[ORAL ARGUMENT SCHEDULED FOR OCTOBER 10, 2012]

No. 11-7118

In the United States Court of Appeals for the District of Columbia Circuit

CLAUDIA BALCERO GIRALDO, et al.,
Petitioners-Appellants,

v.

DRUMMOND COMPANY INC., et al.,
Respondents-Appellees.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEE

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INTRODUCTION AND INTEREST OF THE UNITED STATES

This is an appeal from a district court order denying petitioners' motion to compel the third-party testimony of former Colombian President Álvaro Uribe Vélez. The United States filed a suggestion of immunity to inform the district court that the State Department recognizes Uribe's immunity from compulsory testimony concerning information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official.

JA 191–212. The district court correctly deferred to the Executive Branch's suggestion of immunity.

The conduct of foreign affairs is committed to the political branches. For much of the nation's history, courts deferred to State Department determinations concerning the sovereign immunity of foreign states as well as foreign officials. The Foreign Sovereign Immunities Act (FSIA), enacted in 1976, "transfer[red] primary responsibility for immunity determinations" regarding foreign states "from the Executive to the Judicial Branch." *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004). Congress did not, however, "eliminate[] the State Department's role in determinations regarding individual official immunity." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010). Accordingly, a determination concerning foreign official immunity "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 denying petitioners' motion to compel the testimony of former President Uribe.

STATEMENT

1. Appellants in this case are the plaintiffs in *Giraldo v. Drummond Company, Inc.*, No. 2:09-cv-1041 (N.D. Al.), a suit against an Alabama mining company

operating in Colombia. Plaintiffs, who are Colombian citizens, are the family members of other Colombian citizens who allegedly were killed by the Autodefensas Unidas de Colombia (AUC), the United Self Defense Forces of Colombia. The AUC is a paramilitary group, illegal under Colombian law, that the State Department designated a foreign terrorist organization in 2001. *See* Department of State, *Designation of a Foreign Terrorist Organization*, 66 Fed. Reg. 47054-03 (Sept. 10, 2001). Plaintiffs contend that, to further its financial interests, Drummond aided and abetted and conspired with the AUC in its commission of extrajudicial killing, war crimes, and crimes against humanity. JA 309–512 (third amend. compl.). Plaintiffs assert their claims against Drummond under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act, 28 U.S.C. § 1350, note. JA 459–511.

In October 2010, plaintiffs obtained from the U.S. District Court for the District of Columbia a non-party subpoena directing former Colombian President Álvaro Uribe Vélez to appear for a deposition concerning the *Drummond* litigation. Plaintiffs allege that they served Uribe with the subpoena while he was teaching and lecturing at Georgetown University. JA 37–38. After Uribe's counsel informed plaintiffs that Uribe would not appear for the deposition, plaintiffs filed a motion to

compel Uribe's testimony. JA 18–83. Plaintiffs explained that they sought Uribe's testimony based on their allegation

> that the Government of Colombia committed illegal acts by supporting, collaborating with, and covering up the criminal acts of the AUC.
>
> Mr. Uribe's administration was notorious for its open relationship with and support for the AUC, and he is in a unique position to know the facts regarding the scope and purpose of that unlawful relationship. Further, Mr. Uribe had a direct relationship with Drummond, and his chief of staff, Fabio Escheverri, was receiving payments from Drummond. Mr. Uribe likely knows whether Drummond made those payments to facilitate the cooperation of the Colombian military and the AUC as they jointly committed war crimes that also furthered Drummond's business interests in Colombia.

JA 35 (citations omitted).

Former President Uribe opposed the motion, arguing that "[p]laintiffs seek to inquire about acts which President Uribe allegedly performed while in office as well as information that President Uribe was given while serving in his capacity as President." JA 111. While strongly denying plaintiffs' allegations, Uribe argued that he was protected against compelled testimony of this sort under the "common law" head of state immunity doctrine. JA 104–112. Citing State Department Country Reports on Terrorism, Uribe also argued that plaintiffs' motion would require the court to second-guess the Executive Branch's determination that he was not a supporter of the AUC but had actively (and successfully) fought against that

paramilitary group. JA 112–18; *see id.* at 96–99 (discussing State Department reports).

In response, plaintiffs added further allegations regarding Uribe's participation in criminal activities. They claimed that "Uribe personally participated in illegal acts by supporting, collaborating with, and covering up the criminal acts of the AUC" by, among other things, "personally command[ing] members of the notorious Colombian security service agency, * * * who engaged in illegal acts of assisting the AUC and targeting alleged leftists." JA 134; *see ibid.* (citing "evidence" that Uribe collaborated with the AUC before he became president). Plaintiffs disputed Uribe's claim to foreign official immunity by arguing, among other things, that the testimony they seek concerns "violations of international human rights norms, which by definition constitute individual and not official actions." JA 147.

2. The district court asked the United States to file a statement of interest. JA 130. Based on the State Department's determination, *see* JA 205–06, the United States informed the district court that "former President Uribe enjoys residual immunity from this Court's jurisdiction insofar as Plaintiffs seek information (i) relating to acts taken in his official capacity as a government official; or (ii) obtained in his official capacity as a government official." JA 191.

The United States' statement explained that Uribe did not have testimonial immunity concerning "(i) acts performed or information that he obtained while not serving as a government official; or (ii) acts performed or information obtained during his time in office other than in his official capacity as a government official." JA 192. Nevertheless, in response to concerns raised by the Government of Colombia in a diplomatic note to the State Department, *see* JA 199–200, and in recognition that the court's action here could have implications for our own officials in litigation abroad, the United States asked the court to require plaintiffs to exhaust other reasonably available means of obtaining any information that does not fall within the scope of the State Department's immunity determination. JA 192.

In response to the government's filing, plaintiffs argued that none of the testimony they seek comes within the State Department's immunity determination because "[i]llegal conduct is never considered part of a public official's duties." JA 213. Plaintiffs also objected to the United States' request that plaintiffs be required first to exhaust other means of obtaining information that does not fall within the scope of the immunity determination, arguing that a requirement of this kind is without precedent. JA 219–22.

Plaintiffs once more offered new allegations regarding Uribe's conduct. Plaintiffs' supplemental memorandum claimed that Uribe helped start the AUC,

that he personally participated "in targeting some of Plaintiffs' decedents for execution," and that he "cooperat[ed] with illegal drug smuggling to allow the AUC to raise operating funds." JA 218.

3. The district court denied plaintiffs' motion to compel Uribe's testimony. *Giraldo v. Drummond Co., Inc.*, 808 F. Supp. 2d 247 (D.D.C. 2011). The court concluded that, because plaintiffs seek to depose Uribe "regarding his actions during his presidency," *id.* at 248, or during his time in other office, *id.* at 249, the information plaintiffs seek "relates" to acts taken in an official capacity, within the meaning of the State Department's immunity determination, *see id.* at 249.

The district court rejected plaintiffs' contention that foreign official immunity cannot extend to acts that are illegal because such acts are not taken in an official capacity. *See id.* at 250–51 (explaining that plaintiffs' contention would collapse the distinction between a merits and an immunity determination). The district court also rejected the more limited argument that allegations of *jus cogens* violations[1] defeat foreign official immunity, relying on this Court's decision in *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008), and decisions of the Second and Seventh Circuits

[1] A *jus cogens* norm "is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Belhas v. Ya'alon*, 515 F.3d 1279, 1286 (D.C. Cir. 2008) (quotation marks omitted).

expressly holding that allegations of *jus cogens* violations cannot overcome the Executive Branch's determination of foreign official immunity. *Giraldo*, 808 F. Supp. 2d at 250, 251 (citing *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009); *Wei Ye*, 383 F.3d at 627). Accordingly, the district court concluded that all of the information sought by plaintiffs came within the State Department's immunity determination, *id.* at 251, and the court denied plaintiffs' motion to compel for that reason, *id.* at 252.

Although the district court concluded that plaintiffs "do not currently seek information unrelated to acts taken or obtained in respondent's official capacity," the court ordered that, "were [plaintiffs] to seek such information, plaintiffs may not depose respondent until they exhaust other reasonably available means for obtaining the information." *Id.* at 251 (citing *Société Nationale Industrielle Aérospatiale v. U.S. District Court*, 482 U.S. 522, 546 (1987) (directing courts to "exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position"); *In re Papandreou*, 139 F.3d 247, 252 (D.C. Cir. 1998) ("Principles of comity dictate that we accord the same respect to foreign officials as we do to our own.")). In so ordering, the court deferred to the United States' comity and international relations concerns. *Id.* at 252.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED PLAINTIFFS' MOTION BECAUSE THE STATE DEPARTMENT DETERMINED THAT FORMER COLOMBIAN PRESIDENT URIBE IS IMMUNE FROM COMPULSORY TESTIMONY RELATING TO ACTS TAKEN OR INFORMATION OBTAINED IN HIS OFFICIAL CAPACITY.

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 former President Uribe is immune from compulsory testimony relating to acts taken or information obtained in his official capacity as a government official, taking into account the relevant principles of customary international law 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 State Department determinations of foreign sovereign immunity, recognizing that to do otherwise could undermine the Executive Branch's conduct of foreign relations.

Prior to the enactment of the Foreign Sovereign Immunities Act in 1976, courts deferred to State Department 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 *Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–36 (1945); *Ex parte Peru*, 318 U.S. 578, 587–89 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U. S. 68, 74–75 (1938)).

Under this regime, a foreign state sued 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). The Court 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 also transfer primary responsibility to the Judicial Branch for 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." *Ibid.* 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 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*, "[i]t 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) (quotation marks omitted).

In the absence of a controlling statute, the common law governing foreign sovereign and foreign official immunity is a "rule of substantive law" requiring 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 foreign officials, the decision concerning the immunity of foreign officials "remains vested where it was prior to 1976 — with the Executive Branch." *Wei Ye*, 383 F.3d at 625; *see also United States v.*

[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)).

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.").

B. Uribe Is Presumptively Immune from Compulsory Testimony, and Plaintiffs Have Given the State Department No Reason to Conclude Otherwise.

The district court correctly denied plaintiffs' motion to compel Uribe's testimony in light of the State Department's immunity determination, although some aspects of the court's decision are overly broad.

1. As a general matter, under principles accepted by the Executive Branch, a former foreign official is entitled to immunity from suit based upon, or compelled testimony relating to, acts taken in an official capacity.[3] Allegations relating to the official's exercise of the powers of office presumptively fall into that category. Where

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[3] Under immunity principles recognized by the Executive Branch, most foreign officials enjoy a similar conduct-based immunity from suit while they are in office for acts performed in an official capacity. A small number of foreign officials — such as sitting heads of state, heads of government, and foreign ministers — are entitled to a broader, status-based immunity, which generally precludes suit against the official during his or her time in office, regardless of when the acts alleged took place or whether they were taken in a private or official capacity. *See, e.g.*, *Habyarimana v. Kagame*, 821 F. Supp. 2d 1244, 1259–64 (W.D. Ok. 2011) (dismissing suit against incumbent Rwandan President Paul Kagame, based on State Department determination that Kagame is immune from the suit while in office), *appeal pending*, No. 11-6315 (10th Cir.)).

litigation involves a foreign official's exercise of the powers of his or her office, such as here, mere allegations of illegality are not sufficient to overcome the State Department's presumption that the alleged conduct was undertaken in an official capacity, giving rise to immunity under principles accepted by the Executive Branch.[4]

In addition, the State Department takes into account a foreign government's request that the State Department suggest the former official's immunity. Notwithstanding such a request, the State Department could determine that a foreign official is not entitled to immunity. That would occur, for example, should the State Department conclude that the challenged conduct was not taken in an official capacity, as might be the case in a suit challenging the former official's personal financial dealings.[5]

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[4] It is for the Executive Branch, not the courts, to determine whether a foreign official's presumptive immunity has been overcome. *See Hoffman*, 324 U.S. at 35 ("It is * * * not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.").

[5] As noted, if the United States takes no position in the suit involving a claim to foreign official immunity, "a district court ha[s] authority to decide for itself whether all the requisites for such immunity exist[]," applying "the established policy of the [State Department]." *Samantar*, 130 S. Ct. at 2284 (quotation marks omitted) (last alteration in original). Thus, in the absence of contrary guidance from the Executive Branch, a district court may properly dismiss a suit against a foreign

Here, plaintiffs' central claims involve Uribe's alleged exercise of the powers of his office, and the Government of Colombia has asked the State Department to recognize Uribe's immunity. The State Department accords a presumption of testimonial immunity to information relating to Uribe's alleged actions exercising the powers of his office. Plaintiffs' allegations and submissions have given the State Department no reason to conclude that Uribe should be compelled to testify.

The gravamen of plaintiffs' initial district court filing was that Uribe could provide relevant testimony concerning alleged "illegal acts" by "*the Government of Colombia*" in "supporting, collaborating with, and covering up the criminal acts of the AUC." JA 35 (emphasis added). In response to filings by Uribe and the United States, plaintiffs added allegations of personal wrongdoing by Uribe. But those additional allegations did not change the focus of their request for information, which concerns conduct that Uribe allegedly took exercising the powers of his office. *See, e.g.*, JA 134 (alleging that Uribe "personally commanded members of the

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official if the suit challenges acts taken exercising the powers of the official's office. However, because a foreign state's request for immunity on behalf of an official is laden with foreign policy considerations, courts should obtain guidance from the Executive Branch before giving any effect to a foreign state's request. Indeed, for that reason, a foreign state's request for an official's immunity should always be presented to the State Department, not to the court. *See ibid.* (noting that, under the "two-step procedure," foreign states ask the State Department to make a suggestion of immunity).

notorious Colombian security service agency, * * * who engaged in illegal acts of assisting the AUC and targeting alleged leftists").

In considering whether plaintiffs have offered any basis for concluding that Uribe should not be afforded testimonial immunity, the State Department's review has been informed by its own knowledge of circumstances in Colombia. State Department reports issued during the eight-year period of Uribe's presidency recognized that President Uribe took significant steps to battle paramilitary groups, including the AUC. For example, in a report addressing Uribe's first year in office as president, the State Department explained that, "[u]nder President Uribe, the Colombian military, police, and intelligence forces scored significant victories in 2003 against the [Revolutionary Armed Forces of Columbia (FARC)], National Liberation Army (ELN), and United Self-Defense Forces of Colombia (AUC) terrorist groups." Department of State, *Patterns of Global Terrorism 2003* at 73 (2004); *see id.* at 75 ("From the day the Uribe Administration assumed office in August 2002, it has demonstrated a firm resolve to combat terrorists of all stripes."). The State Department made similar assessments throughout Uribe's tenure.[6]

[6] See, e.g., Department of State, *Country Reports on Terrorism 2004* at 80 (2005) ("The Colombian Government's peace process with the AUC, involving AUC demobilization, made substantial progress in 2004 with the removal of nearly 3,000 AUC paramilitaries from combat in November and December 2004."); Department

Plaintiffs provided no reason for the State Department to conclude that Uribe did not, in fact, combat the AUC, and instead collaborated with that terrorist group. The materials plaintiffs filed in the district court contain assertions that are unsubstantiated, and, in some instances, the materials contradict plaintiffs' allegations. *See, e.g.*, JA 61–62 (Congressional Research Service, *Colombia: The Uribe Administration and Congressional Concerns* (*CRS Report*) (2002) (reporting that, during the 2002 campaign for president, "one of Uribe's opponents * * * accused Uribe of

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of State, *Country Reports on Terrorism 2005* at 162 (2006) ("The Government of Colombia, facing a domestic terrorist threat, continued vigorous law enforcement, intelligence, military, and economic measures against three designated Foreign Terrorist Organizations — the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and the United Self-Defense Forces of Colombia (AUC)."); Department of State, *Country Reports on Terrorism 2007* at 148 (2008) ("President Alvaro Uribe continued vigorous law enforcement, intelligence, military, and economic measures against the Revolutionary Armed Forces of Colombia (FARC), the National Liberation Army (ELN), and remaining elements of the former United Self-Defense Forces of Colombia (AUC) who have not demobilized or who have gravitated to newly-formed criminal groups."); Department of State, *Country Reports on Terrorism 2008* at 164 (2009) ("The administration of President Álvaro Uribe maintained its focus on defeating and demobilizing Colombia's terrorist groups through its 'Democratic Security' Policy, which combines military, intelligence, police operations, efforts to demobilize combatants, and the provision of public services in rural areas previously dominated by illegal armed groups."); Department of State, *Country Reports on Terrorism 2009* at 174 (2010) ("The AUC formally remained inactive as the Colombian government continued to process and investigate demobilized AUC members under the Justice and Peace Law (JPL), which offers judicial benefits and reduced prison sentences for qualified demobilizing terrorists.").

The State Department's reports on global terrorism can be found at http://www.state.gov/j/ct/rls/crt/.

supporting the paramilitaries, and others rumored that he had ties to drug traffickers. Uribe denies such accusations, and *none has been substantiated*." (emphasis added))).

The materials plaintiffs submitted to support their allegation that Uribe helped establish the AUC while he was Governor of Antiquia instead suggest that Uribe promoted the creation of different, legal entities. *See* JA 60 (*CRS Report*) ("As governor, Uribe promoted the establishment * * * of state-sponsored '*Convivir*' civil rural defense organizations *which * * * were authorized by national law in 1994*." (emphasis added)). Plaintiffs' allegation that Uribe "cooperat[ed] with illegal drug smuggling to allow the AUC to raise operating funds," JA 218, is similarly unsupported. *See id.* at 167–68 (declassified Defense Department report relaying anonymous source allegation that, as Senator, Uribe collaborated with the Medellin Cartel); *but see* JA 159 ("THIS IS AN INFO REPORT, NOT FINALLY EVALUATED INTEL."); *see also* JA 218 (wholly unsubstantiated allegation by plaintiffs that Uribe personally participated in targeting for execution some of plaintiffs' decedents).

In short, plaintiffs seek information related to alleged acts taken by Uribe in the exercise of the powers of his offices. The Executive Branch recognizes a

presumption of testimonial immunity regarding such information, and plaintiffs have provided the State Department with no reason to conclude otherwise.

2. The scope of the immunity articulated in the district court's order is broader than the immunity recognized by the State Department. As discussed above, the Executive Branch suggested Uribe's testimonial immunity insofar as plaintiffs sought information "(i) relating to acts taken in [Uribe's] official capacity as a government official; or (ii) obtained in his official capacity as a government official." JA 191. However, language in the district court's opinion suggests that the State Department's immunity determination extends more broadly to any attempt to depose Uribe "regarding his actions during his presidency," *Giraldo*, 808 F. Supp. 2d at 248, or during his time in other office, *id.* at 249.

The Executive Branch's suggestion of immunity did not state that Uribe is immune from compelled testimony concerning *any* conduct that occurred during the time Uribe held government office. *See* JA 192 (Uribe does not have testimonial immunity regarding "acts performed or information obtained during his time in office other than in his official capacity as a government official"). An official may undertake purely private conduct — taking out a personal loan for example — during the official's time in office. Such conduct would not qualify as conduct undertaken in an official capacity, for which an official generally must exercise the powers of his

or her office. Accordingly, the district court's decision is mistaken insofar as it suggests that any act by an official constitutes an act taken in an official capacity merely by virtue of the fact that the act occurred during the official's time in office. *Cf., e.g., Giraldo*, 808 F. Supp. 2d 248–49; *cf. also* Uribe Br. 38–39 (defending district court order because the conduct at issue had some "temporal" connection to Uribe's public service).

However, the court's overly broad articulation of the scope of immunity does not cast doubt on its decision to deny plaintiffs' motion to compel Uribe's testimony. As explained above, plaintiffs have given the State Department no reason to overcome the presumption of immunity that Uribe enjoys from compelled testimony relating to alleged acts involving the exercise of the powers of his office.

3. Plaintiffs appear to suggest that the Executive Branch lacks authority to determine the immunity of former foreign officials, *see, e.g.*, Pls.' Br. 37–43, and of foreign officials below the level of head of state, *see, e.g., id.* at 47–50, contentions for which they can provide no authority.

A State Department determination of a foreign official's immunity is an exercise of the President's constitutional authority over foreign affairs. As the Supreme Court explained before the FSIA was enacted:

> [I]t is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in [cases involving foreign

> sovereign immunity], that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.

Hoffman, 324 U.S. at 35 (quotation marks omitted); *see Spacil*, 489 F.2d at 619 ("Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." (deferring to State Department suggestion of immunity)).

Suits against foreign officials below the head of state can have serious implications for the Executive Branch's conduct of foreign affairs. And, as the Supreme Court noted in *Samantar*, courts historically have deferred to the State Department's immunity determinations for officials below the head of state. *See* 130 S. Ct. at 2290 (citing *Greenspan v. Crosbie*, No. 74 Civ. 4734(GLG), 1976 WL 841 (S.D.N.Y., Nov. 23, 1976) (dismissing provincial officials from suit pursuant to State Department immunity determination)); *see also, e.g.*, Opinion an Order, *Ahmed v. Magan*, No. 2:10-cv-342 (E.D. Va. Nov. 7, 2011) (denying motion to dismiss by former Chief of the National Security Service of Somalia Department of Investigations based on State Department determination that defendant is not immune from suit); *Li Weixum v. Bo Xilai*, 568 F. Supp. 2d 35, 38–39 (D.D.C. 2008) (dismissing suit against Chinese Minister of Commerce based on State Department

suggestion of immunity); *Republic of Philippines v. Marcos*, 665 F. Supp. 793, 798–800 (N.D. Calif. 1987) (quashing subpoena against Philippine Solicitor General based on State Department suggestion of immunity).

Suits against former foreign officials also can adversely affect the nation's foreign relations interests. Under international law, a foreign official's immunity is not a personal right but is for the benefit of the foreign state. *See, e.g., Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belgium)*, 2002 I.C.J. 3, ¶ 61 (Feb. 14). Suits against former foreign officials involving conduct taken in an official capacity thus remain of concern to foreign states even after the official leaves office, and foreign states expect the Executive Branch to suggest their former official's immunity in appropriate cases, as Colombia did here. *See* JA 199–200. Courts recognize the importance to our nation's foreign affairs of the Executive Branch's ability to suggest the immunity of former foreign officials and routinely defer to such determinations. *See, e.g., Matar*, 563 F.3d at 14 (dismissing suit against former head of Israeli Security Agency based on State Department suggestion of immunity); *Wei Ye*, 383 F.3d at 625–27 (deferring to suggestion of immunity for former Chinese President Jiang Zemin, who left office during pendency of litigation).

Indeed, we are aware of no case in which an incumbent or former foreign official was subjected to a court's jurisdiction or to compulsory process after the State Department determined that the official was immune.[7]

C. Plaintiffs' Exhaustion Argument Lacks Merit.

The district court determined that all of the information plaintiffs currently seek came within the State Department's immunity determination. *Giraldo*, 808 F. Supp. 2d at 251. Deferring to the Executive Branch's foreign relations concerns, the district court also ordered plaintiffs to "exhaust other reasonably available means for obtaining the information" before seeking to depose Uribe concerning matters for which Uribe is not immune. *Ibid.* Plaintiffs contend that the district court lacked

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[7] Plaintiffs separately argue that Congress abrogated foreign official immunity in suits brought under the Torture Victim Protection Act and the Alien Tort Statute. Pls.' Br. 28–33. That is incorrect. Courts construe statutes creating rights of action or establishing jurisdiction in harmony with background immunity principles. *See, e.g., Manoharan v. Rajapaksa*, No. 11-235, 2012 WL 642446, at *4 (D.D.C. Feb. 29, 2012) (concluding that the Torture Victim Protection Act did not displace the Executive Branch's preexisting authority to determine the immunity of foreign officials); *Lafontant v. Aristide*, 844 F. Supp. 128, 138 (E.D.N.Y. 1994) (same); *cf. also Malley v. Briggs*, 475 U.S. 335, 339 (1986) ("Although [42 U.S.C. § 1983] on its face admits of no immunities, we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." (internal quotation marks and citation omitted)). In any event, plaintiffs' argument is irrelevant because Uribe is not a defendant in plaintiffs' suit. Plaintiffs fail to show that either the Torture Victim Protection Act or the Alien Tort Statute could plausibly be construed as affecting the immunity of a foreign official not a defendant in a suit brought under those statutes.

authority to impose such a requirement on them. Pls.' Br. 51–56. That argument lacks merit.

The Supreme Court has recognized that district courts have "broad discretion to tailor discovery narrowly." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *see also Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219, 221 (D.C. Cir. 2009) (this Court "review[s] the district court's limits on discovery for abuse of discretion"). In particular, in the context of discovery involving a foreign litigant, the Supreme Court has explained that district courts should "demonstrate due respect * * * for any sovereign interest expressed by a foreign state." *Société Nationale*, 482 U.S.at 546. This Court, moreover, has directed district courts to take comity into account when ruling on discovery motions concerning foreign officials. *See In re Papandreou*, 139 F.3d at 254.

The United States informed the district court that the Government of Colombia had asked the State Department to seek to quash plaintiffs' motion to compel. JA 195, 199–200, 205. The United States further informed the court that the State Department had determined that it is in the United States' own foreign relations interests to require plaintiffs to exhaust other means of obtaining information not within the immunity determination. JA 195, 197, 205. And the United States cautioned that the standards the district court employed in this case

could be reciprocally applied to U.S. officials in foreign litigation. JA 197, 206. The district court relied on these considerations in directing plaintiffs to exhaust other available means of obtaining information before seeking to depose Uribe about any matters for which he is not immune. *Giraldo*, 808 F. Supp. 2d at 251–52.

Plaintiffs make no attempt to demonstrate that the district court abused its discretion in imposing this exhaustion requirement. They object that the district court cited no "authority for the proposition that the State Department is entitled to weigh in on the terms of discovery." Pls.' Br. 54. Plainly, however, the district court was entitled to consider the national interests identified by the United States' filing. The district court acted well within its broad discretion in accommodating those significant concerns, and plaintiffs offer no persuasive reason to set its ruling aside.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order denying plaintiffs' motion to compel former Colombian President Uribe's testimony.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Fed. R. App. P. 29(d) because it uses proportionately spaced, 14-point font and contains 5,764 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Cir. R. 32(a)(1).

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August 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 3d day of August, 2012, I caused the foregoing Brief for the Appellants to be filed with the Court by ECF with eight paper copies subsequently to be delivered to the Court by courier, and I caused one copy to be served by ECF on all counsel of record.

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