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

REPLY BRIEF FOR PETITIONERS

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In an attempted end-run around foreign sovereign immunity, Respondents sued a foreign government contractor as a proxy for the governments that use the contractor's technology. C.A. ER 53, 96. In the Fourth or D.C. Circuits, the defendant could have sought common-law conduct-based immunity as an agent of foreign governments. But the Ninth Circuit created a split of authority by holding that, unlike private individuals, entities can receive immunity only if they are *components* of a "foreign state" under the Foreign Sovereign Immunities Act ("FSIA")—leaving private entities that serve the same functions as government-owned entities categorically ineligible for immunity. App. 12, 17-19.

That decision, which conflicts with this Court's precedent, is dangerously wrong. Precluding private entities from seeking common-law conduct-based immunity will not merely hinder *foreign* governments from contracting with private entities. It also will impede the United States' ability to protect its national security, because the government relies heavily on private contractors to provide the technology and expertise necessary to defend the nation against foreign and domestic threats. This Court's intervention is imperative.

To distract from the circuit split and the drastic consequences created by the decision below, Respondents point—over and over again—to the fact that NSO is on the Commerce Department's Entity List. But NSO's petition presents a pure legal question: Does common-law immunity for private entities survive the FSIA? The decision below is

absolute in precluding entities from invoking common-law immunity regardless of the nature of their work as government agents: "If an entity does not fall within the [FSIA's] definition of 'foreign state,' it cannot claim foreign sovereign immunity. Period." App. 12. Given that absolute, threshold holding, NSO's petition asks the Court only to decide whether the common law governs NSO's claim of immunity—not to apply the common law and decide, in the first instance, the merits of NSO's claim. The Ninth Circuit's holding covers every government contractor providing humanitarian aid, life-saving medical care, or military support. In the Ninth Circuit, a foreign contractor providing any of these services would be just as ineligible as NSO to seek common-law immunity. And if foreign courts follow that precedent, U.S. companies that supply technology, armaments, and other essential supplies to the United States will be equally exposed to litigation around the world.

If anything, Respondents' reliance on the Entity List confirms that the Court, if it does not grant the petition outright, should request the Solicitor General's views. Respondents ask this Court to defer to their own guesses about what the government thinks, but the better course is for the Court to invite the government to speak for itself. The question presented is too important to start and stop with Respondents' speculation.

I. The Ninth Circuit's decision conflicts with decisions from other circuits.

Until the Ninth Circuit's decision, no court had held that the FSIA forbids a private entity from seeking common-law conduct-based immunity. To the

contrary, the Fourth and D.C. Circuits have recognized that private entities may be eligible for conduct-based immunity. Pet. 11-13.

1. Respondents cannot distinguish *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), on the basis that the Fourth Circuit's holding rested on derivative immunity rather than conduct-based immunity. BIO 13-14. Although *Butters* may not have used the words "conduct-based immunity," it applied the same test, holding that private agents are immune "when following the commands of a foreign sovereign employer." 225 F.3d at 466. And it did so based on conduct-based immunity's rationale, observing that "courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved." *Id.* The Fourth Circuit has recognized this point. *See Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004) (recognizing that *Butters* addressed the "expansion of foreign sovereign immunity" to foreign agents). And whatever label Respondents prefer for the foreign-agent immunity at issue in *Butters*, the undisputed bottom line is that *Butters* granted that immunity to a private entity. The Ninth Circuit, in contrast, held that private entities can never receive such immunity under any label, expressly disagreeing with *Butters* in the process. App. 17 n.6.

Respondents also argue that *Butters* was "abrogated" by *Samantar v. Yousuf*, 560 U.S. 305 (2010), BIO 14, but *Samantar* nowhere rejects *Butters*'s holding that private entities are immune when they act as foreign governments' agents. That

holding—as with other pre-*Samantar* decisions interpreting the FSIA—remains "instructive for post-*Samantar* questions of common law immunity." *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012); *see* Ved P. Nanda et al., 1 Litigation of International Disputes in U.S. Courts § 3:59 n.134 (updated Feb. 2022) (citing *Butters* as good law).

Butters's relevance to common-law immunity is confirmed by post-*Samantar* decisions relying on *Butters* to grant common-law 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). Respondents dismiss these as district-court decisions that, as such, cannot create a circuit split, BIO 15 n.6, but that misses the point: *Ivey* and *Moriah* confirm that *Butters* involved the same common-law conduct-based immunity that the Ninth Circuit categorically rejected, and thus confirm that the Fourth and Ninth Circuits are split. Pet. 12.

2. In fact, the D.C. Circuit explained in *Broidy Capital Management LLC v. Muzin*, 12 F.4th 789, 802 (2021), that private entities can seek common-law immunity after *Samantar*. Respondents' assertion that *Broidy* did not *really* involve a private-entity defendant because the entity was owned by two individual defendants, BIO 12-13, is bizarre. The D.C. Circuit identified one of the defendants as a private "public relations consulting firm." 12 F.4th at 793. And it unambiguously analyzed that entity's immunity defense under the standards for common-law conduct-based immunity. *Id.* at 799-802.

That is because, as the D.C. Circuit explained, "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*." *Id.* at 802 (emphasis added). That language was not "dicta." BIO 13. Without it, the court could not have applied the test for common-law conduct-based immunity to the entity defendant's immunity defense. Unlike Respondents, the Ninth Circuit recognized this point, criticizing *Broidy* for "presum[ing] ... that the common law applied to 'private entities or individuals.'" App. 15 n.5 (quoting *Broidy*, 12 F.4th at 802). That is a clear and acknowledged split between the Ninth and D.C. Circuits, which this Court should resolve.

II. This case is an ideal vehicle to resolve the important question presented.

1. As NSO explained, the question presented is important because the Ninth Circuit's decision will expose U.S. contractors to similar suits in foreign courts. Pet. 14-18. Contrary to Respondents' argument, this is not "speculation." BIO 23. The United States' contractors are frequently sued in the United States, where courts have developed doctrines to prevent such suits from interfering with governmental activities. *E.g.*, *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988) (government-contractor defense); *In re KBR, Inc.*, 893 F.3d 241 (4th Cir. 2018) (political question doctrine); *Saleh v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009) (preemption).[1] But if the Ninth

[1] This Court recently called for the views of the Solicitor General in one such case. *Midwest Air Traffic Control Serv., Inc. v. Badilla*, No. 21-867 (U.S. May 2, 2022).

Circuit's decision is allowed to stand, no similar protections will exist for U.S. contractors sued in foreign courts. There is no reason to doubt that the United States' adversaries will take advantage of that opening to obstruct the United States' intelligence and military operations. Respondents, for their part, filed this lawsuit in an avowed effort to prevent governments from relying on contractors in intelligence and law-enforcement operations. Pet. 17.

Indeed, the Solicitor General has warned that "[i]f the United States permits suits against foreign sovereigns," then "foreign states may reciprocate by permitting similar claims against the United States in their tribunals." Brief for the United States as *Amicus Curiae* at 22-23, *Odhiambo v. Republic of Kenya*, No. 14-1206 (U.S. May 24, 2016), 2016 WL 2997336. So too in the context of conduct-based immunity, where the Solicitor General has warned that actions against foreign officials in U.S. courts could prompt reciprocal treatment of U.S. officials in foreign courts. Brief for the United States as *Amicus Curiae* at 16, *Mutond v. Lewis*, No. 19-185 (U.S. May 26, 2020), 2020 WL 2866592. Respondents cannot explain why this concern would evaporate merely because the government agent is a private entity.

Thus, Respondents' attempt to downplay the importance of the question presented, BIO 22-23, is makeweight. Governments routinely rely on private-entity agents. Contractors are essential to the United States, the self-proclaimed "world's largest customer" for contractors. U.S. Small Bus. Admin., *Become a Federal Contractor*, https://bit.ly/39b6hq4. Whether here or abroad, governments regularly and necessarily

"delegate governmental functions" to private entities because they "cannot perform all necessary and proper services" alone. *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996). The decision below threatens governments' ability to rely on private contractors.

2. Unable to identify any genuine vehicle problems obstructing this Court's review of the important question presented, Respondents proffer fake ones.

a. Respondents cannot transform the purely legal question presented by this petition into one that requires further factual development. The question presented by NSO's petition is not, as Respondents suggest, whether NSO's common-law immunity defense will ultimately succeed. BIO 26. The question is what law governs NSO's claim—the FSIA or the common law. The Ninth Circuit answered that question as a pure matter of statutory interpretation that does not turn on any disputed facts. App. 2-3, 18-19. And the legal question is worthy of review, no matter whether Respondents argue on remand that NSO is not entitled to common-law immunity on the facts. This Court routinely grants certiorari to clarify the relevant legal standard, then lets lower courts apply the standard in the first instance. That is what the Court did in *Samantar*, 560 U.S. at 325-26, and it should do the same here.[2]

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[2] Because NSO does not ask the Court to apply the common law and decide in the first instance whether NSO should *receive* immunity, Respondents' arguments that NSO would lose under the common law are irrelevant. BIO 18-22. For what it's worth, though, there is no coherent reason to exclude private entities

In any event, Respondents forfeited their factual arguments. In the district court, NSO raised a "factual" challenge to subject-matter jurisdiction by submitting evidence to support its entitlement to immunity. App. 32. That shifted the burden to Respondents to "furnish affidavits or other evidence necessary to satisfy [their] burden of establishing subject matter jurisdiction." App. 25 (quoting *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)). But Respondents did not submit *any* evidence or otherwise dispute NSO's evidence. The district court thus found it undisputed that NSO is an "agent[] of foreign governments" that acted entirely within its "official capacity." App. 35. The Ninth Circuit did not upset that finding. As the case comes to this Court, therefore, it is established that NSO acted as the agent of foreign sovereigns. It is too late for Respondents to argue otherwise now.

b. Respondents also argue that NSO cannot receive common-law conduct-based immunity because it is on the Entity List. BIO 26. Again, though, whether NSO should ultimately receive conduct-based immunity is not the question presented.

That aside, Respondents offer no authority for their position—because none exists. The relevant

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alone from common-law immunity, which Respondents concede protects private individuals. BIO 12, 20-21. Conduct-based immunity, after all, "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, 13 (D.D.C. 2014).

question for common-law immunity is whether a defendant satisfies the legal test the State Department has previously applied to requests for such immunity. *Samantar*, 560 U.S. at 312. The question is *not*, as Respondents would have it, whether the current Administration supports a specific defendant's alleged conduct as a policy matter. BIO 26. Foreign sovereign immunity applies even when a defendant is sued for violating federal or international law. *Federal Republic of Germany v. Philipp*, 141 S. Ct. 703, 713 (2021); *Saudi Arabia v. Nelson*, 507 U.S. 349, 361-62 (1993). The United States has thus recommended conduct-based immunity for defendants accused of far worse conduct than anything Respondents claim NSO did. *E.g.*, Statement of Interest at 1, *Rosenberg v. Lashkar-E-Taiba*, No. 1:10-cv-05381 (E.D.N.Y. Dec. 17, 2012), ECF 35 (recommending immunity for defendants allegedly involved in "terrorist attacks" that "[t]he United States strongly condemns"); Statement of Interest at 1-2, *Matar v. Dichter*, No. 05 Civ. 10270 (S.D.N.Y. Nov. 17, 2006), ECF 36 (suggesting immunity for official accused of "war crimes," "crimes against humanity," and "extrajudicial killing" for role in "military attack" to which "the United States has voiced serious objections" (cleaned up)); *see Mutond Amicus* Br. at 17-20 (arguing conduct-based immunity protects foreign officials who engage in "heinous acts" of torture). This history disproves Respondents' unsupported assertion that the government would never "support immunity" for "activities it has determined are contrary to U.S. national security or foreign policy." BIO 26.

c. Finally, Respondents' argument that this Court must decide whether the Ninth Circuit properly exercised appellate jurisdiction before reaching the question presented, BIO 29-30, is meritless. This Court is not a "court[] of appeals" whose jurisdiction is limited to review of final judgments. 28 U.S.C. § 1291. Instead, this Court has certiorari jurisdiction over any "judgment" in any "[c]ase[] in the courts of appeals." *Id.* § 1254(1); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-42 (1982); *see Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (section 1254(1) allows "certiorari review of interlocutory orders of federal courts").

That clearly covers the decision below. The Ninth Circuit held that it had jurisdiction over NSO's appeal, App. 5-6, and Respondents have not cross-petitioned for review of that holding. This Court thus has jurisdiction to review the Ninth Circuit's "judgment" that the FSIA precludes common-law immunity for private entities, 28 U.S.C. § 1254(1), irrespective of whether the Ninth Circuit correctly held that it had collateral-order appellate jurisdiction.[3]

[3] If it mattered, the Ninth Circuit was correct to hold that it had appellate jurisdiction. "[C]ommon law" conduct-based immunity is "'an immunity from *suit*,'" *Doğan v. Barak*, 932 F.3d 888, 895 (9th Cir. 2019), that can be raised in an interlocutory appeal, *Farhang v. Indian Inst. of Tech.*, 655 F. App'x 569, 570 (9th Cir. 2016); *Yousuf*, 699 F.3d at 768 n.1. The D.C. Circuit held the same in *Broidy*, rejecting Respondents' exact argument. 12 F.4th at 796-97.

III. The decision below conflicts with *Samantar*.

Although the Court should grant certiorari regardless of its view of the merits of the Ninth Circuit's decision, Respondents are wrong that the decision is consistent with *Samantar*. BIO 16-17; *see* Pet. 19-21. As *Samantar* explained, the FSIA governs only "whether a *foreign state* is entitled to sovereign immunity." 560 U.S. at 313 (emphasis added). The FSIA's definition of "foreign state" incorporates entities that, because they are state-owned "agenc[ies] or instrumentalit[ies]," are equivalent to foreign states. *Id.* at 314; *see* 28 U.S.C. § 1603(a)-(b). But that definition limits only which entities possess immunity *as foreign states*. When a plaintiff sues a defendant that is not "a foreign state as the [FSIA] defines that term," the FSIA does not displace the common law. *Samantar*, 560 U.S. at 325.

It is thus not true that the FSIA "comprehensively addresses immunity for entities." BIO 10. The FSIA is "comprehensive" only "for suits against *states*." *Samantar*, 560 U.S. at 323 (emphasis added). Some entities are, by statutory definition, "foreign states." *Id.* at 325. Some are not. And when they are not, the FSIA has nothing to say about the availability of immunity. *Id.* In that instance, immunity is "governed by the common law." *Id.* The Ninth Circuit, however, held exactly the opposite—that the FSIA "displaced common-law sovereign immunity" for entities not falling within the FSIA's definition of "foreign state." App. 3, 12.

IV. The Court should consider inviting the Solicitor General's views.

Given the importance of the question presented to the United States' reliance on contractors, Respondents cannot persuasively argue that calling for the views of the Solicitor General is unwarranted merely because the government did not file a brief below. BIO 31. The Court frequently calls for the Solicitor General's views on petitions raising immunity questions, Pet. 21-22, even when the government did not participate in the lower courts. *Compare* CVSG, *Mutond*, No. 19-185 (U.S. Jan. 21, 2020), *with* Docket, *Mutond*, No. 17-7118 (D.C. Cir.), *and* Docket, *Mutond*, No. 1:16-cv-01547-RCL (D.D.C.).

If anything, inviting the Solicitor General's views is even *more* appropriate in such cases, where the Court has no other way to learn the United States' position. Respondents' opposition to certiorari largely depends on their speculation that the government would not support NSO. But Respondents are in no better position than NSO to discern the government's views on legal questions—such as whether immunity is categorically unavailable to U.S. contractors and other private entities, or even whether a defendant's presence on the Entity List is relevant to immunity—that the government has never before had an opportunity to address. If the Court believes the government's opinion on those questions would assist its consideration of this petition, it should call for the Solicitor General's views.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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