No. 11-6315

In the
United States Court of Appeals
for the Tenth Circuit

MADAME HABYARIMANA, et al.,
Plaintiffs-Appellants,
v.

PAUL KAGAME,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING APPELLEE

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INTRODUCTION AND INTEREST OF THE UNITED STATES

This action seeks compensatory and punitive damages from the sitting head of state of the Republic of Rwanda, President Paul Kagame. In district court, the United States filed a suggestion of immunity, informing the court that the State Department recognizes President Kagame's immunity from this suit. Appellants' Appendix (AA) 91. The district court properly deferred to the Executive Branch's suggestion of immunity, and the United States files this brief to urge affirmance of the court's ruling.

The conduct of foreign affairs is committed to the political branches, and, until enactment of the Foreign Sovereign Immunities Act (FSIA) in 1976, the judiciary deferred to State Department determinations as to the sovereign immunity of foreign states as well as foreign officials. The FSIA "transfer[ed] 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." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010). "Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch." *Wei Ye v. Jiang Zemin*, 383 F.3d 620, 625 (7th Cir. 2004). For the reasons set out in our suggestion of immunity and discussed below, we respectfully ask that this Court affirm the district court's order dismissing this suit against the sitting head of state of the Republic of Rwanda.

STATEMENT

1. The two plaintiffs in this suit are the widows of Juvénal Habyarimana, the former President of Rwanda, and Cyprien Ntaryamira, the former President of Burundi. AA 41 (June 23 Order). Presidents Habyarimana and Ntaryamira were killed when their airplane was shot down by a surface-to-air missile on April 6, 1994. *Ibid.*;

see Bureau of African Affairs, U.S. Dep't of State, *Background Note: Rwanda* (Feb. 2, 2012), http://www.state.gov/r/pa/ei/bgn/2861.htm. The downing of President Habyarimana's plane precipitated the Rwandan genocide, in which 800,000 Tutsis and moderate Hutus were murdered, 2 million Rwandans fled the country, and 1 million were internally displaced. *See generally ibid.*

Plaintiffs brought suit against the incumbent Rwandan President, Paul Kagame, alleging that Kagame ordered the plane to be shot down.[1] AA 41 (June 23 Order). President Kagame is an ethnic Tutsi who, at the time, allegedly was head of the Rwandan Patriotic Army, an exiled rebel force opposing the Habyarimana regime. *Ibid.* Habyarimana was an ethnic Hutu. *Ibid.* Plaintiffs allege that Kagame ordered Habyarimana's plane to be shot down, anticipating that the event would provoke violence against the Tutsi community, thus giving the Rwandan Patriotic Army a pretense to invade Rwanda and seize power. *Ibid.*

Plaintiffs assert claims under federal statutes, including the Alien Tort Statute (28 U.S.C. § 1350), the criminal torture statute (18 U.S.C. § 2340A), and the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961–1968); as

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[1] Plaintiffs' initial complaint named other defendants in addition to President Kagame. However, plaintiffs conceded that they failed to serve those other defendants, and the district court dismissed the complaint as to them. *See* AA 39–40, 60 (June 23 Order).

well as under federal common law, Oklahoma state law, a host of international instruments, customary international law, and the law of Rwanda. AA 74–75 (complaint). Plaintiffs seek compensatory damages of $250 million and punitive damages of $100 million. *Id.* at 83.

2. President Kagame filed a motion to dismiss the suit, arguing, among other things, that plaintiffs had not properly served him with a summons and complaint, and that he is immune from this suit as a sitting head of state. AA 40 (June 23 Order). The district court determined that plaintiffs had not properly served President Kagame. *Id.* at 43–57. But given plaintiffs' good faith service efforts, the court extended the time for service by 120 days. *Id.* at 57, 60; see Fed. R. Civ. P. 4(m). The court noted, however, that this additional service opportunity "will be futile if President Kagame is correct in his assertion that as head of state of Rwanda, he is absolutely immune from suit." AA 57 (June 23 Order). The district court noted that the Government of Rwanda had asked the State Department to file a suggestion of immunity on behalf of President Kagame. *Id.* at 59. It recognized the "primacy of the Executive Branch's interest in suits against heads of state" and the State Department's lead role in making head of state immunity determinations. *Ibid.* Thus, the district court deferred ruling on President Kagame's immunity from suit until after it heard from the State Department. *Id.* at 60.

The United States filed a suggestion of immunity, informing the district court that the State Department recognizes President Kagame's immunity from this suit in consideration of customary international law principles accepted by the Executive Branch in the exercise of its constitutional authority over foreign affairs. AA 91. Attached to the suggestion of immunity was a letter from the State Department Legal Adviser, explaining the State Department's immunity determination. *Id.* at 99. The government's filing noted that no court has ever subjected a sitting head of state to suit after the Executive Branch submitted a suggestion of immunity on behalf of the foreign official. *Id.* at 95 & n.5 (citing decisions).

Plaintiffs urged the district court to disregard the suggestion of immunity. Relying on *Clinton v. Jones*, 520 U.S. 681 (1997), plaintiffs appeared to argue that deferring to the State Department's immunity determination would be inconsistent with the separation of powers. AA 114–15. Plaintiffs further argued that head of state immunity does not apply to acts taken before a defendant became head of state, *id.* at 113–14, and that a head of state should be immune only for sovereign, public acts, *id.* at 108.

The district court deferred to the Executive Branch's suggestion of immunity and dismissed the suit against President Kagame. AA 116 (Oct. 28 Order). The court observed that the Supreme Court had recognized the immunity from suit of foreign

heads of state as early as 1812. *Id.* at 119 (discussing *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812)). It further explained that, before Congress enacted the FSIA, the Supreme Court required judicial deference to Executive Branch determinations of foreign sovereign immunity in view of the Executive's responsibility for the conduct of foreign affairs. *Id.* at 119–20 (discussing, *e.g.*, *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983); *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945)); *see* 28 U.S.C. §§ 1330, 1441(d), 1602–1611 (2006 & Supp. II 2008) (codifying principles of foreign state immunity). Judicial deference was thus "motivated by respect for the separation of powers." AA 120.

The district court recognized that the FSIA transferred from the Executive Branch to the courts the responsibility to determine foreign state immunity. AA 120. But it also recognized that the immunity of foreign officials is governed not by the FSIA but by the regime that predated that statute's enactment and requires judicial deference to Executive Branch immunity determinations. AA 120–21 (discussing *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)). The district court thus rejected plaintiffs' contention that head of state immunity is limited by the restrictive theory of foreign sovereign immunity, which the FSIA largely codified. *Id.* at 121–22.

The district court also rejected plaintiffs' reliance on *Clinton v. Jones*, which permitted suit against a sitting U.S. President for conduct that allegedly took place before the President took office. 520 U.S. at 684, 710. As the district court explained, the Supreme Court allowed that suit to go forward, in part, because it concluded that there was no likelihood that the litigation would improperly intrude on the power of the Executive Branch. AA 122–23. The district court explained that, as a lawsuit involving domestic officials, *Jones* is "simply inapplicable to the matter at hand," because disregarding the State Department's immunity determination would "potentially intrude[] upon, or even usurp[] the Executive Branch's constitutionally-vested responsibility for conduct of diplomacy and foreign relations." *Id.* at 123.

ARGUMENT

BECAUSE THE STATE DEPARTMENT DETERMINED THAT RWANDAN PRESIDENT KAGAME IS IMMUNE FROM THIS CIVIL SUIT, THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT.

A. Under Supreme Court Precedent, the State Department's Foreign Official Immunity Determinations Are Controlling and Are Not Subject to Review.

The district court correctly deferred to the State Department's determination that President Kagame, as a sitting head of state, is immune from this suit in consideration of customary international law principles accepted by the Executive Branch in the exercise of its constitutional authority over foreign affairs. Except where

otherwise prescribed by statute, courts have deferred to Executive Branch determinations of foreign sovereign immunity, recognizing that to do otherwise could undermine the Executive Branch's conduct of foreign affairs.

Prior to the enactment of the Foreign Sovereign Immunities Act in 1976, courts deferred to Executive Branch determinations concerning the immunity of foreign states as well as foreign officials. *See Samantar*, 130 S. Ct. at 2284. Following the decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch.) 116 (1812), which first recognized the doctrine of foreign sovereign immunity, "a two-step procedure developed for resolving a foreign state's claim of sovereign immunity." *Samantar,* 130 S. Ct. at 2284 (citing *Hoffman*, 324 U. S. at 34–36 (1945); *Ex parte Peru*, 318 U.S. 578, 587–589 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U. S. 68, 74–75 (1938)). A foreign state facing suit in the United States could request a "suggestion of immunity" from the State Department. *Ibid.* (quotation marks omitted). If the State Department accepted the request and filed a suggestion of immunity, the district court "surrendered its jurisdiction." *Ibid.* If the State Department took no position in the suit, "a district court had authority to decide for itself whether all the requisites for such immunity existed," applying "the established policy of the [State Department]." *Ibid.* (quotation marks omitted) (alteration in

original). *Samantar* further explained that, "[a]lthough 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 2284–85 (citing cases).

The FSIA "supersede[d] the common-law regime for claims against foreign states[.]" *Id*. at 2292. With respect to claims against "a foreign state or its political subdivisions, agencies, or instrumentalities," the FSIA "transfers primary responsibility for immunity determinations from the Executive to the Judicial Branch." *Altmann*, 541 U.S. at 691 (quotation marks omitted).

The Supreme Court in *Samantar* concluded that the FSIA did not similarly transfer primary responsibility to the Judicial Branch in determining the immunity of foreign officials. The Court declared that "nothing in the statute's origin or aims * * * indicate[s] that Congress similarly wanted to codify the law of foreign official immunity." 130 S. Ct. at 2292. Accordingly, the Court could discern "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." *Id.* at 2291. The Court explained that "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA." *Id.* at 2291. It thus concluded that the FSIA did not bar suit against the defendant, and remanded to allow

the district court to consider whether he "may be entitled to head of state immunity, or any other immunity, under the common law." *Id.* at 2290 n.15.

In making determinations of foreign official immunity, courts therefore apply the longstanding framework that was not displaced by the FSIA. Under that prior framework, the separation of powers requires courts to defer to the State Department's determination of foreign sovereign and foreign official immunity. As the Seventh Circuit observed in *Wei Ye*, "'it is a guiding principle in determining whether a court should [recognize a suggestion of immunity] in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs * * * by assuming an antagonistic jurisdiction.'" 383 F.3d at 626 (quoting *Hoffman,* 324 U.S. at 35).

In the absence of a controlling statute, the common law governing foreign sovereign and foreign official immunity is a "rule of substantive law," and it requires courts to "accept and follow the executive determination" concerning a foreign official's immunity from suit. *Hoffman*, 324 U.S. at 36; *see Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) ("When the executive branch has determined that the interests of the nation are best served by granting a foreign sovereign immunity from suit in our courts,

there are compelling reasons to defer to that judgment without question.").[2] "Because the FSIA does not apply to heads of states, the decision concerning the immunity of foreign heads of states remains vested where it was prior to 1976 — with the Executive Branch." *Wei Ye*, 383 F.3d at 625; *see also United States v. Noriega,* 117 F.3d 1206, 1212 (11th Cir. 1997) (Because the FSIA does not govern head-of-state immunity, "head-of-state immunity could attach in cases, such as this one, only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny.").

The suggestion of immunity in this case informed the district court that the State Department recognizes President Kagame's immunity from this suit. As the government's filing explained, the doctrine of head of state immunity is well recognized in customary international law. AA 94; *see Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, 20–21 (Feb. 14) (explaining that a head of state's

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[2] *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." (deferring to State Department foreign sovereign immunity determination)); *Rich v. Naviera Vacuba, S.A.*, 295 F.2d 24, 26 (4th Cir. 1961) ("We think that the doctrine of the 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 conclusion." (deferring to State Department foreign sovereign immunity determination)).

"immunit[y] from jurisdiction in other States" is "firmly established"), *available at* http://www.icj-cij.org/docket/files/121/8126.pdf; *Satow's Guide to Diplomatic Practice* 9 (Lord Gore-Booth ed., 5th ed. 1979) (*Satow's Guide*) (same).

Under customary international law principles accepted by the Executive Branch, a sitting head of state's immunity is based on his status as the incumbent office holder, and it extends to all of his actions, whenever performed. *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 21–22; *Satow's Guide* 9–10; *see Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (accepting Executive Branch's determination that incumbent Pope enjoyed head of state immunity for acts allegedly committed before he became head of state). Accordingly, "[n]o distinction can be drawn between acts performed * * * in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office * * * and acts committed during the period of office."[3] *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 22.

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[3] Under customary international law, head of state immunity encompasses the immunity not only of heads of state but also of other "holders of high-ranking office in a State" such as "the Head of Government and Minister for Foreign Affairs." *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 20–21. The *Arrest Warrant* case involved a minister of foreign affairs, but the immunity principles articulated by the International Court of Justice apply *a fortiori* to sitting heads of state.

The Executive Branch considered this principle of international law and determined that, "in light of his current status, President Kagame is entitled to immunity from" plaintiffs' suit. AA 96; *see id.* at 99. The State Department's determination is controlling. *See Samantar*, 130 S. Ct. at 2284, 2291. As the Seventh Circuit explained, "[t]he obligation of the Judicial Branch is clear — a determination by the Executive Branch that a foreign head of state is immune from suit is conclusive and a court must accept such a determination without reference to the underlying claims of a plaintiff." *Wei Ye*, 383 F.3d at 626. In no case has a court ever subjected a sitting head of state to suit after the Executive Branch asserted the official's immunity.[4]

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[4] *See, e.g.*, *Manoharan v. Rajapaksa*, __ F. Supp. 2d __, 2012 WL 642446 (D.D.C. 2012) (order dismissing claims against Sri Lankan President Rajapaksa based on Executive Branch's suggestion of head of state immunity), *appeal docketed* Mar. 26, 2012; *Al Hassan v. Al Nahyan*, No. 09-01106 (C.D. Cal. Sept. 17, 2010) (unreported) (same for claims against United Arab Emirates President Sheikh Khalifa); *Howland v. Resteiner*, No. 07-CV-2332, 2007 WL 4299176 (E.D.N.Y. Dec. 5, 2007) (same for claims against Grenadian Prime Minister Mitchell); *Doe v. Roman Catholic Diocese of Galveston-Houston*, 408 F. Supp. 2d 272 (S.D. Tex. 2005) (same for claims against Pope Benedict XVI); *Doe I v. State of Israel*, 400 F. Supp. 2d 86 (D.D.C. 2005) (same for claims against Israeli Prime Minister Sharon); *Daventree Ltd. v. Republic of Azerbaijan*, No. 02-6356 (S.D.N.Y. Oct. 15, 2003) (unreported) (same for claims against Azerbaijani Prime Minister Ilham Aliyev); *Daventree Ltd. v. Republic of Azerbaijan*, No. 02-6356 (S.D.N.Y. Mar. 10, 2003) (unreported) (same for claims against Azerbaijani President Heydar Aliyev); *Leutwyler v. Queen Rania Al-Abdullah*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001) (same for claims against Jordanian Queen Rania); *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001) (same for claims against Zimbabwean President Mugabe), *aff'd on other grounds sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004); *ABC Info., Inc. v. Lloyd*, No. 01-3456-GHK (C.D. Cal. Aug. 24, 2001)

B. Plaintiffs Offer No Basis For Permitting Suit to Go Forward Notwithstanding the State Department's Immunity Determination.

Plaintiffs' contentions distill to three general arguments. First, they contend that head of state immunity does not apply to acts in a personal capacity prior to taking office. Appellants' Br. 19–23, 26–30. Second, plaintiffs argue that judicial review of the State Department's immunity determination is required under *Clinton v. Jones*. *Id.* at 30–34. And, third, plaintiffs object that the government's immunity determination

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(unreported) (same for claims against Gabonese President Bongo); *Marketic v. Kaliber Talent Consultants, Inc.*, No. CV97-0356-CBM, 1998 WL 1147140 (C.D. Cal. Mar. 15, 1998) (same for claims against Brunei Sultan Bolkiah); *First American Corp. v. Al-Nahyan*, 948 F. Supp. 1107 (D.D.C. 1996) (same for claims against United Arab Emirates President Sheikh Zayed); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379 (S.D. Tex. 1994) (same for claims against Saudi King Fahd), *aff'd*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (same for claims against Haitian President Aristide); *Guardian F. v. Archdiocese of San Antonio*, No. 93-CI-11345 (Dist. Ct. Tex. 1994), *available at* http://www.state.gov/documents/organization/65798.pdf (same for claims against Pope John Paul II); *Anonymous v. Anonymous*, 181 A.D.2d 629 (N.Y. Sup. Ct. App. Div. 1992) (same for claims against unnamed head of state); *Saltany v. Reagan*, 702 F. Supp. 319 (D.D.C. 1988) (same for claims against British Prime Minister Margaret Thatcher), *aff'd in part, rev'd in part on other grounds*, 886 F.2d 438 (D.C. Cir. 1989); *Gerritsen v. De la Madrid*, No. CV 85-5020-PAR (C.D. Cal. Feb. 5, 1986) (unreported) (same for claims against Mexican President de la Madrid), *rev'd as to other defendants on other grounds*, 819 F.2d 1119, 1511 (9th Cir. 1987); *Estate of Domingo v. Marcos*, No. C82-1055V (W.D. Wash. Dec. 23, 1982) (unreported) (same for claims against Philippine President Marcos); *Psinakis v. Marcos*, No. C-75-1725-RHS (N.D. Cal. 1975) (unreported) (same for claims against Philippine President Marcos); *Kendall v. Saudi Arabia*, 65 Adm. 885 (S.D.N.Y. 1965) (same for claims against Saudi King Faisal).

was flawed because plaintiffs were not given an opportunity to present their views to the State Department. *Id.* at 23–26.

1. Head of state immunity is a status-based immunity that shields certain incumbent high officials from suit during their tenure in office regardless of when the alleged act occurred, and regardless of the nature of the act. *Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 22. Because heads of state are immune from any civil suit during their time in office, the nature of the acts alleged is immaterial to a head of state's immunity under customary international law.[5] *Ibid.*

Head of state immunity reflects the principles of absolute immunity from civil suit that historically applied to foreign states as well as their leaders. Under those principles, "'a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign,'" regardless of the nature of the acts alleged to have been committed. *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) (quoting Letter from Acting Legal Adviser Tate to Acting Attorney General Perlman (1952) (Tate Letter)). For much of the Nation's history, the Executive Branch accepted absolute foreign sovereign immunity, and "the State Department

[5] Foreign officials who do not enjoy status-based immunity may be entitled to conduct-based immunity, which provides immunity from civil suit for conduct taken in an official capacity. *See, e.g., Underhill v. Hernandez*, 65 F. 577, 579–580 (2d Cir. 1895), *aff 'd*, 168 U.S. 250 (1897).

ordinarily requested immunity in all actions against friendly foreign sovereigns." *Verlinden*, 461 U.S. at 486.

The 1952 Tate Letter formally announced the State Department's adoption of the restrictive theory of foreign sovereign immunity, under which "'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*).'" *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (quoting Tate Letter). Thus, for example, under the restrictive theory, a foreign state may be subject to suit for commercial activity, because such activity is not considered inherently sovereign. *Verlinden*, 461 U.S. at 486–87. Congress largely codified the restrictive theory of foreign sovereign immunity when it enacted the FSIA, which governs the immunity of foreign states. *Id.* at 488.

Plaintiffs mistakenly urge that head of state immunity, like foreign state immunity, has incorporated the restrictive theory of immunity. *See, e.g.*, Appellants' Br. 15, 21, 28. That is not the case, *see Arrest Warrant of 11 Apr. 2000*, 2002 I.C.J. at 23, and no authority cited by plaintiffs suggests otherwise.

Even if the premise of plaintiffs' argument were not plainly incorrect, a court should nevertheless decline plaintiffs' invitation to review the State Department's

immunity determination, which is controlling under the regime left undisturbed by the FSIA with respect to foreign official immunity. *See supra* Part A; *see also Hoffman*, 324 U.S. at 35 ("It is therefore 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."); *Spacil*, 489 F.2d at 618 ("[W]e are analyzing here the proper allocation of functions of the branches of government in the constitutional scheme of the United States. We are not analyzing the proper scope of sovereign immunity under international law.").

Plaintiffs' brief mistakenly relies on statements addressing conduct-based immunity in an article authored by the State Department's Legal Adviser. Appellants' Br. at 13, 25 & n.60; *see* Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141, 1154 (2011) (discussing "whether an act may be considered 'official' for conduct immunity purposes"). Like the view 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 position of the United States is expressed through court filings by the Department of Justice, *see* 28 U.S.C. § 516, and the Executive Branch's determination concerning President Kagame's head of state immunity is set out in the suggestion of immunity filed in the district court, informing

the court that the State Department recognizes President Kagame's immunity from this suit, and in this brief. In any event, as that article's title makes clear, its subject is official immunity, which is a conduct-based immunity, not head of state immunity, which is a status-based immunity. Thus, the article's observations on conduct-based immunity have no bearing on head of state immunity. Indeed, the article distinguishes the two types of immunity and explicitly states that suits against sitting heads of state can be "disposed of purely on status grounds." *Id.* at 1155; *see also id.* at 1153–54.[6]

2. Plaintiffs are on no firmer ground in urging that *Clinton v. Jones* requires judicial review of State Department foreign official immunity determinations. Appellants' Br. 30–34. In *Jones*, the Supreme Court permitted suit against a sitting U.S. President for conduct that allegedly took place before the President took office, reasoning that the President is generally subject to the law and that permitting suit would not interfere with the President's ability to perform his duties. 520 U.S. at 695–706.

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[6] The Executive Branch's suggestion of immunity in this case noted that *former* heads of state enjoy only residual, conduct-based immunity from civil suits involving acts taken in an official capacity while in office. AA 96. However, because this suit involves the immunity of a sitting head of state, there is no occasion for this Court to consider the residual immunity enjoyed by former heads of state.

That decision implicated none of the concerns that underlie the judiciary's consistent refusal to second-guess State Department immunity determinations in the absence of a specific statute such as the FSIA. Suits against foreign states and foreign officials directly implicate the foreign affairs powers that are constitutionally vested in the political branches. *See, e.g.*, *Hoffman*, 324 U.S. at 35; *Ex Parte Peru*, 318 U.S. at 588. Exercising that authority, Congress in the FSIA codified principles governing the immunity of foreign states. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) (discussing the constitutional basis for the FSIA); *Verlinden*, 461 U.S. at 493 n.19 (same). In the absence of a relevant statute, the Executive Branch retains the authority to make determinations concerning foreign official immunity as an incident to the President's foreign affairs powers. *See Samantar*, 130 S. Ct. at 2291 (Supreme Court discerned "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").

Head of state immunity is well established in international law, *see Arrest Warrant*, 2002 I.C.J. at 20–21; *Satow's Guide* 9, and foreign governments expect that the United States will not permit suit to proceed against a sitting head of state. The United States likewise expects that foreign states will not permit suit to proceed against our head of state. A court's failure to defer to the State Department's determination that

a foreign head of state is immune from suit could significantly interfere with the ability of the President and the State Department to conduct diplomacy at the highest levels. *See Wei Ye*, 383 F.3d at 626–29 (discussing the diplomatic harms that would follow from a court's refusal to defer to the State Department's determination that a foreign head of state is immune from suit and from judicial process). A court's refusal to defer to the State Department's determination of head of state immunity thus would constitute a "constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Jones*, 520 U.S. at 702.

3. Plaintiffs' assertions that the State Department did not employ an appropriate process in making its immunity determination have no bearing on the Court's inquiry in this case. *See* Appellants' Br. 23–26. No statute or regulation governs the State Department's consideration of a request for head of state immunity, and a court has no basis for reviewing either the United States' suggestion of immunity following that consideration or the State Department's decision-making process. *See supra* note 2 and accompanying text.

Plaintiffs again misunderstand the article authored by the State Department's Legal Adviser, which noted that in a "*Samantar*-case," which involves a foreign official's conduct-based immunity, the State Department typically solicits information and offers to meet with the parties' counsel. *See* Koh, *Foreign Official Immunity*, 44 VAND. J.

TRANSNAT'L L. at 1159; *see also id.* at 1151. The process is designed to assist the State Department in understanding "the various factual issues that might be relevant," in making a conduct-based immunity determination. *Id.* at 1159. In contrast, head of state immunity is a status-based immunity, which can be "disposed of purely on status grounds," for which fact finding is unnecessary. *Id.* at 1155. Accordingly, where the dispositive question is whether the defendant is the sitting head of a foreign state, there is no need for the State Department to employ the process described in the Legal Adviser's article.

The State Department employs this informal process only when it believes that additional inquiries would enhance its decision-making. Thus, even when the State Department considers a case of conduct-based immunity, further inquiries may not be profitable. Cases "differ considerably in complexity, in the degree to which Department officials are already familiar with the issues and the legal doctrines, and in the resources of the parties." *Id.* at 1159–60.

In sum, the district court properly deferred to the United States' suggestion of immunity, and plaintiffs' arguments to the contrary are insubstantial.

CONCLUSION

For the foregoing reasons, this Court should affirm the order of the district court granting President Kagame's motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(c) and (d), I certify that this brief uses proportionately spaced font and contains 4,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X5, in 14 point Goudy Old Style.

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April 30, 2012

CERTIFICATE OF SERVICE

I certify that on April 30, 2012 the foregoing document, Brief for the United States as Amicus Curiae Supporting Appellee, was served on all parties or their counsel of record through the CM/ECF system.

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