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 WRIT OF CERTIORARI

SHAY DVORETZKY
Counsel of Record
MICHAEL A. CARVIN
PAUL V. LETTOW
RICHARD M. RE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
sdvoretzky@jonesday.com
(202) 879-3939

Counsel for Petitioner

December 23, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

OTHER AUTHORITIES

SUPPLEMENTAL BRIEF FOR PETITIONER

The Government correctly argues that the decision below is "predicated on . . . critical legal errors," "conflicts with the Second Circuit's decision in *Matar v. Dichter*," 563 F.3d 9 (2d Cir. 2009), poses no vehicle problems, and should not be "left standing." U.S. Br. 11, 12, 22. Indeed, the Fourth Circuit "fundamentally erred" by creating a "categorical exception to official immunity whenever allegations of *jus cogens* violations are made." *Id.* at 21-22. That "per se rule" jeopardizes American officials, who risk reciprocal treatment from foreign nations, and "could have negative consequences for the United States' foreign-relations interests." *Id.* at 12, 19. For these reasons, the Government's brief establishes that the decision below warrants this Court's plenary review.

Yet the Government recommends a GVR instead.[1] The Government suggests that the Fourth Circuit should consider "any new determination [that the Government] *might* make" in the future concerning Petitioner's immunity, in light of developments regarding Somalia that occurred nearly a year ago.

---

[1] Last Term, in response to the Government's invitation brief in *American Trucking Associations, Inc. v. City of Los Angeles*, 133 S. Ct. 2096 (2013), the Petitioner demonstrated the Government's "pattern of apparent reluctance to support review even when substantial factors warranting certiorari are present," and the frequency with which this Court granted certiorari despite the Government's recommendations. Pet'r Supp. Br. at 1 n.1, *American Trucking*, 133 S. Ct. 2096 (No. 11-798). That pattern has apparently continued. The Government recommended against review in 14 out of 17 CVSG cases that have gone to Conference since December 1, 2012. The Court nevertheless granted certiorari in 9 of those 14 cases (including *American Trucking*).

U.S. Br. 23 (emphasis added). That disposition would be both pointless and improper.

It would be pointless because, as the Government itself explains, the Fourth Circuit created a "per se" rule—a "categorical judicial exception to conduct-based immunity for cases involving alleged violations of *jus cogens* norms." *Id.* at 11, 19-22. The Fourth Circuit has thus established a bright-line rule that denies immunity for *jus cogens* violations *regardless* of the Government's recommendation or the status of a foreign government. Indeed, the Fourth Circuit expressly rejected the Government's argument that its immunity determination was controlling, and ignored the Government's specific request not to create a *jus cogens* exception. Therefore, the Fourth Circuit would deny immunity to Petitioner no matter what additional advice (if any) the Government might offer. A GVR for the Fourth Circuit to repeat what it has already clearly said would only waste time and judicial resources.

In any event, speculation that the Government might someday weigh in on Petitioner's entitlement to immunity, in light of developments in Somalia from almost a year ago, does not provide a proper basis for a GVR. The Government carefully avoids offering the Court *any* assurance that it will *ever* opine on Petitioner's immunity, let alone change its previous recommendation. U.S. Br. 22. No authority supports the Government's request for a GVR in light of TBD. Moreover, the Government has a history of needlessly postponing judicial relief by delaying or withholding immunity recommendations, including in this very case, in which the Government refused for years to answer judicial inquiries about its

position on immunity. This Court should not indulge the Government's apparent desire to vacate the Fourth Circuit's decision based only on the Government's say-so, while indefinitely postponing the resolution of this case.

I. THE DECISION BELOW DEMANDS THIS COURT'S REVIEW

The Government confirms that the decision below created a circuit split and erroneously decided important legal issues that warrant immediate review.

First, the Government recognizes that the decision below "conflicts with the Second Circuit's decision in *Matar* . . . ." U.S. Br. 22 (citing *Matar*, 563 F.3d 9). Whereas the Fourth Circuit created "a categorical exception to official 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 21-22. Lower courts have also recognized this division of authority and have expressly looked to this Court for guidance about this "complicated" question. *See, e.g.*, *Rosenberg v. Lashkar-e-Taiba*, 10-CV-5381 DLI CLP, 2013 WL 5502851, at *6-*7 (E.D.N.Y. Sept. 30, 2013).

Second, the Government correctly notes the importance and erroneousness of the Fourth Circuit's *jus cogens* holding. The Fourth Circuit "fundamentally erred" by "fashioning a new categorical judicial exception to immunity for claims alleging violation of *jus cogens* norms." U.S. Br. 19, 21. This "per se," "categorical exception" contradicts domestic law, contravenes bedrock principles of international law, and risks reciprocal treatment of U.S. officials. U.S. Br. 12-21; *see also* Pet. 25-33;

Former AG Amicus Br. 4-16. In addition, the Government explains that the decision below should not be "left standing" because it "could have negative consequences for the United States' foreign-relations interests." U.S. Br. 12; *see also* Saudi Amicus Br. 6-14.

Third, the Government argues that the Fourth Circuit erred in an additional respect that warrants review. According to the Government, the decision below erred not only by creating a *jus cogens* exception, but also by "holding that courts need not defer to the Executive's immunity determination . . . ." U.S. Br. 22. The Government's disagreement with this second aspect of the decision below, which has divided the courts of appeals, *see id.*, provides an additional reason to grant certiorari.

II. BECAUSE A GVR WOULD BE POINTLESS AND IMPROPER, THIS COURT SHOULD GRANT PLENARY REVIEW

The Government devotes over twenty pages to arguing that the court below "fundamentally erred" and created a circuit split on important legal issues. U.S. Br. 21. And the Government identifies no vehicle problems that prevent this Court from deciding the Question Presented (nor are there any, *see* Pet. Reply Br. 1-6). Yet the last two paragraphs of the Government's brief request a GVR—without a single citation of *any* authority, let alone a remotely analogous circumstance in which this Court has GVR'd. U.S. Br. 22-23. This Court should grant plenary review.

1. The Government urges the Court to GVR to "allow an opportunity for further consideration . . . by the Executive Branch" of developments since the

Fourth Circuit's decision. U.S. Br. 23. The Government points to the United States' recognition of the Somali government in January 2013, and the Somali Prime Minister's request for immunity for Petitioner in February 2013, (a development that, the Government obliquely suggests, may soon be reversed in light of the Prime Minister's "expected . . . removal from office," *id.* at 11, 23 n.5). But those circumstances and the Government's view of them are irrelevant to the Fourth Circuit's reasoning and decision. In light of the Fourth Circuit's categorical, per se rule of non-immunity, no "recent developments . . . reveal a reasonable probability"—or even a possibility—"that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam).

The Government's own brief shows the futility of a GVR for consideration of factors that the Fourth Circuit has already deemed irrelevant. Throughout its brief, the Government characterizes the decision below as creating a "categorical" exception and a "per se rule of non-immunity" that applies "*whenever* a plaintiff alleges a *jus cogens* violation." U.S. Br. 11, 19, 20, 21 (emphasis added). The court of appeals did not deny immunity to Petitioner based "on the unique circumstances of this case . . . ." *Id.* at 19. Rather, the Government explains, "[b]ecause respondents allege violations of *jus cogens* norms, the court [below] concluded that petitioner is not entitled to official-act immunity." *Id.* at 8. Moreover, in so holding, the court "engaged in its own immunity inquiry" instead of deferring to the Government's immunity determination, and ignored the

Government's "specific[] request[] . . . not to address" the *jus cogens* issue. U.S. Br. 7, 11-22.

The Government's understanding of the decision below is correct. The Fourth Circuit's generally applicable rule of law could not be 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. The court reached this bright-line rule based on its independent analysis of domestic and international law regarding foreign official immunity, which it considered dispositive. Pet. App. 18a, 25a-26a. Confirming as much, the Fourth Circuit expressly stated—*after* rejecting the Government's assertion that its views were controlling—that the Government had supplied nothing more than "*additional* reasons," apart from the bright-line rule, to deny immunity. Pet. App. 28a (emphasis added). Not *once* in the analysis leading to the court's "conclu[sion]" regarding a categorical *jus cogens* exception did the court even cite the Government's recommendation as to immunity for Petitioner, or any facts regarding the Somali government.

Thus, the Fourth Circuit's "categorical," "per se rule of non-immunity," U.S. Br. 19, 21, turns solely on whether a defendant is accused of *jus cogens* violations. It renders changes concerning the Somali government or additional advice from the United States utterly irrelevant. Indeed, the Government objects to the decision *precisely because* its "categorical," "per se" rule negates the role of the Government's views. *See* U.S. Br. 19, 20-21.

Whatever the "fundamental[]" and "critical legal errors" made by the Fourth Circuit—and Petitioner and the United States believe that there are several, *id.* at 11-22—the Fourth Circuit's decision reflects its carefully considered view. *Cf. Lawrence*, 516 U.S. at 174 (noting that "[r]espect for lower courts . . . counsel[s] against undisciplined GVR'ing"). Nothing about that view depends on the factors for which the Government seeks a GVR. A GVR for the Fourth Circuit to repeat its categorical rule would be pointless.

2. In any event, a GVR is improper for the additional reason that the Government has not even said that it will make *any* new recommendation regarding Petitioner's immunity, let alone a different recommendation than it made before.

The Government's evasiveness about whether it will *ever* take a position about Petitioner's immunity permeates its brief. The Government asks for "an opportunity for further consideration . . . by the Executive Branch," which will "allow the United States to submit any new determination it *might* make concerning [P]etitioner's immunity . . . ." U.S. Br. 23 (emphasis added). It notes that developments regarding Somalia "*may* affect the immunity issues in the case . . . ." *Id.* at 12 (emphasis added). And it says that a "further determination by the United States . . . *could* be submitted" below. *Id.* (emphasis added). The Government does not even hint about the likelihood that it might adopt one position or another, or that it might take any position at all in the foreseeable future.

Moreover, under the Government's own view of immunity determinations, the only developments

that have actually occurred—the recognition of the Somali government, and that government's immunity request—are themselves legally irrelevant. *See* U.S. Br. 12, 22-23. All that matters, according to the Government, is the *United States'* recommendation about immunity. *Id.* So, in truth, the Government appears to want more time to make up its own mind about whether to take a position on immunity *at all*. *Id.* at 23.

Revealing the extraordinary nature of its GVR request, the Government does not cite *any* supportive authority. The Government is not a prevailing party confessing error. *Cf. Mariscal v. United States*, 449 U.S. 405 (1981) (per curiam). The Executive has not issued a new agency interpretation that may be determinative. *Cf. Lawrence*, 516 U.S. 163. This Court would not benefit from the lower court's express discussion of a potentially relevant issue raised by a dissent. *Cf. Youngblood v. West Virginia*, 547 U.S. 867 (2006) (per curiam). Each of those situations stretched the GVR practice to new limits, and therefore divided the Court. *See, e.g., Youngblood*, 547 U.S. at 870-71 (Scalia, J., dissenting); *id.* at 875 (Kennedy, J., dissenting) ("The Court today extends the GVR procedure well beyond *Lawrence* and the traditional practice of issuing a GVR order in light of some new development.").

The Government asks this Court to go even further. Ordering a GVR based on mere speculation that the Government may someday make some pronouncement about Petitioner's immunity—a pronouncement that the Fourth Circuit has already said would not be controlling anyway—distorts this Court's GVR practice beyond recognition. In the stay

context, the standards for which this Court has analogized to GVR's, *see Lawrence*, 516 U.S. at 168, this Court has rejected the Government's request for a stay of execution due to "the possibility that [the petitioner] might be able to bring a . . . claim in federal court" under "hypothetical legislation" that had been proposed but not yet enacted. *Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011) (per curiam). That was particularly so because the United States could not "even bring itself to say that" the petitioner's claim would "ha[ve] any prospect of success" under such a law. *Id.* As this Court explained, its "task is to rule on what the law is, not what it might eventually be." *Id.* at 2867. Likewise, the mere chance that the Government someday might—or might not—make up its mind about Petitioner's entitlement to immunity provides no basis for a GVR.

3. "Whether a GVR order is ultimately appropriate depends further on the equities of the case"—including whether the party seeking a GVR has engaged in an "unfair . . . litigation strategy" and whether "the delay and further cost entailed in a remand are . . . justified by the potential benefits . . . ." *Lawrence*, 516 U.S. at 167-68. The equities favor plenary review, not a GVR.

The Government has long postponed reaching a view of Petitioner's immunity. The U.S. recognized the Somali government approximately eleven months ago, *see* Pet. 9-10, and the Somali Prime Minister requested immunity for Petitioner approximately ten months ago, *see* U.S. Br. 10, Pet. 10, Pet. App. 70a. But the Government has yet to decide on that request. And, as this Court previously pointed out

during oral argument in this case, it "took 2 years for . . . the government to respond to the district court" when it first solicited the Government's views on immunity. Transcript at 47, *Samantar v. Yousuf*, 560 U.S. 305 (No. 08-1555). Even during that oral argument, the Government declined to address Petitioner's immunity request under the common law. *See id.* at 55-56. That was almost four years ago. A GVR would only prolong this litigation, maybe for years more, because the Government *might* someday convey to the Fourth Circuit a recommendation that it withholds from this Court, on an issue that it has continually failed to resolve in any reasonable timeframe.

The Government's desire to stay silent about Petitioner's immunity is hardly anomalous. The State Department believes "that the U.S. Government need not and should not speak [about immunity] in every case." Harold Hongju Koh, *Foreign Official Immunity After Samantar: A United States Government Perspective*, 44 Vand. J. Transnat'l L. 1141, 1160 (Nov. 2011). For example, in another case against a former Somali official, the Government recently declined the district court's request for its views on immunity. *See Doe v. Ali*, No. 1:05-cv-00701, Dkt. 75 (E.D. Va. 2013). And it is not uncommon for the Government to ask courts for lengthy extensions to provide its views about immunity, only to refuse to take a position in the end. *Compare Chen v. Shi*, Case No. 1:09-cv-08920-RJS, Dkt. 21 (S.D.N.Y. Aug. 8, 2011) ("reluctant[ly]" granting the Government's request for a "lengthy extension" to provide its views in a case involving claims against an official on whose behalf the Chinese government asserted immunity) *with Chen*,

2013 WL 3963735, at *3 (S.D.N.Y. Aug. 1, 2013) (noting that, despite the State Department's "request for additional time," it "ultimately did not offer an opinion as to whether common law immunity shielded Defendant from liability").

Such delays undermine the very purposes of official immunity. Petitioner has asserted immunity *from suit*, which protects officials from the "burdens of litigation." *Phoenix Consulting, Inc. v. Republic of Angola*, 216 F.3d 36, 39 (D.C. Cir. 2000) (foreign sovereign immunity). That is why official immunity is "effectively lost" when a defendant—as here—is subjected to unnecessary years of litigation without an appellate determination of immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity).

The Government would obviously rather avoid taking a position on whether officials in Petitioner's position deserve immunity. But the Government is not entitled to a free vacatur for its own convenience. Moreover, the Government's request for a GVR is unnecessary even to achieve its stated objective of "an opportunity for further consideration of [Petitioner's immunity] by the Executive Branch . . . ." U.S. Br. 23. Resolving the Question Presented on plenary review will not require the Court to determine Petitioner's ultimate entitlement to immunity. Instead, the Court can reject the Fourth Circuit's erroneous categorical rule of non-immunity and remand for further proceedings *under the correct legal standard*. Such a remand, unlike a GVR for the Fourth Circuit to repeat its per se rule, will resolve the circuit split that the Fourth Circuit created and advance the ultimate termination of this

litigation. Tellingly, the Government does not argue that any obstacle prevents this Court from deciding the Question Presented, which it acknowledges "would warrant review by the Court at an appropriate time." U.S. Br. 22. Thus, if the Government needs additional time to evaluate Petitioner's immunity, it will have that opportunity during the proceedings before this Court and in the course of any subsequent remand.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

SHAY DVORETZKY
Counsel of Record
MICHAEL A. CARVIN
PAUL V. LETTOW
RICHARD M. RE
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
sdvoretzky@jonesday.com
(202) 879-3939

Counsel for Petitioner

December 23, 2013