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The Honorable Brian Fletcher
Principal Deputy Solicitor General of the United States
Office of the Solicitor General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530

RE: *NSO Group Technologies Limited, et al., v. WhatsApp Inc., et al.* (No. 21-1338)

Dear Mr. Fletcher,

I am writing in connection with the Supreme Court's request for the views of your Office in the above-referenced case. In its petition and arguments in the district and appellate courts, the NSO Group puts forward an expansive theory of foreign sovereign immunity that has no basis in the common law or the text and purposes of the Foreign Sovereign Immunity Act ("FSIA"). I very briefly want to underscore key arguments that counsel in favor of denial of the NSO Group's application for a writ of certiorari.[1]

With respect to the petitioner's arguments concerning the law governing foreign sovereign immunity, I believe that the Ninth Circuit Court appropriately concluded that "NSO is not entitled to the protection of foreign sovereign immunity" and that "[t]here is no need to analyze whether NSO is entitled to immunity under the common law and inquire how the State Department would resolve this case."[2] The Court's holding is largely consistent with the conclusions drawn by three of the leading American experts in international law and foreign sovereign immunity, who explained in an amicus filing in the

[1] For background, I teach international and human rights law, and federal courts, at the University of California, Irvine, School of Law, and from 2014 to 2020 I served as United Nations ("UN") Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. In the context of my UN appointment, I studied and reported to the UN Human Rights Council, the central human rights body in the UN system, on the ways in which private surveillance tools ("spyware") violate rights to privacy and freedom of expression (Surveillance and human rights: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/HRC/41/35, May 28, 2019, available at https://www.undocs.org/A/HRC/41/35). As a result, I am familiar not only with the spyware industry, including its most well-known private company, petitioner NSO Group, but also the international legal framework governing use of its products. I was the first to call for a moratorium on the trade in and use of spyware tools, such as NSO Group's deeply intrusive Pegasus malware, at least pending global controls of such products, a call subsequently adopted by the UN High Commissioner for Human Rights and other human rights experts in the UN system. This letter was prepared with the support of the International Justice Clinic at UC Irvine School of Law.

[2] WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930, 940 (9th Cir. 2021).

Ninth Circuit that the FSIA provides the sole and comprehensive rules for *entities* claiming foreign sovereign immunity, and that NSO Group does not meet the conditions for immunity under the FSIA or the common law. They noted that "[e]ven if Congress had not established a comprehensive regime for the immunity of corporations and other entities by enacting the FSIA (which it did), NSO would not be entitled to common-law conduct-based immunity because such immunity applies only to natural persons."[3] The Circuit Court's conclusion is also consistent with my analysis, shared in an amicus filing in the case, that the extension of legal immunity sought by NSO Group is not only unavailable under recognized principles of foreign sovereign immunity but that acceptance of it would lead to the further deprivation of remedy that individuals and companies are due for the violations caused by NSO Group's product.[4]

In an essay following the Supreme Court's request for your Office's views, Professor William Dodge succinctly reviewed the reasons supporting denial of cert, noting *inter alia* that "no foreign government has stepped forward to assert immunity on NSO's behalf."[5] Though his other points are also compelling, I want to highlight the absence of a foreign state in the context of the U.S. Government's response to the Court. As the record shows, no foreign state has intervened to request or support NSO Group's claim of immunity, not the state where NSO Group is headquartered (Israel) nor any of its reported client governments.[6] This is not surprising, given the extraordinary privacy and human rights violations alleged in the underlying case and credible reporting over the past several years. But the lack of any state expression of interest is telling, given NSO Group's claim to benefit from a form of immunity designed to protect the interests, not to mention the equality and independence, of foreign sovereigns.[7] Historically, direct state intervention or diplomatic requests that the Department of State intervene to support sovereign immunity claims by individual officials have played an important, often decisive, role in determining whether immunity should be extended.

Although NSO Group cannot benefit from it as an entity (as described in the aforementioned amicus), U.S. practice in the context of common-law foreign sovereign immunity, including foreign *official* immunity, is instructive, particularly since NSO Group's petition seeks the protection of "the distinct common-law immunity that applies to foreign officials and agents."[8] State Department views have typically played an important, if not pivotal, role in judicial consideration of immunity claims outside

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[3] Sarah H. Cleveland, Dodge, William S., and Keitner, Chimène, Brief of Foreign Sovereign Immunity Scholars as Amici Curiae in Support of Plaintiffs-Appellees, WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930 (9th Cir. 2021) (No. 20-16408), available at https://ssrn.com/abstract=3754592.

[4] Brief for Amicus Curiae David Kaye, Former Special Rapporteur to the United Nations on the Promotion and Protection of the Right to Freedom of Opinion and Expression, in Support of Appellees, WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930 (9th Cir. 2021) (No. 20-16408), available at https://freedex.org/wp-content/blogs.dir/2015/files/2020/12/Kaye-Amicus-Curiae.pdf.

[5] See William Dodge, *NSO v. WhatsApp: Should the Solicitor General Recommend Allowing Foreign Corporations to Claim Immunity*, Just Security, June 9, 2022, available at https://www.justsecurity.org/81843/nso-v-whatsapp-should-the-solicitor-general-recommend-allowing-foreign-corporations-to-claim-immunity/.

[6] Oral Argument at 1:35 and 8:35, WhatsApp Inc. v. NSO Grp. Techs. Ltd., 17 F.4th 930, (9th Cir. 2021) (No. 20-16408), available at https://www.youtube.com/watch?v=WCvRCmeqmVY.The attorney for NSO Group admitted that no request for a suggestion of immunity has been made to the State Department.

[7] Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983).

[8] Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 5, NSO Group Technologies Limited, et al., Petitioners v. WhatsApp Inc., et al., No. 21-1338 (*petition for cert. filed* Apr. 6, 2022).

the FSIA (i.e., in the common law context).[9] In making immunity determinations in this context, the Department of State has typically provided the views of the Executive Branch only upon receiving a request from a foreign state. This is because, as the Department itself has emphasized, "[t]he immunity protecting foreign officials for their official acts ultimately belongs to the sovereign rather than the official."[10] According to a 1977 report which tracked the history of the Department's decisions on foreign sovereign immunity from 1952 to 1977, the Department required a formal diplomatic request for a suggestion of immunity.[11] More recently, in 2011, the Department reiterated that it is a "typical practice" for a foreign state to request a suggestion of immunity from the Department of State.[12] In 2013, the Department reiterated the importance of a foreign state's request.[13]

Even in the absence of the Department of State's views regarding immunity, a court will examine whether "all the requisites for such immunity exist."[14] The *Samantar* judgment of the Supreme Court acknowledged that courts have long "inquired 'whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.'"[15] To underscore this point in the present context, in *Broidy Capital Management LLC v. Muzin* in 2021, the DC Circuit Court rejected common-law conduct-based immunity claims by U.S. citizens and their company who worked for Qatar as contractors, stating "Qatar's apparent silence on this case weighs heavily against immunity."[16]

I do not mean to offer a comprehensive legal assessment of the NSO Group's straw-grasping effort to benefit from a non-existent form of immunity. Others quoted above, including the Ninth Circuit Court of Appeals, have done so. But the lack of *any* foreign state request to support the NSO Group's claim for immunity speaks not only to the novelty and baselessness of the petitioner's claims. It also speaks to how the petitioner is seeking to insinuate some foreign state interest where none has been expressed and none likely exists.

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[9] Samantar v. Yousuf, 560 U.S. 305, 311 (2010).

[10] Statement of Interest of the United States of America at 7, Yousuf v. Samantar, 2011 WL 7445583 (E.D. Va. Feb. 15, 2011) (No. 1:04CV01360 LMB/JFA), *remanded by* 560 U.S. 305 (2010), available at https://2009-2017.state.gov/documents/organization/194067.pdf.

[11] Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977, Digest of United States Practice in International Law 1017, 1019 (Michael Sandler et al. eds., 1977).

[12] Statement of Interest of the United States of America, *supra* note 10 at 8.

[13] Brief for the United States as Amicus Curiae at 22 and 23, Samantar v. Yousuf, 571 U.S. 1156 (2014) (No. 12-1078), , available at https://sblog.s3.amazonaws.com/wp-content/uploads/2013/12/12-1078-Samantar-v.-Yousuf.pdf.

[14] Samantar v. Yousuf, *supra* note 9, at 311.

[15] *Id.*, at 312.

[16] Broidy Cap. Mgmt. LLC v. Muzin, 12 F.4th 789,800 (D.C. Cir. 2021). Further, in cases where an individual claimed to benefit from foreign official immunity, courts have attached significance to the relevant foreign state's assertion of immunity on the person's behalf. For example, in *Samantar* on remand from the Supreme Court, the Fourth Circuit Court in denying the common-law conduct-based immunity claim reasoned that the absence of a recognized government's assertion of immunity "add[s] substantial weight in favor of denying immunity." Yousuf v. Samantar, 699 F.3d 763, 777 (4th Cir. 2012). Similarly, in 1994, the Ninth Circuit Court rejected an FSIA immunity claim of the estate of a former President of the Philippines relying on the Philippine government's position of denying immunity. In re Est. of Ferdinand Marcos, Hum. Rts. Litig., 25 F.3d 1467, 1472 (9th Cir. 1994).

Thank you for considering these points in your assessment.

Sincerely,

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