Webb, *Law of*

State Immunity 570 (indicating that "[i]mmunity *ratione materiae*, also known as functional immunity, attaches to a person who acts on behalf of a State in relation to conduct performed in their official capacity"). *Amici* are not aware of any authority for the proposition that such conduct-based immunity extends to corporations or other entities under either international law or federal common law.

"Official capacity" is a concept used in a variety of legal contexts, "and the phrase may have a different meaning and scope depending on the context." William S. Dodge, *Foreign Official Immunity in the International Law Commission: The Meanings of "Official Capacity"*, 109 AJIL Unbound 156, 157 (2015).[12] In the context of foreign official immunity, this Court held in *Chuidian v.*

[12] For example, as explained below, a foreign official who clearly exceeds his authority does not act in an "official capacity" for purposes of immunity. Nevertheless, his acts are attributable to the foreign state for purposes of state responsibility under international law even if he exceeds his authority. *See* Draft Articles on the Responsibility of States for Internationally Wrongful Acts, art. 7, Report of the International Law Commission on the Work of its Fifty-Third Session, 19 UN GAOR Suppl. No. 10, at 43, UN Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 26, UN Doc. A/CN.4/SER.A/2001/Add. 1. Therefore, the attributability of an official's act to the state does not immunize that person from personal liability. *Id.* art. 58 ("These articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State."); *see also* Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 Duke J. Comp. & Int'l L. 451, 459 (2016) (noting that "the mere attributability of an act to the state is an inadequate touchstone, both conceptually and doctrinally, for determining whether a foreign official is entitled to claim conduct-based immunity for that act").

Philippine National Bank, 912 F.2d 1095 (9th Cir. 1990), that conduct-based immunity extends to a foreign official "for acts committed in his official capacity," *id.* at 1103, but not to "an official who acts beyond the scope of his authority," *id.* at 1106. Although *Chuidian*'s holding that the FSIA applies to foreign officials, *see id.* at 1103, was overruled in *Samantar*, the Supreme Court noted that the distinction between acts committed in an official capacity and acts beyond the scope of authority "may be correct as a matter of common-law principles." *Samantar*, 560 U.S. at 322 n.17 (quoting *Chuidian*, 912 F.2d at 1103, 1106).

Whether a foreign official was acting in his official capacity for purposes of immunity depends in part on the foreign law defining his authority. A court may consider the views of a foreign government on this question, *see*, *e.g.*, *Belhas v. Ya'alon*, 515 F.3d 1279, 1284 (D.C. Cir. 2008) (relying on statement by Israeli ambassador that Israeli official acted within the scope of his authority), as well as the allegations in the complaint, *see*, *e.g.*, *Doğan*, 932 F.3d at 894 (relying on allegations in complaint that Israeli defense minister had authority to direct Israeli troops). If disputed, the question of an official's authority under foreign law is a question of law for the U.S. court to decide. Fed. R. Civ. P. 44.1; *see also Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1869 (2018) ("A federal court should accord respectful consideration to a foreign government's submission [on the interpretation of its own law], but is not bound to accord

conclusive effect to the foreign government's statements."). Whether an individual's act is considered official for purposes of conduct-based immunity may also turn on the character of the act and whether international law and U.S. domestic law recognize the act as one that can be considered "official."[13]

B. The District Court Erred in Applying Section 66(f) to This Case

Although the district court correctly rejected NSO's claim of immunity, it mistakenly looked to § 66(f) of the Restatement (Second) to define the contours of conduct-based immunity. *See* ER10-12. This reliance was error because § 66(f) properly applies only "if the effect of exercising jurisdiction would be to enforce a rule of law against the state," Restatement (Second) § 66(f). But *Samantar* held that, when "the state is the real party in interest," the FSIA necessarily governs because "actions against an official in his official capacity should be treated as actions against the foreign state itself." 560 U.S. at 325 (citing *Kentucky v.*

[13] For example, the Fourth Circuit has held that, "as a matter of international and domestic law, *jus cogens* violations are, by definition, acts that are not officially authorized by the Sovereign," *Yousuf*, 699 F.3d at 776, whereas this Court has declined to recognize a *jus cogens* exception to foreign official immunity, at least when the U.S. government has filed a suggestion of immunity, *Doğan*, 932 F.3d at 896-97.

Graham, 473 U.S. 159, 166 (1985)). The FSIA has thus superseded § 66(f), just has it has superseded several other subsections of § 66.[14]

Section 66(f) did not purport to be a complete statement of the circumstances under which conduct-based immunity was available to foreign officials.[15] And, today, the law clearly extends conduct-based immunity to foreign officials who *acted* in an official capacity, not just to foreign officials who are *sued* in an official capacity as a stand-in for the state.[16] Simply put, § 66(f) does not apply in cases where the defendant is sued in a personal capacity, and it has been superseded by the FSIA in cases where the defendant is sued in an official capacity because the state is the real party in interest.

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[14] Specifically, the FSIA has superseded subsections (a) ("the state itself"), (c) ("its government or any governmental agency"), (f) (foreign officials "if the effect of exercising jurisdiction would be to enforce a rule of law against the state"), and (g) ("a corporation created under its laws and exercising functions comparable to those of an agency of the state"). Only subsections (b), (d), and (e), dealing with the status-based immunity of foreign heads of state, heads of government, and foreign ministers, respectively, are still governed by federal common law today.

[15] Section 66 was expressly limited to situations to which "[t]he immunity of a foreign state" extends. Restatement (Second) § 66.

[16] *See supra* pp. 15-18. In *Samantar*, the Supreme Court "express[ed] no view on whether Restatement § 66 correctly sets out the scope of the common-law immunity applicable to current or former foreign officials." 560 U.S. at 321 n.15. In *Lewis v. Mutond*, the D.C. Circuit applied § 66(f) based solely on the agreement of the parties and "without deciding the issue." 918 F.3d at 146.

Doğan is not to the contrary. Although *Doğan* quoted § 66(f), this Court looked specifically to the capacity in which the defendant had acted and not to the capacity in which he had been sued. *See Doğan*, 932 F.3d at 894 (noting that the defendant acted under actual or apparent authority); *see also Chuidian*, 912 F.2d at 1106 (asking whether the defendant was "acting in his official capacity"). Had *Doğan* looked instead to the capacity in which the defendant was sued, it would have denied the immunity defense because the defendant had been sued in his personal capacity, and Israel was not the real party in interest. The approach that this Court actually applied in *Doğan* and *Chuidian*, asking whether the defendant is immune from suit because he acted in his "official capacity," is the correct one. But that approach does not apply to corporations.

C. No Authority Recognizes Foreign Official Immunity for Corporations or Other Entities

United States cases consistently describe foreign official immunity as extending to "individuals" rather than entities. *See*, *e.g.*, *Samantar*, 560 U.S. at 322 (noting that "in some circumstances the immunity of the foreign state extends to an individual for acts taken in his official capacity"); *Doğan*, 932 F.3d at 893 (noting that "[c]ommon-law foreign sovereign immunity extends to individual foreign officials"). Indeed, NSO's claim that conduct-based immunity also extends to corporations is contradicted by the very sources it cites (at 12). In *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272 (S.D.N.Y. 2015), for example, the district court

noted that conduct-based immunity "extends beyond current and former government officials to *individuals* acting as an agent for the government." *Id.* at 277 (emphasis added). And in *Ivey for Carolina Golf Development Co. v. Lynch*, 2018 WL 3764264 (M.D.N.C. Aug. 8, 2018), the district court described conduct-based immunity as based on the idea that "any act performed by the *individual* as an act of the State enjoys the immunity which the State enjoys." *Id.* at *3 (quoting *Yousuf*, 699 F.3d at 774) (emphasis added).

With respect to international law, NSO cites three foreign decisions (at 13-14), but each of those cases involved claims against natural persons, not corporations. *See Jones v. Ministry of Interior*, [2006] UKHL 26 (claims against Saudi official); *Jaffe v. Miller*, 95 ILR 446 (Can. Ont. C.A. 1993) (claims against Florida officials); *Church of Scientology Case*, 65 ILR 193 (BGH 1978) (Ger.) (claims against U.K. official). *Amici* are aware of no foreign decisions that have extended the immunities of foreign officials to cover foreign corporations.

NSO also relies (at 14) on the United Nations Convention on Jurisdictional Immunities of States and Their Property, Dec. 16, 2004, U.N. Doc. A/RES/59/38 ("U.N. Convention"), https://treaties.un.org/doc/source/RecentTexts/English_3_13.pdf, and specifically upon Article 2(1)(b)(iv)'s reference to "representatives of the

State acting in that capacity."[17] But, as the leading commentary on the Convention explains, this provision identifies a category of "*natural persons* to be treated as a 'State' for the purposes of the Convention." Tom Grant, *Article 2(1)(a) and (b)*, *in The United Nations Convention on Jurisdictional Immunities of States and Their Properties: A Commentary* 52 (Roger O'Keefe & Christian J. Tams eds., 2013) (emphasis added); *see also id.* ("The word ['representatives'] is intended to refer to all *individual* state functionaries.") (emphasis added). This interpretation is reinforced by the commentary to the treaty's precursor, the 1991 Draft Articles on Jurisdictional Immunities of States and Their Property. *See* Report of the International Law Commission to the General Assembly on the Work of Its Forty-Third Session at 18, July 19, 1991, U.N. Doc. A/46/10 ("Draft Articles on

[17] The U.N. Convention has not been ratified by the United States or even entered into force for other countries. *See* Restatement (Fourth) of the Foreign Relations Law of the United States § 451 reporters' note 1 (Am. Law Inst. 2018) (discussing status of U.N. Convention). The Convention must be approached with caution as evidence of state practice or *opinio juris* in determining the content of customary international law, because the International Law Commission sought not just to codify but also to develop international law. *See* U.N. Convention, pmbl. (referring to "codification and development of international law"); *see also* Christian J. Tams, *Preamble*, in *The United Nations Convention on Jurisdictional Immunities of States and Their Properties: A Commentary* 30 (Roger O'Keefe & Christian J. Tams eds., 2013) ("[The Preamble] does not indicate which aspects of the Convention codify rules of international law . . . and which amount to the development of international law in areas in which 'the law has not yet been sufficiently developed in the practice of States.'").

Jurisdictional Immunities"), https://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf. NSO quotes this earlier commentary in its brief (at 14), citing Article 2, Commentary (18) for the proposition that actions against a State's representatives are essentially proceedings against the State. But, in the prior paragraph, the commentary makes clear that representatives "encompasses all the *natural persons* who are authorized to represent the State in all its manifestations." Draft Articles on Jurisdictional Immunities art. 2, Commentary (17) (emphasis added).

Both the U.N. Convention and the Draft Articles that preceded it address the potential immunities of corporations and other entities separately from those of foreign officials or representatives. The U.N. Convention extends state immunity to "agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State." U.N. Convention art. 2(1)(b)(iii); *see also* Draft Articles on Jurisdictional Immunities art. 2(1)(b)(v) (similar). The fact that there are separate provisions for entities and natural persons confirms that entities are not eligible for immunities accorded to "representatives of the State."

In sum, there is no support in either U.S. case law or in international law for the proposition that foreign official immunity extends beyond natural persons to cover corporations like NSO.

CONCLUSION

Congress comprehensively addressed the immunity of corporations and other entities in the FSIA. And, as the Supreme Court held in *NML Capital*, Congress's decision precludes further judicial development. Even if that were not so, foreign official immunity is limited to natural persons under both international law and federal common law.

Respectfully submitted,

/s/ *Geoffrey M. Klineberg*
Geoffrey M. Klineberg
Bethan R. Jones
KELLOGG, HANSEN, TODD, FIGEL
& FREDERICK, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900
gklineberg@kellogghansen.com
bjones@kellogghansen.com

Counsel for Amici Curiae

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FOR THE NINTH CIRCUIT

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