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 a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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## SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner submits this brief to address Respondents' newfound suggestion—made for the first time in their Supplemental Brief—that *Ortiz v. Jordan*, 131 S. Ct. 884 (2011), might pose a barrier to review. Resp. Supp. Br. 4. According to Respondents, *Ortiz* "ruled that, once a final judgment issues, challenges to interlocutory rulings, including specifically denials of immunity, must proceed through review of the final judgment into which all interlocutory rulings have merged." *Id.* Respondents did not raise this concern before the Fourth Circuit, which they expressly assured of its jurisdiction "under the collateral-order doctrine." Pet. Reply 1 (quoting Fourth Circuit oral argument transcript). Nor did they raise this issue or cite *Ortiz*, a two-year-old case, in their Brief in Opposition to Certiorari. Their reluctance to raise this "jurisdictional doubt[]," Resp. Supp. Br. 4, until the last minute reflects the lack of merit in their argument.[1]

First, this Court expressly noted that the defendants in *Ortiz* never brought a timely interlocutory appeal. *See Ortiz*, 131 S. Ct. at 891. For that reason alone, *Ortiz* has nothing to do with this Court's jurisdiction in this case, where such an appeal was taken.

Second, no interlocutory appeal was even possible in *Ortiz*. The district court denied the defendants' summary judgment motion due to "*factual disputes* material to [their] defense of qualified immunity. . . ."

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[1] This Court's Rule 15.8 permits the filing of a supplemental brief to address an "intervening matter not available at the time of the party's last filing." Petitioner could not have addressed Respondents' reliance on *Ortiz* at the time of his last filing, which preceded Respondents' Supplemental Brief.

*Id.* at 890 (emphasis added). Such a fact-bound denial of immunity is not immediately appealable because it is intertwined with the merits of a plaintiff's claim. *See id.* at 891. The case therefore proceeded to trial, including as to the disputed facts that precluded summary adjudication of qualified immunity. *See id.* at 893 & nn. 8-9 (describing factual disputes about immunity addressed at trial).

Accordingly, the issue presented to this Court in *Ortiz*—which is not presented here—was whether the defendants could appeal the fact-based denial of summary judgment "*after* [the] district court ha[d] conducted a full trial" resolving the factual disputes that precluded summary judgment in the first place. *Id.* at 891-92 (emphasis added). This Court explained that the district court's fact-dependent summary judgment ruling merged into the final judgment concerning those very same facts, and the full trial record "supersede[d]" the summary judgment record on the same issue. *Id.* at 889. Thus, the Court held that, on appeal, the defendants' immunity "defense must be evaluated in light of the character and quality of the evidence received" at the trial regarding immunity. *Id.*

Here, by contrast, both the district court and the Fourth Circuit denied immunity on "purely legal" grounds that did not depend on "the correctness of [Respondents'] version of the facts." *Johnson v. Jones*, 515 U.S. 304, 312-13 (1995) (citation omitted). *See also* Pet Reply. 4-5. A denial of immunity based on a "purely legal issue," *Ortiz*, 131 S. Ct. at 891 (citing *Johnson*, 515 U.S. at 313), separate from the merits of the action, is a collateral order that may be appealed immediately as a "categorical" matter. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107,

112 (2009) (internal quotation marks omitted). Moreover, such an immediately appealable collateral order, by definition, does "not make any step toward final disposition of the merits of the case and will not be merged in final judgment." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Therefore, there is no question about this Court's jurisdiction over Petitioner's interlocutory appeal seeking review of the collateral legal determination below regarding immunity. *See also* 28 U.S.C. § 1254(1) (establishing this Court's jurisdiction over "any" decision by a Court of Appeals).

Nor would it make any sense to abandon review at the eleventh hour of such a pending collateral appeal on immunity. Judicial economy and the purposes of official immunity favor deciding the threshold immunity issue immediately. *See* Pet. Reply 5-6. The Fourth Circuit's immunity ruling presents "a pure issue of law, appropriate for [this Court's] immediate resolution." *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982). The Court should grant plenary review to resolve the important circuit split created by the court below.

## CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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