No. 21-_____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Foreign Sovereign Immunities Act entirely displaces common-law immunity for entities, such that private entities that act as agents for foreign governments may never under any circumstances seek common-law immunity in U.S. courts.

CORPORATE DISCLOSURE STATEMENT

NSO Group Technologies Limited's parent company is Q Cyber Technologies Limited, whose parent company is OSY Technologies. No publicly held company owns 10% or more of the stock of NSO Group Technologies Limited or Q Cyber Technologies Limited.

RELATED PROCEEDINGS

WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930 (9th Cir. 2021)

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PETITION FOR WRIT OF CERTIORARI

Petitioners NSO Group Technologies Limited and Q Cyber Technologies Limited (collectively, NSO) respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision (App.1-19) appears at 17 F.4th 930. The Ninth Circuit's order denying rehearing en banc (App.85) is unpublished. The district court's decision (App.20-84) appears at 472 F. Supp. 3d 649.

JURISDICTION

The Ninth Circuit issued its opinion on November 8, 2021 and denied rehearing on January 6, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the Appendix. App.86.

STATEMENT

A. Legal background

1. For more than 200 years, U.S. law has conferred immunity on foreign states and their agents. *See Samantar v. Yousuf*, 560 U.S. 305, 311-12, 321 (2010). That immunity "developed as a matter of common law." *Id.* at 311.

One form of common-law immunity protected foreign states, and a separate form protected foreign officials and other agents acting on the state's behalf. *See id.* at 320-22. The U.S. Attorney General

recognized the second form, known as "conduct-based" immunity, as early as 1797. Statement of Interest of the United States of America at 6, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-cv-10270), ECF No. 36 (*Matar* Statement); *see Suits Against Foreigners*, 1 Op. Att'y Gen. 45, 46 (1794); *Actions Against Foreigners*, 1 Op. Att'y Gen. 81, 81 (1797).

Following the Attorney General's opinion, this Court and others endorsed conduct-based immunity. *See Matar* Statement at 6-7. In *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), for example, this Court held that foreign officials are immune "for acts done within their own states, in the exercise of governmental authority, whether as civil officers or as military commanders." The basis for this immunity is that "the acts of the official representatives of the state are those of the state itself, when exercised within the scope of their delegated powers." *Underhill v. Hernandez*, 65 F. 577, 579 (2d Cir. 1895), *aff'd*, 168 U.S. 250; *accord Greenspan v. Crosbie*, No. 74 Civ. 4734, 1976 WL 841, at *1-2 (S.D.N.Y. Nov. 23, 1976); *Waltier v. Thomson*, 189 F. Supp. 319, 320-21 (S.D.N.Y. 1960); *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929).

Conduct-based immunity extended beyond foreign officials to "agent[s]" who "acted on behalf of the state." *Matar* Statement at 8, 10; *e.g.*, *Heaney v. Gov't of Spain*, 445 F.2d 501, 504 (2d Cir. 1971); *Belhas v. Ya'alon*, 515 F.3d 1279, 1285 (D.C. Cir. 2008). Because a "government does not act but through its agents," *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), it was the agent's "act itself and whether the act was performed on behalf of the foreign

state . . . that [was] the focus of the courts' holdings," *Rishikof v. Mortada*, 70 F. Supp. 3d 8, 13 (D.D.C. 2014). In other words, under the common law, any act performed "as an act of the State enjoys the immunity which the State enjoys," whether or not the agent is a government official. Hazel Fox, The Law of State Immunity 455 (2d ed. 2008).

"'[C]ustomary international law'" likewise grants immunity to "agent[s] for the government." *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 277 (S.D.N.Y. 2015) (quoting *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012)); *see Jones v. Ministry of Interior*, [2006] UKHL 26 [10] (U.K.) ("The foreign state's right to immunity cannot be circumvented by suing its servants or agents."). That is true even when the agent is a private actor. *Church of Scientology Case*, (1978) [Fed. Supreme Ct.] 65 ILR 193, 197-98 (Ger.). As long as the agent's challenged acts are related "to the official activities of the agency concerned," they "must be placed within the ambit of State conduct." *Id.* at 198.

3. In 1976, Congress passed the Foreign Sovereign Immunities Act to codify the common-law rules governing "claims of foreign states to immunity." *Samantar*, 560 U.S. at 313 (quoting 28 U.S.C. § 1602). The FSIA, "if it applies, is the 'sole basis for obtaining jurisdiction over a foreign state in federal court.'" *Id.* at 314 (quoting *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989)). The FSIA thus supersedes the common law for "foreign state[s]," but not for defendants that are not "foreign state[s] as the Act defines that term." *Id.* at 325.

The FSIA defines "foreign state" as the state itself, along with its "political subdivisions, agencies, and instrumentalities." *Id.* at 314; *see* 28 U.S.C. § 1603(a)-(b). And the Act "specifically define[s] 'agency or instrumentality'" to cover only an

> entity . . . (1) which is a separate legal person, corporate or otherwise, and (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

Samantar, 560 U.S. at 314-15 (quoting 28 U.S.C. § 1603(b)) (internal quotation marks omitted).

Those detailed definitions limit the cases to which the FSIA applies. *Id.* at 313-15. In *Samantar*, for example, this Court affirmed the Fourth Circuit's holding "that the FSIA does not apply to individual foreign government agents." *Id.* at 310. The FSIA's definition of "foreign state," the Court held, does not include foreign officials or agents. *Id.* at 314-16. And "Congress did not mean to cover other types of defendants never mentioned in the text." *Id.* at 319. So when a defendant is not "a foreign state as the Act defines that term," the FSIA does not apply. *Id.* at 325.

But that does not mean the FSIA *forbids* foreign officials and agents from seeking immunity under the common law. The common law historically protected "official[s] or agent[s] of the state" in different situations and on different terms than it protected

foreign states. *Id.* at 321. By "codify[ing] state immunity" in the FSIA, therefore, Congress neither "codif[ied]" nor "supersede[d]" the distinct common-law immunity that applies to foreign officials and agents. *Id.* at 321-22. Claims against such agents, who are not "foreign state[s] as the Act defines that term," are "properly governed by the common law." *Id.* at 325.

4. After the FSIA's enactment, therefore, immunity for foreign agents remains a matter of common law. *Id.* at 321, 324. Courts after 1976 continued to recognize conduct-based immunity for foreign officials and agents. *E.g.*, *Mireskandari v. Mayne*, 800 F. App'x 519, 519 (9th Cir. 2020), *cert denied*, 141 S. Ct. 840 (2020); *Doğan v. Barak*, 932 F.3d 888, 893-94 (9th Cir. 2019); *Yousuf*, 699 F.3d at 774-75; *Matar v. Dichter*, 563 F.3d 9, 14 (2d Cir. 2009); *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398-99 (4th Cir. 2004); *In re Estate of Marcos*, 25 F.3d 1467, 1472 (9th Cir. 1994); *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106 (9th Cir. 1990); *Rishikof*, 70 F. Supp. 3d at 13; *Smith v. Ghana Commercial Bank, Ltd.*, No. 10-4655, 2012 WL 2930462, at *10 (D. Minn. June 18, 2012), *adopted*, 2012 WL 2923543 (D. Minn. July 18, 2012), *aff'd*, No. 12-2795 (8th Cir. Dec. 7, 2012); *Herbage*, 747 F. Supp. at 66; *cf. Am. Bonded Warehouse Corp. v. Compagnie Nationale Air France*, 653 F. Supp. 861, 863-64 (N.D. Ill. Feb. 17, 1987) (holding that defendants "sued in their respective capacities as employees of Air France" would be immune for official acts).

The post-1976 case law has also recognized that *private* agents of a foreign state enjoy conduct-based immunity when acting in their capacity as foreign

agents. For example, the Fourth Circuit held in *Butters v. Vance International, Inc.*, 225 F.3d 462 (4th Cir. 2000), that a private security firm was immune for employment decisions it made while providing security services to Saudi Arabia. *Id.* at 466. *Butters* relied in part on *Alicog v. Kingdom of Saudi Arabia*, where the Fifth Circuit affirmed a decision holding that private agents of a Saudi prince were immune for actions they took at the prince's direction. 860 F. Supp. 379, 384-85 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (5th Cir. 1996) (table).

Other courts have reached the same conclusion. In *Moriah*, the court found a private Israeli citizen immune for actions he took "at the behest of the Israeli government" because "conduct-based immunity . . . extends beyond current and former government officials to individuals acting as an agent for the government." 107 F. Supp. 3d at 277-78 (cleaned up). Similarly, the court in *Ivey ex rel. Carolina Golf Development Co. v. Lynch*, No. 17cv439, 2018 WL 3764264 (M.D.N.C. Aug. 8, 2018), held that a private attorney enjoyed common-law immunity for actions he took as the agent of a German official. *Id.* at *6-7.

Although some post-1976 decisions erroneously treated the FSIA rather than the common law as the source of conduct-based immunity, their reasoning is still "instructive for post-*Samantar* questions of common law immunity." *Yousuf*, 699 F.3d at 774. The United States has approved "the rationale for the immunity recognized in these cases" despite their misplaced reliance on the FSIA. *Matar* Statement at 13-14.

The international community has also codified this consensus about the scope of conduct-based immunity in the United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 (Dec. 16, 2004), https://bit.ly/3oyBEQ9. The Convention grants immunity to "representatives of the State acting in that capacity." *Id.* art. 2, ¶ 1(b)(iv). That includes "entities" that "are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State." *Id.* art. 2, ¶ 1(b)(iii). Although the United States has not ratified the Convention, it views the Convention's treatment of conduct-based immunity "as consistent with customary international law." *Matar* Statement at 21.

B. Factual background and procedural history

1. NSO is an Israeli company that designs highly regulated technology for use by governments to investigate terrorism, child exploitation, and other serious crimes. C.A. ER 52-53 ¶¶ 5-9, 63 ¶ 5. "One of NSO's products—a program named Pegasus—'enables law enforcement and intelligence agencies to remotely and covertly extract valuable intelligence from virtually any mobile device.'" App.3. Pegasus is marketed only to and used only by governments and government agencies. C.A. ER 53 ¶ 9, 96. NSO licenses Pegasus to its government customers, the licenses are approved by the Israeli Ministry of Defense, and NSO's customers choose whether and how to use Pegasus. C.A. ER 54-55 ¶ 14.

Respondent WhatsApp, owned by Respondent Meta Platforms, is a popular communication service.

C.A. ER 65 ¶ 17. In 2019, WhatsApp was used by approximately 1.5 billion people in 180 countries. *Id.* Some WhatsApp users are violent criminals and terrorists who exploit the software's encryption to avoid detection. Technology like Pegasus enables governments to prevent terrorism and violent crime through investigations that might otherwise be frustrated by the WhatsApp software's encryption.

2. In May 2019, WhatsApp notified 1,400 users that their mobile devices may have been accessed by government actors using Pegasus. C.A. ER 70 ¶ 42, 71 ¶ 44. WhatsApp's notification "killed" a significant investigation by European governments into an Islamic State terrorist who had been using WhatsApp to plan an attack. Dov Lieber et al., *Police Tracked a Terror Suspect—Until His Phone Went Dark After a Facebook Warning*, Wall St. J. (Jan. 2, 2020, 3:29 p.m.), https://on.wsj.com/38uXk5s.

WhatsApp then filed this suit, claiming its servers were used in the process of installing Pegasus on the devices of the 1,400 users. App.4. WhatsApp asserted claims under the federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030, the California Comprehensive Computer Data Access and Fraud Act, Cal. Penal Code § 502, and state contract and tort law. App.4.

NSO moved to dismiss. As relevant here, it challenged the district court's subject-matter jurisdiction on the ground that it was immune from this suit as an agent of foreign governments. App.4-5. NSO supported its "factual" challenge to jurisdiction with a declaration from its CEO, who explained NSO's conduct on behalf of foreign governments. C.A. ER 51-56. WhatsApp did not submit any contrary evidence,

so the district court found NSO to be an agent of foreign governments. App.34-35.

The district court nonetheless rejected NSO's immunity defense. Based on NSO's undisputed evidence, the district court found that NSO was an agent of foreign governments that acted entirely within its "official capacity." App.33-35. But the court held that NSO did not qualify for conduct-based immunity because a judgment against NSO would not bind any foreign government. App.36. (The United States has rejected this restrictive interpretation of conduct-based immunity. Brief for the United States as *Amicus Curiae* at 8-16, *Mutond v. Lewis*, No. 19-185 (U.S. May 26, 2020) (*Mutond* Amicus Br.).)

3. The Ninth Circuit affirmed on an alternative ground. App.2-3. The court did not "analyze whether NSO is entitled to immunity under the common law." App.18. Instead, it held that the FSIA entirely "displaced common-law sovereign immunity doctrine as it relates to entities." App.3. As a result, the court concluded, the FSIA "categorically forecloses extending immunity to any entity that falls outside the FSIA's broad definition of 'foreign state.'" App.2-3.

Under the Ninth Circuit's decision, therefore, an entity can receive immunity only if it qualifies as a "foreign state" under the FSIA. App.12. "If an entity does not fall within the Act's definition of 'foreign state,' it cannot claim foreign sovereign immunity. Period." *Id.* Because NSO is not and has never claimed to be a "foreign state" under the FSIA, the Ninth Circuit held it could not receive immunity. App.17-19.

The Ninth Circuit denied NSO's motion for rehearing and rehearing en banc. App.85. The court stayed its mandate pending the filing of this petition. C.A. Dkt. 90.

REASONS FOR GRANTING THE PETITION

This petition offers the Court an excellent vehicle to decide an important question that has divided the federal courts of appeals: whether private entities may ever seek common-law sovereign immunity in U.S. courts. The Ninth Circuit gave a drastic, categorical answer to that question. It held that the FSIA forbids private entities from *ever* seeking common-law conduct-based immunity. That sweeping holding has never been endorsed by any other court. To the contrary, the Fourth and D.C. Circuits have recognized that, notwithstanding the FSIA, entities may be eligible for conduct-based immunity.

This dispute has significant implications for the United States' foreign relations. Numerous countries, including the United States, frequently rely on private contractors to perform or assist with core governmental activities. If such contractors can never seek immunity in U.S. courts, then the floodgates will open to foreign suits against U.S. contractors designed to interfere with the United States' most sensitive intelligence and military operations. In light of those consequences, the question whether entities can seek common-law immunity should not have different answers in different circuits. This Court should resolve that question for the entire nation.

This Court's decision in *Samantar* provides the right answer: the common law governs immunity

claims by private entities. *Samantar* held that claims that are "not . . . against a foreign state as the [FSIA] defines that term" are "governed by the common law." 560 U.S. at 325. This Court expressly stated that "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law." *Id.* at 324. But the Ninth Circuit directly and erroneously rejected that principle by holding that the FSIA entirely displaces the common law for entities that are not "foreign state[s] as the Act defines that term." *Id.* at 325. To clarify and enforce its decision in *Samantar*, this Court should reverse.

As an alternative to granting this petition outright, the Court should call for the views of the Solicitor General. This Court frequently requests the government's views on petitions raising questions of immunity under the FSIA and the common law. The same approach would be appropriate here.

I. The decision below creates a division of authority among the courts of appeals over whether private entities can seek common-law immunity.

The question whether private entities may seek common-law conduct-based immunity has divided the federal courts of appeals. The Fourth Circuit has granted conduct-based immunity to a private entity, and the D.C. Circuit has allowed private entities to seek conduct-based immunity. The decision below, in contrast, held that the FSIA categorically forbids any private entity from ever seeking conduct-based immunity in any circumstances.

The Fourth Circuit held in *Butters v. Vance International, Inc.*, 225 F.3d at 466, that a private entity was immune from claims arising out of its provision of security services to Saudi Arabia. In reaching that conclusion, the court applied the test for conduct-based immunity, holding that private agents are immune "when following the commands of a foreign sovereign employer." *Id.* And it held that private entities could receive that immunity because "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.* Although the court arguably located the source of immunity in the FSIA rather than the common law, its holding remains "instructive for . . . questions of common law immunity." *Yousuf*, 699 F.3d at 774; *see Ivey*, 2018 WL 3764264, at *2, 6-7 (interpreting *Butters* as granting conduct-based immunity); *Moriah*, 107 F. Supp. 3d at 277 & n.34 (same); Hazel Fox & Philippa Webb, The Law of State Immunity 444, 453 (3d ed. 2013) (same).

More recently, the D.C. Circuit treated conduct-based immunity as available to private entities in some circumstances. *Broidy Cap. Mgmt. LLC v. Muzin*, 12 F.4th 789, 802 (D.C. Cir. 2021). In that case, private entities sought immunity for work they allegedly performed for Qatar. *Id.* at 793-94. The D.C. Circuit rejected immunity for factual reasons, holding that the entities had not introduced the necessary evidence to show that they "act[ed] as [Qatar's]

agents." *Id.* at 800.[1] But the court found that private entities can *seek* common-law immunity. It explained that, after *Samantar*, claims of immunity by "private entities or individuals" must "rise or fall not under the FSIA, but the residual law and practice that the FSIA did not displace." *Id.* at 802.

The Ninth Circuit's decision that the FSIA categorically bars private entities from seeking common-law immunity openly conflicts with both *Butters* and *Broidy*. The Ninth Circuit rejected *Butters*, finding the Fourth Circuit's application of immunity to a private entity inconsistent with this Court's "instruct[ion] that 'any sort of immunity defense made by a foreign sovereign in an American court must stand on the Act's text. Or it must fall.'" App.17 n.6 (quoting *Republic of Argentina v. NML Cap., Ltd.*, 573 U.S. 134, 141-42 (2014)). And while *Broidy* recognized that "the FSIA did not displace" common-law immunity for "private entities," 12 F.4th at 802, the Ninth Circuit held the exact opposite, App.3. Indeed, the Ninth Circuit criticized *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).

There is thus a division of authority over whether entities can seek common-law immunity. In the Fourth and D.C. Circuits, they can. In the Ninth Circuit, they categorically cannot. This Court should grant review to resolve that split.

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[1] The district court here, in contrast, found that NSO acted in its "official capacity" as an agent of foreign governments. App.35.

II. The question presented is important and warrants the Court's review in this case.

Whether private entities that serve as government agents may seek common-law immunity is an important question with significant foreign-policy implications. Many nations, including the United States, rely on private contractors to conduct or support core governmental activities. If such contractors can *never* seek immunity, as the Ninth Circuit held, then the United States and other countries may soon find their military and intelligence operations disrupted by lawsuits against their agents.

In light of those consequences, the question presented is too important for its answer to vary based on the circuit in which a plaintiff chooses to file suit. This Court should provide a uniform answer for the entire nation. And this case—which presents a purely legal question that depends on no disputed facts—presents an excellent vehicle for the Court to do so.

A. Whether private entities can seek common-law immunity is important to the United States' and other nations' ability to hire contractors to assist with governmental activities.

Common-law immunity is "a matter of comity," *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004), "rooted in . . . the notion of sovereignty and the notion of the equality of sovereigns," *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (cleaned up). For that reason, "some foreign states base their sovereign immunity decisions on

reciprocity." *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 841 (D.C. Cir. 1984).

In practice, that means that if U.S. courts exercise jurisdiction over foreign actors, then foreign courts will reciprocate by exercising jurisdiction over U.S. actors in similar circumstances. The United States has repeatedly alerted the Court to this risk. *E.g.*, Brief for the United States as *Amicus Curiae* at 20, *Clearstream Banking S.A. v. Peterson*, Nos. 17-1529, 17-1534 (U.S. Dec. 9, 2019); 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. It has done so specifically in the context of conduct-based immunity, warning that "personal damages actions against foreign officials" in U.S. courts could "trigger concerns about the treatment of United States officials abroad, and interfere with the Executive's conduct of foreign affairs." *Mutond* Amicus Br. 16.

This concern extends to the government's private entity agents. Governments have an "unquestioned need to delegate governmental functions. The government cannot perform all necessary and proper services itself and must therefore contract out some services for performance by the private sector." *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1448 (4th Cir. 1996). The United States in particular often has "no choice but to use contractors for work that may be borderline 'inherently governmental.'" Office of the Dir. of Nat'l Intelligence, The U.S. Intelligence Community's Five Year Strategic Human Capital Plan 6 (2006).

That work includes the United States' most sensitive military and intelligence operations. *See Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 240-44 (4th Cir. 2012) (Wilkinson, J., dissenting). "[T]he military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008); *accord* Brief for the United States as *Amicus Curiae* at 16, *KBR, Inc. v. Metzgar*, No. 13-1241 (U.S. Dec. 16, 2014), 2014 WL 7185601 (touting the "military's reliance on the expert judgment of contractors"). Contractor personnel accounted for more than half of the total U.S. force in Iraq and Afghanistan. Moshe Schwartz & Jennifer Church, Cong. Research Serv., No. R43074, Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress 1 (2013), https://bit.ly/3K2O37g. And some 70,000 private contractors support U.S. intelligence operations, with a quarter of those contractors "directly involved in core intelligence mission functions." Glenn J. Voelz, *Contractors and Intelligence: The Private Sector in the Intelligence Community*, 22 Int'l J. Intelligence & CounterIntelligence 586, 587 (2009). That includes "collect[ing] foreign intelligence" through surveillance technology, which is "the sort of peculiarly sovereign conduct that all national governments (including our own) assert the distinctive power to perform." *Broidy Cap. Mgmt., LLC v. Qatar*, 982 F.3d 582, 595 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2704 (2021).

The decision below threatens the United States' and other countries' ability to rely on private contractors. If U.S. courts categorically deny

immunity to foreign government contractors, then foreign states can entertain reciprocal lawsuits against the United States' many contractors. Such lawsuits would be "indirect challenges to the actions of the [United States]," *Saleh v. Titan Corp.*, 580 F.3d 1, 7 (D.C. Cir. 2009), seeking to control how the United States conducts distinctly governmental operations.

That is, in fact, one of Respondents' avowed goals in this lawsuit: to discourage governments, expressly including the United States, from using technology like NSO's—and, even more broadly, from ever using private contractors to support military and intelligence operations. C.A.Resp.Br. 48-50. Below, Respondents urged the court to deny NSO immunity in order to "promote transparency in international affairs" and curb "the troubling trend of governments unduly relying on private companies." *Id.* at 49-51. They argued that "private actors . . . should not share" state power, and that a government should not be allowed to "launder[]" its sovereign activities "through a private entity." *Id.* And they cited the United States' use of private contractors as an example of the governmental conduct they hope their lawsuit will discourage. *Id.* at 48 n.15.

But governments, not Respondents, get to decide when and for what purposes they will use private contractors, and the United States has "significant interests in ensuring" that such "judgments are not subject to judicial second-guessing." Brief for the United States as *Amicus Curiae* at 9, *Carmichael v. Kellogg, Brown & Root Serv., Inc.*, No. 09-683 (U.S. May 28, 2010), 2010 WL 2214879. That is why the United States has left open the possibility that its

entity "contractor[s] should be sheltered by . . . sovereign immunity in an adjudication in a foreign or international court." Brief for the United States as *Amicus Curiae* at 9 n.1, *CACI Premier Tech., Inc. v. Al Shimari*, No. 19-648 (U.S. Aug. 26, 2020) (*Al Shimari* Amicus Br.).

The decision below eliminates that important argument. In so doing, it opens the door to lawsuits in U.S. courts designed to interfere with the sensitive military and intelligence operations of the United States' allies. And, reciprocally, it exposes the United States to the risk of similar suits being filed in foreign courts. That startling result justifies this Court's review.

B. The Court should address the question presented in this case.

This case is an excellent vehicle to decide the important question presented. The Ninth Circuit decided this case on a pure question of statutory interpretation. App.2-3, 18-19. That question was argued in the parties' briefs and conclusively resolved by the decision below. No further factual development or proceedings in the district court could affect the Ninth Circuit's categorical holding that the FSIA forbids *every* non-governmental entity from seeking common-law immunity.

For those reasons, this case's interlocutory posture presents no obstacle to review. To the contrary, immediate review is essential because NSO claims "an immunity from suit," App.6, which will be "effectively lost" if NSO has to go through a trial before seeking review, *Mitchell v. Forsyth*, 472 U.S. 511, 526

(1985). The Ninth Circuit recognized as much when exercising interlocutory jurisdiction over NSO's appeal. App.5-6. This Court granted review in an identical posture in *Samantar*, and it should do the same here. 560 U.S. at 310-11.

III. The decision below conflicts with *Samantar*.

For the reasons set forth above, this Court should grant review to resolve the division of authority on this important issue, irrespective of the merits of the decision below. Moreover, the decision is wrong, as this Court's decision in *Samantar* reveals.

Samantar held that when a plaintiff sues a defendant that is not "a foreign state as the [FSIA] defines that term," the FSIA does not apply. 560 U.S. at 325. Instead, those suits are "governed by the common law." *Id.* The Ninth Circuit, in contrast, held that the FSIA "displaced common-law sovereign immunity" for entities that "do[] not fall within the Act's definition of 'foreign state.'" App.3, 12. In the Ninth Circuit's opinion, the FSIA *sub silentio* outlawed immunity for entities that serve as foreign government agents.

On its face, that holding conflicts with *Samantar*'s conclusion that the FSIA does not "supersede" the common-law with respect to defendants other than "foreign states." 560 U.S. at 320-23. Private entities are not "foreign state[s] as the [FSIA] defines that term." *Id.* at 325. Under *Samantar*, therefore, the FSIA has nothing to say about whether such entities may receive conduct-based immunity. That depends entirely on the common law, which Congress did not "intend[] the FSIA to supersede." *Id.* at 320.

The Ninth Circuit's contrary decision flouts the fundamental "assumption that common-law principles of immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Filarsky v. Delia*, 566 U.S. 377, 389 (2012) (cleaned up); *see* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 318 (2012) ("[S]tatutes will not be interpreted as changing the common law unless they effect the change with clarity."). As *Samantar* recognized, nothing in the FSIA "indicate[s]" that Congress intended to "supersede" the common "law of foreign official immunity." 560 U.S. at 325. The FSIA "supersede[s] the common-law regime" only "for claims against *foreign states*." *Id.* (emphasis added).

For that reason, the Ninth Circuit's focus on the FSIA's "'comprehensive' regime" misses the point. App.12. The FSIA is comprehensive only "if it applies." *Samantar*, 560 U.S. at 314. And it "applies" only to "'foreign state[s],'" *id.*, which it defines to exclude private entities. So while the FSIA no doubt "create[ed] a 'comprehensive set of legal standards governing claims of immunity . . . against a foreign state or its political subdivisions, agencies or instrumentalities,'" App.14 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983)), that in no way suggests that the FSIA overrides the common law with respect to defendants that are *not* "foreign state[s]," *Samantar*, 560 U.S. at 325.

This Court has made a similar point in the context of field preemption. Because "[e]very Act of Congress occupies some field," the Court "must know the

boundaries of that field before" it can decide whether a statute displaces state law. *DeCanas v. Bica*, 424 U.S. 351, 360 n.8 (1976); *see Kansas v. Garcia*, 140 S. Ct. 791, 804 (2020) (the Court "must first identify the field" covered by a federal statute). "To discover the boundaries," the Court "look[s] to the federal statute itself." *DeCanas*, 424 U.S. at 360 n.8. Even when a statute is "comprehensive" within its field, it "does not apply" to matters outside of its scope. *Malone v. White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978).

That principle applies equally here. The FSIA "codif[ied] *state* immunity," and nothing more. *Samantar*, 560 U.S. at 322 (emphasis added). Because NSO is not a "foreign state" under the FSIA, Respondents' claims against NSO are "governed by the common law." *Id.* at 325. This Court should grant review and reverse the Ninth Circuit's decision holding otherwise.

IV. The Court should consider calling for the views of the Solicitor General.

If the Court does not grant review outright, it should call for the views of the Solicitor General.

This Court treats the government's views as relevant to foreign sovereign immunity. *Id.* at 312, 319. The Court thus routinely calls for the Solicitor General's views on petitions raising questions of immunity, including in *Samantar* itself. *Samantar v. Yousuf*, No. 12-1078 (U.S. June 24, 2013); *see also, e.g.*, *Mutond*, No. 19-185 (U.S. Jan. 21, 2020); *Federal Republic of Germany v. Philipp*, No. 19-351 (U.S. Jan. 21, 2020); *Rubin v. Islamic Republic of Iran*, No. 16-534 (U.S. Jan. 9, 2017); *Powerex Corp. v. Reliant*

Energy Servs., Inc., No. 05-85 (U.S. Apr. 17, 2006); *Dole Food Co. v. Patrickson*, No. 01-593 (U.S. Dec. 10, 2001).

The same approach would be appropriate here. Respondents have speculated that the government would oppose NSO's immunity claim. *E.g.*, C.A. Resp.Br. 52; C.A. Dkt. 86 at 18; C.A. Dkt. 89 at 20-21. But the government has not yet had an opportunity to speak for itself on the legal issue. It has not given any opinion on the question presented, in this case or any other. As detailed above, however, it has expressed concerns about decisions that could expose its agents to reciprocal lawsuits abroad—which is precisely what the decision below portends. And the government has reserved the question whether private "contractor[s] should be sheltered by . . . sovereign immunity." *Al Shimari* Amicus Br. 9 n.1.

The division of authority on this important federal question with foreign-policy implications is reason enough to grant review. If, however, the Court is uncertain as to the need for review, the views of the Solicitor General could assist the Court's consideration of this petition.

CONCLUSION

This Court should grant the petition for certiorari.

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