No. 12-1078

In The
Supreme Court of the United States

MOHAMED ALI SAMANTAR,
Petitioner,
v.

BASHE ABDI YOUSUF, *ET AL.*

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

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

To clarify: the Solicitor General asks this Court to invoke its extraordinary certiorari power to vacate an immunity judgment for which the government vigorously advocated below, based on the Solicitor General's express authorization of its amicus position. And the Solicitor General does so *not* because he actually disagrees with the court of appeals' judgment or decision to deny immunity; he confesses no error in the judgment obtained or the immunity denied. Rather, he seeks a summary vacatur based merely on the *possibility* that a federal agency might (or might not) at some unspecified time (if ever) reconsider its current position on immunity.

As of now, however, the Solicitor General's view of the binding nature of its immunity determination would require the *exact same judgment* to be re-entered on remand.

What the Solicitor General really seems to want is the same judgment with an edited opinion. And the Solicitor General asks this Court to interpose that unprecedented result for an interlocutory judgment that has been overtaken by the entry a year-and-a-half ago of a final judgment in the case, which is itself currently pending on appeal in the Fourth Circuit. At bottom, then, the Solicitor General requests an unprecedented expansion of this Court's certiorari power without identifying *any* error in the lower court's judgment or even any legal basis in the record on which a different judgment could be entered.

Finally, the Solicitor General hints that the State Department might reconsider its immunity position because the United States has recognized the Somali government. But the United States accorded that recognition *a year ago* and has had nearly twelve months to think its position over, to file a statement of any new position in the Fourth Circuit briefing on the final judgment appeal, or even to ask the district court to reopen its judgment. It has done none of those things, consciously choosing to keep its official position of no immunity on the books all this time.

The Executive Branch already kept the courts and the parties waiting for six years for its position on

immunity. Now, after two courts have relied on its suggestion of non-immunity to conduct a trial, enter final judgment, and undertake appellate review, the Solicitor General seeks to wield this Court's certiorari power to unravel those judgments and layer on still more open-ended delay while it decides whether to change its mind (or not). That is not a proper basis for granting certiorari or vacatur.

GRANTING, VACATING, AND REMANDING AN UNOBJECTED-TO JUDGMENT WOULD BE BOTH UNPRECEDENTED AND IMPROPER

An order granting certiorari review, vacating the judgment, and remanding the case ("GVR") is only appropriate "when intervening developments reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and "where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (quotations omitted). Here, the Solicitor General requests entry of a GVR order despite the fact that (i) the judgment below wholly accords with the United States' statement of interest seeking a judgment denying immunity; (ii) there is no "reasonable probability" of a changed result because no intervening change in the State Department's position that immunity should be denied has occurred; and (iii) there is no prospect of the court below altering its interlocutory judgment since the final-judgment appeal is pending

and the State Department's position on immunity remains unchanged. The Solicitor General's unprecedented position thus defies this Court's GVR standard.

A. GVR Disposition Is Unwarranted Because of Jurisdictional Doubt.

Before the Fourth Circuit rendered its decision denying immunity in accord with the government's stated position, the district court issued a 38-page decision finding petitioner liable for the crimes for which he was accused and awarding damages. Mem. Op., *Yousuf v. Samantar*, No. 1:04-cv-1360 (LMB/JFA), 2012 WL 3730617 (E.D. Va. Aug. 28, 2012). Petitioner appealed that final judgment, and that appeal remains pending and fully briefed in the court of appeals. *Yousuf v. Samantar*, No. 12-2178 (4th Cir.).

The Solicitor General's request for a GVR thus stumbles procedurally at the starting gate. This Court recently ruled that, once a final judgment issues, challenges to interlocutory rulings, including specifically denials of immunity, must proceed through review of the final judgment into which all interlocutory rulings have merged. *See Ortiz v. Jordan*, 131 S. Ct. 884 (2011). Substantial threshold doubt thus exists, under *Ortiz* and *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009), whether this Court even has jurisdiction to act upon a GVR request in response to this interlocutory petition,

given that a final judgment has been entered and is itself on appeal in the Fourth Circuit.

B. An Unobjected-To Judgment With No Concrete Ground For Judicial Reconsideration Is An Inappropriate Basis For GVR.

Compounding that procedural problem, the grounds for GVR urged by the Solicitor General reflect no disagreement with the underlying judgments of the lower courts, both of which accord with the United States' statement of non-immunity.

Appearing as *amicus curiae* supporting respondents in the court of appeals, the United States argued that the State Department had determined that petitioner "is not immune from this suit under any immunity doctrine," and that its "determination controls." Pet App. 66a. The Fourth Circuit agreed with that immunity recommendation and entered a judgment "affirm[ing] the district court's denial of both head-of-state and foreign official immunity," *id.* at 28a, according the State Department's position "substantial weight" in the process, *id*. at 18a.

Without impugning the Fourth Circuit's judgment of non-immunity, the Solicitor General urges the court to enter a GVR order because it objects to two aspects of how the court wrote its opinion. *See* S.G. Br. 11-12.

But "this Court reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 & n.8 (1984) (citing cases); *see McClung v. Silliman*, 19 U.S. (6 Wheat.) 598, 603 (1821) ("The question before an appellate Court is, was the judgment correct, not the ground on which the judgment professes to proceed."). The Solicitor General does not dispute that denial of petitioner's immunity was correct—and not just correct, but in the Solicitor General's view, the *only* judgment that could have been entered as a matter of law. *See* S.G. Br. 19 (Executive Branch immunity determinations "entitled to controlling weight").

To be sure, the Solicitor General objects to the Fourth Circuit's exercise of a modicum of independent judicial judgment by affording "only non-binding 'substantial weight,'" rather than "controlling weight," S.G. Br. 11, 19 (quoting Pet. App. 18a), to the State Department's statement of interest. But this Court has never summarily vacated a judgment and instructed the lower court to reinstate that very same judgment, just with an edited opinion. *Cf. Michigan v. Lucas*, 500 U.S. 145, 155 (1991) (Stevens, J., dissenting) ("We sit, not as an editorial board of review, but rather as an appellate court."). And it would be doubly inappropriate to start such a practice here because the Solicitor General does not (and cannot) suggest that the identified variation in opinion language made any difference in the outcome of this case. Whether "substantial" or unthinking deference is required of a

court, the answer in this case is exactly the same: Petitioner is not entitled to immunity.

Moreover, the Solicitor General's concern about what it perceives to be a "categorical" *jus cogens* exception (S.G. Br. I, 11, 19-22) overreads the Fourth Circuit's decision. The Solicitor General forgets that petitioner advocated for *no* deference to the Executive Branch's denial of immunity, Pet. App. 10a, and it was because the Fourth Circuit had to answer that argument that it noted the common-law grounding for the State Department's position and the court's "substantial" deference to it, *id.* at 18a. Nothing in the court's immunity judgment here or in any subsequent case substantiates the Solicitor General's concerns. There thus is no need to initiate a brand new certiorari practice of summarily vacating *opinions* for re-entry of the exact same judgment.

Indeed, members of this Court have expressed resistance to vacating a judgment on grounds that do not necessarily impugn the underlying judgment. *See, e.g.*, *Wellons*, 558 U.S. at 226-228 (Scalia, J., dissenting, joined by Thomas, J.) (Court has "no authority" or "power to send back for a re-do."); *id.* at 228-231 (Alito, J., dissenting, joined by Roberts, C.J.); *Nunez v. United States*, 554 U.S. 911, 911 (2008) (Scalia, J., dissenting, joined by Roberts, C.J., and Thomas, J.) ("I continue to resist GVR disposition when the Government, without conceding that a *judgment* is in error, merely suggests that the lower court's *basis* for the judgment is wrong[.]"); *Price v. United States*, 537 U.S. 1152, 1152 (2003) (Scalia, J.,

dissenting, joined by Rehnquist, C.J., and Thomas, J.) (similar); *id.* (Kennedy, J., dissenting).

This case is even worse. At least in those cases, the intervening event (such as the United States' change in position in *Price* and *Nunez*) at least meant that the petitioner had a fighting chance to obtain a more favorable judgment on remand. Here, the Solicitor General simply wants petitioner to lose more emphatically and without any independent judicial judgment. A GVR to re-write the opinion would transform this Court from an appellate court into an editorial board.

C. There Is No Intervening Legal Development For The Court Of Appeals To Reconsider.

Yet another problem for the Solicitor General is that a GVR order requires, at a minimum, an "intervening development" that might affect the "ultimate outcome of the matter" upon lower court reconsideration. *Wellons*, 558 U.S. at 225, 227. The Solicitor General suggests that a remand would allow the court of appeals to "consider[] in the first instance [two] intervening events," namely, "the United States' recognition of the Government of Somalia and that Government's formal request that petitioner be accorded immunity." S.G. Br. 12.

But that argument has the Solicitor General's position running into itself. The Solicitor General's repeated refrain is that courts are *not* "free to second-guess" the State Department's immunity position

under any circumstance. S.G. Br. 15; *see* Pet. App. 49a-69a. Instead, courts must "rest on the United States' submission" without further inquiry, S.G. Br. 21, regardless of what circumstances may intervene or what factors may apply. And, of course, the only extant State Department immunity submission is that immunity should be denied, which is what the court of appeals did. Accordingly, the centerpiece of the Solicitor General's position ensures that there is *no* reasonable probability that the Fourth Circuit will reconsider its judgment at all.

Indeed, the extraordinary nature of the Solicitor General's submission makes it difficult to understand what an order of this Court is even supposed to look like. Ordinarily, a GVR order provides guidance to the lower court concerning the intervening legal basis on which it should reconsider its decision. But that will not work here because the Solicitor General gives this Court nothing to which it could point the court of appeals. Not one of the "submissions in th[e] brief" (S.G. Br. 24) retracts the government's position that immunity should be denied, or leaves the lower court any option other than to re-enter the exact same judgment denying immunity it already entered. What the Solicitor General seemingly wants is a remand "in light of the government's disagreement with certain portions of the opinion accompanying the judgment that it likes." That is not what a GVR order is for.

Citing the United States' recognition of the Somali government twelve months ago, the Solicitor General

notes that a "further [immunity] determination by the United States *** *could* be submitted," or "*might*" be made. S.G. Br. 12, 23 (emphases added). True enough. But it has not done so, and it would stand the GVR process on its head to vacate a perfectly lawful judgment not for reconsideration by the court, but *hypothesized possible* reconsideration by an *agency* that might or might not at some unspecified time in the future change—or not change—its position. And doubly so when that agency has already had a year to re-think its position and has elected not to change anything. In other words, this is not a case where a GVR would "assist[] the court below by flagging a particular issue that it does not appear to have fully considered[.]" *Wellons*, 558 U.S. at 225-226.

Beyond that, the State Department certainly does not need this Court to vacate the Fourth Circuit's judgment for it to change its position. And even if the State Department were ever to reconsider its position, there are ample other procedural mechanisms for the United States to inject its views into the litigation, such as submitting a brief in the final judgment appeal or seeking to reopen the district court's judgment under Federal Rule of Civil Procedure 60(b). But for present purposes, there is no sound basis for this Court to set aside the Fourth Circuit's unchallenged and legally correct judgment

while the Executive Branch thinks about it some more.[1]

D. A Remand Would Not Change The Ultimate Outcome.

Yet another reason to deny GVR is that there is also no reasonable probability that the Fourth Circuit would alter its earlier judgment. *First*, because the State Department has not withdrawn its statement that no immunity should be accorded, the Solicitor General must agree that the court of appeals could not properly change its judgment denying immunity in this case.

Second, there is nothing new in the Solicitor General's brief that was not already argued in its court of appeals brief. The Solicitor General notably does not dispute that it made these exact same arguments and cited these same cases below. *See generally* Pet. App. 58a-68a. Nor is there any dispute that the Fourth Circuit understood and considered the government's position that "the State Department's opinion on any foreign immunity issue

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[1] It is an open question, likely unique to this case, whether as a matter of separation of powers a post-final-judgment change in position by the Executive Branch would bind the Judicial Branch to vacate a final judgment. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) ("By retroactively commanding the federal courts to reopen final judgments, Congress has violated th[e] fundamental principle" that the judicial power is the power to render dispositive judgments.).

is binding upon the courts." *Id.* at 10a. The court of appeals adopted the Executive Branch's position of "absolute deference" with respect to head-of-state immunity, *id.* at 16a, and held that the State Department's common-law official immunity determination, though "not controlling," nevertheless "carries substantial weight," *id.* at 18a. Thus, in affirming the judgment of non-immunity, the Fourth Circuit relied on the State Department's "suggestion of non-immunity." *Id.* at 26a-28a.

Third, the Solicitor General makes no showing that its dissatisfaction with the perceived delta between the type of "substantial weight" accorded the government's views here and the "controlling weight" it wants had any impact on the outcome of this case or would in any other case. In the highly unlikely event that it ever did, the Solicitor General could seek review then.

E. A GVR Would Contradict The Solicitor General's Own Legal Position On The Proper Immunity Process.

A final problem with the Solicitor General's suggestion is that vacating the judgment below would fundamentally undermine the very "two-step process" for making immunity determinations that the Solicitor General purports to defend. Under that process, courts defer to Executive Branch judgments when the State Department makes an immunity determination, but in the absence of such a case-specific pronouncement, courts can and must resolve

the cases by making their own determinations. *See* S.G. Br. 3 (citing *Samantar v. Yousuf*, 130 S. Ct. 2278, 2284 (2010)).

The Solicitor General's position before this Court, however, would confound that process by empowering the Executive Branch to pull the rug out from under final court judgments entered in express reliance on the State Department's position, after years during which the parties and the courts waited more-than-patiently for those views. The Solicitor General's bottom-line proposition is that a year after recognition of the Somali government is not enough, and the parties and courts in this case should sit and wait even longer, in case the State Department "might" (S.G. Br. 23) change its mind.

That is untenable. This litigation has been pending for nearly ten years, has spawned three separate appeals to the Fourth Circuit, plus a merits ruling from this Court. In express reliance on the State Department's statement of non-immunity, the district court conducted a two-day bench trial, issued a lengthy decision with extensive factual findings and legal determinations, and entered a final judgment of liability based on petitioner's open-court admission of full legal responsibility. *See generally* Mem. Op., *Yousuf*, 2012 WL 3730617.

Moreover, demonstrating the very respect for the Executive Branch's view that the government desires, the district court halted all proceedings for two years at the beginning of the case to await the

State Department's views. No response came to the court's inquiries. Ultimately, it took the State Department more than six years to submit a statement of interest. Once that Statement was received, the district court promptly entered judgment in accord with it, and the court of appeals affirmed.

Inter-branch comity is a two-way street. The Solicitor General's request that this Court summarily vacate judgments entered in reliance on and consistent with the State Department's views just because the State Department "might" decide to change its mind or would craft the opinion differently is an affront to the authority of those courts and to basic principles of judicial finality, fairness, and respect for the role of coequal branches of government.

CONCLUSION

For the foregoing reasons, and those stated in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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