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

SUPPLEMENTAL BRIEF OF RESPONDENTS

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000

Michael R. Dreeben
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
(202) 383-5300
mdreeben@omm.com

SUPPLEMENTAL BRIEF OF RESPONDENTS

NSO's petition expressly requested that this Court call for the views of the Solicitor General. It explained that such an invitation was appropriate because "Respondents have speculated that the government would oppose NSO's immunity claim," but "the government has not yet had an opportunity to speak for itself on the legal issue." Pet. 22. The petition also asserted that the government has "concerns about decisions that could expose its agents to reciprocal lawsuits abroad—which is precisely what the decision below portends." *Id.* Indeed, NSO noted that "inviting the Solicitor General's views" was especially "appropriate" because the government's position on immunity is crucial, yet "the Court has no other way to learn the United States' position," Reply 12, without calling for the Solicitor General's views.

The United States has now presented its position, and it is unequivocal—NSO is not entitled to immunity, and this case is not worthy of this Court's review. The government took no definitive position on the question whether the Foreign Sovereign Immunities Act categorically precludes foreign entities' claims of common-law immunity. U.S. Br. 7. But the government explained that the answer to that question did not matter because "NSO plainly is not entitled to immunity here." *Id.* That is so because:

- "The State Department has not filed a suggestion of immunity in this case." *Id.*
- There "is no established practice—or even a single prior instance—of the State Department

suggesting an immunity for a private entity acting as an agent of a foreign state." *Id.*

- "[N]o foreign state has supported NSO's claim to immunity; indeed, NSO has not even identified the states for which it claims to have acted as an agent." *Id.*

The government also provided additional reasons to deny review beyond the lack of merit of NSO's claim of immunity. The government agreed with respondents that the decision below "does not conflict with any decision of this Court," *id.*, including *Samantar v. Yousuf*, 560 U.S. 305 (2010). It stated that the "question presented has not divided the courts of appeals—indeed, it has seldom arisen at all." U.S. Br. 7. "And this unusual case," it explained, "would be a poor vehicle for considering that question in any event." *Id.* Thus, the government concluded, the "petition for a writ of certiorari should be denied." *Id.*

Having requested that the Court seek the government's views about the certworthiness of this case—and having received the government's resounding "no"—NSO now requests that the Court disregard the government's views and grant review. NSO Supp. Br. 1-10. That suggestion lacks merit.

The many reasons for denying certiorari set forth in respondents' brief in opposition and in the government's invitation brief need not be repeated. Respondents submit this supplemental brief to address three mischaracterizations in NSO's supplemental submission.

First, NSO's primary ground for review—that the "government agrees that the Ninth Circuit incorrectly

decided" that the FSIA precluded private foreign entities from seeking common-law immunity, NSO Supp. Br. 1—overstates the government's position. In fact, the government said that the "United States is not prepared *at this time* to endorse that categorical holding," U.S. Br. 7 (emphasis added), but it did not definitively reject it either. Rather, the government explained reasons why that question may warrant a different conclusion in circumstances other than those presented in this case.

The government thus recognized that the structure of the FSIA and its legislative history provided support for the Ninth Circuit's decision, but (in the government's view) do not definitively resolve the issue for *all* entities. *Id.* at 8-10. At the same time, the United States noted that "NSO has not identified—and the United States is not aware of—any history of State Department suggestions of immunity on behalf of private entities acting as agents of foreign states." *Id.* at 10. Nevertheless, the United States suggested that it may favor a more nuanced approach under which the FSIA's effect on private-entity-immunity claims might differ depending on the circumstances. For example, the FSIA might preclude such claims when they involve commercial activity but might not necessarily do so when a private entity is assisting a foreign state "in connection with the exercise of certain core sovereign authority." *Id.* at 12-13.

That discussion concludes that "the FSIA need not be read to entirely foreclose the recognition of such an immunity in the future if the Executive—after considering the nature of the entity and its role as an agent and other relevant considerations . . .—determined

that a suggestion of immunity was appropriate in a particular context or circumstance." *Id.* at 13. But the Executive did not make such a determination here. *Id.* That falls well short of endorsing NSO's categorical position that the court below was wrong. *See* NSO Supp. Br. 1-2. And, importantly, the United States submitted that this Court should not address that legal issue in this case because "the prerequisites for any such immunity are not present here." U.S. Br. 13-14 (providing reasons). NSO provides no sound reason for this Court to reject the government's considered view.

Second, the government's submission definitively rejects one of NSO's principal arguments in favor of certiorari—*viz.*, that the Ninth Circuit's holding would disadvantage the United States by precluding it from arguing in foreign courts for federal-contractor immunity. *E.g.*, Pet. 15; Reply 6. NSO's speculation that the government had such reciprocity concerns was a major ground for NSO's urging the Court to call for the Solicitor General's views. *E.g.*, Pet. 22 (arguing that the Court should seek the government's views because the government "has expressed concerns about decisions that could expose its agents to reciprocal lawsuits"). Yet the government's brief was, again, unequivocal in rejecting NSO's assertion: The "United States does not agree" with NSO's contention that "the court of appeals' decision threatens the United States' ability to rely on private contractors abroad." U.S. Br. 16 n.6. The government's lack of concern with the reciprocity issues that NSO's petition raised further undermines its case for certiorari.

Third, the government's definitive conclusion that NSO is not entitled to common-law immunity renders the petition's vehicle problems—already substantial, *see* Opp. 25-31—insurmountable. NSO says that it does not matter whether it would ultimately be entitled to common-law immunity because this Court could decide whether the FSIA categorically precludes immunity and, if it does not, remand to conduct the common-law immunity analysis, as the Court did in *Samantar*. NSO Supp. Br. 3-5. The problem for NSO, though, is that the government's brief confirms that a remand here would be pointless.

The common-law immunity inquiry turns on whether the State Department has made a suggestion of immunity or, if it has not, whether "the ground of immunity is one which it is the established policy of the [State Department] to recognize." *Samantar*, 560 U.S. at 312 (internal quotation marks and citation omitted); *see* NSO Supp. Br. 5 (agreeing with this standard). NSO acknowledges that the State Department has not filed a suggestion of immunity. And through its brief in this Court, the State Department has now conclusively determined that it *would not* recognize NSO's immunity under its established policies. U.S. Br. 13-14. That determination closes the door on NSO's claim of immunity.

In *Samantar* itself, the court of appeals had remanded for a determination whether the former official could qualify for common-law immunity. 560 U.S. at 310-11. This Court did likewise after holding that the FSIA did not itself preclude that claim. *Id.* at 325-26. The United States favored a remand as well. U.S. Amicus Br. 28, No. 08-1555 (endorsing remand as the

"correct disposition" "to consider whether petitioner is entitled to official immunity under background principles recognized by the Executive and the courts"). Here, however, the United States has explained that background principles *refute* NSO's claim for immunity. And NSO does not explain how a court could conclude that NSO is entitled to immunity under established State Department policies when the State Department itself has determined that immunity is not warranted under those policies. *See* Opp. 22 (citing *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (it is "not for the courts . . . to allow an immunity on new grounds which the government has not seen fit to recognize")). NSO does not identify a single case that has recognized common-law immunity despite the State Department's determination that immunity is not warranted.

There is thus no possibility, in light of the government's brief, that NSO could succeed in its claim of immunity. If the Court is ever to consider the question presented in the petition, it should await a case where the answer to that question could plausibly make a difference. Here, it could not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Anton Metlitsky
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, NY 10036
(212) 326-2000

Michael R. Dreeben
Counsel of Record
O'MELVENY & MYERS LLP
1625 Eye Street N.W.
Washington, D.C. 20006
(202) 383-5300
mdreeben@omm.com

December 7, 2022