No. 13-1361

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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Although the government does not agree with every aspect of the opinion below, it makes clear that "the court of appeals' judgment in respondents' favor is consistent with the Executive Branch's determination that petitioner is not immune." U.S. Br. 23. Accordingly, in agreement with respondents (BIO 17-27), the government correctly concludes that, "in light of all the circumstances, this Court should not grant review." U.S. Br. 23 (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions.")).

As respondents have explained, the courts of appeals—including the Fourth Circuit here—

uniformly agree that courts must afford at least "substantial weight" to the Executive Branch's suggestions of immunity. *See* BIO 17-20. And no court of appeals has ever conferred common law official-acts immunity for violations of *jus cogens* norms where the State Department has suggested no immunity. BIO 20-23. Now that the State Department has conclusively "reaffirmed its determination of non-immunity," U.S. Br. 23, the ultimate judgment in this case would not change under any reasonably conceivable legal standard of immunity or deference to the Executive Branch. This Court's review is therefore unwarranted.

1. Petitioner challenges a Fourth Circuit judgment that accorded "substantial weight" to the Executive Branch's suggestion of non-immunity in the course of denying his immunity request. Pet. App. 58a, 67a. By petitioner's own argument, his prospect of obtaining reversal hinged on recent factual developments, including the United States' diplomatic discussions with the newly recognized Somali government, that raised the possibility that the Executive might submit a "new" immunity determination to replace its "outdated" one. Pet. Reply 9; *see id.* at 8 ("With *** 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'" on remand.).

That possibility (however remote) has now vanished entirely. Following further official diplomatic engagement with the Somali government, the United States has determined that Somalia "does

not request immunity for petitioner in this suit." U.S. Br. 21. The United States has further made the deliberate "deci[sion] that, under the circumstances, there is no reason to alter its determination that petitioner is not immune from this suit." *Id.* That is now, in no uncertain terms, the conclusive position of the United States. Although petitioner has previously suggested that this Court could simply resolve the question he presents and then remand for further consideration, he can no longer proffer any realistic scenario in which this Court's review might lead to a different *judgment*. *See* U.S. Br. 23 ("Now that the Executive Branch has reaffirmed its determination of non-immunity . . . there is no reason to believe that the Fourth Circuit would decline to reinstate its judgment denying immunity.").

2. To be sure, the government disagrees with two aspects of the Fourth Circuit's opinion. *First*, the government contends that the court of appeals erred in affording merely "substantial" (rather than "controlling") weight to conduct-based immunity determinations. The gap between "substantial" deference and "controlling" deference, however, makes no difference in this case, where the Fourth Circuit ultimately agreed with the government's position. And regardless of how this Court might narrow that gap (if at all), the government, respondents, and the Fourth Circuit all agree that there is no merit to petitioner's unsurprising but unprecedented view of no deference whatsoever.

Second, the government contends that the Fourth Circuit erred in creating what the government believes to be a "categorical" judicial exception to

immunity. U.S. Br. 12-20. As respondents have explained, however, the government reads the court of appeals' opinion more broadly than its context warrants. *See* BIO 17-20. Because the court of appeals ultimately adopted the government's position, it had no occasion to decide—and certainly not as a "categorical" matter—whether it would have rejected a contrary, *pro*-immunity suggestion from the Executive. BIO 23.

However one reads the exact terms of the court of appeals' opinion, the government now agrees that the unique and rarely recurring facts presented here do not warrant this Court's review. U.S. Br. 22. That considered conclusion makes petitioner's predictions of dire foreign policy consequences and a "flood[]" of suits against foreign officials (Pet. 18)—yet to materialize—ring particularly hollow. At a minimum, as the government suggests (U.S. Br. 21), this Court should wait for a vehicle in which its resolution of the question presented could make a difference.

* * * * *

Respondents brought their claims accusing petitioner of torture, extrajudicial killing, and other abuses in 2004. More than a decade later, the United States has finally closed the book on its position with respect to petitioner's quest for immunity from those claims and the resulting judgment. It is time for this Court to do the same.

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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