No. 12-1078

IN THE

Supreme Court of the United States

MOHAMED ALI SAMANTAR,

Petitioner,

v.

BASHE ABDI YOUSUF ET AL.,

Respondents.

On Petition For 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 seriously defend the merits of the Fourth Circuit's legal "conclu[sion] 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. 25a-26a. In fact, Respondents do not dispute that this *jus cogens* exception contravenes international law, abrogates immunity in most 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—as Petitioner and his *amici* have previously demonstrated. Instead, Respondents conjure a series of illusory procedural hurdles that they claim bar review of the decision below.

I. THIS COURT HAS JURISDICTION TO REVIEW THE DENIAL OF COMMON-LAW FOREIGN OFFICIAL IMMUNITY

Without arguing that this Court actually lacks jurisdiction under the collateral-order doctrine to review the denial of foreign official immunity, Respondents tepidly suggest that "there is jurisdictional *doubt*," that the Fourth Circuit "*may well have erred*" in finding jurisdiction, and that this poses a "*potential* barrier" to this Court's review. Opp. 8, 10 (emphasis added). Respondents' newfound concern cannot be squared with their previous assurance that the Fourth Circuit "ha[d] jurisdiction over the order under the collateral-order doctrine," Oral Argument at 16:16, *Yousuf v. Samantar*, No. 12-2178 (4th Cir. May 16, 2012), http://www.ca4.uscourts.gov/OAarchive/OAList.asp, a position with

which the Government agreed, Pet. App. 53a. In any event, there is no doubt about this Court's jurisdiction.

Under the collateral-order doctrine, an order is immediately appealable if [1] the order "decided a contested issue, [2] the issue decided is important and separate from the merits of the action, and [3] the District Court's disposition would be effectively unreviewable later in the litigation." *Osborn v. Haley*, 549 U.S. 225, 238 (2007) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

An order denying immunity to a government or government official for suits challenging official acts satisfies these requirements. *See, e.g.*, *Osborn*, 549 U.S. at 238-39 (Westfall Act certification); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-45 (1993) (Eleventh Amendment immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985) (qualified immunity); *Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 (1982) (absolute immunity); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979) (Speech or Debate Clause immunity). The denial of such immunity "[1] conclusively determines [a] disputed question," *Forsyth*, 472 U.S. at 527 (citation omitted); [2] resolves a question that is "vitally important to our system of government," *Helstoski*, 442 U.S. at 506, and "is separate from the merits of the underlying action . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue," *Forsyth*, 472 U.S. at 528-29; and [3] is otherwise unreviewable because the benefits of such immunity would be "effectively lost" if a defendant were subjected to the

burdens of litigation without an appellate determination of immunity, *id.* at 526.

Consistent with these principles, the denial of a foreign state's immunity is immediately appealable. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 854 (2009); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 197 (2007). Foreign sovereign immunity protects a defendant from the "burdens of litigation," *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (citation omitted), and prompt appellate review is necessary to prevent the erroneous denial of immunity from disrupting international comity and provoking reciprocal treatment. And because a suit against a foreign official is just as disruptive of international relations as a suit against a foreign state, there is "no reason to draw a distinction" between an official's common-law immunity and a state's immunity under the FSIA, as the Fourth Circuit properly concluded. Pet. App. 6a.

Respondents suggest that an order denying common-law immunity may not be immediately appealable because such immunity does not "'rest upon an explicit statutory or constitutional guarantee that the trial will not occur.'" Opp. 9 (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) (emphasis omitted)). But the requirement of an "explicit statutory or constitutional guarantee" applies, at most, in *criminal* cases like *Midland*, where the collateral order exception is construed "'with the utmost strictness,'" *Midland*, 489 U.S. at 799 (citation omitted), "[b]ecause of the compelling interest in prompt [criminal] trials," *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

By contrast, both before and after *Midland*, this Court has reaffirmed that the denial of *civil* immunity—including common-law immunity not premised on a statutory or constitutional right—is immediately appealable. *See, e.g.*, *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499-500 (1989) (common-law qualified immunity).[1]

Contrary to Respondents' passing suggestion, Petitioner's immunity does not turn on any "case- and record-specific determination" that makes interlocutory review "less appropriate." Opp. 10. *Every* denial of immunity involves a threshold inquiry into whether the lawsuit challenges actions taken by the defendant on the state's behalf (*e.g.*, directing the exercise of the state's police power) or in the defendant's personal capacity (*e.g.*, the defendant's responsibility for a car accident while running a personal errand). Here, as this Court has already recognized, that issue is undisputed: Respondents challenge actions allegedly authorized by Petitioner in his capacity as the official "in charge of Somalia's armed forces." *Samantar v. Yousuf*, 130 S. Ct. 2278, 2283 (2010). Thus, the only question is whether, "as a matter of international and domestic law," the allegations of *jus cogens* violations against Petitioner (even if assumed to be true) defeat his entitlement to foreign official immunity. Pet. App.

[1] *Van Cauwenberghe v. Biard,* 486 U.S. 517, 526 (1988), is inapposite. It held that the denial of a purported immunity from *process* is not immediately appealable because "the essence" of the claimed right is "the right not to be subject to a binding judgment of the court." *Id.* at 526-27. This right—unlike an immunity from suit—"may be effectively vindicated following final judgment." *Id.* at 527.

23a. That legal question is appropriate for interlocutory review. *See Forsyth*, 472 U.S. at 528-30 & n.9 (finding jurisdiction to consider interlocutory appeal of qualified immunity determination given the "purely legal" question "whether the facts alleged . . . support a claim of violation of clearly established law"). This case is thus a far cry from *Johnson v. Jones*, in which this Court held that the denial of summary judgment was not immediately appealable where the only issue resolved by the lower court was "a fact-related dispute about . . . whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial" as to qualified immunity. 515 U.S. 304, 307 (1995).

Finally, citing this Court's "general[]" preference for "await[ing] final judgment in the lower courts," Respondents argue that interlocutory review would not conserve resources or serve other practical purposes. Opp. 10-11 (citations omitted). But none of the cases on which Respondents rely involved denials of immunity. Allowing immediate appeal of immunity determinations serves a "practical . . . point," Opp. 11, because immunity includes freedom from the "burdens of litigation," and the benefits of immunity are therefore lost if a denial of immunity is not immediately reviewable, *Forsyth*, 472 U.S. at 525-26 (citation omitted).

That is especially true here, where the issue presently on appeal before the Fourth Circuit is whether the district court had the authority to subject Petitioner to the burdens of litigation and enter a judgment against him while his appeal of the denial of immunity was pending. *Yousuf v. Samantar*, No. 12-2178 (4th Cir.) (D.E. 22, 28, 40).

Granting the petition for certiorari may well prevent the parties from having to argue, and the Fourth Circuit from having to decide, that appeal. By contrast, if this Court denies certiorari and the pending Fourth Circuit appeal is decided in Petitioner's favor, the case will be remanded to the district court for additional proceedings, thereby further negating the benefits of the immunity from suit to which Petitioner is entitled. And if Petitioner loses his Fourth Circuit appeal, the parties will need to rebrief, and this Court will need to reconsider, the very same issues regarding common-law immunity that are already presented to this Court now. Thus, it serves numerous "practical [and] resource-conserving point[s]," Opp. 11, for this Court to grant certiorari at this time.

II. THE FOURTH CIRCUIT'S CREATION OF A *JUS COGENS* EXCEPTION TO FOREIGN OFFICIAL IMMUNITY MERITS THIS COURT'S REVIEW

The generally applicable rule of law adopted by the Fourth Circuit could not have been 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. 25a-26a. Respondents stress that the Fourth Circuit reached this conclusion at the same time that the Government recommended that Samantar be denied immunity. But the Government's immunity recommendation does not weigh against this Court's review of the Fourth Circuit's holding for several reasons.

First, the Fourth Circuit created a *jus cogens* exception to immunity without regard for the

Government's recommendation. In the critical part of its opinion—*i.e.*, the portion of the opinion explaining the "conclu[sion]" that foreign officials accused of *jus cogens* violations lack immunity as a matter of law—the court below relied on "international law," which "has shaped the development of the common law of foreign sovereign immunity," and on the decisions of "American courts" construing the common law of foreign sovereign immunity. Pet. App. 18a. Not *once* in the analysis leading up to this "conclu[sion]" did the court even cite the Government's case-specific recommendation as to immunity for Petitioner.

Respondents argue correctly that it is proper for courts to inquire independently into "the application of common-law principles to a traditionally judicial issue like scope of authority." Opp. 18. Indeed, as Respondents explain, that is particularly true where the State Department remains silent (as it did in this case for many years), requiring courts to "make the very common-law judgments that the court did here." Opp. 19. That is precisely why the Fourth Circuit's independent reading of the common law as creating a *jus cogens* exception—a holding that will govern future immunity determinations in the Fourth Circuit—is so important and merits this Court's review.

Second, the *jus cogens* exception to immunity created by the Fourth Circuit is, in fact, inconsistent with the Government's position in this case. The Government urged the court below *not* to recognize a *jus cogens* exception. *See* Pet. 14-15. Respondents attempt to harmonize the Fourth Circuit's *jus cogens* exception with the Government's views because the

Government previously told this Court that it would be "'appropriate to take into account . . . the nature of the acts alleged'" in making immunity determinations. Opp. 19 (quoting Brief for the United States as Amicus Curiae Supporting Affirmance at 7, 25, *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (No. 08-1555), 2010 WL 342031). But that passage in a brief focused on FSIA immunity did not announce a dramatic shift in the Government's interpretation of common-law foreign official immunity. It merely restated the settled principle that official acts are entitled to immunity, while private acts are not. *See* Pet. 13. Indeed, the Government applied the same principle in *Matar* to conclude that acts that allegedly violate *jus cogens* norms are still official in nature and therefore trigger common-law immunity. *See* Statement of Interest of the United States of America at 27-28, *Matar v. Dichter*, 500 F. Supp. 2d 284 (S.D.N.Y. 2007) (No. 05-10270), http://www.state.gov/documents/organization/98806.pdf. Of course, should this Court believe that additional clarification of the Government's position is needed, it should call for the views of the Solicitor General about whether certiorari should be granted.

Third, to be sure, the Fourth Circuit also briefly noted at the end of its opinion that the Government's Statement of Interest "supplied . . . additional reasons to support" the denial of immunity. Pet. App. 28a. But that is hardly an alternative holding that would require this Court to affirm the judgment below regardless of whether a *jus cogens* exception to immunity applies. Opp. 15. The court below never hinted that the two additional factors cited by the Government—the non-recognition of the Somali government at the time, and Petitioner's residency in

the United States—were independently sufficient grounds for denying immunity. Nor could they be, since the United States has now recognized the Somali government, which has requested immunity for Petitioner,[2] and since even the United States acknowledges that residency "in itself, [is not] determinative of the former official's immunity from suit." Pet. App. 56a. Thus, should this Court reject the Fourth Circuit's recognition of a *jus cogens* exception to foreign official immunity, Petitioner would be entitled to immunity. At a minimum, speculation about the outcome of any remand that the Court might order provides no basis for denying certiorari.

III. 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 of authority is without merit:

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[2] There is nothing improper about Petitioner's advising this Court of developments regarding the Somali government. *See generally Republic of Iraq*, 556 U.S. at 864-65 ("Foreign sovereign immunity 'reflects current political realities and relationships . . . .'"). As for Respondents' assertion that the Somali Prime Minister lacks the authority to speak on behalf of Somalia, the Somali constitution makes clear that "[t]he responsibilities of the Prime Minister are to . . . Be the Head of the Federal Government." Provisional Constitution of the Federal Republic of Somalia Aug. 1, 2012, Art. 100, http://unpos.unmissions.org/LinkClick.aspx?fileticket=CqsW6PVY-C4%3D&tabid=9708&language=en-US. In any event, the Court need not reach this issue to decide the Question Presented of whether the Fourth Circuit erred in creating a *jus cogens* exception to foreign official immunity.

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. Yet the Second Circuit adopted the Government's interpretation of the common law, while the Fourth Circuit created a *jus cogens* exception anyway. Pet. 14.

Respondents argue that *Matar* "is an FSIA decision that has been overtaken by this Court's decision in *Samantar*." Opp. 17. Not so. In *Matar*, the Second Circuit expressly *declined* to decide the FSIA issue that this Court subsequently resolved in *Samantar* (whether a former official is entitled to immunity under the FSIA) because, 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. In conflict with the decision below, the Second Circuit thus squarely rejected a *jus cogens* exception to *common-law* foreign official immunity.

Respondents point out that the Second Circuit's holding "came in the context of an Executive Branch suggestion that immunity be granted." Opp. 17. That is factually accurate but provides no basis for distinguishing *Matar*. As discussed above, the Government's position *as to a* jus cogens *exception to common-law foreign official immunity* 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, Pet. App. 22a-26a. 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. 16, 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*, 130 S. Ct. at 2291 n.17. As *Belhas* explained, a *jus cogens* exception "would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations." 515 F.3d at 1287 (citations omitted). And it would make foreign official immunity "irrelevant" by "merg[ing] the merits of the underlying claim with the issue of immunity." *Id.* at 1291-93 (Williams, J., concurring). The Fourth Circuit created a *jus cogens* exception under the common law notwithstanding the D.C. Circuit's contrary conclusion in a directly analogous context.

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. 16. Yet the briefing in that case shows that both head-of-state and foreign official immunity were at issue, as the Government urged the Seventh Circuit to reject a *jus cogens* exception to

both forms of immunity. *See* Pet. 17. Thus, the Seventh Circuit's rejection of the plaintiffs' argument that "the Executive Branch has no power to immunize a head of state (*or 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. 17.

4. Finally, Respondents note that "the Fourth Circuit repeatedly cited *Matar*, *Belhas*, and *Ye* favorably, and perceived no conflict." Opp. 18. But the Fourth Circuit's failure to directly confront contrary authority on such an important question only confirms that the decision below was wrong and should be overturned by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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