No. 20-16408

IN THE

United States Court of Appeals for the Ninth Circuit

NSO GROUP TECHNOLOGIES LTD. ET AL.,

Defendants-Appellants,

v.

WHATSAPP INC. ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Northern District of California,
No. 4:19-cv-07123-PJH

APPELLANTS' MOTION TO STAY THE MANDATE PENDING FILING OF A PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Appellants (collectively, "NSO") move this Court to stay the issuance of its mandate pending the filing and resolution of a petition for writ of certiorari with the Supreme Court.[1]

In its opinion in this case, this Court became the first to hold that private entities can *never* invoke the common-law doctrine—known as "conduct-based immunity"—that protects agents of foreign sovereigns from suit in U.S. courts. To reach that conclusion, this Court adopted a sweeping position that no other court has adopted: that the Foreign Sovereign Immunities Act ("FSIA") entirely supplants common-law immunity for entities. The Court denied rehearing on January 6, 2022.

NSO intends to file a petition for certiorari, and this Court should stay its mandate until the Supreme Court resolves NSO's petition. That petition will "present a substantial question" justifying a stay, Fed. R. App. P. 41(d)(2), because this Court's resolution of an important federal question created a division among the federal Courts of Appeals. The Court's answer to that question—that private entities can never seek

[1] Counsel for Appellees has informed counsel for NSO that Appellees oppose this motion.

conduct-based immunity—is important because it undermines the United States' and other countries' ability to employ private contractors to assist in performing sovereign activities, and it establishes a precedent that could expose the United States' tens of thousands of contractors to lawsuits in foreign courts for conduct undertaken on behalf of the United States. The Court's decision also departs from decisions of the Fourth and D.C. Circuits, both of which acknowledged that private entities may assert conduct-based immunity in some circumstances. And the Court's decision conflicts with *Samantar v. Yousuf*, 560 U.S. 305 (2010), which is best read to hold that the FSIA does *not* displace common-law conduct-based immunity for defendants that are not foreign states.

A stay is particularly important here because without a stay, NSO will have to litigate the case while its petition for certiorari is pending. That would effectively deprive NSO of the immunity to which it claims to be entitled by imposing the "burdens of litigation" that sovereign immunity is designed to avoid. *Peterson v. Islamic Rep. of Iran*, 627 F.3d 1117, 1127 (9th Cir. 2010) (quoting *Foremost-McKesson, Inc. v. Islamic Rep. of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)). Preventing that result creates "good cause for a stay." Fed. R. App. P. 41(d)(2). This Court has

recognized as much by staying its mandate in other cases involving claims of foreign sovereign immunity. *E.g.*, *Farhang v. Indian Inst. of Tech.*, No. 14-15601 (Aug. 30, 2016), Dkt. 58. It should do the same here.

STANDARD

Under Federal Rule of Appellate Procedure 41(d)(2), the Court should stay its mandate when a petition for certiorari "would present a substantial question" and "there is good cause for a stay." The moving party "need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989). To the contrary, this Court "often" stays its mandate while a party "s[eeks] certiorari from the Supreme Court." *United States v. Pete*, 525 F.3d 844, 850 (9th Cir. 2008). The Court's rules thus indicate that a stay will be denied only when the petition "would be frivolous or filed merely for delay." Cir. R. 41-1.

If this Court stays its mandate, the stay will continue until the expiration of the deadline to file a petition for certiorari or "until the Supreme Court's final disposition" of the petition, whichever is later. Fed. R. App. P. 41(d)(2).

ARGUMENT

I. NSO'S Petition for Certiorari Will Present a Substantial Question.

This Court should stay its mandate because NSO's petition for certiorari will "present a substantial question." Fed. R. App. P. 41(d)(2). This Court's decision implicates several of "the reasons the [Supreme] Court considers" when granting review. S. Ct. R. 10. Specifically, the decision "decided an important federal question" that has divided the federal Courts of Appeals and that "has not been, but should be, settled by th[e] [Supreme] Court." S. Ct. R. 10(a), (c). This Court's decision also "conflicts with" *Samantar*, a "relevant decision[] of" the Supreme Court. S. Ct. R. 10(c). These factors show that NSO's petition for certiorari will not be "frivolous or filed merely for delay." Cir. R. 41-1.

A. Whether Private Entities May Seek Conduct-Based Immunity Is an Important Question That Has Divided the Courts of Appeals.

1. Whether private entities may seek common-law conduct-based immunity is an important federal question with significant implications for how the United States and other nations conduct core sovereign activities. Common-law immunity is "a matter of comity," *Rep. of Austria v. Altmann*, 541 U.S. 677, 688 (2004), "rooted in . . . the notion

of sovereignty and the notion of the equality of sovereigns," *Siderman de Blake v. Rep. of Argentina*, 965 F.2d 699, 718 (9th Cir. 1992) (cleaned up). For that reason, denying immunity to foreign agents in U.S. courts could lead foreign courts to deny immunity to the United States' agents in similar circumstances. Elsewhere, the United States warned that "personal damages actions against foreign officials" in U.S. courts could "trigger concerns about the treatment of United States officials abroad, and interfere with the Executive's conduct of foreign affairs." Brief for the United States as Amicus Curiae at 16, *Mutond v. Lewis*, No. 19-185 (U.S. May 26, 2020).

This concern extends to the private agents of sovereigns, including private entities. "All sovereigns need flexibility to hire private agents to aid them in conducting governmental functions," which includes hiring private entities. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000). Indeed, the United States has relied on private contractors to support its intelligence and military operations since the Revolutionary War. Glenn J. Voelz, *Contractors and Intelligence: The Private Sector in the Intelligence Community*, 22 Int'l J. Intelligence & CounterIntelligence 586, 588–91 (2009). Today, the United States often has "no choice but to

use contractors for work that may be borderline 'inherently governmental.'" Office of the Director of National Intelligence, *The U.S. Intelligence Community's Five Year Strategic Human Capital Plan* 6 (June 2006). Some 70,000 private contractors support U.S. intelligence operations, with a quarter of those contractors "directly involved in core intelligence mission functions." Voelz, *supra*, at 587. And "as many as sixty private firms provide[d] various security and intelligence-related services in Iraq and Afghanistan," *id.* at 588, performing "tasks once performed only by military members" in locations "closer to the battlespace than ever before," Lisa L. Turner & Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. Rev. 1, 8 (2001).

If U.S. courts categorically deny immunity to foreign states' private entity agents, then those states might retaliate by exercising jurisdiction over lawsuits against the United States' many contractors. Such lawsuits would implicate "[m]atters intimately related to foreign policy and national security," which "are rarely proper subjects for judicial intervention." *Haig v. Agee*, 453 U.S. 280, 292 (1981). That is why the United States has left open the possibility that its entity "contractor[s] should be sheltered by . . . sovereign immunity in an adjudication in a

foreign or international court." Brief for the United States as Amicus Curiae at 10 n.1, *CACI Premier Tech., Inc. v. Shimari*, No. 19-648 (U.S. Aug. 26, 2020). This Court has taken that important argument away from the United States, potentially exposing U.S. contractors to foreign suits designed to interfere with sensitive U.S. military and intelligence operations.

2. The important question of whether conduct-based immunity can protect private entities has divided the federal Courts of Appeals. The Fourth Circuit has granted conduct-based immunity to a private entity, and the D.C. Circuit has allowed private entities to seek conduct-based immunity. This Court's decision, in contrast, is the first ever to hold that private entities are categorically excluded from conduct-based immunity.

First, the Fourth Circuit held in *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000), that a private entity was immune from claims arising from its provision of security services to Saudi Arabia. Although the Fourth Circuit arguably described that immunity as deriving from the FSIA, it applied the test for conduct-based immunity, holding that private agents are immune "when following the commands of a foreign

sovereign employer." *Id.* And it held that private entities could receive that immunity because "courts define the scope of sovereign immunity by the nature of the function being performed—not by the office or the position of the particular employee involved." *Id.* This holding, even if phrased in terms of FSIA immunity, is "instructive for . . . questions of common law immunity." *Yousuf v. Samantar*, 699 F.3d 763, 774 (4th Cir. 2012); *see Ivey for Carolina Golf Dev. Co. v. Lynch*, 2018 WL 3764264, at *2, 6–7 (M.D.N.C. Aug. 8, 2018) (interpreting *Butters* as granting conduct-based immunity); *Moriah v. Bank of China Ltd.*, 107 F. Supp. 3d 272, 277 & n.34 (S.D.N.Y. 2015) (same); Ved P. Nanda et al., 1 *Litigation of International Disputes in U.S. Courts* § 3:59 n.132 (Dec. 2020 update) (same); Hazel Fox & Philippa Webb, *The Law of State Immunity* 444, 453 (3d ed. 2013) (same).

More recently, the D.C. Circuit treated conduct-based immunity as available to private entities. *Broidy Cap. Mgmt. LLC v. Muzin*, 12 F.4th 789 (D.C. Cir. 2021). In that case, private entities sought immunity for work they allegedly performed for Qatar. The D.C. Circuit rejected immunity for factual reasons, holding that the entities had not introduced the necessary evidence to show that they "act[ed] as [Qatar's]

agents to carry out any sovereign functions" or that "Qatar requested, approved, or even knew of the unlawful conduct." *Id.* at 800. But the court treated private entities as eligible for common-law immunity, *id*. at 802 (stating that common-law immunity applies to "private entities or individuals"), and this Court acknowledged the conflict by criticizing the D.C. Circuit for its "summary assertion that a private *entity* can seek immunity under the common law despite the FSIA." Op. 16 n.5.

This Court's decision takes a brand-new approach, holding that the FSIA prevents private entities from *ever* seeking conduct-based immunity. This "conflict" over "an important federal question" should be resolved by the Supreme Court to provide a uniform answer throughout the United States. S. Ct. R. 10(a). NSO's petition for certiorari will thus present a "substantial question," justifying a stay of the mandate. Fed. R. App. P. 41(d)(2).

B. This Court's Decision Conflicts with *Samantar*.

This Court did not deny that, under the common law, private individuals can claim conduct-based immunity. But it held that the FSIA entirely displaces that common law with respect to entities, categorically excluding entities from conduct-based immunity. That holding is

incorrect and difficult to reconcile with the Supreme Court's decision in *Samantar*.

Congress passed the FSIA to codify only *some* aspects of common-law foreign sovereign immunity. It is a specific and narrow statute that governs only "whether a *foreign state* is entitled to sovereign immunity." *Samantar*, 560 U.S. at 313 (emphasis added). Its definition of "foreign state" thus incorporates entities that, because they are state-owned "agenc[ies] or instrumentalit[ies]," are equivalent to foreign states. *Id.* at 314; 28 U.S.C. § 1603(a)–(b). But that definition limits only which entities possess immunity *as foreign states* under the FSIA. *Samantar* held that when a plaintiff sues a defendant that is not "a foreign state as the [FSIA] defines that term," the FSIA has no force. *Samantar*, 560 U.S. at 325. Those suits are "governed by the common law." *Id.*

Private entities are not "foreign state[s] as the [FSIA] defines that term." *Id.* Under *Samantar*, therefore, the FSIA has nothing to say about whether private entities may receive conduct-based immunity. That depends entirely on the common law, which Congress did not "intend[] the FSIA to supersede." *Id.* at 320.

This Court's response to these points departed from how *Samantar* described both the FSIA and the common law. The Court reasoned that the FSIA does not extend foreign sovereign immunity to "actors that are neither sovereigns themselves nor . . . acting on behalf of a sovereign." Op. 15. True enough, but that does not support the Court's conclusion. Under *Samantar*, the FSIA addresses only entities that, because of their relationship to a foreign state, *are* "sovereigns themselves." *Id.*; *see Samantar*, 560 U.S. at 314. The FSIA does not address entities or individuals that seek immunity because they "act[ed] on behalf of a sovereign." Op. 15. Those claims for immunity are covered by the common law, which the FSIA did not disturb. *Samantar*, 560 U.S. at 320.

Because of the FSIA's limited focus on "foreign state[s]," *Samantar*, 560 U.S. at 325, the Court's invocation of the *expressio unius exclusio alterius* canon is mistaken, Op. 15. It is no doubt correct that the FSIA "create[ed] a 'comprehensive set of legal standards governing claims of immunity . . . *against a foreign state or its political subdivisions, agencies or instrumentalities*.'" Op. 15–16 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983)) (emphasis added). That is why NSO has never claimed immunity under the FSIA. But the Court did not and

could not deny that conduct-based immunity protects more than "foreign state[s] or [their] political subdivisions, agencies or instrumentalities." *Id.* And *Samantar* stated that the FSIA does not apply to defendants that are not "foreign state[s] as the [FSIA] defines that term." *Samantar*, 560 U.S. at 325. If the FSIA does not apply, it cannot bar NSO's claim of immunity.

Samantar is in considerable tension with the Court's holding that the FSIA supersedes conduct-based immunity under the common law for a private entity that is not a "foreign state" under the FSIA. That "conflict[] with [a] relevant decision[]" of the Supreme Court, S. Ct. R. 10(c), means NSO's petition for certiorari will present a substantial question justifying a stay of the mandate, Fed. R. App. P. 41(d)(2).

II. Good Cause Exists for a Stay Because Conduct-Based Immunity Is an Immunity from Suit.

The nature of NSO's immunity defense provides "good cause" to stay this Court's mandate. *Id.* As the Court acknowledged in its decision, NSO claims "an immunity from suit." Op. 8; *accord Doğan v. Barak*, 932 F.3d 888, 895 (9th Cir. 2019). Such an "immunity from suit . . . is effectively lost if a case is erroneously permitted to go to trial." *Compania Mexicana de Aviacion, S.A. v. U.S. Dist. Ct.*, 859 F.2d 1354, 1356 (9th Cir.

1988). Therefore, if NSO is forced to litigate this case in the district court while its petition for certiorari is pending, it will have been deprived of its immunity from suit even if the Supreme Court ultimately reverses this Court's decision.

To avoid that unjust result, the Court should stay its mandate and spare NSO from the "burdens of litigation," *Peterson*, 627 F.3d at 1127, until the Supreme Court resolves its petition for certiorari. That is the approach this Court has taken in other cases involving claims of foreign sovereign immunity. *See, e.g.*, *Farhang*, No. 14-15601 (Aug. 30, 2016), Dkt. 58 (order staying mandate); *Sachs v. Rep. of Austria*, No. 11-15458 (9th Cir. Dec. 16, 2013), Dkt. 61 (same); *Cassirer v. Kingdom of Spain*, Nos. 06-56325, 06-56406 (9th Cir. Oct. 29, 2010), Dkt. 94 (same). And it is the approach the Court should take here.

CONCLUSION

The Court should stay its mandate pending the resolution of NSO's petition for certiorari.

Respectfully submitted,

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January 12, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27 and 9th Cir. R. 27-1, I certify that:

This brief complies with the length limits of Fed. R. App. P. 27(d)(2) and 9th Cir. R. 27-1(1)(d) because it is 14 pages long and contains 2,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and 32(a)(6) because this brief has been prepared in Microsoft Word using 14-point Century Schoolbook font.

Date: January 12, 2022

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