No. 21-1338

In the Supreme Court of the United States

NSO GROUP TECHNOLOGIES LIMITED, ET AL.,
PETITIONERS

v.

WHATSAPP INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD C. VISEK
Acting Legal Adviser
Department of State
Washington, D.C. 20520

QUESTION PRESENTED

Whether a nongovernmental corporation that does not come within the definition of a "foreign state" under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1603(a) and (b), may nevertheless be entitled to immunity from suit as a matter of federal common law based on conduct it claims to have engaged in as an agent of a foreign state.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. For much of our Nation's history, principles adopted by the Executive Branch, which were binding on the courts, determined the immunity of foreign states and their officials in civil suits in courts of the United States. See, *e.g.*, *Republic of Mex.* v. *Hoffman*, 324 U.S. 30, 34-36 (1945). In 1976, Congress replaced that "executive-driven * * * immunity regime," *Republic of Arg.* v. *NML Capital, Ltd.*, 573 U.S. 134, 141 (2014), with the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1330, 1602 *et seq*. The FSIA provides a "comprehensive set of legal standards governing

claims of immunity in every civil action against a foreign state." *Verlinden B. V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 488 (1983); see, *e.g.*, *NML Capital*, 573 U.S. at 141-143.

The FSIA defines a "foreign state" to include not only the state itself, but also "a political subdivision of a foreign state or an agency or instrumentality of a foreign state." 28 U.S.C. 1603(a). The statute defines an "agency or instrumentality of a foreign state" as "any 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 as defined in section 1332(c) and (e) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b).

The FSIA provides (subject to certain international agreements) that a "foreign state shall be immune" from suit, except as provided in Sections 1605 through 1607. 28 U.S.C. 1604. If a suit comes within a statutory exception to foreign sovereign immunity, the FSIA provides for subject-matter jurisdiction in federal district court, 28 U.S.C. 1330(a), as well as for personal jurisdiction over the foreign state if service has been made in accordance with the FSIA's provisions, 28 U.S.C. 1330(b). When a statutory exception to immunity applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606. The FSIA also

makes foreign-state-owned property in the United States "immune from attachment[,] arrest[,] and execution," 28 U.S.C. 1609, subject to exceptions that are "narrower" than those applicable to jurisdictional immunity. *NML Capital*, 573 U.S. at 142; see 28 U.S.C. 1610, 1611.

In *Samantar* v. *Yousuf*, 560 U.S. 305 (2010), this Court held that the FSIA did not displace the common-law immunity regime that applies to individual officials of a foreign state. *Id.* at 323-325. Under that common-law framework, if the State Department informs a court that a foreign official is entitled to immunity in a particular suit, "the district court surrender[s] its jurisdiction." *Id*. at 311 (describing pre-FSIA practice). If the State Department does not participate in the litigation, the court determines whether the official is immune by applying principles articulated by the Executive Branch. *Id*. at 311-312 (same).

2. Petitioner NSO Group Technologies Ltd. (NSO) is an Israeli company that produces surveillance technology, which it licenses to governments and government agencies. Pet. App. 3. Respondent WhatsApp provides a communications service that allows its users to send encrypted communications. *Id.* at 4.

In October 2019, WhatsApp sued NSO in the U.S. District Court for the Northern District of California, alleging that NSO had unlawfully used a spyware program called Pegasus to bypass WhatsApp's encryption and to install malicious code on the devices of WhatsApp users, which allowed NSO's customers to access information on the targeted WhatsApp users' devices. Pet. App. 4; see *id.* at 23-24. WhatsApp asserted violations of federal and state law, and it sought injunctive relief and damages. *Id.* at 4.

NSO moved to dismiss the suit on immunity grounds. Pet. App. 32. The parties agreed that as a private foreign entity, NSO did not "qualify as [a] foreign state[]" and could not "directly avail" itself of sovereign immunity under the FSIA. *Ibid.* But NSO contended that it was immune because it was a contractor of foreign governments and the suit involves conduct NSO allegedly undertook as an agent of those sovereigns. *Ibid.* The district court recognized that NSO's argument implicated two different doctrines, *ibid.*, and it determined that neither one applied, *id.* at 33-41.

First, the district court held that NSO is not immune under the common-law doctrine of foreign official immunity, which "potentially applies to the acts of foreign officials not covered by the FSIA." Pet. App. 33 (citing *Samantar*, 560 U.S. at 311); see *id.* at 33-36. NSO argued that "a foreign sovereign's private agent[]" enjoys "conduct-based" immunity "when the agent acts on behalf of the state." *Id.* at 34. The court determined that in the absence of a suggestion of immunity by the State Department, it should assess NSO's contention under Section 66(f) of the Restatement (Second) of the Foreign Relations Law of the United States (1965) (Second Restatement). Pet. App. 34. The court determined, however, that NSO would not be entitled to conduct-based immunity under the Second Restatement. *Id.* at 35-36.[1]

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[1] The Second Restatement provides that a foreign state's immunity extends to "any other public minister, official, or agent of the state with respect to acts performed in his official capacity if the effect of exercising jurisdiction would be to enforce a rule of law against the state." Second Restatement § 66(f) (emphasis omitted). This Court has not decided whether the Second Restatement "correctly" articulates common-law official immunity

Second, the district court held that NSO is not entitled to "derivative sovereign immunity." Pet. App. 37. The court explained that in *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462 (2000), the Fourth Circuit relied on the FSIA to recognize such an immunity in a suit against a U.S. company acting within the scope of an agency relationship with a foreign sovereign. *Id.* at 466; see Pet. App. 37-38. But the district court declined to follow the Fourth Circuit because the Ninth Circuit has not accepted a derivative foreign sovereign immunity doctrine. Pet. App. 38-40. The district court further explained that even if it were to apply *Butters* "as persuasive authority," NSO would not "meet its standard" because NSO was "not incorporated or formed in the United States." *Id.* at 40; see *ibid.* ("None of the other cases cited by [NSO] involve the application of derivative sovereign immunity to foreign entities.").

3. The court of appeals affirmed on alternative grounds, but likewise rejected NSO's argument that it is protected by a common-law immunity comparable to the immunity for foreign officials. Pet. App. 1-19. The court held that the FSIA "categorically forecloses extending immunity to any entity that falls outside the FSIA's broad definition of 'foreign state.'" *Id.* at 2-3. The court stated that "the FSIA's text, purpose, and history demonstrate that Congress displaced common-law sovereign immunity doctrine as it relates to entities." *Id.* at 3.

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principles. *Samantar*, 560 U.S. at 321 n.15. The United States, however, has taken the position that "[r]eliance on the Second Restatement's provisions on foreign-official immunity as a conclusive statement of current law is misplaced." U.S. Amicus Br. at 14, *Mutond* v. *Lewis*, 141 S. Ct. 156 (2020) (No. 19-185).

The court of appeals reasoned that "[i]n creating a 'comprehensive set of legal standards governing claims of immunity' * * * , Congress defined the types of foreign entities—including, specifically, foreign corporate entities—that may claim immunity." Pet. App. 14 (quoting *Verlinden B. V.*, 461 U.S. at 488) (footnote omitted). The court concluded that the statute's specific delineation of the entities entitled to foreign sovereign immunity "forecloses immunity for any entity falling outside" the FSIA definition. *Id.* at 15.

The court of appeals found it "odd * * * to think that by not including a category of entity within its definition of 'foreign state,' Congress intended for such entities to have the ability to seek immunity outside its 'comprehensive' statutory scheme." Pet. App. 14 (quoting *Republic of Austria* v. *Altmann*, 541 U.S. 677, 699 (2004)). The court also observed that extending the conduct-based immunity for individual officials to foreign private entities would be incongruous because it could give them immunity for some conduct, such as certain commercial conduct, for which foreign state enterprises would be subject to suit. *Id.* at 16 (discussing *Pablo Star Ltd.* v. *Welsh Gov't*, 961 F.3d 555, 560 (2d Cir. 2020), cert. denied, 141 S. Ct. 1069 (2021); 28 U.S.C. 1605(a)(2)). The court further contrasted what it regarded as Congress's comprehensive regulation of immunity for entities with its silence as to foreign officials, emphasizing that this Court had relied on that silence in *Samantar* in concluding that the FSIA did not displace the common-law immunity of individual foreign officials. *Id.* at 12.

DISCUSSION

The court of appeals held that the FSIA entirely forecloses the adoption of any form of immunity under the common law for an entity that acted as an agent of

a foreign state. The United States is not prepared at this time to endorse that categorical holding, which is not necessary to resolve this case—and which would foreclose the Executive Branch from recognizing the propriety of an immunity in a particular context in the future even if such a recognition were found to be warranted, including by developments in international law or practice in foreign courts.

Nonetheless, the court of appeals reached the correct result in this case: Whether or not common-law immunity for an entity acting as the agent of a foreign state might be appropriate in some circumstances, NSO plainly is not entitled to immunity here. The State Department has not filed a suggestion of immunity in this case. There is no established practice—or even a single prior instance—of the State Department suggesting an immunity for a private entity acting as an agent of a foreign state. And no foreign state has supported NSO's claim to immunity; indeed, NSO has not even identified the states for which it claims to have acted as an agent.

Nor does the court of appeals' decision otherwise warrant review. It does not conflict with any decision of this Court. The question presented has not divided the courts of appeals—indeed, it has seldom arisen at all. And this unusual case would be a poor vehicle for considering that question in any event. The petition for a writ of certiorari should be denied.

A. The Court Of Appeals Correctly Held That NSO Is Not Immune From Suit

1. The FSIA provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity" with the statute. 28 U.S.C. 1602. The FSIA defines a "foreign state" to include not just the "body politic" itself,

but also the state's agencies and instrumentalities. *Samantar* v. *Yousuf*, 560 U.S. 305, 314 (2010); see 28 U.S.C. 1603(a). NSO acknowledges that it does not satisfy that statutory definition because it is neither an organ of a foreign state nor majority owned by a foreign state. Pet. App. 32; see 28 U.S.C. 1603(b). But NSO contends that it is nonetheless entitled to a common-law immunity, which it asserts would be analogous to the common-law immunity of foreign officials, for actions NSO allegedly took as an agent of foreign governments.[2]

The court of appeals rejected that contention, concluding that the FSIA's specification of the entities (including corporations) that have a sufficient nexus to a foreign state to be covered by the statute's conferral of sovereign immunity categorically forecloses recognition of any common-law immunity for any other entities. The FSIA's grant of immunity to entities in those specified circumstances could be understood to create such a "negative implication" that immunity for entities is "unavailable in any other circumstances." *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). That negative implication also finds some support in the FSIA's legislative history: Both the House and Senate Reports reprinted a section-by-section analysis prepared by the Departments of State and Justice stating that "[a]n entity which does not fall within the definition of Sections 1603(a) or (b) would not be entitled to sovereign immunity in any case before a Federal or State court." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15 (1976); S. Rep. No. 1310, 94th Cong., 2d Sess. 15 (1976); 122 Cong. Rec. 17,465, 17,466 (1976).

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[2] The United States takes no position on whether NSO in fact acted as such an agent.

This Court has cautioned, however, that "[t]he force of any negative implication" to be drawn from a statute "depends on context." *Marx*, 568 U.S. at 381. In particular, the presumption that Congress's inclusion of some circumstances implies the exclusion of others "does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it.'" *Ibid.* (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003)). And here, there is reason to question whether Congress, in enacting the FSIA, considered and intended to categorically foreclose any immunity for an entity that acts as an agent of a foreign state, but that does not meet the FSIA's definition of an "agency or instrumentality" of a foreign state.

The FSIA's text and the legislative history cited above specifically address only entities that Congress determined should be covered by a foreign state's *sovereign* immunity because they are so closely connected with the foreign state that they are deemed to be part of the state itself for these purposes. That is a *status-based* determination: An entity that satisfies the "agency or instrumentality" definition in 28 U.S.C. 1603(b) is treated as a foreign state for purposes of immunity from suit under the FSIA, regardless of the involvement (or non-involvement) of the foreign state itself in the events giving rise to the suit.

The question whether an entity should be treated as a foreign state for sovereign immunity purposes under the FSIA is distinct from the question whether a more limited form of *conduct-based* immunity could be recognized for specific acts undertaken on behalf of a foreign state by an entity that does not meet the statutory definition of an "agency or instrumentality." And neither the court of appeals nor WhatsApp has pointed to any

specific textual or contextual evidence that Congress considered that specific issue in enacting the FSIA. Cf. *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 424 (2011) ("The test for whether congressional legislation excludes the declaration of federal common law" is "whether the statute 'speaks directly to the question' at issue.") (brackets and citation omitted).

2. Viewed in that light, the FSIA does not necessarily resolve the question whether or to what extent a conduct-based immunity could be recognized for such an entity under the common law—much as this Court has interpreted the FSIA to leave conduct-based immunity for individual foreign officials to be governed by the pre-FSIA common-law regime. See *Samantar*, 560 U.S. at 311-313. There is, however, a significant difference between the immunity for individual officials addressed in *Samantar* and any comparable immunity for entities: Before the FSIA, the State Department and the courts had recognized a conduct-based immunity for "individual foreign officials." *Id.* at 312. In contrast, NSO has not identified—and the United States is not aware of—any history of State Department suggestions of immunity on behalf of private entities acting as agents of foreign states. Nor has any United States court "ever applied foreign official immunity to a foreign private corporation under the common law." Pet. App. 18.[3]

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[3] NSO thus errs in asserting that the United States has already endorsed what NSO describes as an international "consensus" that private entities enjoy conduct-based immunity from suit when they "'are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.'" Pet. 7 (quoting United Nations Convention on Jurisdictional Immunities of States and Their Property (Immunities Convention), art. 2, ¶ 1(b)(iii), *opened*

Unlike in *Samantar*, therefore, the question here is not whether the FSIA should be read to displace a common-law immunity that was recognized at the time of the statute's enactment. Instead, it is whether the FSIA should be read to foreclose the State Department (and the courts) from recognizing an immunity for an entity acting as an agent of a foreign state now or in the future. In deciding whether to recognize an immunity for an entity acting as the agent of a foreign state, the State Department could consider such factors as the nature of the conduct involved; the purpose and scope of the possible immunity; relevant practice in other nations; international-law principles; any assertion by the foreign state involved that the entity was its agent and should in its view be immune; and the foreign policy interests of the United States.

In addition, Congress's enactment of the FSIA means that before recognizing any conduct-based immunity for entities, the State Department and then the courts would at a minimum need to carefully consider the statute's text, structure, context, and purpose.

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for signature Jan. 17, 2005, U.N. Doc. RES/59/38). The Immunities Convention on which NSO relies has not entered into force, and the United States has neither signed nor ratified it. And contrary to NSO's broad assertion (Pet. 7), in the Statement of Interest NSO cites, the United States stated only that the Immunities Convention is "consistent with customary international law *to the extent* that it clothes *individual officials* with the immunity of the state" for acts taken in an official capacity. U.S. Statement of Interest at 21, *Matar* v. *Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270) (emphasis added). In addition, although a few foreign courts have addressed whether a private entity acting as an agent of the state can benefit from immunity, there is not a well-developed international practice on affording immunity to private entities acting as agents of a foreign state.

Even where Congress has not completely displaced the common law in a particular area, its "legislative enactments" may supply instructive "policy guidance" for any future consideration of an immunity. *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2278 (2019) (citation omitted).

Those considerations—including the implications to be drawn from the FSIA—may not lend themselves to a uniform answer to the question whether entities that do not satisfy the FSIA's definition of an agency or instrumentality of a foreign state can nonetheless claim a conduct-based immunity similar to that available to individual foreign officials. For example, the State Department has recognized the immunity of foreign officials in suits involving commercial acts for which a foreign state would not be immune under the FSIA. *Greenspan* v. *Crosbie*, No. 74-Civ.-4734, 1976 WL 841, at *1-*2 (S.D.N.Y. Nov. 23, 1976) (pre-FSIA suit); see 28 U.S.C. 1605(a)(2). If a private entity (such as one in which the state owned only 49% of the shares) were similarly entitled to conduct-based immunity when acting as an agent for a foreign state in a commercial transaction, it would enjoy an immunity Congress chose to deny entities that are agencies and instrumentalities of the state itself. Such a result could create an incentive for foreign states to attempt to use private entities to undertake activities for which their agencies or instrumentalities would be subject to suit under the FSIA.[4]

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[4] In some litigation, it might be possible to substitute the foreign state for the private entity, or to deem the suit as being against the foreign state. Cf. *Samantar*, 560 U.S. at 325 ("[I]t may be the case that some actions against an official in his official capacity should be treated as actions against the foreign state itself, as the state is the real party in interest."). But other issues might then arise. The

In contrast, a case in which a private entity acted as the agent of a foreign state in connection with the exercise of certain core sovereign authority may not raise similar issues in relation to the FSIA. And in the view of the United States, the FSIA need not be read to entirely foreclose the recognition of such an immunity in the future if the Executive—after considering the nature of the entity and its role as an agent and other relevant considerations such as those identified above—determined that a suggestion of immunity was appropriate in a particular context or circumstance.

3. There is no occasion in this case, however, for the Court to consider whether a private corporation or other entity acting as an agent of a foreign state could be protected by some form of immunity outside the FSIA in certain circumstances, because the prerequisites for any such immunity are not present here. Under the common law, courts surrendered their jurisdiction when the State Department filed a suggestion of immunity, or the courts applied the established principles accepted by the State Department if the United States did not participate in the case. See *Samantar*, 560 U.S. at 311-312. Here, however, the State Department has not filed a suggestion of immunity for NSO, and there are no established principles accepted by the State Department affirmatively recognizing a conduct-

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FSIA permits execution against a foreign state's assets in more limited circumstances than it does against the assets of a foreign state's agencies or instrumentalities. Compare 28 U.S.C. 1610(a), with 28 U.S.C. 1610(b). Thus, the remedies available to a prevailing party in a suit against a private entity in such circumstances would be significantly circumscribed as compared to those available in a suit against a foreign state agency or instrumentality.

based immunity for a private entity acting as an agent of a foreign state.

In addition, whether a foreign government has requested that the United States recognize a defendant's immunity can be an important consideration for the Executive in determining whether a suggestion of immunity would be appropriate. See *Broidy Capital Mgmt. LLC* v. *Muzin*, 12 F.4th 789, 800 (D.C. Cir. 2021); cf. *In re Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo* v. *Belg.)*, 2002 I.C.J. 3, 2002 WL 32912040, at *25-*26, No. 121 (Feb. 14, 2002). But despite NSO's claim to have acted on behalf of multiple foreign states, no foreign government has requested that the State Department recognize an immunity of NSO from this suit on the rationale that NSO was acting as its agent, or on any other basis.

B. Review By This Court Is Not Warranted

The decision below does not warrant this Court's review for multiple independent reasons.

1. First, this case would be an exceptionally poor vehicle in which to consider the question NSO seeks to raise. As just explained, the prerequisites for recognition of a common-law conduct-based immunity are not present in this case, whether or not recognition of such an immunity for a private entity that allegedly acted as the agent of a foreign government could ever be consistent with the FSIA. In the government's view, the Court should take up that important and difficult question only if and when, at a minimum, the United States has supported a claim of immunity on behalf of an entity and articulated the principles on which it rests. That would allow the Court to address the issue based on the considered judgment of the Executive Branch that recognition of an immunity would be appropriate—

rather than by asking in the abstract whether the FSIA should be read to categorically displace any such common-law immunity, without regard to its contours or justification.

At a minimum, the Court should not take up the question presented here, in a case where neither the United States nor any foreign sovereign has supported NSO's claim to immunity; where NSO itself has not even identified the foreign sovereigns for which it claims to have acted as an agent; and where the record thus includes scant details about the nature and contours of those purported agency relationships.

We note as well that while the appeal in this case was pending, the United States added NSO to the "Entity List," a list of "entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entities have been involved, are involved, or pose a significant risk of being or becoming involved in activities contrary to the national security or foreign policy interests of the United States." *Addition of Certain Entities to the Entity List*, 86 Fed. Reg. 60,759, 60,759 (Nov. 4, 2021). The United States determined that NSO met that standard based on information that it "developed and supplied spyware to foreign governments that used this tool to maliciously target government officials, journalists, businesspeople, activists, academics, and embassy workers." *Ibid.* The United States noted its commitment to using available policy tools to "hold companies accountable that develop, traffic, or use technologies to conduct malicious activities that threaten the cybersecurity of members of civil society, dissidents, government officials, and organizations

here and abroad."[5] That NSO has been the subject of such a determination for the very type of activities allegedly at issue in this case provides a further complication that distinguishes NSO from other entities that might seek a conduct-based immunity in the future.[6]

2. NSO contends that review is warranted because the court of appeals' reliance on the FSIA in rejecting its claim of immunity is inconsistent with this Court's decision in *Samantar*. See Pet. 10-11, 19-21; Pet. Reply Br. 11. That is incorrect.

According to NSO, *Samantar* held that "the FSIA does not 'supersede' the common-law with respect to defendants other than 'foreign states.'" Pet. 19 (quoting *Samantar*, 560 U.S. at 325); see Pet. 4. Because a private entity acting as an agent of a foreign state is not a "foreign state" within the meaning of the FSIA, NSO contends, the court of appeals' rejection of NSO's claim of common-law "conduct-based immunity" is inconsistent with *Samantar*. Pet. 10-11, 19-21.

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[5] Press Release, U.S. Department of Commerce, *Commerce Adds NSO Group and Other Foreign Companies to Entity List for Malicious Cyber Activities* (Nov. 3, 2021), https://www.commerce.gov/news/press-releases/2021/11/commerce-adds-nso-group-and-other-foreign-companies-entity-list.

[6] NSO contends (Pet. 14-18; Pet. Reply Br. 5-7) that the court of appeals' decision threatens the United States' ability to rely on private contractors abroad. The United States does not agree. This case does not involve the question whether the United States can argue that a contractor should be sheltered by some form of immunity or a government-contractor defense to liability (see p. 20 n.7, *infra*) in an adjudication in a foreign tribunal pursuant to applicable law. And as addressed above, it does not involve a situation in which the United States, taking account of relevant considerations, has determined that a private entity acting as an agent of a foreign state should be protected by some form of conduct-based immunity in a particular context.

Samantar did not address the specific issue presented here. "The question" the Court faced in that case was "whether an *individual* sued for conduct undertaken in his official capacity is a 'foreign state' within the meaning of the Act." 560 U.S. at 314 (emphasis added). In holding that a foreign official is not a foreign state, the Court rejected the contention that an individual official qualifies as an "agency or instrumentality" of a foreign state. *Id.* at 315. That was because the FSIA defines an "agency or instrumentality" using terms like "'entity,'" "'separate legal person,'" and "'organ'" that "simply do not evidence the intent to include individual officials." *Id.* at 315-316 (quoting 28 U.S.C. 1603(b)(1) and (2)) (emphasis omitted). The Court also rejected the argument that the FSIA's definition of "foreign state" encompasses individual officials because it "sets out a nonexhaustive list that 'includes' political subdivisions and agencies or instrumentalities but is not so limited." *Id.* at 317 (quoting 28 U.S.C. 1603(a)). The Court found that contention flawed, in part "because the types of defendants listed [in the statute] are all entities." *Ibid.* *Samantar*'s textual analysis thus turned in substantial part on the distinction between natural persons and entities.

In light of that distinction, *Samantar* determined that suits against individual officials would continue to be governed by the common law. See 560 U.S. at 311-313, 323-325. "Although Congress clearly intended to supersede the common-law regime for claims against foreign states," the Court found "nothing in the statute's origin or aims to indicate that Congress similarly wanted to codify the law of foreign official immunity." *Id.* at 325.

Samantar thus determined the FSIA's effect on claims of immunity from suit by foreign states (which are governed exclusively by the statute) and by individual officials (which remain governed by the common-law). But the Court did not address the distinct category of claims presented here—claims to conduct-based immunity by entities that do not qualify as agencies or instrumentalities of a foreign state. Whether or not the court of appeals correctly interpreted the FSIA to foreclose such claims, its holding does not conflict with *Samantar*.

3. NSO also errs in asserting (Pet. 11-13) that the decision below conflicts with decisions of other courts of appeals. Neither of the decisions on which NSO relies (*ibid.*) holds that private entities may invoke common-law immunity with respect to actions taken on behalf of foreign states.

a. NSO contends (Pet. 12-13) that the court of appeals' decision conflicts with the D.C. Circuit's decision in *Broidy Capital Management*, *supra*. In *Broidy*, the plaintiffs alleged that the defendants—three individuals and a company formed by two of them—hacked into the plaintiffs' computers and disseminated stolen information in an attempt to discredit the plaintiffs' public criticisms of Qatar. *Broidy Capital Mgmt. LLC* v. *Muzin*, No. 19-cv-150, 2020 WL 1536350, at *1 (D.D.C. Mar. 31, 2020), aff'd, 12 F.4th 789 (D.C. Cir. 2021); see *Broidy*, 12 F.4th at 792. The court of appeals affirmed the district court's order rejecting the defendants' claim that although the FSIA "by its term does not apply," "residual common-law immunity protects them as agents of Qatar acting at its behest." *Broidy*, 12 F.4th at 792. In so holding, the D.C. Circuit did not separately address whether a private entity acting as an agent of a

foreign state could be entitled to immunity. Instead, it rejected the defendants' immunity argument because it was not supported by any principles accepted by the State Department. *Id.* at 799-802.

The D.C. Circuit explained that because the State Department had not filed a suggestion of immunity, the court would look to "the State Department's past practice." *Broidy*, 12 F.4th at 799. But the court determined that "[p]ast expressions of State Department policy do not support immunity for private individuals in the defendants' circumstances." *Id.* at 800. In other litigation, the State Department had indicated that a foreign state's request for immunity is an important consideration in the immunity analysis. *Ibid.* But in *Broidy*, Qatar had not requested immunity on the defendants' behalf. *Ibid.* And the contract between Qatar and the company—"the only written agreement between a defendant and Qatar that [wa]s available for [the court's] review—expressly disclaim[ed] the creation of an agency relationship." *Ibid.* The court concluded that no State Department policy supported immunity for private parties with that type of limited relationship with a foreign state. *Id.* at 801.

Because *Broidy* did not specifically address whether a common-law immunity should be recognized for a private entity acting as an agent of a foreign state, the decision is best construed to hold that the company-defendant in that case was not entitled to a common-law immunity even assuming *arguendo* that such an immunity would be available to private entities. Nothing in the decision below conflicts with that holding.

b. The Fourth Circuit's pre-*Samantar* decision in *Butters* v. *Vance Int'l, Inc.*, 225 F.3d 462 (2000), also does not create a conflict warranting this Court's

review. In *Butters*, a former employee of Vance International, an American security services company, sued the company for gender discrimination. *Id.* at 464. Vance argued that it was entitled to "derivative" foreign sovereign immunity under the FSIA because its employment actions were taken at the behest of the Kingdom of Saudi Arabia. *Id.* at 465. The Fourth Circuit affirmed the district court's judgment for Vance on that ground. *Id.* at 464; see *id.* at 465-466.

NSO's reliance on *Butters* is misplaced. NSO contends (Pet. 10) that, like Vance, it may be entitled to "common-law sovereign immunity in U.S. courts." See Pet. i. But *Butters* did not hold that Vance was entitled to a common-law immunity. Instead, it held that Vance was entitled to immunity "under the Foreign Sovereign Immunities Act." *Butters*, 225 F.3d at 464. Indeed, the court considered and rejected the plaintiff's contention that Vance was not immune from suit because its actions came within the FSIA's commercial-activity exception. *Id.* at 465. Although *Butters*' holding is inconsistent with the decision of the court of appeals in this case (Pet. App. 17) that an entity not identified in the FSIA may not claim immunity under the statute, that disagreement does not implicate the question presented. NSO acknowledges that it is not entitled to immunity under the FSIA, *id.* at 32; it seeks this Court's consideration only of whether the FSIA "displaces common-law immunity for entities"—*i.e.*, whether it can obtain immunity *outside* the statute. Pet. i. The Fourth Circuit did not consider that issue in *Butters*.[7]

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[7] In *Butters*, the Fourth Circuit relied in part on an extension of the domestic *Yearsley* doctrine. 225 F.3d at 466; see *Yearsley* v. *W. A. Ross Constr. Co.*, 309 U.S. 18 (1940). Under that doctrine, a contractor cannot be held liable for exercising authority "validly

NSO nevertheless asserts that *Butters* is "instructive" in considering questions of common-law immunity. Pet. Reply Br. 4 (quoting *Yousuf* v. *Samantar*, 699 F.3d 763, 774 (4th Cir. 2012), cert. denied, 571 U.S. 1156 (2014)). But the court of appeals decision on which it relies did not cite *Butters*, and it concerned common-law conduct-based immunity for individual officials, not entities. See *Yousuf*, 699 F.3d at 774. At a minimum, the different content and sources of the derivative sovereign immunity and common-law conduct-based immunity doctrines undermine NSO's assertion of a direct disagreement between *Butters* and the decision below that would warrant this Court's review.

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conferred" by the United States. *Yearsley*, 309 U.S. at 20; see *id.* at 20-21. Although the doctrine is sometimes referred to as "derivative sovereign immunity," *e.g.*, *Butters*, 225 F.3d at 466, that is a misnomer because the doctrine provides a merits defense; federal contractors do not "share the Government's unqualified immunity from liability and litigation," *Campbell-Ewald Co.* v. *Gomez*, 577 U.S. 153, 166 (2016). This case does not provide an opportunity for the Court to consider whether a private entity acting as an agent of a foreign state may be entitled to prevail on the merits of a claim against it involving conduct that was required or authorized, and acknowledged, by the foreign state.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ERICA L. ROSS
Assistant to the Solicitor General
SHARON SWINGLE
LEWIS S. YELIN
Attorneys

RICHARD C. VISEK
Acting Legal Adviser
Department of State

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