No. 13-1361

IN THE
Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF, *ET AL.*,

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY FOR PETITIONER

Respondents do not dispute that the Fourth Circuit adopted a categorical rule eliminating common-law immunity for foreign officials in cases involving alleged violations of *jus cogens* norms. Pet. App. 65a-66a. This per se immunity exception contravenes international law, abrogates immunity in virtually all ATS and TVPA cases against foreign officials, opens the floodgates to suits against officials traveling through the Fourth Circuit, and risks reciprocal treatment of U.S. officials abroad. Trying to forestall this Court's review, Respondents conjure a series of illusory "procedural concerns." Those "concerns" have nothing to do with the categorical rule created by the Fourth Circuit, cast no doubt on this Court's ability to review the decision below, and in no way foreclose Petitioner's entitlement to relief on any potential remand.

I. THE FOURTH CIRCUIT'S CATEGORICAL *JUS COGENS* EXCEPTION TO COMMON-LAW IMMUNITY WARRANTS THIS COURT'S IMMEDIATE REVIEW

The Fourth Circuit's generally applicable rule of law could not be clearer: "We conclude that, under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." Pet. App. 65a-66a. As the Solicitor General has recognized, this "per se rule of non-immunity" admits no exceptions. Br. of the United States 19, *Samantar v. Yousuf*, 134 S. Ct. 897 (2014) (No. 12-1078) ("U.S. Br."). Given the breadth of this "categorical judicial exception to immunity," the Solicitor General

explained that the Fourth Circuit's interlocutory decision "would warrant review by th[is] Court at an appropriate time." U.S. Br. 19, 22.

Now, following final judgment, is the "appropriate time" for review. The Fourth Circuit's rule threatens "negative consequences for the United States' foreign-relations interests." U.S. Br. 12. Not only does this rule "reduce the protection foreign officials receive in our Nation's courts," but it also "very likely would be applied to U.S. officials facing suit in foreign courts." Br. of *Amici Curiae* Former Attorneys General 2. This, in turn, "affects how our leaders govern this Nation," as their "judgments on important matters of international security and foreign affairs may be adversely affected by the policy preferences of foreign states, the views of foreign courts on international law, and foreign substantive legal standards." *Id.* 12-13.

Moreover, the Fourth Circuit's rule opens the floodgates to suits against foreign officials, including officials of close allies of the United States. Pet. 19 & n.4. Given the sweeping nature of the Fourth Circuit's rule, plaintiffs could "proceed to discovery and perhaps ultimately trial" based on mere allegations of *jus cogens* violations. *See* Br. of the Kingdom of Saudi Arabia as *Amicus Curiae* 17. As this litigation demonstrates, such cases can take years to make their way through the courts. *See* Opp. 24. Thus, by the time another vehicle presents itself to this Court, important national interests will have already suffered irreparable harm. This Court's immediate intervention is warranted.

II. RESPONDENTS' ARGUMENTS ARE WITHOUT MERIT

Respondents' attempts to cloud the purely legal question before this Court are unavailing.

A. The District Court's Factual Findings Have No Bearing on the Fourth Circuit's Categorical Non-Immunity Rule for *Jus Cogens* Violations

Respondents claim that, "[i]n his final judgment appeal, petitioner raised no arguments on the district court's immunity judgment." Opp. 12. Contrary to Respondents' suggestion, the scope of Petitioner's final-judgment appeal has nothing to do with this Court's review of the Fourth Circuit's categorical non-immunity rule. *Id.* 12-15.

1. As an initial matter, Respondents do *not* argue that Petitioner has forfeited his objection to the Fourth Circuit's immunity ruling, nor could they. Whatever the scope of his final-judgment appeal,[1] Petitioner had no reason to reiterate his underlying immunity arguments. The Fourth Circuit had already created a categorical *jus cogens* exception in Petitioner's previous appeal, and "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460

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[1] Respondents incorrectly suggest that immunity was irrelevant to Petitioner's final-judgment appeal. The basis for Petitioner's appeal was that "'the District Court was divested of jurisdiction' during the pendency of his earlier interlocutory appeal" of the district court's denial of immunity. Opp. 12. In rejecting that argument, the Fourth Circuit expressly relied on its earlier immunity ruling. Pet. 13.

U.S. 605, 618 (1983). Any attempt to challenge the Fourth Circuit's prior ruling would have been futile. *See Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 521 (4th Cir. 2003) ("By law, the conclusions reached in [the first appeal] are binding on the district court, and they are binding on this panel [in the second appeal] as well . . . ."); *Wyant v. U.S. Fid. & Guar. Co.*, 116 F.2d 83, 85 (4th Cir. 1940) (per curiam) ("Of course the matters settled on the second appeal in this cause cannot be reopened [in] this [third] appeal.").

Moreover, Respondents themselves have previously explained that, "once a final judgment issues, challenges to interlocutory rulings . . . must proceed through review of the final judgment into which all interlocutory rulings have merged." Respondents' 12-24-2013 Supplemental Br. 4, *Samantar*, 134 S. Ct. 897 (No. 12-1078) (citing *Ortiz v. Jordan*, 131 S. Ct. 884 (2011)); *see also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (stating the "general rule" that "'claims of district court error at any stage of the litigation may be ventilated'" after "final judgment has been entered'" (citation omitted)). Here, the Fourth Circuit's immunity decision merged into the final judgment and is ripe for this Court's review.

Indeed, this Court has granted certiorari in similar situations. For example, in *General Dynamics Corp. v. United States*, 131 S. Ct. 1900 (2011), this Court granted certiorari after final judgment to consider the scope of the state secrets privilege. As in this case, petitioners took multiple appeals during the course of the litigation. *Id.* at 1905. The privilege question reviewed by this Court

following final judgment was the subject of an earlier interlocutory appeal. *Id.*; *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006, 1020-24 (Fed. Cir. 2003). Though petitioners did not refer to the state secrets question in their final-judgment appeal, *see* Opening Br. of Appellant Gen. Dynamics Corp., *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009) (No. 07-5131), 2007 WL 3308261; Opening Br. of Appellant McDonnell Douglas Corp., *McDonnell Douglas Corp. v. United States*, 567 F.3d 1340 (Fed. Cir. 2009) (No. 07-5111), 2007 U.S. Fed. Cir. Briefs LEXIS 1297, that was no bar to this Court's grant of certiorari, *Boeing Co. v. United States*, 131 S. Ct. 62 (2010).

2. Perhaps recognizing the futility of a waiver argument, Respondents argue against certiorari because conduct-based immunity depends on the "'conduct' in question," and the "Fourth Circuit was never asked to analyze how petitioner's claim of immunity should be treated now that respondents' *allegations* have been supplanted by proven *facts*." Opp. 14.

But Respondents fail to explain how a *factual* record impacts the Fourth Circuit's purely *legal* conclusion that common-law immunity is categorically unavailable for alleged *jus cogens* violations. *See supra* Part I. By its terms, the Fourth Circuit's exception applies in all cases involving "*act*[*s*] that would violate a *jus cogens* norm of international law," such as "torture, genocide, indiscriminate executions and prolonged arbitrary imprisonment." Pet. App. 62a (emphasis added). At no point did the Fourth Circuit indicate that its holding turned on whether those "acts" were alleged

versus proven. *Id.* 62a-66a. Rather, the court broadly held that, "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity." *Id.* 65a-66a.

Furthermore, the Fourth Circuit's interlocutory opinion involved the denial of Petitioner's motion to dismiss, *id.* 44a-46a, in which a court accepts as true the factual allegations of the complaint, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Respondents do not contend that there is any distinction between the *jus cogens* violations assumed to be true by the Fourth Circuit and the *jus cogens* violations later found by the district court—nor could they. *Compare* Pet. App. 62a (Fourth Circuit) (describing allegations in complaint), *with id.* 7a, 33a (Dist. Ct.) (describing factual findings).

Finally, the whole point of immunity is to shield defendants from liability and the burdens of litigation—whether or not the defendant actually committed the acts in question. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). That is why determinations of foreign official immunity are typically made at the outset of litigation, and it is why the Fourth Circuit's categorical denial of immunity for alleged *jus cogens* violations does not depend on whether those allegations are ultimately proven.

B. The Somali Government's Request for Immunity for Petitioner Does Not Preclude Review

Respondents next argue that Petitioner's citation of the Somali Prime Minister's request for immunity

for Petitioner somehow "compounds the inappropriateness of certiorari review." Opp. 15.

The position of the Somali government played no role in the Fourth Circuit's reasoning for creating a *jus cogens* exception to foreign official immunity. This Court can review that purely legal determination without reaching the Somali government's request for immunity, which the lower courts can consider on any potential remand, along with any new immunity determination by the Executive Branch.

In any event, there is nothing improper about Petitioner's advising this Court of developments regarding the Somali government. *See generally Republic of Iraq v. Beaty*, 556 U.S. 848, 864-65 (2009) ("Foreign sovereign immunity 'reflects current political realities and relationships . . . .'"). Nor is there any ambiguity about a request for immunity signed by the recognized head of the Government of Somalia. Pet. 23. And Respondents can hardly fault Petitioner for raising this evidence now because, as Respondents themselves observe, the Somali Prime Minister's letter is dated "six weeks after the Fourth Circuit dismissed petitioner's final judgment appeal." Opp. 15; Pet. App. 73a.

C. Petitioner Is Not Foreclosed from Obtaining Relief on a Potential Remand

Respondents further contend that this Court should deny certiorari because the United States previously recommended against immunity for Petitioner. Opp. 19. The Government's outdated immunity recommendation does not diminish the certworthiness of this case.

First, the Fourth Circuit created a *jus cogens* exception without regard for the Government's recommendation. Not once in the critical part of its opinion—i.e., the portion of the opinion explaining the "conclu[sion]" that there is no immunity for foreign officials in cases involving *jus cogens* violations—did the Fourth Circuit cite the Government's immunity recommendation. Pet. App. 62a-66a. Only *after* adopting its per se non-immunity rule did the court briefly note that the Government's Statement of Interest supplied "*additional* reasons to support" the denial of immunity. *Id.* 68a (emphasis added). Even then, the Fourth Circuit never suggested that the factors cited by the Government were independently sufficient grounds for denying immunity.

Second, the Solicitor General has previously indicated that the United States would engage in "further consideration" of Petitioner's case in light of subsequent developments in U.S.-Somali relations. U.S. Br. 23. The State Department's original "suggestion of non-immunity . . . rested principally on the fact that there was no recognized government of Somalia to assert immunity on petitioner's behalf." *Id.* 22. Since that determination, the United States has recognized the government of Somalia, *id.* 9-10, and the Somali government has twice requested immunity for Petitioner, Pet. App. 73a, 113a. With these developments having overtaken the primary basis for the United States' recommendation of non-immunity, the Government is free to "submit any new determination it might make concerning petitioner's immunity," and "the lower courts [could] consider such matters in the first instance" during any potential remand. U.S. Br. 23.

Third, even absent a new immunity recommendation, the State Department's now-dated recommendation cannot be entitled to absolute deference when the "principal[]" basis for that recommendation has evaporated. *Id.* 22. After all, the only other ground for the suggestion of non-immunity was Petitioner's "resid[ence] in the United States," Pet. App. 86a, which according to the State Department, "[wa]s not, in itself, determinative of [Petitioner's] immunity from suit," *id.* Rather, it was relevant only "in the circumstances" then at issue, where Petitioner was "a former official of a state with no currently recognized government," *id.* 83a, 85a-86a. At a minimum, speculation about the outcome of any remand that this Court might order provides no basis for denying certiorari.

D. The Circuits Are Divided on the Important Question Presented

The Fourth Circuit's decision is at odds with decisions of the Second, Seventh, and D.C. Circuits. Respondents' attempt to minimize this conflict is without merit.

1. In both *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), and the present case, the Government argued against a *jus cogens* exception to foreign official immunity. While the Second Circuit adopted the Government's interpretation of the common law, the Fourth Circuit recognized a categorical *jus cogens* exception, thus creating a circuit split acknowledged by the Solicitor General. U.S. Br. 22; Pet. 14-16.

That *Matar* pre-dated this Court's decision in *Samantar* is irrelevant. Opp. 22. *Samantar* was decided under the FSIA; *Matar* held that, regardless of the FSIA, the defendant was "immune from suit

under common-law principles that pre-date, and survive, the enactment of that statute." 563 F.3d at 14. That was so, according to the Second Circuit, even though the plaintiffs alleged violations of *jus cogens* norms. *Id.* at 14-15. Thus, in conflict with the decision below, the Second Circuit squarely rejected a *jus cogens* exception to common-law foreign official immunity.

Respondents argue that because *Matar* was decided before *Samantar*, the Second Circuit never had the opportunity "to consider the factors and principles announced by the Executive Branch in its *Samantar* brief and post-*Samantar* statements of interest." Opp. 22 (citing Br. for the United States as *Amicus Curiae* 24-26, *Samantar v. Yousuf*, 560 U.S. 305 (2010) (No. 08-1555)). But the passage that Respondents cite from a brief focused on FSIA immunity did not announce a dramatic shift in the Government's interpretation of common-law immunity. It merely restated the settled principle that official acts, unlike private acts, are subject to immunity. U.S. Br. 25 (No. 08-1555) Critically, the Government has steadfastly maintained—including in this very case—that courts should *not* create a categorical *jus cogens* exception. While *Matar* accepted the Government's argument, the Fourth Circuit rejected it.

Finally, while the Second Circuit's holding "came in the context of an Executive Branch suggestion that immunity be granted," Opp. 22-23, that provides no basis for distinguishing *Matar*. As noted above, the Government's position as to a *jus cogens* exception was consistent in both cases. Moreover, in agreeing with the Government, the Second Circuit

independently discussed the scope of common-law immunity, *see Matar*, 563 F.3d at 14-15, just as the Fourth Circuit discussed its own reasons for recognizing a *jus cogens* exception to immunity. The circuit split between these courts warrants this Court's intervention.

2. The decision below is also at odds with the D.C. Circuit's decision in *Belhas v. Ya'alon*, 515 F.3d 1279, 1286-88 (D.C. Cir. 2008), which rejected a *jus cogens* exception to an individual official's (pre-*Samantar*) immunity under the FSIA. While the D.C. Circuit has not yet had to decide the question, *see* Opp. 21, the logic of *Belhas* applies equally to common-law immunity. Indeed, this Court noted that rules developed for foreign official immunity under the FSIA also "may be correct as a matter of common-law principles." *Samantar*, 560 U.S. at 322 n.17.

3. Respondents characterize the Seventh Circuit's decision in *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004), as rejecting a *jus cogens* exception only as to head-of-state immunity. Opp. 21-22. Yet the briefing in that case shows that both head-of-state and foreign official immunity were at issue, and the Government urged the Seventh Circuit to reject a *jus cogens* exception to both forms of immunity. *See* Pet. 17-18. Thus, the Seventh Circuit's rejection of the plaintiffs' argument that "the Executive Branch has no power to immunize a head of state (o*r any person for that matter*) for acts that violate *jus cogens* norms of international law," *Ye*, 383 F.3d at 625 (emphasis added), covers both categories of immunity. Indeed, the Government has since characterized *Ye* as rejecting a *jus cogens* exception

in both the head-of-state and foreign official immunity contexts. *See* Pet. 18.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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