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

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF FOR PETITIONER

Once again, the Solicitor General recognizes that the Fourth Circuit erroneously adopted a "categorical judicial exception" to common-law immunity for foreign officials in cases involving alleged violations of *jus cogens* norms. Br. of the United States as Amicus Curiae at 18, *Samantar v. Yousuf*, No. 13-1361 ("U.S. Br."). Once again, the Solicitor General acknowledges that this "per se rule of non-immunity" is predicated on "critical legal errors" and creates a circuit split with *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009), on issues of vital national importance. *Id.* at 11, 18, 20. And once again, the Solicitor General explains that such a decision "would warrant review by th[is] Court at an appropriate time." *Id.* at 21.

Yet, once again, the Solicitor General advises against this Court's plenary review. This time, the Solicitor General suggests that the petition for certiorari be denied because of the Government's recent recommendation against immunity for Petitioner. That recommendation, in turn, is based solely on the State Department's conclusion that the Somali Government—after years of supporting immunity for Petitioner—allegedly withdrew that support at the eleventh hour.

There are any number of reasons to question whether this is the actual position of the Somali Government, as outlined below. But, in any event, that issue is irrelevant to the certworthiness of this case. Nothing in the Question Presented requires this Court to determine Petitioner's ultimate entitlement to immunity. Instead, the Court should reject the Fourth Circuit's erroneous categorical rule of non-immunity and remand for further proceedings

under the correct legal standard, as it routinely does in the immunity context. *E.g.*, *Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001) (clarifying the relevant immunity standard and remanding for application of that standard); *Elder v. Holloway*, 510 U.S. 510, 516 (1994) (same); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (same). That would resolve the circuit split that the Fourth Circuit created, bring U.S. law back into accord with general principles of international law, and allow the ultimate question of Petitioner's immunity to be decided by a court better suited to resolving contentious factual disputes.

I. THE DECISION BELOW WARRANTS THIS COURT'S IMMEDIATE REVIEW

For the second time, the Solicitor General has submitted a brief in this Court arguing that the Fourth Circuit created a circuit split and erroneously decided important legal issues that warrant this Court's review. *Compare* U.S. Br. at 11-21, *with* Br. for the United States as Amicus Curiae at 12-22, *Samantar v. Yousuf*, No. 12-1078 (Dec. 2013) ("U.S. Br. (12-1078)").

First, the Government reiterates that the decision below "conflicts with the Second Circuit's decision in *Matar*." U.S. Br. at 20 (citing *Matar*, 563 F.3d 9). Whereas the Fourth Circuit created "a categorical exception to immunity whenever *jus cogens* violations are alleged," *Matar* granted official immunity to a defendant "in a case involving alleged violations of *jus cogens* norms." *Id.* at 19-20. As the Government notes, *id.* at 20, lower courts have recognized this split in authority. *E.g.*, *Rosenberg v. Pasha*, 577 F. App'x 22, 24 (2d Cir. 2014) (explaining

that the Second Circuit is "bound to follow" *Matar* and rejecting the Fourth Circuit's decision in *Samantar*, which "held . . . that common law foreign official immunity did *not* apply to alleged violations of jus cogens norms"). Moreover, they are looking to this Court to resolve this "complicated" question. *Rosenberg v. Lashkar-e-Taiba*, 980 F. Supp. 2d 336, 344 (E.D.N.Y. 2013).

Second, the Government again correctly explains that the Fourth Circuit "fundamentally erred" by "announcing a categorical exception to official immunity whenever allegations of *jus cogens* violations are made." U.S. Br. at 20. As the Government shows, this "per se," "categorical exception" contradicts domestic law and should not be left standing. *Id.* at 18-21.

Third, the Government confirms that the Fourth Circuit's decision is out of step with bedrock principles of international law. *See id.* at 20 (citing *Kazemi v. Islamic Republic of Iran*, 2014 SCC 62, ¶ 106 (Can.)). Indeed, both the Supreme Court of Canada and the European Court of Human Rights ("ECHR") have recently explained that the decision below contravenes the "bulk of authority" in "cases concerning civil claims for torture lodged against foreign State officials." *Jones v. United Kingdom*, [2014] ECHR 34356/06, ¶¶ 110-49, 213, 215; *Kazemi* ¶¶ 106-09 (concluding that the Fourth Circuit's decision lies outside the mainstream of international law).[1]

[1] The opinion in *Jones* is available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140005,

However, both the ECHR and the Canadian Supreme Court suggested that the decision below—if allowed to stand—may foreshadow "emerging support in favour of a special rule or exception . . . in cases concerning civil claims for torture lodged against foreign State officials." *Jones* ¶ 213; *Kazemi* ¶ 108 (suggesting that such a rule was "an emerging idea that is in its conceptual infancy"). Indeed, in declining to follow the Fourth Circuit's decision, they pointedly noted the pendency of this petition for certiorari. *Jones* ¶¶ 125, 211; *Kazemi* ¶ 106. Among other things, the "pending appeal of [the Fourth Circuit's] decision to the Supreme Court of the United States" led the Canadian Supreme Court to afford the ruling "little weight"—presumably on the assumption that this Court would bring U.S. law back into alignment with international norms. *Kazemi* ¶¶ 106-09. With foreign courts monitoring "developments currently underway in this area of public international law," *Jones* ¶ 215, there can be little doubt that they would view this Court's refusal to review the Fourth Circuit's decision as evidence of an "emerging" consensus regarding foreign officials' entitlement to immunity, *id.* ¶ 213; *Kazemi* ¶ 108.

As the Government has previously acknowledged, such a trend would have "negative consequences for the United States' foreign-relations interests." U.S. Br. at 12 (No. 12-1078). Allowing the Fourth Circuit's decision to remain on the books would "disturb th[e existing] international

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and the opinion in *Kazemi* is available at https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14384/index.do.

consensus" concerning foreign official immunity. *See* Br. for the United States of America as Amicus Curiae in Support of Affirmance at 25, *Matar*, 563 F.3d 9 (No. 07-2579), 2007 WL 6931924. "Such a deviation from the international norm would create an acute risk of reciprocation by foreign jurisdictions," increasing the likelihood that U.S. officials will be subjected to similar suits abroad *Id.* at 24-25.

In short, the Solicitor General agrees that the circuits are split, agrees that the Fourth Circuit gravely erred, and has previously argued that allowing such an outlier to stand could have disastrous foreign-relations consequences. That international courts are closely monitoring this proceeding only makes the need for this Court's review all the more pressing.

II. NOTHING PRECLUDES THIS COURT FROM RESOLVING THE LEGAL QUESTION PRESENTED

The Solicitor General nevertheless advises against a grant of certiorari. According to the Solicitor General, the Government's recent recommendation against immunity—based solely on the Somali Government's purported withdrawal of its immunity request—will preclude Petitioner from obtaining relief on remand. U.S. Br. at 21-22. While Petitioner's ultimate fate on remand provides no basis for refusing to resolve the dangerous circuit split created by the decision below, *see supra* at 1-2, the Government's prediction about the result on remand is, in all events, fundamentally flawed. This prediction is based on two separate but related premises: first, that the Fourth Circuit will

unhesitatingly defer to the Executive Branch's recommendation of non-immunity on remand, and second, that the Executive has accurately "ascertain[ed] . . . the Somali Government's actual position" on Petitioner's entitlement to immunity. U.S. Br. at 22. Both premises are wrong.

1. The Fourth Circuit does not consider itself bound by the Executive's immunity determinations. As the Government concedes, *id.* at 23, the Fourth Circuit expressly stated that "[t]he State Department's determination regarding conduct-based immunity . . . *is not controlling*," but carries only "substantial weight," Pet.App. 58a (emphasis added). According to the Fourth Circuit, such "immunity decisions turn upon principles of customary international law and foreign policy, areas in which the courts respect, but do not automatically follow, the views of the Executive Branch." *Id.* 57a. Thus, whatever role the Government's recommendation may play in the Fourth Circuit's decision on remand, it is "not controlling," and thus does not preclude Petitioner from obtaining relief.

2. The sole basis for the Executive's recent recommendation against immunity for Petitioner is its belief that the Somali Government has, at the last minute, withdrawn its longstanding request for immunity. The tenuous basis for that belief makes it all the more unlikely that the courts below would blindly adopt the Government's position. At the very least, the events described below raise factual disputes and questions of foreign law that should be decided on remand; Petitioner should not be deemed

ineligible for immunity on the basis of the ex parte communications described in the Government's brief.

According to the Solicitor General, on April 22, 2014, the State Department received a communication from the Somali "Deputy Director General of the Presidency/Operations Manager" purporting to designate State Attorney General Osman Elmi Guled to "act[] on behalf of the Federal government of Somalia on all types of immunities." U.S.App. 6a-7a. Several months later, on July 25, 2014, an unnamed State Department representative met with State Attorney General Guled, who purportedly indicated that "Somalia does not wish to seek immunity for petitioner in this case." U.S. Br. at 10. None of this information was communicated to Petitioner or his counsel.

Instead, after this Court requested the views of the Solicitor General, counsel for Petitioner were invited to meet with Government counsel at the Department of Justice on November 17, 2014, to discuss the case. The Somali Ambassador to the United States, Omar Abdirashid Ali Sharmarke,[2] informed Petitioner's counsel that he wished to accompany counsel to the meeting to reiterate Somalia's formal request for immunity. Counsel then informed the Office of the Solicitor General that Ambassador Sharmarke would attend the meeting. But, as Ambassador Sharmarke was en route to the undersigned counsel's office shortly before the

[2] Press Release, U.S. Dep't of State, U.S. Welcomes Somali Ambassador to the United States, Omar Abdirashid Ali Sharmarke (July 14, 2014), *available at* http://www.state.gov/r/pa/prs/ps/2014/07/229266.htm.

meeting at the Department of Justice, the State Department contacted him to inform him that the meeting would be for lawyers only. The State Department offered to meet with the Ambassador separately in the near future. But, to the knowledge of undersigned counsel, that meeting never took place.

Rather than meeting with the Somali Ambassador to the *United States*, on December 23, 2014, the State Department, via the U.S. Embassy in Nairobi, submitted a letter through the Somali Ambassador to *Kenya* for transmission to the "office of the President [of Somalia] as well as . . . State Attorney General[] Guled." U.S.App. 3a. In that letter, the State Department said that it would assume that the oral position set forth at the July 25, 2014 meeting—which the Somali Government has never confirmed in writing—was "the Government of Somalia's final position on th[is] matter" unless it heard otherwise by January 23, 2015. *Id.* 4a-5a. The State Department received no response to this silence-is-deemed-assent letter within the dictated time frame. The absence of a response forms the sole basis for the United States' recommendation of non-immunity, expressed in its CVSG brief to this Court a week later. *Id.* 1a-2a.

Suffice it to say, this unusual sequence of events raises serious doubts about whether the Government of Somalia wishes to formally withdraw its repeated, longstanding requests for immunity for Petitioner. Pet. App. 73a, 113a. The United States' actions are all the more puzzling because the same Somali Ambassador who wished to reiterate Somalia's request for immunity at the November 17 meeting *is*

now the Prime Minister of Somalia. U.S. Br. at 9 n.3 (confirming that Omar Abdirashid Ali Sharmarke is the "new Prime Minister" of Somalia). Rather than meeting with the Ambassador (now Prime Minister) while he was in the United States, the State Department chose to wait and indirectly communicate instead through the U.S. Embassy in Nairobi. And though it had previously exhibited no urgency in resolving questions regarding Petitioner's immunity, Pet. Supp. Br. at 9-10, *Samantar v. Yousuf*, No. 12-1078 (Dec. 23, 2013), and was under no deadline from this Court, the State Department imposed an arbitrary cutoff date for Somalia to respond, and filed its brief in this Court one week later. Complicating matters further, the State Department's letter was transmitted—and its arbitrary deadline passed—in the midst of a transition of power in the Office of the Somali Prime Minister, raising questions as to whether any official with decision-making authority even received (much less had time to address) the State Department's inquiry.[3]

Indeed, prior machinations in this case make representations by individuals purporting to represent the Somali President particularly dubious. *See* Pet. at 11-12; U.S. Br. at 8-9. This is especially true because, in a letter from his Chief of Staff, the same President—Hassan Sheikh Mohamoud—whose

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[3] Abdi Sheikh, *Somali Parliament Approves Cabinet After Weeks of Wrangling*, Reuters (Feb. 9, 2015), *available at* http://www.reuters.com/article/2015/02/09/us-somalia-government-idUSKBN0LD1GG20150209.

views were purportedly represented at the July 25, 2014 meeting, had previously "affirm[ed] and ratifie[d] Mr. Samantar's plea of common law immunity from suit, finding that his acts in question were all undertaken in his official capacity with the Government of Somalia." Pet.Supp.App. 4a-5a *Samantar v. Yousuf*, No. 12-1078 (Jan. 7, 2013); *see also* Pet. Supp. Br. at 1-2, *Samantar v. Yousuf*, No. 12-1078 (Jan. 7, 2013).

In any event, under the Somali Constitution, it is the Prime Minister, not the President, who has authority to make final determinations regarding requests for immunity. As in many parliamentary governments, the Somali Prime Minister—not the President—is "the Head of the Federal Government" and is responsible for "formulat[ing] the overall government policy and implement[ing] it." *See* Provisional Constitution, Fed. Rep. of Somalia arts. 99, 100; *cf. id.* art. 87 (describing the President as "[t]he symbol of the national unity"), *available at* http://unpos.unmissions.org/LinkClick.aspx?fileticket=RkJTOSpoMME=. That is why two different *Prime Ministers* have twice formally requested immunity for Petitioner. Pet. App. 73a, 113a. Thus, even if the position purportedly espoused at the July 25, 2014 meeting *were* that of the Somali *President*, it would not reflect the formal position of the Somali Government.

All that is to say that there are legitimate reasons to question whether the Somali Government has in fact decided to suddenly reverse course and withdraw its considered and repeated requests for immunity for Petitioner. Those questions, however, need not be resolved by this Court at all. This Court

should grant certiorari, decide the purely legal question presented, and remand under the correct legal standard for the courts below to resolve any outstanding questions regarding Petitioner's entitlement to immunity, (including contentious factual disputes about Somalia's position).

In sum, a highly dubious eleventh-hour development on a factual question that can be resolved on remand should not lead this Court to leave in place a categorical non-immunity rule that has divided the circuits and that presents a question of national and international importance.

CONCLUSION

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

Respectfully submitted,

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