

No. 16-7027

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ZORAN ZUZA,

Plaintiff-Appellant,

v.

OFFICE OF THE HIGH REPRESENTATIVE, VALENTIN INZKO, and
JEREMY ASHDOWN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING THE APPELLEES

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS
United States Attorney

H. THOMAS BYRON III
(202) 616-5367
EDWARD HIMMELFARB
(202) 514-3547
Attorneys, Appellate Staff
Civil Division, Room 7541
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) PARTIES AND AMICI

Parties before District Court:

All parties, intervenors, and amici appearing before the district court are listed in the Brief for the Appellees.

Parties in this Proceeding:

All parties, intervenors, and amici appearing before this Court are listed in the Brief for the Appellees.

(B) RULINGS UNDER REVIEW

References to the rulings at issue appear in the Brief for the Appellees.

(C) RELATED CASES

This case has not previously been before this Court or any court other than the court below. There are no related cases within the meaning of Rule 28(a)(1)(C).

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASESi

GLOSSARYv

INTRODUCTION AND INTEREST OF THE AMICUS 1

STATEMENT OF THE ISSUE.....3

STATEMENT OF THE CASE.....3

SUMMARY OF ARGUMENT 10

STANDARD OF REVIEW 11

ARGUMENT 11

THE OFFICE OF THE HIGH REPRESENTATIVE AND THE
CURRENT AND FORMER HIGH REPRESENTATIVES ARE
IMMUNE FROM SUIT 11

A. Pursuant To Specific Statutory Authorization, The President Has
Extended To The OHR The Immunity Provisions Of The Inter-
national Organizations Immunities Act 12

B. Both The Current And Former High Representatives Were
Notified To And Accepted By The State Department 15

CONCLUSION 20

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page(s)</u>
<u>Brzak v. United Nations</u> , 551 F. Supp.2d 313 (S.D.N.Y. 2008)	20
<u>D'Cruz v. Annan</u> , No. 05-cv-8918, 2005 WL 3527153 (S.D.N.Y. Dec. 22, 2005).....	20
<u>De Luca v. United Nations Org.</u> , 841 F. Supp. 531 (S.D.N.Y. 1994).....	20
<u>Duncan v. Walker</u> , 533 U.S. 167 (2001)	14
<u>Kilburn v. Socialist People's Libyan Arab Jamahiriya</u> , 376 F.3d 1123 (D.C. Cir. 2004).....	11
<u>Manoharan v. Rajapaksa</u> , 711 F.3d 178 (D.C. Cir. 2013) (per curiam)	17
<u>Nyambal v. International Monetary Fund</u> , 772 F.3d 277 (D.C. Cir. 2014).....	11
<u>Samantar v. Yousuf</u> , 560 U.S. 305 (2010).....	20
<u>Tuck v. Pan American Health Org.</u> , 668 F.2d 547 (D.C. Cir. 1981).....	16, 19
<u>United States v. Enger</u> , 472 F. Supp. 490 (D.N.J. 1978).....	16
<u>United States v. Jicarilla Apache Nation</u> , 564 U.S. 162 (2011)	14
<u>Zuza v. Office of the High Representative</u> , 107 F. Supp.3d 90 (D.D.C. 2015)	6, 7, 8, 9, 12, 14, 16, 19

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes:

International Organizations Immunities Act, ch. 291, tit. I,
59 Stat. 669 (1945):

*	22 U.S.C. 288.....	4, 12
	22 U.S.C. 288 <u>et seq.</u>	1
*	22 U.S.C. 288a(b)	2, 4
	22 U.S.C. 288d.....	19
*	22 U.S.C. 288d(b).....	4, 16, 19
*	22 U.S.C. 288e(a)	1, 6, 16
	22 U.S.C. 288f-1 to 288f-7	2
	22 U.S.C. 288f-1	5
	22 U.S.C. 288f-2.....	5
	22 U.S.C. 288f-3.....	5
	22 U.S.C. 288f-4.....	5
	22 U.S.C. 288f-5.....	5
	22 U.S.C. 288f-6.....	5
*	22 U.S.C. 288f-7	1, 2, 5, 13, 14, 18
	Pub. L. No. 111-177, 124 Stat. 1260 (2010).....	1
	28 U.S.C. 517.....	18

Regulations:

	*Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011)	5, 8, 13, 18
	80 Fed. Reg. 75,700 (Dec. 3, 2015).....	6

Legislative History:

	S. Rep. No. 79-861 (1945).....	2
--	--------------------------------	---

GLOSSARYAbbreviationName

Immunities Act

International Organizations Immunities Act

OHR or Office

Office of the High Representative in Bosnia and Herzegovina

INTRODUCTION AND INTEREST OF THE AMICUS

The International Organizations Immunities Act (Immunities Act), ch. 291, tit. I, 59 Stat. 669 (1945) (codified as amended at 22 U.S.C. 288 et seq.), as originally enacted, confers upon the President the authority to extend certain privileges, exemptions, and immunities to public international organizations in which the United States participates. Through a series of amendments, however, Congress has also authorized the extension of those privileges, exemptions, and immunities to several specifically named international organizations and other entities in which the United States does not participate – including, in an amendment enacted in 2010, the Office of the High Representative in Bosnia and Herzegovina (OHR or Office). Pub. L. No. 111-177, 124 Stat. 1260 (2010) (codified at 22 U.S.C. 288f-7). The Immunities Act provides that an officer or employee of an international organization subject to its provisions is entitled to immunity for official acts if the officer is "duly notified to and accepted by the Secretary of State as a representative, officer, or employee." 22 U.S.C. 288e(a).

The enactment of the Immunities Act at the close of World War II reflected a policy of engagement by the United States in international organizations meant to deter war in a variety of ways. Because they are not foreign states, these organizations, including most significantly the new United Nations, and their officials and employees, were not eligible for the immunity available to foreign states and

officials, and Congress deemed it essential to confer immunity on them to protect them from having to defend lawsuits as if they were private entities. See 22 U.S.C. 288a(b) (organizations entitled to "same immunity from suit * * * as is enjoyed by foreign governments," unless waived); S. Rep. No. 79-861, at 2 (1945) (stating that purpose of Immunities Act is to "protect the official character of public international organizations located in this country" and "to strengthen the position of international organizations of which the United States is a member when they are located or carry on activities in other countries").

Congress later came to the conclusion that extending the same privileges, exemptions, and immunities to certain other specific international organizations and entities in which the United States does not participate was also essential to further American foreign policy objectives. See 22 U.S.C. 288f-1 to 288f-7. One such entity is the Office of the High Representative, which was created as part of the Dayton Accords to help implement the civilian aspects of the peace settlement that led to the end of hostilities in Bosnia and Herzegovina. See 22 U.S.C. 288f-7. While the United States does not participate in the Office of the High Representative, Americans have served in the organization, and its work in securing the peace in Bosnia and Herzegovina has helped further an important element of American foreign policy.

The United States files this brief as amicus curiae to advise the Court of the

government's position that the district court correctly interpreted the 2010 amendment to the Immunities Act to authorize the President to extend statutory immunity to the Office of the High Representative and its officers and employees; that the President has validly done so by Executive Order; and that the two individual defendants in this case, Jeremy ("Paddy") Ashdown, the former High Representative, and Valentin Inzko, the current High Representative, who are sued in their official capacities, have been duly notified to and accepted by the Secretary of State, through his delegate, as officers of the Office of the High Representative. These officials were properly held to be immune from suit.

STATEMENT OF THE ISSUE

Whether the district court correctly held that the defendants are immune from suit under the International Organizations Immunities Act.

STATEMENT OF THE CASE

1. As enacted in 1945, the International Organizations Immunities Act conferred immunity from suit for qualifying "international organizations" to the same extent as enjoyed by foreign governments, and to officers and employees of such organizations for their official acts. The statute defined a qualifying international organization as "a public international organization" (a) in which "the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such

participation," and (b) "which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." 22 U.S.C. 288.

Under the Immunities Act, a qualifying international organization "shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity." 22 U.S.C. 288a(b). In addition, "officers and employees" of international organizations covered by the statute "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions" as officers or employees, "except insofar as such immunity may be waived by the * * * international organization concerned." 22 U.S.C. 288d(b).

In 2010, Congress amended the Immunities Act to authorize the President of the United States to extend the provisions of the statute to the Office of the High Representative in Bosnia and Herzegovina and its officers and employees. That amendment reads as follows:

The provisions of this subchapter may be extended to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates pursuant to any treaty or

under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation. Any such extension may provide for the provisions of this subchapter to continue to extend to the Office of the High Representative in Bosnia and Herzegovina (and to its officers and employees) or the International Civilian Office in Kosovo (and to its officers and employees) after that Office has been dissolved.

22 U.S.C. 288f-7. The Office of the High Representative was not previously covered by the statute, because it is not a public international organization in which the United States participates. Pursuant to the new provision, the President used his authority to order that "all privileges, exemptions, and immunities provided by the International Organizations [Immunities] Act be extended to the Office of the High Representative in Bosnia and Herzegovina and to its officers and employees." Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011).¹

As noted above, officers and employees of the Office of the High Representative also are accorded immunity with respect to their official acts under the

¹ Congress has also authorized the extension of immunity under the International Organizations Immunities Act to other international organizations and entities in which the United States does not participate: the European Space Agency and the Organization of Eastern Caribbean States, 22 U.S.C. 288f-1; the African Union, the International Labor Organization, and the United Nations Industrial Development Organization, 22 U.S.C. 288f-2; the International Committee of the Red Cross, 22 U.S.C. 288f-3; the International Union for Conservation of Nature and Natural Resources, 22 U.S.C. 288f-4; the European Central Bank, 22 U.S.C. 288f-5; and the Global Fund to Fight AIDS, Tuberculosis and Malaria, 22 U.S.C. 288f-6.

Immunities Act, but they must satisfy the following notification and acceptance requirements:

No person shall be entitled to the benefits of this subchapter, unless he (1) shall have been duly notified to and accepted by the Secretary of State as a representative, officer, or employee; or (2) shall have been designated by the Secretary of State, prior to formal notification and acceptance, as a prospective representative, officer, or employee; or (3) is a member of the family or suite, or servant, of one of the foregoing accepted or designated representatives, officers, or employees.

22 U.S.C. 288e(a). Being "notified to" and "accepted by" the Secretary means that there is a request by the international organization to accept the specific person as an officer or employee and that the Secretary of State or his delegate in fact accepts that person as an officer or employee. The Secretary has delegated the responsibilities under this provision to the Director and Deputy Director of the Office of Foreign Missions. 80 Fed. Reg. 75,700 (Dec. 3, 2015).

2. The Office of the High Representative was created in 1995 in the Dayton Accords, which ended the war in Bosnia and Herzegovina. Zuza v. Office of the High Representative, 107 F. Supp.3d 90, 91 (D.D.C. 2015) (JA 2). The High Representative was given the authority to remove officials from government positions throughout Bosnia and Herzegovina and to bar them from public office. Id. at 92 (JA 3). In 2004, the High Representative – Paddy Ashdown, a named defendant in this suit – removed a group of officials from the offices they held, including Zoran

Zuza, who was Chief of Cabinet of the Speaker of the Assembly of Republika Srpska, a region of Bosnia and Herzegovina. Id. (JA 3). The decision was based on the finding that Mr. Zuza (and the others) obstructed implementation of the peace process as part of the political culture within Republika Srpska. Id. (JA 3-4).

Claiming an inability to sue anywhere else, Mr. Zuza brought this pro se action in the U.S. District Court for the District of Columbia in 2014, seeking damages against Paddy Ashdown, the former High Representative, and Valentin Inzko, the current High Representative. JA 35-96. Mr. Zuza's contention was that the defendants "exclusively targeted Orthodox Serbs such as Zuza, imposing on them a stigma that deprived them of their ability to obtain employment." Zuza, 107 F. Supp.3d at 92 (JA 4). He alleged that the removal deprived him of due process and that the decision barring him from public office was not adequately supported. Id.

On November 20, 2015, the Department of State's Acting Deputy Director of the Office of Foreign Missions certified that Messrs. Ashdown and Inzko had been notified to the Department and accepted as the current and the former High Representative. JA 104.²

² The certification letter was filed as Exhibit A to the statement of interest that the United States filed below at the request of the district court. See JA 100-03 (statement of interest); JA 104-05 (letter and attachment).

3. The district court granted the defendants' motion to dismiss. Basing its conclusion on the "plain text" of the 2010 amendment authorizing the extension of statutory immunity to the Office of the High Representative, Zuza, 107 F. Supp.3d at 95 (JA 9), the court held that the amendment permitted the President to confer immunity, notwithstanding the lack of participation of the United States in the Office of the High Representative. Id. (JA 10) ("the 2010 Amendment waived section 1's 'participation' requirement as to OHR; designation by the President would suffice, standing alone, to confer immunity upon OHR, subject to any conditions or limitations imposed by the President"). The court recognized that Executive Order No. 13,568 extended immunity to the Office of the High Representative. Id. at 96 (JA 10).

Mr. Zuza argued that the defendants were barred from arguing this interpretation of the 2010 amendment by judicial estoppel; that the 2010 amendment did not alter the statutory requirement that the United States participate in the international organization, because the text does not contain the term "waiver"; and that it would not make sense to waive that requirement since, in his view, the President's only role under the Immunities Act is to confirm that the participation requirement is satisfied. The district court rejected all three arguments. First, judicial estoppel does not apply, because there was no previous decision in the defendants' favor based on an inconsistent position. Zuza, 107 F. Supp.3d at 96 (JA 10-11). Second, the

statute did not need to mention the word "waiver" to authorize the President to confer immunity on the OHR, as is clear from the plain text of the 2010 amendment. Id. at 97 (JA 11-12). Last, the President's authority under the Immunities Act (even prior to the 2010 amendment concerning the OHR) is broader than "a merely ministerial determination that the 'participation' prong is satisfied"; it includes authority to limit, place conditions on, or revoke the statutory immunity. Id. (JA 12).

Mr. Zuza argued, alternatively, that the immunity did not, in any event, apply to Messrs. Inzko and Ashdown, because they were not formally officers or employees of the OHR. The district court, however, held that the statute does not require corporate formalities; individuals are covered if they are "functionally" officers or employees. Zuza, 107 F. Supp.3d at 98-99 (JA 14-16). The court also rejected Mr. Zuza's argument that Mr. Ashdown, as a former High Representative, was no longer immune, citing several decisions applying the Immunities Act to former officers' or employees' prior official conduct. Id. at 99 (JA 16).

4. Mr. Zuza then filed a motion for reconsideration. The district court ordered supplemental briefing on one of Mr. Zuza's arguments – that the defendants had to show they were notified to and accepted by the Secretary of State – and requested a statement of interest from the United States. JA 97-99. The United States filed a statement of interest that agreed with the court's interpretation of the Immunities Act and the 2010 amendment, and confirmed that Messrs. Inzko and

Ashdown had been notified to and accepted by the Secretary of State as the current and former High Representatives, respectively, as evidenced by an attached letter from Clifton Seagroves, the State Department's Acting Deputy Director of the Office of Foreign Missions. JA 100-05.

Holding that the notification and acceptance were not required to have been completed before Mr. Zuzza's complaint was filed, and that statutory immunity may serve as a defense to litigation that has already commenced, JA 27-28, the district court denied Mr. Zuzza's motion for reconsideration.

SUMMARY OF ARGUMENT

In 2010, Congress amended the International Organizations Immunities Act to authorize the extension of statutory immunity to the Office of the High Representative and its officers and employees to the same extent they would be accorded statutory immunity if the United States participated in the organization. Shortly thereafter, the President issued an Executive Order designating the Office of the High Representative and its employees for immunity under the statute. Messrs. Ashdown and Inzko have been notified to and accepted by the State Department as officers of the Office of the High Representative, and they are accordingly immune under the statute.

The district court correctly interpreted the 2010 amendment to the Immunities Act to authorize the President to extend statutory immunity to the Office of the High

Representative and its officers and employees, and the President has validly done so by Executive Order. Moreover, because the two defendants in this case have been duly notified to and accepted by the Secretary of State as officers of the Office of the High Representative, the defendants are immune from suit in this case. The district court's order dismissing the complaint should be affirmed.

STANDARD OF REVIEW

Review of the dismissal of a complaint on the ground of immunity is de novo. See Kilburn v. Socialist People's Libyan Arab Jamahiriya, 376 F.3d 1123, 1127 (D.C. Cir. 2004) (Foreign Sovereign Immunities Act) ("Our standard of review is de novo."); Nyambal v. International Monetary Fund, 772 F.3d 277, 280 (D.C. Cir. 2014) (applying the same standard to review of immunity under the Immunities Act).

ARGUMENT

THE OFFICE OF THE HIGH REPRESENTATIVE AND THE CURRENT AND FORMER HIGH REPRESENTATIVES ARE IMMUNE FROM SUIT.

Both the Office of the High Representative and the current and former High Representatives are immune from suit in this case. The President's Executive Order extended immunity to them under the International Organizations Immunities Act, and the current and former High Representatives have been notified to and accepted by the Secretary of State. The district court's judgment dismissing this action should be affirmed.

A. Pursuant To Specific Statutory Authorization, The President Has Extended To The OHR The Immunity Provisions Of The International Organizations Immunities Act.

In 2010, Congress enacted an amendment to the International Organizations Immunities Act that authorized the President to extend statutory immunity to the Office of the High Representative and its officers and employees, and the President has done so. Analyzing the "plain text" of the 2010 amendment, the district court determined that Congress authorized the President to extend statutory immunity to the Office of the High Representative without requiring participation by the United States. Zuza, 107 F. Supp.3d at 95 (JA 9-10). Putting it differently, the court held that the amendment "waived section 1's 'participation' requirement as to OHR." Id. This reading of the statute was well founded and correct.

1. In order to be eligible for designation under the Immunities Act as originally enacted, an entity had to be an international organization in which the United States participates. Section 1 of the statute defines a qualifying "international organization" as "a public international organization" (a) in which "the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation," and (b) "which shall have been designated by the President through appropriate Executive order as being entitled to enjoy the privileges, exemptions, and immunities provided in this subchapter." 22 U.S.C. 288.

However, when Congress authorized the extension of statutory privileges, exemptions, and immunities to the Office of the High Representative in 2010, it exempted OHR from the original statutory participation requirement. The amendment expressly provides that the provisions of the Immunities Act may be extended to the Office of the High Representative "in the same manner, to the same extent, and subject to the same conditions, as such provisions may be extended to a public international organization in which the United States participates," and to officers and employees of the organization. 22 U.S.C. 288f-7. Pursuant to that authority, the President extended immunity to the Office of the High Representative by ordering that "all privileges, exemptions, and immunities provided by the International Organizations [Immunities] Act be extended to the Office of the High Representative in Bosnia and Herzegovina and to its officers and employees." Exec. Order No. 13,568, 76 Fed. Reg. 13,497 (Mar. 8, 2011).

2. Mr. Zuza criticizes the district court's interpretation, arguing principally that the lack of United States participation in the Office of the High Representative means that the Office of the High Representative and its officers and employees cannot be immune under the statute. See, e.g., Zuza Br. 33-35, 43-47. In Mr. Zuza's view, the 2010 amendment did nothing to change the Immunities Act as it applies to the OHR. He offers no interpretation of his own that actually accounts for the statutory language of the amendment or even the existence of the amendment. This

failing shows that his argument is flawed; it is a court's "duty to give effect, if possible, to every clause and word of a statute." Duncan v. Walker, 533 U.S. 167, 174 (2001) (quotation marks omitted); see, e.g., United States v. Jicarilla Apache Nation, 564 U.S. 162, 185 (2011). The fact that the Office of the High Representative is not an international organization in which the United States participates, Zuza Br. 35, is the main reason that Congress had to enact a specific provision for extending coverage of the Immunities Act to include the OHR.

The amendment explicitly provides that immunity may be extended to the Office of the High Representative to the same extent as it may be extended "to a public international organization in which the United States participates." 22 U.S.C. 288f-7. As the district court correctly recognized, that plain language eliminates the participation requirement. Mr. Zuza objects to the district court's characterization of the language as having "waived" the requirement of United States participation, Zuza, 107 F. Supp.3d at 95 (JA 10), and he argues that "Congress did not use the words 'waive' or 'notwithstanding,'" Br. 43. But while Congress did not use the word "waive," it did authorize immunity to the Office of the High Representative without requiring United States participation in the Office. In doing so, Congress eliminated the participation requirement for the Office. At bottom, Mr. Zuza fails to explain why, if the Office of the High Representative were to remain subject to the requirement in the original statute that the United States participate in the organization,

Congress would have enacted a special provision authorizing the extension of immunity that did not change anything.

3. Mr. Zuza also contends that, because the 2010 amendment uses the passive voice ("may be extended"), it does not authorize the President to extend immunity. Zuza Br. 38-39. But the passive voice, by definition, has no subject, and if Mr. Zuza were correct, no one could extend the immunity. Indeed, in the Immunities Act, Congress identified the President as the official who extends immunity to an organization only in section 1; in all of the special provisions for organizations in which the United States does not participate (see note 1, supra), Congress did not identify the official who may extend the immunities to the organization. This consistent statutory practice confirms the district court's proper conclusion that it is the President who has the authority to extend statutory immunity to the Office of the High Representative.

In short, the district court was correct that the statutory language authorizes the extension of statutory immunity to the defendants in this case.

B. Both The Current And Former High Representatives Were Notified To And Accepted By The State Department.

The district court was also correct in holding that the current High Representative, Valentin Inzko, and the former High Representative, Paddy Ashdown, are immune as officers of the Office of the High Representative.

1. In district court, the United States filed a statement of interest attaching

a letter from Clifton Seagroves, Acting Deputy Director of the Office of Foreign Missions at the Department of State, informing the court that both officials "have been notified to the Secretary of State and accepted by the Director of the Office of Foreign Missions, acting pursuant to delegated authority from the Secretary of State." JA 104. That is, both have been "duly notified to and accepted by the Secretary of State as a representative, officer, or employee" of the Office of the High Representative. 22 U.S.C. 288e(a).

The individuals accorded statutory immunity do not have to be formally designated as officers or employees in the corporate sense; the district court was correct to use a functional approach. That approach is properly derived from the statutory language, which refers to the functions of an officer or employee. See 22 U.S.C. 288d(b) (officers and employees "shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions"). Moreover, this Court has previously suggested that a "functional necessity" approach should govern an inquiry into the official-capacity aspect of the statutory standard. Tuck v. Pan American Health Org., 668 F.2d 547, 550 n.7 (D.C. Cir. 1981) (quoting United States v. Enger, 472 F. Supp. 490, 502 n.4 (D.N.J. 1978)). The definition of an officer or employee should be similarly accommodating of practical realities. See Zuza, 107 F. Supp.3d at 98-99 (JA 14-16). And in any event, whatever the scope of the term "officer," the term would certainly have to apply to

the Office's chief officer, namely the High Representative.

2. Furthermore, the process of notification and acceptance may occur at any time before or during the litigation; it does not need to be completed before a suit is brought. The statute itself imposes no requirement of advance notification and acceptance. Other types of foreign-official immunity are routinely determined while a suit is pending. See, e.g., Manoharan v. Rajapaksa, 711 F.3d 178 (D.C. Cir. 2013) (per curiam) (determination of foreign head-of-state immunity based on suggestion of immunity filed by State Department after suit was brought). Advance notification and acceptance of all officers and employees of international organizations anywhere in the world would impose a significant burden on the United States government. There are numerous international organizations covered by the Immunities Act, with thousands of officers and employees located around the world, who, in most cases, will never be subject to suit in the United States. If advance notification and acceptance were required, the State Department would have to review notifications and issue acceptances, as appropriate, for all of these employees to confer immunity upon them in the unlikely event they might someday be sued in the United States. Nothing in the statute precludes the State Department from considering their eligibility for immunity only if and when they are actually named in a suit.

As the statement of interest filed in district court demonstrates, the two

defendants here, Messrs. Ashdown and Inzko, have both been notified to and accepted by the Secretary of State. This brings them within the immunity provisions of the Immunities Act, absent a waiver of immunity by the Office of the High Representative. There has been no such waiver.

Mr. Zuza complains that the State Department letter is not authenticated, Zuza Br. 56-58, and worries that private parties can "photoshop factitious contents onto White House letterhead" and fool the courts. Zuza Br. 57. But that unlikely scenario is not a basis for disturbing the decision here. In this case, the United States, through counsel authorized to represent it in court, 28 U.S.C. 517, introduced the letter in response to a request from the district court. There can be no serious allegation that this letter is inauthentic.

3. Finally, an officer or employee does not lose statutory immunity after separating from the international organization. The text of the 2010 amendment confirms that the President may provide that statutory immunity of the Office of the High Representative continues even "after that Office has been dissolved." 22 U.S.C. 288f-7; see also Exec. Order No. 13,568 ("In the event * * * the Office of the High Representative * * * is dissolved, the privileges, exemptions, and immunities of that organization under the International Organizations and Immunities Act, as well as those of its officers and employees, shall continue to subsist."). For similar reasons, it is even more obvious that immunity for official acts must continue when

the organization still exists and the officer has merely left a position.

Mr. Zuza contends that Mr. Ashdown "could not be sued in an official capacity," because he was no longer High Representative at the time of suit. *Zuza* Br. 59. But the language of the statute does not support his contention. If a suit against representatives, officers, or employees of an international organization covered by the Immunities Act relates to acts "falling within their functions as such representatives, officers or employees," then the suit involves "acts performed by them in their official capacity." 22 U.S.C. 288d; see *Tuck*, 668 F.2d at 550 ("To the extent that the acts alleged in the complaint relate to Dr. Acuna's functions at PAHO Director, the provisions of 22 U.S.C. § 288d(b) protect him from suit."); *Zuza*, 107 F. Supp.3d at 99-100 n.9 (JA 17) (statute "expressly provides for immunity 'relating to acts performed by [international officials] in their official capacity and falling within their functions as such'" (brackets in original) (quoting 22 U.S.C. 288d(b)). Mr. Zuza's lawsuit challenges the alleged actions Mr. Ashdown took pursuant to his position as High Representative. The suit therefore seeks to hold Mr. Ashdown liable for acts performed in an official capacity. See *Zuza*, 107 F. Supp.3d at 99 (JA 16) ("Zuza has not 'alleged any actions taken by [Mr. Ashdown] in his individual capacity.>"). The notion that Mr. Ashdown's immunity for official acts ended when he left office runs counter to three district-court decisions that have upheld the immunity of former officers or employees under the International Organizations

Immunities Act. See id. (JA 16) (citing Brzak v. United Nations, 551 F. Supp.2d 313, 319-20 (S.D.N.Y. 2008); D'Cruz v. Annan, No. 05-cv-8918, 2005 WL 3527153, at *1 (S.D.N.Y. Dec. 22, 2005); De Luca v. United Nations Org., 841 F. Supp. 531, 534-35 (S.D.N.Y. 1994)). And Mr. Zuza's reliance on the Supreme Court's decision in Samantar v. Yousuf, 560 U.S. 305 (2010) (Zuza Br. 59), is inapt, because that decision assumed for purposes of argument that the acts of the former official that were at issue were taken in an official capacity. Id. at 314 ("The question we face in this case is whether an individual sued for conduct undertaken in his official capacity is a 'foreign state' within the meaning of the [Foreign Sovereign Immunities Act]."). Thus, Mr. Ashdown's status as the former High Representative does not alter the immunity conferred by statute.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

BENJAMIN C. MIZER

Principal Deputy Assistant Attorney General

CHANNING D. PHILLIPS

United States Attorney

H. THOMAS BYRON III

(202) 616-5367

EDWARD HIMMELFARB

(202) 514-3547

Attorneys, Appellate Staff

Civil Division, Room 7541

Department of Justice

950 Pennsylvania Ave., N.W.

Washington, D.C. 20530-0001

NOVEMBER 2016

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman, 14 point type. Based on a word count under Microsoft Word 2013, this brief contains 4,805 words, including the footnotes, but excluding the tables, certificates, and addenda.

/s/ Edward Himmelfarb

Edward Himmelfarb
Attorney for the Amicus Curiae United States

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Edward Himmelfarb

Edward Himmelfarb
Attorney for the Amicus Curiae United States