No. 21-1338

In the
Supreme Court of the United States

NSO GROUP TECHNOLOGIES LIMITED AND
Q CYBER TECHNOLOGIES LIMITED,

Petitioners,

v.

WHATSAPP INC. AND META PLATFORMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

SUPPLEMENTAL BRIEF OF PETITIONERS

Petitioners ("NSO") submit this supplemental brief to address the Solicitor General's brief. The Solicitor General endorses several of NSO's key arguments and identifies no valid basis for denying review. The Court should grant the petition for certiorari.

ARGUMENT

I. The government agrees that the Ninth Circuit incorrectly decided an important question of law.

Although this Court asked the government to provide its views on the question presented by NSO's petition, the government conspicuously avoids providing a straight answer to that question: Whether the FSIA "entirely displaces common-law immunity for entities." Pet. i. But despite being unwilling to come right out and say it, the Solicitor General's brief makes clear that the Ninth Circuit was wrong to hold that the FSIA categorically prohibits entities from seeking common-law conduct-based immunity even when, like NSO, they act as agents of foreign governments.

The government states it cannot "endorse" the Ninth Circuit's "categorical holding," SG Br. 7, and for good reason. Immunity under the FSIA is "*status-based*": it "address[es] only entities that Congress determined should be covered by a foreign state's *sovereign* immunity because they are so closely connected with the foreign state that they are deemed to be part of the state itself." *Id.* at 9. That is "distinct from the question whether a more limited form of

conduct-based immunity could be recognized for specific acts undertaken on behalf of a foreign state by an entity." *Id.* Contrary to the Ninth Circuit's decision, the FSIA "does not necessarily resolve" that question of "conduct-based immunity." *Id.* at 10.

The government thus endorses one of NSO's central arguments. NSO has explained that "[t]he FSIA's definition of 'foreign state' incorporates entities that, because they are state-owned 'agenc[ies] or instrumentalit[ies],' are equivalent to foreign states." Pet. Reply 11. As a result, the FSIA "limits … which entities possess immunity *as foreign states*," but not which entities can seek conduct-based immunity as foreign agents. *Id.* The government plainly agrees with these points, even if it cannot bring itself to say so.

The government also agrees with NSO that the question presented is "important." SG Br. 14. The Ninth Circuit's decision improperly "foreclose[s] the Executive Branch from recognizing the propriety of [conduct-based] immunity in a particular context in the future even if such a recognition were found to be warranted." *Id.* at 7; *see also id.* at 11, 13. Based on that consequence, the government seemingly agrees that the question presented would be worthy of this Court's review in what the government deems an appropriate case. *See id.* at 14 (identifying circumstances in which "the Court should take up that important and difficult question").

II. Whether NSO should ultimately receive common-law immunity is irrelevant to the question presented.

1. Despite agreeing with NSO that the Ninth Circuit incorrectly decided an important legal question in a way that negatively affects the United States' interests, the government opposes review. It claims to do so because, it argues, NSO is not entitled to conduct-based immunity—even though other entities could be "in a particular context or circumstance." SG Br. 13. But as NSO has already explained, whether it will receive conduct-based immunity on remand is irrelevant to whether the Court should grant the petition for certiorari. Pet. Reply 7-8. The question presented is not whether NSO's conduct-based immunity defense should ultimately succeed. The question is what law governs NSO's defense—the FSIA or the common law. That "important" question, SG Br. 16-17, is worthy of review even if NSO's defense ultimately fails.

This Court faced a similar situation in *Samantar v. Yousuf*, 560 U.S. 305 (2010). There, the court of appeals had held that the defendant was not entitled to FSIA immunity because "the FSIA does not apply to individual foreign government agents." *Id.* at 310. The defendant's petition asked the Court to decide "[w]hether a foreign state's immunity from suit under the [FSIA] extends to an individual acting in his official capacity on behalf of a foreign state." Pet. for Cert. i, *Samantar*, 560 U.S. 305 (No. 08-1555), 2009 WL 1759041. The plaintiffs opposed review, in part, by arguing that "the unique circumstances presented" made the case "a poor vehicle for determining the rules

of sovereign immunity that will apply to nations worldwide." BIO 11, *Samantar*, 560 U.S. 305 (No. 08-1555), 2009 WL 2776860. Among those circumstances was the fact that the State Department had not issued a "statement of immunity" for the defendant. *Id.* at 12.

This Court granted review nonetheless. And it decided the question presented solely as an abstract matter of statutory interpretation. *See* 560 U.S. at 313 ("We begin with the statute's text and then consider … its history and purpose."); *id.* 326-29 (concurring opinions) (relying exclusively on FSIA's text). Nowhere did the Court consider the defendant's particular circumstances or suggest that they were relevant to the FSIA's meaning. To the contrary, the Court expressly avoided addressing "[w]hether petitioner may be entitled to immunity under the common law." *Id.* at 325. It left that question "to be addressed in the first instance by the District Court on remand." *Id.* at 326.

The Court should take the same approach here. As the government admits, the Ninth Circuit interpreted the FSIA in a way that does not depend on the "particular context" of this or any case. SG Br. 7, 13; *see* App. 18-19 ("The proper analysis begins and ends with the FSIA"). This Court can do the same. The FSIA either displaces common-law immunity for *all* entities or *none* of them—whether or not they are similarly situated to NSO. *See* App. 12 ("If an entity does not fall within the [FSIA's] definition of 'foreign state,' it cannot claim foreign sovereign immunity. Period."). The government thus cannot explain how NSO's particular circumstances bear on "whether the

FSIA should be read to categorically displace … common-law immunity" for entities. SG Br. 15.

2. In any event, NSO's circumstances do not support the government's conclusion that it cannot receive common-law immunity. Although the government at times insinuates otherwise, conduct-based immunity does not depend on an ad-hoc, standardless assessment of whether the State Department chooses to support a particular defendant. While the State Department may grant common-law immunity by issuing a "suggestion of immunity," it does not follow that a defendant cannot receive common-law immunity *without* a suggestion of immunity. *Samantar*, 560 U.S. at 311-12. "[I]n the absence of recognition of the immunity by the Department of State," *courts* have the "authority" to decide "whether the ground of immunity is one which it is the established policy of the State Department to recognize." *Id.* (cleaned up).

Here, the relevant "ground of immunity," *id.*, is the well-established conduct-based immunity that an "agent of the state" enjoys "with respect to acts performed in his official capacity." *Id.* at 321 (quoting Restatement (Second) of Foreign Relations Law of the United States § 66 (1965)). By focusing specifically on whether the State Department has "recogniz[ed] a conduct-based immunity for a *private entity* acting as an agent," the government defines the test too narrowly. SG Br. 13-14 (emphasis added). Conduct-based immunity "does not depend on the *identity* of the person or entity [seeking immunity] so much as the *nature of the act* for which the person or entity is claiming immunity." *Herbage v. Meese*, 747 F. Supp.

60, 66 (D.D.C. 1990). The agent's "status" is thus irrelevant if "the act was performed on behalf of the foreign state." *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 12-13 (D.D.C. 2014). That is no doubt why the government agrees that it could suggest conduct-based immunity for entities as well as individuals. *E.g.*, SG Br. 13.[1] And the "factors" the State Department claims it "could consider" for an entity are no different than the factors it considers for individuals. *Id.* at 11.

There is, therefore, no reason to treat conduct-based immunity for entities as a distinct "ground of immunity" separate from "conduct-based immunity for individual foreign officials." SG Br. 10.[2] And so it does not matter whether "the United States []or any foreign sovereign has supported NSO's claim to immunity" or whether NSO has "identified the foreign sovereigns for which it claims to have acted as an

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[1] The government also acknowledges, albeit begrudgingly, that international law has recognized conduct-based immunity for entities. SG Br. 10-11 n.3.

[2] The government worries that a private entity might seek conduct-based immunity for commercial activity that the FSIA would not protect if performed by a state-owned entity. SG Br. 12. That would surely be a factor the State Department or a court could consider when appropriate, but this case presents no such concern. The conduct alleged in respondents' complaint—the "collect[ion] [of] foreign intelligence" through surveillance technology—is "peculiarly sovereign conduct" for which a state-owned entity would be immune under the FSIA. *Broidy Cap. Mgmt., LLC v. Qatar*, 982 F.3d 582, 595 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2704 (2021). That is precisely why respondents sued NSO as an end-run around the FSIA immunity of NSO's government clients.

agent." *Id.* at 15. All that matters is whether NSO, like the many individual agents for whom the State Department *has* suggested conduct-based immunity, carried out the alleged conduct at issue in this case as an agent of foreign governments. SG Br. 10. The district court found, as a matter of fact, that NSO did exactly that. App. 35.[3]

Nor is it relevant that "the United States added NSO to the 'Entity List.'" SG Br. 15.[4] The government identifies no previous instance—and NSO is not aware of any—in which the State Department has rejected a claim of common-law immunity based on its assessment that the defendant's alleged activities are "contrary to the national security or foreign policy interests of the United States." *Id.* The State Department routinely recommends common-law immunity for defendants accused of extrajudicial killings, terrorism, war crimes, torture, and the like—conduct of an entirely different order than anything respondents allege NSO did—while emphasizing that it condemns those actions as a foreign-policy matter. *See* Pet. Reply 9. Just a few weeks ago, in fact, the government told a federal court that Saudi Arabia's

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[3] The government is thus wrong to argue that the record is inadequate to support NSO's defense. SG Br. 15; *see* Pet. Reply 8. But if more facts were required to assess whether NSO is entitled to conduct-based immunity, NSO could develop those facts in the district court after remand. The Ninth Circuit's decision deprives NSO of that opportunity because it "foreclose[s]" conduct-based immunity for all entities in all circumstances. SG Br. 7, 11, 13.

[4] NSO has appealed the Treasury Department's decision to place it on the Entity List, which NSO believes is legally and factually unsupported. That appeal remains in progress.

prime minister is entitled to common-law head-of-state immunity for his alleged role in the "heinous murder of Jamal Khashoggi," despite the State Department's "unequivocal condemnation" of that act. DOJ Letter at 1 (Ex. A), *Cengiz v. bin Salman*, No. 20-cv-3009 (D.D.C. Nov. 17, 2022), ECF No. 53-1. In light of the State Department's established practice of recommending common-law immunity for defendants accused of murder, terrorism, war crimes, and torture, the government cannot credibly claim that NSO—which provides governments technology to *prevent* terrorism—cannot receive common-law immunity due to its presence on the Entity List.

III. The decision below conflicts with *Samantar* and decisions of the D.C. and Fourth Circuits.

The government's argument that the Ninth Circuit's decision is consistent with *Samantar* rests on an unjustifiably narrow interpretation of *Samantar*'s reasoning. While it is true that "*Samantar* did not address the specific issue presented here," SG Br. 17, its rationale still controls. The Court recognized that the FSIA "governs the determination of whether a *foreign state* is entitled to sovereign immunity," so it reached its conclusion that the FSIA does not apply to individual government agents based on its interpretation of the FSIA's definition of "foreign state." 560 U.S. at 313-14 (emphasis added). And it concluded that when a plaintiff's claim "is not a claim against a foreign state as the Act defines that term," it "is properly governed by the common law." *Id.* at 325. The Ninth Circuit's decision conflicts with that rationale because it held that the FSIA governs claims

against entities that everyone agrees are *not* "foreign state[s] as the Act defines that term." *Id.*; *see* App. 3, 12.

The government's attempts to distinguish *Broidy Capital Management LLC v. Muzin*, 12 F.4th 789 (D.C. Cir. 2021), and *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), fare no better. Unlike respondents, BIO 12-13, the government at least admits that *Broidy* involved an entity defendant and that the D.C. Circuit analyzed the entity's conduct-based immunity defense under the common law, SG Br. 18-19. But the government does not acknowledge, let alone address, the D.C. Circuit's holding that "claims of immunity" by "private entities" must "rise or fall not under the FSIA, but the residual law and practice that the FSIA did not displace." 12 F.4th at 802. The Ninth Circuit held the exact opposite, creating a conflict—as the Ninth Circuit itself recognized. App. 15 n.5.

Nor does the government address NSO's showing that *Butters*—although decided before *Samantar*, when some courts analyzed conduct-based immunity under the FSIA—has been understood as granting conduct-based immunity to an entity. Pet. 12; Pet. Reply 4. The government denies that "*Butters* is 'instructive' in considering questions of common-law immunity," SG Br. 21, but it ignores the post-*Samantar* cases that have relied on *Butters* to grant conduct-based immunity to private agents. *Ivey ex rel. Carolina Golf Dev. Co. v. Lynch*, No. 17CV439, 2018 WL 3764264, at *2, *6-7 (M.D.N.C. Aug. 8, 2018); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 277 & n.34 (S.D.N.Y. 2015). Those cases confirm that

Butters is inconsistent with the decision below. *See* App. 17 n.6 (criticizing *Butters*).

CONCLUSION

This Court should grant the petition for certiorari.

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